BRIAN D. BOYLE (S.B. #126576)
bboyle@omm.com
RANDALL W. EDWARDS (S.B. #179053)
redwards@omm.com
MEAGHAN VERGOW (admitted *pro hac vice*)
mvergow@omm.com
O'MELVENY & MYERS LLP
Two Embarcadero Center, 28th Floor
San Francisco, California 94111-3823
Telephone: +1 415 984 8700
Facsimile: +1 415 984 8701

Attorneys for Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Charles Baird and Lauren Slayton, individually, and on behalf of all others similarly situated, and on behalf of the BlackRock Retirement Savings Plan,

Plaintiff,

v.

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

Defendants.

Case No. 17-cv-01892-HSG

NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' AMENDED CLASS ACTION COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

[Request for Judicial Notice and Declarations of Randall W. Edwards, Jason Herman, Ryan Henige, Matthew Soifer, and Jason Boultbee Filed Concurrently Herewith]

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

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 11, 2018, at 2:00 p.m., or as soon thereafter as the matter may be heard, in Courtroom 2 of the United States District Court for the Northern District of California, located at 1301 Clay Street, Oakland, California, 94612, before the Honorable Haywood S. Gilliam, Jr., defendants BlackRock Institutional Trust Company, N.A.; BlackRock, Inc.; The BlackRock, Inc. Retirement Committee; The Investment Committee of the Retirement Committee; Catherine Bolz, Chip Castille, Paige Dickow, Daniel A. Dunay, Jeffrey A. Smith, Anne Ackerley, Amy Engel, Nancy Everett, Joseph Feliciani Jr., Ann Marie Petach, Michael Fredericks, Corin Frost, Daniel Gamba, Kevin Holt, Chris Jones, Philippe Matsumoto, John Perlowski, Andy Phillips, Kurt Schansinger, and Tom Skrobe (together, "BlackRock") will and hereby do move pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for dismissal of the Amended Class Action Complaint filed by plaintiffs Charles Baird and Lauren Slayton. In the alternative BlackRock moves for summary judgment pursuant to Federal Rule of Civil Procedure 56.

The motion is made on the grounds that plaintiffs have failed to plausibly allege that defendants breached any fiduciary duties or caused the prohibited transaction violations they allege, and that plaintiffs lack Article III standing to bring claims regarding funds in which they never invested.

The motion is made pursuant to the stipulated Order regarding timing entered by the Court on October 20, 2017 (ECF No. 78) and is based on this notice of motion and motion, the accompanying memorandum of points and authorities, the concurrently filed Request for Judicial Notice, and the declarations of Randall W. Edwards, Jason Herman, Ryan Henige, Matthew Soifer, and Jason Boultbee with exhibits thereto, all records and pleadings on file with the Court, all further evidence and oral argument that may be presented at the hearing on this motion, and all other matters as the Court deems proper.

Dated: November 8, 2017

O'MELVENY & MYERS LLP

By: */s/ Randall W. Edwards*
Randall W. Edwards

Attorneys for Defendants

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INTRODUCTION

Plaintiffs say this is a case about "hidden fees." The fees on which they base their claims aren't hidden: ***they do not exist***.

BlackRock, Inc. sponsors a 401(k) plan with extraordinarily low costs of participation. BlackRock itself covers the plan-level recordkeeping expenses that many other plans charge to participants. Participants in the BlackRock Retirement Savings Plan (the "Plan") pay ***no investment management fees at any level*** in connection with the vast majority of the Plan's investment options, the collective trust funds ("CTFs") managed by a BlackRock affiliate. Participants have access to these investment products for virtually nothing, substantially enhancing their ability to grow their retirement savings. The fiduciaries' achievement in making low-cost, high-quality investments available to participants forecloses the inference of fiduciary breach that plaintiffs seek. Plaintiffs do not plausibly allege any violation of the Employee Retirement Income Security Act of 1974 ("ERISA").

Plaintiffs refuse to accept this reality. They insist that the Plan invests in fee-bearing share classes of CTFs that themselves carry "hidden fees," and assert that the Plan fiduciaries disloyally selected the CTFs in order to drive revenue to BlackRock. These assertions are untenable. Early in this action—at the request of plaintiffs and before it even moved to dismiss the original complaint—BlackRock produced the documents setting forth the terms on which the Plan invests in the CTFs. These incorporated documents show that the Plan pays no investment management fees for the CTFs ***at any level*** and that BlackRock is compensated only for securities lending services it provides to the funds according to explicit agreements.

