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8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN FRANCISCO DIVISION**

11 Charles Baird and Lauren Slayton, as  
12 individuals, and on behalf of all others  
similarly situated, and on behalf of the  
BlackRock Retirement Savings Plan,

13 Plaintiffs,

14 vs.  
15

16 BlackRock Institutional Trust Company,  
N.A.; BlackRock, Inc.; The BlackRock, Inc.  
Retirement Committee; The Investment  
17 Committee of the Retirement Committee;  
Catherine Bolz, Chip Castille, Paige Dickow,  
18 Daniel A. Dunay, Jeffrey A. Smith; Anne  
Ackerley, Amy Engel, Nancy Everett, Joseph  
19 Feliciani Jr., Ann Marie Petach, Michael  
Fredericks, Corin Frost, Daniel Gamba, Kevin  
20 Holt, Chris Jones, Philippe Matsumoto, John  
Perlowski, Andy Phillips, Kurt Schansinger,  
21 and Tom Skrobe,

22 Defendants.  
23

**PLAINTIFFS' MEMORANDUM IN  
OPPOSITION TO DEFENDANTS'  
REQUEST FOR JUDICIAL NOTICE**

Case No: 4:17-cv-01892-HSG

24  
25 Plaintiffs Charles Baird and Lauren Slayton ("Plaintiffs"), respectfully request that the Court  
26 deny Defendants'<sup>1</sup> request to take judicial notice of Exhibits M through MM, attached to the

27  
28 <sup>1</sup> BlackRock Institutional Trust Company, N.A.; BlackRock, Inc.; The BlackRock, Inc. Retirement  
Committee; The Investment Committee of the Retirement Committee; Catherine Bolz, Chip Castille,  
Case No: 17-cv-1892-HSG: PLAINTIFFS' OPPOSITION TO DEFENDANTS' REQUEST FOR JUDICIAL NOTICE

1 Declaration of Randall W. Edwards (the “Edwards Declaration,” ECF No. 79-1) in Support of  
2 Defendants’ Motion to Dismiss Plaintiffs’ Amended Class Action Complaint or in the Alternative,  
3 For Summary Judgment (the “MTD,” ECF No. 79). For the reasons set forth herein, M through MM  
4 to the Edwards Declaration do not meet the standards set forth in this Circuit for judicial notice to be  
5 taken, and as such, the Request for Judicial Notice<sup>2</sup> in Support of Defendants’ Motion to Dismiss  
6 (“RJN,” ECF No. 80) should be denied as to those documents. Further, with respect to Exhibits C  
7 through F (Form 5500 filings with the Department of Labor) and G through L (fund prospectuses),  
8 Plaintiffs do not object to the Court taking judicial notice of the *existence* of these documents, but as  
9 explained below, Plaintiffs do object to judicial notice of the truth of the facts contained within those  
10 documents.  
11

### 12 **I. Legal Standard**

13  
14 Judicial notice is an explicitly limited doctrine that allows courts to take judicial notice of  
15 adjudicative facts that are “not subject to reasonable dispute.” *United States v. Ritchie*, 342 F.3d 903,  
16 908-09 (9th Cir. 2003) (citing Fed. R. Evid. 201(b)). Facts are indisputable, and thus subject to  
17 judicial notice, only if they are either: “(1) generally known within the trial court’s territorial  
18 jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot  
19 reasonably be questioned.” *Lorenz v. Safeway, Inc.*, 241 F. Supp. 3d 1005, 1012 (N.D. Cal. 2017);  
20 *Hsu v. Puma Biotechnology, Inc.*, 213 F. Supp. 3d 1275, 1280 (C.D. Cal. 2016); Fed. R. Evid. 201.  
21 The Court may also “consider materials incorporated into the complaint,” where “the complaint  
22 necessarily relies upon a document or the contents of the document are alleged in a complaint, the  
23

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24 Paige Dickow, Daniel A. Dunay, Jeffrey A. Smith; Anne Ackerley, Amy Engel, Nancy Everett,  
25 Joseph Feliciani Jr., Ann Marie Petach, Michael Fredericks, Corin Frost, Daniel Gamba, Kevin Holt,  
26 Chris Jones, Philippe Matsumoto, John Perlowski, Andy Phillips, Kurt Schansinger, and Tom Skrobe  
(collectively, “BlackRock” or “Defendants”).

27 <sup>2</sup> Defendants only request judicial notice for Exhibits C through MM attached to the Declaration of  
28 Randall W. Edwards. They do not request judicial notice for Exhibits A and B. In the event  
Defendants intended to request judicial notice for Exhibits A and B, they must offer the basis of such  
request and Plaintiffs will respond accordingly.

