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' REPLY BRIEF

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INTRODUCTION

In their response brief, Defendants say conspicuously little about their process for selecting and monitoring the investment lineup in the Putnam Retirement Plan ("Plan"). That is because their fiduciary processes were sorely lacking. As noted in Plaintiffs' principal brief, Defendants (1) automatically added every Putnam open-end, non-tax exempt mutual fund to the Plan without regard to performance or cost; (2) failed to meaningfully review those investments on an ongoing basis; (3) ignored reports indicating that many of Putnam's funds were failing; (4) retained each and every one of those proprietary funds in Plan throughout the class period (including the Voyager fund, until it was taken off the market due to abysmal investment performance); (5) failed to consider alternatives to Putnam funds until six BNY Mellon funds were belatedly added to the Plan; and (6) failed to minimize costs, and worse, allowed the Plan to be charged higher fees than other investors for the same investments (due to Putnam's failure to offer revenue-sharing rebates to the Plan). *See* Appellants' Brief ("Pls' Br.") at 6-22.

Losses to the Plan

Faced with this record, on which the District Court concluded it "would be warranted" in finding a breach of the duty of prudence, Appellants' Addendum ("ADD")–58, Defendants focus the majority of their argument on the issue of loss. However, Defendants' loss argument suffers from several fundamental flaws.

First, Defendants mischaracterize the District Court's ruling on this issue. The District Court did not make "factual finding[s]" or analyze "the testimony of Plaintiffs' expert, Dr. Steve Pomerantz." *See* Brief of Defendants-Appellees ("Defs' Br.") at 17. To the contrary, it ruled as a "matter of law," acknowledging that its ruling was subject to de novo review. ADD–67 & n.20. The Court did not mention Dr. Pomerantz, except in a footnote. ADD–66 n.18.

Second, Defendants mischaracterize Dr. Pomerantz's loss analysis. He did not fail to tie losses to "specific investment options," Defs' Br. at 22, and certainly did not take the position that Defendants were "liable for money damages with respect to each and every investment option in the Plan lineup, regardless" of merit, *id.* at 2. To the contrary, Dr. Pomerantz considered the cost and performance of each proprietary fund in the Plan relative to two prudent alternatives (a Vanguard index fund and a BNY Mellon alternative), and only calculated a loss where the proprietary fund fared poorly. Indeed, his analysis was more generous to Defendants than an analysis that would have only considered funds that fared poorly, as he gave Defendants a credit for funds that fared well.

Third, Defendants misinterpret the law. Plaintiffs' "procedural breach" theory is not "impermissible." *See* Defs' Br. at 5. To the contrary, process and procedure are the yardsticks by which fiduciary breaches are measured. *See Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 7 (1st Cir. 2009) ("[T]he test of prudence … is

one of *conduct*, and not a test of the result of performance of the investment."). Likewise, a portfolio-wide damages analysis is hardly "unprecedented." *See* Defs' Br. at 35. Rather, it is exactly what this Circuit calls for. *See Evans v. Akers*, 534 F.3d 65, 74 (1st Cir. 2008) ("Losses 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***.") (emphasis added). And it is fully consistent with the breach in this case, which arises from Defendants' mismanagement of the Plan as a whole.

Finally, Defendants practically concede the issue of burden shifting, proportionally leaving it to their amici to argue this issue. Yet, the arguments of these amici (the Chamber of Commerce and American Benefits Council) were previously heard and rejected by the Fourth Circuit in *Tatum v. RJR Pension Inv. Cmte.*, 761 F.3d 346 (4th Cir. 2014). There is no reason to reach a different result on this appeal.

Other Issues

Defendants' arguments regarding other issues are also meritless. For example, the District Court did not make any "finding[s]" as to disgorgement and equitable relief that would be subject to "clearly err[oneous]" review. *See* Defs' Br. at 72. Rather, it held that those claims were "legally insufficient" and "fail[ed] as a

matter of law … [i]n light of the Plaintiffs' [purported] failure to establish loss[.]" ADD–66, 67. Defendants cite no authority, and the District Court cited none, for the proposition that a showing of loss is a prerequisite to disgorgement or equitable relief. The law is to the contrary. *See* Pls' Br. at 68-72.

Defendants also cite no authority for the proposition that contributions to a retirement plan (made in a settlor capacity) may excuse prohibited transactions with a fiduciary under 29 U.S.C. § 1106(b)(3). This is the dispositive rationale upon the District Court's "case stated" opinion rested, and Defendants offer little more than semantics in response. *See* Defs' Br. at 63 n.29.

Finally, Defendants offer no rebuttal to Plaintiffs' case law establishing that fiduciary self-dealing constitutes a breach of loyalty unless it is supported by an "intensive and scrupulous independent investigation." *See* Pls' Br. at 40-41. No such intensive or scrupulous investigation was undertaken here. Instead, Putnam's funds were automatically included in the Plan by fiat, regardless of merit. The District Court erred by failing to recognize this obvious breach of loyalty.

ARGUMENT

I. DEFENDANTS' LOSS ARGUMENTS FAIL

A. Defendants Mischaracterize the District Court's Ruling

In their opening brief, Plaintiffs pointed out several fundamental errors and inconsistencies in the District Court's legal analysis regarding whether the Plan

suffered losses associated with Defendants' fiduciary breaches. *See* Pls' Br. at 49-68. In response, Defendants attempt to re-characterize the District Court's loss analysis as a "factual" analysis resting on "findings" instead of legal conclusions, and suggest that a "clearly erroneous" standard of review applies. *See* Defs' Br. at 17, 21, 23, 27, 29. This is disingenuous. The District Court did not make an affirmative finding that there were "no losses" to the Plan, and did not weigh expert testimony and evidence from each side. Instead, the District Court terminated the case before Dr. Pomerantz had even concluded his testimony, and held that "Plaintiffs' theory that the 'procedural breach' makes Putnam's entire mutual fund lineup imprudent is simply legally insufficient on this record" and "may be reviewed de novo." ADD–67 n.20.

B. A Portfolio-Wide Loss Analysis Was Appropriate in This Case

Defendants also are wrong (and somewhat inconsistent) about what is required to establish a loss to the Plan. Defendants alternatively argue that Plaintiffs must point to "specific imprudent investment ***decisions***." Defs' Br. at 5, 23, 27 (emphasis added), or "specific imprudent investment ***options***." *Id.* at 17, 23 (emphasis added). Either way, Defendants are incorrect.

To make out a prima facie case of loss, all that is required is evidence of "some sort of loss to the plan." *Tatum*, 761 F.3d at 361. That is because loss analysis is not one size fits all. Where a case is predicated on specific decisions

that have been made regarding specific investment options, the loss analysis will necessarily be limited to those specific investments. However, where (as here) the case is predicated on a systemic failure monitor the Plan's investment lineup, the loss analysis will necessarily be portfolio-wide. As Plaintiffs noted in their opening brief, the proper method for determining loss depends on the "nature of the breach." Pls' Br. at 53 (citing Restatement (Third) of Trusts § 100, cmt. b(1)).

