Edward Dewey Chapin (CA SBN 53287)
echapin2@sanfordheisler.com
SANFORD HEISLER SHARP, LLP
655 West Broadway, Suite 1700
San Diego, CA 92101
Telephone: (619) 577-4242
Facsimile: (619) 577-4250

David Tracey*
dtracey@sanfordheisler.com
SANFORD HEISLER SHARP, LLP
1350 Avenue of the Americas, 31st Floor
New York, NY 10019
Telephone: (646) 402-5650
Facsimile: (646) 402-5651

Leigh-Anne St. Charles*
lstcharles@sanfordheisler.com
SANFORD HEISLER SHARP, LLP
611 Commerce Street, Suite 3100
Nashville, TN 37203
Telephone: (615) 434-7001
Facsimile: (615) 434-7020

Attorneys for the Plaintiffs and Plaintiff Class

NC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CV-20-80188MISC

JAIME H. PIZARRO, CRAIG SMITH, JERRY MURPHY, RANDALL IDEISHI, GLENDA STONE, RACHELLE NORTH, and MARIE SILVER, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

THE HOME DEPOT, INC; THE ADMINISTRATIVE COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN; THE INVESTMENT COMMITTEE OF THE HOME DEPOT FUTUREBUILDER 401(K) PLAN; and DOES 1–30

Defendants.

Case No. MISC

[Related to CIVIL ACTION FILE No. 1:18-CV-01566-WMR in the Northern District of Georgia]

PLAINTIFFS' RULE 45 MOTION TO COMPELL PRODUCTION AGAINST FINANCIAL ENGINES ADVISORS, LLC

Hearing Date: November 30, 2020 at 9:30 a.m., or as soon thereafter as the Court may provide.

TABLE OF CONTENTS

MEMORANDUM OF POINTS AND AUTHORITIES 5

FACTUAL BACKGROUND 7

A. Plaintiffs' "Excessive Fees" Claims in the Underlying ERISA Litigation 7

B. The Role of FE in Providing Managed Account Services to Plan Participants 8

C. History of Negotiations Between Plaintiffs and FE 9

ARGUMENT 13

A. FE's Objections are not Valid Grounds to Withhold the Requested Discovery 15

1. FE's Confidentiality Objections are Meritless 15

2. FE's Relevancy and Burden Objections are Similarly Meritless 19

B. Plaintiffs' Subpoena Is Reasonable and Proportionate to the Needs of the Case 21

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

AT&T Corp. v. Microsoft Corp.,
No. 02-0164-MHP (JL), 2003 WL 21212614 (N.D. Cal. Apr. 18, 2003) 16

ATS Prod., Inc v. Champion Fiberglass, Inc.,
309 F.R.D. 527 (N.D. Cal. 2015) 14

Bailey Indus., Inc. v. CLJP, Inc.,
270 F.R.D. 662 (N.D. Fla. 2010) 17

Batra v. Inv'rs Research Corp.,
144 F.R.D. 97 (W.D. Mo. 1992) 19

Beckman Indus., Inc. v. Int'l Ins. Co.,
966 F.2d 470 (9th Cir. 1992) 14, 16

Blankenship v. Hearst Corp.,
519 F.2d 418 (9th Cir. 1975) 15

Brainstorm USA, LLC v. Manes,
No. 1:07-CV-1201-JEC-RGV, 2008 WL 11407353, at *2 (N.D. Ga. Mar. 20, 2008) 17

Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co.,
107 F.R.D. 288 (D. Del. 1985) 18

Coventry First LLC v. 21st Servs.,
No. 05CV2179-IEG (NLS), 2005 WL 8173350, at *4 (S.D. Cal. Dec. 22, 2005) 18

Exxon Shipping Co. v. U.S. Dep't of Interior,
34 F.3d 774 (9th Cir. 1994) 14

Federal Open Market Committee of Federal Reserve System v. Merrill,
443 U.S. 340 (1979) 17

Garneau v. City of Seattle,
147 F.3d 802 (9th Cir. 1998) 20

Gonzales v. Google, Inc.,
234 F.R.D. 674 (N.D. Cal. 2006) 14, 16, 18

Gradillas Court Reporters, Inc. v. Cherry Bekaert, LLP,
No. 18-MC-80064-KAW, 2018 WL 2197544 (N.D. Cal. May 14, 2018) 18

In re SunTrust Banks, Inc. 401(k) Plan Affiliated Funds ERISA Litig.,
No. 1:11-CV-784, 2016 WL 11469158 (N.D. Ga. Nov. 9, 2016) 19

Luppino v. Safeguard Prod. Int'l LLC,
No. 1:13-CV-0964, 2013 WL 12382718 (N.D. Ga. July 19, 2013) 14

Monster Energy Co. v. Vital Pharm., Inc.,
No. 5:18-CV-01882-JGB(SHKx), 2019 WL 8112506 (C.D. Cal. Oct. 16, 2019) 17

Nat'l Acad. of Recording Arts & Scis., Inc. v. On Point Events, LP,
256 F.R.D. 678 (C.D. Cal. 2009) 16

Pasadena Oil & Gas Wyoming LLC v. Mont. Oil Props. Inc.,
320 Fed. Appx. 675 (9th Cir. 2009) 17

Simplex Mfg. Co. v. Chien,
No. C12-835RAJ, 2012 WL 3779629, (W.D. Wash. Aug. 31, 2012) 14

United States v. McGraw-Hill Companies, Inc.,
No. 13-CV-0779-DOC (JCGx), 2014 WL 12589667 (C.D. Cal. June 13, 2014) 15

Unsworth v. Musk,
No. 19-MC-80224-JSC, 2019 WL 5550060 (N.D. Cal. Oct. 28, 2019) 14

Wachovia Ins. Servs., Inc. v. Paddison,
No. 4:06-CV-083, 2006 WL 8435309 (S.D. Ga. July 18, 2006) 18

