NO. 17-1711

In the United States Court of Appeals for the First Circuit

JOHN BROTHERSTON, individually and as representative of a class of similarly situated persons, and on behalf of the Putnam Retirement Plan; JOAN GLANCY, individually and as representative of a class of similarly situated persons, and on behalf of the Putnam Retirement Plan,

Plaintiffs-Appellants,

v.

PUTNAM INVESTMENTS, LLC, PUTNAM BENEFITS OVERSIGHT COMMITTEE, PUTNAM BENEFITS INVESTMENT COMMITTEE; ROBERT REYNOLDS; PUTNAM INVESTMENT MANAGEMENT, LLC; PUTNAM INVESTOR SERVICES, INC.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
Case No. 15-13825-WGY, The Honorable William G. Young

APPELLANTS' BRIEF AND ADDENDUM

NICHOLS KASTER, PLLP
James H. Kaster (#1180486)
Paul J. Lukas (#1148844)
Kai H. Richter (#1148843)
Carl F. Engstrom (#1180487)
Jacob T. Schutz (#1180488)
Eleanor E. Frisch (#1181160)
4600 IDS Center, 80 South Eighth Street Minneapolis, Minnesota 55402
(612) 256-3200

Attorneys for Appellants

2017 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

TABLE OF CONTENTS

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD xiii

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES 2

STATEMENT OF THE CASE...3

I. Statement of Relevant Facts 3

A. Management of the Plan...3

B. Fiduciary Duties 5

C. Breaches of Fiduciary Duties 6

1. Exclusive Use of Proprietary Funds and Failure to Consider Alternatives 6

2. Failure to Monitor Investments in the Plan...................................10

a. No Investment Policy Statement...10

b. No Meaningful Investment Review Process............................13

c. Abdication of Investment Monitoring Function to Putnam's Investment Division 14

d. No Removal of Failing Funds...15

3. Failure to Minimize Costs..17

a. The Funds in the Plan Charged Excessive Fees 17

b. Putnam Retained Portions of Fees Typically Rebated to Plans Through Revenue Sharing 18

D. Belated Addition of Non-Proprietary Funds Due to Liability Concerns 21

E. Losses to the Plan 23

II. Procedural Background 26

SUMMARY OF ARGUMENT 28

STANDARD OF REVIEW 34

ARGUMENT 35

I. ERISA's Duties of Prudence and Loyalty are the "Highest Known to Law" 35

II. The District Court Erred in Holding that Plaintiffs Failed to Demonstrate a Breach of the Duty of Loyalty Under ERISA 37

A. Defendants' Self-Dealing Constituted Evidence of Disloyalty and Was Supported by Further Evidence of Disloyalty 38

B. Plaintiffs Were Not Required to Prove Wrongful Intent, but They Did So Anyway 42

C. No Balancing Test Applies to a Breach of Loyalty Claim, and Unrelated "Settlor" Actions Do Not Excuse Fiduciary Breaches....45

III. The District Court Erred in Holding That The Plan Did Not Suffer Losses as a Result of Defendants' Fiduciary Breaches....49

A. Plaintiffs Presented Evidence of Substantial Losses to the Plan 49

1. The Alternative Portfolios that Dr. Pomerantz Used for Purposes of Drawing Comparisons Were Prudent and Appropriate 50

2. Dr. Pomerantz's Model Appropriately Included All Proprietary Investments in the Plan Based on the Nature of the Fiduciary Breaches 52

B. The District Court Imposed an Improper Burden on Plaintiffs with Respect to Loss Causation 56

1. Defendants Bear the Burden of Proof on Loss Causation 57

a. Burden-Shifting Applies Under Trust Law 57

b. Several Circuit Court Cases Support Burden-Shifting 58

c. The Department of Labor Supports Burden Shifting 59

d. Public Policy Supports Burden Shifting 59

e. Practical Considerations Support Burden Shifting 60

2. The District Court's Loss Analysis Was Inconsistent with the Burden-Shifting Framework It Purported to Adopt 61

C. Although Not Their Burden, Plaintiffs Established a Causal Link Between the Breach and Loss to the Plan 65

IV. The District Court Erred in Failing to Meaningfully Consider Disgorgement or Other Equitable Remedies 68

A. Loss Is Not an Element of a Claim for Disgorgement 69

B. The Propriety of Awarding Other Equitable or Declaratory Relief Does Not Depend on a Showing of Loss to the Plan 71

V. The District Court Erred in Ruling Against Plaintiffs on Their Prohibited Transaction Claims 72

A. Putnam's Contributions to the Plan Are Irrelevant to Plaintiffs' Prohibited Transaction Claim Under § 1106(b)(3) 73

B. Putnam's Compensation Was Not Reasonable As a Matter of Law, as the District Court Wrongfully Found for Purposes of Plaintiffs' Claim Under § 1106(a)(1)(C) 77

CONCLUSION 80

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(g)(1) 82

CERTIFICATE OF SERVICE 83

TABLE OF AUTHORITIES

CASES

Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock, 861 F.2d 1406 (9th Cir. 1988)....................69

Beck v. Levering, 947 F.2d 639 (2d Cir. 1991)....................71

Beddall v. State St. Bank & Trust Co., 137 F.3d 12 (1st Cir. 1998)....................43

Bedrick by & Through Humrickhouse v. Travelers Ins. Co., 93 F.3d 149 (4th Cir. 1996) 47

Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946)....................61

Boggs v. Boggs, 520 U.S. 833 (1997)....................35

Braden v. Wal-Mart Stores, Inc., 588 F.3d 585 (8th Cir. 2009)....................36, 73

Brock v. Robbins, 830 F.2d 640 (7th Cir. 1987)....................60

Bunch v. W.R. Grace & Co., 555 F.3d 1 (1st Cir. 2009)....................46, 47, 53, 77

Bussian v. RJR Nabisco, Inc., 223 F.3d 286 (5th Cir. 2000)....................40, 41

Chao v. Moore, 2001 WL 743204 (D. Md. June 15, 2001)....................54

Chao v. Trust Fund Advisors, 2004 WL 444029 (D.D.C. Jan. 20, 2004)....................59

Commodity Futures Trading Comm'n v. Am. Metals Exchange Corp., 991 F.2d 71 (3d Cir. 1993)....................69

Comm'r v. Keystone Consol. Indus., Inc., 508 U.S. 152 (1993)....................72

Coulter v. Morgan Stanley & Co. Inc., 753 F.3d 361 (2d Cir. 2014)....................48

Cumpiano v. Banco Santander Puerto Rico, 902 F.2d 148 (1st Cir. 1990)....................34

Cunha v. Ward Foods, Inc., 804 F.2d 1418 (9th Cir. 1986)....................41

Dardaganis v. Grace Capital, 889 F.2d 1237 (2d Cir. 1989)....................54, 55, 61, 67

DeFazio v. Hollister, Inc., 854 F. Supp. 2d 770 (E.D. Cal. 2012) 70

DiFelice v. U.S. Airways, Inc., 497 F.3d 410 (4th Cir. 2007) 42-43, 53

Dixon v. United States, 548 U.S. 1 (2006)..58

Donovan v. Bierwirth, 680 F.2d 263 (2d Cir. 1982)..................................36, 41, 43

Donovan v. Bierwirth, 754 F.2d 1049 (2d Cir. 1985)......................................52, 61

Donovan v. Cunningham, 716 F.2d 1455 (5th Cir. 1983) 43, 53

Edmonson v. Lincoln Nat. Life Ins. Co., 725 F.3d 406 (3d Cir. 2013).............69, 70

Estate of Stetson, 345 A.2d 679 (Pa. 1975) 61

Evans v. Akers, 534 F.3d 65 (1st Cir. 2008) 31, 37, 50, 55

Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014) 44, 80

French v. Wachovia Bank, N.A., 722 F.3d 1079 (7th Cir. 2013) 38

Gilbert v. EMG Advisors, Inc., 172 F.3d 876 (9th Cir. 1999) 51

Gillis v. Hoechst Celanese Corp., 4 F.3d 1137 (3d Cir. 1993)...............................71

Glass Dimensions, Inc. Profit Sharing Plan & Trust v. State St. Bank & Trust Co., 290 F.R.D. 11 (D. Mass. 2013)..73

Goldenberg v. Indel, Inc., 741 F. Supp. 2d 618 (D.N.J. 2010)...............................80

Graden v. Conexant Sys. Inc., 496 F.3d 291 (3d Cir. 2007)........................31, 50, 52

Harris Trust & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238 (2000).....72

Hecker v. Deere & Co, 556 F.3d 575 (7th Cir. 2009) 79

Hecker v. Deere & Co., 569 F.3d 708 (7th Cir. 2009) 79

Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Mich., 751 F.3d 740 (6th Cir. 2014) 73

Howard v. Shay, 100 F.3d 1484 (9th Cir. 1996)..41, 53, 73

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 48

In re Beck Indus., Inc., 605 F.2d 624 (2d Cir. 1979) 60

In re Gen. Growth Props., Inc., 2010 WL 1840245 (N.D. Ill. May 6, 2010) 77

Johnson v. Georgia-Pac. Corp., 19 F.3d 1184 (7th Cir. 1994) 48

Krueger v. Ameriprise Fin., Inc., 2012 WL 5873825 (D.Minn. Nov. 20, 2012) 39

Kruger v. Novant Health, Inc., 131 F. Supp. 3d 470 (M.D.N.C. 2015) 80

Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995) 63

Laborers Nat'l Pension Fund v. N. Trust Quantitative Advisors, Inc., 173 F.3d 313 (5th Cir. 1999) 55

Leigh v. Engle, 727 F.2d 113 (7th Cir. 1984) .... *passim*

Leigh v. Engle, 858 F.2d 361 (7th Cir. 1988) 55

Liss v. Smith, 991 F. Supp. 278 (S.D.N.Y. 1998) 54

Litman v. Prudential-Bache Props., Inc., 1994 WL 30529 (Del. Ch. Jan. 14, 1994) 41

Loomis v. Exelon Corp., 658 F.3d 667 (7th Cir. 2011) 79

McDonald v. Provident Indem. Life Ins. Co., 60 F.3d 234 (5th Cir. 1995)............58

Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992) .... *passim*

Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985)....................35

Meyer v. Berkshire Life Ins. Co., 250 F. Supp. 2d 544 (D. Md. 2003) 51

Mullin v. Town of Fairhaven, 284 F.3d 31 (1st Cir. 2002)....................34

Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359 (1980) 35

Nat'l Sec. Sys., Inc. v. Iola, 700 F.3d 65 (3d Cir. 2012) 73

Nedd v. United Mine Workers of Am., 556 F.2d 190 (3d Cir. 1977) 29, 75

N.Y. State Teamsters Council Health & Hosp. Fund v. Estate of DePerno, 18 F.3d 179 (2d Cir. 1994) 62

Niehoff v. Maynard, 299 F.3d 41 (1st Cir. 2002) 41

Patelco Credit Union v. Sahni, 262 F.3d 897 (9th Cir. 2001) 73-74

Pegram v. Herdrich, 530 U.S. 211 (2000)..*passim*

Pepper v. Litton, 308 U.S. 295 (1939)..59

Pfeil v. State St. Bank & Trust Co., 806 F.3d 377 (6th Cir. 2015) 53

Plasterers' Local Union No. 96 Pension Plan v. Pepper, 663 F.3d 210 (4th Cir. 2011) 60

Reich v. Compton, 57 F.3d 270 (3d Cir. 1995)..38

Renfro v. Unisys Corp., 671 F.3d 314 (3d Cir. 2011)..79

Roman v. Maietta Constr., Inc., 147 F.3d 71 (1st Cir. 1998) 34

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 35

Smith v. United States, 568 U.S. 106 (2013) 58

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) 32, 61

Tatum v. RJR Pension Inv. Cmte., 761 F.3d 346, 365 (4th Cir. 2014) ....*passim*

Tibble v. Edison Int'l, 729 F.3d 1110 (9th Cir. 2013) 79

Tibble v. Edison Int'l, 135 S. Ct. 1823 (2015)..................................... 21, 36-37, 79

Tussey v. ABB, Inc., 746 F.3d 327 (8th Cir. 2014) 79

Tussey v. ABB, Inc., 850 F.3d 951 (8th Cir. 2017) 47, 61, 76

Tussey v. ABB, Inc., No. 17-265, 2017 WL 3594208 (U.S. Oct. 2, 2017) 47

United Paperworkers Int'l Union Local 14, AFL-CIO-CLC v. Int'l Paper Co., 64 F.3d 28 (1st Cir. 1995) 34

Urakhchin v. Allianz Asset Mgmt. of Am., L.P., 2016 WL 4507117 (C.D. Cal. Aug. 5, 2016) 40

Varity Corp. v. Howe, 516 U.S. 489 (1996) 36, 37, 57, 72

Vaughn v. Bay Env. Mgmt., Inc., 567 F.3d 1021 (9th Cir. 2009) 50

Wildman v. Am. Century Servs., LLC, 2017 WL 839795 (W.D. Mo. Feb. 27, 2017) 40

Willett v. Blue Cross & Blue Shield of Ala., 953 F.2d 1335 (11th Cir. 1992) 63

STATUTES

28 U.S.C. § 1291 2

28 U.S.C. § 1331 2

29 U.S.C. § 1001 1

29 U.S.C. § 1001(a) 35

29 U.S.C. § 1104 .... 1, 39

29 U.S.C. § 1104(a) 43

29 U.S.C. § 1104(a)(1) 34, 46

29 U.S.C. § 1104(a)(1)(B) 36

29 U.S.C. § 1106 .... 1, 39, 72

29 U.S.C. § 1106(a) 72, 74, 77

29 U.S.C. § 1106(a)(1)(C) .... *passim*

29 U.S.C. § 1106(a)(1)(D) 72

29 U.S.C. § 1106(b) .... *passim*

29 U.S.C. § 1106(b)(1) 72

29 U.S.C. § 1106(b)(3) .... *passim*

29 U.S.C. § 1108 .... 73, 74

29 U.S.C. § 1108(b)(2) 73, 77

29 U.S.C. § 1109(a) .... *passim*

29 U.S.C. § 1132(a) 72

29 U.S.C. § 1132(a)(2) 68

29 U.S.C. § 1132(a)(3) 2, 68

29 U.S.C. § 1132(e)(1) 2

RULES AND REGULATIONS

Fed. R. Civ. P. 52(c) 27, 34, 42, 61

Fed. R. App. P. 32(a)(5) 82

Fed. R. App. P. 32(a)(7) 82

Fed. R. App. P. 32(g)(1) 82

29 C.F.R. § 2550 404a-1 55

29 C.F.R. § 2250.404a-1(b)(1)(i) 47, 77

29 C.F.R. § 2509.75-8 48

42 Fed. Reg. 18,734 (1977) 39, 74

56 Fed. Reg. 10,724, 10,730 (Mar. 13, 1991) 39

OTHER AUTHORITY

Restatement of Trusts (Third) § 78, cmt. c(8) 39

Restatement of Trusts (Third) § 100 cmt. b(1) ....*passim*

Restatement of Trusts (Third) § 100, cmt. e 57

Restatement of Trusts (Third) § 100, cmt. f 32, 57, 58

Black's Law Dictionary (10th ed. 2014)..58

G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 543 (2d ed. 1978) 69

G Bogert & G. Bogert, *The Law of Trusts and Trustees* § 543 (rev. 2d ed. 1980) .38

Adolyn B. Clark, Note, *ERISA Breach of Fiduciary Duty: Shifting the Burden of Proving Causation to the Defendant*, 83 Def. Couns. J. 180 (2016).......................57

Robert C. Jones & Russ Wermers, *Active Management in Mostly Efficient Markets*, Fin. Analysts J., Nov.–Dec. 2011 51

2 McCormick on Evidence § 337 (7th ed. 2013)..60, 61

Lee T. Polk, 1 ERISA Practice and Litigation § 3:32 (Feb. 2017 update)........29, 48

William F. Sharpe, *The Arithmetic of Active Management*, Fin. Analysts J., Jan.–Feb. 1991...24, 51

H.R. Rep. No. 93-533 (1973)..71

S. Rep. No. 93-127 (1973) 35, 36, 71

DOL Advisory Op. No. 88-16A, 1988 WL 222716 (Dec. 19, 1988)......................46

U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* 1–2 (Aug. 2013), *available at* http://www.dol.gov/ebsa/pdf/401kFeesEmployee.pdf 18

2 Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess., 1599-1600 (Comm. Print 1976)...35

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Local Rule 34.0, Plaintiffs-Appellants request oral argument in connection with this appeal. In light of the complexity of the issues in this ERISA class action, the importance of those issues to the retirement security of 401(k) plan participants, the financial and equitable stakes of the case, and the volume of the record, Plaintiffs-Appellants believe that oral argument is warranted and will assist the Court's review.

JURISDICTIONAL STATEMENT

This is a certified class action against Putnam Investments, LLC ("Putnam") and related persons and entities for mismanaging the Putnam Retirement Plan ("Plan") and engaging in unlawful self-dealing in violation of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA").[1] In summary, the named class representatives, John Brotherston and Joan Glancy ("Plaintiffs"), allege that Defendants breached their fiduciary duties of loyalty and prudence to Plan participants under 29 U.S.C. § 1104 by maintaining an investment lineup for the Plan that consisted *exclusively* of Putnam-affiliated investments for the majority of the class period, without considering alternative investments from other companies that offered superior returns at lower cost. In addition, Plaintiffs allege that Defendants engaged in prohibited transactions in violation of 29 U.S.C. § 1106 by causing the Plan to pay investment-related fees to Putnam through affiliated enterprises (Putnam Management and Putnam Services), without providing the Plan with "revenue sharing" rebates that were made available to other plans, which resulted in the Plan paying higher net fees for

[1] The Defendants-Appellees include Putnam, Putnam Investment Management, LLC ("Putnam Management"), Putnam Investor Services, Inc. ("Putnam Services"), the Putnam Benefits Investment Committee, the Putnam Benefits Oversight Committee, and Putnam's CEO, Robert Reynolds ("Reynolds") (collectively referred to herein as "Defendants"). Putnam has agreed it is responsible for any judgment against any of the other Defendants in this action. ECF No. 72.

investment management and servicing than Putnam's other institutional customers. Finally, Plaintiffs assert a claim against Putnam for failing to monitor its appointed fiduciaries, and a claim for equitable relief under 29 U.S.C. § 1132(a)(3).

The district court had jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). The United States District Court for the District of Massachusetts (Young, J.) entered final judgment for Defendants on June 19, 2017 (ADD–69), after issuing two separate orders disposing of Plaintiffs' prohibited transaction claims (ADD–1-33) and their breach of fiduciary duty and other claims (ADD–34-68). Plaintiffs timely filed their Notice of Appeal on July 17, 2017. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. *Duty of loyalty.* Did the district court err in holding that Plaintiffs failed to demonstrate a breach of the duty of loyalty under ERISA, where the evidence showed that Defendants automatically added each of Putnam's proprietary funds to the Plan and failed to consider alternative investments from other companies that were less costly and offered superior returns?

2. *Loss to the Plan and burden of proof.* Upon finding that Plaintiffs had shown a breach of the duty of prudence, did the district court impose an improper burden on Plaintiffs for purposes of establishing a loss to the Plan, and err in concluding that Plaintiffs had not shown a loss as a matter of law?

3. *Other potential remedies*. Did the district court err in failing to meaningfully consider other potential remedies for Defendants' fiduciary breaches, separate and apart from recovery of Plan losses, such as injunctive relief and disgorgement?

4. *Prohibited transactions & employer contributions.* Did the district court err in holding that: (A) Putnam's contributions to employee 401(k) accounts operated to exempt Defendants from liability for Plaintiffs' prohibited transaction claim under 29 U.S.C. § 1106(b)(3); and (B) Defendants qualified for a "reasonable compensation" exemption to Plaintiffs' prohibited transaction claim under 29 U.S.C. § 1106(a)(1)(C), even though the Plan paid higher net fees to Putnam than other plans paid for the same services?

STATEMENT OF THE CASE

I. Statement of Relevant Facts

A. Management of the Plan

Putnam is an asset-management company that creates, manages, and sells mutual funds. ADD–47; JA–1616. In the course of its business, Putnam has established a 401(k) plan, known as the Putnam Retirement Plan, which covers eligible current and former employees of Putnam and its subsidiaries. ADD–47-48;

JA–1616.[2] From 2009 to the end of 2015, the Plan had between $416 million and $608 million in assets. JA–1624. These assets, which consist of both employer and employee contributions, were to be held in trust for the exclusive benefit of participants and beneficiaries. *Trust Agreement*, Trial Ex. 207, at § 1(c).

As the Plan sponsor, Putnam sits at the top of the Plan's fiduciary structure, JA–1653; JA–2774, and it is responsible for the construction and oversight of the Plan's investment lineup, JA–1663. To assist it in carrying out its fiduciary duties, Putnam has established three committees: the Putnam Benefits Investment Committee ("Investment Committee"), the Putnam Benefits Administration Committee ("Administration Committee"), and the Putnam Benefits Oversight Committee ("Oversight Committee"). ADD–48; JA–1617. The Investment Committee is responsible for selecting, monitoring, and removing the Plan's investments, the Administration Committee is responsible for the administration of the Plan, and the Oversight Committee is responsible for overseeing and monitoring the other Committees. ADD–48; JA–1617. The Committees are all comprised of senior-level Putnam employees, and the Oversight Committee is made up of senior management. JA–1617. Each of the Committees is also a fiduciary of the Plan. *Id.*

---

[2] The participating employers in the Plan include Putnam, Putnam Management, Putnam Services, and PanAgora Asset Management ("PanAgora"). JA–1616.

B. Fiduciary Duties

Putnam and its fiduciary Committees were well aware of the fiduciary duties they owed to Plan participants. As a condition of a settlement of a prior ERISA suit, Putnam's in-house counsel distributed a "Primer on ERISA Fiduciary Responsibilities" to the Committees, which advised Committee members of their duties of loyalty and prudence. JA–2813; JA–2939-42; JA–3148-51. The Charters for the Committees also advised Committee members of the "standard of care" that applies under ERISA and included a series of bullet points outlining certain "Duties & Responsibilities" of the Committees under ERISA. JA–2762-64; JA–3078-81; Trial Ex. 11. Further, Putnam published a "Fiduciary Planning Guide" for other plan sponsors, which contained detailed guidance on their fiduciary responsibilities under ERISA. JA–2768-2808. This Fiduciary Planning Guide was prepared by Putnam's Senior Manager of Retirement Plans, Mark Goodfellow, who was a member of the Investment Committee and the individual responsible for the daily operations of the Plan. JA–1617, 1651, 1657; JA–1719-20. Among other things, the Fiduciary Planning Guide explains that "[f]iduciaries are required to perform the tasks a careful, deliberate, knowledgeable, diligent person would do, such as investigating facts, asking questions, consulting experts, considering alternatives, etc." JA–2777.

C. Breaches of Fiduciary Duties

Defendants failed to live up to these duties when it came to the construction and monitoring of the Plan's investment lineup. As the district court noted, the "[Investment Committee's] review of the Plan lineup was no paragon of diligence." ADD–67.

1. Exclusive Use of Proprietary Funds and Failure to Consider Alternatives

From the beginning of the class period through January 31, 2016, the investment lineup for the Plan (from which Plan participants made their investment selections) consisted *exclusively* of Putnam-affiliated funds. ADD–48-49; JA–1621. Contrary to Putnam's Fiduciary Planning Guide, which recommended "considering alternatives," the Investment Committee never considered adding non-affiliated investments to the Plan until 2015. JA–1855; JA–2302; JA–2777.

This bias in favor of Putnam funds was literally written into the Plan. Under Paragraph 8.1 of the Plan document, all publicly offered, open-end Putnam mutual funds, as well as Putnam's Stable Value Fund, Bond Index Fund, and S&P 500 Index Fund, were to be automatically included the Plan's investment lineup, without regard to performance, cost, risk, or other factors. ADD–48; ADD–105; *see also* JA–1620; JA–2111; JA–2763; JA–3634. This was not an excuse for failing to engage in a prudent and objective fiduciary process.

The Investment Committee knew that the "[t]erms of the plan do not excuse fiduciaries from ERISA responsibilities." JA–5584; *see also* JA–1655, 1686. As the minutes from one Committee meeting state:

> [A] number of recent court cases and settlements by other mutual fund providers have highlighted that the mere fact that a plan document 'hard wires' in particular offerings, as in Putnam's case, may not eliminate the need for fiduciary review and monitoring of the lineup.

JA–3470. Yet, the Committee strictly followed Paragraph 8.1 and never sought to have it amended to eliminate the free pass given to Putnam funds, JA–1687-88; JA–2454, even though the Plan document was amended for numerous other reasons (such as when Paragraph 8.1 was amended to provide that the Plan lineup would also include the PanAgora U.S. Large Cap Stock Selector Fund from Putnam's affiliate, PanAgora), JA–1620.

Moreover, even as written, the Plan document did not prohibit the Investment Committee from including non-proprietary investment options in the Plan lineup. Paragraph 8.1 expressly states that the Investment Committee may "designate other mutual funds or other collective investment vehicles." ADD–105. Yet prior to 2016, only proprietary funds were offered as designated investment options. JA–1621.

Notably, the Investment Committee did not pick and choose the best Putnam funds to add to the Plan, instead including *all* of the Putnam funds set forth in the Plan document. JA–1687-88; ADD–105. The Investment Committee never

adopted any standards or prescribed minimums for including those funds. JA–1702, 1707. For example, newly-launched funds were added to the Plan almost immediately, before they even had a track record. JA–1694; JA–2278; *see also, e.g.*, JA-3044 (email instruction to add new funds to Plan immediately upon launch). At one point, the Investment Committee considered establishing a narrower set of "preferred" Putnam funds in the Plan. JA–2810. However, it ultimately decided not to, citing concerns over the need for additional monitoring as well as an "employee relations issue because we would be recommending one employee/investor's funds over another's." JA–1771; JA–2810. As a result, the Plan menu inexorably grew to include 70 proprietary funds, despite the fact that Putnam's Fiduciary Planning Guide cautions against such bloated Plan lineups. *See* JA–4151-52 (listing proprietary funds as of year-end 2015); JA–2784 ("Too many funds can often end up increasing the exposure to fiduciary liability. A large number of funds may become too difficult . . . to monitor adequately and too overwhelming for participants to use successfully.").

Once Putnam funds were added to the Plan, they remained there indefinitely (or until they ceased to exist). Defendants never once removed a Putnam fund from the Plan lineup. ADD–52. Indeed, the Investment Committee never considered or even discussed removing a Putnam fund, and there was no process for doing so. JA–1703; JA–2106; JA–2455; JA–2574. As the minutes from the May 2010

Investment Committee meeting state: "It is uncertain what would be enough for Putnam to remove one if its own funds from the Putnam Retirement Plan lineup." JA–2865; *see also* JA–1737 ("Q: Was there ever an answer to that question? A: No.").

Needless to say, no other retirement plan (and certainly not one managing a half billion dollars in assets) operated in this manner. As Plaintiffs' investment expert, Dr. Steve Pomerantz, testified: "I've never seen a plan that included all of the assets of a given adviser by fiat." JA–2575. Indeed, not only was the Plan lineup "unique," JA–2865, but each of the fund options within the Plan lineup were also highly unusual. Dr. Pomerantz found that 51 of the 69 investment options in the Plan were not included in the investment lineup of *any* retirement plan with more than $250 million in assets. JA–2569-70; JA–6087-89. The remainder of the Putnam funds in the Plan (with just one exception) were included in, at most, a handful of other comparably-sized plans out of more than 2,600 total. JA–2570; JA–6087-89.

Until February 2016, the only way Plan participants could invest in non-affiliated investments was through the Plan's self-directed brokerage account ("SDBA") option. ADD–49; JA–1621. As Defendants' own witnesses conceded, the SDBA did not alter or modify the duties that the Plan's fiduciaries had with respect to Plan lineup. JA–1685. The SDBA was intended only for use by

knowledgeable investors, was available only to Plan participants willing to indemnify Putnam, was not screened by Putnam, and was subject to operational limitations and additional fees. JA–1678; JA–1977; JA–2556-57; JA–3470; JA–4841; JA–5611. Due to these numerous drawbacks, only two percent of the Plan's assets were invested in the SDBA. ADD–49 n.7.

2. Failure to Monitor Investments in the Plan

Aside from the fact that the Plan lineup consisted exclusively of proprietary funds, Putnam failed to prudently monitor the investments in the Plan. As the district court found, Putnam "did not seem to have independent standards or criteria for monitoring the Plan investments." ADD–52.

a. No Investment Policy Statement

This is starkly reflected by the absence of an investment policy statement for the Plan. JA–1670-71. An investment policy statement, or "IPS," is a document that provides a written framework for how to manage the process of selecting and monitoring a plan's investment options. JA–2789. A well-crafted IPS will mandate periodic review of the investments and contain quantitative measures for monitoring funds—such as performance benchmarks, time frames for analyzing performance history (for example, over 1-, 3-, 5-, and 10-year periods), expense ratios, and volatility—as well as qualitative criteria. JA–2790; JA–2828.

In its Fiduciary Planning Guide, Putnam touted the benefits of an IPS:

> **What are the benefits of an investment policy statement?** Having an IPS forcefully promotes procedural prudence. The adoption of an IPS demonstrates the care and seriousness with which the plan sponsor approaches investment issues.

JA–2790. Indeed, Putnam stated that "having an IPS is a hallmark of an active, engaged fiduciary." *Id.* However, it failed to practice what it preached. As the district court noted, Putnam's failure to adopt an IPS "contrasts with Putnam's recommendation to other plan sponsors." ADD–52 n.9.

This was inconsistent not only with Putnam's Fiduciary Planning Guide, but with the actual practice adopted by the overwhelming majority of retirement plan fiduciaries. A survey circulated to the Investment Committee showed that 93% of mid-sized and 88.3% of large financial services companies have an IPS for their defined contribution plans. JA–2837. Similarly, Plaintiffs' fiduciary process expert, Martin Schmidt, testified that approximately 90% of retirement plan fiduciaries use an IPS. JA–2489.

The Investment Committee's failure to adopt an IPS was also inconsistent with its own charter. The 2006 Charter (which remained effective until 2012) expressly stated that one of the duties and responsibilities of the Investment Committee was to "[a]pprove, review annually, and monitor compliance with 'Statements of Investment Policy.'" JA–2762.

The absence of an IPS was not a matter of neglect or oversight; it was a willful omission. For years, the Investment Committee considered adopting an IPS

and developed various drafts. *See, e.g.*, JA–1670; JA–2824; JA–3013; JA–3042. At one point, Putnam's attorney circulated a draft that would have required the Investment Committee to conduct annual reviews of each Putnam mutual fund to determine the "continuing prudence" of keeping each fund in the Plan. JA–3011. Other drafts would have required the application of quantitative and qualitative criteria to the funds in the Plan and would have included a "watch list" for underperforming funds. JA–2987-88.

However, the Investment Committee ultimately chose not to adopt an IPS with objective metrics because it knew that this would have required it to manage the Plan's investments in a prudent and unbiased manner—something it could not do while retaining the Plan's existing investment structure. As Putnam's attorney stated, "I think we have to be very careful about actually complying with whatever procedure we include in the investment policy." JA–3010. The Chair of the Investment Committee, Donald Mullen, was even more explicit. In connection with the seminal Investment Committee meeting in May of 2010, at which the Committee considered whether to adopt an IPS, Mullen wrote:

> Plan advisors, consultants and attorneys regularly counsel on the importance of a Plan having an Investment Policy Statement. Yet some in the legal profession counsel that the only thing worse than not having an IPS is having a written IPS and not following it.

JA–5877; *see also* JA–1811, 1820-22. His handwritten notes at the bottom of the document (written at the meeting) state: "Personal liability," "Fiduciary Policy

ERISA," and "Should we purchase individual coverage"? JA–5877.

After this meeting, the Investment Committee eventually amended its charter to remove the requirement of having an IPS. JA–3078. As Mullen testified, the idea of adopting an IPS "died a quiet death." JA–1899.

b. No Meaningful Investment Review Process

In the absence of an IPS, the Investment Committee never adopted any standards or criteria, whether quantitative or qualitative, for reviewing the proprietary funds in the Plan. JA–1702, 1705-06; JA–1793-94, 1805. Likewise, with the exception of a single suite of target-date funds, the Investment Committee did not conduct any independent monitoring of the performance or fees of the proprietary funds in the Plan and never examined how those funds compared to alternatives in the marketplace. JA–1675-77; JA–2131-32; JA–2563-64, 2574. Even with respect to the target-date funds, the Investment Committee never considered third-party alternatives and never considered replacing them with non-Putnam funds. JA–2136-37; JA–2451-53. At no point did the Investment Committee ever conduct a comprehensive review of the funds in the Plan. JA–1717. As Mr. Mullen explained when attempting to recruit a new member of the Committee, "[s]erving on the Committee doesn't require a lot of heavy lifting . . . . The only real work is your attendance at these internal, on-site one-hour meetings." JA–5880.

c. Abdication of Investment Monitoring Function to Putnam's Investment Division

Instead of monitoring the Putnam funds in the Plan, the Investment Committee left it to Putnam's investment division to monitor the Putnam funds in the regular course of Putnam's business and close down any underperforming funds. ADD–52; *see also, e.g.*, JA–1668; JA–2132. As the district court found, this was inconsistent with Putnam's advice to other plan sponsors and was not sufficient to relieve the Investment Committee of its demanding fiduciary duties. ADD–52 n.9, 58. Putnam's investment division was a business unit of Putnam, not a fiduciary of the Plan, and it had a very different set of incentives and responsibilities than a retirement plan fiduciary. ADD–57-58; JA–2527-28.

Every mutual fund company has investment professionals who oversee its funds. JA–2275-76. This is not a substitute for a fiduciary review process. As Putnam's own Fiduciary Planning Guide explains, "under ERISA, managers of mutual funds are not 'investment managers' and are not plan fiduciaries merely by virtue of managing the mutual funds." JA–2773. If the Investment Committee wished to delegate its fiduciary functions to the investment division, it would have had to obtain a written acknowledgment from the investment division. *Id.*

No such delegation was made. JA–2289. The Chief Operating Officer of Putnam's investment division, Brian Lenhardt, testified that he was never told the Investment Committee was relying on the investment division to monitor funds in

the Plan. JA–2291. When asked at trial whether the investment division had agreed to serve as a fiduciary for the Plan, Lenhardt responded, "What do you mean by 'fiduciary'?" JA–2288. Thus, the district court found that "there seems not to have been separate discussion within the investment division as to whether a particular fund was appropriate for the Plan." ADD–52; *see also* JA–2279, 2283-85.

Nor were there any communications between the investment division and the Investment Committee regarding the funds in the Plan. *See* JA–1690-91. Indeed, members of the Investment Committee were not even aware what standards the investment division used for purposes of evaluating whether a fund should be shut down. JA–1735.

d. No Removal of Failing Funds

The Investment Committee did not just neglect to monitor the funds in the Plan—it consciously ignored evidence that Putnam's funds were failing. Until May of 2010, Mr. Goodfellow periodically circulated reports developed by a Putnam affiliate, Advised Assets Group ("AAG"), to the Investment Committee. JA–1725-26. These reports were developed specifically for retirement plan sponsors to "aid [them] in carrying out their fiduciary responsibilities." JA–3023. The last AAG report circulated to the Committee at the May 2010 meeting showed that eighteen of the Putnam funds received a "fail" grade. JA–2871-72; *see also* JA–

1726. Mr. Mullen, then chair of the Investment Committee, circled the funds with the highest number of failing quarters. *Id.*; JA–1754, 1799.

Yet the Investment Committee did nothing. Indeed, this is the very meeting at which Mr. Mullen cautioned against adopting an IPS (*see supra* at 12-13), and where the minutes note that "[i]t is uncertain what would be enough for Putnam to remove one of its own funds from the Putnam Retirement Plan." JA–2865; *see also* JA–1798. Instead of investigating market alternatives for funds that received a "fail" grade, the Investment Committee chose to bury its head in the sand and stop receiving and reviewing the AAG reports. JA–2107. The reports continued to list Putnam funds as failing, and Mr. Goodfellow continued to receive them, but they were never again distributed to the Investment Committee. JA–1726, 1730; *see also, e.g.*, JA–2950-51; JA–3027-28; JA–3093-94; JA–3211-12; JA–3420-21.

Even after Putnam chose to stop reviewing the AAG reports, it ignored other evidence that its funds were underperforming. For example, Putnam was aware that the Voyager fund was highly volatile, with long periods of significant underperformance. JA–2257-58. Lipper data from 2015 showed the Voyager fund to be in the bottom one percent of its peer group over a five-year period, having underperformed its benchmark by an average of six to seven percent per year. JA–4581. Yet the Committee retained the fund in the Plan and never looked for market alternatives. JA–2105. As a result, the Plan suffered massive investment losses of

approximately $14 million from that one fund alone (under both of Plaintiffs' damages models). JA–2582, 2589.

3. Failure to Minimize Costs

Defendants' ongoing retention of Putnam funds in the Plan benefitted Putnam financially. Putnam's affiliates, including Putnam Management and Putnam Services, received fees in connection with these proprietary funds, which were passed on to Putnam and reflected on its consolidated financial statements. JA–1621. Since December 2009, Putnam and its affiliates have received $27.9 million in fees in connection with the Plan's investment holdings, which amounts to a present-day value of $37.3 million in financial gains. JA–2560-61.[3]

a. The Funds in the Plan Charged Excessive Fees

Those fees are significantly higher than the investment management fees paid by comparable plans. On average, the investment management fees paid by Plan participants during the class period were 27 basis points higher than the fees paid by participants in other similarly-sized plans (0.86% vs. 0.59%). JA–2565, 2567; *see also* JA–95. When compared to a portfolio of low-cost Vanguard index

[3] Putnam also derived a marketing benefit from including Putnam funds in the Plan. In its prospectuses, Putnam touted the fact that its employees were invested in Putnam funds. *See* JA–5635 ("Putnam employees and members of the Board of Trustees place their faith, confidence, and, most importantly, investment dollars in Putnam mutual funds."); JA–5715 (same); JA–5771 (same); JA–5834 (same).

funds, Putnam's fees were over 70 basis points higher on average (0.86% vs. 0.15%). JA–2565, 2567; *see also* JA–95.

Plan fiduciaries must take the role of fees very seriously because of the impact such fees have on account values. JA–2559. Even a small difference in fees can substantially reduce the balance of a retirement account over the long term. *Id.*; *see also* U.S. Dep't of Labor, *A Look at 401(k) Plan Fees* 1-2 (Aug. 2013), *available at* http://www.dol.gov/ebsa/pdf/401kFeesEmployee.pdf (illustrating impact of expenses with example in which 1% difference in fees and expenses over 35 years reduces participant's account balance at retirement by 28%). And, as Plaintiffs' expert testified, higher fees do not correlate with better performance. JA–2558-60. Instead, the gross investment returns on mutual funds, whether actively or passively managed, tend to be in line with the markets, meaning the fees simply detract from the appreciation of the fund and result in lower overall returns. *Id.* Therefore, if a fiduciary intends to include high-cost, actively-managed funds in its Plan, it must, at the very least, have a fiduciary process in place designed to monitor the investments and ensure that the higher fees are justified. JA–2560. As explained above, Defendants had no such process.

b. Putnam Retained Portions of Fees Typically Rebated to Plans Through Revenue Sharing

While one might expect that Putnam would offer its employees a discount on Putnam funds in the Plan, it was actually the opposite. Putnam offered other

retirement plans rebates on Putnam funds through revenue sharing, but did not pay such rebates to its own Plan. ADD–10.

Revenue sharing is a common practice in the retirement plan market whereby a mutual fund company makes payments to a financial intermediary, like a record-keeper, to reimburse for services the plan performs for its participants that otherwise would be the mutual fund company's responsibility. JA–37; JA–71; JA–617; JA–643-44. A plan's fiduciaries then have discretion to use the shared revenue for the benefit of the plan, typically to either pay record-keeping expenses that plan participants would otherwise pay, or to directly credit plan participants' accounts (or a combination of both). JA–38-39; JA–100; JA–618-19; JA–737-39. Each fund typically has a rate that it will pay in revenue sharing, calculated as a percentage of the total assets the plan holds in the particular fund. JA–38; JA–617.

Putnam pays revenue sharing of up to 25 basis points (0.25% of fund assets) in connection with class Y shares of Putnam funds held by other plans. JA–101; JA–619-20; JA–712; JA–741-48; JA–767; JA–772-74. Putnam's Y shares have higher fees than its class R6 shares precisely because the Y shares have a "buil[t] in" rebate that returns a portion of those fees back to retirement plans through revenue sharing. JA–616-17; JA–712. For example, in 2012, the Major League Soccer ("MLS") 401(k) Plan had $827,526 invested in Y shares of the Putnam Equity Income Fund. JA–617; JA–730. Because of the MLS plan's investment in

the fund, Putnam paid the plan's record-keeper 0.25%—or 25 basis points—of the plan's investment in the Putnam Equity Income Fund as revenue sharing. JA–618; JA–723.

But Putnam treated its own Plan differently. Putnam never paid a penny of revenue sharing back to its own Plan for its investments in Y shares, or to the Plan's record-keeper, Great-West, a Putnam affiliate. JA–620-23; JA–797; JA–819; *see also* JA–2561. Other mutual fund companies—including Great-West itself—paid back revenue sharing on the proprietary funds in their own plans, and credited the rebate directly to plan participants. JA–623-24; JA–877. Putnam did not. In fact, when Great-West raised the issue with Putnam, Putnam's CEO, Mr. Reynolds, abruptly ended the discussion. *See* JA–851 ("Why is anyone even responding to this? Ignore [Great-West] on questions on our plan."). Putnam also failed to timely convert its Y shares to low-cost R6 shares, which it should have done if it was not going to pay revenue sharing. JA–921-24; JA–46. Once again, Mr. Reynolds was not in favor of the idea. JA–5907 ("The last time we spoke with Bob Reynolds he did not want to do R6 for the Putnam plan."). This ultimately resulted in Plan participants paying higher net fees to Putnam than other plans paid for the same funds.

