UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 17-1711

JOHN BROTHERSTON; JOAN GLANCY,
Plaintiffs-Appellants,

v.

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

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF DEFENDANTS-APPELLEES

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Dated: January 10, 2018

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Putnam Investments, LLC states that it is an indirect majority-owned subsidiary of Great-West Lifeco Inc., a publicly held corporation whose shares trade on the Toronto Stock Exchange. Great-West Lifeco Inc. is a majority-owned subsidiary of Power Financial Corporation, a publicly held corporation whose shares trade on the Toronto Stock Exchange. Power Financial Corporation is an indirect, majority-owned subsidiary of Power Corporation of Canada, a publicly held corporation whose shares trade on the Toronto Stock Exchange.

Putnam Investment Management, LLC, a Delaware limited liability company, is an indirect wholly-owned subsidiary of Putnam Investments, LLC.

Putnam Investor Services, Inc., a Massachusetts corporation, is an indirect wholly-owned subsidiary of Putnam Investments, LLC.

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PRELIMINARY STATEMENT

Following seven days of trial, the District Court granted Defendants'[1] Rule 52(c) motion for judgment on partial findings, holding that Plaintiffs' claims for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA") suffered from a lack of proof. (Pls.' Add. at 63-65.[2]) Despite having the burden to do so, Plaintiffs failed to establish a prima facie case of loss to the Putnam Retirement Plan (the "Plan") as a result of Defendants' alleged breach of the fiduciary duty of prudence. The District Court's decision was sound and should be affirmed.

Plaintiffs' appellate argument hinges on the fundamentally mistaken assertion that "the district court's finding of a breach of prudence was sufficient, by itself, to entitle Plaintiffs to relief on behalf of the Plan." (Pls.' Br. at 33.) The District Court, however, never found any breach of prudence;[3] in fact, it observed

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[1] Defendants are Putnam Investments, LLC ("Putnam"), Putnam Investment Management, LLC ("Putnam Management"), Putnam Investor Services, Inc. ("Putnam Services," collectively, the "Putnam Companies"), the Putnam Benefits Investment Committee ("PBIC"), the Putnam Benefits Oversight Committee ("PBOC"), and Robert Reynolds (collectively, "Defendants").

[2] The Addendum to Appellants' Brief is cited herein as "Pls.' Add." Appellants' Brief is cited herein as "Pls.' Br."

[3] The AARP, AARP Foundation, and National Employment Lawyers Association, as amici curiae in support of Plaintiffs ("Pls.' Amici"), come to the exact opposite conclusion -- that the District Court found that Defendants in fact

that, if the trial continued, "it is perfectly conceivable that the Defendants would present compelling evidence that they were in fact in full compliance with their ERISA fiduciary duties." (Pls.' Add. at 58.) But the theory that a finding of a fiduciary breach, without any showing of loss, would entitle Plaintiffs to relief, is simply wrong in any event. Plaintiffs make the unprecedented assertion that a purported "procedural breach" of the duty of prudence entitled them to "portfolio-wide damages" (Pls.' Br. at 52, 56) -- in other words, that purported deficiencies in Defendants' procedure for selecting and monitoring the Plan's investment options rendered them liable for money damages with respect to *each and every* investment option in the Plan lineup, *regardless* of whether any individual fund was actually imprudent or suffered a loss. But without *any* evidence of the imprudence of individual Plan investment options, that contention runs contrary to the well-established principle that "simply finding a failure to investigate" -- which the District Court did not find in any event -- does not automatically equate to loss. *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 217 (4th Cir. 2011).

Because Plaintiffs failed to carry their burden on the element of loss, their argument about the element of causation is a red herring. Plaintiffs argue that

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complied with the duty of prudence. (Pls.' Amici Br. at 12.) Neither Plaintiffs' nor their Amici's characterization of the District Court's opinion is accurate.

some courts put the burden on defendants to disprove the loss causation element of an ERISA breach of fiduciary duty claim -- or, in other words, require defendants to prove that the claimed losses did *not* result from the alleged breach. Here, Plaintiffs failed to established *any* loss in the first instance. Indeed, even courts that shift the burden to defendants do so *only* once plaintiffs have established a prima facie showing of loss associated with a fiduciary breach -- which, as the District Court correctly found, Plaintiffs failed to do. *See, e.g.*, *Tatum v. RJR Pension Inv. Cmte.*, 761 F.3d 346, 363 (4th Cir. 2014) (observing that plaintiffs must establish a fiduciary breach and "prima facie case of loss" before burden shifts to defendants to disprove causation).[4] Accordingly, Plaintiffs' novel theory that they are entitled to "portfolio-wide damages," simply on a showing of a purported "procedural breach" (Pls.' Br. at 52, 56), would effectively gut the loss requirement that Congress wrote into ERISA's statutory text, and which is an

[4] Other courts have expressly rejected this burden-shifting framework with respect to the loss causation element of claims for breach of ERISA fiduciary duties. *See, e.g.*, *Pioneer Ctrs. Holding Co. Employee Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1337 (10th Cir. 2017) (holding that "the burden falls squarely on the plaintiff asserting a breach of fiduciary duty claim under § 1109(a) of ERISA to prove losses to the plan 'resulting from' the alleged breach of fiduciary duty"); *Silverman v. Mut. Ben. Life Ins. Co.*, 138 F.3d 98, 105 (2d Cir. 1998) ("Causation of damages is . . . an element of [an ERISA] claim, and the plaintiff bears the burden of proving it."); *Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d 1335, 1343 (11th Cir. 1992) ("[T]he burden of proof on the issue of causation . . . rest[s] on the beneficiaries; they must establish that their claimed losses were proximately caused" by defendants' alleged breach).

element of any ERISA breach of fiduciary duty claim, to be proved by the plaintiff. *See* 29 U.S.C. § 1109(a) (providing that breaching fiduciary "shall be personally liable to make good to [the] plan any losses to the plan resulting from each such breach"); *Tatum*, 761 F.3d at 363; *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995) ("To establish a claimed breach of fiduciary duty, an ERISA plaintiff must prove a breach of a fiduciary duty and a prima facie case of loss to the plan."); *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992) (same). Plaintiffs' recovery of "portfolio-wide" damages -- even if a purported procedural breach did not lead to the selection or retention of any imprudent fund that experienced investment loss -- would therefore be an unprecedented windfall.

Plaintiffs' argument concerning their duty of loyalty claim similarly fails. The District Court did not clearly err in finding that "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." (Pls.' Add. at 54.) On appeal, Plaintiffs again focus on process allegations without identifying evidence of *specific disloyal conduct* that is necessary to support that claim. (*E.g.*, Pls.' Br. at 42 (arguing that breach of the duty of loyalty is evidenced by "the absence of an intensive and scrupulous investigation" (internal quotation marks omitted)).) Plaintiffs provide no reason for this Court to revisit the District Court's factual finding.

The District Court also correctly ruled for Defendants on the prohibited transaction claims, rejecting them both on the merits and on statute of limitations grounds -- the latter of which Plaintiffs do not challenge on appeal. The District Court did not clearly err in finding that Plan participants were treated equally to (or better than) other third-party shareholders of Putnam funds, such that Department of Labor ("DOL") Prohibited Transaction Exemption 77-3 ("PTE 77-3") barred Plaintiffs' claims in their entirety. The District Court also correctly held that the fees of the Plan's investment options were reasonable as a matter of law, thereby providing a complete defense to Plaintiffs' claims under ERISA § 406(a)(1)(C). In spite of this ruling, Plaintiffs inexplicably label those fees "ill-gotten" (Pls.' Br. at 69), and demand disgorgement of a sum apparently corresponding to those fees -- notwithstanding the District Court's finding that they were entitled to no monetary damages. This Court should affirm the District Court in all respects.

<u>STATEMENT OF THE ISSUES</u>

1. *Prima facie evidence of loss*. Whether the District Court clearly erred in finding that Plaintiffs did not bear their burden of establishing a prima facie loss to the Plan, where their case rested on an impermissible "procedural breach" theory, they did not point to specific imprudent investment decisions, and

they offered only a hindsight-based analysis of purported imprudence based on implausible comparators to the Putnam funds.

2. *Duty of loyalty*. Whether the District Court correctly determined that Plaintiffs were required to identify actions motivated by considerations other than Plan participants' best interests; whether the District Court clearly erred in finding that Plaintiffs failed to point to specific circumstances in which Defendants actually put their own interests ahead of those of Plan participants, where Plaintiffs offered no proof of any specific action that was motivated by any consideration other than the best interests of Plan participants.

3. *Prohibited transactions.* Whether the District Court clearly erred in finding that Plan participants were treated at least as well as other shareholders of Putnam funds, in light of the substantial contributions that Putnam made to their individual accounts, or in finding that Plaintiffs had actual knowledge of most of their claims more than three years before filing their complaint; whether the District Court correctly determined that the fees of the Plan's investment options were reasonable as a matter of law.

4. *Equitable relief*. Whether the District Court clearly erred in finding that Plaintiffs were not entitled to equitable relief, where they did not bear their burden of showing a prima facie case of ill-gotten profit, did not allege that

Defendants misused plan assets for their personal profit, and did not specify the type of other equitable relief sought.

STATEMENT OF FACTS

I. THE PARTIES

Putnam, located in Boston, Massachusetts, is an asset-management company that creates, manages, and sells mutual funds. (J.A. at 1616.[5]) In 2017, Putnam was ranked by Barron's as No. 5 on a list of the top fund families over the preceding five years, and as No. 1 or No. 2 for one-year performance three times during the class period.[6] Putnam Management is investment advisor to Putnam mutual funds, and Putnam Services provides services to Putnam fund investors. (*Id.* at 1616.) The PBIC is a named fiduciary under the Plan and is responsible for selecting, monitoring, and removing investments from the Plan lineup. (*Id.* at 1617.) The PBIC's membership during the class period included senior investment professionals (including asset group heads and senior portfolio managers), professionals in retirement solutions and research, and senior employees from Human Resources and Putnam's defined-contribution business. (*Id.* at 1934-40.)

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[5] The parties' Joint Appendix is cited herein as "J.A."

[6] J.A. at 2219, 2242-43, 6053. Barron's is a highly regarded financial-reporting institution that performs in-depth analysis and ranks only a small fraction of the hundreds of mutual fund companies in the marketplace as the top mutual fund families each year. (*Id.* at 2219, 2242-43.)

The PBOC is responsible for overseeing the PBIC; its membership during the class period included senior Putnam employees, including Putnam's Chief Financial Officer and Head of Human Resources. (*Id.*) Mr. Reynolds is Putnam's Chief Executive Officer. (*Id.*)

Plaintiff John Brotherston is a former Putnam employee and current Plan participant; Plaintiff Joan Glancy is a former Putnam employee and former Plan participant. (*Id.* at 1618.) Mr. Brotherston received over $116,000 in Putnam contributions to his Plan account, while Ms. Glancy received over $207,000 in Putnam contributions to her account since 1987. (*Id.* at 495-96.) Ms. Glancy withdrew her entire account balance from the Plan in early 2010 following her departure from Putnam after nearly forty years. (*Id.* at 1618, 2374.) In connection with their separations from Putnam, both Mr. Brotherston and Ms. Glancy received enhanced separation benefits and executed general release agreements. (*Id.* at 2365-66, 2394-95.) Both became plaintiffs in this case after receiving an unsolicited letter from their Minnesota counsel.[7] (*Id.* at 2358, 2398-99.)

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[7] The same plaintiffs' firm has brought at least eight substantially similar class-action lawsuits against other financial-services companies in recent years. *See Velazquez v. Mass. Fin. Servs. Co.*, No. 17-cv-11249-RWZ (D. Mass. July 7, 2017) (ECF No. 1); *Beach v. JPMorgan Chase Bank*, No. 17-cv-00563-JMF (S.D.N.Y. Jan. 25, 2017) (ECF No. 1); *Wildman v. Am. Century Servs., LLC*, 16-cv-00737-DGK (W.D. Mo. June 30, 2016) (ECF No. 1); *Habib v. M&T Bank Corp.*, 16-cv-375-FPG (W.D.N.Y. May 11, 2016) (ECF No. 1); *Main v. Am. Airlines, Inc.*, 16-cv-00473-O (N.D. Tex. Apr. 15, 2016) (ECF No. 1); *Moreno v.*

II. THE PLAN

The Plan is a defined-contribution 401(k) plan. (*See id.* at 1616.) A defined-contribution plan is one in which participants have individual accounts and are responsible for directing their contributions among a variety of investment options. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999). The value of the participant's account is based solely on the aggregate market value of the contributions to the account. *See id.* "A defined benefit plan, on the other hand, consists of a general pool of assets rather than individual dedicated accounts. Such a plan, as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment" -- typically determined by the participant's length of employment at the company, rather than market value. *See id.* at 439-40 (internal quotation marks omitted). Fiduciaries of defined-benefit plans -- not participants -- are responsible for deciding how to invest plan contributions. *See id.* While defined-benefit plans controlled the employee-benefits landscape in decades past, "[t]hat landscape has changed. Defined contribution plans dominate the retirement plan scene today." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 254-55 (2008).

Deutsche Bank Ams. Holding Corp., 15-cv-09936-LGS (S.D.N.Y. Dec. 21, 2015) (ECF No. 1); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 15-cv-01614-JVS-JCG (C.D. Cal. Oct. 7, 2015) (ECF No. 1); *Smith v. BB&T Corp.*, 15-cv-00732-CCE-JEP (M.D.N.C. Sept. 4, 2015) (ECF No. 1).