Rules

Fed. R. Civ. P. 26 ..... 14, 15

Federal Rule of Civil Procedure 45 13

Treatises

Wright & Miller, 8A Fed. Prac. & Proc. Civ. § 2043 (3d ed.) 17

Regulations

29 C.F.R. § 2550.404a-5 ..... 6, 16, 18

29 C.F.R. § 4065.3 ..... 6, 16

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on November 30, 2020, at 9:30 a.m. or as soon thereafter as the matter may be heard in this Court, at a place to be determined by the Court, Plaintiffs will and do hereby move under Rule 45 of the Federal Rules of Civil Procedure for an order compelling Financial Engines Advisors, LLC ("FE"), to produce documents responsive to Request Nos. 25 and 26 of the subpoena issued to FE on April 1, 2020. The requests and objections thereto are set out in the following Memorandum of Points and Authorities and in Exhibits A and B to the Declaration of David Tracey attached to this motion. As grounds for the motion, Plaintiffs state that the requested information is relevant to the subject matter of the underlying action and proportional to the needs of the case, and despite Plaintiffs' exhaustive efforts to resolve the dispute through multiple telephone conferences and email exchanges, FE is refusing to produce the information without justification.

MEMORANDUM OF POINTS AND AUTHORITIES

The Plaintiffs in the underlying case are current and former participants of the Home Depot FutureBuilder 401(k) plan (the "Plan").[1] They have sued the Plan fiduciaries under ERISA,[2] asserting breaches of fiduciary duty for, *inter alia*, allowing Financial Engines Advisors, LLC ("Financial Engines" or "FE") to charge unreasonable fees to Plan participants for managing the assets in accounts of participants who enrolled in the Professional Management Program offered by the Plan and administered by FE. Among other indicators that the fees charged to Plan participants were unreasonable, Plaintiffs allege that the fees FE charged Home Depot Plan participants "we excessive because they were significantly higher than . . . the fees that FE . . . charged other plans for identical services."[3] As the court stressed when it certified the Class and

[1] *Pizzaro et al. v. The Home Depot, Inc.* et al., Case No. 1:18-cv-01566-WMR (N.D. Ga). All Docket citations that follow will be to the docket in the underlying action.

[2] The Plan fiduciaries include The Home Depot, Inc., The Administrative and Investment Committees of the Home Depot FutureBuilder 401(k) Plan, and the members of those committees, each of whom is a defendant in the underlying action (collectively referred to herein as "Defendants").

[3] Tracey Decl. Ex. F (Order on Plaintiffs' Motion for Class Certification and on Defendants' Motions for Summary Judgment as to Counts II and VI) at 56; *see also id.* at 72 ("As to the

denied Defendants' early motions for summary judgment in the underlying action, the fact that FE charged lower fees to other plans is a key allegation underpinning the merits of Plaintiffs' Excessive Fees claim.[4] Further, it bears directly on the measure of damages to which Plaintiffs would be entitled if they prevail.

As the fees FE charges other plan participants are central to Plaintiffs' Excessive Fees claims, and since the fiduciaries of the Plan did not collect that information, Plaintiffs issued a subpoena to FE on April 1, 2020 seeking documents or data that show the fees that FE charges participants of other 401(k) plans for the same managed account services it provided to participants of the Home Depot Plan.[5] FE has resisted producing responsive documents and/or data, claiming, *inter alia*, that the requested information is irrelevant, burdensome, and confidential.[6] FE has persisted in asserting that confidentiality objection throughout many of the parties' efforts to meet and confer on this request, even though the law requires plans to disclose the total annual fees that FE receives for its services in reports filed with the Department of Labor and available to the public.[7] Moreover, as Plaintiffs explained, the law requires that plans for which FE provides services disclose FE's fee schedules to all of their participants at least annually, and those tens- or hundreds-of-thousands of participants who receive such fee information are not required to maintain this information confidentially, nor are they restricted from publishing this fee data.[8] In short, FE has no credible claim that it does—or legally could—maintain either its client list or its fee schedules confidentially because the law expressly requires otherwise.

---

reasonableness of the fees charged by FE and AFA . . . Plaintiffs allege that FE and AFA charged other plans lower fees.")

[4] *Id.* at 67; *see also id.* at 15-16, 40, 56, 71-72; Dkt. 74 at 12-13 (Order on Defendants' Motions to Dismiss).

[5] Tracey Decl., Ex. A at Requests No. 25-26.

[6] *See id.*, Ex. A-D, G-H.

[7] 29 C.F.R. § 4065.3 (requiring plan administrators to file annual reports on IRS Form 5500).

[8] 29 C.F.R. § 2550.404a-5(c)(3) (requiring disclosure to plan participants "at least annually" of "any fees and expenses that may be charged against the individual account of a participant" including "fees for investment advice").

Nevertheless, FE has refused to produce the fee information sought by Plaintiffs' subpoena. Instead, it has offered to produce anonymized data on the ten plans closest to the Home Depot Plan in total assets in the plan and total number of participants, limited to a single method of enrollment.[9] However, Plaintiffs have no way of discerning whether such a limited data set would be sufficiently representative of the fees FE charged to other plans for the same services at issue in the underlying litigation. Indeed, FE has specifically represented in writing to Plaintiffs that factors "like plan size, participant count, and assets under management" are but a few of the "myriad factors" that go into a determination of the fees charged to any given plan.[10]

Most recently, FE has gone so far as to threaten to back out of an upcoming deposition scheduled for November 4, 2020, despite repeatedly representing its availability and requesting that Plaintiffs hold this date for nearly a month, unless "Plaintiffs agree to FEA's most recent proposal on fee-related document production and stipulate not to move to compel any documents from FEA in connection with this lawsuit."[11] Otherwise, FE claims that its witnesses will not be available until December 4 and 11, 2020—the final days before the parties' December 16, 2020 fact discovery deadline.[12]

Having exhausted the meet and confer process over the course of six months, Plaintiffs now move in this Court to compel FE to produce the requested fee documents and/or data.