D. Belated Addition of Non-Proprietary Funds Due to Liability Concerns

In 2014, the Investment Committee belatedly began to consider including non-proprietary investment options in the Plan lineup. JA–1672. The final decision to add non-proprietary funds was not made until late 2015, *id.*, and meeting materials prior to and during this period demonstrate that this decision corresponded with mounting concerns about Defendants' potential liability, due to recent court rulings such as the Supreme Court's decision in *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015) ("*Tibble II*"). JA–3468-72; JA–5578.

The process that the Investment Committee adopted for the purpose of considering and selecting these non-proprietary investments stands in stark contrast to the process (or lack thereof) that was applied to the Plan's proprietary funds. JA–2449-50. As part of this process, the Investment Committee researched low-cost collective investment trusts ("CITs") from three different third-party providers (although only after determining that PanAgora, Putnam's affiliate, did not offer any CITs other than the one CIT that had already been included in the Plan). JA–3499; JA–3505; *see also* JA–3462-67 (spreadsheet with a breakdown including benchmark and expense comparisons). The Committee then discussed (1) "the relevant criteria for selecting a provider or provider(s)," (2) "the fiduciary standard for selection and monitoring," and (3) "the most appropriate benchmarks" to measure performance. JA–3499. The criteria that it ultimately considered included

fees, performance dispersion, stability of the provider, common practice among other plans, and other factors. *Id.*; JA–3505.

As a result of this investigation, the Investment Committee decided to add six passively-managed BNY Mellon CITs to the Plan effective February 2016. JA–1621. There is no dispute that the process for choosing the BNY Mellon CITs was prudent. JA–2448; JA–2573. Likewise, it is undisputed that the BNY Mellon CITs constitute a prudent investment portfolio. JA–1673-74.

At the time the BNY Mellow CITs were added, however, Defendants did not replace or remove any of Putnam's existing proprietary investment options. JA–3633; *see also* JA–1688-89; JA–1969. For example, Defendants retained the Putnam Bond Index Fund, even though it cost three times more than the BNY Mellon bond fund that tracked the exact same index. JA–3353 (noting goal of Putnam Bond Index Fund is to track the Barclays U.S. Aggregate Bond Index); JA–3607 (same as to corresponding BNY Mellon fund); JA–4837 (listing expense ratios for both funds). Alarmingly, upon adding the BNY Mellon funds to the Plan, Putnam confessed to Plan participants what had been true all along—that the Plan's fiduciaries would not be monitoring the Putnam funds, and that Putnam believed Plan participants were "solely responsible for the selection and ongoing monitoring" of those funds (which had been repackaged into a so-called "Putnam Fund Windows" in the Plan). JA–3633-34; *see also* JA–3470.

E. Losses to the Plan

Plaintiffs' expert, Dr. Steve Pomerantz, offered two alternative damages analyses at trial. JA–2575-76. These analyses compared the performance of the Putnam funds in the Plan over the class period to the performance of two prudent alternative portfolios during the same time period. JA–2576-77.

One of the alternative portfolios utilized the very same BNY Mellon funds that Defendants actually chose to add to the Plan in February 2016, when Defendants implemented a prudent process to select non-affiliated funds for the Plan. *Id.* A plan menu consisting of the BNY Mellon funds not only reflects what Defendants actually did when they employed a prudent decision-making process, but also would closely resemble the federal government's Thrift Savings Plan, which is a quintessential example of a prudently-designed plan. JA–2523-24; JA–2576-77.

The other prudent alternative portfolio that Dr. Pomerantz utilized for his damages analysis was an alternative menu of passively-managed Vanguard index funds. JA–2576. As Dr. Pomerantz explained, comparison to an alternative portfolio of passively-managed funds is an appropriate method for measuring damages because such funds are designed to track market benchmarks and can be purchased on the market. JA–2578-81. During Dr. Pomerantz's examination, the district court appeared to recognize this:

> THE WITNESS: . . . . I actually am being a little conservative and I'm saying, Well, the benchmark's not very realistic without -- no complaint to the SEC, but you can't invest in the benchmark. I want to look for a mutual fund that will provide returns that will mimic that of the passive index. And that is the Vanguard fund. It doesn't have to be Vanguard, it could be Fidelity, it could be any of a number of advisers.
>
> THE COURT: Of an index fund. I interrupt, because I really want to understand. Because you could buy that?
>
> THE WITNESS: Yes.
>
> THE COURT: All right.
>
> THE WITNESS: And that, at heart, to me, is the reason. Because I can buy that.
>
> THE COURT: Yeah. And since you can buy that, it has a cost.
>
> THE WITNESS: It does have a cost.
>
> THE COURT: And so you – I'm -- my word choice may be wrong. You're factoring that cost in?
>
> THE WITNESS: I am factoring that cost in . . . .

JA–2580-81. Indeed, the appropriateness of comparisons to passively-managed index funds has been recognized by one of the founders of modern portfolio theory, Dr. William Sharpe, who received a Nobel Prize for his work in this area. JA–2547-48. As Dr. Sharpe has written, "The best way to measure a manager's performance is to compare his or her return with that of a *comparable passive alternative*." JA–2548 (quoting William F. Sharpe, *The Arithmetic of Active Management*, Fin. Analysts J., Jan.–Feb. 1991, at 8).

To measure damages under both models, Dr. Pomerantz mapped each Putnam fund in the Plan to a comparable fund (i.e., a fund in a similar asset class or with similar investment goals) in the prudent alternative portfolios. JA–2576-78; *see also, e.g.*, JA–6133-34 (illustrating how Dr. Pomerantz mapped Putnam funds to the alternative Vanguard funds). Damages were then calculated on a fund-by-fund basis for every fund in the Plan by comparing the investment returns of the Plan's investments, net of expenses, to the alternative investments under each model. JA–6190-93 (demonstrative exhibit illustrating the damage breakdown per fund under each model). Notably, Dr. Pomerantz's methodology was more conservative—and more favorable to Defendants—than a methodology that would have excluded the Putnam funds with the highest performance, since Dr. Pomerantz's more holistic approach provided a credit when the Putnam funds happened to outperform their benchmarks. JA–2582-83, 2588.

These models produced similar results. Under the BNY Mellon damages model, the total damages were $44,191,949, with $35,148,585 representing fee damage (*i.e.*, the damage due to the higher cost of the Putnam-affiliated investments), and $9,143,364 representing investment damage. JA–2588. Under the Vanguard damages model, the total damage was $45,574,124, with $31,684,793 of fee damage, and $13,889,331 of investment damage. JA–2581-82. Thus, not only did Putnam's funds fail to overcome the "price of admission" or

"hurdle" to beat the benchmark and justify their higher fees, JA–2578, but the Putnam investment options actually performed worse, on average, than comparable passively-managed funds available in the marketplace, completely excluding fees from the equation.

II. Procedural Background

Plaintiffs filed the present action on November 13, 2015. ECF No. 1.[4] In their operative Second Amended Complaint, Plaintiffs assert claims for breach of the fiduciary duties of loyalty and prudence (Count One), causing the Plan to engage in prohibited transactions with a party-in-interest (Count Two), causing the Plan to engage in prohibited transactions with a fiduciary (Count Three), failure to monitor fiduciaries (Count Four), and equitable restitution of ill-gotten proceeds (Count Five). JA–134-201. The district court denied Defendants' motion to dismiss the First Amended Complaint (which asserted the same claims), ECF No. 47, and later certified a class and two subclasses of Plan participants, ECF No. 88.

On January 9, 2017, the parties filed cross-motions for summary judgment. ECF Nos. 89, 93. Plaintiffs argued they were entitled to partial summary judgment on their prohibited transaction claims, while Defendants moved for summary judgment on all claims. ECF Nos. 90, 94. The district court denied both motions. ECF No. 120. The district court proposed, however, that the prohibited transaction

[4] All docket references are to the district court docket, unless otherwise noted.

claims be resolved through a "case stated" procedure, with the case-stated record consisting of the materials submitted in support of and in opposition to the motions for summary judgment. JA–1342-44. The parties agreed. JA–1344. Following a case-stated hearing, the court ruled in favor of Defendants on the prohibited transaction claims. ADD–1-33. Although the court found that Defendants had engaged in transactions prohibited under 29 U.S.C. §§ 1106(a)(1)(C) and 1106(b)(3), it concluded that (1) Defendants were exempt from the former claim because the fees paid to Putnam were reasonable "as [a] matter of law," ADD–19; and (2) Defendants were exempt from the latter claim because Putnam made discretionary contributions to Plan participants' 401(k) accounts and "[a]llowing Plan participants to recover . . . would allow Plan participants to be unjustly enriched," ADD–27.

Plaintiffs then presented their remaining claims at trial in April 2017. On April 19, 2017, after seven days of testimony, the district court invited Defendants to submit a Rule 52(c) motion for judgment on partial findings. JA–2592. At that time, Plaintiffs had not yet conducted their re-direct examination of Dr. Pomerantz and had not rested their case. JA–2614-15. The same day, Defendants submitted their Rule 52(c) motion and a brief in support. ECF Nos. 167, 168. The district court then held oral argument the following day, before Plaintiffs had the opportunity to submit a brief in response. JA–2592. Plaintiffs submitted their

response to Defendants' motion on April 28, and Defendants submitted a "supplemental" 20-page brief on May 2.[5] On June 19, 2017, the district court issued its Order granting Defendants' motion for judgment on partial findings, ADD–34-68, and judgment was entered in favor of Defendants. ADD–69.

Although the district court held that Defendants did not breach their duty of loyalty, it found that the existing record would warrant a finding that Defendants had violated their duty of prudence under ERISA by failing to monitor the Plan lineup. ADD–58. The trial court went on to hold, however, that Plaintiffs had not demonstrated a loss to the Plan. ADD–67. The trial court stated that this holding was a legal conclusion and therefore "may be reviewed de novo." ADD–67 n.20. The trial court also declined to award other remedies for the breach, such as injunctive relief or disgorgement. ADD–66-67.

SUMMARY OF ARGUMENT

This is an extreme case of fiduciary misconduct and self-dealing. The case-stated record and trial record contain overwhelming evidence supporting Plaintiffs' claims, and the district court was wrong to enter judgment in favor of Defendants. In doing so, it ignored much of the evidence presented and also committed several fundamental errors of law.

[5] Defendants were thus allowed two, twenty-page briefs, while Plaintiffs were allowed a single twenty-page brief. Plaintiffs requested additional pages, but that request was denied by the district court. ECF No. 188. Plaintiffs' motion to strike Defendants' "supplemental" brief also was denied. ECF No. 201.

Prohibited Transaction Claims

With respect to the prohibited transaction claims, the dispositive portion of the district court's opinion addressing Plaintiffs' claim under 29 U.S.C. § 1106(b)(3) rests entirely on its unprecedented conclusion that employer contributions to a 401(k) plan can excuse otherwise prohibited conduct. ADD–26-27. The law does not support this conclusion. *See Nedd v. United Mine Workers of Am.*, 556 F.2d 190, 213-14 (3d Cir. 1977) ("Certainly a donor to an irrevocable trust could not set off his liability for participation in a breach of trust by the amount of his gift. Set-offs of trust funds are unavailable to trustees against their liability in another capacity."). To hold otherwise in the ERISA context would wreak havoc on the statute and eviscerate the protections it is intended to provide, as almost all employers that offer 401(k) plans contribute to them. Those contributions are made by employers in a "settlor" (*i.e.*, business) capacity, not in their capacity as plan fiduciaries. *See, e.g.*, Lee T. Polk, 1 ERISA Practice and Litigation § 3:32 (Feb. 2017 update) (stating that "decisions relating to the timing and amount of contributions" are generally non-fiduciary decisions). The district court improperly failed to distinguish between the two. This error is dispositive of liability, as the district court found that § 1106(b)(3) otherwise applies. ADD–19-22.

Although the district court found the "reasonable compensation" exemption defeated Plaintiffs' separate prohibited transaction claim under 29 U.S.C. § 1106(a)(1)(C), it acknowledged that this exemption does not apply to claims under § 1106**(b)**. ADD–21-22. In any event, the district court was wrong to find that Putnam's compensation was reasonable "as a matter of law" because (1) Putnam's investment management fees were significantly higher than average; and (2) Putnam failed to offer revenue sharing rebates to the Plan that it offered to other 401(k) plans.

Accordingly, this Court should reverse the district court's order as to liability on Plaintiffs' prohibited transaction claims under 29 U.S.C. §§ 1106(a)(1)(C) and 1106(b)(3), and direct the district court to determine the appropriate relief to award Plaintiffs and the class on those claims. There is no need to remand for further fact-finding as to liability because the prohibited transaction claims were submitted on a case-stated record.

Breach of Fiduciary Duty Claims

The district court's order on Plaintiffs' breach of fiduciary duty claims was also fundamentally flawed and once again gave Defendants a free pass to engage in unlawful conduct. Specifically, the district court found that Plaintiffs had established a breach of the duty of prudence but granted judgment in favor of Defendants because it determined that Plaintiffs had not sufficiently established a

prima facie loss to the Plan. This ruling is directly at odds with the First Circuit's decision in *Evans v. Akers*, which held that "[l]osses to a plan from breaches of the duty of prudence may be ascertained, with the help of expert analysis, by comparing the performance of the imprudent investments [in the Plan] with the performance of a prudently invested portfolio." 534 F.3d 65, 74 (1st Cir. 2008) (citing *Graden v. Conexant Sys. Inc.*, 496 F.3d 291, 301 (3d Cir. 2007)). At trial, Plaintiffs' damages expert presented evidence of not just one, but *two* prudent alternative investment portfolios that would have provided superior investment returns to the proprietary investment lineup that Defendants imprudently maintained. Yet, the district court gave no consideration to his analysis, barely mentioning it in a footnote. ADD–66 n.18.

The only explanation given by the district court for disregarding Dr. Pomerantz's analysis was that he measured damages stemming from a "procedural breach," *i.e.*, Defendants' lack of process for managing the Plan's investments. *Id.* Yet, that is precisely the type of breach that the district court found, and it is elementary that any loss model should match "the nature of the breach involved." *Restatement (Third) of Trusts* § 100 cmt. b(1), ADD–91.

The district court reasoned that a fiduciary "could lack an independent process to monitor his investment [lineup] and still end up with prudent investments, even if it was the result of sheer luck." ADD–65-66. However, it

would "diminish ERISA's enforcement provision to an empty shell" if a breaching fiduciary were permitted to escape liability based on "nothing more than the mere possibility that a prudent fiduciary 'could have' made the same decision." *Tatum v. RJR Pension Inv. Cmte.*, 761 F.3d 346, 365 (4th Cir. 2014). Thus, the burden falls on the breaching fiduciary "to prove that despite its imprudent decision-making process, its ultimate investment decision was 'objectively prudent.'" *Id.* at 363. In this manner, a fiduciary that has "breached its duty of procedural prudence . . . carries the burden of proof on causation." *Id.* at 372.

The district court purported to adopt this "burden shifting framework for loss causation." ADD–59 n.15. Yet, it did exactly the opposite, holding that "an ERISA plaintiff must establish a causal link between the breach and the damages claimed." ADD–60. This was inconsistent not only with *Tatum* and other ERISA cases, but also with (1) longstanding trust law principles (*see* Restatement (Third) of Trusts § 100 cmt. f, ADD–95), (2) the position of the Department of Labor (which submitted an amicus brief in support of the plaintiffs in *Tatum*), and (3) basic principles of law going back to the Supreme Court's decision in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

Moreover, even if the burden of proof did fall on Plaintiffs to establish loss causation, Plaintiffs did so. By its own admission, Putnam's investment lineup for the Plan was "unique." JA–2865. Indeed, 51 of the 69 affiliated investment options

in the Plan were not included in *any* other similarly-sized Plan (out of more than 2,600 plans total), and none of the other investment options cracked a 1% market penetration rate (with 17 of the 18 remaining options falling below a 0.2% market penetration rate). JA–2569-70; JA–6087-89. Thus, it is highly unlikely that a prudent fiduciary would have included any (much less all) of the Putnam-affiliated investments in a 401(k) plan. Moreover, those Putnam-affiliated investments fared poorly when compared to Dr. Pomerantz's index fund benchmarks and the BNY Mellon funds that Putnam itself selected as prudent alternatives when it finally opened the Plan menu to non-affiliated funds in 2016. Accordingly, the district court erred in disregarding Dr. Pomerantz's analysis and concluding that Plaintiffs failed to show a loss to the Plan.

The district court also erred in failing to consider other potential remedies (aside from recovery of Plan losses), such as disgorgement of profits, injunctive relief, and declaratory relief. These remedies do not require a showing of loss to the Plan, and by failing to consider these remedies, the district court effectively let Defendants off the hook for their fiduciary breaches.

Finally, although the district court's finding of a breach of prudence was sufficient, by itself, to entitle Plaintiffs to relief on behalf of the Plan and its participants, the district court erred by not also finding a breach of loyalty. While a mutual fund company is not prohibited from including its own funds in its 401(k)

plan where doing so would be in the best interest of Plan participants, it is not free to include all of its funds (without regard to merit), and only those funds (without regard to possible alternatives), by fiat. That is the very definition of self-serving, disloyal conduct.

STANDARD OF REVIEW

In this Court's review of Rule 52(c) judgments, the Court evaluates the district court's conclusions of law de novo and examines the district court's findings of fact for clear error. *Mullin v. Town of Fairhaven*, 284 F.3d 31, 36-37 (1st Cir. 2002). The Court reviews de novo the trial court's application of the law to the facts. *Roman v. Maietta Constr., Inc.*, 147 F.3d 71, 74 (1st Cir. 1998). Under the clear error standard, the reviewing court may reverse findings of fact if, "on the whole of the record, [the reviewing court] form[s] a strong, unyielding belief that a mistake has been made." *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 152 (1st Cir. 1990).

The standard of review of judgment on a case-stated record is the same. The district court's factual findings are subject to clear error review, but the district court's legal conclusions are reviewed de novo. *United Paperworkers Int'l Union Local 14, AFL-CIO-CLC v. Int'l Paper Co.*, 64 F.3d 28, 31–32 (1st Cir. 1995).

ARGUMENT

I. ERISA's Duties of Prudence and Loyalty Are the "Highest Known to Law"

In passing ERISA in 1974, Congress recognized "that the continued well-being and security of millions of employees and their dependents are directly affected by [retirement] plans." 29 U.S.C. § 1001(a). Thus, "[t]he principal object of the statute is to protect plan participants and beneficiaries." *Boggs v. Boggs*, 520 U.S. 833, 845 (1997) (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)). Before passing ERISA in 1974, Congress spent nearly a decade studying retirement plans in the United States and found that employees had insufficient protections. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361-62 (1980); *see also* 2 Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess., 1599-1600 (Comm. Print 1976) (providing numerous examples of employees failing to receive their expected benefits). The "crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators," and "ERISA was designed to prevent these abuses in the future." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985) (citing extensive legislative history).

To safeguard plan participants' rights, Congress incorporated the fiduciary duties of loyalty and prudence in ERISA. *See* S. Rep. No. 93-127, at 29 (1973). ("[W]ithout standards by which a participant can measure the fiduciary's

conduct . . . he is not equipped to safeguard either his own rights or the plan assets."). Fiduciaries must act "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1), with an "eye single" to the interests of such participants and beneficiaries. *Pegram v. Herdrich*, 530 U.S. 211, 235 (2000). In addition, they are required to exercise the "care, skill, prudence, and diligence" that a prudent person would utilize in managing a similar plan. 29 U.S.C. § 1104(a)(1)(B). These fiduciary duties are "the highest known to the law." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982) ("*Bierwirth I*")).

In these fiduciary provisions, Congress intended to codify the fiduciary principles "developed in the evolution of the law of trusts" and in some circumstances to offer even greater protections where "reliance on conventional trust law . . . is insufficient to adequately protect the interests of plan participants and beneficiaries." S. Rep. No. 93-127, at 29; *see also Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) ("ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection."). For that reason, ERISA's fiduciary provisions "draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment," and the common law of trusts informs a court's analysis. *Varity*, 516 U.S. at 496; *see also Tibble II*, 135

S. Ct. at 1828 ("In determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts."); *Evans*, 534 F.3d at 74 ("Defined contribution plans pursuant to ERISA have their roots in the common law of trusts."). However, "trust law does not tell the entire story," as ERISA was intended to provide greater, not lesser, protection than the common law of trusts, to the extent that goal is consistent with the purposes of employee benefit plans. *Varity*, 516 U.S. at 497.

II. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS FAILED TO DEMONSTRATE A BREACH OF THE DUTY OF LOYALTY UNDER ERISA

In addition to finding that the record demonstrated a breach of prudence, the district court also should have found that the record supported Plaintiffs' breach of loyalty claim. The district court's conclusion that Plaintiffs failed to establish a breach of loyalty rested on several fundamental errors. First, the district court wrongly held that self-dealing does not evidence a breach of loyalty, ADD–54-55, and in focusing on "self-dealing alone," ADD–54, it failed to consider a wealth of other evidence supporting Plaintiffs' disloyalty claim beyond the simple fact that Putnam included its own funds in the Plan. Second, the district court wrongly held that a breach of loyalty requires wrongful intent, and even if this were germane, overlooked the evidence of bad faith in the record. Finally, the district court improperly performed a balancing test, looking far beyond the investment decisions at issue, and improperly considered entirely unrelated conduct, including

Putnam's conduct well outside the fiduciary sphere. For all of these reasons, this Court should vacate the district court's ruling as to the duty of loyalty.

A. Defendants' Self-Dealing Constituted Evidence of Disloyalty and Was Supported by Further Evidence of Disloyalty

In its "case stated" order, the district court noted the "concerning nature of Putnam's [investment lineup] structure" and the conflicts posed by that structure. *See* ADD–20. Yet, in its later order disposing of Plaintiffs' breach of loyalty claim, it essentially looked the other way and held that self-dealing does not constitute evidence of a breach of loyalty. This was contrary to well-established law. As the Supreme Court has noted, ERISA requires fiduciaries to "exclude all selfish interest." *Pegram*, 530 U.S. at 224 (*citing* G Bogert & G. Bogert, *The Law of Trusts & Trustees* § 543 (rev. 2d ed. 1980)). Accordingly, evidence of self-dealing supports a claim for breach of the duty of loyalty. *See French v. Wachovia Bank, N.A.*, 722 F.3d 1079, 1085 (7th Cir. 2013) ("One aspect of the duty of loyalty is the strict prohibition against self-dealing." (citations omitted)); *Reich v. Compton*, 57 F.3d 270, 290 (3d Cir. 1995) ("The evidence . . . with regards to self-dealing also supports the Secretary's argument that the trustees may have violated the duty of loyalty set out in section 404(a)(1)(A).").

In its opinion, the district court observed that "the Department of Labor explicitly allows . . . financial services institutions' practice of offering their own investment products to their own sponsored plans." ADD–40-41 (citing Participant

Directed Individual Account Plans, 56 Fed. Reg. 10,724, 10,730 (Mar. 13, 1991)). However, it misconstrued the applicable regulation. The portion of the Federal Register that it cited references a prohibited transaction exemption, known as PTE 77-3. While this exemption provides relief from prohibited transaction claims under 29 U.S.C. § 1106 where certain criteria are met,[6] it does not operate as a safe harbor from breach of fiduciary duty claims under 29 U.S.C. § 1104. The text of PTE 77-3 makes this clear:

> The fact that a transaction is the subject of an exemption . . . does not relieve a fiduciary . . . from certain other provisions of the Act and the Code, including . . . the general fiduciary responsibility provisions of section 404 of the Act [29 U.S.C. § 1104] . . . .

42 Fed. Reg. 18,734 (1977). Thus, "[w]hile [DOL] regulations permitted the Defendant[s] to select affiliated investment options for the Plan, the Defendant[s] still ha[d] a fiduciary duty to act with an 'eye single' towards the participants in the Plan." *Krueger v. Ameriprise Fin., Inc.*, 2012 WL 5873825, at *14-15 (D.Minn. Nov. 20, 2012); *accord* Restatement of Trusts (Third) § 78, cmt. c(8) ("[T]his . . . exception for corporate trustees' participation in what are generally called 'proprietary mutual funds' does not relieve the trustee of its normal duty to exercise prudence. Nor does it dispense with the trustee's fundamental duty to act

[6] As discussed below, Defendants did not meet the requirements of PTE 77-3 here. *See infra* at 72-80.

in the interest of the beneficiaries, its duty of impartiality, or the other fiduciary duties of trusteeship." (internal cross references omitted)).[7]

Defendants failed to act in the best interest of participants here. It is one thing for a mutual fund company to offer some of its own funds in its 401(k) plan as part of a diversified portfolio; it is quite another for it to (1) include *all* of its funds by fiat (without any screening or review process), including newly-launched funds and funds that were not offered in any other plans of similar size; (2) retain those funds, even though they were consistently underperforming the market and charged significantly higher fees than average; (3) bury evidence that many of the funds were receiving "fail" grades; and (4) fail to consider *any* alternative investments from other companies. In light of this evidence, the district court was wrong to dismiss Plaintiffs' breach of loyalty claim in the middle of trial.

"The presence of conflicting interests imposes on fiduciaries the obligation to take precautions to ensure that their duty of loyalty is not compromised." *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 299 (5th Cir. 2000). Accordingly, if

---

[7] *See also Wildman v. Am. Century Servs., LLC*, 2017 WL 839795, at *6 (W.D. Mo. Feb. 27, 2017) ("PTE 77-3 is specific to prohibited transaction claims under 29 U.S.C. § 1106. It does not relieve a fiduciary from its duties of loyalty and prudence to a plan."); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2016 WL 4507117, at *7 (C.D. Cal. Aug. 5, 2016) ("Defendants point to Prohibited Transaction Exemption 77-3, which provides that plans sponsored by mutual fund advisors and their affiliates may invest in affiliated mutual funds. However, this exemption is specific to prohibited transaction claims under 29 U.S.C. § 1106, which are not at issue here.").

fiduciaries engage in self-dealing, making it "possible to question the fiduciaries' loyalty, they are obliged at a minimum to engage in an intensive and scrupulous independent investigation of their options to insure that they act in the best interests of the plan beneficiaries." *Leigh v. Engle*, 727 F.2d 113, 126 (7th Cir. 1984) (citing *Bierwirth I*, 680 F.2d at 272) ("*Leigh I*"); *accord Bussian*, 223 F.3d at 299; *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996). In this way, the duties of loyalty and prudence overlap. *Bussian*, 223 F.3d at 299 (citing *Bierwirth I*, 680 F.2d at 271). Fiduciaries who engage in self-interested transactions bear the burden of proving they fulfilled their duties of loyalty and care, *Howard*, 100 F.3d at 1488, and courts are obligated to "rigorously scrutinize the conduct," *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1432 (9th Cir. 1986); *see also Niehoff v. Maynard*, 299 F.3d 41, 51 (1st Cir. 2002) ("Allegations of self-dealing significantly taint the fiduciary relationship. They . . . often raise the legal analysis to a higher level than ordinary breaches of care." (quoting *Litman v. Prudential-Bache Props., Inc.*, 1994 WL 30529 (Del. Ch. Jan. 14, 1994))).

The district court did not "rigorously scrutinize" Defendants' conduct here. To the contrary, it overlooked most of the evidence of disloyalty in the record and limited its analysis to whether "self-dealing alone" supports a claim for breach of loyalty. ADD–54. Contrary to what the district court stated in its opinion, Plaintiffs' loyalty claim is *not* "reduced almost exclusively to identifying instances

of self-dealing." ADD–54. Nor are Defendants' practices "common within the industry." ADD–55. The Investment Committee's own meeting minutes reflect that Putnam was "unique" in offering all of its own funds (and only its funds) in the Plan. JA–2865; *see also* JA–2575.

However, the district court need have looked no further than its own findings to determine that there was sufficient evidence to support Plaintiffs' breach of loyalty claim. As noted above, the district court found in its case-stated order that Putnam's Plan lineup structure was "concerning." ADD–20. The district court also found in its Rule 52(c) order that Defendants "did not seem to have independent standards or criteria for monitoring the Plan investments" and "failed to monitor the Plan investments independently." ADD–52, 58. Under applicable case law, this self-interested Plan lineup, combined with the absence of an "intensive and scrupulous investigation" to justify it, constituted an obvious breach of the duty of loyalty. *See Leigh I*, 727 F.2d at 127. Yet, the district court failed to put one and one together.

B. Plaintiffs Were Not Required to Prove Wrongful Intent, but They Did So Anyway

The trial court also erred in holding that a breach of loyalty requires wrongful intent. ADD–42. Several circuit court decisions clearly establish that "[g]ood faith is not a defense to an ERISA fiduciary's breach of the duty of loyalty." *Leigh I*, 727 F.2d at 124; *see also DiFelice v. U.S. Airways, Inc.*, 497 F.3d

410, 418 (4th Cir. 2007); *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983) ("Contrary to the appellees' contentions, this is not a search for subjective good faith—a pure heart and an empty head are not enough.").

The text of the statute underscores the point. Under § 1104(a), the duty of loyalty is two-pronged, requiring *both* that fiduciaries "discharge [their] duties" solely in plan participants' interests, *and* that they do so "for the exclusive purpose of" providing benefits to those participants. 29 U.S.C. § 1104(a); *see also Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 18 (1st Cir. 1998) ("The fiduciary should act 'solely in the interest of the participants and beneficiaries,' *and* his overarching purpose should be to 'provid[e] benefits to the participants and their beneficiaries' and to 'defray[ ] reasonable expenses of administering the plan.'" (emphasis added)). These two standards may overlap, but they are distinct. *Bierwirth I*, 680 F.2d at 271. Thus, while a fiduciary's improper "purpose," or subjective motivations, can violate the duty of loyalty, so can his or her conduct.

Moreover, even if wrongful intent were required to establish a breach of loyalty (which is not the case), the district court ignored substantial evidence of bad faith in the record. For example, the language of Paragraph 8.1 of the Plan document (providing for the automatic inclusion of Putnam funds), *see* ADD–105, and the Investment Committee's utter disregard of basic fiduciary processes constitute evidence of bad faith. *See Cunningham*, 716 F.2d at 1468 n.28 ("[G]ood

faith [entails] not only the sole motivation of benefiting the ESOP but also the application of sound business principles of evaluation."). Mr. Mullen's notes (quoted *supra* at 12-13), the "quiet death" of the IPS, and the entombment of the AAG reports constitute further evidence of bad faith. And perhaps worst of all, Defendants were on notice of the problematic nature of the Plan throughout the entire class period:

- As early as April 2009, before the start of the class period, "[a] question was raised as to the fiduciary obligations because of the fact that the retirement plan offers only Putnam funds as investment options." JA–2809.
- At the May 2010 Investment Committee meeting, it was again noted that Putnam was "unique" in offering only its own funds. JA–2865.
- A 2013 Fiduciary Responsibilities Review warned of "ERISA [c]laims" in connection with the "[u]se of [p]roprietary [i]nvestments." JA–3294.
- A 2014 Fiduciary Responsibilities Update referenced the Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), and warned: "No presumption of prudence for use of employer securities. Terms of the plan do not excuse fiduciaries from ERISA responsibilities." JA–5584.

- The July 2015 Investment Committee meeting minutes also noted that "a number of recent court cases and settlements by other mutual fund providers have highlighted that the mere fact that a plan document 'hard wires' in particular offerings, as in Putnam's case, may not eliminate the need for fiduciary review and monitoring." JA–3470.

Moreover, at the time the BNY Mellon CITs were added to the Plan, Defendants issued an announcement *admitting* that they were not monitoring the Putnam funds in the Plan and improperly attempted to shift that burden to Plan participants. JA–3634. This evidence is more than sufficient to meet any theoretical *mens rea* requirement. Yet, the district court almost completely ignored it.

C. No Balancing Test Applies to a Breach of Loyalty Claim, and Unrelated "Settlor" Actions Do Not Excuse Fiduciary Breaches

Paradoxically, while the district court ignored most of the evidence of disloyalty, *see supra* at 41-45, it took into account other evidence unrelated to Defendants' management of the Plan's investments (such as Putnam's contributions to the Plan, the fact that Putnam "paid all of the Plan's recordkeeping expenses," and educational services that Putnam provided to Plan participants), and balanced that evidence against the evidence of "self-dealing alone" under a "totality of the circumstances" test. *See* ADD–53-55. This was improper for two reasons.

First, although the totality-of-the-circumstances test is appropriate for determining whether a fiduciary has engaged in due diligence, it is not useful for determining whether a fiduciary acted with "an eye single" to plan participants' interests, "solely" in their interest, and for the "exclusive purpose" of providing benefits to them. 29 U.S.C. § 1104(a)(1); *Pegram*, 530 U.S. at 224. This Court has applied the totality-of-the-circumstances standard to evaluate prudence, *see Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 7 (1st Cir. 2009), but has never endorsed use of this test for evaluating breaches of the duty of loyalty. Nor does such a balancing test have any place in the present context. As the Department of Labor ("DOL") has stated:

> [I]n deciding whether and to what extent to invest in a particular investment, a fiduciary must ordinarily consider *only* factors relating to the interests of plan participants and beneficiaries . . . . A decision to make an investment may not be influenced by [other] factors unless the investment, when judged *solely* on the basis of its economic value to the plan, would be equal or superior to alternative investments available to the plan.

DOL Advisory Op. No. 88-16A, 1988 WL 222716, at *3 (Dec. 19, 1988) (emphasis added). Any test that would allow fiduciaries to engage in disloyal conduct because they also performed other acts that benefitted plan participants is inconsistent with this standard. "A fiduciary with a conflict of interest must act as if he is 'free' of such a conflict. 'Free' is an absolute. There is no balancing of

interests . . . ." *Bedrick by & Through Humrickhouse v. Travelers Ins. Co.*, 93 F.3d 149, 154 (4th Cir. 1996) (citation omitted).

Second, even if the totality-of-the-circumstances test applied in the loyalty context, the relevant inquiry is not infinite in scope. It is limited to the circumstances surrounding the challenged investment decision. *See Bunch*, 555 F.3d at 6 ("The district court noted that other courts faced with allegations similar to those of appellants in this case had looked at the totality of the circumstances *involved in the particular transaction*." (emphasis added)); 29 C.F.R. § 2250.404a-1(b)(1)(i) (explaining that a fiduciary acts prudently when it gives "appropriate consideration to those facts and circumstances that . . . the fiduciary knows or should know are relevant to the . . . *investment course of action involved*" (emphasis added)). Putnam's discretionary contributions, educational efforts, and payment of recordkeeping fees are all acts unrelated to the challenged conduct regarding the Investment Committee's review and retention of the proprietary funds at issue. *See Tussey v. ABB, Inc.*, 850 F.3d 951, 957 (8th Cir. 2017) ("*Tussey II*") (explaining that where fiduciaries' examples of good conduct "all relate to other investment decisions" rather than the challenged decision, those examples are not relevant to "why they made the particular decisions at issue in this case"), *cert. denied*, No. 17-265, 2017 WL 3594208 (U.S. Oct. 2, 2017).

Indeed, not only are Putnam's contributions, educational efforts, and payment of recordkeeping fees unrelated to the challenged conduct, but they were not even performed in Putnam's capacity as a fiduciary. Employer contributions to plan participants' accounts are made in one's capacity as an employer, not as a fiduciary. *See* JA–2773 (excerpt from Fiduciary Planning Guide explaining that decisions about benefit levels "are made in [one's] capacity as an employer," and not in a fiduciary capacity); Lee T. Polk, 1 ERISA Practice and Litigation § 3:32 (Feb. 2017 update) (stating that "decisions relating to the timing and amount of contributions" are generally non-fiduciary decisions); *accord Coulter v. Morgan Stanley & Co. Inc.*, 753 F.3d 361, 367 (2d Cir. 2014). Similarly, Putnam's educational efforts and decision to underwrite recordkeeping fees are settlor, rather than fiduciary, functions. *See* 29 C.F.R. § 2509.75-8 (noting that "[o]rientation of new participants and advising participants of their rights and options under the plan" typically are not fiduciary acts); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999) (explaining that decisions about plan design and structure are settlor functions). "In doing these things . . . , [employers] are no more the employees' 'fiduciaries' than when they decide what wages to offer . . . ." *Johnson v. Georgia-Pac. Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994).

Nothing in ERISA prevents Plan employers from also serving as Plan fiduciaries. *Pegram*, 530 U.S. at 225. "ERISA does require, however, that the

fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions." *Id.* This separation of the fiduciary and settlor spheres is reciprocal. Just as an ERISA fiduciary does not violate its fiduciary duties when acting in a non-fiduciary capacity, *see id.* at 225-26, in the same way, an ERISA fiduciary cannot make up for its fiduciary breaches through its non-fiduciary acts.

III. THE DISTRICT COURT ERRED IN HOLDING THAT THE PLAN DID NOT SUFFER LOSSES AS A RESULT OF DEFENDANTS' FIDUCIARY BREACHES

The district court also erred in ruling, as a matter of law, that Plaintiffs "failed to establish a prima facie case of loss" to the Plan. ADD–67. In reaching this result, the district court (1) ignored the analysis of Plaintiffs' damages expert; (2) imposed an improper burden of proof on Plaintiffs; and (3) improperly gave Defendants the benefit of the doubt as to any uncertainties in damages stemming from their breaches.

A. Plaintiffs Presented Evidence of Substantial Losses to the Plan

Under ERISA, fiduciaries "who breach[] any of the responsibilities, obligations, or duties" imposed by the Act are required to "make good to such plan any losses to the plan resulting from [the] breach." 29 U.S.C. § 1109(a). For purposes of this remedy,[8] "[l]osses to a plan . . . may be ascertained, with the help of expert analysis, by comparing the performance of the imprudent investments

---

[8] Plaintiffs may obtain disgorgement and other equitable relief without showing a loss to the Plan. *See infra* at 68-72.

with the performance of a prudently invested portfolio." *Evans*, 534 F.3d at 74 (citing *Graden*, 496 F.3d at 301); *see also Vaughn v. Bay Env. Mgmt., Inc.*, 567 F.3d 1021, 1027 (9th Cir. 2009) ("This amount is ascertainable through expert testimony or other evidence regarding investment returns during the relevant period."). This is precisely what Plaintiffs' expert, Dr. Pomerantz, did by comparing the performance of the investments in the Plan to his alternative portfolios. Yet, the district court barely addressed his analysis, glossing over it in a footnote. ADD–66 n.18.

The district court erred in disregarding Dr. Pomerantz's expert analysis. Although Defendants filed a motion in limine, *see* ECF No. 137, that motion was not granted, and Dr. Pomerantz testified at trial. Based on his testimony, the Plan suffered losses of between $44.2 million to $45.6 million during the class period. JA–2581-82, 2588. As the record presently stands, this testimony is unrebutted.

1. The Alternative Portfolios that Dr. Pomerantz Used for Purposes of Drawing Comparisons Were Prudent and Appropriate

Notably, the district court did *not* find that that either of the alternative portfolios that Dr. Pomerantz used for purposes of making comparisons and calculating losses to the Plan would be imprudent or inappropriate. Nor could it. As Dr. Pomerantz testified, there were sound reasons for using each set of comparators. JA–2547-48, 2578-81, 2586-87.

Comparisons to index fund alternatives are well-grounded in the law and academic literature. *See* Restatement (Third) of Trusts § 100 cmt. b(1), ADD–91 (explaining that one acceptable method for measuring damages to a trust is to compare the returns of "imprudent or otherwise improper investments" to "return rates of . . . suitable index mutual funds or market indexes"); *Gilbert v. EMG Advisors, Inc.*, 172 F.3d 876 (9th Cir. 1999) (approving measuring damages by comparing imprudent investments to returns of Lehman Government Index-Aggregate); *Meyer v. Berkshire Life Ins. Co.*, 250 F. Supp. 2d 544, 573-74 (D. Md. 2003) (measuring damages by using prudent mix of stocks and bonds, as measured by S&P 500 and Lehman Brothers Government/Corporate Bond Index); William F. Sharpe, *The Arithmetic of Active Management*, Fin. Analysts J., Jan.–Feb. 1991, at 8 ("The best way to measure a manager's performance is to compare his or her return with that of a *comparable passive alternative*."). Index funds serve as proxies for market benchmarks and are superior to simple comparisons to the benchmark index itself because they reflect the cost of "buying in" to the market. *See* JA–2580-81; *accord* Robert C. Jones & Russ Wermers, *Active Management in Mostly Efficient Markets*, Fin. Analysts J., Nov.–Dec. 2011, at 31 ("[T]he relevant comparison is to the passive alternative and not to the index itself.").

Moreover, as to the BNY Mellon CITs, it is undisputed that those funds could be used as the "building blocks" of a prudent portfolio. JA–3499; *see also*

supra at 22. Because Defendants approved the use of those funds for the Plan, and all parties agree those funds were properly included in the Plan lineup, they are uniquely suitable for purposes of drawing comparisons to Putnam's proprietary funds. *See* Restatement (Third) of Trusts § 100 cmt. b(1), ADD–91 (stating that loss models may appropriately be based on "the return experience (positive or negative) for other investments, or suitable portions of other investments, of the trust in question"); *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985) ("*Bierwirth II*") ("In determining what the Plan would have earned had the funds been available for other Plan purposes, the district court should presume that the funds would have been treated like other funds being invested during the same period in proper transactions."); *accord Graden*, 496 F.3d at 301.