Through the Plan, all eligible employees of the Putnam Companies may contribute tax-deferred savings to individual participant accounts. (J.A. at 1616.) Given the nature of Putnam's business, the average Plan participant tends to have greater investment sophistication than do employees of other companies. (J.A. at 1860-61.)

A. The Plan Provides Participants With The Opportunity To Invest In A Broad Range Of Investment Options With Reasonable Fees

1. The Plan Allows Participants To Construct Diversified Portfolios

Pursuant to Section 8.1 of the Plan Document, the Plan offers "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." (*Id.* at 2737.) These investment options include both actively managed and index funds.[8] (*Id.* at 1220-26.) The Plan does *not* include Putnam closed-end funds, tax-exempt funds, hedge

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[8] The Plan's investments are largely "actively managed," meaning that the funds are operated by "an investment adviser who continually researches, monitors, and actively trades the holdings of the fund to seek a higher return than the market [and, as a result, these funds] generally have higher fees." U.S. Dep't of Labor, Emp. Benefits Sec. Admin., *A Look at 401(k) Plan Fees*, at 7 (Aug. 2013), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/a-look-at-401k-plan-fees.pdf (last visited Jan. 8, 2018). By contrast, "passively managed" products, or "index funds," "seek to obtain the investment results of an established market index . . . by duplicating the holdings included in the index" and generally have lower management fees because they "require little research or trading activity." *Id.*

funds, or funds undergoing internal testing at Putnam. (*Id.* at 1942.) The Putnam funds included in the Plan are frequently selected by fiduciaries of other plans for inclusion in their 401(k) lineups. (*Id.* at 1515, 1535.)

Plan participants can direct their investments among investment options offering different risk and return characteristics and investment objectives, including various equity and fixed-income funds. (*Id.* at 3343-58.) Categories of investment options include target date, asset allocation, growth, blend, value, income, capital preservation, absolute return, and global sector. (*Id.* at 3343-47.) During the class period, the Plan offered a total of 121 investment options, including 108 share classes of Putnam-managed mutual funds, six unaffiliated collective investment trusts ("CITs") managed by BNY Mellon, five CITs managed by Putnam, a Marsh & McLennan Companies, Inc. common stock fund (Putnam's former ultimate parent), and a CIT managed by PanAgora Asset Management. (*Id.* at 1220-26.)

In addition to these investment options, the Plan offers participants the opportunity to invest in thousands of unaffiliated third-party funds through the TD Ameritrade brokerage window. (*Id.* at 3359.) Since 2014, over a thousand exchange-traded funds ("ETFs") have been available to Plan participants through the brokerage window. (*Id.* at 3287-88.) Over one hundred of the ETFs, including many index funds, are available through the brokerage window trade-commission-

free. (*Id.* at 2038-39, 3287.) Vanguard index funds -- to which Plaintiffs compare Putnam funds -- are also available to Plan participants through the brokerage window. In 2013, Putnam began voluntarily paying the annual per-account brokerage window maintenance fee, in an effort to enhance the accessibility of the brokerage window. (*Id.* at 568-70, 2052-53.) As a result, Plan participants no longer pay any brokerage window account-maintenance fees. (*Id.* at 568-70.)

2. Both The Fees And Performance Of The Plan's <u>Investment Options Are Comparable To Peer Funds</u>

During the class period, the net expense ratios[9] of the Plan's investment options ranged from approximately 0.08% to 1.65%. (J.A. at 1267.) These expense ratios generally have declined over the course of the class period; on average, the expense ratio of a given Putnam fund declined by 0.24% from 2009 to 2014. (J.A. at 1465-66.) The Putnam funds' expense ratios also compare favorably to those of peer funds: from 2009 to 2014, the Plan paid approximately $500,000 less in mutual fund fees in the aggregate than it would have paid had it invested at the mean expense ratios for peer funds. (*Id.* at 1466-67, 1495-96.) In addition, the PBIC selects the lowest-cost share class available for each investment option: in February 2013, the committee voted to convert the Plan's mutual fund

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[9] The term "expense ratio" refers to a fund's annual operating expenses, which includes management fees, distribution and service fees, and other expenses. (*See* J.A. at 666.) Expense ratios are expressed as a percentage of the value of an investment. (*See id.*)

holdings in class Y shares and units to lower-cost class R6 or M shares or units for twenty-two funds where those share classes recently became available. (*Id.* at 3225-26.) In April 2013, the PBIC voted "[t]o convert any of the Plan's Putnam mutual fund holdings in class Y shares to class R6 shares as soon as administratively feasible after class R6 shares are made available by any of the funds." (*Id.* at 3229.)

The performance of the Putnam funds also compare favorably to that of peer funds. For example, if, in 2009, a hypothetical investor contributed $100 each to a portfolio weighted equally across all Plan investment options, and to a portfolio comprised of peer funds, that $100 contribution would have yielded $200.03 in the Plan portfolio by the end of 2015, compared to $196.77 in the peer portfolio. (*Id.* at 1468-69, 1499.)

3. <u>The PBIC Actively Monitors The Plan's Investment Options</u>

The PBIC membership includes senior investment professionals within Putnam's Investment Division who have day-to-day responsibility for monitoring the Putnam funds.[10] (*Id.* at 2203-04.) The Putnam funds are systematically reviewed:

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[10] The compensation structure of the Investment Division "align[s] the actions of [Putnam's] portfolio managers [and] analysts, the investment team, with the long-term goals and benefit of shareholders." (J.A. at 2265; *see also id.* at 6044

- By the risk team, portfolio managers (including PBIC members), and analysts on a daily basis (*id.*);
- At weekly risk meetings (attended by PBIC members), which monitor the funds to ensure that they are "taking prudent risk to deliver appropriate returns over the long term" (*id.* at 2204-05);
- At quarterly fund reviews (attended by PBIC members), which assess the funds' investment process, risk, attribution, and performance -- including reasons for both out- and underperformance (*id.* at 2306-07); and
- At meetings of the mutual funds' independent trustees (attended by PBIC members), which assess the funds' performance relative to peer funds and market benchmarks, both on an absolute and risk-adjusted basis, as well as net of fees. (*Id.* at 2222-29, 2248-49.)

PBIC members who are not investment professionals interact with members of the Investment Division on a daily basis -- both in and out of PBIC meetings -- and are intimately familiar with their actions. (*Id.* at 2027-30, 2125.) In addition to the Investment Division's robust monitoring of the Putnam funds, the PBIC is responsible for monitoring the Plan's qualified default investment alternative[11] ("QDIA"), and also oversaw the selection of the unaffiliated BNY Mellon funds to add to the Plan -- functions that Plaintiffs' own expert, Mr. Schmidt, testified were carried out "prudent[ly]." (*Id.* at 2448-49.) Among other things, the PBIC regularly reviews the QDIA's performance and other attributes

(showing that compensation incentives are tied to fund's achievement of top quartile performance, not assets under management).)

[11] A plan's "qualified default investment alternative" is the investment option to which a participant's contributions are directed by default if he or she fails to make an affirmative investment decision. *See generally* 29 C.F.R. § 2550.404c-5.

against similar unaffiliated funds, including those offered by Vanguard and T. Rowe Price. (*Id.* at 2312-13, 3224-25, 5563-73.) Mr. Schmidt also testified that the PBIC's in-depth research of the BNY Mellon funds, as well as its reliance on experts, constituted aspects of its overall prudent process with respect to adding those funds to the Plan. (*Id.* at 2449.)

B. Putnam, Not Plan Participants, Pays The Plan's Administrative Expenses

All recordkeeping expenses -- including the cost of custodial services, Plan maintenance, participant account maintenance, and maintenance of the Plan's website -- are paid by Putnam. (*Id.* at 566, 605.) In addition, Putnam pays the cost of a service that provides individualized investment advice to participants (*id.* at 1944, 1950-51), and has developed the award-winning Lifetime Income Analysis Tool, which participants can use to plan for retirement at no cost (*id.* at 1930-31, 1951-54). During the class period, Putnam also began to pay the annual brokerage-window fee so that participants could use it free of charge to access any non-Putnam funds they desired.

Because Putnam pays the Plan's administrative expenses, revenue-sharing payments are not necessary to offset those expenses. Revenue-sharing payments are made by investment managers to service providers such as recordkeepers for services provided on behalf of investment managers. (*Id.* at 617.) Revenue-sharing is typically used by retirement plans to pay recordkeeping and

administrative costs, as subaccounting fees corresponding to services provided to the plan. (*Id.* at 227-28.) The Plan does not receive revenue-sharing payments from Putnam entities. (*Id.* at 228.) Because Putnam -- rather than participants -- pays the Plan's administrative expenses, there are no participant-borne administrative expenses for revenue-sharing payments to offset. (*Id.*)

C. Putnam Has Contributed Over One Hundred Million Dollars In Discretionary And Matching Contributions To Plan Participants' Accounts

The Plan allows Putnam's CEO to determine, on an annual basis, the amount of Putnam's discretionary contribution to participants' Plan accounts, if any. (*Id.* at 2727-28.) Putnam made a discretionary contribution to eligible participants in every year of the class period, in an amount ranging from 5% to 15% of participants' applicable compensation, for a total of $70 million through 2015. (*Id.* at 571-87.) Putnam made this contribution even in years when the company was not profitable. (*Id.* at 281.) In addition, Putnam also matches any contributions made by participants, up to 5% of a participant's pre-tax pay, totaling an additional $41 million in matching contributions from 2010 to 2015. (*Id.* at 571-87, 4845.) Putnam contributed $116,391.82 to Mr. Brotherston's Plan account, while he contributed $75,854.58. (*Id.* at 495.) Since 1987, Putnam contributed $207,501.19 to Ms. Glancy's Plan account, while she contributed approximately $64,448.00. (*Id.* at 496.)

SUMMARY OF ARGUMENT

This Court should affirm the District Court's orders granting judgment in favor of Defendants on all counts.

First, the District Court did not clearly err in finding that Plaintiffs failed to establish a prima facie case of loss, which was fatal to their duty of prudence claim. (*See infra* Part I.) In particular, the District Court correctly held that Plaintiffs were required to point to specific imprudent investment options, rather than rest on a purported "procedural breach." Contrary to Plaintiffs' argument, the District Court did not impose an improper burden on Plaintiffs, but rather properly required that they show prima facie evidence of loss, meaning "enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." *Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, No. 12-cv-02547-RM-MEH, 2015 WL 2065923, at *8 (D. Colo. May 1, 2015), *aff'd*, 858 F.3d 1324 (10th Cir. 2017). The District Court's factual finding that Plaintiffs failed to do so was not clearly erroneous. (*See infra* Part I.A.)

Further, the testimony of Plaintiffs' expert, Dr. Steve Pomerantz, was insufficient to satisfy Plaintiffs' burden. Dr. Pomerantz's only damages model assumed the imprudence of *all* of the Putnam funds in the first instance and calculated purported damages for those funds with the benefit of hindsight -- even for funds that were selected and monitored pursuant to a process that Plaintiffs'

expert determined was prudent. This "portfolio-wide" approach represented a profound departure from the case law, which requires proof of the imprudence of *specific* investment options. Further, Dr. Pomerantz's arbitrary selection of the passively managed BNY Mellon and Vanguard funds as comparators did not establish a cognizable loss where there was no evidence in the record that either of those sets of funds were plausible alternatives to the largely actively managed Putnam funds. (*See infra* Part I.B.) Finally, this Court should reject Plaintiffs' request to shift the burden of proving the objective imprudence of the Plan's investment options to Defendants, which would not affect the outcome of this case, as Plaintiffs have failed to establish a prima facie case of loss in the first instance. (*See infra* Part I.C.)

Second, the District Court did not clearly err in finding that Plaintiffs failed to point to specific disloyal conduct, which was fatal to their duty of loyalty claim. (*See infra* Part II.) In that regard, the District Court correctly held Plaintiffs to their burden of identifying specific conduct that was motivated by considerations other than Plan participants' best interest, and the court's finding that Plaintiffs failed to meet this burden was not clearly erroneous. (*See infra* Part II.A.) Moreover, the logical conclusion of Plaintiffs' argument would be to impose a per se rule against offering affiliated funds in plan lineups -- a result that is contrary to settled case law and DOL guidance. (*See infra* Part II.B.)

Third, the District Court correctly granted judgment for Defendants on Plaintiffs' prohibited transaction claims because the Plan's investment in Putnam-affiliated funds was expressly permitted, and those claims were largely time-barred in any event. (*See infra* Part III.) Specifically, the District Court did not clearly err in holding that Plaintiffs' claims were barred by PTE 77-3 -- which permits the inclusion of affiliated funds in 401(k) lineups when certain conditions have been met -- based on the factual finding that Plan participants were treated no less favorably (and in fact more favorably) than other shareholders of the Putnam funds. Further, this Court should reject Plaintiffs' argument that the requirements of PTE 77-3 were not met due to Putnam's revenue-sharing payments to third-party recordkeepers, as those payments are not "dealings" within the meaning of the regulation. (*See infra* Part III.A.) The District Court also correctly determined that Plaintiffs' claims under ERISA § 406(a)(1)(C) were barred by the reasonableness of the funds' fees as a matter law; in addition, Defendants successfully proved the reasonableness of those fees as a matter of fact. (*See infra* Part III.B.) Finally, the prohibited transaction claims are largely time-barred in any event, a holding that Plaintiffs fail to challenge on appeal. (*See infra* Part III.C.)

