

1 BRIAN BOYLE (S.B. #126576)  
 bboyle@omm.com  
 2 RANDALL W. EDWARDS (S.B. #179053)  
 redwards@omm.com  
 3 MEAGHAN VERGOW (admitted *pro hac vice*)  
 mvergow@omm.com  
 4 O'MELVENY & MYERS LLP  
 Two Embarcadero Center, 28<sup>th</sup> Floor  
 5 San Francisco, California 94111-3823  
 Telephone: +1 415 984 8700  
 6 Facsimile: +1 415 984 8701  
 7 Attorneys for Defendants

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 11 **UNITED STATES DISTRICT COURT**  
 12 **NORTHERN DISTRICT OF CALIFORNIA**  
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14 Charles Baird and Lauren Slayton, as  
 15 individuals, and on behalf of all others  
 16 similarly situated, and on behalf of the  
 BlackRock Retirement Savings Plan,

17 Plaintiffs,

18 v.

19 BlackRock Institutional Trust Company, N.A.  
 20 *et al.*,

21 Defendants

Case No. 17-cv-01892-HSG

**REQUEST FOR JUDICIAL NOTICE  
 IN SUPPORT OF DEFENDANTS'  
 MOTION TO DISMISS PLAINTIFFS'  
 AMENDED CLASS ACTION  
 COMPLAINT OR, IN THE  
 ALTERNATIVE, FOR SUMMARY  
 JUDGMENT**

Hearing Date: January 11, 2018  
 Time: 2:00 p.m.  
 Place: Courtroom 2, Oakland Courthouse  
 Judge: Hon. Haywood S. Gilliam, Jr.

1 Defendants request that this Court take judicial notice of exhibits that are publicly  
2 available documents related to the BlackRock Retirement Savings Plan at issue in this case, that  
3 are referred to or otherwise incorporated into the allegations in Plaintiffs’ Amended Class Action  
4 Complaint (“AC”; ECF No. 75), or both. These documents are attached as Exhibits C–MM to the  
5 Declaration of Randall W. Edwards in Support of Defendants’ Motion To Dismiss Plaintiff’s  
6 Amended Class Action Complaint Or, In The Alternative, For Summary Judgment. Given the  
7 centrality of each exhibit to the Amended Complaint’s allegations and given that each exhibit’s  
8 authenticity is not subject to reasonable dispute, judicial notice is proper under applicable law.  
9 Thus, each may be properly considered as part of Defendants’ motion to dismiss for failure to  
10 state a claim, without converting that motion into one for summary judgment. Consideration of  
11 these exhibits fits squarely within the Ninth Circuit’s precedent for judicial notice, and it is  
12 consistent with the consideration given by many other courts to similar retirement plan-related  
13 documents when evaluating claims under the Employee Retirement Income Security Act of 1974  
14 (“ERISA”).

15 **I. LEGAL STANDARD**

16 Federal courts may grant judicial notice of facts that “can be accurately and readily  
17 determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid.  
18 201(b)(2). On a motion to dismiss for failure to state a claim, a court likewise “may take into  
19 account documents whose contents are alleged in a complaint and whose authenticity no party  
20 questions, but which are not physically attached to the [plaintiff’s] pleading” and may “treat such  
21 a document as part of the complaint, and thus . . . assume that its contents are true for purposes of  
22 a motion to dismiss under Rule 12(b)(6).” *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152,  
23 1160 (9th Cir. 2012) (alteration in original; quotation marks omitted); *see also, e.g., Tellabs, Inc.*  
24 *v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (“[C]ourts must consider the complaint  
25 in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6)  
26 motions to dismiss, in particular, documents incorporated into the complaint by reference, and  
27 matters of which a court may take judicial notice.”).