FACTUAL BACKGROUND

A. Plaintiffs' "Excessive Fees" Claims in the Underlying ERISA Litigation

Plaintiffs' breach of fiduciary duty claims in the underlying ERISA case fall into two broad categories—the "Challenged Funds" claim, which is not germane to this motion,[13] and the "Excessive Fees" claim, which is. For the "Excessive Fees" claim, Plaintiffs allege that

---

[9] *See* Tracey Decl.¶ 17, Ex. H at 3-6.

[10] *See* Tracey Decl., Ex. D at 2.

[11] *See id.*, Ex. J at 4; *see also id.* at 9-10 (FE's counsel's email representing that "both" its Rule 30(b)(6) designees were available on November 4, 2020, and Plaintiffs' counsel's email agreeing to hold that date open for a deposition).

[12] *See id.* at 4, 7.

[13] For the "Challenged Fund" claim, Plaintiffs maintain that Defendants imprudently selected and retained certain chronically underperforming options for the Home Depot FutureBuilder 401(k) Plan (the "Plan"). *E.g.*, Am. Compl. ¶¶ 160-175.

Defendants breached their fiduciary duties by engaging in an imprudent process for selecting and retaining FE, as well as its successor, Alight Financial Advisors, LLC ("AFA"), to provide managed account services to plan participants in exchange for unreasonably high fees.[14] *See* Amended Complaint ("Am. Compl."), Dkt. No. 53 ¶¶ 60-65. In their complaint, Plaintiffs asserted separate factual bases that support, independently and collectively, their claim that the Home Depot fiduciaries employed imprudent processes when deciding to retain FE and in allowing FE to charge participants unreasonably high fees for managed account services. One of the primary factual bases supporting Plaintiffs' claim of Excessive Fees is that participants in other 401(k) plans paid less for comparable managed account services provided by FE. *See id.* ¶¶ 52, 66.

B. The Role of FE in Providing Managed Account Services to Plan Participants

In July of 2011, the Plan engaged FE as an investment adviser to provide managed account services to Plan participants enrolled in the Plan's "Professional Management" program (the "Program"). Am. Compl. ¶ 35. Participants who enrolled in the Program paid FE a fee based upon a percentage of the assets in their retirement accounts. *Id.* ¶ 189. On a quarterly basis, FE charged participants an asset-based fee on a sliding scale based on the value of the assets in their accounts. For example, in 2014, the tiered fee arrangement was: 0.55% (55 basis points) of the assets for the first $100,000, 0.45% (45 basis points) for the next $150,000, and 0.30% (30 basis points) for account balances above $250,000. *See* Dkt. No. 145-11 ("2014 Annual Fee Disclosure Statement"). In July of 2017, the Plan removed FE and instead retained AFA to provide managed account services to Plan participants enrolled in the Program. AFA, in turn, hired FE to act as a "subadvisor." In that capacity, FE continued providing the investment advisory services to Plan participants. Am. Compl. ¶¶ 35, 45, 198. AFA largely followed the same fee schedule that FE charged to Plan participants, though it reduced the top-tier fee by 5 basis points to 0.50% of assets. *See, e.g.*, Tracey Decl., Ex. F at 14.

[14] The Amended Complaint also alleged in Count VI a breach of Defendants' duty to monitor other fiduciaries to whom they may have delegated any duties related to the selection and monitoring of FE and AFA. Am. Compl. ¶¶ 211-214. Count VI's particularized claim is that Defendants breached their fiduciary duty by "failing to ensure that the monitored fiduciaries had a prudent process in place for evaluating and ensuring that fees were competitive." *Id.* ¶ 214(c).

C. History of Negotiations Between Plaintiffs and FE

Over a six-month period, Plaintiffs have made extensive efforts to compromise with FE on Requests Nos. 25 and 26. Yet, FE's objections to Plaintiffs' requests have been a moving target and their demands impossible to satisfy. At first, FE principally complained that its fee information was "sensitive"—even though fee information is disclosed annually on public filings and to plan participants—and requested that Plaintiffs accept anonymized data. Yet when Plaintiffs agreed to accept anonymized data on reasonable conditions, FE continued to object to a complete production. Indeed, throughout the negotiations, FE has refused to address Plaintiffs' key concern: that FE produce an unbiased and appropriate dataset so that Plaintiffs could perform a rigorous comparison of the fees Home Depot's participants paid with the fees that participants of other plans paid for FE's services. As the below summary of negotiations demonstrates, FE has never offered a serious proposal to address Plaintiffs' concern.

Plaintiffs first served their subpoena duces tecum over six months ago, on April 1, 2020. Tracey Decl. Ex. A at 2. That subpoena included the two Requests at issue in this motion:

> **REQUEST 25**: Documents sufficient to identify every defined contribution plan for which FE has provided Professional Management services between January 1, 2010 and the present and the rates that FE charges or charged each Plan's participants for such services.
>
> **REQUEST 26:** Documents sufficient to describe any differences (if any) between the Plan's Professional Management program and the Professional Management services FE provides to any other defined contribution plan.

Id. at 25. Financial Engines responded to each of those Requests on April 22, 2020 with substantially the same boilerplate objection, *see id.* Ex. B at 29-31, which read:

> **RESPONSE:** FEA objects to the request as overly broad, unduly burdensome, and not proportional to the needs of the case in seeking documents related to all of FEA's clients and [in Request 25, the rates FEA charges, and in Request 26, the services FEA provides to them]. FEA further objects to the request as seeking documents not relevant to the parties' claims and/or defenses, including documents that were not transmitted to the Home Depot Defendants, which are unrelated to Plaintiffs' monitoring claims, and documents unrelated to the Plan. FEA further objects to the request to the extent it seeks trade secrets and/or other confidential research, development, or commercial information protected from discovery by Rule 45 of the Federal Rules of Civil Procedure. FEA does not intend to search for and produce documents in response to this request.

