Docket No. 17-1711
Oral Argument Requested

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BROTHERSTON, *et al.,*
Plaintiffs-Appellants,

v.

PUTNAM INVESTMENTS, *et al.,*
Defendants-Appellees.

Appeal from a Decision of the United States District Court for the District of Massachusetts, Honorable William G. Young, Case No. 15-13825-WGY

BRIEF OF AMICI CURIAE AARP, AARP FOUNDATION, AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure:

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

Dated: November 8, 2017

/s/ Mary Ellen Signorille
Mary Ellen Signorille

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the National Employment Lawyers Association (NELA) makes the following disclosure: (1) NELA is a private, non-profit organization under Internal Revenue Code § 501(c)(6); (2) NELA has no parent corporation; and (3) no publicly held corporation or other publicly-held entity owns ten percent (10%) or more of NELA.

Dated: November 8, 2017

/s/ Matt Koski
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INTERESTS OF AMICI CURIAE[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to ensure that low-income older adults have nutritious food, affordable housing, a steady income, and strong and sustaining bonds. Among other things, AARP and AARP Foundation seek to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits that countless members and older individuals receive or may be eligible to receive, including through participation as amici curiae in state and federal courts.[2]

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[1] Amici certify that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and further certifies that no person, other than amici, contributed money intended to prepare or submit this brief. FED. R. APP. P. 29(c)(5). Counsel for appellants have consented to the filing of this brief, while counsel for appellees do not oppose amici's filing of this brief.

[2] *E.g.*, *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011); *LaRue v. DeWolff, Boberg & Assocs*., 552 U.S. 248 (2008); *Glista v. UNUM Life Ins. Co. of Am*., 378 F.3d 113 (1st Cir. 2004); *Brigham v. Sun Life of Can*., 317 F.3d 72 (1st Cir. 2003).

One of amici's main objectives is to ensure that participants receive those benefits that they have been promised in accordance with the protections of the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. §§ 1001 *et seq*. The quality of the lives of these workers in retirement depends substantially on their ability to obtain those benefits that they have been promised. To achieve that goal, amici work to ensure that fiduciaries prudently and loyally manage and administer participants' plans.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

Amici submit this brief because the decision below incorrectly found that Putnam prudently selected and monitored its investment options, including its proprietary funds in its 401(k) plan. Given the primacy of 401(k) plans in the American workplace landscape, it is imperative that fiduciaries of ERISA-governed plans be held to a high standard of duty to manage plans prudently. How the Court decides this case will have a significant impact on the integrity of the administration of employee benefit plans and individual participants' ability to protect their pension plans from mismanagement. In light of the significance of the issues presented by this case, amici respectfully submit this brief.

SUMMARY OF ARGUMENT

A firm understanding of ERISA's purposes, particularly the rationale for its fiduciary and prohibited transaction provisions, is essential when analyzing claims of breaches of fiduciary duties. ERISA protects retirement plan participants by holding fiduciaries to a standard that requires them to administer and manage the plan with "care, skill, prudence, and diligence"; "solely in the interest of the participants"; and "for the exclusive purpose of providing benefits" to the participants.[3]

Fiduciary duties apply to the selection and monitoring of investment options, including those options that are proprietary mutual funds. Excessive fees in

[3] ERISA § 404(a), 29 U.S.C. §1104(a).

investment options negatively affect 401(k) account balances. Small changes to 401(k) plan fees substantially affect the amount of benefits that plan participants accrue for retirement and whether they will have adequate assets in retirement.

Additionally, the Court should find there is no substitute for ERISA compliance. Compliance with the internally mandated vetting process under the Investment Company Act of 1940 ("ICA" or "40 Act") has no connection to compliance with ERISA's fiduciary duties. The Court should reject any argument stating otherwise. Similarly, a settlor's contributions to a plan are not a defense to claims for a trustee's breach of fiduciary duty. Plan fiduciaries should not get a "pass" on breaches of fiduciary duties merely because the plan sponsor as the settlor takes some positive action.