28 As this Court has held previously, the incorporation-by-reference doctrine—often

1 discussed as a type of judicial notice—encompasses situations in which the plaintiff’s claim  
2 depends on the contents of a document, even if the plaintiff’s complaint does not expressly attach  
3 the document or allege its contents. *Shrem v. Sw. Airlines Co.*, No. 15-cv-04567-HSG, 2016 WL  
4 4170462, at \*1 (N.D. Cal. Aug. 8, 2016) (stating that court may consider document where  
5 “plaintiff’s claim depends on the contents of a document . . . and the parties do not dispute the  
6 authenticity of the document, even though the plaintiff does not explicitly allege the contents of  
7 that document in the complaint.”) (quoting *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir.  
8 2005)).<sup>1</sup> The Ninth Circuit has explained “the policy concern underlying the rule” as  
9 “[p]reventing plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting references  
10 to documents upon which their claims are based.” *Parrino v. FHP, Inc.*, 146 F.3d 699, 705–06  
11 (9th Cir. 1998).

12 In the context of motions to dismiss ERISA claims, “[c]ourts routinely take judicial notice  
13 of ERISA plan documents,” including the “Plan itself, the summary plan descriptions, Form 5500  
14 filings submitted to the Department of Labor, participant fee disclosure notices, [and] the master  
15 services agreement” between the Plan’s sponsor and the Plan’s administrator. *Lorenz v. Safeway,*  
16 *Inc.*, 241 F. Supp. 3d 1005, 1012 (N.D. Cal. 2017); *see also, e.g., White v. Chevron Corp.*, No.  
17 16-cv-0793-PJH, 2017 U.S. Dist. LEXIS 83474, at \*15 (N.D. Cal. May 31, 2017) (taking  
18 “judicial notice of several Plan-related documents” on motion to dismiss); *Watkins v. Citigroup*  
19 *Ret. Sys.*, No. 15-cv-731 DMS (NLS), 2015 WL 9581838, at \*2 (S.D. Cal. Dec. 30, 2015) (taking  
20 judicial notice of ERISA Pension Plan on motion to dismiss); *Urakhchin v. Allianz Asset Mgmt.*  
21 *of Am., L.P.*, No. SACV 15-1614-JLS (JCGx), 2016 WL 4507117, at \*3–4 (C.D. Cal. Aug. 5,  
22 2016) (taking judicial notice of ERISA plan document on motion to dismiss); *Care First Surgical*  
23 *Ctr. v. ILWU-PMA Welfare Plan*, No. CV-14-1480 MMM (AGRx), 2014 WL 6603761, at \*4  
24 (C.D. Cal. July 28, 2014) (taking judicial notice of plan agreements on motion to dismiss);  
25 *Koblentz v. UPS Flexible Emp. Benefit Plan*, No. 12-CV-0107-LAB, 2013 WL 4525432, at \*1–2

26 \_\_\_\_\_  
27 <sup>1</sup> *Accord, e.g., Parrino v. FHP, Inc.*, 146 F.3d 699, 705–06 (9th Cir. 1998), *abrogated on other*  
28 *grounds by Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006); *Kentwool Co. v.*  
*NetSuite Inc.*, No. 14-CV-05264-JST, 2015 WL 693552, at \*2 (N.D. Cal. Feb. 18, 2015); *Hoey v.*  
*Sony Elecs. Inc.*, 515 F. Supp. 2d 1099, 1103 (N.D. Cal. 2007).

1 (S.D. Cal. Aug. 23, 2013) (taking judicial notice of plan provisions and correspondences on  
2 motion to dismiss).

3 **II. ARGUMENT**

4 The Court may take judicial notice of the Plan-related documents in this Request because  
5 each document is publicly available, incorporated by reference into plaintiff's Amended  
6 Complaint, or central to the allegations of the Amended Complaint, and plaintiffs cannot  
7 reasonably dispute any of the documents' authenticity.