Although Defendants suggest that a portfolio-based loss analysis would be "an unprecedented departure from the case law," Defs' Br. at 35, it is fully consistent with this Court's existing precedent and other decisions. *See Evans*, 534 F.3d at 74; *see also* Pls' Br. at 54-55 (citing *Dardaganis v. Grace Capital*, 889 F.2d 1237 (2d Cir. 1989); *Liss v. Smith*, 991 F. Supp. 278 (S.D.N.Y. 1998)). Defendants do not distinguish *Evans*, and their efforts to distinguish *Dardaganis* and *Liss* are strained at best. Even the District Court concluded that Defendants' efforts to distinguish *Liss* were unavailing, ADD–63 at n.17, and that *Liss* "provides … support for the Plaintiffs' position." ADD–63.

Defendants conspicuously cite very little case law of their own. The primary case they cite in the relevant section of their brief is *Tussey v. ABB, Inc.*, 2012 WL 1113291 (W.D. Mo. Mar. 31, 2012) ("*Tussey I*"). However, in *Tussey I*, the court did not find evidence of a failure to monitor the Plan's investment lineup (as the District Court did in this case). *See id.* at * 16, *36. The court simply found that

one of the investment options (the Vanguard Wellington Fund) should not have been replaced with a fund from Fidelity. *Id.* Thus, a global loss analysis across the entire lineup would not have made sense in that case because it would not have been tied to the underlying fiduciary breach. Likewise, the Eighth Circuit's decision in *Martin v. Feilen* involved an employee stock ownership plan that had only one asset – company stock. 965 F.2d 660 (8th Cir. 1992). Therefore, the issue of whether damages should be calculated for a specific investment option or portfolio-wide never came up because they were one and the same.[1]

What is truly "unprecedented" in this case is not Plaintiffs' loss analysis, but rather the nature of Defendants' breach. As Dr. Pomerantz, testified: "I've never seen a plan that included all of the assets of a given adviser by fiat." JA–2575. Moreover, once Putnam's proprietary investments were added to the Plan, Defendants "did not seem to have independent standards or criteria for monitoring the Plan investments." ADD–52. In the face of this Plan-wide failure to "take even the most minimal and basic steps to ensure that [f]und assets were invested

[1] *Tussey* and *Martin* actually support Plaintiffs' position. Both cases applied the burden-shifting framework that Plaintiffs advocate. *Tussey I*, 2012 WL 1113291, at *7; *Martin*, 965 F.2d at 671. Both cases held that the measure of damages "need not be exact." *Tussey I*, 2012 WL 1113291, at *36; *Martin*, 965 F.2d at 672. The *Tussey* court found that Dr. Pomerantz's testimony regarding plan losses was "credible." *Tussey I*, 2012 WL 1113291, at *37. And the *Martin* court held that the "district court's decision to award no damages" constituted reversible error. *Martin*, 965 F.2d at 672.

and spent properly," *Liss*, 991 F. Supp. at 288, a Plan-wide loss analysis is appropriate. *See* Pls' Br. at 53-56.

At any rate, Dr. Pomerantz calculated losses for the Plan on a fund-by-fund basis. *See* JA-2583 ("Q: . . . [Y]ou've done an analysis both from a performance standpoint and expense standpoint fund by fund; correct? A. Yes."); JA-2588 ("Q. … You did the analysis fund by fund; correct? A. Yes."); JA–6135-36, 6140-41. This methodology contrasts with the methodology in *Tussey I*, which simply compared the overall returns of the challenged 401(k) plan against another plan. 2012 WL 11132391, at *3.

C. A Showing of Loss Involves a Comparative Performance Analysis, Not an Intrinsic Evaluation of Whether Any Specific Investment Option Was "Objectively Imprudent"

The disconnect in Defendants' loss argument comes into even starker relief as it is unpackaged further. Throughout their brief, Defendants argue that Plaintiffs failed to make out a prima facie case of loss because they did not show any specific investments were imprudent. *See* Defs' Br. at 2, 17, 22, 23, 24-25, 31, 33. Yet, elsewhere in their brief, Defendants admit that Plaintiffs are ***not*** required to prove that specific funds were "objectively imprudent." *See* Defs' Br. at 26-27. The latter interpretation is the correct one.

It is well-established that losses to a plan from a fiduciary breach may be determined through comparisons of the performance of the investments in the plan

with alternative investments outside the plan. *See Evans*, 534 F.3d at 74; *Roth v. Sawyer-Cleator Lumber Co.*, 61 F.3d 599, 604 (8th Cir. 1995). This is true even in circuits like the Ninth Circuit that purportedly have not adopted burden-shifting. *See Vaughn v. Bay Env. Mgmt.*, Inc. 567 F.3d 1021, 1027 (9th Cir. 2009).

By contrast, there is no requirement that plan participants show any specific investment option was objectively imprudent. *See Tussey v. ABB, Inc.*, 850 F.3d 951, 956, 959-60 (8th Cir. 2017) ("*Tussey III*") (holding that district court erred in requiring plaintiffs to show fund at issue fell below "minimum" level of performance for prudent investments, and instructing the district court to consider alternative measure of losses based on simple comparison of the effect of owning that fund versus an alternative fund). In promulgating its regulations, "the Department of Labor expressly rejected the suggestion that a particular investment can be deemed *per se* prudent or *per se* imprudent." *Tatum*, 761 F.3d at 360 (citing 44 Fed. Reg. 37,221, 37,225 (June 26, 1979)). "[T]he test of prudence … is one of *conduct*, and not a test of the result of performance of the investment." *Bunch*, 555 F.3d at 7.[2]

[2] To the extent that "objective prudence" has any relevance or meaning, it is Defendants' burden (as the breaching fiduciaries who lacked a prudent process) to show that the funds in the Plan met this definition. *See Tatum*, 761 F.3d at 363. The *Plasterers* decision is not to the contrary. *See Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 219-20 (4th Cir. 2011) ("expressing "no opinion" as to "who carries the burden" on whether funds were "objectively imprudent").

In any event, Plaintiffs did show that (1) 51 of the 69 proprietary investment options in the Plan were not included in ***any*** other similarly-sized plans; and (2) the remaining proprietary investments were included in only a miniscule number of plans (out of 2,600). JA–2568-70; JA–6087-89. Whatever it may mean for an investment to be "objectively imprudent," this surely fits the description. Yet, the District Court explicitly disregarded this evidence, characterizing it as "irrelevant." *See* ADD–56 n.12.[3] In doing so, the District Court appeared to be under the misimpression that the control group of 2,600 similarly-sized plans were all sponsored by "Putnam's competitors." *Id.* This is obviously not the case.

D. Dr. Pomerantz's Loss Analysis Was Sound

Defendants' challenges to Dr. Pomerantz's loss analysis are meritless. Dr. Pomerantz is a well-respected expert,[4] and none of the issues raised by Defendants

[3] The fact that the District Court referenced this evidence shows that such evidence was admitted at trial, contrary to Defendants' assertions. *See* Defs' Br. at 28 n.16. The lack of usage of Putnam funds among other similarly-sized plans was not only addressed in Dr. Pomerantz's report, but also his testimony. *See* JA–2568-70; JA–6087-89. Moreover, the District Court admitted (for demonstrative purposes) those portions of Dr. Pomerantz's report that were discussed by him at trial. *See* JA–2519.