Fourth, the District Court's finding that Plaintiffs were not entitled to equitable relief was not clearly erroneous. Having failed on the merits of both their fiduciary duty and prohibited transaction claims, Plaintiffs' requested disgorgement

of $37.3 million would be an end-run around the District Court's rulings. This is so particularly where Plaintiffs failed to establish a prima facie case of ill-gotten profit, did not show that Defendants ever misused any Plan assets, and never articulated the nature of the "other" equitable relief they supposedly sought. (*See infra* Part IV.) In short, this Court should affirm the rulings of the District Court in all respects.

STANDARD OF REVIEW

In a nonjury case, such as this one, that was submitted in part to the District Court as a "case stated,"[12] the clear-error standard of review applies "when examining the inferences drawn by the district court." *United Paperworkers Int'l Union Local 14 v. Int'l Paper Co.*, 64 F.3d 28, 31-32 (1st Cir. 1995). This standard is "more deferential" than the de novo standard that typically governs the review of summary judgment decisions, because "the appellate court may assume that the parties considered the matter to have been submitted to the district court as a case ready for decision on the merits." *Id.* at 31. Under the clear-error standard, this Court must affirm the District Court's findings "[i]f the district court's account of

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[12] Parties in a nonjury case may submit their dispute to the district court as a case stated "when the basic dispute . . . concerns only the factual inferences that one might draw from the more basic facts to which the parties have agreed, and where neither party has sought to introduce additional factual evidence or asked to present witnesses." *United Paperworkers Int'l Union Local 14 v. Int'l Paper Co.*, 64 F.3d 28, 31 (1st Cir. 1995). Here, the parties agreed to submit the prohibited transaction claims to the District Court as a case stated. (J.A. at 1343.)

the evidence is plausible in light of the record viewed in its entirety." *Tsoulas v. Liberty Life Assurance Co. of Bos.*, 454 F.3d 69, 76 (1st Cir. 2006) (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985)). Legal conclusions are reviewed de novo. *Id.*

The clear-error standard also governs this Court's review of the District Court's fact-finding following the bench trial. *See* Fed. R. Civ. P. 52(a)(6). "This deferential standard extends to inferences drawn from the underlying facts." *Janeiro v. Urological Surgery Prof'l Ass'n*, 457 F.3d 130, 138-39 (1st Cir. 2006) (alteration and internal quotation marks omitted). In the absence of clear error, the appellate court must "accept the facts as found and draw all reasonable inferences therefrom in the light most favorable to the judgment." *Forcier v. Metro. Life Ins. Co.*, 469 F.3d 178, 180 (1st Cir. 2006). Legal conclusions are reviewed de novo. *Janeiro*, 457 F.3d at 139.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY REJECTED PLAINTIFFS' DUTY OF PRUDENCE CLAIM IN THE ABSENCE OF A PRIMA FACIE CASE OF LOSS

The District Court did not clearly err in finding that Plaintiffs failed to establish a prima facie case of loss, and correctly held that such failure was fatal to their duty of prudence claim. As Plaintiffs recognize, it is their burden to establish

both "procedural imprudence *and* a prima facie loss."[13] (Pls.' Br. at 58 (quoting *Tatum*, 761 F.3d at 362) (emphasis added).) Case law makes clear that neither element is sufficient on its own to recover monetary relief. *See, e.g.*, *Plasterers'*, 663 F.3d at 217 (observing that an imprudent process, without evidence of loss, is insufficient to establish liability); *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 7 (1st Cir. 2009) (observing that loss, without evidence of an imprudent process, is insufficient to establish liability). But Plaintiffs' argument that "[t]he entire portfolio is imprudent because of a procedural breach" (J.A. at 2641) -- even in the absence of *any* evidence concerning the imprudence of any specific investment options or associated losses -- misreads this case law, mistaking a necessary element of their claim (an imprudent process) for a sufficient one.

As the District Court correctly found, however, Plaintiffs failed to establish the necessary element of loss. Indeed, Plaintiffs failed to adduce *any* evidence at trial concerning the imprudence of any specific investment options, and accordingly failed to produce "enough evidence to allow the fact-trier to infer" that they suffered any loss associated with a purported procedural breach. *See*

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13 "Prima facie" evidence of loss refers to a "party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." *Pioneer Ctrs.*, 2015 WL 2065923, at *8 (quoting *Black's Law Dictionary* 1382 (10th ed. 2014)) (granting summary judgment to defendant on ERISA fiduciary duty claim, and holding that plaintiff failed to establish prima facie case of loss).

Pioneer Ctrs., 2015 WL 2065923, at *8. As a result, Plaintiffs failed to establish their prima facie case. Thus, in the absence of any evidence of loss, even if the Court were to apply the burden-shifting framework advocated by Plaintiffs -- and it should not -- there is no occasion for the burden to shift to Defendants to disprove that any loss was caused by the alleged breach.

A. Plaintiffs Failed To Establish A Prima Facie Case Of Loss Where They Did Not Identify Any Specific Imprudent Investment Options

The District Court's holding that "Plaintiffs' theory that the procedural breach tainted all of the Defendants' investment decisions for the Plan" was unsupported, and that they were instead required to point to specific imprudent investment decisions, was legally correct. (Pls.' Add. at 63, 65 (collecting cases).) The District Court did not clearly err in finding that Plaintiffs failed to meet this burden.

1. Plaintiffs Are Required To Establish Specific Imprudent Investment Decisions

As explained in an oft-cited opinion, the ERISA duty of prudence embraces "two related but distinct duties . . . : to investigate and evaluate investments, and to invest prudently. Neither does the faithful discharge of the first satisfy the second, nor does breach of the first constitute breach of the second." *Fink v. Nat'l Sav. & Tr. Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part). Those duties are two sides of the

same coin. As courts routinely recognize, a claim for breach of the duty of prudence is incomplete without evidence of both. For example, in *Plasterers'*, the plaintiffs alleged that the plan fiduciaries failed to research the plan's investment vehicles to ensure that those investments were prudent when measured against other similar investments. 663 F.3d at 213. The district court agreed that there had been a procedural breach and adopted the plaintiffs' damages analysis, which compared the performance of the plan's lineup to a hypothetical prudent portfolio. *Id.* at 214-15. But because the district court made no finding that the investments selected as a result of the breach were objectively imprudent, the Fourth Circuit vacated the district court's judgment, emphasizing that "simply finding a failure to investigate . . . does not automatically equate to causation of loss and therefore liability." *Id.* at 217, 219. The court remanded for consideration of "the prudence of [the plan's] *actual investments*." *Id.* at 219 (emphasis added).

In support of the argument that their "procedural breach theory" is somehow "entirely consistent with the law," Plaintiffs cite a string of cases standing for the unremarkable proposition that the test of prudence is one of conduct. (*See* Pls.' Br. at 52-53 (collecting cases).) But that proposition does not support Plaintiffs' argument: it is one thing to say that prudence is measured by the robustness of process, and quite another to say that deficiencies in that process generate an entitlement to monetary damages, *in the absence of a showing of any*

imprudent investment with a related investment loss. Plaintiffs' argument that such evidence should be excused in their case due to the purportedly peculiar "nature of the breach involved" is misplaced. (Pls.' Br. at 53 (internal quotation marks omitted).) There is nothing about the nature of Plaintiffs' "procedural breach" claim that warrants such unprecedented treatment. Indeed, the type of breach they claim occurred -- a "procedural breach" stemming from a lack of adequate investigation (Pls.' Br. at 1, 52) -- is the same type of breach present in virtually every case cited,[14] and none of those cases purport to lower the quantum of evidence that ERISA plaintiffs need to put forward in order to demonstrate loss.

To accept Plaintiffs' argument that they need not show specific imprudent investments and related losses because the alleged breach was "procedural" in nature would be to erase ERISA's loss requirement right out of the statute. *See* 29 U.S.C. § 1109(a) (stating that breaching fiduciary "shall be personally liable to make good to [the] plan any losses to the plan resulting from

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[14] *E.g.*, *Tatum*, 761 F.3d at 355 (affirming district court finding that defendant "breached its fiduciary duties when it decided to remove and sell Nabisco stock from the Plan without undertaking a proper investigation into the prudence of doing so" (internal quotation marks omitted)); *Plasterers'*, 663 F.3d at 216-17 (approving of district court finding that defendants "breached their fiduciary duty to investigate" by failing to review plan investment options); *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 302-03 (5th Cir. 2000) ("[A] reasonable factfinder could conclude that [the defendant] failed to structure, let alone conduct, a thorough, impartial investigation of which provider or providers best served the interests of the participants and beneficiaries.").

each such breach"). As Plaintiffs' own expert witness, Dr. Pomerantz, agreed, "each fund has to stand on its own" and "each investment in the plan ha[s] to be prudent." (J.A. at 2522, 2590.) Plaintiffs utterly failed to make any showing at trial regarding the imprudence of any particular fund as a Plan investment option, as required by law.

Plaintiffs misinterpret the District Court's opinion, arguing that the court "required [Plaintiffs] to prove that each of the specific funds in the Plan were objectively imprudent." (Pls.' Br. at 63.) Not so. The District Court simply held that Plaintiffs were required to "point to" specific imprudent investment decisions (Pls.' Add. at 63), which is consistent with the requirements of a prima facie showing of loss and not equivalent to demanding definitive proof. *E.g.*, *Black's Law Dictionary* 1382 (10th ed. 2014) (defining "prima facie" as "based on what seems to be true on first examination, even though it [may] later be proved to be untrue"). Further, while Plaintiffs take issue with the District Court's requirement that they show a "causal link" (Pls.' Br. at 62), this, too, was entirely consistent with the statute and the case law. *E.g.*, *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1099 (9th Cir. 2004) ("[A] plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan" (quoting *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995), *abrogated on other grounds by Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014))). Requiring evidence of a

"causal link" is *not* the same as requiring Plaintiffs to definitively prove loss causation, *i.e.*, that, as a result of their procedural imprudence, Defendants offered objectively imprudent investments in the Plan, which a hypothetical prudent fiduciary would not have offered, thereby causing loss to the Plan. *See generally Tatum*, 761 F.3d at 356-57, 361-62 (discussing difference between prima facie showing of "related loss" and definitive proof of loss causation). In short, the District Court correctly held Plaintiffs to their prima facie burden.[15]

2. The District Court's Finding That Plaintiffs Did Not Establish Any Specific Imprudent Investment Decisions Was Not Clearly Erroneous

The District Court's finding that Plaintiffs failed to "point to a specific imprudent investment decision or decisions" at trial (Pls.' Add. at 63) was not clearly erroneous. In fact, the finding was consistent with Plaintiffs' own (correct) statement of their case at the Rule 52 motion hearing: "we don't do a fund-by-fund analysis." (J.A. at 2640.) Plaintiffs now attempt an about-face, erroneously arguing on appeal that they "prove[d] loss causation . . . on a fund-by-

[15] Plaintiffs' argument that the District Court improperly applied a "could have" instead of a "would have" standard is also a nonstarter. (Pls.' Br. at 63-64.) The District Court simply observed that it is hypothetically possible that a fiduciary "could" lack a prudent process and nevertheless select objectively prudent investments. (Pls.' Add. at. 65-66.) The court did not opine as to the standard under which the prudence of those investments ultimately would be determined, *i.e.*, whether a hypothetical prudent fiduciary either "could have" or "would have" made the same decision.

fund basis." (Pls.' Br. at 65.) Yet Plaintiffs still cite *no* evidence of the imprudence of any particular fund.[16] Their failure to do so is fatal to their appeal.

Plaintiffs argue that they carried their burden by pointing to Defendants' decision to follow the Plan Document and offer all Putnam funds in the Plan lineup, as well as the decision not to consider non-Putnam alternatives until the BNY Mellon collective investment trusts were added. (Pls.' Br. at 67.) But that conflates alleged *procedural* deficiencies with specific imprudent investment decisions. And while Plaintiffs curiously argue that evidence of specific fund-level investment decisions was tantamount to "evidence of a ghost" (*id.*), that assertion is belied by the allegation in their own Complaint that Defendants purportedly failed to remove specific investments that had become imprudent. (*E.g.*, J.A. at 180-81, 184-85 (Compl. ¶¶ 82, 85, 98).) Plaintiffs, however, did not offer any evidence of the imprudence of those or any other investments at trial. Their case simply suffered from a failure of proof -- and was not bolstered by Dr. Pomerantz's testimony, as explained below.

[16] Plaintiffs' argument concerning the number of other plans that offered Putnam funds (Pls.' Br. at 65) does not demonstrate the imprudence of any particular fund and must be discounted in any event, as it is based on data found in Dr. Pomerantz's written report, *which was not before the District Court*. (J.A. at 2519 (statement of court that "[w]e're not receiving the reports in evidence").)