8 **DOL Form 5500 Filings (Exhibits C–F).** The annual reports for the Plan—known as  
9 Form 5500s—are properly subject to judicial notice for two independently sufficient reasons.  
10 **First**, Plaintiffs specifically allege that the Amended Complaint is “based upon counsel’s  
11 investigation of public documents, including filings with the U.S. Department of Labor and U.S.  
12 Securities and Exchange Commission.” AC ¶ 9. Such filings include the Form 5500s, which the  
13 Department of Labor and Internal Revenue Service “require plan sponsors to submit . . . to satisfy  
14 annual reporting requirements under ERISA and the Internal Revenue Code.” *Nat’l Ret. Fund v.*  
15 *Metz Culinary Mgmt., Inc.*, No. 16-CV-2408 (VEC), 2017 WL 1157156, at \*3 n.5 (S.D.N.Y.  
16 Mar. 27, 2017). The Amended Complaint also expressly identifies the Plan’s Form 5500 as the  
17 source of multiple allegations regarding the Plan’s fees and investment options, *see, e.g.*, AC  
18 ¶¶ 139, 143, and incorporates the Form 5500 filings by the Plan by making numerous references  
19 to information disclosed in these annual filings with the Department of Labor, *see id.* ¶ 56  
20 (describing the number of participants in the Plan, their average annual investment, and the  
21 amount of assets managed by the Plan, as disclosed in the Plan’s latest Form 5500); *id.* ¶ 94  
22 (describing Blackrock-affiliated investment options offered to Plan participants, as disclosed in  
23 the Plan’s Form 5500).

24 **Second**, courts routinely take judicial notice of Form 5500 filings and similar publicly  
25 available records. *E.g., Terraza v. Safeway Inc.*, 241 F. Supp. 3d 1057, 1067 (N.D. Cal. 2017)  
26 (taking judicial notice of Form 5500 filings and plan documents); *Powell v. Unum Life Ins. Co. of*  
27 *Am.*, No. 1:16-cv-01197-AWI-SKO, 2016 WL 8731383, at \*1 n.2 (E.D. Cal. Sept. 30, 2016)  
28 (taking judicial notice of a Form 5500, citing *Disabled Rights Action Comm. v. Las Vegas Events,*

1 *Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004)); *Palmason v. Weyerhaeuser Co.*, No. C 11-0695  
2 RSL, 2013 WL 1788002, at \*1 (W.D. Wash. Apr. 26, 2013) (taking judicial notice of Form 5500  
3 and other filings because “[t]hese documents were filed with or produced by government  
4 agencies, plaintiffs have not challenged the authenticity of these documents, and their existence  
5 and contents can be ascertained by resort to public records”); *Almont Ambulatory Surgery Ctr.,  
6 LLC v. United Health Grp., Inc.* 99 F. Supp. 3d 1110, 1126 (C.D. Cal. 2015) (taking judicial  
7 notice of Form 5500 filings); *Knight v. Standard Ins. Co.*, No. CIV 07-1691 WBS EFB, 2008 WL  
8 343852, at \*2 (E.D. Cal. Feb. 6, 2008) (same); *Hilton Worldwide, Inc. Glob. Benefits Admin.  
9 Comm. v. Caesars Entm’t Corp.*, 532 B.R. 259, 269 (E.D. Va. 2015) (same); *see also Cty. of  
10 Santa Clara v. Astra USA, Inc.*, 401 F. Supp. 2d 1022, 1024 (N.D. Cal. 2005) (taking judicial  
11 notice of information available on the HHS website). Plaintiff cannot dispute the authenticity of  
12 the Form 5500 filings because they are publicly available on the Department of Labor’s website  
13 at <https://www.efast.dol.gov/portal/app/disseminatePublic?execution=e1s1>. The Court may  
14 accordingly take judicial notice of them.

15 **Fund Prospectuses (Exhibits G–L).** Exhibits G to L are publicly available fund  
16 prospectuses, and they all are properly subject to judicial notice for similar reasons as the Form  
17 5500s. As noted above, Plaintiffs expressly allege that the Amended Complaint is based on  
18 filings with the Securities and Exchange Commission (“SEC”). AC ¶ 9. Plaintiffs also explicitly  
19 incorporate various SEC filings in their Amended Complaint, including the prospectuses of  
20 BlackRock funds and third-party funds to which they compare the Plan’s options. For example,  
21 the Amended Complaint incorporates the contents of the prospectuses of the Vanguard Target  
22 Retirement Income Trust I target-date funds by making allegations regarding these funds’  
23 investment objectives, asset allocations, performance outcomes, and expenses. *See id.* ¶¶ 171–72,  
24 174–76. Moreover, the Amended Complaint *directly quotes* from the prospectuses of the  
25 Vanguard Short-Term Investment Grade Fund and the BlackRock Low Duration Bond Fund in its  
26 allegations regarding these funds’ investment strategy, expense ratio, and performance. *See id.* ¶¶  
27 128–29. The Amended Complaint also incorporates the contents of the prospectuses of the  
28 BlackRock Global Allocation Fund, the American Funds Capital Income Builder Fund, the DFA