[4] Several courts have found that Dr. Pomerantz is qualified to testify as an expert, including in ERISA 401(k) cases. *See, e.g., Goldenberg v. Indel, Inc.*, 2012 WL 3780555, at *14 (D.N.J. Aug. 30, 2012) (admitting Dr. Pomerantz's testimony in ERISA matter); *Tussey I*, 2012 WL 1113291, at *37 (finding Dr. Pomerantz's damages testimony credible in 401(k) case); *Abbott v. Lockheed Martin Corp.*, No. 06-CV-0701 MJR, Dkt. No. 225, slip op. at 1, 5-6 (S.D. Ill. Mar. 31, 2009) (denying *Daubert* motion as to Dr. Pomerantz in 401(k) case).

formed the basis for the Court's opinion. Regardless, Dr. Pomerantz's methodology was sound, and he assiduously avoided hindsight bias.

1. Dr. Pomerantz Used Appropriate Comparators

The comparators that Dr. Pomerantz used for purposes of calculating losses are well-grounded in the law and academic literature. *See* Pls' Br. at 50-52. The Restatement of Trusts explicitly provides that such comparisons:

> 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 **[i.e., the BNY Mellon Funds]** … or suitable index mutual funds **[i.e., the Vanguard funds]** or market indexes (with such adjustments as may be appropriate).

Restatement of Trusts (Third) §100, cmt. b(1). Accordingly, Defendants cannot credibly argue that Dr. Pomerantz's comparators were "picked out of thin air" Defs' Br. at 44.[5]

a. BNY Mellon Funds

Defendants' challenges to the BNY Mellon comparisons are particularly meritless because (as Defendants concede) those funds were "indisputably prudent and offered in the Plan during the class period." Defs' Br. at 45. If anyone "cherry picked" those funds, it was Defendants, not Dr. Pomerantz.

Defendants mislead the Court by claiming the BNY Mellon funds did "not even exist for the majority of the class period." Defs' Br. at 45. The BNY Mellon

[5] This case is distinguishable from *Plasterers* in this regard. *See Plasterers*, 663 F.3d at 221 (emphasizing that damages model was "*picked out of the air*").

Aggregate Bond Index Fund, which Defendants highlight, was launched March 25, 2009. JA–3566. Defendants' record citation suggesting the fund was "newly created" refers only to that fund's "Institutional Share Class." JA–3607.[6]

Defendants alternatively argue that just because they offered the BNY Mellon funds "alongside" the Putnam funds does not suggest they would offer a menu consisting only of BNY Mellon funds. Defs' Br. at 46. However, this argument is fundamentally flawed in multiple respects.

First, no such showing of exclusive use is required. This is implicit in the commentary to the Restatement, which allows for comparisons to "other investments, or suitable portions of other investments, of the trust in question." Restatement of Trusts (Third) §100, cmt. b(1). By definition, "other investments" or "portions of other investments" within a trust do not comprise ***all*** of the investments in the trust.

Second, even if such a showing were required, the six BNY Mellon funds closely resemble the investment menu in the Federal Government's Thrift Savings

[6] Additional BNY Mellon funds also were launched before the class period:
- BNY Mellon Large Cap Stock Index Fund: Inception 10/16/2009. JA–3516.
- BNY Mellon Large Cap Value Index Fund: Inception 3/31/1994. JA–3536.
- BNY Mellon Small Cap Index Fund: Inception 10/16/2009. JA–3556.
- BNY Mellon International Stock Index Fund: Inception 10/16/2009. JA–3591.

The other BNY Mellon fund (the Large Cap Growth Index Fund) was launched in 2014, but materials reviewed by the Investment Committee demonstrate that comparable funds were available in 2009. JA–3547.

Plan ("TSP"), which was indisputably selected pursuant to a prudent process. JA–2576-77; 6075-77.

Finally, Defendants explicitly presented the BNY Mellon funds as the Plan's only "designated investment options," and the remaining Putnam funds as merely supplemental offerings "available through the Plan's Putnam Funds Window," which Defendants were not monitoring. JA–3633-34. Therefore, it is not only plausible that Defendants would have offered "a lineup comprised exclusively of the BNY Mellon funds," that is precisely what Defendants represented they were doing as of 2016. Defs' Br. at 46.[7]

b. Vanguard Index Funds

Defendants' attacks on Dr. Pomerantz's index fund comparisons are also meritless. Although Defendants dispute the "plausibility of the Vanguard [index] funds as comparators," Defs' Br. at 47, the Restatement expressly provides:

> Investing in index funds that track major stock exchanges or widely published listings of publicly traded stocks is illustrative of an essentially passive but ***practical investment alternative to be considered by trustees*** seeking to include corporate equity in their portfolios. It is one that offers the pricing security and economies of buying in essentially efficient markets.

[7] Defendants note that the BNY Mellon funds did not include a "cash investment option." Defs' Br. at 46 n.21. This is immaterial, as Dr. Pomerantz only calculated damages for the Putnam mutual funds in the Plan, and did not compare the performance of the Putnam Stable Value Fund (the Plan's cash option) with any BNY Mellon funds. JA–6186 n.1.

Restatement of Trusts (Third) §90, cmt. h(1) (emphasis added). Vanguard index funds are chosen by fiduciaries of numerous similarly-sized plans. *See* JA–6088-89.

While the Restatement also allows for use of active management strategies, Defs' Br. at 47, this does not mean that index funds are not plausible. In fact, the Restatement comment cited by Defendants cautions that active strategies entail additional "investigation and analysis expenses," and "these added costs … must be justified by realistically evaluated return expectations." Restatement of Trusts (Third) §90, cmt. h(2). Dr. Pomerantz's analysis demonstrates that these increased costs were not justified by higher returns in this case; to the contrary, the Putnam funds performed worse than Vanguard index funds even when the additional fees associated with active management are excluded from the analysis. *See* Pls' Br. at 25-26.

Defendants' "apples and oranges" argument also fails. *See* Defs' Br. at 47. This very argument was recently rejected by the Eighth Circuit:

> [I]t is a mistake to argue, as [defendants] do, that measuring any portion of the losses by comparing the returns from the Freedom Funds with what the plans would have earned from the Wellington Fund is necessarily inappropriate because it involves "an apples-to-oranges comparison.

Tussey III, 850 F.3d at 960. The District Court made clear at the start of trial that its "apples-to-oranges comment" in the case stated opinion was made "in another

context" and "we're talking about damages here." JA–2579. In fact, the District Court stated that Dr. Pomerantz's damages analysis could be described as "***elegant***." JA–2622 (emphasis added). In any event, Dr. Pomerantz did not compare apples and oranges, but rather different shades of the same fruit, as he made sure to map each Putnam fund in the Plan to a comparable index fund in the same Morningstar category. JA–2576.