B. The District Court Did Not Clearly Err In Determining That Dr. Pomerantz's Testimony Did Not Establish A Prima Facie Loss And Properly Declined To Credit It

The District Court did *not*, as Plaintiffs argue, "disregard[] Dr. Pomerantz's expert analysis." (Pls.' Br. at 50.) Rather, the court found that, because it rested on an untenable "procedural breach" theory, its quantification of losses purportedly suffered by the Plan missed the mark. (Pls.' Add. at 66 n.18.) This finding was not clearly erroneous. Notably, Dr. Pomerantz's testimony is the *only* evidence that Plaintiffs cite on appeal in support of their argument that they carried their burden of demonstrating a prima facie loss. But the District Court properly declined to credit that testimony in light of the numerous analytical flaws in his model. Indeed, other courts have similarly declined to credit Dr. Pomerantz's testimony due to various methodological flaws in his analysis. *See CCM Rochester, Inc. v. Federated Inv'rs, Inc.*, No. 14-cv-03600-VEC, slip op. at 8-14 (S.D.N.Y. Aug. 31, 2016) (ECF No. 75) (excluding one of Dr. Pomerantz's opinions because "it does not employ the rigor one would expect from an expert in his field nor a reasoned manipulation of numbers"); *Sivolella v. AXA Equitable Life Ins. Co.*, No. 11-cv-04194-PGS-DEA, 2016 WL 4487857, at *14 (D.N.J. Aug. 25, 2016) (finding Dr. Pomerantz not credible due to "inconsistencies, oversimplifications, and his sarcastic demeanor" during trial and deposition testimony); *Eastman v. First Data Corp.*, 292 F.R.D. 181, 186-88 (D.N.J. 2013)

(finding "numerous problems with [Dr. Pomerantz's] analysis" and "declin[ing] to engage in the mathematical exploration proposed by Plaintiffs' expert"); Transcript of Oral Argument at 34:22-35:14, *Picard v. Mets Ltd. P'ship*, No. 11-cv-03605-JSR (S.D.N.Y. Feb. 23, 2012) (ECF No. 139) (striking proposed testimony of Dr. Pomerantz and noting that court was "very doubtful about the relevance of [Dr. Pomerantz's] methodology and experience").

1. Dr. Pomerantz's Hindsight-Based Model Impermissibly Assumed The Imprudence Of All Funds In The Plan Lineup, While Failing To Demonstrate The Actual Imprudence Of Any

As Plaintiffs note, by including all Putnam funds in his model, Dr. Pomerantz purported to measure alleged damages stemming from a so-called "procedural breach." (Pls.' Br. at 52.) But this purported measure of damages was premised on the same erroneous assumption discussed above: that a procedural breach (which the District Court did not find in any event) automatically taints all ensuing investment decisions -- a proposition that courts have roundly rejected. *See, e.g.*, *Tussey v. ABB, Inc.*, 746 F.3d 327, 335 (8th Cir. 2014) ("Even if a [fiduciary] failed to conduct an investigation before making a decision, he is insulated from liability if a hypothetical prudent fiduciary would have made the same decision anyway." (internal quotation marks omitted)); *Plasterers'*, 663 F.3d at 217 ("[S]imply finding a failure to investigate . . . does not automatically equate to causation of loss and therefore liability."). Dr. Pomerantz's approach was

exactly backwards: instead of determining which funds were imprudent (and over which periods of time), and then calculating damages based on those specific funds and time periods, Dr. Pomerantz instead assumed the imprudence of *each and every* Putnam fund and calculated damages for all of them in one fell swoop.[17] Further, Dr. Pomerantz's contravened clear case law holding that prudence is measured based on the information available to a fiduciary at the time a decision was made, rather than with the benefit of hindsight.[18]

Dr. Pomerantz's trial testimony can be summarized as follows. Dr. Pomerantz compared the performance of *all* of the Putnam funds in the Plan lineup to that of two alternatives: a corresponding Vanguard index fund and BNY Mellon CIT. (J.A. at 2577-78.) He ran the comparison at the end of every quarter from the beginning of the class period through the end of the second quarter of 2016,

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[17] That Dr. Pomerantz awarded a credit when a Putnam fund outperformed or was less expensive than its comparator (J.A. at 2588) does not change the fact that he assumed *all* of the funds' eligibility for damages in the first instance, without any basis for doing so.

[18] In other words, past underperformance does not equate to imprudence. *E.g.*, *Tussey v. ABB, Inc.*, 850 F.3d 951, 960 n.8 (8th Cir. 2017) (observing that it is not the case that "whichever fund earned more over the relevant time frame 'should' have been offered to the participants, or even that it performed 'better' in a meaningful sense. Not only can good bets go bust and bad bets hit the jackpot, but some investments are simply meant to pay off less than others, in return for lower risks, different exposures, or countless other considerations"); *Bunch*, 555 F.3d at 7 ("[T]he test of prudence . . . is one of *conduct*, and not a test of the result of performance of the investment." (alterations in original)).

and summed up each performance differential to arrive at a total performance damages figure. (*Id.* at 2577.) He then repeated the comparisons with respect to the funds' fees. (*Id.* at 2577-78.) On the basis of that arithmetic, Dr. Pomerantz arrived at a total damages figure of $45,574,124 based on the Vanguard comparator (*id.* at 2581-82), and $44,291,949 based on the BNY Mellon comparator (*id.* at 2588). In essence, Dr. Pomerantz's analysis looked at the total performance and fee differentials as of June 30, 2016, and if, as of that date, the result of that comparison was positive (*i.e.*, the non-Putnam comparator outperformed or was cheaper than the Putnam alternative), he concluded that the Putnam fund was imprudent *on that basis alone* and assessed damages accordingly. On the basis of that point-in-time calculation, Dr. Pomerantz then looked backwards and concluded that each fund was imprudent for the *entire duration* of the class period.

That is the very definition of impermissible hindsight. As the Second Circuit has observed, a court "cannot rely, after the fact, on the magnitude of the decrease in the [relevant investment's] price; rather, we must consider the extent to which plan fiduciaries at a given point in time reasonably could have predicted the outcome that followed." *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) (alteration in original) (affirming dismissal of ERISA breach of

fiduciary duty claims). Dr. Pomerantz's analysis failed to provide this prospective measure. The total performance differentials he cited, as of one day in 2016, provide no metric by which to assess how much underperformance, and over what length of time, is too much for a prudent fiduciary to bear. A hypothetical prudent fiduciary reviewing Dr. Pomerantz's analysis would have no way to assess whether and when any Putnam fund became imprudent, necessitating its removal from the Plan lineup on a going-forward basis. Dr. Pomerantz's testimony therefore failed to demonstrate that any individual fund was imprudent.

2. Dr. Pomerantz's Model Directly Conflicted With Plaintiffs' Other Evidence

Dr. Pomerantz's analysis was further undermined by the fact that his baseline assumption that *all* the Putnam funds were imprudent directly conflicted with Plaintiffs' other evidence.

First, as discussed above, Dr. Pomerantz calculated alleged damages for *all* Putnam funds, notwithstanding testimony from Plaintiffs' other expert witness, Mr. Schmidt, that the process used to select and monitor certain funds was, in fact, prudent. Mr. Schmidt testified that the suite of Putnam RetirementReady funds (the Plan's QDIA) was prudently reviewed and monitored. (J.A. at 2448 ("There was a prudent process that was followed in terms of the review and monitoring of the QDIA.").) Thus, Dr. Pomerantz's assumption that *all* Putnam

funds were imprudent, including concededly *prudent* funds, is directly at odds with the evidence presented at trial.

Second, although Plaintiffs argue that the Plan's investment options were imprudent due to Defendants' failure to consider alternatives to Putnam funds (Pls.' Br. at 6; J.A. at 161 (Compl. ¶ 67)), Dr. Pomerantz's model assessed damages over the *entire duration* of the class period -- despite evidence that Defendants considered non-Putnam alternatives at least as early as 2014, ultimately adding a set of unaffiliated BNY Mellon funds to the Plan. (*See generally* Pls.' Br. at 21-22.) Plaintiffs concede, as they must, that "[t]here is no dispute that the process for choosing the BNY Mellon CITs was prudent." (*Id.* at 22.) Where the entire premise of Plaintiffs' claim is that Defendants offered only Putnam funds in the Plan without investigating non-Putnam alternatives (J.A. at 135 (Compl. ¶ 3)), there is no basis to assess damages for a time period during which Defendants were undisputedly following a prudent process to investigate and select unaffiliated alternatives.

In light of this conflicting evidence, the District Court was free to discount Dr. Pomerantz's testimony, and properly did so. *Cf. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242-43 (1993) (affirming judgment notwithstanding verdict and observing that expert opinion cannot support verdict "when indisputable record facts contradict or otherwise render the opinion

unreasonable"); *see also Sivolella*, 2016 WL 4487857, at *58 (declining to credit Dr. Pomerantz's testimony concerning total amount of fees retained by investment manager where he failed to account for other evidence presented at trial concerning fee reimbursements).

3. Dr. Pomerantz's Purported "Portfolio-Wide" Analysis Is An Unprecedented Departure From The Case Law

Plaintiffs' assertion that they are entitled to "portfolio-wide" damages, as calculated by Dr. Pomerantz, (*e.g.*, Pls.' Br. at 55), is untethered to the factual record in this case -- which reveals no evidence of the imprudence of *any* fund -- and depends on Plaintiffs' false assertion that the District Court found a procedural breach in the first instance. (*See, e.g.*, Pls.' Br. at 30-31 ("[T]he 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.").) But the district found no breach of any sort -- procedural or otherwise. Further, Dr. Pomerantz's so-called "holistic" damages model (*id.* at 56), on which Plaintiffs exclusively rely to show loss, has no basis whatsoever in law, particularly when it comes to assessing damages in the context of a defined-contribution plan such as this one.

(a) Plaintiffs Cite No Authority Supporting The Sweeping Relief They Seek

Plaintiffs cite no case holding -- or even suggesting -- that challenging the imprudence of a Plan's lineup as a whole over a seven-year class period entitles them to "portfolio-wide" damages in the absence of a showing of the imprudence of any particular investment. For example, in *Dardaganis v. Grace Capital, Inc.* (cited at Pls.' Br. at 54), the trustees of an ERISA retirement fund sued the fund's investment manager for breach of fiduciary duty, where the proportion of the fund's assets held in common stock routinely exceeded the 50% ceiling set by contract. 889 F.2d 1237, 1239 (2d Cir. 1989). Observing that the damages award was based on the reasonable assumption that the defendant "would have liquidated an equal proportion of each stock held, sufficient to reduce the total stock holdings to 50% of the Fund's assets," the court affirmed the award -- the difference between the actual value of the fund and what it would have been had the 50% limit been heeded. *Id.* at 1243. The court rejected the argument that the district court should have instead determined which specific purchase or refusal to sell caused the fund to exceed the limit, reasoning that "[w]here . . . 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." *Id.* at 1243-44. That approach was applied under the

circumstances as a reasonable workaround to address the practical difficulties in determining which individual security caused the fund to exceed the 50% limit at any given time. But no such practical difficulties are present here, and indeed, *Dardaganis* says nothing about a plaintiff's burden of demonstrating prima facie loss in the case of a multi-fund defined contribution plan. As the District Court recognized, "*Dardag*[*anis*] was not factually similar to this case" (J.A. at 2658), and does not support Plaintiffs' argument here.

Similarly, *Liss v. Smith* (cited at Pls.' Br. at 54-55), held only that a material issue of fact with regard to loss precluded summary judgment in favor of defendants, emphasizing that "Plaintiffs will bear the burden of proof with respect to causation and extent of damages at trial." 991 F. Supp. 278, 295 (S.D.N.Y. 1998). In addition, *Liss* was based on allegations of "gross mismanagement" not present here, including allegations of kickbacks to the plans' legal counsel and his brothers, as well as "the trustees' complete and total failure to take even the most minimal and basic steps to ensure that [f]und assets were invested and spent properly." *Id.* at 285-88. In assessing the plaintiffs' showing of loss at the summary judgment stage, the court observed that "it is important to keep in mind the mosaic that emerges when all the allegations are looked at together," including the defendants' "astounding naivete [sic] evidencing a lack of basic investment techniques and knowledge," *id.* at 294, 297, and their "[p]articularly shocking"

investment of over 25% of the entire pension fund in collateralized mortgage obligations, as well as millions of dollars in questionable investments in second mortgages on taxi cabs, *id.* at 299. No such "mosaic" is present here.

Plaintiffs' assertion that they are entitled to "portfolio-wide" damages *without even attempting* to demonstrate the imprudence of any individual investment option is belied by case law more germane than *Dardaganis* or *Liss*. For example, in *Tussey v. ABB*, the court rejected the exact type of theory that Plaintiffs advocate. No. 06-cv-04305, 2012 WL 1113291, at *2 (W.D. Mo. Mar. 31, 2012) *aff'd in part, vacated in part, rev'd in part on other grounds*, 746 F.3d 327 (8th Cir. 2014). There, the court found that the defendants breached their fiduciary duty when they, among other things, removed an investment option from the plan and replaced it with another set of funds. *Id.* The plaintiffs argued that, due to the breaches, damages should be assessed by comparing the performance of the challenged defined-contribution plans *on the whole* to that of the defined-benefit plan also maintained by the plan sponsor. *Id.* at *3. But the court "reject[ed] [p]laintiffs' global damages theory which [was] based on the assumption that [defendant's] breaches infected all of its investment decisions for the [p]lans," and instead "determined the specific damages that resulted from *each of the transactions* in which ERISA fiduciary duties were breached." *Id.* (internal quotation marks omitted) (emphasis added). Similarly, Plaintiffs quote *Martin* for

the proposition that "courts are required to 'fashion the remedy best suited to the harm'" (Pls.' Br. at 53), but in that case the court actually *rejected* the plaintiff's "unsound global damage theory" and remanded for a determination of "the specific damages that resulted from *each of the transactions* in which ERISA fiduciary duties were breached." 965 F.2d at 672 (emphasis added).[19]

Ultimately, Plaintiffs' assertion that they are entitled to "portfolio-wide" damages simply because the alleged "procedural breaches at issue affected the entire Plan" (Pls.' Br. at 53) is based on a profound misinterpretation of the case law. The standard for recovering monetary damages is not whether a procedural breach simply "affects" a plan, but whether there is a *related cognizable loss*. (Pls.' Br. at 58 (citing *Tatum*, 761 F.3d at 362).) In the absence of such evidence, Dr. Pomerantz's "holistic" damages model, based on a "portfolio-wide" loss theory, falls short.