1 Global Allocation 60/40 Portfolio, the BlackRock Total Return Fund, and the BlackRock  
 2 LifePath Index Funds by making allegations regarding the management and expense ratios of  
 3 those funds—allegations about information publicly reported in the filings. *See id.* ¶¶ 115–18,  
 4 136, 189. The Court therefore should take judicial notice of these prospectuses based on  
 5 Plaintiffs’ express incorporation of them in the Amended Complaint.

6 Courts routinely grant such requests for judicial notice of SEC filings, including  
 7 prospectuses. *See, e.g., Renfro v. Unisys Corp.*, Civ. No. 07-2098, 2010 WL 1688540, at \*2  
 8 (E.D. Pa. Apr. 26, 2010), *aff’d*, 671 F.3d 314 (3d Cir. 2011) (taking judicial notice of fee  
 9 information disclosed in prospectuses filed with the SEC); *Hecker v. Deere & Co.*, 496 F. Supp.  
 10 2d 967, 972 (W.D. Wis. 2007), *aff’d*, 556 F.3d 575 (7th Cir. 2009) (taking judicial notice of  
 11 prospectuses because they are “widely circulated publicly available documents”). *See also*  
 12 *Norfolk Cty. Ret. Sys. v. Solazyme, Inc.*, No. 15-cv-02938-HSG, 2016 WL 7475555, at \*1 n.1  
 13 (N.D. Cal. Dec. 29, 2016) (citing *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049,  
 14 1064 n.7 (9th Cir. 2008)) (SEC filings subject to judicial notice); *Dreiling v. Am. Express Co.*,  
 15 458 F.3d 942, 946 n.2 (9th Cir. 2006) (same); *Fulmer v. Klein*, No. 3:09-CV-2354-N, 2011 WL  
 16 1108661, at \*3 (N.D. Tex. Mar. 16, 2011) (“A court may . . . consider [on] a motion to dismiss . .  
 17 . the contents of documents filed with the [SEC].”) (citing *Lovelace v. Software Spectrum Inc.*, 78  
 18 F.3d 1015, 1018 (5th Cir. 1996)). Plaintiffs cannot dispute the authenticity of any of these  
 19 prospectuses because they are publicly available on the SEC website. *See* Edwards Decl. ¶¶ 9–14  
 20 (identifying URLs on SEC website where each prospectus may be downloaded). Therefore, the  
 21 Court may take judicial notice of these prospectuses on the additional basis that they are public  
 22 records filed with the SEC.

23 **Other ERISA Plan-Related Documents (Exhibits M–V, Z–MM).** Exhibits M to V and  
 24 Z to MM are all Plan-Related documents that are properly subject to judicial notice. As Judge  
 25 Tigar has noted in a recent ERISA case, “[c]ourts routinely take judicial notice of ERISA plan  
 26 documents,” including agreements between the plan’s sponsor and plan service providers that are  
 27 central to the allegations in a complaint. *Lorenz*, 241 F. Supp. 3d at 1012 (taking judicial notice  
 28 of master services agreement on motion to dismiss); *see also, e.g., In re Lehman Bros. Sec. &*