Finally, Defendants' argument that a plan menu consisting only of index funds would be imprudent fails for the reasons discussed above with respect to the BNY Mellon funds. *See supra* at 12-13. Once again, the Restatement is instructive, as it expressly approves of a portfolio consisting exclusively of index funds and no-load funds. Restatement of Trusts (Third) §90, cmt. h(2), illustration 13.

2. Dr. Pomerantz Avoided Hindsight Bias

Defendants and their amici decry these models as suffering from "hindsight" bias. *See* Defs. Br. at 31-32; Amicus Br. of Chamber of Commerce, et al. ("Chamber Br.") at 5. However, if Dr. Pomerantz was attempting to use hindsight to maximize damages, he must have been cross-eyed, because his analysis produced negative damages for certain funds that outperformed their BNY Mellon or Vanguard index fund comparators, and he gave Defendants a corresponding credit in his plan-wide loss tabulations. JA–2582-83, 2588.

The fact that Dr. Pomerantz's comparators are endorsed by the Restatement further demonstrates that those comparators were based on principle, and not opportunistic hindsight. The Restatement recognizes that a proper choice of comparators "should not rely on hindsight." Restatement of Trusts (Third) §100, cmt. b(1). Yet, the very same commentary endorses "index mutual funds" and "other investments … of the trust in question" as comparators. *Id.* The clear implication is that these comparators are standard benchmarks that can and should be used to ***avoid*** hindsight bias.

Defendants are confusing impermissible "hindsight" for purposes of establishing a breach with a perfectly normal and natural loss calculation. In the ERISA context, "hindsight" refers to the practice of "looking back at the funds' earnings after the fact" to determine "whether there was a breach in the first place." *Tussey III*, 850 F.3d at 957 n.4. However, once a breach has been shown based on a defendant's imprudent process, it is entirely appropriate to measure the associated losses based on the "relative performance" of the funds in question compared to an alternative portfolio. *Id*; *accord*, *Evans*, 534 F.3d at 74. The "hindsight" case cited by Defendants does not support their position, as it dealt with the issue of breach on a motion to dismiss, not the issue of loss at trial. *See* Defs' Br. at 32 (citing *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705 (2d Cir. 2013)).

E. The District Court Improperly Resolved Ambiguities in Favor of Defendants and Ignored the Equitable Nature of the Claims.

Even if Defendants' quibbles with Dr. Pomerantz's analysis had any merit (which they do not), the mere fact that a damages model is imperfect or imprecise is not a basis for denying any recovery altogether. That is especially true here because damages in ERISA breach of fiduciary duty cases are "of necessity somewhat arbitrary" and "difficult" to measure. *Donovan*, 754 F.2d at 1058. As the Supreme Court explained long ago:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.

Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 563 (1931).

"[W]hen precise calculations are impractical, trial courts are permitted significant leeway in calculating a reasonable approximation of the damages suffered." *Cal. Ironworkers Field Pension Trust v. Loomis Sayles & Co.*, 259 F.3d 1036, 1047 (9th Cir.2001). For example, the court in *Dardaganis* applied an averaging technique to come to a rough estimate of the plan's losses without "inquir[ing] into specific investment decisions," it is not practical "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." 889 F.2d at 1244.[8] Just as in *Dardaganis*, Dr. Pomerantz's loss analysis is sufficient to determine the losses to the Plan as a matter of "just and reasonable inference." *See Story Parchment*, 282 U.S. at 563.

Moreover, even if the District Court had been unsatisfied with Plaintiffs' loss analysis after properly applying these principles and resolving any doubt or ambiguity against Defendants as the breaching fiduciaries, *see Donovan*, 754 F.2d at 1056, it should have "fashion[ed] the remedy best suited to the harm." *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992). For example, to the extent the District Court believed that particular funds should have been excluded from the analysis (such as the RetirementReady funds[9]), the proper course was to exercise a line item

[8] Although the District Court stated that "no such difficulties" exist here, ADD–62, it offered no explanation for this comment. Plaintiffs could hardly be expected to point to "specific imprudent investment decision[s]" (ADD–63) that should have been made differently by the Investment Committee when the Investment Committee never analyzed specific funds in the first place, and did not even have a set of guidelines (*i.e.*, an IPS) for doing so.

[9] Defendants cite Mr. Schmidt's testimony regarding the selection and monitoring of the Plan's QDIA (the Putnam RetirementReady funds) out of context. *See* Defs' Br. at 33. Mr. Schmidt testified that although there was *some* process in place for selecting the monitoring the Plan's QDIA, "the process that was followed for those funds, . . . was not to the same level that was done for when the BNY funds were added to the plan." JA–2448-49. And, more importantly, "within that whole review process . . . it was only done with Putnam [target date] funds in mind. It was looking at the two brand of Putnam [target date] funds, and no other funds at that point in time." JA–2452.

veto as to those funds in Dr. Pomerantz's analysis, not deny Plaintiffs any measure of loss. *See Tussey III*, 850 F.3d at 959 (The district court … should have considered other ways of measuring the plans' losses from the ABB fiduciaries' breach"); *Donovan*, 754 F.2d at 1055 ("Since we have rejected the three measures of loss proposed to us, our task is to determine what the measure of loss in this case ought to be.").

F. Burden-Shifting Is Appropriate in This Case, Even Though It Is Not Necessary for Plaintiffs to Prove Loss

For the reasons discussed above and in Plaintiffs' earlier brief (Pls' Br. at 65-68), Plaintiffs have established that Defendants' fiduciary breaches resulted in a loss to the Plan, irrespective of whether burden-shifting applies on this issue. However, because Defendants contend that burden-shifting should be rejected (mostly through their amici), Plaintiffs offer the following brief points in response.

First, burden shifting is not "at odds with the plain language of ERISA." *See* Defs' Br. at 50. ERISA does not address the burden of proof, and the pertinent language in ERISA ("losses … resulting from [the] breach") mirrors the language in the commentary to the Restatement. *See* Restatement of Trusts (Third) § 100, cmt. e. The scholars who adopted the Restatement concluded that burden shifting was consistent with this language. *See* Restatement of Trusts (Third) § 100, cmt. f. This Court should as well.

Second, the "ordinary default rule" (Chamber Br. at 4) at common law is that the breaching fiduciary has the burden of persuasion on the issue of loss causation. *See* Pls' Br. at 57-58. Because ERISA does not establish a different rule, it is "presume[d] that Congress intended to preserve the common-law rule." *Smith v. United States*, 568 U.S. 106, 112 (2013).

Third, Defendants and their amici do not dispute that the DOL (which is charged with enforcing ERISA) supports burden-shifting. *See* Pls' Br. at 59.