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[19] By the same token, in *Meyer v. Berkshire Life Insurance Co.* (cited at Pls.' Br. at 51), the court found that the defendant had acted imprudently in "churning" certain assets within the pension fund, but made clear that it was awarding damages *only* in connection with those assets that had actually been imprudently churned. 250 F. Supp. 2d 544, 574 (D. Md. 2003), *aff'd*, 372 F.3d 261 (4th Cir. 2004) ("Although the court finds . . . that a prudent fiduciary would have invested the [challenged] assets pursuant to [a given asset mix], it cannot accept the plaintiffs' assertion that, in this case, *all* of the plans' assets should have been invested in this manner.").

(b) Plaintiffs' Argument That Dr. Pomerantz's "Portfolio-Wide" Approach Aligns With Modern Portfolio Theory Is Based On A Misunderstanding Of That Theory

Plaintiffs' argument that Dr. Pomerantz's "portfolio-wide" approach aligns with modern portfolio theory (Pls.' Br. at 55) fares no better. As applied in the case law, "modern portfolio theory" refers to the proposition that the goal of a prudent investment manager is to construct a diversified portfolio and to consider each investment in relationship to the overall portfolio; the riskiness of each individual investment in isolation is not dispositive. *E.g.*, *Laborers Nat'l Pension Fund v. N. Tr. Quantitative Advisors, Inc.*, 173 F.3d 313, 317 (5th Cir. 1999). The theory does not purport to lower or otherwise alter ERISA plaintiffs' burden of identifying specific imprudent investments in order to recover damages, and Plaintiffs cite no cases in which a court relied on modern portfolio theory to conclude that an entire portfolio was imprudent, particularly in the absence of a prima facie showing of loss.[20]

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[20] *Cf. Evans v. Akers*, 534 F.3d 65, 74 (1st Cir. 2008) (cited at Pls.' Br. at 55) (reversing dismissal of complaint and holding that, "[a]t this early stage in the proceedings," former participants who challenged imprudence of specific fund in plan stated "colorable" ERISA claim, and that claimed damages were not too speculative where performance of that individual fund could be compared to prudent alternative); *Laborers*, 173 F.3d at 323 (cited at Pls.' Br. at 55) (entering judgment for defendants where plaintiffs "failed to produce evidence from which it reasonably could be found that [defendants] acted imprudently or that the . . investments in the present case violated . . . ERISA policies"); *Leigh v.*

In fact, the theory is commonly invoked by defendants in an effort to escape liability, who argue that they should not be held liable for the losses of a given imprudent investment where the portfolio as a whole yielded positive returns. Such arguments are not always successful. For example, in *Leigh*, on which Plaintiffs rely (*see* Pls.' Br. at 55), the court rejected the defendants' argument that it should "look[] at the value of the entire portfolio in determining whether the trust suffered any loss from the investments." 858 F.2d at 367. The court held that modern portfolio theory, which is based on the notion that trustees aim to build diversified portfolios for the benefit of trust beneficiaries, had no application to the case, where the defendants did not aim to build a diversified portfolio but instead used plan assets to purchase stocks of companies that were targets of their corporate investment program. *Id.* at 368; *Leigh v. Engle*, 727 F.2d 113, 115 (7th Cir. 1984). Instead, the court affirmed the assessment of damages based on the *one* fund out of the whole portfolio that was found to have incurred a loss caused by the breach. *Leigh*, 858 F.2d at 367.

In another case that Plaintiffs cite, *Chao v. Trust Fund Advisors* (cited at Pls.' Br. at 59), the court similarly rejected the defendants' argument that the court should "limit its review of their possible imprudence by examining their

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Engle, 858 F.2d 361, 367-68 (7th Cir. 1988) (cited at Pls.' Br. at 55) (rejecting application of modern portfolio theory and affirming calculation of damages based on specific imprudent investments).

investment activities for the . . . whole portfolio." No. 02-cv-00559-GK, 2004 WL 444029, at *4 (D.D.C. Jan. 20, 2004). The court instead emphasized the statutory duty "to be prudent in *each* investment decision." *Id.* (internal quotation marks omitted) (alteration in original). The court concluded that it would examine whether the defendants breached their fiduciary duties with respect to the prudence of the individual investment at issue, not the whole portfolio, and observed that "while a fiduciary may consider the prudence of an individual investment in the context of the 'whole portfolio,' such consideration does not immunize or permit any individual investment to be less than prudent." *Id.* at *4-5.

Further, as the Fourth Circuit has explained, case law concerning the modern portfolio theory developed in the context of defined-benefit plans, in which the fiduciary -- rather than the participant -- is responsible for the construction of the overall portfolio and for the direction of participant contributions. *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 423 n.8 (4th Cir. 2007) (citing *Laborers*, 173 F.3d at 315). In defined-contribution plans such as the Putnam Plan, by contrast, participants are responsible for directing their contributions to one or more funds; thus, "the relevant 'portfolio' that must be prudent is *each* available [f]und considered on its own." *Id.* at 423 (alteration in original). As a result, the modern portfolio theory provides no support for the

assertion that purported "portfolio-wide" damages obviate the need to put forward evidence of specific imprudent investments and related losses.

4. Dr. Pomerantz's Selection Of Arbitrary Comparators Does Not Establish That Any Fund Experienced A Cognizable Loss

Even if Dr. Pomerantz had made some attempt to analyze whether specific funds were imprudent and when they became so -- and he did not -- his model still failed to demonstrate loss for the independent reason that it arbitrarily compared the predominantly actively managed Putnam funds to the passive Vanguard index funds and BNY Mellon CITs. There is simply no evidence in the record from which to infer that either the Vanguard or BNY Mellon funds were plausible investment alternatives for the Plan. There is accordingly no reason to believe that Dr. Pomerantz's calculations represent the amounts that the challenged funds would have earned had there not been an alleged procedural breach.

To demonstrate a cognizable investment loss resulting from an imprudent investment decision, a plaintiff must compare the performance of the challenged investment to the performance of an alternative investment that plausibly would have been selected had the plan's fiduciaries properly discharged their duties of prudent investigation. *E.g.*, *Evans*, 534 F.3d at 74 ("Losses to a plan from breaches of the duty of prudence may be ascertained . . . by comparing the performance of the imprudent investments with the performance of a prudently

invested portfolio."); *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985) ("[T]he measure of loss applicable under ERISA section 409 requires a comparison of what the [p]lan actually earned on the [challenged] investment with what the [p]lan would have earned had the funds been available for other [p]lan purposes.").

Because the point of the exercise is to measure what *would have* occurred had there not been a procedural breach, the comparator may not be picked out of thin air -- rather, there must be some basis in the evidence for selecting that comparator. *E.g.*, *Tussey v. ABB, Inc.*, 850 F.3d 951, 960-61 (8th Cir. 2017) (observing that damages award must be supported by a "reasonable inference" from the evidence); *Tussey*, 746 F.3d at 339 (vacating damages award where plaintiffs "fail[ed] to cite any evidentiary support for inferring the participants' voluntary" investment in comparator funds); *Bierwirth*, 754 F.2d at 1056 (observing that proposed comparators must both be "equally plausible" before other factors are considered as a tiebreaker).

In most cases, there is no need to engage in extensive analysis concerning would-be comparators because it is reasonably obvious, based on the facts, how the challenged funds would have been invested had there been no procedural breach. For example, in *Leigh*, on which Plaintiffs rely (Pls.' Br. at 55), the district court assessed the loss associated with an imprudent investment by comparing the investment returns of that investment with those of funds offered by

the trustee bank, in which the trust's assets *were already invested*. 669 F. Supp. 1390, 1396, 1405, 1407 (N.D. Ill. 1987), *aff'd*, 858 F.2d 361 (7th Cir. 1988). It was therefore a reasonable inference that, had the imprudent investment not been made, those funds would instead have been invested in a prudent investment alternative already available in the plan. *See id.* at 1405. This accords with appellate guidance that loss is demonstrated by "look[ing] to the prudent investment alternatives *that the . . . plan offered during this period* to determine what the . . . investors [in the challenged fund] would have earned but for [the] breach." *Graden v. Conexant Sys. Inc.*, 496 F.3d 291, 301 (3d Cir. 2007) (emphasis added); *accord Bierwirth*, 754 F.2d at 1056 ("In determining what the [p]lan would have earned had the funds been available for other [p]lan 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.").

Although Dr. Pomerantz used BNY Mellon funds as comparators in one of his models -- which were indisputably prudent and offered in the Plan during the class period (Pls.' Br. at 22) -- they cannot serve as plausible comparators for a number of reasons. *First*, those funds did not even exist for the majority of the class period. (*See, e.g.*, J.A. at 3607 (BNY Mellon Aggregate Bond Index Fund As Of September 30, 2015) (stating that it is "newly created").) Plaintiffs' argument therefore amounts to the nonsensical proposition that, had

Defendants undertaken a thorough investigation of all available investment options, they would have chosen to offer not Putnam funds but rather funds that did not even exist yet. *Cf. In re Computer Scis. Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1137 (C.D. Cal. 2009), *aff'd sub nom. Quan v. Computer Scis. Corp.*, 623 F.3d 870 (9th Cir. 2010), *abrogated on other grounds by Dudenhoeffer*, 134 S. Ct. 2459 (holding that plaintiffs failed to demonstrate loss where they failed to present evidence of challenged investment's performance "compared to another investment alternative *for the duration of the class period*" (emphasis added)).

Second, while Plaintiffs argue that the BNY Mellon funds are appropriate comparators because Defendants themselves prudently selected them (Pls.' Br. at 51-52), they overlook the fact that Defendants offered them in the Plan alongside a range of Putnam funds, and that participants chose to put only one percent of Plan assets into them. (J.A. at 5909.) Plaintiffs offer no evidentiary support for the additional inference that a lineup comprised *exclusively* of the BNY Mellon funds would be a plausible alternative to the full complement of the Plan's diversified slate of investment options, including both actively and passively managed funds.[21]

[21] Moreover, even Dr. Pomerantz agreed that a prudently constructed plan should include, at minimum, "a cash investment, a bond, and a stock," (J.A. at 2522-23), but neither the Vanguard nor BNY Mellon proposed alternative includes a cash investment option.

With respect to Dr. Pomerantz's proposed Vanguard comparators, those were *never* offered as investment options within the Plan, making their selection entirely arbitrary. Plaintiffs never attempted to build a factual record that, had Defendants not purportedly breached their duty of investigation, they would have chosen a set of Vanguard index funds from among the thousands of other funds available in the marketplace. Neither did Plaintiffs attempt to demonstrate the counterfactual proposition that the Plan would have offered *only* passively managed Vanguard index funds instead of a slate of mostly active Putnam funds -- two sets of funds that the District Court, in considering their fees, found so different as to be "apples and oranges." (Pls.' Add. at 18.)

While Plaintiffs concede that their proposed comparator must be "plausibl[e]" (Pls.' Br. at 66), they do not (and cannot) point to any specific facts in the record to demonstrate the plausibility of the Vanguard funds as comparators. Rather, they largely confine their argument to theoretical support for passive investing in "academic literature" and the Restatement (Third) of Trusts (Pls.' Br. at 51, 66) -- a source which also endorses the use of "active management strategies."[22] Restatement (Third) of Trusts § 90, cmt. h(2). But the test is not

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[22] The cases that Plaintiffs cite in which courts considered market indices generally do not support the factual plausibility of the Vanguard funds as investment options for the Plan in this instance. Indeed, comparing one imprudent investment to a market index is entirely different from assuming that a prudent

whether a given investment strategy is prudent in the abstract, but whether it is factually plausible based on the evidence before the court. *See, e.g.*, *Tussey*, 746 F.3d at 339. Even Dr. Pomerantz himself testified that:

> the performance of a fund that is not even an option for a plan, that a plan wouldn't even consider including, the performance of it should not be relevant to your evaluation of how the subject mutual fund performs.

(J.A. at 2537.) Without any tether to the factual record, there is nothing to prevent ERISA plaintiffs from selecting absurd comparators (with the benefit of hindsight) and then claiming that they have satisfied their prima facie burden.