1 document's authenticity is not in question and there are no disputed issues as to the document's  
2 relevance.” *Lorenz*, 241 F. Supp 3d at 1012. *See also United States v. Corinthian Colls.*, 655 F.3d  
3 984, 998–99 (9th Cir. 2011); *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (same).

## 4 **II. Argument**

5 Courts may take judicial notice of matters in the public record, but not those which may be  
6 subject to reasonable dispute. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).  
7 Applying this standard, a court in this district recently found “that defendants’ arguments challenge  
8 the facts of plaintiffs’ complaint, thus they are better suited for summary judgment. Because the  
9 Court declines to take “judicial notice” of the extensive plan documentation both parties provides,  
10 the Court limits its review to whether the facts alleged in the complaint, when taken as true, survive  
11 the plausibility standard on a motion to dismiss.” *See Johnson v. Fujitsu Tech. and Bus. of Am., Inc.*,  
12 250 F. Supp. 3d 460, 464 (N.D. Cal. 2017) (refusing to take judicial notice of extensive plan  
13 documents provided by the parties, and limited its review to the facts alleged in the complaint).<sup>3</sup>  
14

### 15 **1. Exhibits C - F (DOL Form 5500 Filings) and Exhibits G - L (Fund Prospectuses)**

16 Plaintiffs do not object to the Court taking judicial notice of the *existence* of these  
17 governmental filing, but the facts contained inside these documents are disputed and therefore not  
18 subject to judicial notice. *Lee*, 250 F.3d at 689 (holding a court may take judicial notice of an  
19 opinion written by another court to acknowledge its existence, but District Court erred in taking  
20 judicial notice of the disputed facts contained therein); *see also Patel v. Parnes*, 253 F.R.D.531, 546  
21 (C.D. Cal 2008) (taking notice of the content of SEC Forms 4, but not the truth of the content)  
22 (collecting cases holding same).  
23

24 Here, it is even clearer that the Court should not take notice of the contents of the  
25 governmental filings because Defendants themselves dispute the truth of some information  
26 contained in these documents. For example, even though Defendants rely on *certain* statements  
27

28 <sup>3</sup> Moreover, because discovery is ongoing, the Court should defer judgment until discovery is completed. *See Plaintiffs’ Opposition to the MTD/Rule 56(d)*.

1 from the Form 5500 filings, they disavow other statements in these documents as “errors” (MTD at  
2 10) by attaching two Declarations to their Motion to Dismiss. *See, e.g.* Declaration of Jason Herman  
3 (ECF No.79-17) at ¶¶3-6; Declaration of Ryan Henige (ECF No. 79-18) at ¶3 (claiming that the  
4 statements in the Form 5500s which contradict Defendants’ view of the facts are “errors”).  
5 Defendants attempt to pick and choose which statements within their governmental filings are true  
6 and which are “errors” demonstrates why courts routinely decline to take judicial notice of the  
7 contents within governmental filings. *See, e.g. Patel v. Parnes*, 253 F.R.D. at 546; *Corinthian Colls.*,  
8 655 F.3d at 999; *In re Energy Recovery Inc. Sec. Litig.*, No. 15-CV-00265-EMC, 2016 WL 324150,  
9 at \*3 (N.D. Cal. Jan. 27, 2016); *Rollins v. Dignity Health*, 19 F. Supp. 3d 909, 912 n.2 (N.D. Cal.  
10 2013); *In re Am. Apparel, Inc. S’holder Litig.*, 855 F.Supp.2d 1043, 1064 (C.D.Cal.2012); *In re Wet*  
11 *Seal, Inc. Secs. Litig.*, 518 F.Supp.2d 1148,1157 (C.D. Cal. 2007).

## 12 2. Exhibits M-V and Z-MM

13 Exhibits M-V and Z-MM cannot be judicially noticed because they fail to meet the  
14 requirements set forth in this Court’s precedent. First, only three of the twenty four documents are  
15 relied upon and incorporated by reference into the Amended Complaint and thus the unincorporated  
16 documents cannot be judicially noticed on that basis alone. *See, e.g. Duguid v. Facebook, Inc.*, No.  
17 15-CV-00985-JST, 2016 WL 1169365, at \*1 (N.D. Cal. Mar. 24, 2016) (refusing to take judicial  
18 notice of documents in part because they were not incorporated by reference in plaintiff’s complaint,  
19 which neither necessarily relied on them nor alleged their contents); *Colodney v. Cty. of Riverside*,  
20 No. EDCV 13-00427-VAP (SPX), 2013 WL 12200649, at \*2 (C.D. Cal. Aug. 16, 2013), *aff’d*, 651  
21 F. App’x 609 (9th Cir. 2016) (court declined to take judicial notice of documents in part because  
22 they were not incorporated by reference in the complaint).