ARGUMENT

I. IT IS ESSENTIAL TO PARTICIPANTS' RETIREMENT SECURITY THAT ERISA BE CONSTRUED TO PROTECT THE TRILLIONS OF DOLLARS IN 401(k) PLANS.

A. Congress Enacted ERISA's Fiduciary Standards To Protect Pension Plan Assets And, Thus, Participants' Retirement Security.

Prior to the passage of ERISA, there were no federal standards requiring persons operating employee benefit plans to avoid imprudent transactions that would dissipate plan assets and result in insufficient funds to meet the vested claims of participants. *See* The American Bar Association & The Bureau of

National Affairs, *Employee Benefits Law* xcix-c (3d ed. 2012). In response to "horror stories,"[4] Congress "wanted to . . . mak[e] sure that if a worker has been promised a defined pension benefit upon retirement -- and if he has fulfilled whatever conditions are required to obtain a vested benefit -- he actually will receive it." *Nachman Corp. v. Pension Benefit Guar. Corp*., 446 U.S. 359, 375 (1980). Accordingly, ERISA endeavors to "make as certain as possible that pension fund assets [will] be adequate" to meet expected benefits payments. *Id.*

After assembling a record that showed a history and pattern of employees failing to receive their promised employee benefits, a lack of disclosure and transparency, and varied and numerous financial abuses, Congress enacted ERISA. ERISA § 2(a), 29 U.S.C. § 1001(a). Not surprisingly, Congress connected the growth in and judicious management of pension plan assets with the future adequacy of retirement income. *Id.* By "establishing standards of conduct, responsibility, and obligation for fiduciaries" and "by providing for appropriate remedies [and] sanctions" for violations of those fiduciary standards, Congress sought to protect "the interests of participants in employee benefit plans and their

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[4] *See* James A. Wooten, *The Employee Retirement Income Security Act Of 1974: A Political History* 118 (2004); *see also Nachman Corp. v. Pension Benefit Guar. Corp*., 446 U.S. 359, 374 n.22 (1980) (quoting 2 *Legislative History Of The Employee Retirement Income Security Act* 1599-1600 (1976)) (discussing closure of Studebaker and sale of P. Ballantine and Sons resulting in termination of insufficiently funded pensions plans and workers' loss of substantial portion of pension benefits).

beneficiaries." ERISA § 2(b), 29 U.S.C. § 1001(b); *see also Shaw v. Delta Air Lines, Inc*., 463 U.S. 85, 90 (1983) ("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans."); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (same). In this manner, fiduciaries are held accountable for their decisions, thereby fostering ERISA's primary goal of protecting employees' benefits. *See Merrimon v. Unum Life Ins. Co. of Am.*, 758 F.3d 46, 50 (1st Cir. 2014) ("One of ERISA's principal goals is to afford appropriate protection to employees and their beneficiaries with respect to the administration of employee welfare benefit plans.").

One of the significant methods that Congress provided participants for protecting their plans and, thus, their benefits, was through ERISA's fiduciary requirements – requirements that even now, more than 40 years later, remain a keystone in ERISA's structure. *See, e.g.*, *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015) ("Under trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones."). Although Congress relied on trust law as the foundation of ERISA, *see, e.g.*, *id.*; *Central States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc*., 472 U.S. 559, 569-71 (1985) (fiduciary powers must be exercised in accordance with trust law standards), it realized that trust law was inadequate to completely protect participants. *See Varity Corp. v. Howe*, 516 U.S.

489, 497 (1996) ("ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection."). ERISA's fiduciary requirements imposed duties of prudence, loyalty, and care with respect to the management of trust funds upon plan fiduciaries. ERISA § 404, 29 U.S.C. § 1104.

Congress also prohibited certain transactions between the plan and parties in interest such as employers sponsoring plans, ERISA § 406, 29 U.S.C. § 1106, because Congress found that these transactions were "likely to injure the pension plan." C*omm'r v. Keystone Consol. Indus.*, 508 U.S. 152, 160 (1993). Section 406 of ERISA categorically bars transactions involving plan assets that "are commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arm's length." *Lockheed Corp. v. Spink*, 517 U.S. 882, 893 (1996); *accord Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 252 (2000) (§406(a) expands upon the common law's arm's-length standard of conduct).