Courts have rejected such speculative damages calculations. For example, in *Plasterers'*, the Fourth Circuit vacated the district court's damages award where the district court acknowledged that the relevant time period during

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fiduciary, based on the circumstances then prevailing, would replace *an entire lineup* of funds with a slate of index funds -- an assumption not present in any of Plaintiffs' cited cases. For example, in *Gilbert v. EMG Advisors, Inc.* (cited at Pls.' Br. at 51), the Ninth Circuit rejected the defendant's argument that a "bad market," rather than a failure to investigate, caused the loss at issue, and noted that the district court had "adjust[ed]" the total damages figure by reference to a market index in any event. 172 F.3d 876 (9th Cir. 1999). The court did not, however, endorse the use of an index fund as a comparator for the imprudent investment. *See id.* *Meyer* (cited at Pls.' Br. at 51) involved "churning" of a pension fund's assets, whereby the defendants "rapidly transferr[ed] funds from one investment to another," in order to "generate commissions for [themselves]." 250 F. Supp. 2d at 555-56. Comparison to an index is recognized as a practical method of calculating damages in churning cases in particular. *E.g.*, *Miley v. Oppenheimer & Co., Inc.*, 637 F.2d 318, 328 (5th Cir. 1981), *abrogated on other grounds by Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985). This case bears no resemblance to a churning case.

which the value of the comparator was assessed had been "somewhat sort of picked out of the air." 663 F.3d at 215. The Fourth Circuit held that the district court had "failed to articulate a reasoned basis" for the damages award and remanded for factual findings concerning the plan's "unique circumstances" justifying a particular damages award, including "the [p]lan's size and type, the [p]lan members' demographics, and the [defendants'] goal and objectives." *Id.* at 219, 221.

Without any evidence that either a lineup of passively managed BNY Mellon CITs or Vanguard index funds are plausible investment alternatives for the Plan, Dr. Pomerantz has also effectively "picked out of the air" the comparators for the Plan's investment options. *Plasterers'*, 663 F.3d at 220. A damages award based on these entirely arbitrary comparators would run afoul of the established principle that "no one party, not even the plan beneficiaries, should unjustly profit," and should be denied. *Harris v. Harvard Pilgrim Health Care, Inc.*, 208 F.3d 274, 279 (1st Cir. 2000) (internal quotation marks omitted). As the Seventh Circuit observed in similar circumstances, "Plaintiffs ask for the moon, a possibility we firmly reject[]." *Leigh*, 858 F.2d at 368.

C. Plaintiffs' Argument About A Burden-Shifting Framework For Loss Causation Is A Red Herring, And Should Be Rejected In Any Event

This Court should reject Plaintiffs' invitation to adopt a burden-shifting framework for this and other claims under ERISA § 409 for multiple independent reasons. (*See* Pls.' Br. at 56-61.)

First, and foremost, adopting a burden-shifting framework would not affect the outcome of this case. Even if the Court were to adopt the framework that Plaintiffs advocate, Plaintiffs failed in any event to overcome their initial burden of showing a prima facie loss, and thus there is no occasion for the burden to shift to Defendants. Any ruling on the burden-shifting framework is therefore unnecessary. *See, e.g.*, *Tatum*, 761 F.3d at 363 (observing that even under a burden-shifting analysis, the plaintiff must first establish a prima facie showing of loss associated with a fiduciary breach); *see also Rockwood v. SKF USA Inc.*, 687 F.3d 1, 8 (1st Cir. 2012) (declining to resolve disputed issue of law where "result would be the same" either way).

Second, while circuits have split on the issue,[23] burden-shifting is at odds with the plain language of ERISA. As the Tenth Circuit held most recently in

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[23] *Compare Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1334-37 (10th Cir. 2017) (holding that plaintiff bears burden of proving loss causation); *Silverman v. Mut. Ben. Life Ins. Co.*, 138 F.3d 98, 104 (2d Cir. 1998) (same); *Willett v. Blue Cross & Blue Shield of Ala.*,

Pioneer Centres, the burden of proving all elements of an ERISA claim remains squarely on the plaintiff. 858 F.3d at 1334-37. There, the court observed that "[t]he plain language of § 1109(a) establishes liability for losses resulting from the breach, which we have recognized indicates that there must be a showing of some causal link between the alleged breach and the loss plaintiff seeks to recover." *Id.* at 1334 (internal quotation marks omitted). While the court recognized that other circuits shift the burden of disproving causation to defendants once plaintiffs prove a "related" loss, the court reasoned that "[w]here the plain language of the statute limits the fiduciary's liability to losses *resulting from* a breach of fiduciary duty, there seems little reason to read the statute as requiring the plaintiff to show only that the loss is *related* to the breach." *Id.* at 1337. The court thus concluded that causation is an "express element of a claim for breach of fiduciary duty under 29 U.S.C. § 1109(a)," which must be proved by the plaintiff. *Id.*

Third, Plaintiffs' argument that burden-shifting is necessary to address "uncertainty" is misplaced. (Pls.' Br. at 61.) The cases that Plaintiffs cite generally stand for the proposition that if there are several plausible courses of conduct that a prudent fiduciary could have taken, any ambiguity should be resolved against the

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953 F.2d 1335, 1343-44 (11th Cir. 1992), *with Tatum v. RJR Pension Inv. Cmte.*, 761 F.3d 346, 363 (4th Cir. 2014) (holding that burden of disproving loss causation shifts to defendant upon plaintiff's prima facie showing of a breach and associated loss); *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995) (same); *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992) (same).

fiduciary as a tiebreaker. *E.g.*, *Bierwirth*, 754 F.2d at 1056 ("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. . . . Any doubt or ambiguity should be resolved against [the fiduciaries]."). But there is no occasion for the Court to apply any tiebreaker, as Plaintiffs have not advanced *any* "equally plausible" alternatives. *See id.* Further, the notion that Plaintiffs perceive any "uncertainty" or difficulty in measuring loss here is belied by their unequivocal argument that they are entitled to monetary damages of precisely $44,191,949 (according to the BNY Mellon model) or $45,574,124 (under the Vanguard model). (Pls.' Br. at 25.)

In sum, there is no reason to adopt the burden-shifting framework that Plaintiffs advocate for, and the Court should decline to do so.

II. THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT PLAINTIFFS' FAILURE TO IDENTIFY SPECIFIC DISLOYAL CONDUCT WAS FATAL TO THEIR DUTY OF LOYALTY CLAIM

The District Court's finding that "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" was not clearly erroneous. (Pls.' Add. at 54.) On appeal, Plaintiffs again focus on *process* allegations without identifying evidence of *specific disloyal conduct* that is necessary to support that claim. (*E.g.*, Pls.' Br. at 42 (arguing that breach of the duty of loyalty is evidenced

by "the absence of an intensive and scrupulous investigation" (internal quotation marks omitted)).) Accordingly, this Court should affirm the District Court's finding.

A. Plaintiffs Must Prove That Defendants Engaged In Specific Disloyal Conduct That Was Motivated By Considerations Other Than Participants' Best Interests

As the District Court correctly observed, "the Exclusive Benefit Rule [of ERISA § 404(a)(1)(A)] looks to the fiduciary's subjective motivation in determining whether the fiduciary is in compliance with the rule." (Pls.' Add. at 42 (quoting *A.F. v. Providence Health Plan*, 173 F. Supp. 3d 1061, 1073 (D. Or. 2016).) "The Plaintiffs' burden, therefore, is to point to the Defendants' motivation behind specific disloyal conduct." (*Id.* (citing *In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 812, 834-35 (N.D. Cal. 2005).)

This is a correct statement of the law, and the District Court properly held Plaintiffs to this burden. As other courts have recognized, "[t]he duty of loyalty is grounded in the motivation driving a fiduciary's conduct," and a breach will not lie absent evidence that a fiduciary engaged in specific conduct for a reason other than to further participants' best interests. *Perez v. First Bankers Tr. Servs., Inc.*, No. 12-cv-08648-GBD, 2016 WL 5475997, at *13 (S.D.N.Y. Sept. 28, 2016) (denying motions for summary judgment on ERISA § 404(a)(1)(A) claim where "incidental benefit" to defendant was not proof that action was not

"motivated by what is best for the [plan]"); *see also Degnan v. Publicker Indus., Inc.*, 42 F. Supp. 2d 113, 120 (D. Mass. 1999) (denying motion for summary judgment on ERISA § 404(a)(1)(A) claim in light of dispute as to defendant's state of mind).

For example, in *Chao v. Linder*, the court addressed whether the defendant, who was alleged to have approved fees that were adverse to the interests of plan participants, breached the duty of loyalty. No. 05-cv-03812, 2007 WL 4109685, at *1-2 (N.D. Ill. Nov. 15, 2007). The court held that the fact that "the fees were unreasonable and/or illegal and harmed the plan," was insufficient, standing alone, to prove a breach as a matter of law. *Id.* at *3. The court therefore denied the plaintiff's motion for summary judgment "because there [was] a question of fact as to [the defendant's] intent at the time of approval [of the fees]." *Id.*

Similarly, here, Plaintiffs' claim of a "self-interested Plan lineup" (Pls.' Br. at 42), without *any* evidence of Defendants' intent to benefit themselves over participants, is insufficient to support a duty of loyalty claim.[24] The evidence that

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[24] Likewise, Plaintiffs' argument that "good faith is not a defense" misses the point. (Pls.' Br. at 42 (alteration and internal quotation marks omitted).) Defendants do not assert a "good faith" defense, but rather make the basic observation that it is *Plaintiffs' burden* to prove that Defendants' actions were motivated by an improper desire to benefit themselves to the detriment of Plan participants.

Plaintiffs now cite to demonstrate purported "bad faith" -- largely a recitation of meetings Defendants held at which fiduciary responsibility was discussed -- does not come close to meeting the required showing. (*See* Pls.' Br. at 44-45.) To the contrary, this evidence shows that Defendants had many discussions over the course of the class period concerning the scope and nature of their fiduciary duties, particularly in connection with developments in the law, as is expected of prudent and loyal fiduciaries. And while Plaintiffs mention -- without citation to the record -- actions such as an alleged "entombment" of reports concerning the Plan's investment options issued by Advised Assets Group ("AAG"), they do not put forward any evidence of *why* Defendants stopped considering those reports, and indeed ignore record evidence that Defendants had good reasons for doing so.[25] Plaintiffs' failure to adduce that evidence at trial is fatal to their appeal.

The cases that Plaintiffs cite illustrate the type of evidence from which a court can infer an intent to benefit oneself over plan participants -- evidence that is lacking here. For example, in *Bussian* (cited at Pls.' Br. at 41), the defendants

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[25] J.A. at 1785 (testimony of Mr. Mullen, Putnam's former Director of Benefits and PBIC member, 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"); *id.* at 2051 (testimony of Mr. Goodfellow, Putnam's Senior Manager of Retirement Plans and PBIC member, that "[t]he AAG reports on the performance of the funds . . . [--] investment professionals on the committee . . . didn't think the analytics were very useful and that the organization had better analytics"; *id.* at 2253 (testimony of Mr. Lenhardt, Chief Operating Officer of Putnam's Investment Division, that AAG reports are "superficial and incomplete").

purchased an ultra-low-cost annuity (Executive Life) to cover the pension obligations of a terminated pension fund. 223 F.3d at 289. At the time of termination, the plan was over-funded, such that the surplus would revert to the company. *Id.* In compiling a list of annuities to consider, the defendants' consultant initially did not include Executive Life due to its risky nature; however, one defendant "specifically requested that [Executive Life] be added because its expected lower bid could be used to drive down the bids of other providers," thus maximizing the reversion to the company. *Id.* at 303, 307. The court therefore held that "a reasonable factfinder could conclude that [the defendant] placed its interests in the reversion ahead of the beneficiaries' interests in full and timely payment of their benefits." *Id.* at 306.

Similarly, in *Leigh* (cited at Pls.' Br. at 41), the defendants "used plan assets to purchase stocks of companies that were targets of [their] investment program." 727 F.2d at 115. The Seventh Circuit's determination that that constituted a breach of the duty of loyalty was based on evidence that the defendants took specific actions with the intent to benefit themselves over beneficiaries. For example, when the defendants learned of a proposed transaction involving one of their targets (Berkeley), they responded by "gain[ing] control of more Berkeley shares and . . . su[ing] Berkeley management to force a favorable settlement." *Id.* at 130. One of the arguments against Berkeley management was

that it was acting against the interests of minority shareholders. *Id.* "Meanwhile, . . . [however, the defendants] were investing over $71,000 of the trust's assets in Berkeley stock. Under their direction, therefore, the [trust] was becoming one of those minority shareholders against whose interests the Berkeley management was supposed to be acting." *Id.* The court found that the use of trust assets to buy Berkeley stock, and the inclusion of the trust's shares in the ultimate settlement of the lawsuit against Berkeley management, was evidence that the trust's assets were used in the "contest for control of Berkeley" to benefit the defendants.[26] *Id.*

It is this absence of evidence of specific disloyal conduct -- present in both *Bussian* and *Leigh* -- that the District Court found was fatal to Plaintiffs' claim. It did not, as Plaintiffs argue, impose a "balancing test." (Pls.' Br. at 45.) While the court noted certain of Defendants' actions that were undeniably taken to benefit participants, it specifically observed that "these practices do not eliminate the

[26] *See also Tussey*, 850 F.3d at 956-57 (affirming finding that defendants' removal of a fund from the plan and mapping its assets to another set of funds managed by the plan's recordkeeper "was motivated in large part to benefit [defendants], not the [p]lan participants," based on evidence that defendants "openly communicated with [the recordkeeper] about the 'pricing implications' of changes to the plans' investment lineup and the specific dollar amounts by which [the recordkeeper] would cut its fees" if the other fund's assets were mapped to recordkeeper's funds).