1 *ERISA Litig.*, No. 09 MD 2017(LAK), 2012 WL 6000575, at \*1 n.2 (S.D.N.Y. Dec. 3, 2012)  
2 (taking judicial notice of plan documents, including the agreement between the plan’s sponsor  
3 and service provider); *Watkins*, 2015 WL 9581838, at \*2 (taking judicial notice of ERISA plan  
4 documents on motion to dismiss); *Urakhchin*, 2016 WL 4507117, at \*3–4 (same); *Care First*  
5 *Surgical Ctr.*, 2014 WL 6603761, at \*4 (same); *Koblentz*, 2013 WL 4525432, at \*1–2 (same).  
6 Plaintiffs’ allegations regarding the management of the Plan, including the fees and expenses  
7 associated with the Plan, necessarily reference and incorporate the plan-related documents that  
8 govern those issues. In addition, the audited financial statements are explicitly referenced at  
9 various points in Plaintiffs’ Amended Complaint. See AC ¶¶ 101, 103, 198. And because the  
10 authenticity of these plan-related documents cannot be reasonably disputed—they have all been  
11 disclosed in response to Plaintiff Baird’s request under 29 U.S.C. § 1024(b) and produced in  
12 discovery—the Court should take judicial notice of the Investment Management Agreement for  
13 the Plan’s collective trust options, each of the Guideline and Fee Agreements that has applied to  
14 those options during the class period, and the annual audited financial statements of the collective  
15 trusts offered by the Plan. See *In re Lehman Bros. Sec & ERISA Litig.*, 2012 WL 6000575, at \*1  
16 n.2.

17 The Court also should take judicial notice of the “*Managing ERISA Assets*” (MEA) and  
18 “*16 Things You Should Know: Information About BTC*” (16 Things) plan documents. The MEA  
19 and 16 Things documents set forth terms governing the CTFs. These documents are also  
20 explicitly incorporated into the Investment Management Agreement that is incorporated by  
21 reference into Plaintiffs’ Amended Complaint. See AC ¶¶ 59-60 (incorporating Investment  
22 Management Agreement); Investment Management Agreement (Exhibit T) at 7 (incorporating 16  
23 Things and MEAs). Therefore, the MEA and 16 Things documents are also judicially noticeable.

24 **Fee Disclosures (Exhibits W–Y).** Exhibits W to Y are fee disclosures that are central to  
25 Plaintiffs’ allegations in the Amended Complaint. The Amended Complaint alleges that the  
26 Plan’s expenses for BlackRock-affiliated investment options were excessive and not fully  
27  
28



1 reflected in the disclosures made to plan participants. *E.g.*, AC ¶ 5.<sup>2</sup> Plaintiffs’ allegations about  
 2 the publication to Plan participants of the investment option expense ratios necessarily are based  
 3 upon, and thus incorporate by reference, the disclosures that participants received regarding the  
 4 fees associated with the Plan. *See Knievel*, 393 F.3d at 1076 (extending “‘incorporation by  
 5 reference’ doctrine to situations in which the plaintiff’s claim depends on the contents of a  
 6 document”). And because Plaintiffs and other Plan participants received these fee disclosures, the  
 7 authenticity of these documents is not reasonably subject to dispute. For these reasons, these  
 8 documents are judicially noticeable. *See Lorenz*, 241 F. Supp. 3d at 1012 (taking judicial notice  
 9 of participant fee disclosure notices); *Davis*, 691 F.3d at 1159 (affirming judicial notice of fee  
 10 disclosure and other disclosures on a motion to dismiss).

### 11 **III. CONCLUSION**

12 For the foregoing reasons, the Court should take judicial notice of Exhibits C through MM  
 13 of the Edwards Declaration.

14  
 15 Dated: November 8, 2017

O’MELVENY & MYERS LLP

16  
 17 By: /s/ Randall W. Edwards

18 Randall W. Edwards

19 Attorneys for Defendants

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 25 <sup>2</sup> *See also, e.g.*, AC ¶ 55 (alleging fees are determined by the fund options selected and  
 26 maintained in the Plan); ¶ 199 (alleging unreported additional fees); ¶¶ 115–116, 171–173, 196–  
 27 197 (alleging that the investment options offered in the Plan had investment management  
 28 expenses greater than alternatives); ¶ 168 (alleging “a mire of unnecessary and undisclosed  
 expenses through excessive fund layering”); ¶¶ 139–44 (alleging the Plan invests in share classes  
 of the LifePath funds and US Debt Index Funds with higher expenses than other classes of the  
 same funds); ¶ 195 (alleging that BlackRock, Inc. offers options with lower fees to non-  
 BlackRock retirement plans).