Plaintiffs' contrary allegations are built on a handful of public filings that state the incorrect numeric identifier for a CTF in which the Plan was invested, or that state that the Plan was invested in both a fee-bearing and a fee-free version of certain CTFs. These statements are controverted by the agreements by which the Plan invests in the CTFs, the Plan's fee disclosures, and the Plan's annual reports (which correctly recite the names of the Plan's investments). There can be no genuine dispute about the investment options in which the Plan was actually invested:

records maintained by the Plan's third-party recordkeeper are attached to this motion, confirming that the Plan ***was never invested in CTF share classes with investment management fees***.

The other allegations from which plaintiffs try to draw an inference of fiduciary breach do not permit that leap, either. Plaintiffs do not plausibly impugn the performance of the funds they target (much less the few funds which plaintiffs have standing to challenge). And plaintiffs offer only hindsight-based critiques in any event, which do not draw the fiduciaries' monitoring processes into question, as courts consistently hold in dismissing similar claims. Plaintiffs assert that the Low Duration Bond Fund (in which neither of them was ever invested) was inferior to one other publicly available fund, but the existence of a single allegedly better alternative never establishes a fiduciary breach; here, the comparison is literally meaningless because the alternative plaintiffs highlight is a different type of fund altogether. Plaintiffs' challenge to the Global Allocation Fund is likewise baseless. Plaintiffs allege that two lower-cost alternatives were available, but the allegation is again legally insufficient as the fiduciaries were not bound to pick the cheapest possible option for this strategy. Notably, plaintiffs have now abandoned the fund comparators offered in their original complaint, apparently conceding that those alternatives were ***more*** expensive than the BlackRock Global Allocation Fund (as BlackRock argued in seeking dismissal).

Plaintiffs also assert that the Plan's inclusion of BlackRock-sponsored investment products violated ERISA's prohibited transaction provisions. Yet every fund in which plaintiffs invested was added more than six years before this lawsuit was filed, and the feature plaintiffs now challenge—the funds' affiliation with BlackRock—was always openly disclosed. Plaintiffs' claims are accordingly untimely both under ERISA's three-year statute of limitations (barring claims brought more than three years after a plaintiff acquired actual knowledge of them) and under ERISA's six-year statute of repose (barring claims brought more than six years after the challenged fiduciary decision occurred). Even if these claims were not time-barred, they still would have to be dismissed, as the Amended Complaint establishes that the Plan's inclusion of these offerings is expressly exempted from the prohibited transaction provisions.

Confronted with the deficiencies in their claims on behalf of the Plan, plaintiffs now add

an entirely new claim asserted on behalf of a different (and substantially larger) putative class: plaintiffs allege that BlackRock Institutional Trust Company ("BTC"), the trustee and manager of the Plan's CTFs, is a fiduciary with respect to its compensation for the securities lending services that it provides to all of the retirement plans that invest in the CTFs. But the incorporated documents refute this audacious claim, too. The agreements by which the Plan invests in the CTFs ***explicitly set forth*** the terms on which the services are provided, ***including*** the compensation BTC is to receive. That means the Plan fiduciaries—not BTC—bear fiduciary responsibility for the appointment of BTC to serve as lending agent, and for the compensation itself. An express agreement as to those terms must be inferred with respect to the other investing plans. The CTF Class claims fail accordingly.

The new allegations confirm what was already apparent from the initial complaint: this lawyer-manufactured lawsuit amounts to nothing more than an attempt by a plaintiffs' firm to ride the wave of similar challenges to 401(k) plans across the financial services industry. Here, though, plaintiffs have no credible complaint about the Plan because of the extraordinary fee concessions the Plan enjoyed. The Amended Complaint should be dismissed with prejudice.

BACKGROUND AND FACTUAL ALLEGATIONS

The BlackRock Retirement Savings Plan is a defined contribution plan that BlackRock sponsors to help its employees save for retirement. The Plan is funded by salary deferments and contributions from BlackRock. Amended Complaint ("AC") (ECF. No. 75) ¶ 50. While most plans pay operational costs out of plan assets (as ERISA permits), BlackRock bears virtually all of the Plan's costs itself: most of the Plan's assets are invested in CTFs for which BlackRock's investment management fees are waived (*see infra* at 8), and BlackRock itself pays for the Plan's administrative services, *see* Declaration of Randall W. Edwards in Support of BlackRock's Motion to Dismiss ("Edwards Decl."), Ex. E (2015 RSP Form 5500), at BAIRD_0000335.[1] These BlackRock-assumed expenses substantially lower the cost, for employees, of participation in the Plan.