2. Dr. Pomerantz's Model Appropriately Included All Proprietary Investments in the Plan Based on the Nature of the Fiduciary Breaches

The only explanation given by the district court for disregarding Dr. Pomerantz's analysis was that he measured damages stemming from a "procedural breach", *i.e.*, Defendants' lack of process for managing the Plan's investments. ADD–66 n.18. However, Plaintiffs' "procedural breach theory" was entirely consistent with the law. As this Court has made clear, "[t]he test of prudence—the Prudent Man Rule—is one of *conduct*" and focuses on whether a fiduciary charged with making investment decisions has appropriate processes in place for making

those decisions. *Bunch*, 555 F.3d at 7, 9 n.9 (quoting *Cunningham*, 716 F.2d at 1467); *see also Pfeil v. State St. Bank & Trust Co.*, 806 F.3d 377, 384 (6th Cir. 2015) ("We evaluate [an ERISA fiduciary's] actions according to a prudent-process standard."); *Tatum*, 761 F.3d at 356 ("Our focus is on 'whether the fiduciary engaged in a reasoned decision-making *process* . . . .'") (quoting *DiFelice*, 497 F.3d at 420) (emphasis added)); *Howard*, 100 F.3d at 1489 ("The focus is on the thoroughness of the investigation."). Indeed, Putnam's own Oversight Committee minutes state that "ERISA fiduciary standards focus on process and . . . there must be sufficient procedures in place to make prudent decisions." JA–2810; *see also* JA–2776 ("The emphasis of ERISA's fiduciary standards is on the 'how.' This means procedure and process are the keys.").

As part of its breach analysis, the district court found (at least on a preliminary basis) that Defendants failed to exercise procedural prudence in managing the Plan's investment lineup. ADD–58. Yet, the district court's loss analysis was entirely detached from the nature of the breach it found to exist, and ignored the fact that the procedural breaches at issue affected the entire Plan. This was highly incongruous, and an obvious error of law. In measuring losses to an ERISA plan, courts are required to "fashion the remedy best suited to the harm." *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992). Thus, the loss model must match "the nature of the breach involved." Restatement (Third) of Trusts § 100

cmt. b(1), ADD–91; *see also Chao v. Moore*, 2001 WL 743204, at *7 (D. Md. June 15, 2001) ("[T]he method for ascertaining a loss to the plan should be tailored to the type of breach claimed.").

For example, in *Dardaganis v. Grace Capital*, the Second Circuit upheld a portfolio-wide method of measuring damages where "the breach ar[o]se[] from a pattern of investment rather than from investment in a particular stock." 889 F.2d 1237, 1244 (2d Cir. 1989). Similar to the present case, the breaching fiduciaries argued that "the Court must look at specific investment decisions and determine whether the [plan] lost any money as a result of those particular decisions." *Id.* at 1243. However, the Second Circuit affirmed the district court's "decision not to require inquiries into specific investment decisions." *Id.* at 1244.

The court's opinion in *Liss v. Smith*, 991 F. Supp. 278 (S.D.N.Y. 1998), is also instructive.[9] In *Liss*, the plan's fiduciaries breached their fiduciary duties by, among other things, failing to "implement an investment policy," "properly investigate Fund investments," and "monitor" the plan's investments. *Id.* at 294. Based on these breaches, the court held that plaintiffs' expert properly stated a "prima facie case of loss" by comparing the plan's investment returns to the returns of other similar pension plans. *Id.* at 295. The court held that this was a proper method for measuring losses "where, as here, the allegations of fiduciary breaches

[9] The district court acknowledged that *Liss* provides "support for the Plaintiffs' position." ADD–63.

relate to the overall investment strategy of the Funds (or the lack thereof) as opposed to the wisdom of a single transaction or investment." *Id.* The court noted that "[s]uch a measure of loss has been repeatedly recognized as legitimate." *Id.* (citing *Dardaganis*, 889 F.2d at 1243).

This portfolio-wide approach aligns with this Court's statement in *Evans* that losses to the plan should be measured based on comparisons to a "prudently invested portfolio." *Evans*, 534 F.3d at 74. Moreover, it also makes economic sense. Under modern portfolio theory—which has been adopted as part of ERISA's regulatory scheme, *see* 29 C.F.R. § 2550 404a-1—fiduciaries are required to analyze investments holistically, as components of an entire portfolio, in order to further the purposes of the plan as a whole. *See Laborers Nat'l Pension Fund v. N. Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 322 (5th Cir. 1999). As the Seventh Circuit has held, "it makes sense for courts to look at the whole portfolio" to measure loss "[g]iven the facts that investment advisors generally follow a portfolio strategy of investment and that beneficiaries whose assets are being managed are concerned with the end result of that strategy." *Leigh v. Engle*, 858 F.2d 361, 368 (7th Cir. 1988) ("*Leigh II*"). In contrast, if the fiduciary made decisions about investments "in isolation," then a court might be "justified in taking the same view when calculating the loss from those investments." *Id.* But Defendants did not make decisions in isolation. They categorically included and

retained all of Putnam's proprietary funds (and only its proprietary funds) in the Plan. Where, as here, the breach was a categorical, portfolio-wide decision, Plan participants may appropriately offer a portfolio-wide damages model.

Ironically, holistic damages models such as Dr. Pomerantz's are often favored by fiduciaries because they are a more conservative approach to measuring damages. *See id.* at 367-68 (noting the breaching fiduciary argued for loss model based on entire portfolio). As Dr. Pomerantz explained, his damages model was more favorable to Defendants than a model that would have excluded Putnam's best-performing funds because it provided a credit to Defendants for any of Putnam's funds that happened to outperform the market. *See* JA–2582-83, 2588. Thus, his portfolio-based comparisons were not only consistent with established law and economic principles, but exceedingly fair.

B. The District Court Imposed an Improper Burden on Plaintiffs with Respect to Loss Causation

In addition to disregarding Plaintiffs' damages expert, the district court imposed an improper burden on Plaintiffs with respect to loss causation. The strict standard that it applied was contrary to (1) trust law, (2) several circuit court decisions, (3) the DOL's stated position, (4) the policy aims of the statute, and (5) basic practical considerations. Moreover, it was contrary to the "burden shifting framework" that the district court purported to adopt at both the beginning and end of its loss analysis. *See* ADD–59 n.15, 67 n.19.

1. Defendants Bear the Burden of Proof on Loss Causation

a. Burden-Shifting Applies Under Trust Law

Under trust law, a "trustee who commits a breach of trust is liable for a loss resulting from the breach." Restatement (Third) of Trusts § 100 cmt. e, ADD–93. However, the beneficiary of the trust does not bear the burden of proof on the "resulting from," or causation, factor. "[W]hen 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." *Id.* § 100 cmt. f. This is a "long-recognized trust law principle." *Tatum*, 761 F.3d at 363.

ERISA, just like the common law of trusts, provides that a fiduciary is liable for "any losses to the plan resulting from [the] breach." 29 U.S.C. § 1109(a). Although the statute does not explicitly state which party bears the burden of proof on causation, there is no reason to deviate from the common-law standard. *See Varity*, 516 U.S. at 496-97; *see also* Adolyn B. Clark, Note, *ERISA Breach of Fiduciary Duty: Shifting the Burden of Proving Causation to the Defendant*, 83 Def. Couns. J. 180, 190-91 (2016) (explaining that the burden of proof for causation does not meet *Varity*'s criteria for deviation from trust law). Indeed, given that ERISA drew much of its content from the common law of trusts, there is a presumption that Congress intended to preserve the common-law rule on the

allocation of the burden of proof. *See Smith v. United States*, 568 U.S. 106, 112 (2013) ("Because Congress did not address in [the statute] the burden of proof for withdrawal, we presume that Congress intended to preserve the common-law rule." (citing *Dixon v. United States*, 548 U.S. 1, 13-14 (2006))).

b. Several Circuit Court Cases Support Burden-Shifting

Not surprisingly, several circuit courts have applied the burden-shifting framework set forth in trust law to ERISA cases. *See Tatum*, 761 F.3d at 362-63; *Martin*, 965 F.2d at 671; *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995); *accord Leigh I*, 727 F.2d at 138-39 (holding that burden-shifting on causation applies in the analogous context of disgorgement for breaches under ERISA). This burden-shifting framework is clearly and succinctly discussed in the Fourth Circuit's opinion in *Tatum*. Under this framework, a plaintiff must first prove "the defendant-fiduciary's procedural imprudence and a prima facie loss." *Tatum*, 761 F.3d at 364. The standard for a "prima facie loss" is low. In keeping with trust law, it simply requires a showing of "related loss." *Id.* at 362 (citing Restatement (Third) of Trusts § 100 cmt. f).[10] The plaintiff then "prevails *unless* the defendant-fiduciary can show, by a preponderance of the evidence," that loss causation is lacking because its investments were nevertheless "objectively

---

[10] The word "related" is expansive, and means simply "[c]onnected in some way" or "having relationship to or with something else." *Black's Law Dictionary* (10th ed. 2014).

prudent." *Id.* at 363-64. To meet its burden on objective prudence—*i.e.*, loss causation—the breaching fiduciary must demonstrate "that a prudent fiduciary *would have* made the same decision" anyway. *Id.* at 364.

c. The Department of Labor Supports Burden Shifting

The *Tatum* case is particularly noteworthy because the DOL authored an amicus brief in that case advocating the burden-shifting approach that the Fourth Circuit adopted. *See* Amicus Br. of Sec'y of Labor at 19-20, *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346 (4th Cir. 2014) (No. 13-1360). Moreover, subsequent case law involving the DOL further confirms that burden shifting applies. *See Chao v. Trust Fund Advisors*, 2004 WL 444029, at *6 (D.D.C. Jan. 20, 2004) ("[The Secretary of Labor] has made a persuasive argument in support of burden-shifting . . . [O]nce the Secretary has proven a breach of fiduciary duty and a prima facie case of loss to the plan, Defendants must then prove that the loss was not caused by their breach of fiduciary duty.").

d. Public Policy Supports Burden Shifting

The burden-shifting framework also "comports with the structure and purpose of ERISA," including its goal of protecting plan participants from fiduciary misconduct. *Tatum*, 761 F.3d at 363. Cases involving a fiduciary relationship are well recognized as special cases where the burden is often placed on the defendant fiduciary. *See, e.g.*, *Pepper v. Litton*, 308 U.S. 295, 306 (1939).

"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).

e. Practical Considerations Support Burden Shifting

Finally, certain practical considerations support burden shifting in this type of case as well.

First, breaches of ERISA's fiduciary duties will usually result in losses to the plan. *Tatum*, 761 F.3d at 361 (citing *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 218 (4th Cir. 2011)); *Brock v. Robbins*, 830 F.2d 640, 647 (7th Cir. 1987). A "frequently significant consideration in the fixing of the burdens of proof is the judicial estimate of the probabilities of the situation." 2 McCormick on Evidence § 337 (7th ed. 2013). "The risk of failure of proof may be placed upon the party who contends that the more unusual event has occurred." *Id.* To illustrate, when a fiduciary fails to employ procedures to ensure prudent decision-making, it is highly unlikely that the fiduciary will happen upon a prudent Plan menu through sheer coincidence, for the same reason that a blindfolded dart player is unlikely to hit as close to the target as one who can see the board. In such a situation, it is appropriate to shift the burden to the breaching fiduciary to prove that it somehow managed to hit the mark, despite all probability to the contrary.

Second, the loss causation analysis necessarily involves weighing alternative possibilities and therefore tends to be uncertain. *See Dardaganis*, 889 F.2d at 1244 ("Where, as in this case, the breach arises from a pattern of investment rather than from investment in a particular stock, courts will rarely be able to determine, with any degree of certainty, which stock the investment manager would have sold or declined to buy had he complied with investment guidelines."). Under these circumstances, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946); *see also Tussey II*, 850 F.3d at 960-61; *Martin*, 965 F.2d at 671-72 (quoting *Story Parchment*, 282 U.S. at 563); *Bierwirth II*, 754 F.2d at 1056. Thus, "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) (shifting the burden of proving loss causation to the breaching fiduciary); *see also* 2 McCormick on Evidence § 337 (allocation of burden involves "special policy considerations" as well as considerations of "fairness").

2. The District Court's Loss Analysis Was Inconsistent with the Burden-Shifting Framework It Purported to Adopt

In its Order, the district court stated that it was "adopt[ing] the burden shifting framework for loss causation" for purposes of the Rule 52(c) motion.

ADD–59 n.15. In actuality, however, the district court did the exact opposite, and held that "an ERISA plaintiff must establish a causal link between the breach and the damages claimed." ADD–60. This was internally inconsistent, and an obvious legal error.

The district court's erroneous conflation of the concepts of "prima facie loss" and "loss causation" is even more apparent when the order is unpackaged in detail. In the initial legal standard section of its order, the district court stated that there is a circuit split on the burden-shifting issue, noting that "[t]he Fourth, Fifth, and Eighth Circuits, applying trust law principles, have held that the fiduciary bears the burden of disproving loss causation once a plaintiff shows breach of a fiduciary duty," whereas "the Second, Sixth, Ninth, Tenth, and Eleventh Circuits have all refused to adopt burden shifting in ERISA breach of fiduciary duty claims." ADD–46.[11] Later in its order, the district court stated that it was applying the burden-shifting framework adopted by the Fourth, Fifth, and Eighth Circuits. ADD–59 n.15. Yet, it held Plaintiffs to the opposite standard, requiring them to show loss causation, or a "causal link," and citing as authority for that proposition cases from the Second, Sixth, Ninth, and Eleventh circuits—the *very circuits* that it

[11] The circuit split is more nuanced than the district court stated. For example, earlier Second Circuit precedent appears to be consistent with burden shifting. *See N.Y. State Teamsters Council Health & Hosp. Fund v. Estate of DePerno*, 18 F.3d 179, 182 (2d Cir. 1994). However, that is irrelevant for purposes of illustrating the district court's error.

previously cited as having rejected burden-shifting. ADD–60-61. Indeed, two of the cases it cited in its causation analysis (on page 27) were the very same cases it cited earlier (on page 13) as having rejected burden shifting. *Compare* ADD–60 (citing *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995), and *Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d 1335 (11th Cir. 1992)), *with* ADD–46 (same).

The district court then continued to misapply the burden-shifting framework. Despite concluding that the record warranted a finding that Defendants breached their fiduciary duties by failing to adopt prudent procedures for selecting and monitoring the Plan lineup, the district court nevertheless took issue with Plaintiffs' "procedural breach" theory as applied to damages. ADD–61. The district court held that even though the breach was procedural and affected the entire Plan, Plaintiffs were required to prove that each of the specific funds in the Plan were objectively imprudent, *i.e.*, that a prudent fiduciary would not have chosen them for the Plan. ADD–63-66. This was directly contrary to the burden-shifting framework approved in *Tatum* and other cases. *See Tatum*, 761 F.3d at 372 ("[W]e affirm the district court's holding that RJR breached its duty of procedural prudence and so carries the burden of proof on causation . . . ."). Under that framework, Putnam had the burden "to prove that despite its imprudent decision-making process, its ultimate investment decision was 'objectively prudent.'" *Id*. at 363. As the court explained in *Tatum*:

> [A] plaintiff who has proved the defendant-fiduciary's procedural imprudence and a prima facie loss prevails *unless* the defendant-fiduciary can show, by a preponderance of the evidence, that a prudent fiduciary *would have* made the same decision. Put another way, a plan fiduciary carries its burden by demonstrating that it would have reached the same decision had it undertaken a proper investigation.

Id. at 364.

The district court then determined that Plaintiffs failed to meet their burden because Defendants could have "still end[ed] up with prudent investments," even if this were "the result of sheer luck." ADD–65-66. However, the proper question is not whether a prudent fiduciary "could have" made the same investment decisions by chance, but whether it "would have" made the same investment decisions by design if a prudent process had been followed. *See Tatum*, 761 F.3d at 364-65. As the court held in *Tatum*, "We would diminish ERISA's enforcement provision to an empty shell if we permitted a breaching fiduciary to escape liability by showing nothing more than the mere possibility that a prudent fiduciary 'could have' made the same decision." *Id.* at 365.

The district court went on to state that "luck seems to have little to do with the Plan lineup" because Putnam's *investment division* "employs sophisticated techniques to monitor its mutual funds." ADD–66. However, the district court explicitly held earlier in its order that Defendants cannot rely on Putnam's investment division to fulfill their fiduciary duties. ADD–56-58, 66. A mutual fund

company will obviously take steps to monitor its mutual funds in the regular course of its business, but the decision whether the retain any of its funds in a retirement plan—and the determination of whether those funds are appropriate for the plan—is left to the plan's fiduciaries, who should consider a variety of alternatives from different fund companies across the marketplace. There is no evidence that a prudent fiduciary would have chosen the same investment lineup (or even a remotely similar lineup) here.

C. Although Not Their Burden, Plaintiffs Established a Causal Link Between the Breach and Loss to the Plan

Even assuming that Plaintiffs were required to prove loss causation, they did so, both on a Plan-wide basis and a fund-by-fund basis. The evidence at trial showed that Defendants were "unique" among retirement Plan fiduciaries in offering only Putnam-affiliated funds, JA–2865, and that other plans do not include all of the assets of a given mutual fund company by fiat, JA–2575. Moreover, the vast majority of the funds in the Plan (51 of 69) were not included in the investment lineup of *any* retirement plan with more than $250 million in assets. JA–2569-70; JA–6087-89. All but one of the remaining funds (17 of 18) were held in 0.2% of similarly-sized plans or less, *i.e.*, five plans or less out of over 2,600 total. *Id.* Even Putnam's most "popular" fund, the Putnam Equity Income fund, gained little traction in the marketplace, and was found in less than 1% of similarly-sized plans (21 out of over 2,600). JA–2570; JA–6089. Thus, prudent

fiduciaries would not—and did not—make the same investment decisions as Defendants.

The record also reflects what the fiduciaries of the Plan would do—and did do—upon adopting a prudent fiduciary process: include the BNY Mellon CITs in the Plan lineup. *See supra* at 21-22. It is undisputed that the BNY Mellon CITs were prudent investments for the Plan, JA–1673-74; JA–2448; JA–2573, and an alternative lineup consisting of these CITs would closely resemble the federal government's highly-regarded Thrift Savings Plan, JA–2576-77. Thus, Dr. Pomerantz's BNY Mellon portfolio was a prudent and plausible alternative portfolio for purposes of calculating losses to the Plan and was causally linked to the procedural breaches at issue. If this model, consisting of the actual funds Defendants selected when they employed a prudent process, is not sufficient to establish loss causation, it is unclear what would be.

In most cases, it is not possible for a damages model to be based on a set of alternative investments that were actually selected by the plan sponsor. Thus, the law only requires Plaintiffs to put forward a set of "hypothetical" investments that a prudent fiduciary would plausibly select for the Plan. Restatement (Third) of Trusts § 100 cmt. b(1), ADD–91. The hypothetical investment alternatives that a prudent fiduciary would plausibly select include "suitable index mutual funds." *Id.* Indeed, the Vanguard index funds in Dr. Pomerantz's alternative portfolio were far

more popular with retirement plan fiduciaries than the Putnam funds in the Plan. *See* JA–6087-89. Accordingly, Dr. Pomerantz's Vanguard index fund portfolio is also causally linked to the procedural breaches at issue.

Although the district court suggested, as part of its causal analysis, that Plaintiffs were required to "point to a specific imprudent investment decision or decisions to make a showing of loss," ADD–63, this is directly at odds with the Second Circuit's opinion in *Dardaganis*, 889 F.2d at 1244. In any event, Plaintiffs did so. In particular, Plaintiffs pointed to the decision to retain all of Putnam's open-end, non-tax-exempt funds in the Plan pursuant to Section 8.1 of the Plan document. Plaintiffs also pointed to the decision not to consider alternative funds for the Plan until the BNY Mellon CITs were added. This should have been sufficient to satisfy the causal burden that the district court improperly placed on Plaintiffs. Although the district court desired still more specificity, and demanded evidence of individualized fund-level decisions that resulted in losses to the Plan, this was tantamount to asking Plaintiffs to produce evidence of a ghost. As noted above, the Investment Committee did not make reasoned fund-level decisions regarding the Putnam-affiliated investments in the Plan; it simply included *all* investments specified by Paragraph 8.1 of the Plan document by fiat. Indeed, the Investment and Oversight Committees explicitly rejected a fund-by-fund approach, citing employee relations issues and the dictates of Paragraph 8.1. *See* JA–1771;

JA–2810; JA–2865. Accordingly, it was unreasonable for the district court to demand evidence of fund-level decisions, because none were made.[12]

IV. THE DISTRICT COURT ERRED IN FAILING TO MEANINGFULLY CONSIDER DISGORGEMENT OR OTHER EQUITABLE REMEDIES

Regardless of whether the district court believed that the Plan suffered a loss as a result of Defendants' fiduciary breaches, it was obligated to consider other potential remedies for those breaches. Section 1109 of the Code, entitled "Liability for breach of fiduciary duty," provides for *multiple* remedies in the event of a fiduciary breach. 29 U.S.C. § 1109(a). One of those remedies is "to make good to [the] plan any losses to the plan resulting from each such breach." *Id.* But that is not the only remedy. Section 1109 also provides that a breaching fiduciary (1) shall "restore to [the] plan any profits of such fiduciary" that are attributable to the breach; and (2) "shall be subject to such other equitable or remedial relief as the court may deem appropriate." *Id.*

Section 1132 of the Code, entitled "Civil enforcement," contains an explicit cross reference to § 1109. *See id.* § 1132(a)(2). In addition, § 1132 separately and independently provides that Plan participants may seek injunctive relief and "other appropriate equitable relief" to redress violations of ERISA. *Id.* § 1132(a)(3).

---

[12] Moreover, the district court ignored the evidence specific to the Voyager fund, which was responsible for approximately $14 million of the losses at issue over the class period. *See supra* at 16-17.

Yet, the district court gave almost no consideration to these alternative remedies. It devoted less than a page to disgorgement of profits, and only a single sentence to other equitable relief. ADD–66-67. The district court dismissed each of these remedies out of hand based on its determination that Plaintiffs "failed to establish a prima facie case of loss." ADD–67. However, it cited no support for its conclusion that evidence of loss is required to obtain relief separate from a restoration of Plan losses, such as disgorgement, injunctive relief, or declaratory relief. Indeed, the law is to the contrary. Accordingly, the district court erred by failing to meaningfully consider these alternative forms of relief.[13]

A. Loss Is Not an Element of a Claim for Disgorgement

The purpose of the disgorgement remedy is to take away any possible financial incentives for fiduciaries to commit a breach. *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1411 (9th Cir. 1988) (citing G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 543, at 218 (2d ed. 1978)). Thus, "disgorgement claims seek not to compensate for a loss, but to 'deprive[] wrongdoers of ill-gotten gains.'" *Edmonson v. Lincoln Nat. Life Ins. Co.*, 725 F.3d 406, 415 (3d Cir. 2013) (citing *Commodity Futures Trading Comm'n v. Am. Metals Exchange Corp.*, 991 F.2d 71, 76 (3d Cir. 1993)). As such, loss is

[13] Even if a showing of loss were required to obtain disgorgement of profits, injunctive relief, or declaratory relief, Plaintiffs made a showing of loss to the Plan as explained above. *See supra* at 23-26, 48-68.

not an element of a claim for disgorgement. *Id.*; *see also Leigh I*, 727 F.2d at 122 ("ERISA clearly contemplates actions against fiduciaries who profit by using trust assets, even where the plan beneficiaries do not suffer direct financial loss."); *Edmonson*, 725 F.3d at 415-16 ("Under 29 U.S.C. § 1109(a), ERISA provides that plans can recover . . . profit whether or not the plan suffered a financial loss."). Nor, by extension, is loss causation. "While the 'hypothetical prudent fiduciary' inquiry may . . . limit an award of damages against a fiduciary who fails to investigate but nonetheless makes a prudent investment," it does not "absolve defendants from *liability*" and therefore does not affect the availability of a disgorgement remedy. *DeFazio v. Hollister, Inc.*, 854 F. Supp. 2d 770, 800-01 (E.D. Cal. 2012).

To establish their entitlement to disgorgement, ERISA plaintiffs only need to make a prima facie showing that the fiduciary profited from the breach. *Martin*, 965 F.2d at 671. The burden then shifts to the breaching fiduciary to establish that some portion of the profits were not attributable to the breach. *Id.*; *Leigh I*, 727 F.2d at 138-39. Any doubts as to whether the fiduciary profited from plan assets should be resolved in favor of plaintiffs. *Leigh I*, 727 F.2d at 138-39.

Here, Plaintiffs introduced evidence (through Dr. Pomerantz's testimony) that Putnam and its affiliates gained $27.9 million in fees from the proprietary funds in the Plan, which equates to a present-day value of $37.3 million. JA–

2560-61. Since these are "profits . . . which have been made through use of assets of the plan by the fiduciary," 29 U.S.C. § 1109(a), Putnam is required to restore them to the Plan unless it can prove that they were not attributable to the breach. *See Martin*, 965 F.2d at 671; *Leigh*, 727 F.2d at 138-39.

B. The Propriety of Awarding Other Equitable or Declaratory Relief Does Not Depend on a Showing of Loss to the Plan

The purpose of ERISA's equitable relief provision is to prevent future violations, not merely to remedy past harms. *See* S. Rep. No. 93-127, at 35 (noting the enforcement provision "provide[s] both the Secretary and participants and beneficiaries with broad remedies for redressing or *preventing* [ERISA] violations" (emphasis added)); H.R. Rep. No. 93-533, at 17 (same). Accordingly, an absence of provable losses to the Plan is also not a valid basis for denying equitable relief, such as injunctive relief or declaratory relief. *See Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1148 (3d Cir. 1993) ("ERISA does not require that harm be shown before a plan participant is entitled to an injunction . . . .").

"ERISA imposes a high standard on fiduciaries, and serious misconduct that violates statutory obligations is sufficient grounds for a permanent injunction." *Beck v. Levering*, 947 F.2d 639, 641 (2d Cir. 1991). The district court's order left the status quo intact and allows Defendants to continue breaching their duties in perpetuity. That is inconsistent with ERISA's purpose of protecting plan

participants. *See Varity*, 516 U.S. at 513 ("ERISA's basic purposes favor a reading of the *third* subsection [of § 1132(a)] that provides the plaintiffs with a remedy.").

V. THE DISTRICT COURT ERRED IN RULING AGAINST PLAINTIFFS ON THEIR PROHIBITED TRANSACTION CLAIMS

Finally, the district court also erred in ruling against Plaintiffs on their prohibited transaction claims prior to trial. Section 406 of ERISA (29 U.S.C. § 1106) supplements a fiduciary's duty of loyalty "by categorically barring certain transactions deemed 'likely to injure the pension plan.'" *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 241-42 (2000) (quoting *Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993)). These *per se* prohibited transactions fall into two categories: subsection (a) prohibits certain transactions with parties-in-interest, while subsection (b) broadly prohibits transactions with plan fiduciaries. 29 U.S.C. § 1106(a)-(b).

The pertinent provisions for purposes of this appeal are 29 U.S.C. §§ 1106(a)(1)(C) and 1106(b)(3).[14] The former provision provides that a fiduciary shall not "engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . furnishing of goods, services, or facilities between the plan and a party in interest." 29 U.S.C. § 1106(a)(1)(C). The latter provision provides that a fiduciary shall not "receive any consideration for his own

---

[14] The District Court found that certain other sections of the statute do not apply (specifically §§ 1106(a)(1)(D) and 1106(b)(1)). *See* ADD–11-15. Plaintiffs do not challenge those rulings on appeal.

personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." *Id.* § 1106(b)(3).

The district court found that both of these statutory provisions apply in this case. However, it ruled that Defendants were saved by two prohibited transaction exemptions. Specifically, the district court ruled that the "reasonable compensation" exemption in § 1108(b)(2) and (c)(2) saved Defendants from liability for Plaintiffs' claim under § 1106(a)(1)(C), ADD–15-19, and that PTE 77-3 saved Defendants from liability for Plaintiffs' claim under § 1106(b)(3), ADD–22-28. Both of these rulings were erroneous, particularly given that Defendants bear the burden of proof on these exemptions.[15]

A. Putnam's Contributions to the Plan Are Irrelevant to Plaintiffs' Prohibited Transaction Claim Under § 1106(b)(3)

The most egregious of these errors was the district court's ruling with respect to Plaintiffs' claim under 29 U.S.C. § 1106(b)(3). As the district court acknowledged, there is no "reasonableness defense" under § 1108 to a prohibited transaction claim under § 1106(b). ADD–21-22; *see also Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Mich.*, 751 F.3d 740, 750-51 (6th Cir. 2014); *Nat'l Sec. Sys., Inc. v. Iola*, 700 F.3d 65, 93-96 (3d Cir. 2012); *Patelco Credit Union v. Sahni*,

[15] Prohibited transaction exemptions are affirmative defenses upon which defendants bear the burden of proof. *See Glass Dimensions, Inc. Profit Sharing Plan & Trust v. State St. Bank & Trust Co.*, 290 F.R.D. 11, 16 & n.18 (D. Mass. 2013) (citing *Braden*, 588 F.3d at 601); *Howard*, 100 F.3d at 1488.

262 F.3d 897, 910-11 (9th Cir. 2001). This is evident from the language of the statute. Although § 1106(**a**) contains an express exemption for transactions permitted under § 1108, *see* 29 U.S.C. § 1106(a) ("Except as provided in section 1108 . . . ."), § 1106(**b**) does not contain a similar exemption. Accordingly, the only possible defense to Plaintiffs' prohibited transaction claim under § 1106(b)(3) is PTE 77-3, the "Class Exemption Involving Mutual Fund In-House Plans." *See* 42 Fed. Reg. 18,734 (April 8, 1977), ADD–86-87.

In order to qualify for this exemption, an investment company such as Putnam must meet four conditions. The fourth condition (condition (d)) requires:

> (d) All other dealings between the plan and the investment company, the investment adviser or principal underwriter for the investment company, or any affiliated person of such investment adviser or principal underwriter, are on a basis *no less favorable to the plan than such dealings are with other shareholders* of the investment company.

Id. (emphasis added), ADD–87.

Here, the case-stated record was clear that Putnam did not treat the Plan on par with other shareholders because it offered revenue sharing rebates to other plans (and the recordkeepers of other plans) in connection with Y shares of mutual funds that were not made available to the Putnam Retirement Plan or the recordkeeper for the Plan. As the district court noted in its opinion:

> Putnam currently pays revenue sharing of up to twenty-five basis points in connection with class Y shares of Putnam mutual funds held by third party plans, and has paid revenue sharing in that same range since 2009. From 2009 to the present, Putnam has not made revenue

> sharing payments to the Plan or the Plan's recordkeeper, Great-West, in connection with Y shares of Putnam mutual funds held by the Plan. It is undisputed that the Plan does not receive revenue sharing payments from Putnam entities.

ADD–10 (internal citations omitted). The end result of this was that "Plan participants effectively paid higher expenses for the funds relative to other non-Plan shareholders who received revenue sharing rebates." ADD–23.[16]

Incredibly, however, the district court found that Putnam still treated the Plan "no less favorabl[y]" than other plans, and therefore qualified for PTE 77-3, because Putnam made discretionary employer contributions to participants' accounts. *See* ADD–25-28. This ruling is utterly without support, both from a legal and factual standpoint.

Under settled principles of trust law, a trustee cannot set off the amount of its gifts to a trust against its liability for breach. *See Nedd*, 556 F.2d at 213-14. To hold otherwise would eviscerate the very protections that ERISA is intended to provide, as almost all employers that offer 401(k) plans contribute to them.

Moreover, even if the law were otherwise, the contributions that Putnam made to employee 401(k) accounts were not gifts; they were compensation. JA–1917. The company's discretionary contributions were set to the level deemed

[16] "Expense[s] Net of Revenue Sharing" must be reviewed for purposes of making comparisons; indeed, this is exactly what the Plan's recordkeeper (Great-West) did when comparing the expenses of Putnam's target date funds with other funds in the market. *See* JA–772-74; JA–1123-24.

"competitively necessary" to attract and retain talented employees in a "war for talent." JA–938-39; JA–948; JA–1051; JA–5884; JA–5895. Putnam did not contribute more than necessary to the Plan; in fact, Putnam contributed 24% to 31% *less* than its competitors. JA–1052; JA–5906. Accordingly, Putnam's discretionary contributions to the Plan do not excuse its unlawful conduct. Indeed, Mr. Mullen (the former chair of the Investment Committee) admitted that the employer contributions and other benefits Putnam voluntarily provided did not lessen Putnam's legal duties with respect to the Plan. JA–1965-67.

The "totality of the circumstances" standard cited by the district court has no place in a prohibited transaction analysis, which is specific to the transaction at issue. Regardless, it does not allow Defendants to avoid liability for unlawful conduct by pointing to unrelated Plan features or decisions. *See Tussey II*, 850 F.3d at 957 ("The ABB fiduciaries stress that there was a great deal of other evidence too, and some of it showed them acting against Fidelity's interests in various ways. . . . However, their examples all relate to other investment decisions, not the Wellington–Freedom swap. The fact the ABB fiduciaries apparently did not always favor Fidelity as much as they could, or seize every opportunity to send Fidelity more of the participants' money, does little to undermine [liability] in this case."). As this Court has stated, and as the DOL regulations make clear, the

relevant inquiry is specific to the circumstances surrounding the *particular transaction*. *See Bunch*, 555 F.3d at 6; 29 C.F.R. § 2250.404a–1(b)(1)(i).[17]

As noted above, decisions regarding plan contribution levels are separate and independent "settlor" decisions, not fiduciary decisions. *See supra* at 48-49. Accordingly, employer contributions have no bearing on whether Plan fiduciaries have complied with ERISA's prohibited transaction proscriptions and any associated exemptions. This is not a valid defense to Plaintiffs' prohibited transaction claim under 29 U.S.C. § 1106(b)(3), and in the absence of any other viable exemption, the district court should have entered judgment in favor of Plaintiffs—not Defendants—on this claim.

B. Putnam's Compensation Was Not Reasonable As a Matter of Law, as the District Court Wrongly Found for Purposes of Plaintiffs' Claim Under § 1106(a)(1)(C)

The district court also erred in its disposition of Plaintiffs' other prohibited transaction claim under 29 U.S.C. § 1106(a)(1)(C). Specifically, the district court erred in finding that Defendants qualified for the "reasonable compensation" exemption in § 1108(b)(2) and (c)(2). Although this exemption is available for claims under § 1106(a) (unlike claims under § 1106(b)), the district court's analysis of whether the exemption applied in this case suffered from several flaws.

---

[17] *Accord In re Gen. Growth Props., Inc.*, 2010 WL 1840245, at *6 (N.D. Ill. May 6, 2010) ("When evaluating whether a fiduciary has fulfilled its role or not, a court must look to the totality of the circumstances *concerning the investment decision*." (emphasis added)).

First and foremost, the district court gave no consideration in its "reasonable compensation" analysis to the fact that Putnam failed to offer the Plan the same revenue sharing rebates that it offered to other Plans on Y shares of Putnam mutual funds. As noted above, this meant that the Putnam Retirement Plan paid higher fees than other plans for the same mutual fund shares. This was inherently ***un***reasonable, and should have disqualified Defendants from relying on the reasonable compensation exemption.

Second, the investment management fees charged to the Plan for Putnam's mutual funds were substantially higher than the average investment management fee charged to similarly-sized plans for comparable funds. *See* JA–88-95. Contrary to what the district court suggested in its opinion, these fee differences were *not* based solely on comparisons to "Vanguard passively-managed index funds' average fees." ADD–18. Rather, these comparisons were to plan averages based on Investment Company Institute ("ICI") data that included all types of funds. JA–88-91. Although Plaintiffs presented certain other comparisons *in addition* to the comparisons to ICI averages (including comparisons to Vanguard index funds and comparisons to CITs), those comparisons were broken out separately. As Dr. Pomerantz explained in his Expert Report:

> On average, the Putnam fees, averaging 84 bps [basis points] over the period shown, were 47% higher than the fees in the ICI scenario, 538% higher than the Vanguard index fund scenario, and 1,557% higher than the CIT alternatives. This demonstrates that no matter

> what fee comparison is used—the average for similarly-sized plans, the fees charged by Vanguard, or the fees charged by the CITs that the [Investment Committee] recently selected for inclusion in the Plan—the Plan's participants paid materially higher fees than they should have.

JA–93.

Finally, the district court erred in ruling that the investment management fees for the funds in the Plan were reasonable "as [a] matter of law" without regard to the cost of comparable funds. *See* ADD–19. In support of its ruling, the district court cited certain decisions (which dealt with breach of fiduciary duty claims as opposed to prohibited transactions claims), which it deemed to establish a reasonable range of fees. *See* ADD–17 (citing *Hecker v. Deere & Co*, 556 F.3d 575, 586 (7th Cir. 2009); *Renfro v. Unisys Corp.*, 671 F.3d 314, 319 (3d Cir. 2011); *Loomis v. Exelon Corp.*, 658 F.3d 667, 669-70 (7th Cir. 2011); *Tibble v. Edison Int'l*, 729 F.3d 1110, 1135 (9th Cir. 2013), *vacated on other grounds*, 135 S. Ct. 1923 (2015)). However, the District Court vastly overread these opinions, which were limited to their facts. *See Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014) (rejecting range of fees cited by Defendants because those cases "are inevitably fact intensive, and the courts in the cited cases carefully limited their decisions to the facts presented").[18] There is no *per se* acceptable range of fees

---

[18] Indeed, the Seventh Circuit issued a subsequent opinion in *Hecker* that expressly stated that its original opinion "was tethered closely to the facts before the court." *See Hecker v. Deere & Co.*, 569 F.3d 708, 711 (7th Cir. 2009).

under ERISA. As the Supreme Court has noted, "the appropriate inquiry will necessarily be context specific." *Dudenhoeffer*, 134 S. Ct. at 2471. Accordingly, "[t]he actual test of whether fees are excessive does not involve a categorical benchmark of whether the fees are above a certain amount" and "depends on the alternatives available." *Goldenberg v. Indel, Inc.*, 741 F. Supp. 2d 618, 636 (D.N.J. 2010).[19]

Here, the district court failed to give any consideration in its opinion to how the cost of Putnam's funds compared to the cost of alternative funds in the marketplace. Accordingly, its analysis was incomplete. *See Kruger v. Novant Health, Inc.*, 131 F. Supp. 3d 470, 475-76 (M.D.N.C. 2015) (distinguishing "range of fees" cases because "Plaintiffs have alleged these fees are excessive, not by virtue of their percentage as in *Hecker* and its progeny, but because there are different versions of the same investment vehicle available to the Plan that have lesser fees").

CONCLUSION

For the above reasons, the district court's order on Plaintiffs' prohibited transaction claims should be reversed, and its subsequent order on Plaintiffs' breach of fiduciary duty claims and other claims should be vacated.

---

[19] In light of the context-specific nature of the inquiry, it was hardly remarkable (as the district court seemed to believe) that "Plaintiffs cite[d] no relevant case holding that [specific] ranges or averages are unreasonable as a matter of law." ADD–19.

Dated: November 1, 2017

Respectfully submitted,

NICHOLS KASTER, PLLP

/s/ Kai H. Richter
James H. Kaster, 1180486
Paul J. Lukas, 1148844
Kai H. Richter, 1148843
Carl F. Engstrom, 1180487
Jacob T. Schutz, 1180488
Eleanor E. Frisch, 1181160
4600 IDS Center, 80 South Eighth Street
Minneapolis, Minnesota 55402
Office: (612) 256-3200

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(g)(1)

This brief complies with Federal Rules of Appellate Procedure 32(a)(5) and (7), as modified by this Court's order dated September 14, 2017 allowing Plaintiffs-Appellants to file an oversized brief containing no more than 19,500 words. The brief was prepared in Microsoft Word, using Times New Roman 14-point font. According to the word count function, the word count, including footnotes and headings—from the Statement of Jurisdiction through the brief's conclusion—is 19,402 words.

/s/ Kai H. Richter
Kai H. Richter

ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE AND FILING

I, KAI H. RICHTER, declare that:

I am a resident of the State of Minnesota, over the age of eighteen years, and not a party to this action. My business address is Nichols Kaster, PLLP, 4600 IDS Center, 80 South 8th Street, Minneapolis, Minnesota 55402. On November 1, 2017, I caused the service and filing of the following document:

APPELLANTS' BRIEF AND ADDENDUM

I effectuated service and filing via the electronic filing system of the U.S. Court of Appeals for the First Circuit.

I further caused the service and filing of the following document:

THE PARTIES' JOINT APPENDIX

I effectuated service and filing of this document by sending true and correct copies of the above via overnight next business day delivery service addressed to the U.S. Court of Appeals for the First Circuit and to the following counsels:

James R. Carroll
Eben P. Colby
Michael S. Hines
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
500 Boylston Street
Boston, MA 02116

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed this 1ST day of November, 2017, in Minneapolis, Minnesota.

/s/ Kai H. Richter
Kai H. Richter

NO. 17-1711

In the
United States Court of Appeals
for the First Circuit

JOHN BROTHERSTON, individually and as representative of a class of similarly situated persons, and on behalf of the Putnam Retirement Plan; JOAN GLANCY, individually and as representative of a class of similarly situated persons, and on behalf of the Putnam Retirement Plan,

Plaintiffs-Appellants,

v.