Sections 404 and 406 of ERISA carefully regulate the conduct of plan fiduciaries with regard to the administration and management of the plan and its assets. *See* 29 U.S.C. §§ 1002(21)(A), 1104 & 1106. Congress established these standards of conduct to ensure that fiduciaries would be held liable for their breaches. *See Merrimon,* 758 F.3d at 53 ("An ERISA beneficiary thus has a legally

cognizable right to have her plan fiduciaries perform those duties that ERISA mandates."); *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 920 (8th Cir. 1994) (stating that the breach of fiduciary duty is "a standard of conduct that Congress has imposed and that the fiduciary can satisfy by acting reasonably."). Accordingly, these provisions should, as a general matter, be broadly construed. *See Varity*, 516 U.S. at 496 ("ERISA protects employee pensions and other benefits by . . . setting forth certain general fiduciary duties applicable to the management of both pension and nonpension benefit plans") (internal citations omitted).

B. Although 401(k) Plans Hold Trillions Of Dollars Of Assets And Have Become The Predominant Private Retirement Savings Vehicle, Individual Account Balances Are Modest, Warranting Fiduciaries' Prudent Investigation Of Investment Options.

Employer-sponsored retirement plans were established to provide a stable source of income to employees and their families upon retirement. Since the passage of ERISA, there has been a marked shift from defined benefit plans ("DB plans") to defined contribution plans ("DC plans"). Indeed, since the mid-1980s, defined contribution plans have become the primary workplace retirement plan. *LaRue*, 552 U.S. at 255. 401(k) plans are the most ubiquitous among DC plans.[5] For the majority of individuals now saving for retirement through 401(k) plans, the

[5] As of March 30, 2017, 401(k) plans held more than $5 trillion in assets. Inv. Co. Inst., *Ten Important Facts About 401(k) Plans*, 2 (Aug. 28, 2017), goo.gl/s2Zcte.

amount contributed and accumulated is critically important, as it is often their only source of private retirement income, other than Social Security. U.S. Gov't Accountability Office, GAO-18-111SP, The Nation's Retirement System 8-9, 12, 14, 40-41 (Oct. 18, 2017), goo.gl/TZq4pv ("GAO, Nation's Retirement System").

The differences between DB and DC plans center around who carries the funding, investment, longevity risk, and costs. *Id*. at 12, 40-41; *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-441 (1999). In DB plans, workers' retirement benefits are generally funded solely by the employer and calculated using a formula based upon each worker's earnings and the number of years worked for that employer before retirement. *Id.* at 439-40. DB plans are required to provide a lifetime annuity as a distribution option. *Id*. In contrast, in DC plans, the retirement benefit that a participant will receive is totally dependent on the amount of employee and employer contributions invested; whether the plan investments that the participants chose experienced growth or suffered losses during the life of the account, with no guaranteed amount over any period of time; and the amount of fees charged to the account. *Id*. at 439; GAO, Nation's Retirement System at 12, 40-41; *see also LaRue*, 552 U.S. at 250 n.1 (contrasting DB and DC plans).

The impact that fees can have on investment returns in 401(k) plans is demonstrated in a report by the U.S. Department of Labor:

> Assume that you are an employee with 35 years until retirement and a current 401(k) account balance of $25,000. If returns on investments

> in your account over the next 35 years average 7 percent and fees and expenses reduce your average returns by 0.5 percent, your account balance will grow to $227,000 at retirement, even if there are no further contributions to your account. If fees and expenses are 1.5 percent, however, your account balance will grow to only $163,000. The 1 percent difference in fees and expenses would reduce your account balance at retirement by 28 percent.

U.S. Dep't of Labor, Employee Benefits Security Administration, *A Look At 401(K) Plan Fees* 1-2 (2013), goo.gl/7ihk3G. A small difference in fees, therefore, can substantially alter the amount of benefits that a participant will have accumulated upon retirement.