Fourth, the Chamber of Commerce misrepresents the applicable circuit case law. *See* Chamber Br. at 9. In *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987), the Third Circuit did not reject burden shifting. To the contrary, it held that the district court erred by "requir[ing] the appellants to bear the burden that properly rests with the defendant." *Id.* at 864. In *Peabody v. Davis*, 636 F.3d 368 (7th Cir. 2011), the court was silent as to burden shifting. It did not overturn *Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1984), and cited *Martin v. Feilen*, 965 F.2d 660 (8th Cir. 1992) (another case applying burden shifting) with approval. *See Peabody*, 636 F.3d at 377. The case law in other circuits cited by the Chamber also is not as clear as it suggests.[10] Regardless, several circuit cases support Plaintiffs' position. *See* Pls' Br. at 58 (citing four circuit cases).

[10] *See, e.g., N.Y. State Teamsters Council Health & Hospital Fund v. Estate of DePerno*, 18 F.3d 179, 182 (2d Cir. 1994) (unanimous decision suggesting burden shifting applies).

Fifth, burden-shifting is not unique to ERISA, and is consistent with several other areas of law. *See, e.g.*, *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (once plaintiff establishes adverse event followed protected speech, burden shifts to government to show outcome would have been the same absent the protected conduct); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (once plaintiff demonstrates a prima facie case of race discrimination, burden shifts to defendant to produce evidence supporting a legitimate, non-discriminatory reason for the discharge).

Sixth, public policy favors burden shifting in the ERISA context. *See* Pls' Br. at 60-61. There is no evidence that it has "discourage[d] employers from offering ERISA plans[.]" *See* Chamber Br. at 6.

Finally, burden-shifting will not prevent 401(k) fiduciaries from defending themselves. In *Tatum*, after the Fourth Circuit instructed the district court to apply burden shifting, the defendants were able to demonstrate that despite their "lack of procedural prudence" a "prudent fiduciary . . . would have decided to divest the Nabisco Funds at the time and in the manner as did RJR." *Tatum v. RJ Reynolds Tobacco Co.*, 2016 WL 660902 (M.D.N.C. Feb. 18, 2016). Here, Defendants would be afforded a similar opportunity on remand.

II. PLAINTIFFS ARE ENTITLED TO DISGORGEMENT AND EQUITABLE RELIEF, REGARDLESS OF WHETHER THE PLAN SUFFERED LOSSES

Defendants' arguments regarding equitable relief also fail. Plaintiffs were not required to "establish a prima facie case of loss" (ADD–67) to obtain disgorgement or other equitable relief. *See* Pls' Br. at 69-72. In so holding, the District Court improperly conflated the question of loss with the question of breach. *See Shaver v. Operating Eng'rs Local 428 Pens. Trust Fund*, 332 F.3d 1198 (9th Cir. 2003).

It is absurd for Defendants to argue that Plaintiffs failed to "show a relationship between the purported profit and the breach." Defs' Br. at 72. The evidence at trial showed that (1) Defendants included and retained Putnam's funds in the Plan by fiat (without engaging in a prudent review process), and (2) Putnam received tens of millions of dollars in fees as a result. Regardless of whether Putnam's fees were "reasonable" (an unsupported determination the District Court made in the context of the prohibited transaction claims, which Plaintiffs dispute, *see infra* at 33-36) this does not change the fact that Putnam only received these fees because its funds were included in the Plan.

Likewise, whether these fees were technically "paid out of plan assets" (Defs' Br. at 74) misses the point. The test under 29 U.S.C. § 1109(a) is not whether monies were "paid out of plan assets," but whether the defendant profited "through use" of plan assets. Here, Putnam unquestionably profited "through use"

of Plan assets by maintaining Putnam mutual funds in the Plan. In any event, disgorgement is alternatively available under 29 U.S.C. § 1132(a)(3) as an equitable remedy, regardless of whether the defendant was paid out of "plan assets." *See Fish v. GreatBanc Trust Co.*, 109 F. Supp.3d 1037, 1041-43 (N.D. Ill. 2015); *Chesemore v. Alliance Holdings, Inc.*, 948 F.Supp.2d 928, 947 n.20 (W.D. Wis. 2013); *Solis v. Couturier*, 2009 WL 1748724, at *4-6 (E.D. Cal. June 19, 2009);[11] *accord*, *Nat'l Sec. Sys, Inc. v. Iola*, 700 F.3d 65, 101 (3d Cir. 2012) ("[W]hen a fiduciary receives a commission from an insurance company in exchange for purchasing insurance policies as trust assets, 'he is accountable for the commission.'") (quoting Restatement (Second) of Trusts § 170, at 370-71, cmt. O).

Finally, Defendants can hardly criticize Plaintiffs for not putting forward any post-trial orders articulating their desired relief in detail because ***trial was not over*** and Plaintiffs had not even rested their case. Any such proposed orders would have been premature. In any event, Plaintiffs were explicit in their pre-trial briefing that they sought disgorgement even in the absence of proof of loss. *See Dkt. No. 164 at 19.*

[11] *Bast v. Prudential Ins. Co. of Am.*, 150 F.3d 1003, 1011 (9th Cir. 1998) is distinguishable, as no fees were paid to the defendant in that case. *See Solis*, 2009 WL 1748724, at *5 (distinguishing *Bast*). The defendant simply delayed authorization of an insurance payment.

III. DEFENDANTS' LOYALTY ARGUMENTS FAIL

In their discussion of Plaintiffs' loyalty claim, Defendants say almost nothing about how they actually managed the Plan. Instead, Defendants' loyalty arguments rest entirely on their assertion that their intentions were pure. This argument fails for multiple reasons.

A. Intent Is Not A Required Element of a Loyalty Claim

As an initial matter, wrongful intent is not a required element of a loyalty claim. *See* Pls' Br. at 42-43 (citing cases). The relevant Restatement section on the duty of loyalty expressly addresses this issue, and describes the "black letter" rule as follows:

> Whether the trustee acted in good faith and with honest intentions is not relevant, nor is it important that the transaction attacked was fair and for an adequate consideration so that the beneficiary has suffered no loss as a result of the disloyal act.

Restatement of Trusts (Third) § 78, cmt. b (reporter's note).

As Plaintiffs explained in their opening brief, the duty of loyalty has two separate components: a duty to act solely in the interest of participants, and a duty to do so for that "exclusive purpose." *See* Pls' Br. at 43; 29 U.S.C. 1104(a)(1) ("[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"); *Beddall v. State St. Bank & Tr.*

Co., 137 F.3d 12, 18 (1st Cir. 1998). Defendants' own documents confirm these duties are separate and distinct. *See* JA–2764, 2939, 3148, 3260, 3293. Consequently, purported good intentions do not excuse disloyal actions.

B. Intent May Be Proven Through Circumstantial Evidence, Which Was Present in Spades

Even if intent were a required element of a loyalty claim (which it is not), Defendants misconstrue the type of evidence that would be required to prove intent. Specifically, Defendants suggest that direct evidence of wrongful intent is required. However, this Court has held otherwise:

> In most cases, given that the employer controls the evidence related to intent, a plaintiff will be unable to adduce "smoking gun" evidence that the employer intended to interfere with his or her benefits. An employer is unlikely to document such a motive, and there is rarely eyewitness testimony as to the employer's mental processes. Therefore, a plaintiff usually must rely on circumstantial evidence to prove his or her case.