PUTNAM INVESTMENTS, LLC, PUTNAM BENEFITS OVERSIGHT COMMITTEE, PUTNAM BENEFITS INVESTMENT COMMITTEE; ROBERT REYNOLDS; PUTNAM INVESTMENT MANAGEMENT, LLC; PUTNAM INVESTOR SERVICES, INC.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
Case No. 15-13825-WGY, The Honorable William G. Young

APPELLANTS' ADDENDUM

NICHOLS KASTER, PLLP
James H. Kaster (#1180486)
Paul J. Lukas (#1148844)
Kai H. Richter (#1148843)
Carl F. Engsrom (#1180487)
Jacob T. Schutz (#1180488)
Eleanor E. Frisch (#1181160)
4600 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 256-3200

Attorneys for Appellants

2017 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

Appellants' Addendum

Table of Contents

Findings of Fact, Rulings of Law, and Order for Judgment, *Brotherston, et al. v. Putnam, et al.*, Case No. 1:15-cv-13825-WGY (D. Mass. March 30, 2017) (ECF No. 158)....ADD 1

Findings of Fact, Rulings of Law, & Order, *Brotherston, et al. v. Putnam, et al.*, Case No. 1:15-cv-13825-WGY (D. Mass. June 19, 2017) (ECF No. 202)...ADD 34

Judgment in a Civil Case, *Brotherston, et al. v. Putnam, et al.*, Case No. 1:15-cv-13825-WGY (D. Mass. June 19, 2017) (ECF No. 203) ....ADD 69

29 USC § 1104....ADD 70

29 USC § 1106....ADD 73

29 USC § 1109....ADD 74

29 USC § 1132....ADD 75

PTE 77-3 (42 Fed. Reg. 18,734)....ADD 83

Restatement (Third) of Trusts § 100....ADD 88

Excerpt from Trial Exhibit 001, The Putnam Retirement Plan Amended and Restated Effective as of January 1, 2010.... ADD 105

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN BROTHERSTON and JOAN GLANCY, individually and as representatives of a class of similarly situated persons, and on behalf of the Putnam Retirement Plan, Plaintiffs, v. PUTNAM INVESTMENTS, LLC, PUTNAM INVESTMENT MANAGEMENT, LLC, PUNTNAM INVESTOR SERVICES, INC., the PUTNAM BENEFITS INVESTMENT COMMITTEE, the PUTNAM BENEFITS OVERSIGHT COMMITTEE, and ROBERT REYNOLDS, Defendants.	)	CIVIL ACTION NO. 15-13825-WGY

YOUNG, D.J. March 30, 2017

FINDINGS OF FACT, RULINGS OF LAW,
AND ORDER FOR JUDGMENT

I. INTRODUCTION

On November 13, 2015, John Brotherston ("Brotherston") and Joan Glancy ("Glancy") (collectively, the "Plaintiffs"), individually and on behalf of a class of similarly situated persons and on behalf of the Putnam Retirement Plan ("Plan"), brought this class action under section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), against the

Plan's fiduciaries: Putnam Investments, LLC, Putnam Investment Management, LLC, Putnam Investor Services, Inc., the Putnam Benefits Investment Committee, the Putnam Benefits Oversight Committee, and Putnam's Chief Executive Officer Robert Reynolds (collectively, the "Defendants"), for breach of the fiduciary duties of loyalty and prudence in violation of 29 U.S.C. section 1104(a)(1)(A)-(B) (count I), prohibited transactions with a party in interest in violation of 29 U.S.C. section 1106(a)(1) (count II), prohibited transactions with a fiduciary in violation of 29 U.S.C. section 1106(b) (count III), failure to monitor fiduciaries in violation of 29 U.S.C. section 1109(a) (count IV), and other equitable relief based on ill-gotten proceeds in violation of 29 U.S.C. section 1132(a)(3) (count V). Second Am. Compl. ("SAC") ¶¶ 117-48, ECF No. 73.

On January 9, 2017, the parties filed cross-motions for summary judgment pursuant to Federal Rule of Civil Procedure 56(a), Pls.' Mot. Partial Summ. J. Modification Class Certification Order, ECF No. 93; Defs.' Mot. Summ. J., ECF No. 89, along with supporting memoranda of law and statements of facts, Mem. Law Supp. Pls.' Mot. Partial Summ. J. Modification Class Certification Order ("Pls.' Mem."), ECF No. 94; Pls.' Statement Undisputed Material Facts Supp. Pls.' Mot. Partial Summ. J. ("Pls.' Facts"), ECF No. 95; Mem. Law Supp. Defs.' Mot. Summ. J. ("Defs.' Mem."), ECF No. 90; Defs.' Statement Material

Facts ("Defs.' Facts"), ECF No. 91. On January 30, 2017, the parties filed memoranda in opposition to each other's motions for summary judgment, Mem. Law Opp'n Defs.' Mot. Summ. J. ("Pls.' Opp'n"), ECF No. 102; Defs.' Mem. Law Opp'n Pls.' Mot. Partial Summ. J. ("Defs.' Opp'n"), ECF No. 105, along with supplemental statements of facts, Pls.' Statement Material Facts Presenting Genuine Issue ("Pls.' Suppl. Facts"), ECF No. 103; Defs.' Resp. Pls.' Statement Undisputed Material Facts & Suppl. Statement Material Facts Dispute Opp'n Pls.' Mot. Partial Summ. J. ("Defs.' Suppl. Facts"), ECF No. 106. On February 13, 2017, the parties filed reply briefs. Reply Mem. Law Supp. Pls.' Mot. Partial Summ. J. Modification Class Certification Order ("Pls.' Reply"), ECF No. 112; Defs.' Reply Mem. Law. Supp. Mot. Summ. J. ("Defs.' Reply"), ECF No. 110. On that date, the Defendants also filed a new supplemental statement of material facts. Defs.' Resp. Pls.' Statement Material Facts Presenting Genuine Issue ("Defs.' Suppl. Facts II"), ECF No. 111. The Defendants submitted a supplemental brief on March 6, 2017. Defs.' Suppl. Br. Supp. Mot. Summ. J. Counts II and III ("Defs.' Suppl. Reply"), ECF No. 124. The Plaintiffs also submitted a supplemental brief on March 8, 2017. Pls.' Resp. Defs.' Suppl. Br. Supp. Mot. Summ. J. Counts II and III ("Pls.' Suppl. Reply"), ECF No. 127.

After carefully reviewing the record and hearing oral arguments, the Court concluded that there were genuine issues of material fact in dispute as to counts I, IV, and V, as well as the Defendants' fifth affirmative defense. On March 3, 2017, the Court issued an order denying summary judgment on these counts. Order, ECF No. 120. The Court also denied the Plaintiffs' request for modification of the class certification order. Id.

By agreement of the parties, the Court held a case stated hearing on February 28, 2017 on counts II and III.[1] It now makes the following findings of fact and rulings of law.

II. FINDINGS OF FACT

A. The Parties

Putnam Investments, LLC ("Putnam") is an asset management company located in Boston, Massachusetts. Defs.' Facts ¶ 1. Putnam is the sponsor of Plan. Pls.' Facts ¶ 11; Defs.' Facts ¶ 1. Putnam, through its Chief Executive Officer ("CEO") and Board of Directors, has the authority to amend any or all provisions of the Plan as well as to select the investment

[1] The case stated procedure allows the Court to render a judgment based on a largely undisputed record in cases where there are minimal factual disputes. In its review of the record, "[t]he [C]ourt is . . . entitled to 'engage in a certain amount of factfinding, including the drawing of inferences.'" TLT Constr. Corp. v. RI, Inc., 484 F.3d 130, 135 n.6 (1st Cir. 2007) (quoting United Paperworkers Int'l Union Local 14 v. International Paper Co., 64 F.3d 28, 31 (1st Cir. 1995)).

options available to participants of the Plan. Pls.' Facts ¶ 13; Defs.' Suppl. Facts ¶ 13.

Brotherston is a Westford, Massachusetts resident and a participant in the Plan. SAC ¶ 12; Defs.' Facts ¶ 8. From November 13, 2009 to the present ("Relevant Period"), Brotherston has invested in over thirty different investment options offered within the Plan. SAC ¶ 12; Defs.' Facts ¶ 9. Glancy is a Peabody, Massachusetts resident and was a participant in the Plan until the first quarter of 2010. SAC ¶ 13; Defs.' Facts ¶ 16. Glancy invested in fourteen funds offered by the Plan from November 2009 through March 2010. SAC ¶ 13; Defs.' Facts ¶ 17.

The Plan is a 401(k) employee pension, defined-contribution plan and is open to eligible current and former employees of Putnam and its wholly-owned domestic subsidiaries. Pls.' Facts ¶ 12; Defs.' Facts ¶ 25; Defs.' Suppl. Facts ¶ 12. Plan participants can invest a percentage of their pre-tax earnings, and Putnam matches contributions up to five percent of the participant's salary. Defs.' Facts ¶ 47.

Putnam Investment Management, LLC ("Putnam Management"), a wholly-owned subsidiary of Putnam, provides investment management services to Putnam mutual funds. SAC ¶ 24; Pls.' Facts ¶¶ 28-29; Defs.' Facts ¶ 2. Putnam Management is a participating employer in the Plan. Pls.' Facts ¶ 29; Defs.'

Suppl. Facts ¶ 29. Putnam Investor Services, Inc. ("Putnam Services") is a wholly-owned subsidiary of Putnam and provides investor servicing functions to Putnam mutual fund investors. Defs.' Facts ¶ 3. Putnam Services is a participating employer in the Plan. Pls.' Facts ¶ 32; Defs.' Suppl. Facts ¶ 32.

The management of the Plan is assigned to a set of committees. Pls.' Suppl. Facts ¶ 4; Defs.' Suppl. Facts II ¶ 4. The Putnam Benefits Investment Committee ("PBIC") is responsible for controlling and managing the investments made available by the Plan. Pls.' Facts ¶ 15; Defs.' Suppl. Facts ¶ 15. The Putnam Benefits Administration Committee ("PBAC") establishes procedures for Plan participants to determine the investment of their individual accounts. Defs.' Suppl. Facts ¶ 15. Both PBAC and PBIC are overseen by the Putnam Benefits Oversight Committee ("PBOC"), which has the authority to appoint and remove PBIC members. Pls.' Facts ¶ 16; Defs.' Suppl. Facts ¶ 16. PBOC members are appointed by and report to Putnam senior management. Pls.' Facts ¶ 17; Defs.' Suppl. Facts ¶ 17. Robert Reynolds is Putnam's CEO. Pls.' Facts ¶ 22.

B. Challenged Transactions and Fees

The Plan invests predominately in mutual funds owned and managed by Putnam. Pls.' Facts ¶ 26; Defs.' Suppl. Facts ¶ 26. Between 2009 and 2015, over 85% of the Plan's assets were invested in Putnam mutual funds. Pls.' Facts ¶ 26; Defs.'

Suppl. Facts ¶ 26. These Putnam mutual funds pay management fees to Putnam from the assets of each mutual fund as compensation for the provision of investment management services and as reimbursement for certain investment management-related expenses. Pls.' Facts ¶ 28; Defs.' Suppl. Facts ¶ 28.

The Plan invests in Putnam mutual funds by acquiring two distinct classes of shares: Y shares and R6 shares. Pls.' Suppl. Facts ¶¶ 72-73; Defs.' Suppl. Facts II ¶¶ 72-73. At the end of 2009, the Plan owned Y shares in almost sixty Putnam mutual funds. Pls.' Facts ¶ 34; Defs.' Suppl. Facts ¶ 34. On July 2, 2012, Putnam introduced an R6 share class for twenty Putnam mutual funds, and converted these twenty funds from class Y to class R6 shares effective April 1, 2013. Pls.' Facts ¶ 35; Defs.' Suppl. Facts ¶ 35. By the end of 2015, the Plan had converted its investments in twenty-five Putnam mutual funds from Y shares to R6 shares, the lower cost option of the two classes of shares. Pls.' Facts ¶¶ 36-37; Defs.' Suppl. Facts ¶¶ 36-37.

Both classes of shares charge the same investment management fees. Pls.' Facts ¶ 37; Defs.' Suppl. Facts ¶ 37. The difference in expense ratios between the two classes of shares is explained, in part, by certain servicing fees charged by R6 shares that are lower than those charged by Y shares. Pls.' Facts ¶ 37; Defs.' Suppl. Facts ¶ 37. The expense

difference between both classes of shares is also attributable, in part, to the fact that Y shares of Putnam mutual funds offer additional fee payments to certain financial intermediaries. Pls.' Facts ¶ 38; Defs.' Suppl. Facts ¶ 38. These additional fees charged by Y shares are often, but not always, in the form of revenue sharing payments. Pls.' Facts ¶ 38; Defs.' Suppl. Facts ¶ 38.

Revenue sharing refers to the practice by which investment managers might opt to compensate certain financial intermediaries, like record-keepers, in recognition of services provided that the investment managers would otherwise have to perform themselves. Pls.' Facts ¶ 39; Defs.' Suppl. Facts ¶ 39. Whether revenue sharing payments are made is contingent on a negotiated agreement between investment managers and financial intermediaries. Pls.' Facts ¶ 43; Defs.' Suppl. Facts ¶ 43. Revenue sharing payments can be made in one of three ways: (i) the payments can be applied directly to administrative expenses; (ii) the payments can be deposited in a plan expense account from which administrative expenses are paid, with the leftover paid to the plan's participants; or (iii) payments can be allocated to participant accounts and administrative expenses paid some other way, such as pro rata or as a per-participant fee. Pls.' Facts ¶¶ 45-47; Defs.' Suppl. Facts ¶¶ 45-47.

Great-West Life & Annuity Insurance Company ("Great-West") is responsible for providing recordkeeping services to Putnam on behalf of the Plan. Pls.' Facts ¶¶ 50-51; Defs.' Suppl. Facts ¶¶ 50-51. Pursuant to the 2008 contract between Putnam and Great-West, Putnam would not pay revenue sharing fees to Great-West. Pls.' Facts ¶ 50; Defs.' Suppl. Facts ¶ 50. Instead, Great-West would receive a yearly adjustable recordkeeping fee of $38.54 per participant, billable directly to Putnam.[2] Engstrom Decl., Ex. 38, Putnam Retirement Plan Recordkeeping Agreement Effective July 30, 2008, at 17, ECF No. 97-38. In 2013, Great-West contacted Putnam inquiring about revenue sharing payments related to Putnam funds held within the Plan. Pls.' Facts ¶ 53; Defs.' Suppl. Facts ¶ 53. Putnam concluded

---

[2] At the beginning of the Relevant Period, TD Ameritrade paid Great-West an annual fee of six basis points of Plan assets held in the Plan's self-directed brokerage accounts. Hines Decl., Ex. 37, Great-West Retirement Services Fee Disclosure 14, ECF No. 92-39. Great-West also charged Plan participants a $50 annual per-account fee in connection with the Plan's self-directed brokerage accounts. Engstrom Decl., Ex. 38, Putnam Retirement Plan Recordkeeping Agreement Effective July 30, 2008, at 18, ECF No. 97-38. In 2013, Putnam and Great-West negotiated a new arrangement, whereby Putnam now pays the annual self-directed brokerage fee (up from $50 per account to $120) that was previously charged to Plan participants. Hines Decl., Ex. 54, Great-West Retirement Services Amendment No. 4 to Great-West Life & Annuity Insurance Co. Services Agreement 2, ECF No. 92-56. In addition, Great-West now pays the 0.06% fee it receives from TD Ameritrade into an unallocated Plan account to be used for Plan expenses or other Plan purposes. Hines Decl., Ex. 62, Great-West Retirement Services Fee Disclosure 2015, at 15, ECF No. 92-64.

that paying revenue sharing fees to Great-West would constitute a prohibited transaction under ERISA due to Great-West's affiliation with Putnam. Pls.' Facts ¶ 54; Defs.' Suppl. Facts ¶ 54.

Putnam currently pays revenue sharing of up to twenty-five basis points in connection with class Y shares of Putnam mutual funds held by third party plans, and has paid revenue sharing in that same range since 2009. Pls.' Facts ¶ 48; Defs.' Suppl. Facts ¶ 48. From 2009 to the present, Putnam has not made revenue sharing payments to the Plan or the Plan's record-keeper, Great-West, in connection with Y shares of Putnam mutual funds held by the Plan. Pls.' Facts ¶ 51; Defs.' Suppl. Facts ¶ 51. It is undisputed that the Plan does not receive revenue sharing payments from Putnam entities. Pls.' Facts ¶ 61; Defs.' Facts ¶¶ 53-54; Defs.' Suppl. Facts ¶ 61.

III. RULINGS OF LAW

The Plaintiffs claim that the payment of fees by Putnam mutual funds to Putnam constitutes a prohibited transaction under 29 U.S.C. section 1106 ("Section 1106"). SAC ¶¶ 124-134; Pls.' Mem. 13-14. Count II is brought under various subsections of Section 1106(a)(1), which provides in relevant part:

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . .
> (C) furnishing of goods, services, or facilities

> between the plan and party in interest;
> (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan.

29 U.S.C. § 1106(a)(1). Count III is brought under Section 1106(b), which provides in relevant part:

> A fiduciary with respect to the plan shall not--
> (1) deal with the assets of the plan in his own interest or for his own account . . .
> (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

29 U.S.C. § 1106(b). The Defendants advance three counterarguments: (i) the challenged transactions do not involve "assets of the plan," as required by Section 1106(a)(1)(D) and (b)(1), and therefore are not prohibited under ERISA; (ii) 29 U.S.C. section 1108 ("Section 1108") and Prohibited Transaction Exemption 77-3 ("PTE 77-3") specifically exempt these transactions from Section 1106's restrictions; and (iii) the Plaintiffs' prohibited transaction claims based on seventy-two investment options are barred by ERISA's three-year statute of limitations. Defs.' Mem. 14-18. The Court now makes the following rulings of law.

A. 29 U.S.C. § 1106(a)(1)(D) & (b)(1) and "Plan Assets"

Section 1106(a)(1)(D) and (b)(1) define certain prohibited transactions involving ERISA retirement plan assets. Section 1106(a)(1)(D) prohibits a fiduciary from effecting any transaction that constitutes a "transfer to, or use by or for

the benefit of a party in interest, of any assets of the plan." Section 1106(b)(1), in turn, prohibits a fiduciary from "deal[ing] with the assets of the plan in his own interest or for his own account." See Alves v. Harvard Pilgrim Health Care Inc., 204 F. Supp. 2d 198, 214 (D. Mass. 2002) (Saris, J.) (holding that "violations of 20 U.S.C. § 1106(b)(1) generally involve an ERISA fiduciary's use of plan assets for personal profit, gain or advantage"); see also Patelco Credit Union v. Sahni, 262 F.3d 897, 911 (9th Cir. 2001) (finding Section 1106(b)(1) violation where ERISA fiduciary marked up premiums, set administrative fees, and collected them himself from plan assets); Srein v. Soft Drink Workers Union, Local 812, 93 F.3d 1088, 1097-98 (2d Cir. 1996) (finding breach of Section 1106(b)(1) where insurer paid broker's commission out of ERISA reserve fund and withheld monies in reserve fund to extract concessions from plan that would benefit it in litigation with broker); Leigh v. Engle, 727 F.2d 113, 124 (7th Cir. 1984) (finding Section 1106(b)(1) violation where ERISA fiduciaries invested plan assets in firms involved in corporate control contests that the fiduciaries were involved in).

The First Circuit has erected some guideposts in construing whether assets are "plan assets" within the compass of Section 1106. In Merrimon v. Unum Life Insurance Co. of America, 758 F.3d 46, 56 (1st Cir. 2014), the court adopted the Department of

Labor's interpretation that "the assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law."[3] Applying this principle, the First Circuit recently adopted a narrow definition of "plan assets" for the purpose of enforcing fiduciary responsibilities under ERISA. In re Fidelity ERISA Float Litig., 829 F.3d 55, 62 (1st Cir. 2016) ("Cash held by a mutual fund is not transmuted into a plan asset when it is received by an intermediary whose obligation is to transfer it directly to a participant.").

The Defendants note that the challenged management and servicing fees are paid out of mutual fund assets rather than plan assets. Defs.' Mem. 14-15. The Plaintiffs do not contend otherwise. Pls.' Facts ¶¶ 28, 31. Relying on In re Fidelity, the Defendants argue that because cash held by mutual funds is not an "asset of the plan" -- only the shares of the mutual funds owned by the plan are plan assets within the scope of

[3] The Department of Labor has promulgated rules for determining what constitutes "plan assets." These regulations provide that "assets of the plan include amounts (other than union dues) that a participant or beneficiary pays to an employer, or amounts that a participant has withheld from his wages by an employer, for contribution . . . to the plan." 29 C.F.R. § 2510.3-102(a)(1). In terms of plan investments, such as in the mutual funds at issue here, "[g]enerally, when a plan invests in another entity, the plan's assets include its investment, but do not, solely by reason of such investment, include any of the underlying assets of the entity." 29 C.F.R. § 2510.3-101(a)(2).

Section 1106(a)(1)(D) and (b)(1) -- the payment of fees is not a prohibited transaction under Section 1106.

The Plaintiffs, in turn, attempt to distinguish In re Fidelity as applying narrowly to "float interest"[4] on cash paid out by the mutual fund upon redemption. Pls.' Opp'n 15 n.30. At the same time, the Plaintiffs argue that because the payment of management fees by Putnam mutual funds to Putnam reduced the value of Plan participants' shares, the payment of management fees constitutes "an indirect transfer of Plan assets to a party in interest." Pls.' Mem 13. The Plaintiffs contend that ERISA's overriding concern with protecting participants mandates a broad construction of "plan assets." Pls.' Opp'n 15. This position, however, runs squarely against the First Circuit's decision in In re Fidelity, which adopted a narrow, formal approach to identifying "plan assets" for the purposes of Section 1106. 829 F.3d at 62.[5] The Plaintiffs' argument that

---

[4] "Float interest" or "float income" refers to the interest earned on cash paid out by the mutual fund upon redemption of shares. See In re Fidelity, 829 F.3d at 59 n.5.

[5] The out-of-circuit case law that the Plaintiffs cite is given no weight in light of the First Circuit's express rejection of the principle on which those cases were decided. See Shirk v. Fifth Third Bancorp., No. 05-cv-049, 2008 WL 4449024, at *16-17 (S.D. Ohio Sept. 26, 2008) (applying Ninth Circuit's functional test established in Acosta v. Pacific Enterprises, 950 F.2d 611, 620 (9th Cir. 1991)); Merrimon, 758 F.3d at 57 (explicitly rejecting the Ninth Circuit's "functional approach" to determining what assets are "plan assets" for the purpose of Section 1106).

the management fees paid from the mutual fund reduce the value of the mutual fund shares owned by the Plan (which are plan assets) is, therefore, precluded by First Circuit case law.

The Court, finding that the management fees are not paid out of plan assets, rules that the Plaintiffs' prohibited transaction claim fails as matter of law under Section 1106(a)(1)(D) and (b)(1).

B. 29 U.S.C. § 1106(a)(1)(C) and Reasonableness of Fees

Section 1106(a)(1)(C) does not hinge on the challenged transaction involving "assets of the plan" but simply prohibits a "direct or indirect . . . furnishing of goods, services, or facilities between the plan and a party in interest." 29 U.S.C. § 1106(a)(1)(C). The Defendants, however, raise an affirmative defense under Section 1108, Defs.' Reply 12-13, which provides an exception to Section 1106 if the fees involved in the transaction are reasonable. In particular, Section 1108(b)(2) provides that Section 1106 does not apply to "[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." 29 U.S.C. § 1108(b)(2). Furthermore, Section 1108(c)(2) mandates that "[n]othing in section 1106 of this title shall be construed to prohibit any fiduciary from . . . receiving any reasonable

compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan." 29 U.S.C. § 1108(c)(2).

The next step of the analysis, therefore, is to examine whether the management fees Putnam mutual funds paid to Putnam were reasonable. The Defendants bear the burden of proof on the reasonableness of the challenged fees. See Golden Star, Inc. v. Mass Mut. Life Ins. Co., 22 F. Supp. 3d 72, 79 (D. Mass. 2014) (Saris, J.); Glass Dimensions, Inc. ex rel. Glass Dimensions, Inc. Profit Sharing Plan & Trust v. State Street Bank & Trust Co., 290 F.R.D. 11, 16 & n.18 (D. Mass. 2013) (Tauro, J.).

The record available to the Court indicates that the net expense ratios of the Plan's investments as of December 2011 ranged from 0.00% to 1.65%.[6] Hines Decl., Ex. 35, The Putnam Retirement Plan - 385008-01 Investment Performance as of 12/30/2011, at 2, ECF No. 92-37. The evidence does not show, and the parties do not argue, that the expense range was materially different during the Relevant Period. In fact, the

---

[6] The Defendants mistakenly claim that the range is 0% to 1.52%. Defs.' Facts ¶ 33. The Plaintiffs, in turn, question the low end of 0.00% as the accurate expense ratio for the Putnam Stable Value Fund. Pls.' Facts ¶ 61. Excluding Putnam Stable Value Fund from the analysis, the next "cheapest" Putnam mutual fund the Plan is invested in has a net expense ratio of 0.25%. Hines Decl., Ex. 35, The Putnam Retirement Plan -- 385008-01 Investment Performance as of 12/30/2011, at 2, ECF No. 92-37. That difference is not sufficient to change the conclusion the Court reaches below.

record reflects similar expense ratios in 2013 and 2015. Hines Decl., Ex. 37, Great-West Fee Disclosure 2013, at 9-13, ECF No. 92-39; Hines Decl., Ex. 62, Great-West Fee Disclosure 2015, at 10-14, ECF No. 92-64.

The Defendants argue that the fees associated with Putnam-affiliated funds are within a range that other courts have found reasonable as matter of law. Defs.' Mem. 9, 16 (citing Tibble v. Edison Int'l, 729 F.3d 1110, 1135 (9th Cir. 2013) (rejecting excessive fee arguments where expense ratios varied from 0.03% to more than 2.00%), vacated on other grounds, 135 S. Ct. 1923 (2015); Renfro v. Unisys Corp., 671 F.3d 314, 319, 327-28 (3d Cir. 2011) (rejecting excessive fee claims where expense ratios for the plan's investment options ranged from 0.1% to 1.21%); Loomis v. Excelon Corp., 658 F.3d 667, 669-70 (7th Cir. 2011) (rejecting excessive fee claims where expense ratios ranged from 0.03% to 0.96%); Hecker v. Deere & Co., 556 F.3d 575, 586 (7th Cir. 2009) (rejecting excessive fee arguments where expense ratios varied from 0.07% to just over 1%)).[7] Importantly, all of the Putnam mutual funds the Plan invested in were also offered to investors in the general public, therefore, their expense

[7] The Plaintiffs' reply that these are "old cases" and, therefore, carry little weight, is without merit. Tr. Case-Stated Hr'g 17, 22, 34, ECF No. 122. Fewer than ten years have passed since the oldest of the cited cases was decided. Case law does not become outdated at the same rate as smartphones.

ratios were "set against the backdrop of market competition." Hecker, 556 F.3d at 586. "The fact that it is possible that some other funds might have had even lower ratios is beside the point; nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)." Id.

The Plaintiffs argue that the management fees Putnam mutual funds paid to Putnam were materially higher on average than the investment fees paid by other funds. Pls.' Opp'n 16. On this point, the Plaintiffs rely on their expert, Dr. Steve Pomerantz, whose report compares Putnam mutual funds' average fees to Vanguard passively-managed index funds' average fees. Decl. Steve Pomerantz Supp. Pls.' Mot. Class Certification, Ex. 1, Expert Report Steve Pomerantz, Ph.D. 35-44, ECF No. 70-1. Dr. Pomerantz's comparison, however, is flawed. Vanguard is a low-cost mutual fund provider operating index funds "at-cost." See Amron v. Morgan Stanley Inv. Advisors Inc., 464 F.3d 338, 345 (2d Cir. 2006) (rejecting comparison of expense ratios between mutual fund and one Vanguard fund -- "a firm known for its emphasis on keeping costs low"). Putnam mutual funds operate for profit and include both index and actively managed investment. Dr. Pomerantz's analysis thus compares apples and oranges. Moreover, even if the Court were to accept the Plaintiffs' account of the range of Putnam mutual fund expense

ratios or average management fees, the Plaintiffs cite no relevant case law holding that such ranges or averages are unreasonable as matter of law.

Accordingly, the Court rules that Putnam mutual funds pay reasonable management fees to Putnam, and the Defendants have carried their burden on their Section 1108 defense with respect to the challenged transaction under Section 1106(a)(1)(C). Therefore, the Plaintiffs' prohibited transaction claim fails as matter of law under Section 1106(a)(1)(C).

C. 29 U.S.C. § 1106(b)(3)

The Plaintiffs further allege that the Defendants violated Section 1106(b)(3), which provides that "[a] fiduciary with respect to a plan shall not . . . receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." Pls.' Opp'n 14. Section 1106(b)(3) is not limited to transactions involving assets of the plan, but extends to transactions made "in connection with" assets of the plan. Courts have interpreted this distinction to mean that Section 1106(b)(3) covers a broader swath of conduct than 1106(b)(1). See Leimkuehler v. American United Life Ins. Co., 752 F. Supp. 2d 974, 986-87 (S.D. Ind. 2010) ("A violation of section 1106(b)(3) can occur in a less direct manner than self-interested dealing with plan assets proscribed in (b)(1).");

Haddock v. Nationwide Fin. Servs., Inc., 419 F. Supp. 2d 156, 171 (D. Conn. 2006) ("Violations of section 1106(b)(3) must relate to transactions involving assets of the plan, although the consideration received by the fiduciary need not itself constitute plan assets.").

It would seem, though, that such a broad reading of Section 1106(b)(3) would essentially swallow the remaining prohibited transactions provisions of Section 1106. Nevertheless, the First Circuit's ruling in In re Fidelity highlights the concerning nature of Putnam's structure, and sheds some light on the proper interpretation of 1106(b)(3). The intent of Section 1106 is to protect against the siphoning of plan assets by plan fiduciaries, hence the repeated reference to transactions involving "plan assets" in the prohibited transactions provisions of Section 1106(a)(1) and (b). See Vander Luitgaren v. Sun Life Assurance Co. of Can., 765 F.3d 59, 62 (1st Cir. 2014). Absent the protections of a broad reading of Section 1106(b)(3), a fiduciary could shield itself from liability under the First Circuit's narrow definition of plan assets by simply structuring its transaction to avoid paying fees to a related party, as Putnam has done here, directly out of plan assets. In an open-end mutual fund, shares are bought and sold directly from a fund, on demand, at their net asset value. Open-End Fund, Investopedia, http://www.investopedia.com/terms/o/open-

endfund.asp (last visited Mar. 28, 2017). Because the amount of management fees -- calculated as a percentage of assets invested in the mutual funds -- is directly tied to the purchase of plan assets, that transaction satisfies the "in connection with" requirement of section 1106(b)(3).

1. 29 U.S.C. § 1108

The parties dispute whether Section 1108's safe harbor applies to Section 1106(b) prohibited transactions. Pls.' Opp'n 16; Defs.' Opp'n 8-9. The majority of courts have ruled that there is no "reasonableness defense" against self-dealing transactions prohibited under Section 1106(b). See, e.g., Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Mich., 751 F.3d 740, 750 (6th Cir. 2014); National Sec. Sys., Inc. v. Iola, 700 F.3d 65, 93-96 (3d Cir. 2012); Patelco, 262 F.3d at 910-11. But see Harley v. Minnesota Mining & Mfg. Co., 284 F.3d 901, 908-09 (8th Cir. 2002) (granting summary judgment in light of uncontroverted evidence that the challenged compensation was reasonable, stating "the plain language of [Section] 1108(c)(2) sensibly insulates the fiduciary from liability if the compensation paid was reasonable"). These courts rely on the Department of Labor's implementing regulations for that conclusion. In particular, the regulations state that "Section [1108](b)(2) of [ERISA] exempts from the prohibitions of section [1106](a) of the Act payment by a plan to a party in interest,

including a fiduciary, for office space or any service," 29 C.F.R. § 2550.408b-2 (emphasis added). Given the weight of such persuasive legal authority, the Court adopts the majority approach to Section 1108 and holds that the Defendants may not raise a reasonableness defense to the Section 1106(b)(3) claim.

2. PTE 77-3

The Defendants further assert an affirmative defense under PTE 77-3, which exempts transactions that otherwise fall within Section 1106's prohibition. Defs.' Opp'n 6. PTE 77-3 states that Section 1106 does not apply to plans investing in mutual funds offered by the plan sponsor or affiliate where four conditions are met. Class Exemption Involving Mutual Fund In-House Plans Requested by the Investment Company Institute, 42 Fed. Reg. 18,734 (Apr. 8, 1977). The Plaintiffs challenge only PTE 77-3(d), which requires:

> All other dealings between the plan and the investment company, the investment adviser or principal underwriter for the investment company, or any affiliated person of such investment adviser or principal underwriter, are on a basis no less favorable to the plan than such dealings are with other shareholders of the investment company.

Id. at 18,735.

The Plaintiffs first contend that the requirements of PTE 77-3 are not satisfied because Putnam made revenue sharing payments in connection with Y shares of Putnam mutual funds to third-party record-keepers, who rebated part of the revenue

sharing payments back to third-party plans. Pls.' Mem. 18; Pls.' Reply 16. In untangling the elaborate facts of this case, it becomes clear that the thrust of the Plaintiffs' prohibited transaction claim is that Putnam's failure to give Plan participants a revenue sharing rebate violates Section 1106. Pls.' Suppl. Reply 5. The result, the Plaintiffs contend, is that Plan participants effectively paid higher expenses for the funds relative to other non-Plan shareholders who received revenue sharing rebates. Id.

It is undisputed, and various Form 5500s from third-party retirement plans show, that Putnam made revenue sharing payments to third-party record-keepers. Defs.' Suppl. Facts ¶ 48. The record also clearly shows that at least in some cases, revenue sharing payments from Putnam were rebated, at least in part, back to the other plans' participants.[8] See Engstrom Decl., Exs.

---

[8] It is not clear, however, how often these revenue sharing payments were rebated back to the third-party plans. The fact that many third-party record-keepers receive revenue sharing from Putnam alone does not place Putnam's Plan participants at disadvantage. Rather, the Plaintiffs' argument requires that the revenue sharing payments be rebated back to third-party plan participants. For example, Convergex's Form 5500 shows that Putnam made revenue sharing payments of 0.25% to Convergex's record-keeper, Engstrom Decl., Ex. 32, at 7, ECF No. 97-32, and further reflects an entry of negative $71,712 under compensation paid to the record-keeper by the plan, id. at 6, suggesting a refund of revenue sharing payments to the Convergex Plan in that amount, Pls.' Suppl. 9. At the same time, ELGA Credit Union's Form 5500, which also reflects revenue sharing of 0.25% paid by Putnam, shows a positive $2,725 of compensation paid to the record-keeper by the plan, which suggests no rebate. Engstrom

30-35, ECF Nos. 97-30-97-35. While the parties agree on these facts, they adopt significantly different interpretations of PTE 77-3. There is little case law discussing PTE 77-3 in any depth. The only court to do so interpreted PTE 77-3(d) as a reasonableness requirement mirroring that found in Section 1108, but did not discuss the scope of the exemption. See Krueger v. Ameriprise Fin., Inc., No. 11-cv-02781 (SRN/JSM), 2012 WL 5873825, at *17 (D. Minn. Nov. 20, 2012). The Plaintiffs characterize PTE 77-3(d) narrowly as requiring the Defendants to "prove that not a single third-party retirement plan received more favorable treatment than the Plan due to revenue sharing from Putnam." Pls.' Suppl. Reply 5. The Defendants respond that PTE 77-3(d) does not apply to the challenged revenue sharing arrangements because they are not "dealings" within the meaning of the exemption, and in the alternative, that PTE 77-3(d) is satisfied because plan participants have received discretionary contributions far in excess of any rebate that the Plaintiffs are allegedly owed. Defs.' Opp'n 8; Defs.' Suppl. Reply 3-4. In essence, the Defendants focus not on the individual rebate transactions, but rather on the net position

---

Decl., Ex. 34, at 6, ECF No. 97-34. The same ELGA document shows that Putnam was not the only fund that paid revenue sharing to the ELGA Plan. Id. at 7. The record therefore shows that, contrary to the Plaintiffs' assertion, some but not all third-party plans received revenue sharing rebates.

of the Plan participants vis-à-vis Putnam, as compared to third-party plan participants.

The Defendants first advance the argument that revenue sharing payments are not "dealings" within the meaning of the exemption because Putnam has no input in the amount of the rebate that is negotiated between third-party plans and their record-keepers. Defs.' Opp'n 8; Defs.' Suppl. Reply 3-4. There is no basis for such a narrow reading of the exemption. The Defendants' argument also plainly ignores the fact that the Plan sponsor, its record-keeper, and the investment manager are all Putnam entities. While it may be true that Putnam is not involved in determining the rebate negotiated between third-party bookkeepers and the plans they service, Putnam certainly is in the position to determine whether to give a rebate to its <u>own</u> plan participants. To allow Putnam to make revenue sharing payments to third-party record-keepers, then disclaim its involvement in the rebate transactions for the purposes of PTE 77-3, would undermine the exemption's protections against self-dealing. Indeed, such a rule would yield an untenable result, as any fiduciary could turn a blind eye to third-party dealings that place its own plan participants in an unfavorable position.

The Defendants' second argument is that PTE 77-3(d) is satisfied because Putnam made a total of $69.98 million in voluntary payments to Plan participants over the Relevant

Period. Defs.' Facts ¶ 46. With respect to the class representatives, Putnam made voluntary contributions of $207,501.19 to Glancy, id. ¶ 18, and $116,391.82 to Brotherston, id. ¶ 10. The Plaintiffs reply that the discretionary payments are irrelevant to PTE 77-3 because the fourth condition of the exemption "relates to how the Plan is treated as a shareholder compared to other shareholders," and the voluntary contributions are made to participants' accounts based on their status as employees, not shareholders. Pls.' Suppl. Reply 6. This argument appears to draw a distinction without a difference. It is undisputed that the Plan receives discretionary payments from Putnam to its participants' accounts that other shareholders clearly do not receive. Defs.' Facts ¶ 46. Indeed, a plain reading of "all other dealings" requires that the Court examine the totality of the economic relationship between the investment manager and the Plan participants in order to determine whether the fiduciary has placed its own Plan investors in an inferior net position relative to third-party investors.

This interpretation accords with the approach taken in this Circuit with respect to enforcing a fiduciary's duties under 29 U.S.C. section 1104, which courts review "in light of 'the totality of the circumstances.'" Kenney v. State St. Corp., Civil Action No. 09-10750-DJC, 2011 WL 4344452, at *3 (D. Mass. Sept. 15, 2011) (Casper, J.) (quoting Bunch v. W.R. Grace & Co.,

555 F.3d 1, 7 (1st Cir. 2009)). Furthermore, this broader construction of PTE 77-3(d) more faithfully respects the desire of Congress "to ensure that plan funds are administered equitably, and that no one party, not even plan beneficiaries, should unjustly profit."[9] Harris v. Harvard Pilgrim Health Care, Inc., 208 F.3d 274, 279 (1st Cir. 2000) (quoting Martz v. Kurtz, 907 F. Supp. 848, 856 (M.D. Pa. 1995)); see also Provident Life & Accident Ins. Co. v. Waller, 906 F.2d 985, 993 (4th Cir. 1990) (finding strong statutory support for fashioning common law rule of unjust enrichment allowing employers to recover erroneous payments to pension funds); Carl Colteryahn Dairy, Inc. v. Western Pa. Teamsters & Emp'rs Pension Fund, 847 F.2d 113, 122 (3d Cir. 1988) (same). Allowing Plan participants to recover for the lack of revenue sharing rebate when they have already profited from Putnam's discretionary contribution to the Plan would allow the Plan participants to be unjustly enriched.[10]

[9] Different courts have held that Congress, in enacting ERISA, intended to give federal courts the authority to develop a body of federal common law to supplement the statute's express provisions whenever "necessary to effectuate the purposes of ERISA." Harris v. Harvard Pilgrim Health Care, Inc., 208 F.3d 274, 279 (1st Cir. 2000); see also Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987); United McGill Corp. v. Stinnett, 154 F.3d 168, 171 (4th Cir. 1998); Bollman Hat Co. v. Root, 112 F.3d 113, 118 (3d Cir. 1997); Weiner v. Klais & Co., 108 F.3d 86, 92 (6th Cir. 1997).

[10] The record reflects that Putnam opted not to pay revenue sharing to Great-West as part of a risk-averse strategy to avoid litigation, fearing that such payment might be challenged as an ERISA violation given Great-West's affiliation with Putnam. Hines

Accordingly, this Court finds that the PTE 77-3 requirement that Putnam's dealings with Plan participants be on a "basis no less favorable to the plan" than dealings with its other shareholders is met.

3. Statute of Limitations

The Plaintiffs also argue that the requirements of PTE 77-3 are not satisfied because Putnam introduced a lower cost R6 class of shares for twenty Putnam funds on July 2, 2012, but did not convert the Plan's investments in Putnam mutual funds from R6 to class Y shares until April 1, 2013. Pls.' Opp'n 9, 11. This is undisputed. Defs.' Suppl. Facts ¶ 35. It is also undisputed that R6 shares charge lower fees than Y shares. Id. ¶ 37. Indeed, the Plaintiffs seem to have the bulk of recent ERISA cases implicating PTE 77-3(d) on their side here. Other courts have ruled that the exemption does not apply where an investment company offered a lower-cost share class to other employer-sponsored plans but failed timely to convert its in-house Plan assets to the new lower-cost share class. See, e.g., Wildman v. American Century Servs., LLC, No. 4:16CV-00737-DGK, 2017 WL 839795, at *10 (W.D. Mo. Feb. 27, 2017) (holding that where an investment company fails timely to convert Plan assets

---

Decl., Ex. 23, Email Re: Putnam Retirement Plan-Follow Up (August 8, 2013) 2-3, ECF No. 113-23. Because today's rulings do not depend on the legality of revenue sharing payments to Great-West by Putnam, the Court declines to draw any conclusions thereon.

to a lower-cost share class offered to other employer-sponsored plans, PTE 77-3(d) is not met); Moreno v. Deutsche Bank Ams. Holding Corp., 15 Civ. 9936 (LGS), 2016 WL 5957307, at *7 (S.D.N.Y Oct. 13, 2016) (same).