Excessive fees on 401(k) investments burden millions of participants' retirement accumulations, jeopardizing their ability to be financially self-sufficient in retirement. *Strengthening Worker Retirement Security Before the H. Comm. on Education and Labor*, 111th Cong. 11 (2009) (statement of John C. Bogle, founder and former Chief Executive of the Vanguard Group) (In describing the dangers of high costs, Mr. Bogle quoted an article that he wrote in the *Journal of Portfolio Management* in 2008: "These enormous costs seriously undermine the odds in favor of success for citizens who are accumulating savings for retirement. Alas, the investor feeds at the bottom of the costly food chain of investing, paid only after all the agency costs of investing are deducted from the markets' returns."), *available at* goo.gl/BKz9sy. Accordingly, employees today bear the major responsibility for the ultimate funding of their retirement income as well as for active account

management. *See* GAO, Nation's Retirement System at 3; *Strengthening Worker Retirement Security* at 6 (2009) (statement of John C. Bogle) ("Despite its worthy objectives, the deeply flawed implementation of defined contribution plans has subtracted — and subtracted substantially — from the inherent value of this new system."), *available at* goo.gl/BKz9sy. The current market structure tolerates a symbiotic relationship between sophisticated financial advisers and naïve investors, *id*. at 17 (quoting David F. Swensen, Chief Investment Officer at Yale University, who stated that "'[t]he drive for profits by Wall Street and the mutual fund industry overwhelms the concept of fiduciary responsibility, leading to an all too predictable outcome: . . . the powerful financial services industry exploits vulnerable individual investors . . . ."), making the fiduciaries' management and administration of the plan even more crucial.

Sadly, most individual 401(k) account balances are modest. "At year-end 2015, the average account balance among all 26.1 million 401(k) plan participants was $73,357; the median account balance was $16,732." Inv. Co. Inst., *Ten Important Facts* at 7, Note. Even the oldest and longest-tenured participants still only have an average of $280,976 in their accounts. *Id*. at 7. Even more sobering is Fidelity's estimate that, in 2017, health care spending during retirement has risen to an average of $275,000 per couple, excluding long-term care. Fidelity

Viewpoints, *Retiree health care costs continue to surge* (Sept. 6, 2017), goo.gl/f4qeHt.

These modest account balances underscore the critical significance of a fiduciary's duty to select prudent investments. Employees and retirees rely heavily on the prudence, knowledge and expertise of plan fiduciaries charged with evaluating those investment options. Employees rely on their fiduciary's prudence because investment selections are limited by the fiduciary's selection of available investment options. Accordingly, courts must strictly enforce the duties imposed upon 401(k) plan fiduciaries by ERISA in order to protect participants. *See Tibble*, 135 S. Ct. at 1828.

II. THE DISTRICT COURT INCORRECTLY RELIED UPON COMPLIANCE WITH THE INTERNAL MANDATED VETTING PROCESS UNDER THE INVESTMENT COMPANY ACT OF 1940 TO FIND THAT THE FIDUCIARIES DID NOT BREACH ERISA'S FIDUCIARY DUTIES.

The district court seemingly accepted the remarkable argument that because Putnam's proprietary mutual funds survived Putnam's internal 40 Act mandated vetting process at Putnam, their inclusion on the plan's investment option menu was prudent under ERISA. If the district court is correct — that compliance with the 40 Act gives ERISA fiduciaries a pass on their ERISA fiduciary duties — then

this would eliminate all liability related to any plan sponsor's inclusion of any of their proprietary funds.[6] This cannot be.

There is no statutory text or established interpretive principle to support the contention that the 40 Act precludes ERISA suits like the one brought by Brotherston in this case. Nothing in the text, history, or structure of the 40 Act or ERISA demonstrates any congressional purpose or design to forbid ERISA suits for breaches of fiduciary duty merely because an investment company met 40 Act requirements. *Cf. POM Wonderful LLC v. Coca-Cola Co*., 134 S. Ct. 2228, 2238 (2014) ("When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other."). The purpose of each statute clearly demonstrates the reason compliance with one statute is not equal to compliance with the other.