On April 29, 2020, Plaintiffs met and conferred telephonically with FE's counsel to discuss FE's responses and objections. *See* Tracey Decl. ¶ 5. During the phone call, FE's counsel insisted that the fees FE charges other defined contribution plans for Professional Management Services constituted sensitive and/or competitive information. *Id.* Plaintiffs explained that this was a mischaracterization because the fees FE charges its customers are disclosed to many thousands of plan participants. *Id.* The next day, in an email to FE's counsel, Plaintiffs further noted that the requested information is far more accessible to FE than to Plaintiffs and that information about FE's compensation is disclosed both in Department of Labor filings and to plan participants. Tracey Decl. Ex. C at 16-17. Plaintiffs further emphasized that FE could use the protective order issued in the underlying case to the extent it reasonably believed responsive documents to be confidential. *Id.*

On May 8, Plaintiffs held another meet-and-confer with FE's counsel. This time, FE suggested that it might be willing to provide anonymized data with respect to Requests 25 and 26. *See id.* ¶ 7. Plaintiffs expressed their reservations about accepting anonymized data but agreed to take FE's suggestion under advisement. *Id.* In a subsequent email exchange, Plaintiffs emphasized that FE had yet to provide a clear reason why they would not provide data responsive to Requests 25 and 26, aside from characterizing the materials as "sensitive" and "competitive" information. *See* Decl. Ex. C at 11-12. Plaintiffs again reminded FE that it could mark the purportedly "confidential" information as such, and the Court's protective order would govern its use. *Id.* Yet FE had not explained why the protective order would fail to address its concerns.

Nonetheless, in an effort to compromise—*and to fully address FE's purported confidentiality concerns*—Plaintiffs offered to consider accepting anonymized data if FE provided information that enabled Plaintiffs to compare FE's other (anonymized) clients with the Home Depot Plan. In particular, Plaintiffs proposed that FE provide: (1) a sworn statement identifying the factors that might affect the fee schedule; and (2) anonymized data for each plan, along with a fee schedule and plan-specific data for all factors that might affect the fee schedule.

Id.[15]

Even though Plaintiffs had embraced FE's offer of anonymized data, FE rejected Plaintiffs' proposal. After Plaintiffs' counsel made several attempts to follow up with FE, the parties scheduled a telephonic conference for June 19, 2020. Tracey Decl. ¶ 9. During the phone call, FE's counsel stated that FE would not swear to the factors that might affect the fee schedule. *Id.* Instead, counsel for FE offered a vastly narrowed and methodologically flawed proposal: it would provide anonymized "fee ranges" for sets of FE clients who fell within certain broadly-defined categories. *Id.* (For example, FE propose to describe that "for clients with $X billion - $Y billion in assets, fees ranged from X to Y." *id.* Ex. D at 4). Plaintiffs' counsel pointed out that such fee ranges would not provide a reliable basis for evaluating the reasonableness of the fees class members paid for FE's services. Tracey Decl. ¶ 9. Among other issues, the proposed fee ranges could be biased by even one other plan that, like Home Depot's, paid anomalously high fees. The proposal's flaws were evident.

During the June 19 call, FE's counsel indicated that FE's principal objection to providing a declaration was that it could not swear to *all* factors that affect FE's fees. *See id.* So, in yet another effort to compromise, Plaintiffs suggested that FE provide a declaration that outlines the *major* points or factors that generally affect FE's professional management fees, along with anonymized data that corresponds to the principal factors it identified. *Id.* ¶ 10. FE instead asked Plaintiffs to propose a list of such potential factors, and in yet a further effort of compromise, Plaintiffs agreed to do so. *Id*

In a June 23, 2020 follow-up email, Plaintiffs listed fourteen factors that it identified as potentially influencing fee rates, and they proposed accepting a production of anonymized data including only these factors. *See* Tracey Decl. Ex. C at 2-3. In a July 16 letter, however, rather than responding to any of the specific factors proposed by Plaintiffs, FE rejected Plaintiffs' proposal outright, reiterating the same baseless relevance, burden, and confidentiality objections FE had interposed without meaningful elaboration since April. *Id.* Ex. D. Instead of offering a

[15] Alternatively, Plaintiffs offered to accept a non-anonymized list of all plans with lower fees than Home Depot, along with their respective fee schedules. *See* Tracey Decl. Ex. C at 11.

counterproposal of factors that it deemed relevant in setting its fees, FE "reiterated its offer" to provide fee ranges (*id.* at 3) even though Plaintiffs' counsel *had already explained* on June 19 why this proposal was unacceptable. In other words, FE refused to provide any new offer of compromise.

Plaintiffs responded by letter on August 19, explaining that, as the Court had recognized in its Order on Defendants' Motions to Dismiss, Dkt. No. 74 at 12-13, Plaintiffs' allegations that "lower fees were offered to participants in other comparable plans" were relevant to Plaintiffs' claims that the Defendants could and should have negotiated with FE for lower fees. Tracey Decl. Ex. E at 2. Moreover, FE had still failed to provide any factual support for the alleged burden of producing the information. *Id.* at 3. Nor had FE explained why it believed that information that, by law, is routinely disclosed to the DOL and to all plan participants was confidential. *Id.*

On September 18, the parties spoke again by phone to discuss the requests, yet FE's counsel still refused to make any effort to provide a sufficiently representative or reliable set of fee data. Instead, FE's counsel offered to produce information contained in a presentation that FE had delivered to Home Depot. *See* Tracey Decl. ¶¶ 15-16. The flaws with the proposal were readily apparent. Among other indicia of unreliability: (1) the presentation would only capture a moment in time—the time in which the presentation was delivered—while ignoring the remainder of the time period during which FE provided investment advice to participants in the Home Depot Plan; (2) the data contained in any client presentation is suspect and could be misleading given that its purpose is, by design, to present the best possible framing of fees the client is paying; and (3) the proposed data represents only a sliver of the aggregate data that Plaintiffs sought in order to compare the fees FE charged the Home Depot Plan to the fees charged to other defined contribution plans for the same or similar Professional Management Services. As a result, FE's marketing presentation to Home Depot would not provide sufficient information to determine whether a meaningful number of comparable plans paid FE lower rates for the same services; rather, it may well omit key data on other comparable plans that paid fees even lower than those hand selected by FE for presentation to Home Depot.