Defendants' ability to breach the duty of loyalty."[27] (Pls.' Add. at 53-54.) Accordingly, Plaintiffs' admonition that fiduciaries should not be permitted "to engage in disloyal conduct because they also performed other acts that benefitted plan participants" (Pls.' Br. at 46) is a straw man: Defendants are not advocating for, and the District Court did not adopt, a test that would give fiduciaries a free pass to act disloyally. Rather, the District Court's core finding was that Plaintiffs "failed to point to specific circumstances" in which Defendants in fact acted disloyally, as distinct from claims of "self-dealing" in the abstract. (Pls.' Add. at 54.) Plaintiffs have not demonstrated that this finding was clearly erroneous based on the evidence presented.

B. Plaintiffs' Argument Would Lead To An Impermissible Per Se Rule Against The Inclusion Of Affiliated Funds In Plan Lineups

Without any evidence that Defendants in fact put their own interests before participants', Plaintiffs' argument that they have proved a breach of the duty of loyalty based on this record would lead to an impermissible per se rule against the inclusion of affiliated funds in plan lineups. The evidence that Plaintiffs cite

[27] In any event, the actions that the District Court cited -- such as Defendants' payment of recordkeeping expenses and redesign of the Plan to boost retirement savings -- constitute objective facts from which Defendants' intent to benefit Plan participants can be inferred. *Cf. A.F.*, 173 F. Supp. 3d at 1070, 1073-74 (holding that documents concerning non-fiduciary decision to implement policy exclusion were relevant to "sincerity of [defendant's] efforts to understand and perform its [fiduciary] responsibilities").

highlights, at most, a *potential* conflict of interest, present whenever affiliated funds are offered in a plan. As discussed above, however, this mere potential is insufficient to establish a breach. *E.g.*, *McKesson*, 391 F. Supp. 2d at 834. Moreover, such a per se rule would be directly at odds with settled case law and DOL guidance. *E.g.*, *Friend v. Sanwa Bank Cal.*, 35 F.3d 466, 469 (9th Cir. 1994) (observing that "Congress never intended section 1104(a)(1) to establish a per se rule of fiduciary conduct" and holding that trustee "with dual loyalties" did not commit breach); Notice of Proposed Rulemaking, Participant Directed Individual Account Plans, 56 Fed. Reg. 10,724, 10,730 (Mar. 13, 1991) (observing 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"); *Dupree v. Prudential Ins. Co. of Am.*, No. 99-cv-08337, 2007 WL 2263892, at *45 (S.D. Fla. Aug. 10, 2007) (holding that "[s]imply [offering affiliated funds] does not give rise to an inference of disloyalty, especially where these practices are universal among plans of the financial services industry").

Defendants do not argue, as Plaintiffs suggest, that this established law permitting investment in affiliated funds "operate[s] as a safe harbor from breach of fiduciary duty claims." (Pls.' Br. at 39.) Indeed, it is possible that a fiduciary could select affiliated funds for a plan *for specific self-interested reasons*, at odds with the best interests of participants. But that is not this case. In the

absence of evidence of a self-interested motivation for Defendants' actions, Plaintiffs' argument boils down to the impermissible proposition that "[a]llegations of self-dealing" equate with evidence of disloyalty, which is contrary to settled law. (*See* Pls.' Br. at 41 (internal quotation marks omitted).)

III. THE DISTRICT COURT CORRECTLY REJECTED PLAINTIFFS' PROHIBITED TRANSACTION CLAIMS BECAUSE THE PLAN'S INVESTMENT IN PUTNAM-AFFILIATED FUNDS WAS EXPRESSLY PERMITTED, AND THOSE CLAIMS WERE LARGELY TIME-BARRED IN ANY EVENT

The District Court did not clearly err in finding that Plan participants were treated equally to (or better than) other third-party shareholders of Putnam funds, such that PTE 77-3 barred Plaintiffs' prohibited transaction claims in their entirety. The District Court also correctly held that the fees of the Plan's investment options were reasonable as a matter of law, thereby providing a complete defense to Plaintiffs' claims under ERISA § 406(a)(1)(C). Further, the District Court did not clearly err in finding that the majority of Plaintiffs' prohibited transaction claims -- as to seventy-two funds -- were time-barred, a holding that Plaintiffs do *not* challenge on appeal. Thus, there are multiple bases for affirmance.

A. The District Court Did Not Clearly Err In Finding That Plaintiffs Were Treated No Less Favorably Than Other Putnam Shareholders, Such That PTE 77-3 Barred Plaintiffs' Prohibited Transaction Claims

The District Court did not clearly err in finding that Plan participants were treated "no less favorabl[y]" than were other shareholders of Putnam mutual funds. (Pls.' Add. at 28.) Accordingly, Defendants met the conditions of PTE 77-3 that expressly permit retirement plans to invest in affiliated funds registered under the Investment Company Act of 1940, and provide a complete defense to the prohibited transaction claims. (*Id.* at 22.)

Plaintiffs mistakenly argue that the PTE 77-3 exemption does not apply because they were treated unfairly as compared to other shareholders of Putnam funds, since Defendants allegedly failed to credit revenue-sharing rebates to the Plan, even as they provided those rebates to other third-party plans. (Pls.' Br. at 74-75.) As discussed above (*see supra* Statement of Facts, Part II.B), revenue-sharing payments are made by investment managers to service providers, such as recordkeepers, to reimburse for services performed by the recordkeepers that would otherwise be the investment manager's responsibility. Because Defendants already pay the Plan's recordkeeping fees in the first instance, there is no occasion to make revenue-sharing payments on top of those fees. (J.A. at 228.) In essence, Plaintiffs fault Defendants for paying recordkeeping fees upfront, instead of making revenue-sharing payments on the back end. That makes no sense.

Plaintiffs' argument amounts to the assertion that Defendants are required to pay the Plan to cover the very expenses Defendants *already bear* on the Plan's behalf -- *in addition* to the discretionary payments that Defendants also make to participants' individual accounts, which are far more generous than any revenue-sharing payments would be.[28] As the District Court found, Plaintiffs' position would result in an inequitable windfall, which ERISA, as an equitable statute, does not permit. (*See* Pls.' Add. at 27 (quoting *Harris v. Harvard Pilgrim Health Care, Inc.*, 208 F.3d 274, 279 (1st Cir. 2000) (stating that, in enacting ERISA, Congress intended "to ensure that plan funds are administered equitably, and that no one party, not even plan beneficiaries, should unjustly profit")).)

Plaintiffs argue further that "[t]he 'totality of the circumstances' standard cited by the district court has no place in a prohibited transaction analysis,

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[28] Plaintiffs' Amici erroneously argue that Defendants' contributions "do not benefit the individuals' account balances the way that lower fees can" because Putnam contributes the funds to the trustee, not to individual employee accounts. (Pls.' Amici Br. at 18.) That incorrect assertion is based on a misinterpretation of the Plan Document, which provides that *all* contributions (both employee and employer) are paid to the trustee in the first instance, before being credited to individual accounts. (*E.g.*, J.A. at 241, 248 (Plan Document §§ 4.1(g), 7.2).) Indeed, Defendants' discretionary contributions are reflected as a line item on participant account statements. (*E.g.*, *id.* at 284, 4877.) Further, there is *no* support in the record for the proposition that fees have a greater impact on account balances than do employer contributions -- to the contrary, the record reveals that Defendants' contributions to Plaintiff Joan Glancy's account, for example, were responsible for *over ninety-two percent* of her account's overall value at the time of her withdrawal from the Plan. (*See id.* at 4877.)

which is specific to the transaction at issue." (Pls.' Br. at 76.) Plaintiffs overlook, however, that the District Court did *not* apply a "totality of the circumstances" standard in determining whether there was a prohibited transaction in the first instance, but rather in evaluating whether the prohibited transaction *exemption* applied. (*See* Pls.' Add. at 22.) The District Court's assessment of the "totality of the economic relationship" (*id.* at 26) is derived from the text of the regulation itself, which directs courts to consider "*[a]ll other dealings* between the plan and the investment company." *See* Class Exemption Involving Mutual Fund In-House Plans Requested by the Investment Company Institute, 42 Fed. Reg. 18,734, 18,735 (Mar. 31, 1977) (emphasis added). Plaintiffs offer no explanation as to why contributions made by an investment company to a plan do not constitute "other dealings" within the meaning of the regulation.[29]

[29] Plaintiffs' argument that the District Court's consideration of the discretionary contributions was erroneous because "a trustee cannot set off the amount of its gifts to a trust against its liability for breach" is a red herring. (Pls.' Br. at 75.) Defendants do *not* assert that they are entitled to a setoff from any assessment of damages, but rather that the totality of their dealings with the Plan demonstrates that there should be no liability in the first instance. Along those lines, the District Court did *not* find liability or assess a setoff, but simply considered Defendants' voluntary contributions to the Plan as part of an assessment of "all other dealings" between Putnam and the Plan. (*See* Pls.' Add. at 26.) As such, *Nedd v. United Mine Workers of America* (cited at Pls.' Br. at 75) is inapposite. 556 F.2d 190, 213-14 (3d Cir. 1977) ("When one in a fiduciary relationship asserts a set-off to a liability for participating in a breach of trust, the burden . . . should be on him to establish that the transaction on which he relies properly qualifies for that set-off.").

In the alternative, if Plaintiffs are correct that those contributions do not constitute "other dealings," then neither do revenue-sharing payments made by Putnam to third-party recordkeepers. The text of PTE 77-3 requires parity between the investment company's relationship with the plan on the one hand, and its relationship with "other shareholders" on the other. *Id.* But revenue-sharing payments do not implicate "other shareholders": as Plaintiffs concede, revenue-sharing is a practice whereby investment companies (like Putnam) make payments to *recordkeepers* of retirement plans -- *not* to "other shareholders." (*See* Pls.' Br. at 19.) Moreover, as Plaintiffs admitted below, "[t]he amount of a revenue sharing payment a fund pays depends upon . . . the particular deal that has been negotiated between the mutual fund company and the specific recordkeeper administering the plan." (J.A. at 618.) In other words, *shareholders* of the funds offered to third-party plans have no role in the "dealings" with the investment company. Further, recordkeepers' and third-party plans' decisions as to how to apportion revenue-sharing payments do not involve shareholders (or the investment company) in any way; indeed, "[d]iscretion over how revenue sharing payments are used generally rests with the retirement plan and the [recordkeeper] receiving the revenue sharing payments." (*Id.*) Consequently, revenue-sharing payments are not "dealings" with other mutual fund shareholders within the meaning of PTE 77-3, providing an

alternative basis to affirm the District Court's dismissal of the prohibited transaction claims.

B. The District Court Correctly Determined That Plaintiffs' Claims Under ERISA § 406(a)(1)(C) <u>Were Barred Due To The Reasonableness Of The Funds' Fees</u>

As an independent ground for dismissing Plaintiffs' claims under ERISA § 406(a)(1)(C), the District Court correctly held those claims were barred by the reasonable-compensation exemption of §§ 408(b)(2) and (c)(2) because the fees of the Plan's investment options were reasonable as a matter of law. (Pls.' Add. at 19.) Defendants also carried their burden of demonstrating that the funds' fees were reasonable as a matter of fact. This Court may affirm on either ground.

1. The District Court Correctly Held That The <u>Funds' Fees Were Reasonable As A Matter Of Law</u>

The District Court correctly held that Plaintiffs' § 406(a)(1)(C) prohibited transaction claims were barred because Defendants successfully proved their affirmative defense of reasonable compensation under ERISA §§ 408(b)(2) and (c)(2). According to those provisions, the prohibited transaction rules do not apply to arrangements with a party-in-interest or fiduciary for payment of reasonable compensation for services rendered. 29 U.S.C. §§ 1108(b)(2), (c)(2).

The District Court correctly applied established case law to hold that the funds' fees -- ranging from 0.08% to 1.65% -- were reasonable as a matter of law. (Pls.' Add. at 16-19 (citing *Tibble v. Edison Int'l*, 729 F.3d 1110, 1135 (9th

Cir. 2013), *vacated on other grounds*, 135 S. Ct. 1923 (2015) (rejecting excessive-fee claims where expense ratios ranged from 0.03% to more than 2.00%); *Renfro v. Unisys Corp.*, 671 F.3d 314, 319, 327-28 (3d Cir. 2011) (rejecting excessive-fee claims where expense ratios ranged from 0.1% to 1.21%); *Loomis v. Exelon Corp.*, 658 F.3d 667, 669-70 (7th Cir. 2011) (rejecting excessive-fee claims were expense ratios ranged from 0.03% to 0.96%); *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2011) (rejecting excessive-fee claims where expense ratios ranged from 0.07% to over 1.00%).) *See also Rosen v. Prudential Ret. Ins. & Annuity Co.*, No. 15-cv-01839-VAB, 2016 WL 7494320, at *15 (D. Conn. Dec. 30, 2016), *aff'd*, No. 17-00239-cv, 2017 WL 4534782 (2d Cir. Oct. 11, 2017) (rejecting excessive-fee claims where expense ratios ranged from 0.04% to 1.02%). The court correctly observed that, because the funds were also offered to investors in the marketplace at large, "their expense ratios were set against the backdrop of market competition" and that "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund." (Pls.' Add. at 17-18 (quoting *Hecker*, 556 F.3d at 586).) The court also properly rejected Plaintiffs' argument that the funds' fees were excessive based on the "apples and oranges" comparison to index funds offered by Vanguard, "a low-cost mutual fund provider operating index funds at cost" (unlike Putnam). (Pls.' Add. at 18 (internal quotation marks omitted).)