Congress passed the 40 Act in the wake of the Great Depression with the purpose of protecting investors from fraud and misrepresentation of investment advisers. H.R. Rep. No. 76-2639 (1940). To protect investors from unscrupulous investment advisers, the ICA places vicarious liability on mutual funds for selected actions. In order to renew annual advisory contracts with investment advisers, ICA

[6] Of course, under this theory, there could be liability if the 15c process were defective. However, taken to its logical extreme, this argument could even displace the prohibited transactions that Congress established in Section 406 of ERISA.

section 15(c) requires that directors of mutual funds evaluate the information reasonably necessary to analyze advisory contracts and then conduct an in-person vote where the majority of the directors must approve the renewal. 15 U.S.C. § 80a-15(c). Courts use the "*Gartenberg* factors" to analyze what is "reasonably necessary": 1) the nature and quality of the adviser's services; 2) the adviser's costs in rendering the services; and 3) whether the cost was disproportionate to the services rendered. *Gartenberg v. Merrill Lynch Asset Mgmt*., 694 F.2d 923, 930 (2d Cir. 1982). The *Gartenberg* factors essentially require only a determination that fees are related and not disproportionate to the services rendered, but no more than that. When the factors are applied to Section 15(c), they provide an extremely low bar for the documents that directors must analyze in deciding to renew adviser contracts.

In contrast, "[o]ne of ERISA's principal goals is to afford appropriate protection to employees and their beneficiaries with respect to the administration of employee welfare benefit plans." *Merrimon,* 758 F.3d at 50. Congress "establish[ed] standards of conduct, responsibility, and obligations for fiduciaries." ERISA § 2(b), 29 U.S.C. § 1001(b). In this manner, fiduciaries are held accountable for their decisions, thereby fostering ERISA's primary goal of protecting employees' benefits. *See supra* at pp. 4-8. Under ERISA, the duties owed by fiduciaries to plan participants and beneficiaries "are those of trustees of

an express trust—the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 271, 272 n.8 (2d Cir. 1982).

Because ERISA was enacted more than thirty years after the ICA, ERISA's primacy over retirement plans should be even more obvious. If Congress had intended that compliance with the 40 Act satisfied ERISA's strict fiduciary standards, surely it would have said so.[7] *See Russello v. United States*, 464 U.S. 16, 25 (1983) ("Language in one statute usually sheds little light upon the meaning of different language in another statute, even when the two are enacted at or about the same time."). Congress did not.

The requirement that ICA section 15(c) imposes on mutual funds is the minimal standard for compliance with SEC regulations; it merely requires directors of a mutual fund to affirmatively approve the renewal of adviser contracts. Approval of adviser contracts has nothing to do with ERISA compliance. Thus, the Putnam Board of Trustees' compliance with section 15(c) through analysis of fee levels would never, alone, satisfy ERISA's prudence and loyalty standards. The ICA was never meant to protect retirement plans, and has never served that function. ERISA, unlike the ICA, statutorily requires anyone with significant control over a retirement plan to meet ERISA's fiduciary duties of loyalty and

[7] For example, Congress enacted ERISA's preemption provision that maintained state laws regulating insurance, banking, or securities, demonstrating that it was capable of distinguishing between different types of statutes. *See* ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A).

prudence. *See* 29 U.S.C. § 1104. ERISA's standards are far higher than those of the 40 Act because ERISA's role is to protect an individual's retirement benefits. *See Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. at 375.

III. A SETTLOR'S CONTRIBUTIONS TO ERISA PLAN ACCOUNTS ARE NOT A DEFENSE TO CLAIMS FOR A TRUSTEE'S BREACH OF FIDUCIARY DUTY.