On October 3, 2020, FE sent Plaintiffs another letter about their requests. *See* Tracey Decl. Ex. G. FE repeated the same confidentiality and burden objections, but it still did not provide details substantiating its alleged burden (such as the number of clients that FE would allegedly have to contact to respond to Plaintiffs' requests). *Id.* at 2-3. Instead, FE asked Plaintiffs to propose one final compromise. *Id.* at 3. A few days later, Plaintiffs set forth their final offer of compromise: FE would provide anonymized fee schedules for each plan it serviced from 2011 through the present, along with ten corresponding data points for each plan. *See* Tracey Decl. Ex. H at 5-6.

On October 9, 2020, FE rejected Plaintiffs' final offer of compromise. *Id.* at 3. Instead, it offered to provide information corresponding to only some of the factors Plaintiffs identified, and only for "ten plans with opt-in enrollment" that were "closest" to Home Depot's size in terms of "total assets" and the "number of participants." *Id.* at 3-4. But since FE refused to provide a declaration identifying the factors that influence fee rates (as Plaintiffs requested on May 8), it has not provided any reliable assurance that total plan assets and participant numbers are considered by FE to be the most significant in determining fees such that Plaintiffs could rely on this small selection of plans to necessarily convey the most appropriate comparators. Indeed, in her July 16 letter, ***FE's counsel represented the opposite***: that "myriad factors beyond metrics like plan size, participant count, and assets under management" influence fees. Tracey Ex. D at 3.

Accordingly, after six months of negotiation, Plaintiffs were left with no option but to move to compel. FE insisted on providing only a limited set of anonymized data—based on factors that its counsel had previously disclaimed—with no reliable way to guarantee that those few examples were even the most comparable to the Home Depot for the purposes of determining reasonable fees. With the discovery deadline looming, and unable to afford more delay, Plaintiffs expressed their intent to move forward with this motion to compel. *See* Tracey Decl. Ex. H at 2.

ARGUMENT

Federal Rule of Civil Procedure 45 governs the production of documents pursuant to a subpoena duces tecum served on a nonparty. The scope of discovery of documents sought

pursuant to subpoena under Rule 45 is identical to the scope of discovery permitted under Rule 26(b). *ATS Prod., Inc v. Champion Fiberglass, Inc.*, 309 F.R.D. 527, 530 (N.D. Cal. 2015) ("Federal Rule of Civil Procedure 45 governs discovery of nonparties by subpoena. . . . The Advisory Committee Notes to Rule 45 state that 'the scope of discovery through a subpoena is the same as that applicable to Rule 34 and the other discovery rules,' which in turn is the same as under Rule 26(b)."); *see also Luppino v. Safeguard Prod. Int'l LLC*, No. 1:13-CV-0964, 2013 WL 12382718, at *4 (N.D. Ga. July 19, 2013). Rule 26(b) provides in relevant part:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Courts have reached a broad consensus that "determining the propriety of a subpoena balances the relevance of the discovery sought, the requesting party's need, and the potential hardship to the party subject to the subpoena." *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 680 (N.D. Cal. 2006); *see also Simplex Mfg. Co. v. Chien*, No. C12-835RAJ, 2012 WL 3779629, at *1 (W.D. Wash. Aug. 31, 2012) ("The apparent relevance of the information a subpoena seeks informs the extent to which its burden is undue, and the court must balance relevance, the requesting party's need for the information, and the hardship to the subpoena's target.").

Although plaintiffs must show "that the information sought is relevant and material to [their] allegations and claims" in the underlying case, "[t]he burden of showing that a subpoena is unreasonable and oppressive is upon the party to whom it is directed." *Unsworth v. Musk*, No. 19-MC-80224-JSC, 2019 WL 5550060, at *4 (N.D. Cal. Oct. 28, 2019) (internal quotation marks and citations omitted). "[T]he Federal Rules of Civil Procedure strongly favor full discovery," *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 779 (9th Cir. 1994), and "Ninth Circuit precedent strongly favors disclosure to meet the needs of parties in pending litigation." *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992). Accordingly, a nonparty seeking

to withhold relevant evidence must "carry a heavy burden of showing why discovery [should be] denied." *United States v. McGraw-Hill Companies, Inc.*, No. 13-CV-0779-DOC, 2014 WL 12589667, at *3, *6 (C.D. Cal. June 13, 2014) (quoting *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)). To carry that burden, FE must overcome the Federal Rules' "liberal discovery principles" by "clarifying, explaining and supporting its objection with competent evidence." *Id.* (first quoting *Blankenship*, 519 F.2d at 429; next quoting *La. Pac. Corp. v. Money Mkt. 1 Institutional Inv. Dealer*, No. C 09-03529, 2012 U.S. Dist. LEXIS 162971, at *9 (N.D. Cal. Nov. 14, 2012)). Otherwise, the motion must be granted. *See id.*

FE has failed to meet its burden in resisting production of documents responsive to Request Nos. 25 and 26—documents pertaining to the fees it charges other plan participants for managed account services. Instead, it has relied upon baseless claims that the information sought is "confidential," is not relevant, and that its production would cause undue burdens. In contrast, Plaintiffs have articulated a compelling need for the requested information, taking into account "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Accordingly, the Court should grant their Motion to Compel.