Plaintiffs argue that the cases on which the District Court relied were "limited to their facts" (Pls.' Br. at 79), but provide no analysis of those facts or why they render the cases' holdings inapplicable here.[30] Plaintiffs cite *Tussey* in support of this argument (*id.*), but in that case, the defendants did *not* contend that particular fees were reasonable, but rather relied on the *Hecker* line of cases to make the sweeping assertion that they could *never* be liable for excessive fees when "participants in a self-directed 401(k) retirement savings plan that offers many different investment options with a broad array of fees can direct their contributions across different cost options as they see fit." 746 F.3d at 336. The court appropriately rejected that assertion -- one that Defendants do not make here. *Id.* Further, in *Goldenberg v. Indel, Inc.* (cited at Pls.' Br. at 80), the plaintiff challenged the fees of only *one* fund. 741 F. Supp. 2d 618, 636 (D.N.J. 2010). The court found *Hecker* and its progeny inapplicable because they involved a *range* of fees -- as does the Plan here. While Plaintiffs argue that, due to the "context-specific" inquiry, it is "hardly remarkable" that they failed to cite any case

[30] Plaintiffs mention parenthetically that these cases dealt with claims of breach of fiduciary duty, rather than prohibited transactions, but offer no reason as to why fees that are reasonable for fiduciary duty purposes are somehow rendered unreasonable for prohibited transaction purposes. (*See* Pls.' Br. at 79.) In fact, Plaintiffs themselves cite a breach of fiduciary duty case, *Dudenhoeffer*, 134 S. Ct. at 2471, for the proposition that the analysis of prohibited transaction claims is "context specific." (*Id.* at 79-80.)

holding that the fees at issue here are unreasonable as a matter of law (Pls.' Br. at 80 n.19), they do not adequately account for the slew of cases that reach the opposite conclusion.[31]

2. Defendants Proved That The Funds' Fees Were Reasonable As A Factual Matter, Which Plaintiffs Failed To Rebut

Although the District Court did not decide whether the fees of the Plan's investment options were reasonable as a matter of fact, Defendants successfully proved this as well, and this Court may affirm on any ground that is supported by the record. *E.g.*, *de Casenave v. United States*, 991 F.2d 11, 12 n.2, 13-14 (1st Cir. 1993) (dismissing plaintiffs' claims on different grounds than did trial court and explaining that appellate court is "free to affirm a district court's decision on any ground supported in the record even if the issue was not pleaded, tried or otherwise referred to in the proceedings below" (internal quotation marks omitted)).

[31] Plaintiffs' passing argument that Defendants should be disqualified from relying on the reasonable-compensation exemption due to their failure to offer revenue-sharing rebates to the Plan should be rejected out of hand. (*See* Pls.' Br. at 78.) Plaintiffs cite *no* authority for this novel proposition, which would have bizarre consequences. Under Plaintiffs' theory, if an investment manager offered different share classes of the same fund (with different expense ratios) in its in-house 401(k) plan and in a third-party plan -- based on those plans' differing eligibility for certain share classes -- then the fees of one or more share classes of that fund could *never* be deemed reasonable. That makes no sense.

The case-stated record contains the reports of Defendants' expert, Dr. Erik Sirri, who compared the fees of the Putnam funds to those of their respective peer funds, as defined by Lipper, Inc. ("Lipper"), an independent provider and analyzer of investment company data. (J.A. at 1464-65.) Lipper identified funds that are similar to the Putnam funds in terms of type, investment objective, load type, average net assets, and expense structures and attributes -- sound "apples to apples" comparators. (*See id.*) On the basis of this data, Dr. Sirri concluded that there was no evidence that the funds' fees were unreasonably high: from 2009 to 2014, the Plan paid approximately $500,000 less in mutual fund fees in the aggregate than it would have paid had it invested at the mean expense ratios for peer funds. (*Id.* at 1466-67, 1495-96.)

Plaintiffs failed to rebut this evidence. They now argue that, based on data from the Investment Company Institute ("ICI"), the fees of the Plan's investment options were higher than "the average investment management fee charged to similarly-sized plans for comparable funds." (Pls.' Br. at 78.) But as Dr. Sirri opined, the ICI comparison is invalid because "[t]he expense ratio for the ICI scenario that [Dr. Pomerantz] construct[ed] is biased downward, i.e. understated, because he does not adjust for the proportion of Plan participants who chose active versus passive funds." (J.A. at 1517-18.) As a result, "[t]he heavier weighting of survey plans toward index funds means that [Dr.] Pomerantz's ICI weighted

average expense measure . . . cannot be compared meaningfully to the Plan's expense ratio." (*Id.* at 1520.) Plaintiffs' evidence therefore failed to refute the proof offered by Defendants that the funds' fees were reasonable as a factual matter.

C. The District Court Did Not Clearly Err In Finding That The Majority Of Plaintiffs' Prohibited Transaction Claims Were Barred By The Statute Of Limitations, And Plaintiffs Have Waived Any Argument To The Contrary

As an independent basis for ruling for Defendants on Plaintiffs' prohibited transaction claims,[32] the District Court held that those claims were barred by ERISA's three-year statute of limitations as to the seventy-two funds in the Plan lineup that were added before November, 2012. (Pls.' Add. at 31.) In support of this ruling, the District Court found that Plaintiffs had actual knowledge of their claims more than three years before filing their complaint. (*Id.*) Plaintiffs do *not* challenge this finding on appeal -- in fact, they do not even mention the statute of limitations at all -- and therefore have waived any argument as to its applicability. *E.g.*, *P.R. Tel. Co., Inc. v. San Juan Cable LLC*, 874 F.3d 767, 769-70 (1st Cir. 2017) (declining to revisit district court's factual findings where

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[32] The District Court dismissed only Plaintiffs' § 406(b)(3) claims on statute of limitations grounds and did not explicitly mention the § 406(a)(1)(C) claims in this context. (*See* Pls.' Add. at 32.) However, the facts that the District Court found demonstrating Plaintiffs' actual knowledge of their claims apply equally to their causes of action under both § 406(a)(1)(C) and § 406(b)(3). Plaintiffs' claims as to the seventy-two funds that were added to the Plan before November, 2012 are therefore time-barred under either prong of the statute.

plaintiff "waived any challenge to those findings" by not raising the issue in its opening brief).

In any event, the District Court's finding that Plaintiffs had actual knowledge of their claims before November, 2012 because they were "well aware that the parties involved were all Putnam entities" is far from clearly erroneous. (Pls.' Add. at 31; *e.g.*, J.A. at 284, 4876-77 (Plaintiffs' account statements listing Putnam funds).) The District Court also correctly held as a matter of law that Plaintiffs need not have knowledge of facts giving rise to an affirmative defense in order to start the statute of limitations. (Pls.' Add. at 30-31.) That holding is in line with this Court's ruling in *Edes v. Verizon Communications, Inc.*, that ERISA's statute of limitations is triggered by a plaintiff's actual knowledge of "the essential facts of the transaction or conduct constituting the violation." 417 F.3d 133, 142 (1st Cir. 2005) (internal quotation marks omitted); *see also Krueger v. Ameriprise Fin., Inc.*, No. 11-cv-02781-SRN-JSM, 2014 WL 1117018, at *11-12 (D. Minn. Mar. 20, 2014) (dismissing as untimely prohibited transaction claims arising out of plan's investment in affiliated funds where plaintiffs had actual knowledge of affiliation between plan sponsor and funds' investment manager through plan documents; rejecting argument that plaintiffs' lack of knowledge of facts going to affirmative defenses prevented limitations period from running). At a minimum,

this Court should affirm the District Court's ruling that the statute of limitations bars Plaintiffs' prohibited transaction claims as to seventy-two funds.

IV. THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT PLAINTIFFS WERE NOT ENTITLED TO EQUITABLE RELIEF

Having failed on the merits of both their fiduciary duty and prohibited transaction claims, Plaintiffs seek an end-run around the District Court's rulings by claiming that they are nonetheless entitled to ***$37.3 million*** as a disgorgement remedy. (Pls.' Br. at 70-71.) Nonsense.

First, as the District Court correctly observed, Plaintiffs' argument "erroneously assumes that they have made a prima facie showing" of ill-gotten proceeds, which they have not. (Pls.' Add. at 66-67.) *See Martin*, 965 F.2d at 671 (stating that it is plaintiff's burden to prove "prima facie case of . . . ill-gotten profit to the fiduciary"). As with Plaintiffs' prima facie case of loss, their prima facie burden with regard to ill-gotten profit requires that they show a relationship between the purported profit and the breach. *E.g.*, *Hart v. Grp. Short Term Disability Plan for Empls. of Cap Gemini Ernst & Young*, 338 F. Supp. 2d 1200, 1201 (D. Colo. 2004) (holding that plaintiff failed to state claim for ERISA equitable relief where he did not allege "ill-gotten profits to the fiduciary as a result of the fiduciary's alleged breach"). Plaintiffs have made no attempt to connect the $37.3 million in alleged profits from the funds' fees to any specific imprudent

investment -- nor have they explained how that figure can possibly represent "ill-gotten" proceeds in light of the District Court's finding that those fees were "set against the backdrop of market competition" and reasonable as a matter of law. (Pls.' Add. at 17-19 (internal quotation marks omitted).)

Second, Plaintiffs misunderstand the conduct that disgorgement is intended to remedy. "The purpose of [the disgorgement] rule is to deter breaches by denying fiduciaries any profits from their misuse of [plan] assets." *Leigh*, 727 F.2d at 122 n.17 (cited at Pls.' Br. at 70-71). All of Plaintiffs' cited cases arise in the context of defined-benefit or group-insurance plans, in which the fiduciaries -- who controlled the investment of plan assets -- dipped into those assets in order to finance a personal project.[33] But as the District Court correctly held in its case-

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[33] *See Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 418-19 (3d Cir. 2013) (cited at Pls.' Br. at 69) (holding that plaintiff had standing to seek disgorgement against defendant who invested for its own profit amount due to plaintiff under policy, but affirming summary judgment in favor of defendant); *Martin*, 965 F.2d at 663-64, 671-72 (cited at Pls.' Br. at 70) (affirming finding of liability against defendants who "engaged in complex financial transactions that destroyed the company, thereby wiping out the employees' stock ownership plan," transactions from which company's directors stood to gain personally); *Amalgamated Clothing & Textile Workers Union v. Murdock*, 861 F.2d 1406, 1408, 1411 (9th Cir. 1988) (cited at Pls.' Br. at 69) (holding that plaintiffs had standing to seek imposition of constructive trust on defendants who used plan assets to acquire stock in companies controlled by plan fiduciary to finance "greenmail" transaction); *Leigh*, 727 F.2d at 115 (cited at Pls.' Br. 70-71) (affirming finding of liability against defendants who "used plan assets to purchase stocks of companies that were targets of [their] investment program").

stated ruling, the management fees that Plaintiffs seek to have disgorged "are not paid out of plan assets" (Pls.' Add. at 15), and Plaintiffs have explicitly declined to challenge that ruling on appeal. (Pls.' Br. at 72 n.14.) At bottom, Plaintiffs have not demonstrated, as they must, that Defendants profited from "tak[ing] money from the Plan." *Bast v. Prudential Ins. Co. of Am.*, 150 F.3d 1003, 1011 (9th Cir. 1998) (declining to disgorge money from administrator of health-insurance plan who denied coverage for medical procedure and observing that "[t]his amount of money is not an 'ill-gotten profit' in the same sense as . . . money taken from . . . pension plans").

Third, Plaintiffs' criticism of the District Court for not considering "injunctive or declaratory relief" in the abstract is a non sequitur. (Pls.' Br. at 71.) Plaintiffs *never* put forward any proposed orders articulating the scope of their desired relief, and do not now explain what, specifically, the District Court should have done differently. "The court is not in the business of divining appropriate relief absent a request from plaintiffs." *DeFazio v. Hollister, Inc.*, 854 F. Supp. 2d 770, 806 (E.D. Cal. 2012), *aff'd sub nom. DeFazio v. Hollister Emp. Share Ownership Tr.*, 612 F. App'x 439 (9th Cir. 2015) (ruling for defendants after bench trial on ERISA fiduciary duty claims where plaintiffs did not prove loss or appropriateness of equitable relief). And while Plaintiffs complain that the District Court "left the status quo intact" (Pls.' Br. at 71), that is the necessary outcome of

Plaintiffs' failure to prove their own claims. *See Pioneer Ctrs.*, 858 F.3d at 1335 (observing that it is the plaintiff "who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion" (quoting 2 *McCormick on Evidence* § 337 (7th ed. 2013))). This Court should therefore affirm the District Court's ruling in all respects.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court affirm the judgments of the District Court.

Dated: January 10, 2018
Boston, Massachusetts

Respectfully submitted,

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Dated: January 10, 2018

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I, James R. Carroll, hereby certify on January 10, 2018, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and they will be served by the CM/ECF system:

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