Barbour v. Dynamics Research Corp., 63 F.3d 32, 37 (1st Cir. 1995) (internal citations and quotation marks omitted).

Numerous other cases, including cases in the investment context, support the principle that circumstantial evidence may be used to prove wrongful intent. *See, e.g.*, *Tussey III*, 850 F.3d at 957; *Reich v. Compton*, 57 F.3d 270, 280 (3d Cir. 1995); *Hugler v. Byrnes*, 247 F. Supp.3d 223, 230 (N.D.N.Y. 2017); *Davidson v. Cook*, 567 F. Supp. 225, 236 (E.D. Va. 1983). Notably, Defendants cite no case law to the contrary.

The circumstantial evidence of disloyalty in this case was overwhelming, and included evidence that Defendants failed to consider non-proprietary alternatives to Putnam funds. *See* JA–1675-77, 2131-32, 2563-64, 2574. This constitutes strong evidence of an improper intent to benefit Putnam. *See Tussey III*, 850 F.3d at 957 (circumstantial evidence of improper motives includes "not considering other possible" investments); *Davidson*, 567 F. Supp. at 236 ("The fiduciaries did not … compare [the loan investment] to other available investments, but instead did their best to accommodate the [sponsor's] needs."); *accord*, DOL Advisory Op. No. 88-16A, 1988 WL 222716, at *3 (Dec. 19, 1988) ("decision to make an investment" must consider "alternative investments available to the plan.").

Plaintiffs also supplemented this with other evidence showing that:

- Defendants included ***all*** of Putnam's open-end, non-tax-exempt funds by fiat (*see* ADD–105), without any screening or review process, including newly-launched funds and funds that were not offered in any other plans of similar size (*see* JA–1694; JA–2278; JA–3044; JA–2569-70; JA–6087-89);

- Defendants "did not seem to have independent standards or criteria for monitoring the Plan investments" (ADD–52), which directly conflicted with the advice Putnam gave to other plan sponsors it advised (*Id. at n.9*);

- The Investment Committee did not adopt an IPS because it knew that it would not be able to comply with an objective IPS while maintaining a Putnam-only investment menu. *See* JA-5877 ("the only thing worse than not having an IPS is having a written IPS and not following it");

- Defendants buried evidence that many of Putnam's funds were receiving "fail" grades (*see* JA–1726, 1730; JA–2107, JA–2950-51; JA–3027-28; JA–3093-94; JA–3211-12; JA–3420-21);

- The majority of the Putnam funds in the Plan were not included in ***any*** other similarly-sized retirement plans, and the remainder were included in less than 1% of such plans (JA–2569-70);

- The Putnam funds in the Plan were significantly more expensive than average for investments in similarly-sized plans, and those costs were not justified by superior performance (JA–2567; JA–2583-86);

- The Investment Committee left the Putnam Voyager fund in the Plan for years (until the Voyager fund closed), even though it was ranked in the bottom 1% of all funds according to the very Lipper data that Defendants featured at trial (JA–2103; JA–4581);

- The Investment Committee never removed any Putnam funds from the Plan (JA–1969);

- Putnam stood to gain financially from retaining affiliated investments in the Plan, and received more than $27 million in fees from those proprietary investments during the class period. (JA–2560-61);

- Putnam also derived a marketing benefit from retaining Putnam funds in the Plan, and touted in its prospectuses that "Putnam employees … place their faith, confidence, and, most importantly, investment dollars in Putnam mutual funds." (JA–5637; JA–5717; JA–5773; JA–5836).

If this evidence is not sufficient to prove a loyalty claim, then surely nothing is. Notably, Defendants fail to cite any case dismissing loyalty claims on facts remotely similar to this case.[12]

[12] The cases cited by Defendants involved decisions ***denying*** motions for summary judgment (and one decision granting a motion to compel), not decisions granting judgment in favor of defendants. *See* Defs' Br. at 53-54.

C. Defendants Did Not Undertake an "Intensive and Scrupulous" Investigation to Mitigate Their Conflicts of Interest

Just as important as what the evidence did show is what it did not. As Plaintiffs noted in their opening brief, Pls' Br. at 40-41, conflicted fiduciaries must "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), and 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*, 727 F.2d at 126. Defendants do not dispute this. Nor do they cite any evidence of such an "intensive and scrupulous" investigation, other than with respect to the BNY Mellon funds (which are not at issue here). This conclusively demonstrates a breach of loyalty in this case.

D. Defendants' Other Arguments Are Red Herrings

It is not accurate for Defendants and their amici to argue that Plaintiffs seek a "per se rule against the inclusion of affiliated funds in plan lineups." Defs' Br. at 58; *see also* Amicus Br. of Investment Company Institute ("ICI Br.") at 3. In Plaintiffs' briefing before the District Court, Plaintiffs explicitly stated:

> Plaintiffs do not claim that there is a "per se rule that you violate the duty of loyalty by offering your own funds[.]" Rather, Plaintiffs claim that Defendants violated the duty of loyalty by automatically including all of Putnam's open-end mutual funds in the Plan for the benefit of Putnam (from a financial, marketing, and HR standpoint), (1) without regard to whether this was in the best interest of Plan participants, (2) without giving any consideration to market

> alternatives from different companies, and (3) without engaging in any objective analysis as to the merit of those funds (and without considering evidence that many of those funds were failing).

Dkt. No. 189 at 1 (emphasis and internal citations omitted).

Defendants are seeking to win a debate that has no relevance to the dispute before this Court because they cannot win the debate over the real issues. PTE 77-3 and the other authority cited by Defendants (such as the 1991 Notice of Proposed Rulemaking that is based on PTE 77-3, *see* Pls' Br. at 39), provide no cover for Defendants' conduct here. By its own terms, PTE 77-3 "does not relieve a fiduciary" from "the general fiduciary responsibility provisions" of ERISA, including the duty to discharge one's duties "solely in the interests of the plan's participants and beneficiaries[.]" ADD–86. "While [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, which … Defendants failed to do." *Krueger v. Ameriprise Fin., Inc.*, 2012 WL 5873825, at *14-15 (D. Minn. Nov. 20, 2012). Indeed, the ICI's own counsel has published a guide that states that proprietary funds should only be added "after careful and impartial investigation." *See View from Groom: An Overview of ERISA Issues Related to 'In-House' Plan Use of Proprietary*

Products and Services, at p.2 (2014).[13] No such careful or impartial investigation was conducted here.

Finally, Defendants' disloyalty is not countered or excused by conduct unrelated to the challenged investment decisions. *See* Defs' Br. at 58 n.27. The relevant inquiry is the circumstances surrounding the challenged investment decision. *Tussey III*, 850 F.3d at 957; *Bunch*, 555 F.3d at 6. As noted in Plaintiffs' opening brief, a broader "totality of the circumstances" test is inappropriate when applied to the duty of loyalty. *See* Pls' Br. at 46-47. Defendants do not seriously contest this or distinguish the case law cited by Plaintiffs on this point.