23 Defendants attempt to avoid this problem by asserting that “Plaintiffs’ allegations regarding  
24 the management of the Plan, including the fees and expenses associated with the Plan, *necessarily*  
25 reference and incorporate” Exhibits M-V and Z-MM. RJN at 6 (emphasis added). However, they do  
26 not cite any legal authority to support this position. Indeed, in Defendants’ view, allegations of  
27 ERISA fiduciary breach would always incorporate any document that a defendant believes touches  
28 upon those issues. This would be true even when the plaintiff has never seen such documents before

1 discovery and have not had an opportunity to obtain other evidence that contradicts a single cherry-  
2 picked document by the defendant, which is the case here.

3         Second, unlike in *Lorenz* (Defendants’ primary authority for judicial notice of Exhibits M-V  
4 and Z-M), Plaintiffs here **do question** the authenticity of these documents because they are not  
5 publicly available and none have been authenticated by any witness with knowledge of the  
6 circumstances of their creation or maintenance. Again, without legal authority, Defendants argue  
7 that because Exhibits M-V and Z-MM have been produced in discovery,<sup>4</sup> their authenticity “cannot  
8 be reasonably disputed.” RJN at 6. Defendants’ lack of legal authority is not surprising given that, if  
9 taken to its logical end, Defendants’ position means that documents produced in discovery never  
10 need to be authenticated. In reality, because Plaintiffs question the authenticity of these documents,  
11 the Court cannot take judicial notice of them. *Fitzhenry-Russell v. Coca-Cola Co.*, No. 5:17-CV-  
12 00603-EJD, 2017 WL 4680073, at \*1 n.1 (N.D. Cal. Oct. 18, 2017) (denying request for judicial  
13 notice because defendant did not provide evidence authenticating the subject of the request); *Glassey*  
14 *v. Microsemi Inc.*, No. C 14-03629 WHA, 2014 WL 7387161, at \*2 (N.D. Cal. Dec. 29, 2014), *aff’d*  
15 *sub nom. Glassey v. Microsemi, Inc.*, 636 F. App’x 433 (9th Cir. 2016) (plaintiffs’ requests for  
16 judicial notice of certain documents printed from the internet was denied because they were not  
17 properly authenticated); *Barney Ng v. Wells Fargo Foothill LLC*, No. CV 12-8942 MMM (AJWX),  
18 2013 WL 12084726, at \*3 (C.D. Cal. July 30, 2013), *aff’d sub nom. Ng v. Wells Fargo Foothill,*  
19 *LLC*, No. CV 12-8942-R, 2016 WL 6661339 (C.D. Cal. Mar. 28, 2016) (declining to take judicial  
20 notice or consider incorporation by reference of a credit agreement, because plaintiff argued he was  
21 not a party to such agreement and had the right to do discovery to verify its authenticity).

22         Moreover, several of the documents appear to be materials for BlackRock customers. *See*  
23 Exhibit Z-FF (attaching seven annual versions of a document titled “16 Things You Should Know:

24 \_\_\_\_\_  
25 <sup>4</sup> Defendants’ brief argues that the authenticity of Exhibits M-V and Z-MM “cannot be reasonably  
26 disputed—they have all been disclosed in response to Plaintiff Baird’s request under 29 U.S.C. §  
27 1024(b) and produced in discovery” (RJN at 6). However, Exhibits M-V and Z-MM were **not all**  
28 **disclosed** in response to Baird’s 29 U.S.C. § 1024(b) request as Defendants’ represent. In reality, all  
these documents were only produced through discovery. Accordingly the disclosure pursuant to 29  
U.S.C. § 1024(b) is not a valid basis for establishing the authenticity of all the documents that  
Defendants attempt to refer to as “plan-related.” *Id.* at 5-6.