A. FE's Objections are not Valid Grounds to Withhold the Requested Discovery.

FE's asserted grounds for refusing to produce the requested information come nowhere close to satisfying its burden of showing why the requested discovery should be withheld from production. First, FE objects on alleged confidentiality grounds, despite overwhelming evidence that information about FE's compensation has been publicly disclosed as required by DOL regulation. Next, FE objects that producing the documents responsive to Request Nos. 25 and 26 would involve an undue burden, yet offers no meaningful explanation of the alleged burden involved, and certainly no burden disproportionate to the needs of the case. Finally, FE objects on generalized claims of relevancy that simply ignore the basis of Plaintiffs' claims.

1. FE's Confidentiality Objections are Meritless.

FE objects that Plaintiffs request "trade secrets and/or other confidential research,

development, or commercial information protected from discovery." *See* Decl. Ex. B at 30. The conclusory nature of FE's objections on this point is reason enough to discount the objection. "[A] party asserting a Rule 45 privilege must show that the information is a trade secret or confidential *and* demonstrate that its disclosure might be harmful." *AT&T Corp. v. Microsoft Corp.*, No. 02-0164-MHP (JL), 2003 WL 21212614, at *8 (N.D. Cal. Apr. 18, 2003) (emphasis added). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning," cannot shield relevant information from discovery. *Beckman Indus.*, 966 F.2d at 476.

Even if the court were to entertain it, FE's attempt to pass off its fee schedules as "confidential" is belied by the reality that information about FE's fees is in the public domain. It is hornbook law that to qualify as "confidential" commercial information that *may* be protected from disclosure under Rule 45, the information must have been held in confidence and cannot be publicly available. Rather, "the party challenging the subpoena must make 'a strong showing that it has historically sought to maintain the confidentiality of this information.'" *Gonzales*, 234 F.R.D. at 684 (quoting *Compaq Computer Corp. v. Packard Bell Elec., Inc.*, 163 F.R.D. 329, 338 (N.D. Cal. 1995)); *Nat'l Acad. of Recording Arts & Scis., Inc. v. On Point Events, LP*, 256 F.R.D. 678, 683 (C.D. Cal. 2009) (compelling discovery because party resisting disclosure did not show it took "reasonable steps to assure the confidentiality of this information and to prevent its disclosure to third parties").

FE's confidentiality claim fails that most basic criterion. As Plaintiffs explained to FE during the parties' multiple conferences, the "fees for investment advice" that may be charged to plan participants, such as the fee schedules FE charges, are *required* to be published "at least annually" to all plan participants to whom FE provided managed account services, and none of those participants is under any obligation to keep such information confidential. 29 C.F.R. § 2550.404a-5(c)(3). Thus, as a *matter of law*, every plan that contracts with FE must disclose FE's fee schedule to every single plan participant. Moreover, every plan administrator is required by law to file an Annual Report Form 5500 that discloses (among other things) the total compensation paid by participants to investment advisors such as FE. *See* 29 C.F.R. § 4065.3. As a result, this "sensitive" and confidential information is already in the hands of tens or hundreds

of thousands of individuals who have no obligation to hold this information in confidence, and the total fees per plan are published in a public database. That defeats any assertion that the fee schedules FE sets for various plans are a well-guarded secret.

Even assuming, *arguendo*, that FE's confidentiality objections somehow survived their fee schedule's wide publication, it still would not license FE to withhold the documents sought by Plaintiffs. "[U]nder federal law, there is no absolute privilege for trade secrets" or other confidential information that shields them from discovery. *Pasadena Oil & Gas Wyoming LLC v. Mont. Oil Props. Inc.*, 320 Fed. Appx. 675, 677 (9th Cir. 2009). "[I]nstead, courts weigh [the subpoenaed party's] claim to privacy against the need for disclosure in each case, and district courts can enter protective orders allowing discovery but limiting the use of the discovered documents." *Id.* Since such protective measures ordinarily suffice to safeguard the disclosing party's competitive interests, "orders forbidding any disclosure of trade secrets or confidential commercial information are rare." *Federal Open Market Committee of Federal Reserve System v. Merrill*, 443 U.S. 340, 362 n.24 (1979); *accord* Wright & Miller, 8A Fed. Prac. & Proc. Civ. § 2043 (3d ed.); *see also Bailey Indus., Inc. v. CLJP, Inc.*, 270 F.R.D. 662, 669 (N.D. Fla. 2010) (explaining that given the availability of protective orders, "confidentiality does not act as a bar to discovery and is generally not grounds to withhold documents from discovery"); *Brainstorm USA, LLC v. Manes*, No. 1:07-CV-1201-JEC-RGV, 2008 WL 11407353, at *2 (N.D. Ga. Mar. 20, 2008) (compelling disclosure pursuant to a protective order like the one in this case).

This case is no exception. The court in the underlying litigation has already entered a protective order that applies to confidentiality claims of non-parties, and which more than adequately addresses any concerns FE may have over disclosure of any information deemed to be confidential or commercially sensitive. *See* Dkt. No. 85. "[W]here the parties have agreed to a protective order . . . even a very sensitive trade secret will be sufficiently protected and should be produced if relevant." *Monster Energy Co. v. Vital Pharm., Inc.*, No. 5:18-CV-01882-JGB(SHKx), 2019 WL 8112506, at *6 (C.D. Cal. Oct. 16, 2019) (internal quotation marks and citations omitted). Indeed, to date, FE has not offered any serious argument for why the protective order would be insufficient to protect it from competitive harm if it disclosed the requested

material.[16] No party in the underlying action competes with FE. *See id.* at *6 (adding that "[c]ourts have routinely recognized that disclosure to a competitor is more harmful that to a noncompetitor"). This Court has ordered disclosure of confidential information under a protective order despite more serious threats to the disclosing party's protected interests. *See, e.g.*, *Gradillas Court Reporters, Inc. v. Cherry Bekaert, LLP*, No. 18-MC-80064-KAW, 2018 WL 2197544, at *7 (N.D. Cal. May 14, 2018) (ordering nonparty to disclose confidential pricing information to its *competitor's* attorneys under a protective order); *Gonzales*, 234 F.R.D. at 684-87 (ordering nonparty Google to produce commercially sensitive information that "could permit competitors to estimate information about Google's indexing methods" under protective order).[17]

As in those cases, Plaintiffs' substantial need for the subpoenaed information to establish a key plank of their Excessive Fees claim—as explained more fully below—easily outweighs any competitive interest FE may have in withholding its fee information from limited disclosure pursuant to the protective order. Thus, even leaving aside the fact that the information Plaintiffs seek from FE is in the public domain and therefore not confidential, confidentiality on its own would not be a valid ground for FE to refuse compliance with Plaintiffs' subpoena.