IV. DEFENDANTS' PROHIBITED TRANSACTION ARGUMENTS FAIL

Finally, Defendants' prohibited transaction arguments fail for the reasons previously explained by Plaintiffs. *See* Pls' Br. at 72-79.

A. PTE 77-3 Does Not Defeat Plaintiffs' Claim under § 1106(b)(3)

Defendants concede that PTE 77-3 only applies if "[a]ll other dealings between the plan and the investment company … or any affiliated person … are on a basis no less favorable to the shareholders of the plan than such dealings are with other shareholders of the investment company." ADD–74. Defendants also concede that Putnam failed to provide revenue sharing to the Plan or its recordkeeper (Great-West) in connection with Y-shares of Putnam mutual funds

[13] Publicly-available at Dkt. 148-23 in *Urakhchin v. Allianz Asset Mgmt. of Am., LLP*, No. 8:15-cv-01614 (C.D. Cal.).

held by the Plan, even though revenue sharing payments were made in connection with Y-Shares of Putnam funds held by other plans. ADD–10. Defendants merely dispute whether Putnam's failure to offer revenue sharing on the Plan's mutual fund shares meant that it dealt less favorably with the Plan. However, this argument ignores the fact that mutual fund expenses are calculated "Net of Revenue Sharing." *See* Pls' Br. at 75 n.16.

None of Putnam's excuses or justifications can obscure its disparate treatment of the Plan. Defendants' first excuse is that Putnam paid the Plan's recordkeeping fees. *See* Defs' Br. at 61. However, this does not justify Putnam's failure to pay revenue sharing for multiple reasons:

- Revenue sharing payments can be used for many different purposes (not just defraying recordkeeping expenses), and can be credited directly to participant accounts instead of being paid to third-party service providers. *See* Pls' Br. at 19, 20.

- There is no evidence of a quid pro quo in which Putnam paid the Plan's recordkeeping expenses in lieu of providing revenue sharing payments that otherwise would have been made.

- Even if there were evidence of such a quid pro quo, it would have been decidedly unfavorable to the Plan because ***the lost revenue sharing (25 basis points) exceeded the recordkeeping expenses (about 3 basis points) by several fold***. JA–1123, ¶ 48; JA–1129-30, ¶ 66.

Defendants' second excuse is that Putnam made employer contributions to participants' accounts. *See* Defs' Br. at 62-63.[14] However, the law is clear that contributions to a trust account (made in a settlor capacity) do not excuse a breach of trust or other prohibited conduct (in a fiduciary capacity). *See, e.g.*, *Nedd v. United Mine Workers of Am.*, 556 F.2d 190, 213-14 (3d Cir. 1977). Defendants cannot distinguish this case law by engaging in semantics over whether the District Court treated their contributions as a "setoff" to liability or a "circumstance[]" defeating liability. *See* Defs' Br. at 63 & n.29. Nor does the language of PTE 77-3 provide Defendants any shelter. Under this exemption, "**[a]ll** other dealings" between the Plan and the investment company must be no less favorable to the Plan than the investment company's dealings with other shareholders. ADD–87 (emphasis added). It is not sufficient that "some dealings" are as favorable or more favorable. Yet, this was the logic the District Court adopted in its "totality of the circumstances" test, which is unprecedented in the prohibited transaction context.

Finally, Defendants' argument that revenue sharing payments on mutual fund shares do not constitute "dealings" between the plan and the investment company was roundly rejected by the District Court:

> The Defendants [] advance the argument that revenue sharing payments are not "dealings" within the meaning of the exemption …. There is no basis for such a narrow reading of the exemption. The

[14] Putnam's contributions were not benevolent gifts, but "competitively necessary" compensation for services rendered. *See* Pls' Br. at 75-76.

> Defendants' argument also plainly ignores the fact that the Plan sponsor, its recordkeeper, and the investment manager are all Putnam entities. … 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.

ADD–25. On this point, the District Court's logic was sound. The record is undisputed that revenue sharing payments can be paid either to a plan or its recordkeeper (or a combination of both), that the payments are always used for the plan's financial benefit, and that the decision as to how these payments will be made rests with the plan. JA–1250, ¶ 35; JA–1255-59, ¶¶ 44-47. Whether or not the payments are made directly to a plan or a recordkeeper on behalf of the plan has no bearing on the application of PTE 77-3; in either case, the mutual fund company is "dealing" with the plan. *See N.L.R.B. v. Cabot Carbon Co.*, 360 U.S. 203, 210-11 (1959) (characterizing "dealing with" as "broad term" and rejecting narrow construction).

B. Defendants' "Reasonable Compensation" Defense Also Fails

Defendants' arguments regarding the "reasonable compensation" exemption have no bearing on Plaintiffs' claim under 29 U.S.C. § 1106(b)(3), and are specific to Plaintiffs' claim under 29 U.S.C. § 1106(a)(1)(C). *See* Defs' Br. at 65. Moreover, even as to that claim, Defendants' arguments fall short.

1. Putnam's Fees Were Not Reasonable as a Matter of Law

As Defendants concede, the District Court ruled upon the reasonableness of Putnam's fees "as a matter of law." *See* Defs' Br. at 65. This was improper because "[t]he question of what is fair and reasonable compensation for the services rendered is a question of fact." *Incase Inc. v. Timex Corp.*, 488 F.3d 46, 54 (1st Cir. 2007) (quotations and citation omitted).[15] The DOL has emphasized that the issue of "reasonable compensation" is "inherently factual in nature." *See, e.g.*, Office of Pension & Welfare Benefit Programs, Opinion No. 93-06A, 1993 WL 97262, at *5 (Mar. 11, 1993). Indeed, the relevant regulation expressly states that "whether compensation is 'reasonable' under sections 408(b)(2) and (c)(2) of the Act depends on the particular facts and circumstances of each case." 29 C.F.R. § 2550.408c-2(b)(1). "The Department doesn't typically prescribe numerical targets" because "[i]t can be dangerous to be too prescriptive[.]" Greg Iacurci, *What is 'reasonable' cost under DOL's fiduciary rule? Well, it depends*, Investment News (Apr. 11, 2016), available at http://www.investmentnews.com/article/20160411/FREE/160409922/what-is-reasonable-cost-under-dols-fiduciary-rule-well-it-depends.

[15] Compounding this error, the District Court suggested that it was Plaintiffs' burden to show that Putnam's fees were "***un***reasonable as a matter of law." ADD–19 (emphasis added). This is inconsistent with the applicable burden of proof on a prohibited transaction exemption. *See* ADD–16 ("Defendants bear the burden of proof on the reasonableness of the challenged fees").