The Defendants, however, argue that ERISA's statute of limitations bars this aspect of the Plaintiffs' prohibited transaction claims as to seventy-two investment funds. Defs.' Mem. 17-18. 29 U.S.C. section 1113 ("Section 1113") provides that no action may be commenced after the earlier of:

> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113. In response, the Plaintiffs contend that: (i) they did not have "actual knowledge" of the claimed breaches more than three years prior to filing suit and that Putnam had fraudulently concealed its breaches by claiming that its transactions were exempted; and (ii) the six year statute of repose bars actions filed not more than six years after the "last action which constituted a part of the breach or

violation," id. § 1113(1), which in this case is the monthly receipt of fees. Pls.' Opp'n 16-19.[11]

A plaintiff has "actual knowledge" when he or she knows "the essential facts of the transaction or conduct constituting the violation." Edes v. Verizon Commc'ns, Inc., 417 F.3d 133, 142 (1st Cir. 2005) (quoting Martin v. Consultants & Adm'rs, Inc., 966 F.2d 1078, 1086 (7th Cir. 1992)). Here, the Plaintiffs argue that they lacked knowledge of many "essential facts," including knowledge regarding the Defendants' decision-making processes with respect to the Plan, as well as knowledge of facts negating possible exemptions. Pls.' Opp'n 18-19. The Defendants respond that all of the relevant information was clearly disclosed in the Plan's enrollment kit, and the Plaintiffs cannot argue that they were unaware of facts comprising defenses based on Section 1108 and PTE 77-3, on which the Defendants bear the burden of proof. Defs.' Reply 13-14.

Courts have rejected the argument that knowledge of facts negating possible affirmative defenses on which the Defendants

[11] The Plaintiffs' reliance on Tibble v. Edison International, 135 S. Ct. 1823, 1826 (2015), is misplaced. The Supreme Court held that claims based on alleged breaches of the continuing duty to monitor are subject to the six year statute of limitations. Id. at 1829. The decision did not, however, address Section 1113's three year statute of limitations that applies where plaintiffs have actual knowledge of the violation, which is the core of the Defendants' statute of limitations challenge to counts II and III.

bear the burden of proof is necessary to establish "actual knowledge." See Krueger v. Ameriprise Fin., Inc., No. 11-cv-02781 (SRN/JSM), 2014 WL 1117018, at *12 (D. Minn. Mar. 20, 2014). Indeed, the First Circuit in Edes found actual knowledge where the "Plaintiffs' claim of breach of fiduciary duty arises not from an intricate financial transaction . . . but from [the defendant's] decision to hire Plaintiffs without rendering them eligible to participate in its ERISA plans."[12] 417 F.3d at 142. Similarly, the underlying challenged transaction in this case is not so intricate as to impede the Plaintiffs from having actual knowledge. The Plaintiffs were well aware that the parties involved were all Putnam entities. As a result, the actual knowledge requirement is satisfied, and the three-year statute of limitations bars the Plaintiffs' prohibited transactions claims based on seventy-two investment funds.[13]

---

[12] Other circuits are split on the precise scope of the "actual knowledge" requirement. While the Third and Fifth Circuits have required both a knowledge of the events that constitute the breach and knowledge that those events support a breach of fiduciary duty or violation of ERISA, the Sixth, Seventh, Ninth, and Eleventh Circuits require only knowledge of the events or facts underlying the breach. See In re Northrop Grumman Corp. ERISA Litig., CV 06-06213 MMM (JCx), 2015 WL 10433713, *18-19 (C.D. Cal. Nov. 24, 2015) (collecting cases). The First Circuit has not spoken on this precise issue.

[13] The Plaintiffs further point out that Putnam's disclosures stated that the challenged transactions were "exempt party-in-interest transactions," apparently arguing that such statements render the three year statute of limitations inapplicable because of "fraud or concealment," 29 U.S.C.

Accordingly, the Court rules that the Plaintiffs' prohibited transaction claim fails under Section 1106(b)(3).

D. Modified Class Definition

In light of the above rulings, it has come to the Court's attention that its previous class definition fails to include important elements of this case. The Court, therefore, adopts the following modified class definition:

> All participants and beneficiaries of the Putnam Retirement Plan who received discretionary contributions in excess of any unpaid revenue sharing rebate at any time on or after November 13, 2009, excluding Defendants, employees with responsibility for the Plan's investment or administrative functions, and members of the Putnam Investments, LLC Board of Directors.

This Court's decision is limited to the class of plaintiffs that received discretionary payments from Putnam. It is undisputed that Putnam has made a voluntary contribution to eligible participants in every year of the Relevant Period. Defs.' Facts ¶ 46. The record also shows, however, that in each year, fewer Plan participants were eligible for discretionary contributions than received matching contributions, suggesting that there is a class of Plan participants that did not receive their share of the nearly $70 million in discretionary payments. See, e.g., Hines Decl., Ex. 56, ECF No. 92-58 ("For 2010, 1,671

---

§ 1113(2). The Plaintiffs have not brought a fraud claim, and the Plaintiffs make no effort to show why such statements by the Defendants rise to the level of fraud or concealment.

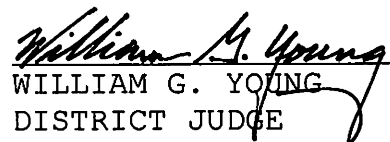
participants are eligible for a discretionary contribution while 2,001 employees received matching contributions . . . .").

Because Brotherston and Glancy both received discretionary payments, and the record is incomplete as to the number of class members who may not have been eligible for discretionary contributions, this Court makes no determination as to the prohibited transaction claims with respect to this last group of individuals. The Court therefore enters judgment with respect to the modified class. See, e.g., Powers v. Hamilton Cty. Publ. Def. Comm'n, 501 F.3d 592, 619 (6th Cir. 2007) (describing courts' broad discretion to modify class definitions); In re Monumental Life Ins. Co., 365 F.3d 408, 414 (5th Cir. 2004) ("District courts are permitted to limit or modify class definitions to provide the necessary precision.").

IV. CONCLUSION

For the foregoing reasons, the Court finds and rules that the Plaintiffs' prohibited transactions claims under Section 1106 fail. Judgment will enter for the Defendants on counts II and III.

SO ORDERED.



WILLIAM G. YOUNG
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN BROTHERSTON and JOAN GLANCY, individually and as representatives of a class of similarly situated persons, and on behalf of the Putnam Retirement Plan, Plaintiffs, v. PUTNAM INVESTMENTS, LLC, PUTNAM INVESTMENT MANAGEMENT, LLC, PUNTNAM INVESTOR SERVICES, INC., the PUTNAM BENEFITS INVESTMENT COMMITTEE, the PUTNAM BENEFITS OVERSIGHT COMMITTEE, and ROBERT REYNOLDS, Defendants.	)	CIVIL ACTION NO. 15-13825-WGY

YOUNG, D.J. June 19, 2017

FINDINGS OF FACT, RULINGS OF LAW, & ORDER

I. INTRODUCTION

On November 13, 2015, John Brotherston ("Brotherston") and Joan Glancy ("Glancy"), individually and on behalf of a class of similarly situated persons and the Putnam Retirement Plan ("Plan") (collectively, the "Plaintiffs"), brought this class action under section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), codified as amended at 29 U.S.C. §§ 1001-1461, against the Plan's fiduciaries: Putnam

Investments, LLC, Putnam Investment Management, LLC, Putnam Investor Services, Inc., the Putnam Benefits Investment Committee, the Putnam Benefits Oversight Committee, and Putnam's Chief Executive Officer Robert Reynolds (collectively, the "Defendants"), for breach of the fiduciary duties of loyalty and prudence in violation of 29 U.S.C. § 1104(a)(1)(A)-(B) (count I), prohibited transactions with a party in interest in violation of 29 U.S.C. § 1106(a)(1) (count II), prohibited transactions with a fiduciary in violation of 29 U.S.C. § 1106(b) (count III), failure to monitor in violation of 29 U.S.C. § 1109(a) (count IV), and other equitable relief based on ill-gotten proceeds under 29 U.S.C. § 1132(a)(3) (count V). Second Am. Compl. ("SAC") ¶¶ 117-48, ECF No. 73.

Following a case stated hearing[1] on March 30, 2017, this Court entered judgment for the Defendants on counts II and III. Order, ECF No. 158. A bench trial on the remaining counts commenced before this Court on April 7, 2017. Upon the conclusion of the Plaintiffs' final witness, the Defendants moved for judgment on partial findings pursuant to Rule 52(c) of

---

[1] The case stated procedure allows the Court to render a judgment based on a largely undisputed record in cases where there are minimal factual disputes. In its review of the record, "[t]he [C]ourt is . . . entitled to 'engage in a certain amount of factfinding, including the drawing of inferences.'" TLT Constr. Corp. v. RI, Inc., 484 F.3d 130, 135 n.6 (1st Cir. 2007) (quoting United Paperworkers Int'l Union Local 14 v. International Paper Co., 64 F.3d 28, 31 (1st Cir. 1995)).

the Federal Rules of Civil Procedure. Defs.' Mot. J. Partial Findings Fed. R. Civ. P. 52(c), ECF No. 167. The parties briefed the issues. Pls.' Mem. Opp'n Defs.' Mot. J. Partial Findings Fed. R. Civ. P. 52(c) ("Pls.' Opp'n"), ECF No. 189; Mem. Supp. Defs.' Mot. J. Partial Findings Fed. R. Civ. P. 52(c) ("Defs.' Mem."), ECF No. 168; Defs.' Suppl. Br. Supp. Mot. J. Partial Findings Fed. R. Civ. P. 52(c) ("Defs.' Suppl. Br."), ECF No. 190. Having heard oral argument on the Defendants' motion, this Court now makes the following findings of fact and rulings of law.

II. THE LEGAL FRAMEWORK

A. Judgment on Partial Findings

A Rule 52(c) motion for judgment on partial findings is the analogue of a Rule 50(c) motion for directed verdict in a jury trial.[2] See Federal Ins. Co. v. HPSC, Inc., 480 F.3d 26, 32 (1st Cir. 2007); Northeast Drilling, Inc. v. Inner Space Servs., Inc., 243 F.3d 25, 37 (1st Cir. 2001) (characterizing

[2] Federal Rule of Civil Procedure 52(c) provides in relevant part:

> If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue . . . . A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

Fed. R. Civ. P. 52(c).

defendant's motion for judgment after plaintiff rested at bench trial as a motion for judgment on partial findings, rather than as a motion for judgment as a matter of law under Rule 50(c)). A court should enter a judgment under Rule 52(c) only "[w]hen a party has finished presenting evidence and that evidence is deemed . . . insufficient to sustain the party's position." Morales Feliciano v. Rullan, 378 F.3d 42, 59 (1st Cir. 2004); see also Halpin v. Atkinson-Kiewit, J.V., 894 F. Supp. 486, 494 (D. Mass. 1995) (Collings, M.J.) ("Rule 52(c) plainly permits the court to decline to render any judgment until the close of all the evidence.").

This rule promotes efficiency. If a party bearing the burden of proof fails to persuade the court once it has been fully heard on a crucial issue, the court need not forge ahead to finish the case, but may make its findings on that issue against the party and thus dispose of the case. While this makes eminent sense, it places the court in the somewhat awkward position of making factual findings absent a complete evidentiary record developed by the contending parties.

B. The Substantive Legal Framework

This is an equitable action to charge a group of trustees. Like its closest analogue -- an action at law to recover for a statutory tort -- it requires proof of three matters, viz.: 1) a

violation of a statutory duty, 2) loss causation, and 3) damages.[3] The Court considers these issues in turn.

---

[3] This parallelism and the extraordinary money damages sought by the Plaintiffs' counsel on behalf of the class leads one to wonder why they did not demand a jury in this case where they assert a plan-wide ERISA fiduciary breach claim for money damages. See Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002). After all, this is precisely what the defense bar fears. See, e.g., James P. Baker, The Jury Trial, the Magna Carta, and ERISA, 22 Benefits L.J. 1, 6 (2009).

As will be seen, however, this action to charge the trustees historically sounds in equity and has significant differences from the usual statutory tort claim. The most thorough scholarship confirms that no constitutional right to a jury trial attaches under the Seventh Amendment. See Note, The Right to Jury Trial in Enforcement Actions Under Section 502(a)(1)(B) of ERISA, 96 Harv. L. Rev. 737, 750-56 (1983); see also Denise Drake Clemow & Lisa Hund Lattan, ERISA Section 510 Claims: No Right to a Jury Trial Can be Found, 73 Neb. L. Rev. 756, 774-78 (1994); David M. Cook & Karen M. Wahle, Procedural Aspects of Litigating ERISA Claims 53-56 (2000).

It need not be this way, of course. Congress could certainly extend the citizens' rights to the adjudication of this action. Indeed, while Congress may not -- though it frequently does -- constrict the reach of the Seventh Amendment, it possesses the undoubted power to extend adjudication by the American jury beyond that Amendment's historical reach.

An instructive example is found in legislative proposals seeking to restore to litigants the right to have access to the federal courts and, whenever appropriate, to adjudication by jury in Securities Exchange Commission proceedings. Both the Due Process Restoration Act, H.R. 3798, 114th Cong. (2015), and the Financial CHOICE Act, H.R. 10, 115th Cong. (2017), seek to provide a mandatory right of removal to federal court to certain respondents in administrative proceedings. See Joseph A. Grundfest, Fair or Foul? SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation, 85 Fordham L. Rev. 1143, 1149-50 (2016); see also Securities Exch. Comm'n. v. EagleEye Asset Mgmt., 975 F. Supp. 2d 151, 155 (D. Mass. 2013). While an excellent argument can be made in the SEC context that the Seventh Amendment guarantees such access whenever fines and monetary damages (i.e., legal remedies) are sought to be exacted, see Suja A. Thomas, The Missing American Jury:

1. Statutory Duties Under ERISA

a. Duty of Loyalty

Under ERISA, retirement plan trustees are fiduciaries who owe a duty of loyalty to plan participants. 29 U.S.C. § 1104(a)(1)(A); Bunch v. W.R. Grace & Co. (Bunch I), 532 F. Supp. 2d 283, 288 (D. Mass. 2008) ("ERISA fiduciaries owe participants duties of prudence and loyalty." (citing Moench v. Robertson, 62 F.3d 553, 561 (3d Cir. 1995)), aff'd, 555 F.3d 1 (1st Cir. 2009). The duty of loyalty requires fiduciaries to administer the plan "solely in the interest of the [plan] participants and beneficiaries" and "for the exclusive purpose" of providing them with benefits. Bunch I, 532 F. Supp. 2d at 291-92; see also Pegram v. Herdrich, 530 U.S. 211, 224 (2000); Vander Luitgaren v. Sun Life Assurance Co. of Can., 765 F.3d 59, 65 (1st Cir. 2014); Glass Dimensions, Inc. ex rel. Glass

---

Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries 169-72 (2016), the point here is that the Congress can at will extend this aspect of direct popular democracy. Indeed, that the SEC would be reticent to submit itself to the judgment of the very people on whose behalf it purports to be regulating is especially disquieting. See generally Gretchen Morgenson, In S.E.C.'s Streamlined Court, Penalty Exerts a Lasting Grip, NY Times (May 4, 2017), https://www.nytimes.com/2017/05/04/business/sec-internal-court.html?_r=0. But see Stephen Hall, The Shameless Wall Street Double Standard, Law360 (June 12, 2017), https://www.law360.com/articles/930747 ("[T]here is a double standard at work when industry clamors for access to the federal courts while denying that very same right to their customers and relegating them to arbitration.").

Dimensions, Inc. Profit Sharing Plan & Tr. v. State St. Bank & Tr. Co., 931 F. Supp. 2d 296, 304-05 (D. Mass. 2013) (Tauro, J.); Alves v. Harvard Pilgrim Health Care, Inc., 204 F. Supp. 2d 198, 214 (D. Mass. 2002) (Saris, J.), aff'd, 316 F.3d 290 (1st Cir. 2003).

It is well-established that under ERISA, "a fiduciary does not breach its duty of loyalty solely by conducting other activities that relate to or impact the Plan." Bunch I, 532 F. Supp. 2d at 291 (citing Hughes Aircraft Co. v. Stanley Jacobson, 525 U.S. 432, 443-46 (1999)). Accordingly, identifying a potential conflict of interest alone is not sufficient to establish a breach of the duty of loyalty. See Pegram, 530 U.S. at 225 (2000) ("Under ERISA, . . . a fiduciary may have financial interests adverse to beneficiaries."); DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 421 (4th Cir. 2007). Nor is it sufficient merely to point to a defendant's self-dealing, such as the investment of plan assets in their own mutual funds. See Dupree v. Prudential Ins. Co. of Am., No. 99-8337, 2007 WL 2263892, at *45 (S.D. Fla. Aug. 10, 2007) ("Simply because [the plan sponsor] followed such a practice . . . does not give rise to an inference of disloyalty, especially where these practices are universal among plans of the financial services industry."). In fact, the Department of Labor explicitly allows, and courts have upheld, financial services institutions' practice of

offering their own investment products to their own sponsored plans. See, e.g., Hecker v. Deere & Co., 556 F.3d 575, 586 (7th Cir. 2009) (finding "no statute or regulation prohibiting a fiduciary from selecting funds from one management company"); Participant Directed Individual Account Plans, 56 Fed. Reg. 10,724, 10,730 (Mar. 13, 1991) (to be codified at 29 C.F.R. pt. 2550) (noting that it would be "contrary to normal business practice for a company whose business is financial management to seek financial management services from a competitor").

In order to prevail on a claim for breach of the duty of loyalty, the Plaintiffs must show by a preponderance of the evidence that the Defendants, while wearing their ERISA fiduciary hats, failed to "'discharge [their] duty with respect to the plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries.'" Bunch I, 532 F. Supp. 2d at 291 (quoting 29 U.S.C. § 1104(a)(1)(A)). In making this inquiry, courts take into consideration "the totality of the circumstances." See Bunch v. W.R. Grace & Co. (Bunch II), 555 F.3d 1, 7 (1st Cir. 2009) (citing DiFelice, 497 F.3d at 418; Keach v. U.S. Tr. Co., 419 F.3d 626, 636-37 (7th Cir. 2005)); Kenney v. State St. Corp., No. 09-10750-DJC, 2011 WL 4344452, at *3 (D. Mass. Sept. 15, 2011) (Casper, J.).

The "Exclusive Benefit Rule" of section 1104(a)(1)(A) is rooted in the trust law duty of loyalty. Peter J. Wiedenbeck, ERISA in the Courts 155 (2008). The trust law duty of loyalty, however, is governed by an objective test, Restatement (Second) of Trusts § 170, whereas courts have held that "the Exclusive Benefit Rule looks to the fiduciary's subjective motivation in determining whether the fiduciary is in compliance with the rule," A.F. v. Providence Health Plan, 173 F. Supp. 3d 1061, 1073 (D. Or. 2016) (citing Wiedenbeck, supra, at 156); see also Varity Corp. v. Howe, 516 U.S. 489, 506 (1996); Perez v. First Bankers Tr. Servs., Inc., 210 F. Supp. 3d 518, 534 (S.D.N.Y. 2016) ("[T]he duty of loyalty is grounded in the motivation driving a fiduciary's conduct, and liability will not lie where a fiduciary's decisions were motivated by what is best for the [plan], even if those decisions also incidentally benefit the fiduciary."); Degnan v. Publicker Indus., Inc., 42 F. Supp. 2d 113, 120 (D. Mass. 1999) (Garrity, J.).

The Plaintiffs' burden, therefore, is to point to the Defendants' motivation behind specific disloyal conduct. In re McKesson HBOC, Inc. ERISA Litig., 391 F. Supp. 2d 812, 834-35 (N.D. Cal. 2005) ("[T]he duty of loyalty requires fiduciaries to refrain from actual disloyal conduct, not simply running the risk that such behavior will occur."). Examples of disloyal conduct might include "mislead[ing] plan participants about the

operation of a plan," Adamczyk v. Lever Bros. Co., Div. of Conopco, 991 F. Supp. 931, 939 (N.D. Ill. 1997), or "receiv[ing] commissions from insurance companies," Patelco Credit Union v. Sahni, 262 F.3d 897, 911 (9th Cir. 2001).

b. Duty of Prudence

ERISA fiduciaries also owe participants a duty of prudence, according to which they must "act 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." 29 U.S.C. § 1104(a)(1)(B); see also Tibble v. Edison Int'l, 135 S. Ct. 1823, 1828 (2005) ("[A] trustee has a continuing duty to monitor trust investments and remove imprudent ones."); Bunch II, 555 F.3d at 7; Beddall v. State St. Bank & Tr. Co., 137 F.3d 12, 18 (1st Cir. 1998).

A prudent fiduciary need not, however, follow a uniform checklist. See Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 358 (4th Cir. 2014). Instead, a variety of actions can support a finding that a fiduciary acted with prudence. Id. In general, "ERISA requires fiduciaries to employ 'appropriate methods to investigate the merits of the investment and to structure the investment' as well as to 'engage[] in a reasoned decision[-]making process, consistent with that of a 'prudent man acting in [a] like capacity.''" Id. (quoting DiFelice, 497 F.3d at 420). "[T]he test of prudence . . . is one of conduct,

and not a test of the result of performance of the investment." Bunch II, 555 F.3d at 7; see also Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983). A breach of the duty of prudence, therefore, "cannot be measured in hindsight." DiFelice, 497 F.3d at 424; see also Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 917-18 (8th Cir. 1994) ("[T]he prudent person standard is . . . a test of how the fiduciary acted viewed from the perspective of the time of the [challenged] decision rather than from the vantage point of hindsight." (alteration in original) (quoting Katsaros v. Cody, 744 F.2d 270, 279 (2d Cir. 1984)) (internal quotation marks omitted)). Rather, the appropriate test is whether the fiduciary behaved like "a prudent investor [would have behaved] under similar circumstances," Hecker, 556 F.3d at 586, given "the totality of the circumstances involved in the particular transaction," Bunch I, 532 F. Supp. 2d at 288. The crucial question is whether the defendants "took into account all relevant information in performing [their] fiduciary duty under ERISA." Id. Importantly, ERISA does not require a fiduciary to maximize the value of investments or "follow a detailed step by step process

to analyze investment options." Id. at 287 (citing Roth, 16 F.3d at 917-18).[4]

2. Loss Causation

ERISA requires plaintiffs to prove losses to the plan for any breach of fiduciary duty claim. Evans v. Akers, 534 F.3d 65, 74 (1st Cir. 2008) ("ERISA § 409 . . . requires fiduciaries who breach their duties 'to make good to such plan the losses to the plan resulting from such breach.'" (citing 29 U.S.C. §§ 1109(a), 1132(a)(2))). Section 1109(a) provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter 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). Section 1132(a)(3) further allows the Court to award "other appropriate equitable relief" for ERISA violations. 29 U.S.C. § 1132(a)(3).

Courts have consistently ruled that plaintiffs bear the burden of persuasion to establish loss to the plan as a result

---

[4] Because the Plaintiffs have consistently framed the failure to monitor as a theory of breach of fiduciary duty, this Court treats the duty to monitor claim (count IV) as subsumed within count I. Indeed, courts have consistently held that failure to monitor claims are dependent upon breach of fiduciary duty claims. See, e.g., Krueger v. Ameriprise Fin., Inc., No. 11-cv-02781 (SRN/JSM), 2012 WL 5873825, at *18 (D. Minn. Nov. 20, 2012) ("[T]here can be no liability for failure to monitor without an underlying breach of fiduciary duty.").

of the breach. Circuits split, however, on whether this burden shifts upon a plaintiff's prima facie showing. The Fourth, Fifth, and Eighth Circuits, applying trust law principles, have held that the fiduciary bears the burden of disproving loss causation once a plaintiff shows breach of a fiduciary duty. Tatum, 761 F.3d at 363 (4th Cir. 2014); McDonald v. Provident Indem. Life Ins. Co., 60 F.3d 234, 237 (5th Cir. 1995); Martin v. Fellen, 965 F.2d 660, 671 (8th Cir. 1992). In contrast, the Second, Sixth, Ninth, Tenth, and Eleventh Circuits have all refused to adopt burden shifting in ERISA breach of fiduciary duty claims. Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A., No. 15-1227, 2017 WL 2415949, at *10 (10th Cir. June 5, 2017); Silverman v. Mutual Benefit Life Ins. Co., 138 F.3d 98, 104 (2d Cir. 1998); Wright v. Oregon Metallurgical Corp., 360 F.3d 1090, 1099 (9th Cir. 2004); Kuper v. Iovenko, 66 F.3d 1447, 1459-60 (6th Cir. 1995), abrogated on other grounds by Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014); Willett v. Blue Cross & Blue Shield of Ala., 953 F.2d 1335, 1343-44 (11th Cir. 1992). The First Circuit has not yet addressed this issue.

3. Damages

Because this is an equitable action to charge the trustees, the Plaintiffs need only to prove the aggregate loss to the Plan. See Cal. Ironworkers Field Pension Tr. v. Loomis Sayles &

Co., 259 F.3d 1036, 1047 (9th Cir. 2001) ("[A] fiduciary is liable for the total aggregate loss of all breaches of trust and may reduce liability for the net loss of multiple breaches only when such multiple breaches are so related that they do not constitute separate and distinct breaches." (citing Restatement (Third) of Trusts § 213)). Conceptually at least, with liability established, there would be no problem with requiring the Defendants to sort out damages to each class member, potentially off-setting any voluntary contributions or other payments the class member received from the Defendants. See In re Nexium (Esomeprazole) Antitrust Litig., 309 F.R.D. 107, 135 (D. Mass. 2015) ("[Had] liability been established, my idea was to shift to the Defendants the burden of going forward with evidence of lack of injury to particular class members, while leaving the [] Plaintiffs with the ultimate burden of persuasion as to the damages suffered by particular claimants."), aff'd, 842 F.3d 34 (1st Cir. 2016); see also Evans, 534 F.3d at 74 ("'[T]here is nothing in ERISA to suggest that a benefit must be a liquidated amount in order to be recoverable.'" (quoting Harzewski v. Guidant Corp., 489 F.3d 799, 807 (7th Cir. 2007))).

III. FINDINGS OF FACT

A. The Putnam Retirement Plan

Putnam Investments, LLC ("Putnam") is an asset management company located in Boston, Massachusetts, and the sponsor of the

Plan, a 401(k) profit-sharing retirement plan. Parties' Joint Pretrial Mem., Ex. 1, Stipulated Facts ¶¶ 1-2, ECF 145-1. The Plan covers eligible current and former employees of Putnam, its directly and indirectly wholly-owned domestic subsidiaries, and PanAgora Asset Management, Inc. ("PanAgora"). Id. ¶ 4. From November 13, 2009, to the present ("Relevant Period"), Putnam has managed the Plan through three committees: the Putnam Benefits Investment Committee ("PBIC"), which is responsible for selecting, monitoring, and removing the Plan's investments; the Putnam Benefits Administration Committee ("PBAC"), which is responsible for the administration of the Plan; and the Putnam Benefits Oversight Committee ("PBOC"), which oversees PBIC and PBAC. Id. ¶ 9. All three committees are fiduciaries of the Plan. Id.

The Plan's governing documents provide that the available investments under the Plan include, among other options, "any publicly offered, open-end mutual fund (other than tax-exempt funds) that are generally made available to employer-sponsored retirement plans and under written or managed by Putnam Investments or one of its affiliates." Id. ¶ 23.

From the beginning of the class period through January 31, 2016, all of the designated investment options available under

the Plan's investment menu were affiliated with Putnam.[5] Id. ¶ 28. With the exception of certain categories of funds, i.e., close-end mutual funds, hedge funds, and tax-exempt funds, all Putnam open-end mutual funds were added to the Plan lineup upon launch, as required by the Plan Document. 4/12/17 Trial Tr. 33:1-12;[6] Trial Ex. 1, Putnam Retirement Plan Document 19. Up until early 2016, non-affiliated investments were offered exclusively through the Plan's self-directed brokerage account option ("SDBA").[7] Stipulated Facts ¶ 28. Starting on February 1, 2016, the Plan's investment menu included six BNY Mellon collective investment trusts ("CITs"). Id. ¶ 30.

B. Plan Monitoring

PBIC, the Plan's named fiduciary, meets on a regular basis to monitor the Plan's investment options. 4/7/17 Trial Tr.

[5] Brotherston has been invested in thirty-five of the Plan's available investments throughout the Relevant Period. Stipulated Facts ¶¶ 16-17. Before leaving the Plan around March of 2010, Glancy was invested in approximately fourteen of the Plan's available investments. Id. ¶¶ 18-19.

[6] The trial transcript spans multiple docket entries labeled ECF Nos. 172 through 185. The transcript for each day is divided into multiple files. For the sake of simplicity, this Court cites to the daily, continuously paginated transcripts and omits references to specific ECF numbers.

[7] Since 2008, the Plan has offered participants the opportunity to invest in a self-directed brokerage account. Stipulated Facts ¶¶ 31-32. Approximately two percent of the Plan's assets were invested in the SDBA option during the class period. Id. ¶ 34.

67:3-21; Trial Ex. 10, PBIC Charter 1-2. The committee is composed of an evolving group of senior level employees from different Putnam groups, including equity, fixed income, risk or investment products, defined contribution, treasury/finance, human resources, and marketing communications. 4/11/17 Trial Tr. 25:3-15; Trial Ex. 546, PBIC Membership Demonstrative 2. In recruiting new members for the committee, the role was advertised as not "requir[ing] a lot of 'heavy lifting.'" Trial Ex. 549, Apr. 20, 2010 E-mail from Donald Mullen to Kelly Marshall. Each member of PBIC was considered an expert in their area, and was expected to share that expertise in the discharge of the committee's duty. 4/11/17 Trial Tr. 94:12-22.

For a period of time, PBIC reviewed reports compiled by the Advised Asset Group ("AAG Reports"), a subsidiary of Great-West. 4/7/17 Trial Tr. 101:15-102:20. The AAG Reports showed that a number of Putnam funds were given "fail" ratings. Trial Ex. 32, March 2010 AAG Report 5-6. After internal discussions, PBIC determined that the AAG Reports did not provide an accurate indication of fund performance. 4/11/17 Trial Tr. 139:16-140:5. Nevertheless, Putnam recommended the AAG Reports as a source of investment advice to Plan participants on their account statements. 4/18/17 Trial Tr. 16:11-18.

The Plan maintains a number of Qualified Default Investment Alternative ("QDIA") funds, also known as the Retirement Ready

Funds, which are default elections for participants who do not actively make fund selections from the Plan lineup. Trial Ex. 113, Sept. 17, 2013 PBIC Meeting Minutes 1. PBIC regularly reviews the QDIA funds for risk-adjusted returns, costs, asset allocation, and performance as compared to competitors. 4/13/17 Trial Tr. 78:25-79:4; see Trial Ex. 91, Aug. 14, 2012 PBIC Meeting Minutes 1. It is undisputed that PBIC followed a prudent process in reviewing and monitoring the QDIA funds. 4/18/17 Trial Tr. 119:18-23.

Around 2014, PBIC began exploring the idea of adding a "core lineup" of passive index funds into the Plan. Trial Ex. 135, Dec. 19, 2014 PBIC Meeting Minutes 2. These Designated Investment Alternatives ("DIA") would be presented to participants as the building blocks of a diversified portfolio. 4/13/17 Trial Tr. 13:11-17. Because Putnam did not offer these products, PBIC considered various low cost index ETFs available in the SDBA, funds managed by PanAgora, and other third party products. Trial Ex. 147, July 8, 2015 PBIC Meeting Minutes 2-3. After carefully considering the appropriate asset class lineup and the different fund options, incorporating input from Putnam's investment professionals, and reviewing various performance metrics, PBIC voted to offer six BNY Mellon CITs. Trial Ex. 462, Sept. 3, 2015 PBIC Meeting Minutes 5-7; Trial Ex. 291, Sept. 2015 Index Options Presentation.

In contrast to the review process applied to the QDIA and DIA funds, PBIC appeared to rely entirely on the expertise of the investment division to determine whether a fund was failing and needed to be shut down. 4/11/17 Trial Tr. 43:24-44:7, 44:23-25. As a result, PBIC did not seem to have independent standards or criteria for monitoring the Plan investments. Trial Ex. 31, May 26, 2010 PBIC Meeting Minutes 1 ("It is uncertain what would be enough for Putnam to remove one of its own funds from the Putnam Retirement Plan line up."); Trial Ex. 21, Aug. 28, 2009 PBIC Meeting Minutes 2 ("[T]arget date funds are sold as a group so it is not clear what to do if one fails."). In fact, PBIC never once removed a fund from the Plan lineup.[8] 4/11/17 Trial Tr. 44:8-15. Perhaps most importantly, there seems not to have been separate discussion within the investment division as to whether a particular fund was appropriate for the Plan.[9] 4/14/17 Trial Tr. 90:6-9, 101:11-17.

---

[8] A fund was removed from the Plan lineup only if merged or closed, a decision made entirely by professionals in the investment division. 4/14/17 Trial Tr. 72:15-73:6. With respect to one particular underperforming fund, the Putnam Voyager Fund, Putnam's investment professionals closely monitored the performance of the fund, made changes directed toward improving performance, and ultimately replaced the portfolio manager. Id. at 76:4-13.

[9] This arrangement contrasts with Putnam's recommendation to other plan sponsors. In its own published advisory material, Putnam strongly recommended that other plan sponsors adopt Investment Policy Statements ("IPS"), which document qualitative

IV. RULINGS OF LAW

A. Duty of Loyalty

The Plaintiffs argue that the Defendants violated the duty of loyalty by "stuffing the Plan's investment lineup with all of Putnam's publicly-offered mutual funds, as well as other Putnam affiliated investments, without regard to their expenses, track record, or other objective criteria." Pls.' Trial Br. 7, ECF 164; SAC ¶¶ 119-120. In response, the Defendants contend that they "did not exploit the Plan to serve [their own] interests, but rather, voluntarily took actions that cost [Putnam] considerable money and significantly dwarf[ed] any revenue received from the Plan."[10] Defs.' Mem. 5. In particular, the

---

and quantitative criteria for monitoring and removing funds from 401(k) plans. Trial Ex. 23, Putnam 401(k) Investment Policy Statement Checklist and Sample 6; Trial Ex. 15, Fiduciary Planning Guide 22-23 ("Having an IPS is a hallmark of an active, engaged fiduciary."). An earlier version of PBIC's Charter, the committee's governing document, listed "[a]pprove, review annually, and monitor compliance with 'Statements of Investment Policy'" under "Duties & Responsibilities." Trial Ex. 10, PBIC Charter 1. After discussion between various members of PBIC and the Legal Department, the committee concluded that a written IPS would be redundant, given the investment division's procedures for monitoring the performance of its funds. 4/7/17 Trial Tr. 85:8-11. The Legal Department also expressed concern about being able to follow an IPS. Trial Ex. 51, May 11, 2011 E-mail from Pamela Fleming to Donald Mullen. PBIC's Charter was amended to remove the language discussing an IPS in January 2012. Trial Ex. 72, PBIC Amended Charter 1.

[10] For instance, Putnam provided a number of additional services to Plan participants, including ongoing education about retirement planning and the various investment options available

Defendants point to discretionary contributions made to the Plan, totaling more than $40,000,000 during the class period, as well as a series of administrative expenses and services that the Defendants paid to the Plan and Plan participants.[11] Id.

Although these practices do not eliminate the Defendants' ability to breach the duty of loyalty, the Plaintiffs have failed to point to specific circumstances in which the Defendants have actually put their own interests ahead of the interests of Plan participants. The Plaintiffs' duty of loyalty claims are reduced almost exclusively to identifying instances of self-dealing. Pls.' Opp'n 4-6; Pls.' Trial Br. 7; SAC ¶¶ 119-120. As discussed above, however, pointing to self-dealing alone is insufficient for the Plaintiffs to meet their

---

in the Plan. See generally Trial Ex. 336, Preparing for the Unpredictable: The Benefits of Diversification (explaining importance of diversification in investment planning). Putnam also created the Lifetime Income Analysis Tool, which helps participants plan for retirement by modeling different retirement date scenarios. Trial Ex. 467, The Putnam Retirement Plan 4. Furthermore, Putnam hired Hewitt Associates, a human resource consulting firm, to redesign the Plan to encourage more participation, yielding an approximately ninety percent participation rate. 4/12/17 Trial Tr. 37:2-11. Putnam also paid all of the Plan's recordkeeping expenses. Stipulated Facts ¶ 37. This approach resulted in significant investment gains for Plan participants, including Brotherston and Glancy, who both kept their retirement savings in the Putnam 401(k) plan after leaving the company. 4/18/17 Trial Tr. 24:14-17, 67:8-14.

[11] With respect to the class representatives, Putnam made voluntary contributions of $854,000 to Glancy, 4/18/17 Trial Tr. 61:17-19, and $315,000 to Brotherston, id. at 26:20-22.

burden of persuasion to show by a preponderance of the evidence a breach of the fiduciary duty of loyalty, particularly where the practices are common within the industry. See Dupree, 2007 WL 2263892, at *45; In re McKesson HBOC, Inc. ERISA Litig., 391 F. Supp. 2d at 834-35. Evaluating the totality of the circumstances, the Court holds that the Defendants have not breached the duty of loyalty owed to the Plaintiffs' class.

B. Duty of Prudence

The Plaintiffs argue that the Defendants violated their fiduciary duty of prudence by failing to implement or follow a prudent objective process for investigating and monitoring the individual merits of each of the Plan's investments in terms of costs, redundancy, or performance. Pls.' Opp'n 8. In support, the Plaintiffs point to PBIC's failure to remove funds from the Plan that had repeatedly received "fail" designations in AAG Reports. Id. at 5, 9. The AAG Reports alone, however, are insufficient to carry the Plaintiff's burden of persuasion with respect to the claim of breach. See, e.g., 4/14/17 Trial Tr. 70:5-71:2 (testimony of Mr. Lenhardt that AAG reports are "superficial and incomplete"); 4/13/17 Trial Tr. 5:5-15 (testimony of Mr. Goodfellow that the "investment professionals on the committee . . . didn't think the [AAG Report] analytics were very useful and that the organization had better analytics"); 4/11/17 Trial Tr. 37:4-11 (testimony of Mr. Mullen

that "[a]s we looked into the AAG documents and we shared it with members of our investment professionals, we really determined that it was a flawed methodology").[12]

The Defendants counter that they fulfilled their fiduciary obligations by having Putnam's Investment Division, some senior members of which sat on PBIC, monitor the performance of Putnam's mutual funds, including those in which the Plan is invested. Defs.' Mem. 7. The record reflects the Investment Division's highly sophisticated, systematic review of all Putnam mutual funds. See, e.g., 4/14/17 Trial Tr. 20:15-21:5, 21:25-14, 23:9-24:1, 39:17-46:13. Such care for its mutual funds, however, is not sufficient to rebut the Plaintiff's claims of breach of fiduciary duty with respect to the Plan. Although Putnam is a defendant in the present lawsuit, it is in fact PBIC that is the named fiduciary of the Plan under ERISA. Trial Ex.

[12] The Plaintiffs also attempt to show the Defendants' lack of prudence by pointing out that "the majority of the Putnam-affiliated investments in the Plan were not included in any other large retirement plans, and the remainder (with one exception) were included in at most a handful of other plans out of more than 2,600 plans with $250 million in assets or more." Pl.'s Opp'n 4. Even if factually accurate, this argument is unavailing. The prudence of the Plan's investments is measured against what a prudent investor would do in Putnam's shoes. Tatum, 761 F.3d at 358 (ERISA requires fiduciaries to act prudently "consistent with that of a prudent man acting in [a] like capacity." (emphasis added) (internal quotation marks omitted)). It is irrelevant whether Putnam's competitors invested in Putnam's mutual funds.

10, PBIC Charter 1-2. Other divisions within Putnam did not specifically owe ERISA fiduciary duties to the Plan even if they were acting as fiduciaries for other groups (e.g., shareholders of mutual funds, of which the Plan was a member).[13]

Although there is no "uniform checklist" for procedural prudence, Tatum, 761 F.3d at 358, it must be the case that prudence requires more than blindly to defer to the decisions of someone else, no matter how qualified. Indeed, closely monitoring Putnam's mutual funds is not the same as closely monitoring the Plan's lineup. The fact that some of the incentives of Putnam's Investment Division aligned with those of the Plan participants is not sufficient to remedy the situation.[14] A direct contribution 401(k) retirement plan could well have specific interests and goals different from a given mutual fund (e.g., different levels of exposures to different

[13] The fiduciary duty of prudence under ERISA is only delegable if the named fiduciary explicitly names an investment manager to manage assets of a plan provided that the plan document so authorizes. 29 U.S.C. §§ 1102(c)(3), 1105(c)(3). Nothing in the record suggests, nor do the parties claim, that such explicit delegation ever took place here.