---

[16] Instead, FE suggests that it "would face significant risk to its client base if its clients were exposed to future litigation as a result of [FE's] disclosure of confidential client information" to Plaintiffs' counsel. *See* Decl. Ex. D at 3 n. 1. Leaving aside that (as explained above), FE's clients must disclose the requested fee information to Plan participants and the DOL, *see* 29 C.F.R. §§ 2550.404a-5(c)(3), 4065.3—so it is not confidential—the protective order obligates Plaintiffs' counsel to use any confidential discovery *only* for the purposes of this litigation "and no other purpose or litigation whatsoever." Dkt. No. 85 ¶ 2. In any event, FE has cited no authority for the odd proposition that evidence should be shielded from discovery in one lawsuit because it could reveal unlawful conduct actionable in another.

[17] *See also Wachovia Ins. Servs., Inc. v. Paddison*, No. 4:06-CV-083, 2006 WL 8435309, at *19-21 (S.D. Ga. July 18, 2006) (denying defendant's motion to quash and motion for a protective order as to plaintiff's subpoena, which sought defendant's "confidential commercial information that include[d] sensitive pricing and rating structures" from defendant's non-party clients); *Coventry First LLC v. 21st Servs.*, No. 05CV2179-IEG (NLS), 2005 WL 8173350, at *4-5 (S.D. Cal. Dec. 22, 2005) (ordering disclosure of several years of nonparty's "highly sensitive" and confidential pricing information to a competitor's attorneys pursuant to a protective order); *Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co.*, 107 F.R.D. 288, 293 (D. Del. 1985) (ordering the production of one of the most closely guarded trade secrets in history—the formula for making Coca-Cola—to a non-competitor pursuant to a protective order).

2. FE's Relevancy and Burden Objections are Similarly Meritless.

The documents Plaintiffs seek bear directly on the prudence of the fees Home Depot allowed FE to charge Plan participants. *See In re SunTrust Banks, Inc. 401(k) Plan Affiliated Funds ERISA Litig.*, No. 1:11-CV-784, 2016 WL 11469158, at *4 (N.D. Ga. Nov. 9, 2016) (finding that production of all documents "analyzing, discussing or referencing the performance or fees of investments in [defendant's] defined benefit plan" overcame defendant's relevance objections). In the underlying litigation Plaintiffs have alleged, *inter alia*, that Defendants acted imprudently by allowing FE to charge Plan participants excessive fees, as measured against several benchmarks, including the rates that FE charged participants in other plans for substantially similar services. *See* Am. Compl. ¶¶ 66, 178. The fee rates that other 401(k) plan fiduciaries were able to negotiate with the same company for the same product—FE's Professional Management services—are thus directly relevant to Plaintiffs' argument that Plan participants were paying excessive fees, and that in comparison with other fiduciaries, Defendants fell well short of their obligations.

Further, such discovery is relevant to Plaintiffs' damages for their Excessive Fees claim: it will speak to what Plan participants would have been charged had Defendants engaged in a prudent process for negotiating fees with FE. As courts have recognized, fees that other clients "pay[] to [an] investment advisor may be relevant to determine the excessive nature of the [fees]" charged to a similar plan, and "may be helpful for comparative purposes." *Batra v. Inv'rs Research Corp.*, 144 F.R.D. 97, 98 (W.D. Mo. 1992) (granting plaintiff's motion to compel documents because "rates charged by [defendants] to other similar funds" were "relevant for comparative purposes").

The Court in the underlying litigation recently underscored the relevance of the information Plaintiffs seek in this motion. In its Order granting class certification and denying Defendants' motions for summary judgment, the Court noted, "if lower rates were otherwise available from FE . . . for the same services provided to similar plans, then the fees may well be too high Plan-wide for each of [the Home Depot's] participants." Tracey Decl. Ex. F at 16. Furthermore, the court denied summary judgment, in part, because Defendants failed to establish

undisputed material facts about the fees FE charged other plans. *Id.* at 67 (noting Defendants' failure to refute Plaintiffs' "key" allegation that "lower fees were offered to participants in other comparable plans"); *id.* at 71-72 (noting Defendant failed to establish undisputed material facts refuting Plaintiffs' Excessive Fees claim, including Plaintiffs' allegation "that FE and AFA charged other plans lower fees.").[18] The Court also indicated that this information may factor into Plan participants' damages, which could be calculated by taking "the difference between what participants paid to FE and AFA and what they would have paid under a prudent selection and retention process." *Id.* at 40.

Accordingly, the series of relevance objections FE set forth in its April 22, 2020 response to Plaintiffs' subpoena are meritless. Indeed, the unquestionable relevance of the requested documents to Plaintiffs' claims plainly counsels in favor of requiring FE to produce this information. "Relevance for purposes of discovery is defined very broadly." *Garneau v. City of Seattle*, 147 F.3d 802, 812 (9th Cir. 1998). But by any measure, the discovery Plaintiffs seek is critical to evaluating whether Defendants in the underlying litigation breached their fiduciary duties by allowing Plan participants to pay FE excessive fees, higher than those paid by participants in other 401(k) plans for the same services, without prudent investigation or negotiation.