There are many instances in which investment management fees that appear reasonable on their face would still be excessive when compared to other alternatives. *See, e.g., Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 n.5 (8th Cir. 2009) (0.68% expense ratio was excessive when institutional version of same fund was available for 0.43%); *Moreno v. Deutsche Bank Americas Holding Corp.*, 2016 WL 5957307, at *1, *6 (S.D.N.Y. Oct. 13, 2016) (0.23% expense ratio for S&P 500 index fund was excessive when identical S&P 500 option was available from Vanguard with 0.02% expense ratio). The Putnam Bond Fund is a perfect example, as its expense ratio of 0.12% might appear reasonable at first glance until one realizes that BNY Mellon offered a collective investment trust ("CIT") that tracked the exact same index for one-third the cost (0.04%). JA–4837; *see also* Pls' Br. at 22. Thus, it would be unwise to "adopt an approach that would immunize an investment from scrutiny simply because its expense ratio fell within a certain range." *Terraza v. Safeway*, 241 F. Supp. 3d 1057, 1078 (N.D. Cal. 2017); *see also Troudt v. Oracle Corp.*, 2017 WL 1100876, at *1 (D. Col. Mar. 22, 2017); *Goldenberg v. Indel, Inc*, 741 F. Supp. 2d 618, 632 (D.N.J. 2010).

The District Court committed precisely this error by ruling that Putnam's compensation was reasonable simply because its fees fell partially within a range reported in other cases involving other investments from other companies. ADD–16-19. The District Court made these comparisons out of context, and also ignored

the fact that fees in the marketplace have dropped significantly since those cases were decided. As Plaintiffs' expert noted, the average fee in 2009 (when *Hecker v. Deere*, 556 F.3d 575 (7th Cir. 2009) was decided) was approximately 140% of the average fee just five years later in 2014. JA–91.[16]

In any event, the fees for Putnam's funds were still materially higher than the reported ranges in many of the cited cases. The fees for the Putnam funds were 0.25% to 1.65% (excluding the stable value fund, which is not at issue here, *see supra* at 13 n.7). ADD–16. By contrast, the reported fees were significantly lower in *Hecker* (0.07% to 1.00%), *Loomis* (0.10% to 1.21%), and *Renfro* (0.03% to 0.96%). *See* Defs' Br. at 66. Thus, even at face value, *Hecker* and its progeny do not support the District Court's "range of fees" analysis. *See Kruger v. Novant Health, Inc.*, 131 F. Supp. 3d 470, 476 (M.D.N.C. 2015) (rejecting the range of fees argument where "the fees offered by Defendants range from 0.425 to 1.51%, a notably different range from that offered in *Hecker* and related cases").[17]

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[16] It has been widely-reported that lawsuits like this have contributed to the drop in fees. *See, e.g., 401(k) Fees Continue To Drop*, FORBES (Aug. 20, 2015), available at https://www.forbes.com/sites/ashleaebeling/2015/08/20/401k-fees-continue-to-drop/#368c2d1b164f.

[17] Defendants note that the fees in *Tibble v. Edison Int'l*, 729 F.3d 1110 (9th Cir. 2013) ranged from .03% to 2.00%. However, that case did not establish a per se reasonable range of fees. This is demonstrated by the Ninth Circuit's subsequent *en banc* opinion, which emphasized the "fundamental" nature of the duty to be cost-conscious, and provided an example of how two mutual funds with expense ratios of 1.18% and 1.40% (within the previously cited range) could be unreasonably expensive. *Tibble v. Edison Int'l*, 843 F.3d 1187, 1198 & n.4 (9th Cir. 2016).

2. The District Court Made No Factual Findings Regarding the Reasonableness of Putnam's Fees

Defendants alternatively argue that the fees of the Putnam funds were "reasonable as a factual matter." Defs' Br. at 68. However, Defendants admit that "the District Court did not decide whether the fees of the Plan's investment options were reasonable as a matter of fact[.]" *Id.* Thus, there are no findings to affirm in this regard, and this Court should not undertake such fact finding in the first instance. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982); *Swift v. United States*, 866 F.2d 507, 510-11 (1st Cir. 1989).

This is especially true here, where this Court would have to sift through competing expert reports and a voluminous record to render a determination whether Putnam's compensation was reasonable. Although Defendants argue that "Plaintiffs failed to rebut" the report of Defendants' expert (Dr. Sirri), *see* Defs' Br. at 69, this misstates the record. Dr. Pomerantz submitted a lengthy report "in rebuttal to the report of Dr. Erik Sirri." JA–6143. As Dr. Pomerantz pointed out, Dr. Sirri's "peer group" analysis was flawed because it "systematically exclude[d] large mutual funds that are widely utilized by other plans." JA–6144. Moreover, Dr. Sirri's analysis of "peer" funds fails to account for the fact that Putnam offered revenue sharing rebates on its *own* funds to other institutional investors, but did not offer such revenue sharing rebates to the Plan. Putnam's fees were unreasonable for this reason as well.

C. The District Court's Statute of Limitations Ruling Was Specific to Plaintiffs' Share Class Allegations and Is Not the Subject of the Pending Appeal

Defendants' final argument regarding the District Court's statute of limitations ruling falls outside the scope of the pending appeal, *see* Pls' Br. at 2-3, and need not be addressed by this Court. In raising this argument, Defendants only serve to underscore their lack of confidence in the District Court's ruling on the merits of the prohibited transaction claims.

Defendants also ignore the narrow scope of the District Court's ruling, which was specific to Plaintiffs' claims regarding Putnam's failure to immediately offer "lower cost R6 class[es] of shares" to the Plan. ADD–28. The District Court held that "ERISA's statute of limitations bars ***this aspect*** of the Plaintiffs' prohibited transaction claims[,]" but nothing more. ADD–29 (emphasis added). It did not hold that other aspects of Plaintiffs' prohibited transaction claims, arising from Putnam's failure to offer revenue sharing or its receipt of unreasonable compensation, were time-barred. Nor would it have made sense for it to do so, as it had already dismissed those other aspects of Plaintiffs' claims on the merits. Any ruling that would have extended beyond the share class allegations would have been dicta.

Finally, while Defendants cite evidence showing that participants were in receipt of information indicating that the Plan was invested in "Y" shares of

Putnam mutual funds instead of "R6" shares, *see* Defs' Br. at 71 (citing JA–284, 4876-77), there is no evidence that Plan participants had knowledge regarding whether Putnam treated other Plans more favorably with respect to revenue sharing, or what constitutes a "reasonable" fee for mutual fund shares. For this reason as well, the District Court's statute of limitations ruling has no bearing here.[18]

CONCLUSION

For the above reasons, this Court should overturn the subject orders and judgment.

Dated: February 13, 2018

Respectfully submitted,

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[18] Defendants are also wrong that "Plaintiffs need not have knowledge of facts giving rise to an affirmative defense in order to start the statute of limitations." Defs' Br. at 71. The law is to the contrary. *See Fish v. GreatBanc Tr. Co.*, 749 F.3d 671, 674 (7th Cir. 2014).

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 January 22, 2018 allowing Plaintiffs-Appellants to file an oversized brief containing no more than 9,750 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 9,722 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 February 13, 2018, I caused the service and filing of the following document:

APPELLANTS' REPLY BRIEF

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

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed this 13th day of February 2018, in Minneapolis, Minnesota.

/s/ Kai H. Richter
Kai H. Richter