[14] Mr. Lenhardt's testimony, along with supporting internal documents, show that Putnam's compensation philosophy aims "to align the actions of our portfolio managers, our analysts, the investment team, with the long-term goals and benefit of shareholders." 4/14/17 Trial Tr. 82:3-8; Trial Ex. 558 (2016 Investment Division Performance Evaluation and Compensation Design). Mr. Mullen further testified that no portfolio manager ever complained about their fund being excluded from the Plan. 4/11/17 Trial Tr. 124:25-125:7.

types of risk, short versus long term strategy). ERISA fiduciaries ought take into consideration those differences in managing and monitoring Plan assets. The fact that certain members of the investment division served on PBIC and PBOC is not sufficient to dispel concerns about lack of independent monitoring. That those members wear two hats -- one of portfolio manager and another of ERISA fiduciary -- says nothing about which hat they were wearing when making decisions about the Plan's investments.

Because the Defendants have not yet presented the entirety of their case, the Court refrains from making conclusive findings and rulings on whether the Defendants breached their duty of prudence. The Court notes, however, that on this record, it would be warranted in ruling that PBIC and PBOC failed to monitor the Plan investments independently. The seemingly informal delegation of that function to Putnam's investment division does not seem sufficient to discharge PBIC of its demanding fiduciary duty. The Court makes these remarks tentatively, because it is perfectly conceivable that the Defendants would present compelling evidence that they were in fact in full compliance with their ERISA fiduciary duties. Nevertheless, on this equivocal record, the Court must move on to address the next issue.

C. Prima Facie Case of Loss[15]

"[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." Martin, 965 F.2d at 671 (emphasis added). Where the evidence presented is insufficient to sustain either the plaintiff's claim of breach of fiduciary duty or a prima facie case of loss to the plan, the plaintiff's claim fails. Because the Court refrains from making any conclusive ruling about the alleged breach of fiduciary duty of prudence before the Defendants have had the opportunity to put forward all of their evidence, the question here becomes whether the Plaintiffs have made out a prima facie case of loss.

To hold the Defendants liable for damages based on the alleged breach of fiduciary duty, the Court must first determine that the breach resulted in losses to the Plan. See Plasterers' Local Union No. 96 Pension Plan v. Pepper, 663 F.3d 210, 217

[15] In light of the close split among the circuits, which were divided 4-3 at the time of this trial, as well as the procedural posture of this case, this Court adopts the burden shifting framework for loss causation only for the purposes of this analysis. Thus, if the Plaintiffs make a prima facie showing of loss, the burden falls on the fiduciaries to prove no loss was caused by such violation, and the case continues.

(4th Cir. 2011) ("W]hile certain conduct may be a breach of an ERISA fiduciary's duties under § 1104, that fiduciary can only be held liable upon a finding that the breach actually caused a loss to the plan."); Allison v. Bank One—Denver, 289 F.3d 1223, 1239 (10th Cir. 2002) ("The phrase 'resulting from' indicates that there must be a showing of 'some causal link between the alleged breach . . . and the loss plaintiff seeks to recover.'"). Specifically, an ERISA plaintiff must establish a causal link between the breach and the damages claimed. See Kuper, 66 F.3d at 1459 ("[A] fiduciary's failure to investigate an investment decision alone is not sufficient to show that the decision was not reasonable. Instead, . . . a plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan."); Friend v. Sanwa Bank Cal., 35 F.3d 466, 469 (9th Cir. 1994) ("ERISA holds a trustee liable for a breach of fiduciary duty only to the extent that losses to the plan result from the breach."); Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 279 (2d Cir. 1992) ("The last element in this cause of action is proof of a causal connection between the fraud perpetrated and the loss complained of."); Willett, 953 F.2d at 1343 ("Section [1109(a)] of ERISA establishes than an action exists to recover losses that 'resulted' from the breach of fiduciary duty; thus the statute does require that the breach of the fiduciary duty be the

proximate cause of the losses claimed . . . ."); Brandt v. Grounds, 687 F.2d 895, 898 (7th Cir. 1982) ("[A] causal connection is required between the breach of the fiduciary duty and the losses incurred by the plan.").

The fundamental problem in this case is the broad sweep of the Plaintiffs' "procedural breach" theory. The Plaintiffs argue that the alleged lack of an "objective process" by PBIC to monitor the Plan investments makes the entire investment lineup of the Plan imprudent. Pls.' Opp'n 11, 13-14; Pls.' Trial Br. 21-23; see also Hearing Tr. 30:4-11, Apr. 20, 2017, ECF No. 186.[16] Although the Plaintiffs contend that they "are not required to prove that any individualized investment decision was imprudent because no individualized investment decisions were made," Pls.' Opp'n 11 (internal citations and quotation marks omitted), this argument lacks legal support. The Plaintiffs mistakenly rely first on Urakhchin v. Allianz Asset

---

[16] While they present no evidence that any of the Plan beneficiaries ever invested in the entire Putnam funds lineup -- the two named plaintiffs certainly did not -- the Plaintiffs posit that if one tracked the performance of the entire Putnam funds lineup over the class period, it did not outperform (and over certain periods underperformed) a hypothetically comparable index fund with far less in management fees. 4/19/17 Trial Tr. 122:12-19. Such data, while interesting, appears unsurprising to a multitude of mutual fund investors. See Landon Thomas Jr., Vanguard is Growing Faster than Everybody Else Combined, NY Times (Apr. 14, 2017), https://www.nytimes.com/2017/04/14/business/mutfund/vanguard-mutual-index-funds-growth.html?_r=0.

Management of America, L.P., No. SACV 15-1614-JLS (JCCx), 2016 WL 4507117, at *5 (C.D. Cal. Aug. 5, 2016), and Glass Dimensions, Inc. v. State Street Bank & Trust Co., 285 F.R.D. 169, 175 (D. Mass. 2012) (Tauro, J.). Pls.' Opp'n 11. These decisions, however, addressed only whether plaintiffs had standing to challenge the inclusion of certain funds in a plan, and have no bearing on the issue of a prima facie showing of loss caused by a breach of fiduciary duty.

The Plaintiffs then cite Dardaganis v. Grace Capital, 889 F.2d 1237, 1244 (2d Cir. 1989), and Liss v. Smith, 991 F. Supp. 278 (S.D.N.Y. 1998), in support of their theory that PBIC's alleged lack of an objective process to monitor the Plan investments is a "procedural breach" that renders the entire lineup imprudent. Hearing Tr. 25:1-20, Apr. 20, 2017, ECF 20; Pls.' Opp'n 14. These case are unpersuasive. First, although the court in Dardaganis upheld an averaging technique for calculating damages where it was impossible to determine individual stock purchase-level losses, 889 F.2d at 1243-44 ("Where . . . the breach arises from a pattern of investment rather than from investment in a particular stock, courts will rarely be able to determine, with any degree of certainty, which stock the investment manager would have sold or declined to buy had he complied with investment guidelines."), this Court finds no such difficulties here.

Liss, on the other hand, provides better support for the Plaintiffs' position. See Liss, 991 F. Supp. at 295 (finding expert report sufficient to state a prima facie case of loss where "the allegations of fiduciary breaches relate to the overall investment strategy of the Funds (or the lack thereof) as opposed to the wisdom of a single transaction or investment").[17] This Court, however, respectfully disagrees with its sister court's analysis in Liss. Indeed, the weight of precedent supports the position that the Plaintiffs must point to a specific imprudent investment decision or decisions to make a showing of loss due to a breach of fiduciary duty. See Bunch II, 555 F.3d at 7 ("'[The prudence test] [is] how the fiduciary acted viewed from the perspective of the time of the challenged decision rather than from the vantage point of hindsight.'" (emphasis added) (quoting Roth, 16 F.3d at 917-18)); see also Plasterers' Local Union No. 96 Pension Plan, 663 F.3d at 218-19

[17] The Defendants argue that Liss, which relies on Dardaganis, is not relevant to the present dispute because it was decided at the summary judgment stage, not in the midst of a bench trial. Defs.' Suppl. Br. 6-7. That distinction, however, does not reduce the potential relevance of Liss to this case. The Defendants also attempt to distinguish Liss based on the fact that it involved allegations of "gross mismanagement" by fiduciaries, including allegations of kickback payments. Defs.' Suppl. Br. 6. While the present case does not involve similarly serious allegations, it is not clear that the Liss court relied on the severity of the allegations' cause to consider defendant's overall investment strategy instead of specific investments.

("It was incumbent on the district court to determine whether the [defendants'] failure to investigate caused them to make imprudent investments, such that there was a loss to the Plan for purposes of liability for those losses under § 1109(a)."); Bussian v. RJR Nabisco Inc., 223 F.3d 286, 300 (5th Cir. 2000) ("ERISA's obligations are nonetheless satisfied if the [investment] selected would have been chosen had the fiduciary conducted a proper investigation."); In re Unisys Sav. Plan Litig., 173 F.3d 145, 154 (3d Cir. 1999) ("[W]e are satisfied that the District Court's holdings that [the fiduciary] was prudent, and in the alternative, that a hypothetical prudent fiduciary would have made the same investments, are supported by the evidence."); Martin, 965 F.2d at 672 ("[T]he district court must determine the specific damages that resulted from each of the transactions in which ERISA fiduciary duties were breached."); Fink v. National Sav. & Tr. Co., 772 F.2d 951, 962 (D.C. Cir. 1985) ("It is the imprudent investment rather than the failure to investigate and evaluate that is the basis of suit; breach of the latter duty is merely evidence bearing upon breach of the former[.]"); Tussey v. ABB, Inc., No. 2:06-CV-04305-NKL, 2012 WL 1113291, at *3 (W.D. Mo. Mar. 31, 2012) ("[T]he Court rejects Plaintiffs' global damages theory which is based on the assumption that ABB's breaches infected all of its

investment decisions for the Plans . . . ."), aff'd in part, vacated in part, rev'd in part, 746 F.3d 327 (8th Cir. 2014).

This approach is also consistent with a plain reading of the statute, which ties the imposition of monetary penalties to actual losses to a plan resulting from a breach of fiduciary duty. See 29 U.S.C. § 1109(a); see also Evans, 534 F.3d at 73 ("ERISA does not authorize suits for what the Seventh Circuit calls 'extracontractual damages' -- i.e., damages separate from the benefits to which the plan documents entitle the participants -- such as emotional distress resulting from a plan's failure to honor it [sic] obligations[.]"); Brock v. Robbins, 830 F.2d 640, 647 (7th Cir. 1987) ("If trustees act imprudently, but not dishonestly, they should not have to pay a monetary penalty for their imprudent judgment so long as it does not result in a loss to the Fund."). The Plaintiffs' theory that the procedural breach tainted all of the Defendants' investment decisions for the Plan constitutes an unwarranted expansion of ERISA's seemingly narrow focus on actual losses to a plan resulting from specific incidents of fiduciary breach.

Furthermore, the Plaintiffs' argument that PBIC's alleged lack of an "objective process" to monitor the Plan investments makes the entire Plan lineup imprudent is a non sequitur. Indeed, a person could lack an independent process to monitor his investment and still end up with prudent investments, even

if it was the result of sheer luck. See Roth, 16 F.3d at 919 ("Even if a trustee failed to conduct an investigation before making a decision, he is insulated from liability [under § 1109(a)] if a hypothetical prudent fiduciary would have made the same decision anyway."). In the present case, however, luck seems to have little to do with the Plan lineup. It is clear from the record before the Court that Putnam employs sophisticated techniques to monitor its mutual funds. Even if these practices are not sufficient to meet the ERISA fiduciary duties to the Plan, they are certainly sufficient to dispel the unsupported allegation that the entire Plan investment lineup was per se imprudent.[18]

For the same reasons, the Plaintiffs' claim for $37.3 million in ill-gotten proceeds, 4/19/17 Trial Tr. 97:22-98:3, is legally insufficient. Although section 1109(a) requires an ERISA fiduciary "to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary," 29 U.S.C. § 1109(a), the Plaintiffs' argument that the burden of proof shifts to the Defendants to show that

[18] The Plaintiffs also rely on the analysis of their expert, Dr. Pomerantz, to quantify the losses the Plan would have suffered as a consequence of the alleged breach of fiduciary duty by the Defendants. Pls.' Opp'n 13-15. Courts may generally rely on the help of expert analysis to show damages from fiduciary breach. Evans, 534 F.3d at 74. Dr. Pomerantz's analysis, however, relies on this Court accepting the Plaintiffs' "procedural breach" theory.

"some portion of the investment management fees do not represent profits to the Company," Pls.' Opp'n 20 (citing Martin, 965 F.2d at 671), erroneously assumes that they have made a prima facie showing.

PBIC's review of the Plan lineup was no paragon of diligence. But because the Plaintiffs have failed to establish a prima facie case of loss, counts I and IV must fail as matter of law.[19, 20] In light of the Plaintiffs' failure to establish loss, the Court further declines to grant other declaratory or injunctive relief under section 1132(a)(3) (count V). See Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821, 824 (1st Cir. 1988) (interpreting "[o]ther appropriate equitable relief" in section 1132(a)(3) to mean "declaratory or injunctive relief, not compensatory and punitive damages").

---

[19] Although this Court applied the burden shifting framework for the purposes of this analysis, the Court finds that the Plaintiffs fail to establish a prima facie case of loss. As a result, the question of whether the burden of persuasion on the loss element shifts to the fiduciary need not be resolved today.

[20] As the text explains, this Court rules that the Plaintiffs' theory that the "procedural breach" makes Putnam's entire mutual fund line up imprudent is simply legally insufficient on this record. It may be reviewed de novo.

Were this a workable theory supported by adequate evidence, it would have been the Court's duty to finish the case since the Plaintiffs at this stage need only have laid out a prima facie case in order to shift the burden of proof to the Defendants.

V. CONCLUSION

For the foregoing reasons, the Court enters judgment for the Defendants on all remaining counts.

SO ORDERED.

/s/ William G. Young
WILLIAM G. YOUNG
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

John Brotherston et al

Plaintiff(s)

v. CIVIL ACTION NO. 15cv13825-WGY

Putnam Investments, LLC et al

Defendant(s)

JUDGMENT IN A CIVIL CASE

YOUNG, D.J.

_____ **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by the Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

Pursuant to the Findings of Fact and Conclusions of Law entered on June 19, 2017, the Court enters JUDGMENT FOR THE DEFENDANTS ON ALL REMAINING COUNTS.

ROBERT M. FARRELL
CLERK OF COURT

Dated: June 19, 2017

By /s/Matthew A. Paine
Deputy Clerk

Case: 17-1711 Document: 00117217400 Page: 168 Date Filed: 11/02/2017 Entry ID: 6129475

L. 109–280 to certain eligible cooperative plans, PBGC settlement plans, and eligible government contractor plans, see sections 104, 105, and 106 of Pub. L. 109–280, set out as notes under section 401 of Title 26, Internal Revenue Code.

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) 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;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term ''blackout period'' has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of—

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of title 26, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon—

(A) the earlier of—

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term ''qualified change in investment options'' means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which—

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to

risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if—

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) DEFAULT INVESTMENT ARRANGEMENTS.—

(A) IN GENERAL.—For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) NOTICE REQUIREMENTS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if each participant or beneficiary—

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) FORM OF NOTICE.—The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of title 26 shall apply with respect to the notices described in this subparagraph.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement—

(i) under section 4980(d)(2)(B) of title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement—

(i) under section 4980(d)(2)(A) of title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection—

(A) any term used in this subsection which is also used in section 4980(d) of title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to title 26 shall be a reference to title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

(Pub. L. 93–406, title I, § 404, Sept. 2, 1974, 88 Stat. 877; Pub. L. 96–364, title III, § 309, Sept. 26, 1980, 94 Stat. 1296; Pub. L. 101–508, title XII, § 12002(b)(1), (2)(A), Nov. 5, 1990, 104 Stat. 1388–565, 1388–566; Pub. L. 104–188, title I, § 1421(d)(2), Aug. 20, 1996, 110 Stat. 1799; Pub. L. 107–16, title VI, § 657(c)(1), June 7, 2001, 115 Stat. 136; Pub. L. 107–147, title IV, § 411(t), Mar. 9, 2002, 116 Stat. 51; Pub. L. 109–280, title VI, §§ 621(a), 624(a), Aug. 17, 2006, 120 Stat. 978, 980; Pub. L. 110–458, title I, § 106(d), Dec. 23, 2008, 122 Stat. 5107.)

REFERENCES IN TEXT

The enactment of the Omnibus Budget Reconciliation Act of 1990, referred to in subsec. (d)(2)(B), is the enactment of Pub. L. 101–508, which was approved Nov. 5, 1990.

AMENDMENTS

2008—Subsec. (c)(5). Pub. L. 110–458 substituted ''participant or beneficiary'' for ''participant'' wherever appearing.

2006—Subsec. (c)(1). Pub. L. 109–280, § 621(a)(1), designated existing provisions as subpar. (A), redesignated former subpars. (A) and (B) as cls. (i) and (ii), respectively, of subpar. (A), in cl. (ii), inserted '', except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary'' before period at end, and added subpars. (B) and (C).

Subsec. (c)(4). Pub. L. 109–280, § 621(a)(2), added par. (4).

Subsec. (c)(5). Pub. L. 109–280, § 624(a), added par. (5).

2002—Subsec. (c)(3)(A). Pub. L. 107–147, § 411(t)(1), struck out ''the earlier of'' after ''the earlier of'' in introductory provisions.

Subsec. (c)(3)(B). Pub. L. 107–147, § 411(t)(2), substituted ''a transfer that'' for ''if the transfer''.

2001—Subsec. (c)(3). Pub. L. 107–16 added par. (3).

1996—Subsec. (c). Pub. L. 104–188 designated existing provisions as par. (1), redesignated former pars. (1) and (2) as subpars. (A) and (B), respectively, and added par. (2).

1990—Subsec. (a)(1)(D). Pub. L. 101–508, § 12002(b)(2)(A), substituted ''and subchapter III'' for ''or subchapter III''.

Subsec. (d). Pub. L. 101–508, § 12002(b)(1), added subsec. (d).

1980—Subsec. (a)(1)(D). Pub. L. 96–364 inserted reference to subchapter III of this chapter.

EFFECTIVE DATE OF 2008 AMENDMENT

Amendment by Pub. L. 110–458 effective as if included in the provisions of Pub. L. 109–280 to which the amendment relates, except as otherwise provided, see section 112 of Pub. L. 110–458, set out as a note under section 72 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 2006 AMENDMENT

Pub. L. 109–280, title VI, § 621(b), Aug. 17, 2006, 120 Stat. 979, provided that:

''(1) IN GENERAL.—The amendments made by this section [amending this section] shall apply to plan years beginning after December 31, 2007.

''(2) SPECIAL RULE FOR COLLECTIVELY BARGAINED AGREEMENTS.—In the case of a plan maintained pursuant to 1 or more collective bargaining agreements between employee representatives and 1 or more employers ratified on or before the date of the enactment of this Act [Aug. 17, 2006], paragraph (1) shall be applied to benefits pursuant to, and individuals covered by, any such agreement by substituting for 'December 31, 2007' the earlier of—

''(A) the later of—

''(i) December 31, 2008, or

''(ii) the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof after such date of enactment), or

''(B) December 31, 2009.''

Pub. L. 109–280, title VI, § 624(b), Aug. 17, 2006, 120 Stat. 980, provided that:

''(1) IN GENERAL.—The amendments made by this section [amending this section] shall apply to plan years beginning after December 31, 2006.

''(2) REGULATIONS.—Final regulations under section 404(c)(5)(A) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1104(c)(5)(A)] (as added by this section) shall be issued no later than 6 months after the date of the enactment of this Act [Aug. 17, 2006].''

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–147 effective as if included in the provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107–16, to which such amendment relates, see section 411(x) of Pub. L. 107–147, set out as a note under section 25B of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 2001 AMENDMENT

Amendment by Pub. L. 107–16 applicable to distributions made after Mar. 28, 2005, see section 657(d) of Pub. L. 107–16, set out as a note under section 401 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–188 applicable to taxable years beginning after Dec. 31, 1996, see section 1421(e) of Pub. L. 104–188, set out as a note under section 72 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101–508 applicable to reversions occurring after Sept. 30, 1990, but not applicable to any reversion after Sept. 30, 1990, if (1) in the case of plans subject to subchapter III of this chapter, notice of intent to terminate under such subchapter was provided to participants (or if no participants, to Pension Benefit Guaranty Corporation) before Oct. 1, 1990, (2) in the case of plans subject to subchapter I of this chapter (and not subchapter III), notice of intent to reduce future accruals under section 1054(h) of this title was provided to participants in connection with termination before Oct. 1, 1990, (3) in the case of plans not subject to subchapter I or III of this chapter, a request for a determination letter with respect to termination was filed with Secretary of the Treasury or Secretary's delegate before Oct. 1, 1990, or (4) in the case of plans not subject to subchapter I or III of this chapter and having only one participant, a resolution terminating the plan was adopted by employer before Oct. 1, 1990, see section 12003 of Pub. L. 101–508, set out as a note under section 4980 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–364 effective Sept. 26, 1980, except as specifically provided, see section 1461(e) of this title.

REGULATIONS

Pub. L. 109–280, title VI, § 625, Aug. 17, 2006, 120 Stat. 980, provided that:

''(a) IN GENERAL.—Not later than 1 year after the date of the enactment of this Act [Aug. 17, 2006], the Secretary of Labor shall issue final regulations clarifying that the selection of an annuity contract as an optional form of distribution from an individual account plan to a participant or beneficiary—

''(1) is not subject to the safest available annuity standard under Interpretive Bulletin 95–1 (29 CFR 2509.95–1), and

''(2) is subject to all otherwise applicable fiduciary standards.

''(b) EFFECTIVE DATE.—This section shall take effect on the date of enactment of this Act [Aug. 17, 2006].''

Secretary authorized, effective Sept. 2, 1974, to promulgate regulations wherever provisions of this part call for the promulgation of regulations, see sections 1031 and 1114 of this title.

PLAN AMENDMENTS NOT REQUIRED UNTIL JANUARY 1, 1998

For provisions directing that if any amendments made by subtitle D [§§ 1401–1465] of title I of Pub. L. 104–188 require an amendment to any plan or annuity contract, such amendment shall not be required to be made before the first day of the first plan year beginning on or after Jan. 1, 1998, see section 1465 of Pub. L. 104–188, set out as a note under section 401 of Title 26, Internal Revenue Code.

§ 1105. Liability for breach of co-fiduciary

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable

manager in accordance with section 1102(c)(3) of this title.

(d) Investment managers

(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b) of this section, no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

(Pub. L. 93–406, title I, § 405, Sept. 2, 1974, 88 Stat. 878.)

§ 1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

(Pub. L. 93–406, title I, § 406, Sept. 2, 1974, 88 Stat. 879.)

§ 1107. Limitation with respect to acquisition and holding of employer securities and employer real property by certain plans

(a) Percentage limitation

Except as otherwise provided in this section and section 1114 of this title:

(1) A plan may not acquire or hold—

(A) any employer security which is not a qualifying employer security, or

(B) any employer real property which is not qualifying employer real property.

(2) A plan may not acquire any qualifying employer security or qualifying employer real property, if immediately after such acquisition the aggregate fair market value of employer securities and employer real property held by the plan exceeds 10 percent of the fair market value of the assets of the plan.

(3)(A) After December 31, 1984, a plan may not hold any qualifying employer securities or qualifying employer real property (or both) to the extent that the aggregate fair market value of such securities and property determined on December 31, 1984, exceeds 10 percent of the greater of—

(i) the fair market value of the assets of the plan, determined on December 31, 1984, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

(B) Subparagraph (A) of this paragraph shall not apply to any plan which on any date after December 31, 1974; and before January 1, 1985, did not hold employer securities or employer real property (or both) the aggregate fair market value of which determined on such date exceeded 10 percent of the greater of

(i) the fair market value of the assets of the plan, determined on such date, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

(4)(A) After December 31, 1979, a plan may not hold any employer securities or employer real property in excess of the amount specified in regulations under subparagraph (B). This subparagraph shall not apply to a plan after the earliest date after December 31, 1974, on which it complies with such regulations.

(B) Not later than December 31, 1976, the Secretary shall prescribe regulations which shall have the effect of requiring that a plan divest itself of 50 percent of the holdings of employer securities and employer real property which the plan would be required to divest before January 1, 1985, under paragraph (2) or subsection (c) of this section (whichever is applicable).

(b) Exception

(1) Subsection (a) of this section shall not apply to any acquisition or holding of qualifying

the date of the enactment of this Act [Aug. 17, 2006], the Secretary of Labor, after consultation with the Securities and Exchange Commission, shall issue regulations regarding the content of policies and procedures required to be adopted by an investment manager under section 408(b)(19) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1108(b)(19)].''

Secretary of the Treasury or his delegate to issue before Feb. 1, 1988, final regulations to carry out amendments made by section 1114 of Pub. L. 99–514, see section 1141 of Pub. L. 99–514, set out as a note under section 401 of Title 26, Internal Revenue Code.

Secretary authorized, effective Sept. 2, 1974, to promulgate regulations wherever provisions of this part call for the promulgation of regulations, see sections 1031 and 1114 of this title.

APPLICABILITY OF AMENDMENTS BY SUBTITLES A AND B OF TITLE I OF PUB. L. 109–280

For special rules on applicability of amendments by subtitles A (§§ 101–108) and B (§§ 111–116) of title I of Pub. L. 109–280 to certain eligible cooperative plans, PBGC settlement plans, and eligible government contractor plans, see sections 104, 105, and 106 of Pub. L. 109–280, set out as notes under section 401 of Title 26, Internal Revenue Code.

COORDINATION OF 2006 AMENDMENT WITH EXISTING EXEMPTIONS

Any exemption under subsec. (b) of this section provided by amendment by section 601(a)(1), (2) of Pub. L. 109–280 not to alter existing individual or class exemptions provided by statute or administrative action, see section 601(c) of Pub. L. 109–280, set out as a note under section 4975 of Title 26, Internal Revenue Code.

PLAN AMENDMENTS NOT REQUIRED UNTIL JANUARY 1, 1989

For provisions directing that if any amendments made by subtitle A or subtitle C of title XI [§§ 1101–1147 and 1171–1177] or title XVIII [§§ 1800–1899A] of Pub. L. 99–514 require an amendment to any plan, such plan amendment shall not be required to be made before the first plan year beginning on or after Jan. 1, 1989, see section 1140 of Pub. L. 99–514, as amended, set out as a note under section 401 of Title 26, Internal Revenue Code.

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

(Pub. L. 93–406, title I, § 409, Sept. 2, 1974, 88 Stat. 886.)

§ 1110. Exculpatory provisions; insurance

(a) Except as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

(b) Nothing in this subpart[1] shall preclude—

(1) a plan from purchasing insurance for its fiduciaries or for itself to cover liability or losses occurring by reason of the act or omission of a fiduciary, if such insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by such fiduciary;

(2) a fiduciary from purchasing insurance to cover liability under this part from and for his own account; or

(3) an employer or an employee organization from purchasing insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee benefit plan.

(Pub. L. 93–406, title I, § 410, Sept. 2, 1974, 88 Stat. 886.)

§ 1111. Persons prohibited from holding certain positions

(a) Conviction or imprisonment

No person who has been convicted of, or has been imprisoned as a result of his conviction of, robbery, bribery, extortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 802(6) of title 21, murder, rape, kidnaping, perjury, assault with intent to kill, any crime described in section 80a–9(a)(1) of title 15, a violation of any provision of this chapter, a violation of section 186 of this title, a violation of chapter 63 of title 18, a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of title 18, a violation of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401), any felony involving abuse or misuse of such person's position or employment in a labor organization or employee benefit plan to seek or obtain an illegal gain at the expense of the members of the labor organization or the beneficiaries of the employee benefit plan, or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve—

(1) as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, employee, or representative in any capacity of any employee benefit plan,

(2) as a consultant or adviser to an employee benefit plan, including but not limited to any entity whose activities are in whole or substantial part devoted to providing goods or services to any employee benefit plan, or

(3) in any capacity that involves decision-making authority or custody or control of the moneys, funds, assets, or property of any employee benefit plan,

during or for the period of thirteen years after such conviction or after the end of such imprisonment, whichever is later, unless the sentencing court on the motion of the person convicted sets a lesser period of at least three years after

[1] So in original. This part does not contain subparts.

Case: 17-1711 Document: 00117217400 Page: 173 Date Filed: 11/02/2017 Entry ID: 6129475

Revenue Code of 1954'', which for purposes of codification was translated as ''title 26'' thus requiring no change in text, and substituted ''or the corresponding provisions of prior law)'' for '') or the corresponding provisions of prior law''.

Subsec. (e). Pub. L. 101–239, § 7894(h)(4), added subsec. (e).

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–239 effective, except as otherwise provided, as if originally included in the provision of the Employee Retirement Income Security Act of 1974, Pub. L. 93–406, to which such amendment relates, see section 7894(i) of Pub. L. 101–239, set out as a note under section 1002 of this title.

PART 5—ADMINISTRATION AND ENFORCEMENT

§ 1131. Criminal penalties

(a) Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $100,000 or imprisoned not more than 10 years, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $500,000.

(b) Any person that violates section 1149 of this title shall upon conviction be imprisoned not more than 10 years or fined under title 18, or both.

(Pub. L. 93–406, title I, § 501, Sept. 2, 1974, 88 Stat. 891; Pub. L. 107–204, title IX, § 904, July 30, 2002, 116 Stat. 805; Pub. L. 111–148, title VI, § 6601(b), Mar. 23, 2010, 124 Stat. 779.)

AMENDMENTS

2010—Pub. L. 111–148 designated existing provisions as subsec. (a) and added subsec. (b).

2002—Pub. L. 107–204 substituted ''$100,000'' for ''$5,000'', ''10 years'' for ''one year'', and ''$500,000'' for ''$100,000''.

REGULATIONS

Secretary authorized, effective Sept. 2, 1974, to promulgate regulations wherever provisions of this subchapter call for the promulgation of regulations, see section 1031 of this title.

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), (8), or (9) of subsection (c) or under subsection (i) or (*l*);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title[1] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts;

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor—

(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section,

by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan; or

(11) in the case of a multiemployer plan, by an employee representative, or any employer that has an obligation to contribute to the plan, (A) to enjoin any act or practice which violates subsection (k) of section 1021 of this title (or, in the case of an employer, subsection (*l*) of such section), or (B) to obtain ap-

[1] So in original. Probably should be ''subtitle''.

propriate equitable relief (i) to redress such violation or (ii) to enforce such subsection.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a)[2] of title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(3) Except as provided in subsections (c)(9) and (a)(6) (with respect to collecting civil penalties under subsection (c)(9)), the Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 1191b(a)(1) of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166[2] of this title, section 1021(e)(1) of this title, section 1021(f) of this title, or section 1025(a) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(1) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person or who fails to meet the requirements of section 1082(d)(12)(E)[2] of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 a day for each violation by any person of subsection (j), (k), or (*l*) of section 1021 of this title or section 1144(e)(3) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 1021(g) of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024(a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary may assess a civil penalty against a plan administrator of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to participants and beneficiaries in accordance with subsection (i) or (m) of section 1021 of this title. For purposes of this paragraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(8) The Secretary may assess against any plan sponsor of a multiemployer plan a civil penalty of not more than $1,100 per day—

(A) for each violation by such sponsor of the requirement under section 1085 of this title to adopt by the deadline established in that section a funding improvement plan or rehabilitation plan with respect to a multiemployer plan which is in endangered or critical status, or

(B) in the case of a plan in endangered status which is not in seriously endangered status, for failure by the plan to meet the applicable benchmarks under section 1085 of this title by the end of the funding improvement period with respect to the plan.

(9)(A) The Secretary may assess a civil penalty against any employer of up to $100 a day

[2] See References in Text note below.

from the date of the employer's failure to meet the notice requirement of section 1181(f)(3)(B)(i)(I) of this title. For purposes of this subparagraph, each violation with respect to any single employee shall be treated as a separate violation.

(B) The Secretary may assess a civil penalty against any plan administrator of up to $100 a day from the date of the plan administrator's failure to timely provide to any State the information required to be disclosed under section 1181(f)(3)(B)(ii) of this title. For purposes of this subparagraph, each violation with respect to any single participant or beneficiary shall be treated as a separate violation.

(10) SECRETARIAL ENFORCEMENT AUTHORITY RELATING TO USE OF GENETIC INFORMATION.—

(A) GENERAL RULE.—The Secretary may impose a penalty against any plan sponsor of a group health plan, or any health insurance issuer offering health insurance coverage in connection with the plan, for any failure by such sponsor or issuer to meet the requirements of subsection (a)(1)(F), (b)(3), (c), or (d) of section 1182 of this title or section 1181 or 1182(b)(1) of this title with respect to genetic information, in connection with the plan.

(B) AMOUNT.—

(i) IN GENERAL.—The amount of the penalty imposed by subparagraph (A) shall be $100 for each day in the noncompliance period with respect to each participant or beneficiary to whom such failure relates.

(ii) NONCOMPLIANCE PERIOD.—For purposes of this paragraph, the term "noncompliance period" means, with respect to any failure, the period—

(I) beginning on the date such failure first occurs; and

(II) ending on the date the failure is corrected.

(C) MINIMUM PENALTIES WHERE FAILURE DISCOVERED.—Notwithstanding clauses (i) and (ii) of subparagraph (D):

(i) IN GENERAL.—In the case of 1 or more failures with respect to a participant or beneficiary—

(I) which are not corrected before the date on which the plan receives a notice from the Secretary of such violation; and

(II) which occurred or continued during the period involved;

the amount of penalty imposed by subparagraph (A) by reason of such failures with respect to such participant or beneficiary shall not be less than $2,500.

(ii) HIGHER MINIMUM PENALTY WHERE VIOLATIONS ARE MORE THAN DE MINIMIS.—To the extent violations for which any person is liable under this paragraph for any year are more than de minimis, clause (i) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(D) LIMITATIONS.—

(i) PENALTY NOT TO APPLY WHERE FAILURE NOT DISCOVERED EXERCISING REASONABLE DILIGENCE.—No penalty shall be imposed by subparagraph (A) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such penalty did not know, and exercising reasonable diligence would not have known, that such failure existed.

(ii) PENALTY NOT TO APPLY TO FAILURES CORRECTED WITHIN CERTAIN PERIODS.—No penalty shall be imposed by subparagraph (A) on any failure if—

(I) such failure was due to reasonable cause and not to willful neglect; and

(II) such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such penalty knew, or exercising reasonable diligence would have known, that such failure existed.

(iii) OVERALL LIMITATION FOR UNINTENTIONAL FAILURES.—In the case of failures which are due to reasonable cause and not to willful neglect, the penalty imposed by subparagraph (A) for failures shall not exceed the amount equal to the lesser of—

(I) 10 percent of the aggregate amount paid or incurred by the plan sponsor (or predecessor plan sponsor) during the preceding taxable year for group health plans; or

(II) $500,000.

(E) WAIVER BY SECRETARY.—In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the penalty imposed by subparagraph (A) to the extent that the payment of such penalty would be excessive relative to the failure involved.

(F) DEFINITIONS.—Terms used in this paragraph which are defined in section 1191b of this title shall have the meanings provided such terms in such section.

(11) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b–14(c)(8)[2] of title 42.

(12) The Secretary may assess a civil penalty against any sponsor of a CSEC plan of up to $100 a day from the date of the plan sponsor's failure to comply with the requirements of section 1085a(j)(3) of this title to establish or update a funding restoration plan.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be en-

Case: 17-1711 Document: 00117217400 Page: 176 Date Filed: 11/02/2017 Entry ID: 6129475

forceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(*l*) Civil penalties on violations by fiduciaries

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9)) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

(Pub. L. 93–406, title I, § 502, Sept. 2, 1974, 88 Stat. 891; Pub. L. 96–364, title III, § 306(b), Sept. 26, 1980, 94 Stat. 1295; Pub. L. 99–272, title X, § 10002(b), Apr. 7, 1986, 100 Stat. 231; Pub. L. 100–203, title IX, §§ 9342(c), 9344, Dec. 22, 1987, 101 Stat. 1330–372, 1330–373; Pub. L. 101–239, title II, § 2101(a), (b), title VII, §§ 7881(b)(5)(B), (j)(2), (3), 7891(a)(1), 7894(f)(1), Dec. 19, 1989, 103 Stat. 2123, 2438, 2442, 2445, 2450; Pub. L. 101–508, title XII, § 12012(d)(2), Nov. 5, 1990, 104 Stat. 1388–573; Pub. L. 103–66, title IV, § 4301(c)(1)–(3), Aug. 10, 1993, 107 Stat. 376; Pub. L. 103–401, §§ 2, 3, Oct. 22, 1994, 108 Stat. 4172; Pub. L. 103–465, title VII, § 761(a)(9)(B)(ii), Dec. 8, 1994, 108 Stat. 5033; Pub. L. 104–191, title I, § 101(b), (e)(2), Aug. 21, 1996, 110 Stat. 1951, 1952; Pub. L. 104–204, title VI, § 603(b)(3)(E), Sept. 26, 1996, 110 Stat. 2938; Pub. L. 105–34, title XV, § 1503(c)(2)(B), (d)(7), Aug. 5, 1997, 111 Stat. 1062; Pub. L. 107–204, title III, § 306(b)(3), July 30, 2002, 116 Stat. 783; Pub. L. 108–218, title I, §§ 102(d), 103(b), 104(a)(2), Apr. 10, 2004, 118 Stat. 602, 603, 606; Pub. L. 109–280, title I, § 103(b)(2), title II, § 202(b), (c), title V, §§ 502(a)(2), (b)(2), 507(b), 508(a)(2)(C), title IX, § 902(f)(2), Aug. 17, 2006, 120 Stat. 816, 884, 885, 940, 941, 949, 951, 1039; Pub. L. 110–233, title I, § 101(e), May 21, 2008, 122 Stat. 886; Pub. L. 110–458, title I, §§ 101(c)(1)(H), 102(b)(1)(H), (I), Dec. 23, 2008, 122 Stat. 5097, 5101; Pub. L. 111–3, title III, § 311(b)(1)(E), Feb. 4, 2009, 123 Stat. 70; Pub. L. 113–97, title I, § 102(b)(6), Apr. 7, 2014, 128 Stat. 1117; Pub. L. 113–235, div. O, title I, § 111(d), Dec. 16, 2014, 128 Stat. 2793.)

REFERENCES IN TEXT

Section 405(a) of title 26, referred to in subsec. (b)(1), was repealed by Pub. L. 98–369, div. A, title IV, § 491(a), July 18, 1984, 98 Stat. 848.

Paragraphs (1) and (4) of section 1166 of this title, referred to in subsec. (c)(1), were redesignated as pars. (1) and (4) of section 1166(a) of this title by Pub. L. 101–239, title VII, § 7891(d)(1)(A)(ii)(I), Dec. 19, 1989, 103 Stat. 2445.

Section 1082 of this title, referred to in subsec. (c)(3), was repealed and a new section 1082 was enacted by Pub. L. 109–280, title I, § 101(a), (b), Aug. 17, 2006, 120 Stat. 784, and, as so enacted, section 1082 of this title no longer contains a subsec. (d)(12)(E).

Section 1320b–14 of title 42, referred to in subsec. (c)(11), was repealed by Pub. L. 104–226, § 1(a), Oct. 2, 1996, 110 Stat. 3033, and a new section 1320b–14 of title 42, which does not contain a subsec. (c)(8), was enacted by Pub. L. 106–554, § 1(a)(6) [title IX, § 911(a)(1)], Dec. 21, 2000, 114 Stat. 2763, 2763A–583.

This chapter, referred to in subsec. (k), was in the original "this Act", meaning Pub. L. 93–406, known as the Employee Retirement Income Security Act of 1974. Titles I, III, and IV of such Act are classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of this title and Tables.

CODIFICATION

Another section 306(b)(3) of Pub. L. 107–204 is classified to section 7244(b)(3) of Title 15, Commerce and Trade.

AMENDMENTS

2014—Subsec. (a)(11). Pub. L. 113–235 added par. (11).

Subsec. (c)(10) to (12). Pub. L. 113–97 redesignated par. (10) relating to ongoing consultation by the Secretary and the Secretary of Health and Human Services as par. (11) and added par. (12).

2009—Subsec. (a)(6). Pub. L. 111–3, § 311(b)(1)(E)(i), which directed the substitution of "(8), or (9)" for "or (8)", could not be executed because the words "or (8)" did not appear after the amendment by Pub. L. 110–233, § 101(e)(1). See 2008 Amendment note below.

Subsec. (c)(9), (10). Pub. L. 111–3, § 311(b)(1)(E)(ii), added par. (9) and redesignated former par. (9) as (10) relating to Secretarial enforcement authority relating to use of genetic information.

2008—Subsec. (a)(6). Pub. L. 110–233, § 101(e)(1), substituted "(7), (8), or (9)" for "(7), or (8)".

Subsec. (b)(3). Pub. L. 110–233, § 101(e)(2), substituted "Except as provided in subsections (c)(9) and (a)(6) (with respect to collecting civil penalties under subsection (c)(9)), the Secretary" for "The Secretary".

Subsec. (c)(2). Pub. L. 110–458, § 102(b)(1)(H), substituted "1021(b)(1)" for "1021(b)(4)".

Subsec. (c)(4). Pub. L. 110–458, § 101(c)(1)(H), substituted "by any person of subsection (j), (k), or (*l*) of section 1021 of this title or section 1144(e)(3) of this title." for "by any person of subsection (j), (k), or (*l*) of section 1021 of this title, section 1082(b)(7)(F)(vi) of this title, or section 1144(e)(3) of this title."

Subsec. (c)(8)(A). Pub. L. 110–458, § 102(b)(1)(I), inserted "plan" after "multiemployer".