FE's objections on the grounds of burden fare no better. FE does not contest the fact that this information is readily available without the need for extensive or expensive ESI search or recovery. Instead, the primary "burden" FE claims is that under its purported confidentiality agreements with its other clients, it would need to notify the plans and "take steps to protect the information from [broader] disclosure" before producing the data to Plaintiffs. Tracey Decl. Ex. D at 3. But notably, FE makes no mention of this specific burden in its initial responses to Plaintiffs' subpoena, *see id.* Ex. B at 29-31, and has never provided Plaintiffs with any specific estimate as to how many clients it would need to contact, or the anticipated cost or labor required

[18] *See also id.* at 56 ("Rather, Plaintiffs claim that the fees were excessive because they were significantly higher than the fees charged by other comparable services providers providing the same or substantially similar services or *even the fees that FE and AFA charged other plans for identical services*.") (emphasis added).

for this effort, such that Plaintiffs or the Court could determine the actual burden claimed by FE.

B. Plaintiffs' Subpoena Is Reasonable and Proportionate to the Needs of the Case.

In contrast to FE's baseless excuses for refusing to comply with Plaintiffs' subpoena, each of the factors articulated in Rule 26(b)(1) weighs in favor of ordering FE's compliance.

First, the issues at stake in the underlying litigation are of the upmost importance, and the requested discovery is critical to resolving them. At issue are the retirement funds of tens of thousands of current and former Home Depot employees—employees who relied on the Plan's fiduciaries to ensure that they were not charged excessive fees by companies such as FE. The total amount in controversy amounts to hundreds of millions of dollars, Am. Compl. ¶ 173, with millions of dollars of damages arising from Plaintiffs' Excessive Fee claim, *id.* ¶ 184.

Second, the parties' relative access to the requested information and respective resources also weighs in favor of an order requiring FE to comply with Plaintiffs' subpoena. While (as discussed earlier) each plan's Form 5500—disclosing the total compensation each plan provides FE—is publicly available in the Department of Labor's electronic database, Plaintiffs face significant challenges using this resource. Plaintiffs would first have to identify all plans that disclose Financial Engines as a service provider on their Form 5500—out of the more than 500,000 401(k) plans that submit a Form 5500 each year.[19] From there, Plaintiffs would only be able to derive the total amount of fees FE charged to plan participants for all services on an aggregated basis, not the actual fee schedule for the given plan's Professional Management services. Plaintiffs would therefore have to pursue further discovery and investigation, possibly with the assistance of experts, to try and determine the actual fee schedules FE used over time for each plan. Meanwhile, FE has ready access to its own fee schedules charged to other plans and could easily produce them. Further highlighting this disparity in access and burden are the parties' resources: FE is a sophisticated corporation earning millions of dollars each year from employees'

[19] *See* DOL Employee Benefits Security Administration, Private Pension Plan Bulletin: Abstract of 2016 Form 5500 Annual Reports, December 2018, *available at* https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2016.pdf (reporting that as of 2016, over 560,000 plans in the United States filed a Form 5500).

retirement funds, while Plaintiffs are aggrieved current and former Home Depot employees.

Next, the discovery sought by Plaintiffs is of critical importance to resolving the issues in the underlying litigation. As discussed *supra*, one of the fundamental allegations underpinning Plaintiffs' Excessive Fees claim—as recognized by the court in the underlying litigation—is that the Plan fiduciaries allowed FE to charge Plan participants more than it charged participants in other plans for the same investment advisory services. Am. Compl. ¶ 66; Tracey Decl., Ex. F at 48, 56, 59, 63, 72. Plaintiffs need the requested information to prove these allegations, and as evidence of the damages suffered as a result of the fiduciaries' imprudent conduct. *See* Tracey Decl. Ex. F at 16 & 40. Without this information, Plaintiffs will be at a significant disadvantage in acquiring evidence to show that class members were charged more than those other plans for the same services, and in acquiring evidence to establish the scope of the financial harm resulting from Defendants' failure to negotiate and monitor the reasonableness of FE's fees.

Given that the requested information is crucial to establishing Plaintiffs' claims and damages and challenging to compile from public sources, the benefit to Plaintiffs in receiving the requested data is significant. In contrast, the burden or expense articulated by FE amounts to (1) protecting its clients' purported "confidentiality" interests in public information that could be produced under a protective order and (2) in compiling its *own* fee schedules, tasks for which FE has provided no useful estimate as to expense or burden. As such, there is simply no question that the likely benefit to Plaintiffs of this production outweighs any burden or expense claimed by FE.

CONCLUSION

This Court should not tolerate FE's continued delay. Without the documents Plaintiffs seek from FE, Plaintiffs will be prejudiced in proving their case against Home Depot. For the foregoing reasons, Plaintiffs respectfully request that this Court order FE to produce documents and data responsive to Request Nos. 25 & 26 and grant any other relief the Court deems just and proper.

Dated: October 23, 2020

/s/ Edward Dewey Chapin
Edward Dewey Chapin
SANFORD HEISLER SHARP, LLP
655 West Broadway, Suite 1700
San Diego, CA 92101
Telephone: (619) 577-4242
Facsimile: (619) 577-4250
echapin2@sanfordheisler.com

*David Tracey
SANFORD HEISLER SHARP, LLP
1350 Avenue of the Americas, 31st Floor
New York, NY 10019
Telephone: (646) 402-5650
Facsimile: (646) 402-5651
dtracey@sanfordheisler.com

*Leigh Anne St. Charles
SANFORD HEISLER SHARP, LLP
611 Commerce Street, Suite 3100
Nashville, TN 37203
Telephone: (615) 434-7000
Facsimile: (615) 434-7020
ksharp@sanfordheisler.com
lstcharles@sanfordheisler.com

**Pro hac vice forthcoming*