As the settlor of the plan, Putnam made voluntary contributions to the plan and paid certain plan administrative fees. It argued, and the court seemed to agree, *Brotherston v. Putnam Invs., LLC*, No. 15-13825-WGY, 2017 U.S. Dist. LEXIS 48223, at *21-27 (D. Mass. Mar. 30, 2017), that these contributions and payments are an appropriate defense to the breach of the duty of loyalty claim.

There is no doubt that settlor and fiduciary functions are separate. *See Spink*, 517 U.S. at 889-890 (stating that when employers undertake actions, such as adoption, modification, or termination of welfare plans, they do not act as fiduciaries, but instead are acting analogous to the settlors of a trust); *Hughes Aircraft*, 525 U.S. at 443 (same). Moreover, if there is a breach of fiduciary duty, nothing in ERISA permits the fiduciary to claim a set-off by the settlor to extinguish all or part of the claim. *See Nedd v. United Mine Workers of Am.*, 556 F.2d 190, 214 (3d Cir. 1977) ("Set-offs of trust funds are unavailable to trustees against their liability in another capacity."); *Ambromovage v. United Mine Workers*, 726 F.2d 972, 984 (3d Cir. 1984) ("under settled principles of trust law, a

settlor-trustee cannot set off the amount of his gifts to the trust against his liability for a subsequent breach of trust."). Indeed, the Restatement of Trusts contains rules concerning permissible set-offs against various trustee actions. Rstmt. 2d of Trusts § 252 (2012); *see also id*. §§ 213, 243, and 323. None of these rules, however, concerns a fiduciary extinguishing its liability through the actions of the settlor.

In addition, cases involving traditional trusts have held that trustees cannot set off the losses of some investments that breach a fiduciary duty with the profits from other investments that also breach that duty. *See Pa. Co. for Ins. on Lives and Granting Annuities v. Gillmore*, 59 A.2d 24, 37 (1948) ("A trustee who is liable for a loss occasioned by one breach of trust cannot reduce the amount of his liability by deducting the amount of a gain which has accrued through another and distinct breach of trust.") (quoting Restatement of Trusts § 213) (internal quotation marks omitted). The *Gillmore* court also quoted a companion principle from the Restatement: "If the trustee is liable for a loss occasioned by a breach of trust in respect of one portion of the trust property, he cannot reduce the amount of his liability by deducting the amount of gain which has accrued with respect to another part of the trust property through another and distinct transaction which is not a breach of trust." *Id.* (internal quotation marks omitted). In short, the sort of balancing of gains and losses proposed by the Defendants-Appellees has no place in trust law.

Furthermore, the court's concern with unjust enrichment is misplaced. *See Brotherston*, 2017 U.S. Dist. LEXIS 48223, at *26. Generous contributions to employee retirement plans are made for business reasons such as attracting and retaining employees and for the tax breaks the employer receives. Moreover, Putnam does not contribute funds directly to individual employee accounts. Rather, pursuant to the Putnam Retirement Plan, the CEO of Putnam Investments is authorized to make discretionary contributions, "paid to the trustee" and not to individuals. Def. Decl. re Mot. for Summ. J. Ex. 5 § 5.2, ECF No. 92. Such contributions are not made on an individual basis but, instead, are made based on the classes of participants established by the plan. *Id.* They do not benefit the individuals' account balances the way that lower fees can. Defendants-Appellees' suggestion that such contributions can either set off losses due to a fiduciary's breach or lead to unjust enrichment of beneficiaries is a *non sequitur*. This argument would be tantamount to a trustee claiming that losses due to the trustee's breach should be balanced against a settlor's generosity in funding the trust; nothing in the Restatement of Trusts or the cases it consults suggests that trust law and principles require courts to inquire into whether such a situation could unjustly enrich beneficiaries.

CONCLUSION

For the foregoing reasons, the court should reverse the district court's order and remand for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because the brief contains 4,271 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on November 8th, 2017, I filed the foregoing Brief of Amici Curiae AARP, AARP Foundation, and National Employment Lawyers Association in Support Of Plaintiffs-Appellants with the Clerk of the United States Court of Appeals for the First Circuit via the CM/ECF system, which will send notice of such filings to all registered CM/ECF users.

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