Subsec. (c)(9), (10). Pub. L. 110–233, § 101(e)(3), added par. (9) and redesignated former par. (9) as (10).

2006—Subsec. (a)(6). Pub. L. 109–280, § 202(b)(1), substituted "(6), (7), or (8)" for "(6), or (7)".

Subsec. (a)(8) to (10). Pub. L. 109–280, § 202(c), amended subsec. (a) by striking out "or" at end of par. (8), substituting "; or" for period at end of par. (9), and adding par. (10).

Subsec. (c)(1). Pub. L. 109–280, § 508(a)(2)(C), substituted "section 1021(f) of this title, or section 1025(a) of this title" for "or section 1021(f) of this title".

Subsec. (c)(4). Pub. L. 109–280, § 902(f)(2), which directed amendment of par. (4) by substituting ", section 1082(b)(7)(F)(vi) of this title, or section 1144(e)(3) of this title" for "or section 1082(b)(7)(F)(vi) of this title", was executed by making the substitution for "or 1082(b)(7)(F)(iv) of this title", to reflect the probable intent of Congress.

Pub. L. 109–280, § 502(b)(2), which directed amendment of par. (4) by substituting "subsection (j), (k), or (*l*) of

section 1021 of this title'' for ''section 1021(j) or (k) of this title'', was executed by making the substitution for ''subsection (j) or (k) of section 1021 of this title'', to reflect the probable intent of Congress.

Pub. L. 109–280, § 502(a)(2), substituted ''subsection (j) or (k) of section 1021 of this title'' for ''section 1021(j)''.

Pub. L. 109–280, § 103(b)(2), which directed amendment of par. (4) by substituting ''section 1021(j) or 1082(b)(7)(F)(iv) of this title'' for ''section 1082(b)(7)(F)(iv) of this title'', was executed by making the substitution for ''section 1082(b)(7)(F)(vi) of this title'', to reflect the probable intent of Congress.

Subsec. (c)(7). Pub. L. 109–280, § 507(b), substituted ''subsection (i) or (m) of section 1021'' for ''section 1021(i)''.

Subsec. (c)(8), (9). Pub. L. 109–280, § 202(b)(2), (3), added par. (8) and redesignated former par. (8) as (9).

2004—Subsec. (c)(1). Pub. L. 108–218, § 103(b), substituted '', section 1021(e)(1) of this title, or section 1021(f) of this title'' for ''or section 1021(e)(1) of this title''.

Subsec. (c)(3). Pub. L. 108–218, § 102(d), inserted ''or who fails to meet the requirements of section 1082(d)(12)(E) of this title with respect to any person'' after ''1021(e)(2) of this title with respect to any person''.

Subsec. (c)(4). Pub. L. 108–218, § 104(a)(2), amended par. (4) generally. Prior to amendment, par. (4) read as follows: ''The Secretary may assess a civil penalty of not more than $1,000 for each violation by any person of section 1021(f)(1) of this title.''

2002—Subsec. (a)(6). Pub. L. 107–204, § 306(b)(3)(A), substituted ''(5), (6), or (7)'' for ''(5), or (6)''.

Subsec. (c)(7), (8). Pub. L. 107–204, § 306(b)(3)(B), (C), added par. (7) and redesignated former par. (7) as (8).

1997—Subsec. (a)(6). Pub. L. 105–34, § 1503(d)(7), substituted ''(5), or (6)'' for ''or (5)''.

Subsec. (c)(6), (7). Pub. L. 105–34, § 1503(c)(2)(B), added par. (6) and redesignated former par. (6) as (7).

1996—Subsec. (a)(6). Pub. L. 104–191, § 101(e)(2)(A)(i), substituted ''under paragraph (2), (4), or (5) of subsection (c) or under subsection (i) or (*l*)'' for ''under subsection (c)(2) or (i) or (*l*) of this section''.

Subsec. (b)(3). Pub. L. 104–204 made technical amendment to reference in original act which appears in text as reference to section 1191b of this title.

Pub. L. 104–191, § 101(b), added par. (3).

Subsec. (c)(1). Pub. L. 104–191, § 101(e)(2)(B), inserted at end ''For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.''

Subsec. (c)(4) to (6). Pub. L. 104–191, § 101(e)(2)(A)(ii), struck out ''For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation. The Secretary and'' after ''section 1021(f)(1) of this title.'', redesignated ''the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b–14(c)(8) of title 42.'' as par. (6) and inserted ''The Secretary and'' before ''the Secretary of Health and Human Services'', and added par. (5).

1994—Subsec. (a)(9). Pub. L. 103–401, § 2, added par. (9).

Subsec. (*l*)(3)(B). Pub. L. 103–401, § 3, inserted ''(or to provide the relief ordered pursuant to subsection (a)(9))'' after ''to restore all losses to the plan''.

Subsec. (m). Pub. L. 103–465 added subsec. (m).

1993—Subsec. (a)(7), (8). Pub. L. 103–66, § 4301(c)(1), added pars. (7) and (8).

Subsec. (c)(4). Pub. L. 103–66, § 4301(c)(2), added par. (4).

Subsec. (e)(1). Pub. L. 103–66, § 4301(c)(3), substituted in first sentence ''fiduciary, or any person referred to in section 1021(f)(1) of this title'' for ''or fiduciary'' and in second sentence ''paragraphs (1)(B) and (7) of subsection (a)'' for ''subsection (a)(1)(B)''.

1990—Subsec. (c)(1). Pub. L. 101–508, § 12012(d)(2)(A), inserted ''or section 1021(e)(1) of this title'' after ''section 1166 of this title''.

Subsec. (c)(3). Pub. L. 101–508, § 12012(d)(2)(B), inserted ''or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person'' after first reference to ''beneficiary'' and ''or to such person'' after second reference to ''beneficiary''.

1989—Subsec. (a)(6). Pub. L. 101–239, § 7881(j)(2), substituted ''subsection (c)(2) or (i)'' for ''subsection (i)''.

Pub. L. 101–239, § 2101(b), inserted ''or (*l*)'' after ''subsection (i)''.

Subsec. (b)(1). Pub. L. 101–239, § 7894(f)(1), substituted ''respect'' for ''respct'' before ''to a violation'' in introductory provisions.

Pub. L. 101–239, § 7891(a)(1), substituted ''Internal Revenue Code of 1986'' for ''Internal Revenue Code of 1954'', which for purposes of codification was translated as ''title 26'' thus requiring no change in text.

Subsec. (c)(2). Pub. L. 101–239, § 7881(j)(3), inserted ''against any plan administrator'' after ''civil penalty'' and substituted ''such plan administrator's'' for ''a plan administrator's''.

Subsec. (c)(3). Pub. L. 101–239, § 7881(b)(5)(B), added par. (3).

Subsec. (g)(2). Pub. L. 101–239, § 7891(a)(1), substituted ''Internal Revenue Code of 1986'' for ''Internal Revenue Code of 1954'', which for purposes of codification was translated as ''title 26'' thus requiring no change in text.

Subsec. (*l*). Pub. L. 101–239, § 2101(a), added subsec. (*l*).

1987—Subsec. (c). Pub. L. 100–203, § 9342(c), designated existing provision as par. (1), redesignated as cls. (A) and (B) former cls. (1) and (2), and added par. (2).

Subsec. (i). Pub. L. 100–203, § 9344, amended second sentence generally. Prior to amendment, second sentence read as follows: ''The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of title 26); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved.''

1986—Subsec. (c). Pub. L. 99–272 inserted ''(1) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title with respect to a participant or beneficiary, or (2)''.

1980—Subsec. (b). Pub. L. 96–364, § 306(b)(1), redesignated existing provisions as par. (1)(A) and (B) and added par. (2).

Subsec. (g). Pub. L. 96–364, § 306(b)(2), redesignated existing provisions as par. (1), inserted exception for actions under paragraph (2), and added par. (2).

Effective Date of 2014 Amendment

Amendment by Pub. L. 113–235 applicable with respect to plan years beginning after Dec. 31, 2014, see section 111(e) of Pub. L. 113–235, set out as a note under section 1021 of this title.

Amendment by Pub. L. 113–97 applicable to years beginning after Dec. 31, 2013, see section 3 of Pub. L. 113–97, set out as a note under section 401 of Title 26, Internal Revenue Code.

Effective Date of 2009 Amendment

Amendment by Pub. L. 111–3 effective Apr. 1, 2009, and applicable to child health assistance and medical assistance provided on or after that date, with certain exceptions, see section 3 of Pub. L. 111–3, set out as an Effective Date note under section 1396 of Title 42, The Public Health and Welfare.

Effective Date of 2008 Amendment

Amendment by Pub. L. 110–458 effective as if included in the provisions of Pub. L. 109–280 to which the amendment relates, except as otherwise provided, see section

112 of Pub. L. 110–458, set out as a note under section 72 of Title 26, Internal Revenue Code.

Pub. L. 110–233, title I, § 101(f)(2), May 21, 2008, 122 Stat. 888, provided that: ''The amendments made by this section [amending this section and sections 1182 and 1191b of this title] shall apply with respect to group health plans for plan years beginning after the date that is 1 year after the date of enactment of this Act [May 21, 2008].''

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by section 103(b)(2) of Pub. L. 109–280 applicable to plan years beginning after Dec. 31, 2007, with collective bargaining exception, see section 103(c) of Pub. L. 109–280, set out as a note under section 1021 of this title.

Amendment by section 202(b), (c) of Pub. L. 109–280 applicable with respect to plan years beginning after 2007, with special rules for certain notices and certain restored benefits, see section 202(f) of Pub. L. 109–280, set out as a note under section 1082 of this title.

Amendment by section 502(a)(2), (b)(2) of Pub. L. 109–280 applicable to plan years beginning after Dec. 31, 2007, see section 502(d) of Pub. L. 109–280, set out as a note under section 4980F of Title 26, Internal Revenue Code.

Amendment by section 507(b) of Pub. L. 109–280 applicable to plan years beginning after Dec. 31, 2006, see section 507(d)(1) of Pub. L. 109–280, set out as a note under section 1021 of this title.

Amendment by section 508(a)(2)(C) of Pub. L. 109–280 applicable to plan years beginning after Dec. 31, 2006, with special rule for collectively bargained agreements that were ratified on or before such date, see section 508(c) of Pub. L. 109–280, set out as a note under section 1025 of this title.

Amendment by section 902(f)(2) effective Aug. 17, 2006, see section 902(g) of Pub. L. 109–280, set out as a note under section 401 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 2004 AMENDMENT

Amendment by section 103(b) of Pub. L. 108–218 applicable to plan years beginning after Dec. 31, 2004, see section 103(d) of Pub. L. 108–218, set out as a note under section 1021 of this title.

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–204 effective 180 days after July 30, 2002, see section 7244(c) of Title 15, Commerce and Trade.

EFFECTIVE DATE OF 1996 AMENDMENTS

Amendment by Pub. L. 104–204 applicable with respect to group health plans for plan years beginning on or after Jan. 1, 1998, see section 603(c) of Pub. L. 104–204 set out as a note under section 1003 of this title.

Amendment by Pub. L. 104–191 applicable with respect to group health plans for plan years beginning after June 30, 1997, except as otherwise provided, see section 101(g) of Pub. L. 104–191, set out as a note under section 1181 of this title.

EFFECTIVE DATE OF 1994 AMENDMENTS

Amendment by Pub. L. 103–465 applicable to plan years beginning after Dec. 31, 1994, see section 761(b)(1) of Pub. L. 103–465, set out as a note under section 1056 of this title.

Pub. L. 103–401, § 5, Oct. 22, 1994, 108 Stat. 4173, provided that: ''The amendments made by this Act [amending this section] shall apply to any legal proceeding pending, or brought, on or after May 31, 1993.''

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101–508 applicable to qualified transfers under section 420 of title 26 made after Nov. 5, 1990, see section 12012(e) of Pub. L. 101–508, set out as a note under section 1021 of this title.

EFFECTIVE DATE OF 1989 AMENDMENT

Pub. L. 101–239, title II, § 2101(c), Dec. 19, 1989, 103 Stat. 2123, provided that: ''The amendments made by this section [amending this section] shall apply to any breach of fiduciary responsibility or other violation occurring on or after the date of the enactment of this Act [Dec. 19, 1989].''

Amendment by section 7881(b)(5)(B), (j)(2), (3) of Pub. L. 101–239 effective, except as otherwise provided, as if included in the provision of the Pension Protection Act, Pub. L. 100–203, §§ 9302–9346, to which such amendment relates, see section 7882 of Pub. L. 101–239, set out as a note under section 401 of Title 26, Internal Revenue Code.

Amendment by section 7891(a)(1) of Pub. L. 101–239 effective, except as otherwise provided, as if included in the provision of the Tax Reform Act of 1986, Pub. L. 99–514, to which such amendment relates, see section 7891(f) of Pub. L. 101–239, set out as a note under section 1002 of this title.

Amendment by section 7894(f)(1) of Pub. L. 101–239 effective, except as otherwise provided, as if originally included in the provision of the Employee Retirement Income Security Act of 1974, Pub. L. 93–406, to which such amendment relates, see section 7894(i) of Pub. L. 101–239, set out as a note under section 1002 of this title.

EFFECTIVE DATE OF 1987 AMENDMENT

Pub. L. 100–203, title IX, § 9342(d), Dec. 22, 1987, 101 Stat. 1330–372, provided that:

''(1) IN GENERAL.—The amendments made by this section [amending this section and sections 1023, 1024, and 1113 of this title] shall apply with respect to reports required to be filed after December 31, 1987.

''(2) REGULATIONS.—The Secretary of Labor shall issue the regulations required to carry out the amendments made by subsection (c) [amending this section] not later than January 1, 1989.''

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–272 applicable to plan years beginning on or after July 1, 1986, with special rule for collective bargaining agreements, see section 10002(d) of Pub. L. 99–272, set out as an Effective Date note under section 1161 of this title.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–364 effective Sept. 26, 1980, except as specifically provided, see section 1461(e) of this title.

REGULATIONS

Pub. L. 110–233, title I, § 101(f)(1), May 21, 2008, 122 Stat. 888, provided that: ''The Secretary of Labor shall issue final regulations not later than 12 months after the date of enactment of this Act [May 21, 2008] to carry out the amendments made by this section [amending this section and sections 1182 and 1191b of this title].''

Secretary authorized, effective Sept. 2, 1974, to promulgate regulations wherever provisions of this subchapter call for the promulgation of regulations, see section 1031 of this title.

APPLICABILITY OF AMENDMENTS BY SUBTITLES A AND B OF TITLE I OF PUB. L. 109–280

For special rules on applicability of amendments by subtitles A (§§ 101–108) and B (§§ 111–116) of title I of Pub. L. 109–280 to certain eligible cooperative plans, PBGC settlement plans, and eligible government contractor plans, see sections 104, 105, and 106 of Pub. L. 109–280, set out as notes under section 401 of Title 26, Internal Revenue Code.

SPECIAL RULE FOR CERTAIN BENEFITS FUNDED UNDER AN AGREEMENT APPROVED BY THE PENSION BENEFIT GUARANTY CORPORATION

For applicability of amendment by section 202(b), (c) of Pub. L. 109–280 to a multiemployer plan that is a party to an agreement that was approved by the Pension Benefit Guaranty Corporation prior to June 30,

2005, and that increases benefits and provides for certain withdrawal liability rules, see section 206 of Pub. L. 109–280, set out as a note under section 412 of Title 26, Internal Revenue Code.

EFFECT OF PUB. L. 103–401 ON OTHER PROVISIONS

Pub. L. 103–401, § 4, Oct. 22, 1994, 108 Stat. 4172, provided that: ''Nothing in this Act [amending this section and enacting provisions set out as notes under this section and section 1001 of this title] shall be construed to limit the legal standing of individuals to bring a civil action as participants or beneficiaries under section 502(a) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1132(a)), and nothing in this Act shall affect the responsibilities, obligations, or duties imposed upon fiduciaries by title I of the Employee Retirement Income Security Act of 1974 [this subchapter].''

PLAN AMENDMENTS NOT REQUIRED UNTIL JULY 30, 2002

For provisions directing that if any amendment made by section 306(b) of Pub. L. 107–204 requires an amendment to any plan, such plan amendment shall not be required to be made before the first plan year beginning on or after July 30, 2002, see section 7244(b)(3) of Title 15, Commerce and Trade.

PLAN AMENDMENTS NOT REQUIRED UNTIL JANUARY 1, 1994

For provisions setting forth circumstances under which any amendment to a plan required to be made by an amendment made by section 4301 of Pub. L. 103–66 shall not be required to be made before the first plan year beginning on or after Jan. 1, 1994, see section 4301(d) of Pub. L. 103–66, set out as an Effective Date of 1993 Amendment note under section 1021 of this title.

§ 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

(Pub. L. 93–406, title I, § 503, Sept. 2, 1974, 88 Stat. 893.)

REGULATIONS

Secretary authorized, effective Sept. 2, 1974, to promulgate regulations wherever provisions of this subchapter call for the promulgation of regulations, see section 1031 of this title.

§ 1134. Investigative authority

(a) Investigation and submission of reports, books, etc.

The Secretary shall have the power, in order to determine whether any person has violated or is about to violate any provision of this subchapter or any regulation or order thereunder—

(1) to make an investigation, and in connection therewith to require the submission of reports, books, and records, and the filing of data in support of any information required to be filed with the Secretary under this subchapter, and

(2) to enter such places, inspect such books and records and question such persons as he may deem necessary to enable him to determine the facts relative to such investigation, if he has reasonable cause to believe there may exist a violation of this subchapter or any rule or regulation issued thereunder or if the entry is pursuant to an agreement with the plan.

The Secretary may make available to any person actually affected by any matter which is the subject of an investigation under this section, and to any department or agency of the United States, information concerning any matter which may be the subject of such investigation; except that any information obtained by the Secretary pursuant to section 6103(g) of title 26 shall be made available only in accordance with regulations prescribed by the Secretary of the Treasury.

(b) Frequency of submission of books and records

The Secretary may not under the authority of this section require any plan to submit to the Secretary any books or records of the plan more than once in any 12 month period, unless the Secretary has reasonable cause to believe there may exist a violation of this subchapter or any regulation or order thereunder.

(c) Other provisions applicable relating to attendance of witnesses and production of books, records, etc.

For the purposes of any investigation provided for in this subchapter, the provisions of sections 49 and 50 of title 15 (relating to the attendance of witnesses and the production of books, records, and documents) are hereby made applicable (without regard to any limitation in such sections respecting persons, partnerships, banks, or common carriers) to the jurisdiction, powers, and duties of the Secretary or any officers designated by him. To the extent he considers appropriate, the Secretary may delegate his investigative functions under this section with respect to insured banks acting as fiduciaries of employee benefit plans to the appropriate Federal banking agency (as defined in section 1813(q) of title 12).

(d) Evidentiary privilege; confidentiality of communications

The Secretary may promulgate a regulation that provides an evidentiary privilege for, and provides for the confidentiality of communications between or among, any of the following entities or their agents, consultants, or employees:

(1) A State insurance department.

(2) A State attorney general.

(3) The National Association of Insurance Commissioners.

(4) The Department of Labor.

(5) The Department of the Treasury.

(6) The Department of Justice.

(7) The Department of Health and Human Services.

(8) Any other Federal or State authority that the Secretary determines is appropriate for the purposes of enforcing the provisions of this subchapter.

federal register

FRIDAY, APRIL 8, 1977

PART II

DEPARTMENT OF LABOR

Pension and Welfare Benefit Programs

DEPARTMENT OF THE TREASURY

Internal Revenue Service

■

EMPLOYEE BENEFIT PLANS

Class Exemption for Certain Transactions Between Investment Companies and Employment Benefit Plans

DEPARTMENT OF LABOR

Pension and Welfare Benefit Programs

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[Prohibited Transaction Exemption 77-4]

EMPLOYEE BENEFIT PLANS

Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans

On November 16, 1976, notice was published in the FEDERAL REGISTER (41 FR 50516) that the Department of Labor (the Department) and the Internal Revenue Service (the Service) had under consideration a proposed class exemption from the restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and from the taxes imposed by section 4975 (a) and (b) of the Internal Revenue Code of 1954 (the Code), by reason of section 4975(c)(1) of the Code. The class exemption was requested in an application (Application No. D-055) filed by T. Rowe Price Associates, Inc., Scudder, Stevens & Clark, Stein Roe & Farnham and Thorndike, Doran, Paine & Lewis, Inc., investment advisory firms. The class exemption would exempt from the prohibited transaction restrictions the purchase and sale by an employee benefit plan of shares of a registered, open-end investment company when a fiduciary with respect to the plan (e.g., an investment manager) is also the investment adviser for the investment company. The exemption was proposed in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975 and Rev. Proc. 75-26, 1975-1 C.B. 722, and all interested persons were invited to submit comments on the proposed exemption.

Eight comments were received with regard to the proposed exemption, all supporting the grant of the exemption. Three comments supported the exemption as proposed, while one comment suggested that the exemption be expanded to cover so-called mutual fund "in house" plans. This comment was withdrawn after the publication of notice of the pendency of a proposed class exemption for mutal fund "in house" plans in 41 FR 54080.

Each of the remaining comments, while supporting the exemption, contained one or more suggestions for changes in the exemption.

One comment suggested a technical amendment to sections I(c) and II(c) of the exemption to make clear that payment of an investment advisory fee based on total plan assets, from which credit has been subtracted representing the plan's pro rata share of the investment advisory fees paid by the investment company, would not contravene the ban on payment of investment management or investment advisory fees with respect to plan assets invested in shares of the investment company. The comment was accepted, and incorporated in sections I(c) and II(c). In addition, a typographical error in section I(c) has been corrected. Another commentator suggested that the investment adviser be allowed to charge his investment advisory fee or the fee paid for management of the investment company, whichever was higher, so long as no double fee was charged, on the grounds that the higher fee is often necessary for the economic servicing of smaller accounts. This suggestion was not accepted, because it would provide a situation with a potential for abuse involving economic gain for the fiduciary which could not be easily monitored.

Three suggestions were rejected as unnecessary in light of existing provisions in the proposed exemption. The first was to amend section II(e) of the proposed exemption to permit the Board of Trustees to approve the fees paid to the fiduciary/investment adviser. Section II(e) provides for approval by a second fiduciary of fees paid to the fiduciary/investment adviser. Inasmuch as the Board of Trustees is a fiduciary to the plan, if it meets the criteria set forth in section II(d) of the exemption for a second fiduciary independent of and unrelated to the investment adviser, it may approve the fees paid. The second suggestion, that the investment adviser be allowed to invest in its money market fund without receipt of written approval by the second fiduciary, provided it has notified the trustees both by prospectus and orally of its intent to do so, was not accepted, as the methods provided for approval in section II(e) provide enough alternatives to allow flexibility in receipt of approval, and the method suggested by the commentator would not provide adequate documentation of prior approval. Another suggestion, to the effect that the exemption be clarified to state that it covers insurance company separate accounts which invest portions of their assets in mutual funds, the adviser to which is the insurance company, was not accepted because the exemption, as proposed, covers that situation. Plan assets invested in an insurance company separate account remain plan assets under section 401(b)(2)(B) of the Act. The fact that the insurance company need not hold such assets in trust under section 403(b)(2) of the Act, and that therefore the insurance company holds such assets in its own name and not in the name of the plan, does not alter the fact that it, as investment adviser to the plan, is investing plan assets in a mutual fund to which it is an investment adviser. Therefore, to the extent it meets the conditions set forth in the exemption, it may cause the purchase or sale by such separate account of shares of such mutual funds.

Similarly, a suggestion that the exemption be extended to no-load, closed-end investment companies was rejected because insufficient information was provided to determine whether such an extension would be justified.

Finally, one commentator expressed concern that the standard set forth in section II(d) as to what constitutes an unrelated, indepedent fiduciary for purposes of the exemption would be used as the definition of what constitutes an "affiliate" of a bank for purposes of section 408(b)(8) of the Act and section 4975(d)(8) of the Code. Concern was also expressed as to how the standard would operate in situations involving common directors and officers. The first concern is unwarranted, as section II(d) clearly states that the definition set forth is "for purposes of this exemption." With respect to the other concern, section II(d)(3) has been amended to make clear that an officer, director, partner or employee or relative of a fiduciary/investment adviser, or an affiliate thereof, could be a director of the second fiduciary without thereby automatically disqualifying the second fiduciary as being independent of and unrelated to the fiduciary/investment adviser. However, in that case the director must abstain from any participation in the selection of the investment adviser or the approval of any purchases or sales between the plan and the investment company, or the approval of any change of fees charged to or paid by the plan.

General information. The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption granted under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan to which the exemption is applicable from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion in acordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that a plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries.

(2) The exemption set forth herein is supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(3) The class exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption.

(4) In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code, and based upon the entire record, including the written comments submitted in response to the notice of November 16, 1976, the Department and the Service make the following determinations:

(i) The class exemption set forth herein is administratively feasible;

(ii) It is in the interests of plans and of their participants and beneficaries; and

(iii) It is protective of the rights of participants and beneficiaries of plans.

Exemption. Accordingly, the following exemption is hereby granted under the authority of section 408(a) of the Act and section 4975(c) (2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975) and Rev. Proc. 75-26, 1975-1 C.B. 722:

Section I—Retroactive. Effective January 1, 1975 until 90 days after the date of granting of this exemption, the restrictions of section 406 of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975 (c) (1) of the Code, shall not apply to the purchase or sale by an employee benefit plan of shares of an open-end investment company registered under the Investment Company Act of 1940, the investment adviser for which is also a fiduciary with respect to the plan (or an affiliate of such fiduciary) and is not an employer of employees covered by the plan, provided that the following conditions are met:

(a) The plan does not pay a sales commission in connection with such purchase or sale.

(b) The plan does not pay a redemption fee in connection with the sale by the plan to the investment company of such shares, unless (1) such redemption fee is paid only to the investment company, and (2) the existence of such redemption fee is disclosed in the investment company prospectus in effect both at the time of the purchase of such shares and at the time of such sale.

(c) The plan does not pay an investment management, investment advisory or similar fee with respect to the plan assets invested in such shares for the entire period of such investment. This condition does not preclude (1) the payment of investment advisory fees by the investment company under the terms of its investment advisory agreement adopted in accordance with section 15 of the Investment Company Act of 1940, (2) the payment of an investment advisory fee by the plan based on total plan assets from which a credit has been subtracted representing the plan's pro rata share of investment advisory fees paid by the investment company, or (3) the purchase by the plan of shares of the investment company during any fee period for which the plan prepaid its investment management, investment advisory or similar fee, regardless of whether any part of such prepaid fee is returned to the plan, provided that no investment management, investment advisory or similar fee was or is paid by the plan for any subsequent fee period during any part of which such investment in shares of the investment company was or is retained by the plan.

Section II—Prospective. Effective 90 days after the date of granting of this exemption, the restrictions of section 406 of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c) (1) of the Code, shall not apply to the purchase or sale by an employee benefit plan of shares of an open-end investment company registered under the Investment Company Act of 1940, the investment adviser for which is also a fiduciary with respect to the plan (or an affiliate of such fiduciary) and is not an employer of employees covered by the plan (hereinafter referred to as "fiduciary/investment adviser"), provided that the following conditions are met:

(a) The plan does not pay a sales commission in connection with such purchase or sale.

(b) The plan does not pay a redemption fee in connection with the sale by the plan to the investment company of such shares unless (1) such redemption fee is paid only to the investment company, and (2) the existence of such redemption fee is disclosed in the investment company prospectus in effect both at the time of the purchase of such shares and at the time of such sale.

(c) The plan does not pay an investment management, investment advisory or similar fee with respect to the plan assets invested in such shares for the entire period of such investment. This condition does not preclude the payment of investment advisory fees by the investment company under the terms of its investment advisory agreement adopted in accordance with section 15 of the Investment Company Act of 1940. This condition also does not preclude payment of an investment advisory fee by the plan based on total plan assets from which a credit has been subtracted representing the plan's pro rata share of investment advisory fees paid by the investment company. If, during any fee period for which the plan has prepaid its investment management, investment advisory or similar fee, the plan purchases shares of the investment company, the requirement of this paragraph (c) shall be deemed met with respect to such prepaid fee if, by a method reasonably designed to accomplish the same, the amount of the prepaid fee that constitutes the fee with respect to the plan assets invested in the investment company shares (1) is anticipated and subtracted from the prepaid fee at the time of payment of such fee, (2) is returned to the plan no later than during the immediately following fee period, or (3) is offset against the prepaid fee for the immediately following fee period or for the fee period immediately following thereafter. For purposes of this paragraph, a fee shall be deemed to be prepaid for any fee period if the amount of such fee is calculated as of a date not later than the first day of such period.

(d) A second fiduciary with respect to the plan, who is independent of and unrelated to the fiduciary/investment adviser or any affiliate thereof, receives a current prospectus issued by the investment company, and full and detailed written disclosure of the investment advisory and other fees charged to or paid by the plan and the investment company, including the nature and extent of any differential between the rates of such fees, the reasons why the fiduciary/investment adviser may consider such purchases to be appropriate for the plan, and whether there are any limitations on the fiduciary/investment adviser with respect to which plan assets may be invested in shares of the investment company and, if so, the nature of such limitations. For purposes of this exemption, such second fiduciary will not be deemed to be independent of and unrelated to the fiduciary/investment adviser or any affiliate thereof if:

(1) Such second fiduciary directly or indirectly controls, is controlled by, or is under common control with the fiduciary/investment adviser or any affiliate thereof;

(2) Such second fiduciary, or any officer, director, partner, employee or relative of such second fiduciary is an officer, director, partner, employee or relative of such fiduciary/investment adviser or any affiliate thereof; or

(3) Such second fiduciary directly or indirectly receives any compensation or other consideration for his or his own personal account in connections with any transaction described in this exemption.

If an officer, director, partner, employe or relative of such fiduciary/investment adviser or any affiliate thereof is a director of such second fiduciary, and if he or she abstains from participation in (i) the choice of the plan's investment adviser, (ii) the approval of any such purchase or sale between the plan and the investment company and (iii) the approval of any change of fees charged to or paid by the plan, then paragraph (d) (2) of this section shall not apply.

For purposes of this exemption, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual, and the term "relative" means a "relative" as that term is defined in section 3(15) of the Act (or a "member of the family" as that term is defined in section 4975(e) (6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(e) On the basis of the prospectus and disclosure referred to in paragraph (d), the second fiduciary referred to in paragraph (d) approves such purchases and sales consistent with the responsibilities obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act. Such approval may be limited solely to the investment advisory and other fees paid by the mutual fund in relation to the fees paid by the plan and need not relate to any other aspects of such investments. In addition, such approval must be either (1) set forth in the plan documents or in the investment management agreement between the plan and the fiduciary/investment adviser, (2) indicated in writing prior to each purchase or sale, or (3) indicated in writing prior to the commencement of a specified purchase or sale program in the shares of such investment company.

(f) The second fiduciary referred to in paragraph (d), or any successor thereto,

Case: 17-1711 Document: 00117217400 Page: 184 Date Filed: 11/02/2017 Entry ID: 6129475

is notified of any change in any of the rates of fees referred to in paragraph (d) and approves in writing the continuation of such purchases or sales and the continued holding of any investment company shares acquired by the plan prior to such change and still held by the plan. Such approval may be limited solely to the investment advisory and other fees paid by the mutual fund in relation to the fees paid by the plan and need not relate to any other aspects of such investment.

Signed at Washington, D.C., this 31st day of March 1977.

J. VERNON BALLARD,
Acting Administrator of Pension and Welfare Benefit Programs, Department of Labor.

WILLIAM E. WILLIAMS,
Acting Commissioner of Internal Revenue.

[FR Doc.77-10156 Filed 4-1-77;11:44 am]

[Prohibited Transaction Exemption 77-3]

EMPLOYEE BENEFIT PLANS

Class Exemption Involving Mutual Fund In-House Plans Requested by the Investment Company Institute

On December 10, 1976, notice was published in the FEDERAL REGISTER (41 FR 54080) that the Department of Labor (the Department) and the Internal Revenue Service (the Service) had under consideration a proposed class exemption from the restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and from the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code (the Code), by reason of section 4975(c)(1) of the Code. The class exemption was requested in an application (Application No. D-025), filed by the Investment Company Institute (ICI), a national association of the mutual fund industry. The class exemption would exempt from the prohibited transaction restrictions the acquisition and sale of shares of a registered open-end investment company ("mutual fund") by an employee benefit plan which covers employees of the mutual fund or the mutual fund's investment adviser or principal underwriter, or an affiliate thereof (hereinafter referred to as an "in-house" plan).

The exemption was proposed and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975) and Rev. Proc. 75-26, 1975-1 C.B. 722, and all interested persons were invited to submit comments on the proposed exemption.

Six comments were received, all expressing support for the grant of the exemption. Two of the comments urged approval of the exemption as proposed.

A third comment urged that the exemption be extended to in-house plans of closed-end mutual funds. After due consideration, this request was rejected because insufficient information was provided to enable the Department and the Service to determine whether the conditions set forth in the comment would provide adequate safeguards for plans, their participants and beneficiaries, and extending the comment period to secure such information would unjustifiably impose further delay in the granting of the exemption to the applicant. To the extent the commentator perceives the need for an exemption, the Department and the Service invite the commentator to submit an application for a class exemption pursuant to the procedures set forth in ERISA Procedure 75-1 and Rev. Proc. 75-26.

A fourth comment urged that the exemption be granted but that condition (c) of the exemption (which states that for transactions occurring more than 60 days after the grant of the exemption, the plan may not pay a sales commission) be deleted entirely, or be suspended until 60 days after the Securities and Exchange Commission clarifies the application of Rule 22d-1 under the Investment Company Act 1940 to a mutual fund which waives sales commission on sales to in-house plans as required by such condition (c). The commentator further stated that the applicant had received an interpretation from the staff of the Securities and Exchange Commission relating to the uniform offer requirements of Rule 22d-1(f) which would be a satisfactory resolution, for the industry generally, of the problem of sales to in-house plans. Nevertheless, the commentator has requested that condition (c) be either deleted or suspended for an indefinite period of time for the entire class to accommodate its individual situation. Absent a showing of a genuine class problem, the Department and the Service generally will not delete or suspend an otherwise valid class condition to accommodate an individual situation. The Department and Service note that the commentator has stated that it will file with the Securities and Exchange Commission an application for exemption from Rule 22d-1 in the first week in February and that it has on file with the Department and the Service an application for an individual exemption. If the applicant fails to get the relief it seeks from the Securities and Exchange Commission, it may then pursue its request for exemption from the Department and the Service.

Finally, two comments were received from the applicant, noting the requests of the preceding two commentators that the exemption be extended to closed end investment companies and that condition (c) be deleted or suspended, and urging that consideration of those comments not delay the issuance of the exemption.

General information. The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption granted under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan to which the exemption is applicable from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401 (a) of the Code that a plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries.

(2) The class exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption.

(3) The exemption set forth herein is supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(4) In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code, and based upon the entire record, including the written comments submitted in response to the notice of December 10, 1976, the Department and the Service make the following determinations:

(i) The class exemption set forth herein is administratively feasible;

(ii) It is in the interests of plans and of their participants and beneficiaries; and

(iii) It is protective of the rights of participants and beneficiaries of Plans.

Exemption. Accordingly, the exemption proposed in the notice of December 10, 1976, 41 FR 54080 as set forth below is hereby granted under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975) and Rev. Proc. 75-26, 1975-1 C.B. 722.

Signed at Washington, D.C. this 31st day of March, 1977.

J. VERNON BALLARD,
Acting Administrator of Pension and Welfare Benefit Programs, Department of Labor.

WILLIAM E. WILLIAMS,
Acting Commissioner of Internal Revenue.

Effective for transactions occurring after December 31, 1974, the restrictions of sections 406 and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1) of the Code, shall not apply to the acquisition or sale of shares of an open-end investment company registered under the Investment Company Act of 1940 by an employee benefit plan covering only employees of such investment company, employees of the in-

vestment adviser or principal underwriter for such investment company, or employees of any affiliated person (as defined in section 2(a)(3) of the Investment Company Act of 1940) of such investment adviser or principal underwriter, provided that the following conditions are met (whether or not such investment company, investment adviser, principal underwriter or any affiliated person thereof is a fiduciary with respect to the plan):

(a) The plan does not pay any investment management, investment advisory or similar fee to such investment adviser, principal underwriter or affiliated person. This condition does not preclude the payment of investment advisory fees by the investment company under the terms of its investment advisory agreement adopted in accordance with section 15 of the Investment Company Act of 1940.

(b) The plan does not pay a redemption fee in connection with the sale by the plan to the investment company of such shares unless (1) such redemption fee is paid only to the investment company, and (2) the existence of such redemption fee is disclosed in the investment company prospectus in effect both at the time of the acquisition of such shares and at the time of such sale.

(c) In the case of transactions occurring more than 60 days after the granting of this exemption, the plan does not pay a sales commission in connection with such acquisition or sale.

(d) All other dealings between the plan and the investment company, the investment adviser or principal underwriter for the investment company, or any affiliated person of such investment adviser or principal underwriter, are on a basis no less favorable to the plan than such dealings are with other shareholders of the investment company.

[FR Doc.77-10157 Filed 4-1-77;11:44 am]

the trust holds shares and discusses the trustee's duties with respect to such arrangements. Also cf. id., Comments *c(5)* (self-employment) and *c(6)* (advances to the trust).

§ 100. Liability of Trustee for Breach of Trust

A trustee who commits a breach of trust is chargeable with

(a) the amount required to restore the values of the trust estate and trust distributions to what they would have been if the portion of the trust affected by the breach had been properly administered; or

(b) the amount of any benefit to the trustee personally as a result of the breach.

General Comment:

a. Introduction; cross-references. This Section addresses the measure of a trustee's personal liability for a breach of trust. ("Breach of trust" is defined in § 93; the word "chargeable" is used in the initial phrase of the black letter to recognize that the beneficiaries may fail or decide not to sue the trustee for the breach in question. See Comment *a(1)*.) When circumstances permit recovery alternatively under Clause (a) or Clause (b), recovery is to be based on the alternative that is more beneficial to the trust and its beneficiaries, unless all affected beneficiaries are sui juris and agree on the other alternative. See Reporter's Note.

The primary objectives of the rule of this Section, if suit is brought against a trustee and if that suit is successful, are (i) to make the trust and its beneficiaries whole, usually by restoring the trust estate and trust distributions to what they would have been if the portion of the trust affected by the breach had been properly administered (Clause (a)) and (ii) to ensure that the trustee does not personally benefit from the breach (Clause (b)).

The goal of making the trust and beneficiaries whole is not always taken literally, however, either as a floor or as a ceiling. For example, an award of attorney fees and other costs incurred by the trust or the beneficiaries in remedying the breach is not automatic but a matter of judicial discretion (see Comment *b(2)*; cf. § 88, Comment *d*). Also see Comment *d* on the possibility, in some jurisdictions, of adding punitive damages.

a(1). Beneficiaries' right to affirm or refrain from taking action. Beneficiary awareness or suspicion that a trustee has committed a breach of trust may arise in the context of an accounting or report submitted (or not submitted), or from information provided (or not

Ch. 19

provic to be: provic I breac tion a take effect from accou on tl Repo: ry ra relea: other any j espec for) t dutie admi of a: Com: succe of a see I espe its p: to th the l reco appr how one infor exan (but belo: orde is w

provided), by the trustee. On the trustee's duty to provide information to beneficiaries, see § 82; and on the duty to maintain records and provide reports, see § 83.

If beneficiaries know or suspect that the trustee has committed a breach of trust, they are entitled, collectively (with proper representation as necessary) or individually, to ratify the transaction or simply take no action regarding the trustee's possible misconduct. On the effect of laches and statutes of limitations on beneficiaries who refrain from acting, see § 98. On the potentially preclusive effect of court accountings, see § 83, Comment *c*, and Reporter's Note thereto; and on the effect of judicial instructions, see § 71, Comment *b*, and Reporter's Note thereto. On the requirements and effects of beneficiary ratification and release, see generally § 97; that ratification or release by some beneficiaries *ordinarily* does *not* preclude suit by other beneficiaries, see id., Comment *c(1)*.

In all of the above circumstances, the trustee is accountable for any profit accruing to the trust as a result of the breach (see § 83, especially Comment *b*).

The beneficiaries' decision to accept (or to hold the trustee liable for) the results of a breach ordinarily does not modify the trustee's duties or relieve the trustee of the duty thereafter properly to administer the trust (requiring, for example, that the trustee dispose of an improper investment and reinvest the proceeds). See § 97, Comment *c(3)*.

a(2). Form of recovery from trustee. If suit for breach of trust is successfully brought against the trustee, recovery may take the form of a money judgment or (if feasible) specific restitution. On the latter, see Restatement Third, Restitution and Unjust Enrichment §§ 54–61, especially § 55 (constructive trust) and § 58 (following property into its product and against transferees). The form of the recovery should, to the extent practicable, reflect the preferences and best interests of the beneficiaries.

Ordinarily, the trustee (or a successor) receives the amount of a recovery and retains it or distributes it, in whole or in part, as appropriate to the terms and circumstances of the trust. The court, however, may allocate some or all of the surcharged amount directly to one or more of the beneficiaries to the extent the court has the information necessary to do so. Thus, ordinarily, if it is clear, for example, that a specific beneficiary is entitled to all of the trust income (but see adjustment power in § 111), any recovery for lost income belongs to that beneficiary, to be paid either directly pursuant to court order or by distribution by the trustee. By way of contrast, if the trust is wholly discretionary as to distributions, the trustee (or successor)

Case: 17-1711 Document: 00117217400 Page: 188 Date Filed: 11/02/2017 Entry ID: 6129475

should determine and make any appropriate distributions to the beneficiaries.

a(3). Additional cross-references. Various obstacles that might limit or preclude suit against a trustee for breach of trust are examined in §§ 96–98. The power of the court, pursuant to its equitable authority or statute, to excuse the trustee in whole or in part from liability for a breach of trust is considered in § 95, Comment *d*, and Reporter's Note thereto.