1 Information About BTC” (“16 Things”), dated 2011 to 2017). All of these documents are self-  
2 created, and courts generally find that self-created documents do not qualify for judicial notice. This  
3 principal was recently explained by another court in this circuit. *See SolarCity Corp. v. Salt River*  
4 *Project Agric. Improvement*, No. CV-15-00374-PHX-DLR, 2015 WL 6503439, at \*4 (D. Ariz. Oct.  
5 27, 2015), *appeal dismissed sub nom SolarCity Corp. v. Salt River Project Agric. Improvement &*  
6 *Power Dist.*, 859 F.3d 720 (9th Cir. 2017). In *SolarCity*, the defendants sought judicial notice of  
7 “three self-created documents.” *Id.* at \*4. However, because these documents were “prepared by the  
8 [defendant], and because [the plaintiff] challenge[d] their content,” the court could not conclude they  
9 were beyond reasonable dispute, and declined to take judicial notice of them. *Id.* The court found  
10 that the documents in question lacked the “high degree of indisputability” required pursuant to Rule  
11 201, and “taking notice of the documents for the purposes suggested by the [defendant] would  
12 require the Court to engage in evidentiary and factual analysis inappropriate at this stage.” *Id.*

13 Furthermore, Exhibits GG through MM are seven “plan-related documents” entitled  
14 “Managing ERISA Assets. A Comprehensive Guide to ERISA Exemptions Used by BlackRock  
15 Institutional Trust Co., N.A.”, dated 2011 to 2017. Again, these documents are self-created by BTC,  
16 and purport to explain how BTC complies with ERISA when managing assets of clients who are  
17 subject to ERISA, including the prohibited transaction exemptions that BTC relies upon. Like  
18 Exhibits Z through FF, these self-created documents fail to meet the standards for judicial notice  
19 because they have not been authenticated and were not incorporated by reference into the Complaint.  
20 Moreover, Exhibits GG through MM are particularly inappropriate for judicial notice because they  
21 purport to show the various defenses to ERISA’s prohibited transaction rules of which BTC seeks to  
22 avail itself. As such, the truth of the contents of these documents is very much in dispute and not  
23 subject to judicial notice. *Lee*, 250 F.3d at 689 (holding a court may take judicial notice of an  
24 opinion written by another court to acknowledge its existence, but district court erred in taking  
25 judicial notice of the disputed facts contained therein).

1 In short, Exhibits M-V and Z-MM<sup>5</sup> cannot be properly judicially noticed because the  
2 authenticity of all of these documents is in question and because 21 of the 24 documents are not  
3 incorporated by reference into, nor relied upon in the Amended Complaint.

### 4 **3. Exhibits W-Y (Participant Fee Disclosures)**

5 Exhibits W through Y are each titled “Participant Disclosure of Plan and Investment Related  
6 Information,” and are dated August 20, 2103, October 13, 2016, and March 17, 2017, respectively.  
7 Not one of these documents is referenced in the Amended Complaint, much less incorporated into  
8 the pleading. Nor does the Complaint rely in any way on these documents. Moreover, Plaintiffs  
9 question the authenticity of these documents because they are not publicly available nor have they  
10 been authenticated by any witness with knowledge of the circumstances of their creation or  
11 maintenance. Accordingly, these documents are not proper for judicial notice. *Corinthian Colleges*,  
12 655 F.3d at 999; *Marder*, 450 F.3d at 448; *Lee*, 250 F.3d at 688.

13 Regardless, these exhibits are of no moment to the Court’s determination of the MTD;  
14 Defendants offer them to support their factual contention that the “fee disclosures to participants  
15 reflect that [the funds at issue] bear no *investment management fees*.” MTD at 9 (emphasis added).  
16 Yet Plaintiffs allege that most of the assortment of fees borne by Plan participants are *hidden*, and  
17 thus not disclosed. Defendants’ statement regarding the disclosure of one type of fee – investment  
18 management fees – does not refute the allegations of the Complaint but instead improperly asks the  
19 Court to accept Defendants’ untested version of the facts. Just as the *Johnson* court declined to make  
20 a factual finding in an ERISA case at the motion to dismiss stage and therefore declined to take  
21 judicial notice of extrinsic documents, this Court should as well. 250 F. Supp. 3d at 465.

### 22 **IV. CONCLUSION**

23 For all of the foregoing reasons, Plaintiffs Charles Baird and Lauren Slayton respectfully  
24 request this Court deny Defendants’ Request for Judicial Notice as to Exhibits M through MM and  
25 to requests this Court to take judicial notice of the *existence* of, but not the truth of the facts  
26

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27 <sup>5</sup> Most of these documents are also stamped “proprietary” indicating that Defendants view them as  
28 their own commercial work product, which renders these documents even less appropriate for  
judicial notice. *See* Exhibits M-T, Z-FF, II-MM.

1 contained in, Exhibits C through L.  
2

3 Dated: December 8, 2017

Respectfully submitted,

4  
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