In addition to or instead of liability, a trustee who commits a breach of trust may, in appropriate circumstances, be subject to removal (see § 37, especially Comment *e*) or other remedies to respond to the trustee's misconduct or to improve the administration of the trust (see § 95, Comment *c*).

The possibility of offsetting profits against losses from a trustee's misconduct is considered in § 101. The rules governing contribution from another trustee are discussed in § 102. Additional cross-references are contained in the Comments below.

References to "return" in this Section (and elsewhere in this Restatement) refer to "total return," meaning capital gain and appreciation as well as income. See, e.g., § 90, Comment *e*.

Comment on Liability of Trustee Under Clause (a):

b. Measure of trustee liability. Ordinarily (but compare, e.g., Comment *b(2)*, second paragraph), the liability of a trustee who is sued and found to have committed a breach of trust is the amount required to restore the values of the trust estate and its distributions to what they would have been if the affected portion of the trust estate had been properly administered. This amount to be restored is generally referred to as the "loss" throughout the commentary to this Section.

b(1). Determining amount of loss. If a breach of trust causes a loss, including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration of the trust, the trustee is liable for the amount necessary to compensate fully for the breach.

Occasionally a situation arises that offers an essentially objective means of ascertaining the loss for which a trustee is liable under Clause (a). For example, if the trustee failed to retain (or to acquire) certain property as specifically required by the terms of the trust, whether and in what amount the trust suffered a loss can be determined by ascertaining the specified property's value and earnings as of the time of surcharge and comparing that with the results of the trustee's investment of the sale proceeds (or of the funds that would

have been needed to purchase the property as directed). See Reporter's Note. Also, on other potential remedies, see Comment *a(2)*.

If the breach of trust involved accepting too low a price in an otherwise proper sale of trust property, the trustee's liability would be the amount by which the sale price was inadequate, plus (or minus) a projected total return on that amount to the time of surcharge. In this situation, the return projection probably (see, however, Reporter's Note) can be based simply on the return received on the trustee's investment of the actual proceeds of the sale. (If the only breach was in selling the property for too little, the trustee is not chargeable with the amount of any subsequent increase in that property's value.)

Illustrative of more difficult "loss" determinations is the determination of the recovery from a trustee for imprudent or otherwise improper investments. The recovery in such a case ordinarily would be the difference between (1) the value of those investments and their income and other product at the time of surcharge and (2) the amount of funds expended in making the improper investments, increased (or decreased) by a projected amount of total return (or negative total return) that would have accrued to the trust and its beneficiaries if the funds had been properly invested. (A return projection for "properly invested" funds should reflect the standards of prudent investment in § 90(a), and should not rely on hindsight (cf. § 77, Comment *a*) in selecting a benchmark (below) for hypothetical performance.)

Depending on the type of trustee and the nature of the breach involved, the availability of relevant data, and other facts and circumstances of the case, the projected returns on indefinite hypothetical investments during the surcharge period may appropriately be based, inter alia, on: the return experience (positive or negative) for other investments, or suitable portions of other investments, of the trust in question; average return rates of portfolios, or suitable parts of portfolios, of a representative selection of other trusts having comparable objectives and circumstances; or return rates of one or more suitable common trust funds, or suitable index mutual funds or market indexes (with such adjustments as may be appropriate). See Reporter's Note.

In some situations, especially involving breaches of short duration, or relatively minor or complicated details of loss measurement, it may be appropriate simply to use compound interest rather than total-return projections in determining the amount of loss to be recovered from a trustee.

b(2). Attorney fees and other costs. The "make whole" objective (see Comment *a*) of recovery from a trustee under Clause (a) may include, in an appropriate case, the attorney fees and other litigation

Case: 17-1711 Document: 00117217400 Page: 190 Date Filed: 11/02/2017 Entry ID: 6129475

costs of a successful plaintiff—that is, a co-trustee or successor trustee, or a beneficiary who qualifies for reimbursement from the trust under § 88, Comment *d*. This element of recovery, however, is a matter of judicial discretion and not a routine part of trustee liability for breach of trust (see id.). Among the facts and circumstances courts consider in exercising their judgment in these matters are the nature and extent of trustee misconduct in committing the breach, the conduct of the trustee in presenting the accounting or defending the surcharge action, and the significance of imposing costs on the trustee as a deterrent to misconduct.

A trustee's payment of a beneficiary's costs is especially significant and appropriate with regard to violations of fiduciary duty that are unlikely to cause losses of the types considered in Comment *b(1)*, such as a trustee's improper refusal to provide information requested by a beneficiary (see § 82(1)). (For other remedial actions that might serve a similar purpose in breach-of-trust cases of this type, see § 91, Comment *c*.)

Comment on Liability of Trustee Under Clause (b):

c. Liability to prevent personal benefit to trustee. A trustee who commits a breach of trust normally is not allowed to benefit individually from the breach, and the trustee is subject to liability to eliminate any such benefit. (The term "benefit" used here and in Clause (b) is comprehensive; thus, if a trustee misappropriates trust funds and invests them, the trustee's "benefit" includes the amount misappropriated as well as any profit from the investment.) Unless the beneficiaries choose to affirm the breach transaction or otherwise allow it to stand (see Comment *a(1)*) or they achieve a greater recovery under Clause (a) (see Comments *b-b(2)*), the trustee's improper benefit is eliminated by a decision of the beneficiaries (or on their behalf) to set aside the transaction or act constituting the breach of trust.

For example, if a trustee breaches the duty of loyalty by selling trust property to the trustee individually (or to certain of the trustee's family members defined in § 78, Comment *e*), even in good faith at a fair price (see "no further inquiry" principle, § 78, Comment *d*), and if the property thereafter appreciates, the beneficiaries may avoid the sale in order to eliminate the trustee's profit. The trust thus restores the purchase price and its return (positive or negative) to the trustee (these funds remaining subject to a lien to secure any unpaid surcharge) and recovers instead the value of the property at the time of the decree, or (if feasible) the property itself, plus the earnings from the property or its proceeds. (On the potential liability of a family-member buyer to the trust, see §§ 107–108.)

Conversely, if the trustee breaches the duty of loyalty in *purchasing* an asset for the trust from the trustee individually or from a family member, the beneficiaries may compel the trustee to restore the purchase price, plus an appropriate return on it, with the trustee (or family member) thereby becoming entitled to the asset and any return received by the trust from that asset (subject to a lien for any unpaid surcharge).

Also, if the trustee is a real-estate broker and receives a commission for handling (through the firm of which the trustee is a member) a purchase or sale of land for the trust, and the beneficiaries affirm the purchase or sale (also cf. § 78, Comment *c(5)*), the trustee commits a breach of trust by retaining the commission rather than accounting for it to the trust. The trustee is liable for the amount of the commission, plus an appropriate return on that amount to the time of surcharge.

In each of the foregoing examples, avoidance of the transaction, or recovery of an improper profit, eliminates the trustee's benefit from the breach. The trustee may also be liable for fees and other costs incurred in recovering that benefit. See Comment *b(2)*.

Additional General Comment:

d. Punitive damages. Ordinarily, a recovery under this Section would not be supplemented by an additional award of exemplary damages. The rule stated in Clause (a) of this Section is restorative (see Comment *a*), not punitive. On the distinction between restitution and punishment, see Restatement Third, Restitution and Unjust Enrichment § 49, Comment *a*, and id. § 51, Comment *a*.

In the egregious case, however, punitive damages are permissible under the laws of many jurisdictions. This is especially so if the trustee has acted maliciously, in bad faith, or in a fraudulent, particularly reckless, or self-serving manner. Among the facts and circumstances that are relevant when punitive damages are being considered in such jurisdictions are the nature and extent of the trustee's wrongdoing, the trustee's conduct in presenting an accounting or defending a surcharge action, and the extent to which punitive damages are important in order to punish the trustee, to recognize the harm to the beneficiaries, and to deter similar misconduct.

e. Loss: causation requirement. A trustee who commits a breach of trust is liable for a loss resulting from the breach. A question may arise, therefore, as to the causal connection between the breach of trust and the loss. If a trustee commits the breach and a loss is incurred, the trustee ordinarily is not chargeable with the amount of the loss if the same loss would have occurred in the absence of a

breach of trust. However, special rules govern a breach of the duty to earmark (§ 84) and a breach of the duty of loyalty (§ 78).

If a trustee has committed a breach of trust in failing to earmark trust property (see especially Comment *d* to § 84), the trustee ordinarily is not liable for a loss that is shown not to have resulted from the breach. A special prophylactic rule applies, however, if the trustee's failure to earmark the property presents a danger that the trustee might claim that the property is a personal asset if it increases in value and that it is a trust asset if its value declines. In such a case, the trustee is liable for the loss even without proof of causation or that the trustee had this purpose in mind, as long as the failure to earmark puts the trustee in a realistic position to make such a claim. On the other hand, if the trustee can show that there is no realistic danger that such a claim could successfully be made, the failure to earmark does not render the trustee liable for a loss resulting from the otherwise proper investment. See, however, § 95, Comment *c*, on other remedies the beneficiaries might pursue; and also see Comment *b(2)* to this Section.

An analogous prophylactic rule governs a breach of the duty of loyalty. For example, if the trustee purchases, for the trust, property owned by the trustee individually (or by a family member described in § 78, Comment *e*) and the property subsequently loses value, it is immaterial that the trustee could properly have purchased identical property for the same price from a third person. In order to deter breaches of the duty of loyalty, under the "no further inquiry" principle (id., Comment *d*, and for the reasons explained in id., Comment *b*), the trustee is chargeable with the loss.

f. Burden of proof. When a plaintiff brings suit against a trustee for breach of trust, the plaintiff generally bears the burden of proof. This general rule, however, is moderated in order to take account of the trustee's duties of disclosure (§ 82) and of recordkeeping and reporting (§ 83) as well as the trustee's superior (often, unique) access to information about the trust and its activities, and also to encourage the trustee's compliance with applicable fiduciary duties.

Furthermore, there are examples in trust fiduciary law where the normal burden of proof (resting on the plaintiff to prove all elements of the cause of action) does not obtain. For example, the "no further inquiry" principle (see § 78, Comment *b*) operates to relieve the plaintiff of proving that the transaction was affected by a conflict between the trustee's fiduciary and personal interests. Similarly, an exculpatory clause drafted (or caused to be included in the trust instrument) by the trustee is presumptively unenforceable, with the trustee having the burden of rebutting the presumption (see § 96,

Case: 17-1711 Document: 00117217400 Page: 193 Date Filed: 11/02/2017 Entry ID: 6129475

Comment *d*). And once a plaintiff shows a loss associated with an inadequately diversified trust portfolio, the plaintiff need not negate, but the trustee has the burden to establish, the existence of an exception to the normal duty to diversify (see § 90(b) and id., Comment *g*).

Also, in matters of causation (Comment *e*), 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.

The trustee also bears an analogous burden of proving each item in an accounting or report, if challenged by a beneficiary, with doubts about the accuracy and completeness of the trustee's records being resolved against the trustee (see § 83, especially Comments *a* and *b*). On the beneficiary's burden to produce evidence to contradict evidence presented by the trustee in support of a challenged item, see Reporter's Note.

REPORTER'S NOTES ON § 100

This Section and its commentary correspond to but differ significantly from Restatement Second, Trusts §§ 205–212, 214; differences are indicated in the Introductory Note to this Chapter and in various Reporter's Notes that follow.

See also Austin W. Scott, William F. Fratcher & Mark L. Ascher, *Scott and Ascher on Trusts* §§ 24.9–24.17, 24.19.1 (5th ed. 2007); Amy M. Hess, George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* §§ 701–707 (3d ed. 2009); and George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* §§ 861–867 (Rev. 2d ed. 1995).

Comment *a*:

The principle of recovery stated at the end of the first paragraph of this Comment can be simply illustrated by trustee T's breach of trust in purchasing for the trust for $1 million (fair market value) land owned by T personally, after which (1) the land appreciates $100,000 in value (with no other return) and (2) the purchase price, if retained and properly invested (Comment *b(1)*), would have earned a return of $200,000, resulting in a recoverable amount of **$100,000 under Clause (a)**, while (3) T's investment of $1 million produced a profit of **$150,000 under Clause (b)**. Because avoidance of T's transaction with the trust would require returning the land to T (Comment *c*), a recovery under Clause (b) ($1.15 million) would be less beneficial to the trust than the result under Clause (a) ($1.2 million, i.e., the $100,000 recovery added to the existing value of $1.1 million). If T's personal post-sale investment returned $250,000, however, recovery under Clause (b) would offer the better result for the trust and its beneficiaries; but even then, if all potentially affected beneficiaries agree

and are sui juris, as might well be the case at the trust's termination date (see § 89), the beneficiaries could choose the "less optimal" result under Clause (a) if they strongly prefer to retain the land. Compare generally the extensive discussion and Illustrations in Restatement Third, Restitution and Unjust Enrichment §§ 43 and 51.

Comment *a(1)*:

Eaves v. Penn, 587 F.2d 453, 462 (10th Cir. 1978), stated: "Generally, in the absence of an election of a particular remedy by all beneficiaries, the court has a duty to enforce the remedy which is most advantageous to the participants and most conducive to effectuating the purposes of the trust." Rippey v. Denver U.S. Nat'l Bank, 273 F.Supp. 718, 742 (D. Colo. 1967), stated: "The plaintiffs have not made a clear and unequivocal election but have been content to leave the fashioning of the remedy to the court.... To force an election of remedies would have the effect of requiring plaintiffs [trust remainder beneficiaries] to predict at their peril the outcome of the case.... In selecting the appropriate remedy the controlling consideration is the award of fair compensation and advancement of the best interests of all of the beneficiaries."

Comment *b*:

For rationale and background regarding, and some of the authorities supporting, the modernized, total-return measure of trustee liability stated in Clause (a) of this Section, see Chapter 19, Introductory Note, supra, and the Reporter's Notes thereto.

On the general principle articulated in Clause (a), see *Scott and Ascher on Trusts*, supra, § 24.9 (pp. 1690–1691): "To avoid these difficulties [noted in last paragraph of Reporter's Notes to the Introductory Note, supra], the Uniform Trust Code and the Restatement (Third) of Trusts have reformulated, in more general terms, the amount for which the trustee is liable when the beneficiaries choose to surcharge the trustee.... [Quotation from Prudent Investor Rule § 205(b) omitted, as is a footnote observation that Uniform Trust Code § 1002(a)(1) is similar.] In broad concept, this has long been the objective of the law of trusts. In limiting the beneficiaries' remedy to the initial amount of the loss, increased by statutory interest, however, the law has often failed fully to effectuate that objective. These days, courts seem increasingly willing to calculate the trust estate's total loss ... by reference to the more general concept of what it would take to make the trust estate whole."

Comment *b(1)*:

The first example (second paragraph) of this Comment (unlike the other text examples that follow) is consistent with Restatement Second, Trusts § 211 (and id., Comments *a-d*) and, e.g., Rollins v. May, 473 F.Supp. 358 (D. S.C. 1978), aff'd, 603 F.2d 487 (4th Cir. 1979) (awarding time-of-surcharge value of land improperly sold);

cf. Flagship Bank v. Reinman, et al., 503 So.2d 913 (Fla. App. 1987).

In the second example (third paragraph) of this Comment, the word "probably" is to indicate that the result assumes that the trustee's actual investments were not only prudent but that the asset allocation also would have been suitable for the amount of funds added by surcharge. Even in this rather clear-cut case, the modern measure of damages was apparently too speculative for Restatement Second, Trusts; see id. § 205, Comment *d*, leaving the matter of time lapse after the initial loss to the rule of id. § 207, merely adding interest for cases of delayed recovery, as in Lincoln Nat. Bank and Trust Co. v. Shriners Hospitals for Crippled Children, 588 N.E.2d 597, 601 (Ind. App. 1992), which interestingly awarded the interest element to the remainder beneficiaries because, if additional sale proceeds had been received and invested "there would have been an obvious growth in the principal over the years."

"[D]amages based on what a prudent investor would have done would be appropriate for a breach of the duty of prudent investing ... and therefore would show the amount of profits lost...." Uzyel v. Kadisha, 188 Cal.App.4th 866, 116 Cal.Rptr.3d 244, 277 (2010).

On measuring loss and liability more generally under Clause (a) (fourth and fifth paragraphs of this Comment), the opinion in Baker Boyer Nat. Bank v. Garver, 43 Wash. App. 673, 719 P.2d 583 (1986), review denied, 106 Wash. 2d 1017, summarizes the holding on damages and how that holding was reached, as well as the nature of the breach, as follows (at 591, citations omitted):

[Remainder beneficiaries] contend the trial court erred in surcharging the bank only $22,950 ... based on the court's conclusion [that] a reasonable policy would have been to invest 40 percent of the funds in other investment quality stocks.... [A]n investment expert, testified [that] the portfolio should have contained between 40 and 60 percent equity stock. [Beneficiaries] contend that 50 percent would be a more appropriate percentage for the court to use in computing the damages.

It was within the court's discretion to determine, consistent with the evidence, the extent of the Bank's liability for investing too large an amount in the tax-exempt securities. A trustee is liable only for such loss as results from the investment beyond the amount which would have been proper to invest. The court's conclusion was within the range [the expert] testified constituted proper diversification. Therefore, the court did not err in using the conservative figure of 40 percent.

[Remainder beneficiaries] also assert the court should have computed into the damage award the amount which equity stock appreciated as a whole during the trust period. We agree the court should have considered the lost appreciation in equity securities which would have been realized but for the failure to diversify. The object of awarding damages to [beneficiaries] is to place them in the position they would have been in if the Bank had prudently diversified between tax-exempt and equity securities. Since the court found the Bank should have placed 40 percent of the funds in equity securi-

ties (approximately $77,600), the measure of damages should properly reflect the increase in their value. The court found that the stock equity market, as measured by the broad stock indexes, rose approximately 20–22 percent during the trusts' administration. If properly diversified, the trusts should have totaled $171,270 when liquefied [sic]. Instead, the trusts totaled approximately $130,250. The correct measure of damages should have been $41,020, not $22,950 as found by the trial court. Therefore, the surcharge is increased by $18,070.

The more recent opinion in an ERISA case, Meyer v. Berkshire Life Ins. Co., 250 F. Supp. 2d 544 (D. Md. 2003), is also instructive on how damages may be determined, explaining (at 572–573, citations omitted and paragraphing disregarded):

> [T]he proper measure of damages is the difference between the actual value of the plans and the 'value prudent investments would bear.' . . . While awards may not be speculative, the court may approximate the extent of damages. [A] fair damages calculation [requires] the court to determine what asset mix a prudent fiduciary would have maintained . . . during the 1993–1997 time frame. . . . Considering the testimony and evidence as a whole, the court concludes that a moderate asset mix consisting of 50% equity and 50% income [securities] . . . would have been prudent [and that] . . . it would have been reasonable to achieve a 10% to 12% rate of return on the plans' investment components during [that] time frame. . . .

(The point of repeatedly using the term "suitable" in the references (fifth paragraph of Comment) to various measures of loss is aptly made in D. Campisi & P. Collins, "Index Returns as a Measure of Damages in Fiduciary Surcharge Cases," 140 Trusts & Estates 18, 26–28 (June 2001) (paragraphing disregarded): "The risk tolerance of the trust may make [a solely] equity-based measure inappropriate. . . . Success or failure, to use Third Restatement phraseology, is considered in the 'portfolio context.' Often, the portfolio context will call for use of multiple indexes in order to form a benchmark portfolio. The allocation targets established by investment policy determine the weight of each index.")

In First Alabama Bank v. Spragins, 515 So.2d 962 (Ala. 1987), although accepting that "speculation is not a sufficient basis for an award of damages" (and although some discussion of the trustee's alleged failures sounds of hindsight), the court affirmed a surcharge for lost appreciation with respect to improperly retained investments, the substantial profits of which were appreciably less than what would have resulted if the investments had "been prudently managed." The benchmark used (and affirmed by the Alabama Supreme Court) to measure what proper investments would have produced was Standard and Poor's 500.

In Estate of Wilde, 708 A.2d 273, 275–276 (Me. 1998), the trial and appellate courts were presented, by detailed stipulation of the parties, with a choice among alternative "measures of damages" applicable to the "trustee of an express trust" and with the amounts of liability that would result from each; after deciding that "Restatement (Third) of Trusts § 205 (1992)" (not Maine's traditional rule) states "the proper measure of dam-

ages" to be applied, the court proceeded to accept and impose the stipulated liability that would result if the trust "had been managed by a prudent professional trustee in Portland, Maine," attempting (unsuccessfully but, in any event, for reasons peculiar to the case) to explain this choice from among the stipulated alternatives, vacating the probate court's judgment that had been based on the alternative of investment "in an S & P 500 Index Fund."

In Noggle v. Bank of America, 70 Cal.App.4th 853, 82 Cal.Rptr.2d 829, 836 (1999) (violation of duty of impartiality, favoring income beneficiaries of several family trusts; damages significantly limited by statute of limitations), the court decided that the "portion of the trust estates that should have been invested in assets that would have benefited the remaindermen over their parents would have been invested in the Bank's common equity trust fund." (Earlier, a California case involving a trustee's breach of the duty of loyalty, Estate of Anderson, 149 Cal.App.3d 336, 196 Cal.Rptr. 782 (1983), affirmed "an award of so-called 'appreciation damages' ").

In Estate of Cooper, 81 Wash.App. 79, 913 P.2d 393 (1996), review denied, 130 Wash.2d 1011, 928 P.2d 414 (another case of impartiality, favoring income), the trustee was surcharged for loss of the greater appreciation that would have resulted from proper investment at suitable risk, but the opinion does not address how to project a return for the equity portion of a balanced portfolio.

See also Dennis v. Rhode Island Hospital Trust Nat. Bank, 744 F.2d 893, 900 (1st Cir. 1984), which noted that "Rhode Island law simply requires that the [trial] court's approach be reasonable and ... grounded in the record's facts" and concluded that "inflation adjustments" were properly included in the remainder beneficiaries' recovery, but excluded any additional amounts to reflect appreciation beyond maintenance of real value for lack of evidence showing "the performance of an average, or typical, trust." The court observed that, in attempting to reconstruct "what would have occurred to a hypothetical 1950 investment, we see nothing unreasonable in assuming that the value of the corpus would have kept pace with inflation."

Compare the Colorado Supreme Court's approval of an award of an "additional [amount] representing damages for the loss of appreciation of the funds [that had been improperly] invested" by a *custodian* in Buder v. Sartore, 774 P.2d 1383 (Colo. 1989), acknowledging that it was "well within" a trial court's discretion to require payment for lost appreciation as a "realistic recognition of the opportunity costs" involved. Also compare Miley v. Oppenheimer & Co., 637 F.2d 318, 328 (5th Cir. 1981) (investor's action against stockbroker under federal securities law; absent "either a specialized portfolio or a showing by either party that a different method is more accurate," the court approved a "mode of estimating [that] utilizes the average percentage performance in the value of the Dow Jones Industrials or the Standard and Poor's Index during the relevant period as the indicia of how a given portfolio would have performed"); and Adams v. Paine, Webber, Jackson & Curtis, 686 P.2d 797 (Colo. App. 1983) (another customer's action against a broker for breach of fiduciary duty, approving inclusion of lost profits in the recovery where "evi-

Case: 17-1711 Document: 00117217400 Page: 198 Date Filed: 11/02/2017 Entry ID: 6129475

dence presented to the jury as to the amount of lost profits and how they could be calculated . . . nullified the broker's claim that such damages, if granted, would be speculative").

ERISA cases. The influential decision in Donovan v. Bierwirth, 754 F.2d 1049, 1056 (2d Cir. 1985), 78 A.L.R.3d 91, looked to both common-law trust principles and ERISA § 409 (which "seeks to undo harm" from fiduciary misconduct) and concluded that the ERISA measure of loss even then required a comparison of the plan's actual earnings on its Grumman stock holdings with what the plan would have earned had the funds been properly invested. (On remand, Ford v. Bierwirth, 636 F.Supp. 540 (E.D.N.Y. 1986), later found that Grumman outperformed the benchmark portfolios.) In dicta that may be excessively harsh, sounding seriously of hindsight, and a bit constraining for the exercise of a court's judgment in matters of damages, *at least for trust cases generally*, the Second Circuit opinion (citations omitted) stated: "Where several alternative investment strategies were equally plausible, the court should presume that the funds would have been used in the most profitable of these. The burden of proving that the funds would have earned less than that amount is on the fiduciaries.... This is nothing more than application of the principle that, once a breach of trust is established, uncertainties in fixing damages will be resolved against the wrongdoer." Soon thereafter, in Dardaganis v. Grace Capital, Inc., 889 F.2d 1237 (2d Cir. 1989), the same court held: "If, but for the breach, the Fund would have earned even more than it actually earned, there is a 'loss' for which the breaching fiduciary is liable."

Another leading ERISA case of that period, Leigh v. Engle (*Leigh II*), 858 F.2d 361, 367 (7th Cir. 1988), affirmed a trial-court judgment that, in determining liability, "merely found that the gain from the Hickory investment was less than that which would have been obtained through prudent alternative investments," here Harris Bank's common trust funds.

Almost two decades after Donovan v. Bierwirth, the 2003 opinion in Meyer v. Berkshire, supra, stated (at 572 n.36, citations omitted): "The plaintiffs also assert . . . that the 'court must assume that . . . plan assets would have been invested in the most profitable manner possible.' This contention reflects a misunderstanding of the proper damages standard." Cf. Williams v. Security Nat. Bank, 358 F. Supp. 2d 782 (N.D. Iowa 2005). Also cf. R. Roth, "Hindsight Bias and the Curse of Knowledge," 139 ABA Trust & Investments 30 (Amer. Bankers Assn. Jan.-Feb. 2011).

Damages reduced or eliminated due to general decline in relevant market. Except for cases involving failure to acquire or retain a specific investment as required by the terms of the trust, there is little authority for the position taken in Comment *b(1)* that damages attributable to a breach of trust may be reduced or eliminated because of a general pattern of low or negative total return (such as might result from declining market values generally) among investments that would have been appropriate for the trust and funds in question. Such a case is First National Bank v. Truesdale Hospital, 288 Mass. 35, 192 N.E. 150 (1934), noted in 48 Harv. L. Rev. 347 and 21 Va. L. Rev. 334. Also, see Estate of Nola, 333 Pa. 106, 3 A.2d 326 (1939) (trust-

ee directed to sell land and invest in Italian government bonds; loss from noncompliance to be reduced by any losses likely to have resulted from the directed bond investments), and Fort Meyers Mem. Gardens v. Barnett Banks Trust Co., 474 So.2d 1215 (Fla. App. 1985) (lack of causation when authorized AAA and AA rated bonds generally declined more than the trust's improperly purchased A bonds).

Although generally not adopting a total-return approach to measuring damages (e.g., generally not allowing recovery for "lost appreciation"), the prior Restatement did consider the declining market situation sympathetically. See Restatement Second, Trusts § 212, Comment *e* ("*Where a loss would probably have been incurred in absence of breach of trust*"), ending: "Where the breach of trust is merely in the failure to [replace] legal trust securities which [trustee] should have sold because they had so risen in value that there was not a proper diversification of risk, it would seem that it is a defense if there has been an average loss on similar securities which he might have purchased with the proceeds."

Comment *b(2)*:

Uniform Trust Code § 1004 authorizes courts to "award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy," the comment observing that the section "codifies the court's historic authority . . . in judicial proceedings grounded in equity." Some cases have required *trusts* to pay reasonable litigation costs of successful beneficiary-plaintiffs (see common-fund doctrine, § 88, Comment *d*) and wrongdoing *trustees* to reimburse the trust, as in Davis v. Davis, 889 N.E.2d 374 (Ind. App. 2008), and Feinberg v. Feinberg Hotel Trust, 922 S.W.2d 21 (Mo. App. 1996). Other cases have held wrongdoing trustees directly liable for the litigation costs of plaintiff-beneficiaries, as in Reynolds v. First Alabama Bank, 471 So.2d 1238 (Ala. 1985), In re Will of Samson, 684 So.2d 845 (Fla. App. 1996), In re Will of Jacobs, 91 N.C.App. 138, 370 S.E.2d 860 (1988), and Wadsworth v. Bank of California, 97 Or.App. 491, 777 P.2d 975 (1989). Cf. Estate of Talty, 376 Ill.App.3d 1082, 315 Ill.Dec. 866, 877 N.E.2d 1195 (2007) (liability of *executor*). In Sullivan v. William A. Randolph, Inc., 504 F.3d 665, 671 (7th Cir. 2007), the court mentioned, among factors relevant to "fee-shifting issues" under the statutory rule of ERISA, the degree of culpability, bad faith in conduct of litigation, the ability of the offending party to satisfy an award of attorney fees, and whether the award would deter similar misconduct by others.

"Although . . . [the trust] suffered no harm as a result of the Trustee's breach, the Trustee's actions, including a general reticence or refusal to communicate . . . , forced [the beneficiaries] to enlist the aid of attorneys and a trial court to determine that, in fact, they had not sustained financial harm as a result of [the trustee's] inaction. Under the circumstances, we find that the trial court did not err by ordering the Trustee to pay [the beneficiaries'] attorney fees. . . ." In re Wilson, 930 N.E.2d 646, 652 (Ind. App. 2010). "The only damages that could result [from the trustee's failure to file accountings] would be

the costs of the remaindermen in [compelling] the accountings," there being no other breach of trust. Law v. Law, 753 A.2d 443, 450 (Del. 2000). See also Heller v. First Nat. Bank, 657 P.2d 992, 997, 999 (Colo. App. 1982) (awarding plaintiff "reasonable accounting fees" from bank trustee for breaching "its duty to provide clear and accurate accountings," as well as attorney fees awarded "to make the injured party whole"), and Citizens & Southern Nat. Bank, 254 Ga. 131, 327 S.E.2d 192, 196 (Ga. 1985) (affirming award of beneficiaries' attorneys' fees from trustee, having "stubbornly" caused "plaintiffs unnecessary trouble and expenses").

Comment *c*:

Restatement Third, Restitution and Unjust Enrichment § 43, Comment *h*, states: "[T]he prophylactic aims of fiduciary duty require a fiduciary to disgorge profits (including consequential gains) even if the breach of duty is inadvertent."

". . . [A] trustee is liable for any profit he has made through his breach of trust even though the trust has suffered no loss. Thus the trustee will be held liable for profits made through a prohibited dealing even though the trust received or paid fair market value for the property." Bogert & Bogert, supra, § 862 (pp. 63–64). Thus, in Coster v. Crookham, 468 N.W.2d 802 (Iowa 1991), a bank trustee's loans to a trust were enforceable as to principal but not as to interest.

In Nickel v. Bank of America, 290 F.3d 1134, 1139 (9th Cir. 2002), a bank had been trustee for "2,500 or more" trusts, with contractual compensation that could be increased only by consent or court order; in breach of trust, the bank raised its fees nine times between 1975 and 1990. The bank was acquired in 1992 by Bank of America, which, after discovering the breach, "refunded [in 1994] $24 million of over-charges . . . with $17.8 million interest . . . at the legal rate" on judgments during the period. The opinion (citing Restatement of Restitution § 1 (1937)) noted the "elementary rule . . . that if you take my money and make money with it, your profit belongs to me" and that the bank "put the overcharges to work . . . caus[ing] an addition to profit." Because money "is fungible . . . sums taken from the trusts could never be identified again. A requirement of traceability . . . [would nullify the] obligation to cough up the profits" and the "district court suggest[ion] that proof of the trusts' share of profits was 'speculative' . . . is simply a sophisticated restatement of the requirement of traceability. There is no speculation as to either the bank's annual profit or the share of the bank's capital represented by the overcharges. . . . [T]he calculation of what is owed the trusts is straightforward. . . . The appropriate remedy is to allot to these unwitting and unwilling contributors a proportionate share of the bank's profits during the years of misappropriation" (id. at 1136–1139, citations omitted and paragraphing disregarded).

Comment *d*:

On this subject, *Scott and Ascher on Trusts*, supra, observes at pp. 1694–1695: "The courts have traditionally been hesitant to impose punitive damages on a trustee. These days, however, they seem increasingly willing to do so, at least when the trustee's conduct is especially egregious."

As stated in Dan B. Dobbs, *Hornbook on Remedies* § 3.11 (2d ed. 1993): "The traditional rule was that equity would not award punitive damages, either because equity's sole province was to provide 'complete relief,' and compensatory damages marked the limit of that relief, or because punishment or vengeance seemed vaguely inappropriate to a 'benignant' equity. Though this rule is rejected by contemporary decisions that have addressed it as a serious issue, there are cases that still repeat it."

See also J. Pankauski, L. Steckman & R. Conner, "Punitive Damages Against Fiduciaries, Probate Cases, and Equitable Relief," 25 Prob. & Prop. 43 (May/June 2011), stating at the outset that courts should allow punitive damages "in probate cases, for reasons unique to probate law" (at 43) and concluding (at 47):

> Overreaching by those who are charged with managing property for others is a great problem. Attorneys-in-fact misuse powers of attorney; trustees treat trust property as their own; children abuse their parent's illnesses or frailties for their own benefit. The combination of the current, extraordinary aggregation of wealth, and the difficult economic circumstances that are afflicting so many people, have created the incentive and opportunity for fiduciaries to abuse positions of trust and confidence....
>
> ... Bank robber Willie Sutton, when asked why he robbed banks, famously said, "That's where the money is." Today, bank accounts, will-substitutes, and trust accounts, including revocable trusts, are where the money is. Grantors and beneficiaries need legal protection, and punitive damages are a critical part of the law's deterrent arsenal....

For an extensive collection and discussion of cases and statutes allowing punitive damages, see Walter L. Nossaman & Joseph L. Wyatt, Jr., *Trust Administration and Taxation* § 34.12A (2010).

See also InterFirst Bank v. Risser, 739 S.W.2d 882 (Tex. App. 1987) (exemplary damages awarded because of bad faith, self-dealing, and beneficiaries' "inconvenience" and expense, but award reduced as disproportionate to actual damages).

Contrast Harris v. Digital Pulse Pty Ltd [2003] NSWCA 10 (concluding, at para. 470, after extensive examination of cases and arguments, that "[t]here is no power in the law of New South Wales to award exemplary damages for equitable wrongs of the type [employer/employee 'fiduciary obligation' created by contract, para. 5] involved in this case.") *with* Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada* 1225 (3d ed. 2005) ("The [Supreme Court of Canada recently] accepted that such damages are available for a breach of fiduciary duty.").

ERISA. The Supreme Court in dictum indicated that ERISA does not permit punitive damages (see Massa-

chusetts Mutual Life Ins. Co., 473 U.S. 134, 144 (1985)), and lower courts have followed that view. See, e.g., Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 585 n.6 (7th Cir. 2000); Turner v. Fallon Community Health Plan, Inc., 127 F.3d 196, 198 (1st Cir. 1997).

Comment *f*:

On the burden of proof, in addition to *Scott and Ascher on Trusts*, supra, § 17.4 (duty to keep and render accounts) and § 17.5 (duty to furnish information), see Bogert & Bogert, supra, § 871 (on procedure, including the burden of proof) and Charles E. Rounds, Jr. & Charles E. Rounds III, *Loring: A Trustee's Handbook* § 8.24 (2009 ed.).

Estate of Stetson, 463 Pa. 64, 345 A.2d 679, 690 (1975) states: "[W]hen a beneficiary has succeeded in proving that the trustee has committed a breach of duty and that a related loss has occurred, we believe that the burden of persuasion ought to shift to the trustee to prove, as a matter of defense, that the loss would have occurred in the absence of a breach of duty."

On the trustee's burden to justify each item in an account, see George T. Bogert, *Trusts* (Hornbook) § 143 (6th ed. 1987). See also Bogert, *Trusts and Trustees*, supra, § 970 (p. 401), stating: "[T]he burden of proving the propriety of an act or transaction set forth in the account, if it is objected to, should rest on the trustee, but . . . if [the trustee] makes out a prima facie case, the burden of producing contradictory evidence rests on the beneficiary who has objected." And similar language is found in In re Riddle, 946 N.E.2d 61, 68 (Ind. App. 2011).

§ 101. Offsetting Profit Against Loss

The amount of a trustee's liability for breach of trust may not be reduced by a profit resulting from other misconduct unless the acts of misconduct causing the loss and the profit constitute a single breach.

Comment:

a. Scope, effect, and rationale of Section. If a trustee is liable for a loss caused by a breach of trust, the amount of the liability is not reduced by a profit resulting from actions of the trustee that do not involve a breach of trust. The rule of this Section applies only where the trust estate has experienced a profit as well as a loss from *improper* administration.

If it is determined under the rule of this Section that profit and loss are to be offset (see Comment *c*), the trust and its beneficiaries are entitled, as the case may be, either to hold the trustee accountable for the net profit or to charge the trustee with the net loss.

The rule of this Section balances fairness to the trustee and regard for the interests and entitlements of the beneficiaries. Whether

needed to restore the account will be taken from forfeitures for the year in which the participant returns to employment or, if necessary, from a supplemental employer contribution for the year.

(b) Partial Distributions. If a participant receives a partial distribution of the participant's discretionary contributions account and matching contributions account before the account is fully vested, the participant's vested interest in the account at any time after the distribution will be determined in accordance with the following formula:

$$X = P * (AB + D) - D$$

where "X" is the remaining vested portion, "P" is the vested percentage at the relevant time, "AB" is the balance in the account at the relevant time and "D" is the amount of the distribution from the account.

7.7 Missing Persons. If a person entitled to benefits under the plan cannot be located after diligent search by the PBAC and the whereabouts of the person continues to be unknown for a period of one year, the PBAC may determine that the accounts of the person shall be forfeited; provided, however, that such forfeited amounts shall be restored upon the filing of a claim by the person within the time prescribed by applicable law.

ARTICLE 8

INVESTMENT FUNDS AND CREDITING INVESTMENT EXPERIENCE

8.1 Investment Funds. The available investment funds under the plan include (a) any publicly offered, open-end mutual fund (other than tax-exempt funds) that are generally made available to employer-sponsored retirement plans and underwritten or managed by Putnam Investments or one of its affiliates, (b) the Putnam Stable Value Fund, (c) the Putnam S&P 500 Index Fund and the Putnam Bond Index Fund, (d) MMC stock, provided, however, that notwithstanding any other provision herein to the contrary, effective July 1, 2007, no additional shares of MMC stock may be purchased under the plan other than shares purchased through reinvested dividends, and (e) any publicly offered, open-end mutual fund (other than tax-exempt funds and the funds described in (a) above) that may be available through a provider of participant-directed brokerage account services designated by the PBIC. The PBIC may from time to time designate other mutual funds or other collective investment vehicles, categories or classes of mutual funds or collective investment vehicles, or categories of other securities available for investment of contributions under the plan. The trustee will maintain accounts reflecting investment in each of the separate investment funds. The trustee will maintain records which reflect the portion of each account of a participant that is invested in each separate investment fund. The existence of such records and of participants' accounts will not be deemed to give any person any right, title or interest in or to any specific assets or part of the trust fund or any separate investment fund.

United States Court of Appeals
For the First Circuit

No. 17-1711

JOHN BROTHERSTON, individually and as representative of a class of similarly situated persons, and on behalf of the Putnam Retirement Plan; JOAN GLANCY, individually and as representative of a class of similarly situated persons, and on behalf of the Putnam Retirement Plan

Plaintiffs - Appellants

v.

PUTNAM INVESTMENTS, LLC; PUTNAM BENEFITS OVERSIGHT COMMITTEE; PUTNAM BENEFITS INVESTMENT COMMITTEE; ROBERT REYNOLDS; PUTNAM INVESTMENT MANAGEMENT, LLC; PUTNAM INVESTOR SERVICES, INC.

Defendants - Appellees

PUTNAM BENEFITS ADMINISTRATION COMMITTEE; ELLEN NEARY; JOHN DOES 1-30

Defendants

APPELLEE'S BRIEFING NOTICE

Issued: November 2, 2017

Appellee's brief must be filed by **December 1, 2017**.

The deadline for filing appellant's reply brief will run from service of appellee's brief in accordance with Fed. R. App. P. 31 and 1st Cir. R. 31.0. Parties are advised that extensions of time are not normally allowed without timely motion for good cause shown.

Presently, it appears that this case may be ready for argument or submission at the coming **March, 2018** session.

The First Circuit Rulebook, which contains the Federal Rules of Appellate Procedure, First Circuit Local Rules and First Circuit Internal Operating Procedures, is available on the court's website at www.ca1.uscourts.gov. Please note that the court's website also contains tips on filing briefs, including a checklist of what your brief must contain.

Failure to file a brief in compliance with the federal and local rules will result in the issuance of an order directing the party to file a conforming brief and could result in the appellee not being heard at oral argument. <u>See</u> 1st Cir. R. 3 and 45.

Margaret Carter, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
John Joseph Moakley
United States Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210
Case Manager: Garineh- (617) 748-4664

cc:
James R. Carroll
Eben P. Colby
Carl Engstrom
Eleanor Emmons Frisch
Michael S. Hines
James Kaster
Raoul D. Kennedy
Jason Mathew Leviton
Paul J. Lukas
Kai Heinrich Richter
Jacob T. Schutz
Jacob A. Walker