[1] The Court may consider these and other materials on this motion, as explained more fully in BlackRock's Request for Judicial Notice, filed concurrently herewith. *See infra* at 6.

The Plan's administrator is the BlackRock, Inc. Retirement Committee. AC ¶ 39. The BlackRock, Inc. Investment Committee, a subcommittee of the Retirement Committee, is responsible for selecting and monitoring the investment options that are made available to participants for the investment of their individual accounts. *Id.* ¶¶ 46-48. Approximately 9,700 current and former employees participate in the Plan, which had roughly $1.56 billion in assets as of 2015. *Id.* ¶ 56.

During the class period, the Plan lineup included more than two dozen investment options, some managed by BlackRock affiliates and others managed by independent asset managers. The options have consistently reflected a broad range of asset classes, risk profiles, and investment strategies. *See id.* ¶ 88; Edwards Decl., Ex. D (2011 RSP Form 5500), at BAIRD_0039672; *id.* 2015 RSP Form 5500, at BAIRD_0000343. The vast majority of those options are the BTC-managed CTFs. *See, e.g., id.* 2015 RSP Form 5500, at BAIRD_0000343. The Plan currently offers one mutual fund managed by a BlackRock affiliate, the Low Duration Bond Fund. *Id.* Ex. Y ("Mar. 2017 Participant Fee Disclosure").[2] The Plan also offers several mutual funds managed by unaffiliated third parties, and over time has shifted certain investment strategies from mutual fund vehicles to the investment management fee-free CTFs as those alternatives became available. *See, e.g., id.* 2015 RSP Form 5500, at BAIRD_0000343; *compare id.* Mar. 2017 Participant Fee Disclosure, at BAIRD_0000746-47, *with id.* 2011 RSP Form 5500, at BAIRD_0039672.

The Investment Committee elected, for the most part, CTFs that participate in a securities lending program as a way for a fund to enhance participant returns. Under this program, the fund's securities are loaned to institutional borrowers for a fee, and the cash collateral posted by the borrowers is also then invested for the benefit of participants. *See id.* Ex. Z (Aug. 2011 *16 Things You Should Know: Information About BTC* ("16 Things")), at BAIRD_0001580. The Plan's agreements with BTC authorize the Plan's investment in certain "lending" funds, and

[2] Mutual funds are pooled investment vehicles that are managed by registered investment advisers and subject to the regulatory supervision of the Securities and Exchange Commission ("SEC"); collective trusts are also pooled investment vehicles, but they are administered by a bank or trust company and are not regulated by the SEC. *E.g.*, 15 U.S.C. § 80a-3(a), (c)(11); *see* AC at 1 n.1.

provide that BTC will receive as compensation for its services as lending agent half of the additional income generated through securities lending, along with fees from the management of the cash collateral. *Id.* Ex. T (Investment Management Agreement ("IMA")), at BAIRD_0000348 ("[T]he Manager is authorized … [t]o lend, including through a collective investment fund, any securities"); *id.* Ex. S (Oct. 2016 Guideline and Fee Agreements ("GLFA")), at BAIRD_0000426 (setting securities lending fee at 50% of lending revenue, and specifying short-term investment fund that will hold cash collateral); *id.* Aug. 2011 "16 Things," at BAIRD_0001580-85 (same).[3] The incorporated documents reflect that securities lending income is a relatively modest proportion of fund assets. *See, e.g., id.* Ex. V ("2015 Audited Financial Statements" (2015 Russell 2000 Index Fund financial statement)), at BAIRD_0025680-97. BTC also manages CTFs that do not engage in securities lending.

Plaintiff Charles Baird is a former BlackRock employee who continues to participate in the Plan. AC ¶¶ 12, 14. He filed this putative class action on April 5, 2017, alleging that the Plan's fiduciaries breached their fiduciary duties of loyalty and prudence in selecting and monitoring investment options managed by BlackRock affiliates in the Plan's investment lineup. ECF No. 1. Defendants moved to dismiss the complaint in its entirety and concurrently filed a request for judicial notice of Plan documents and publicly available investment materials. ECF No. 35, 36. On October 18, 2017, while that motion was pending, plaintiffs obtained leave to file an Amended Complaint reiterating the allegations in the original complaint, and adding as a plaintiff Lauren Slayton, another former employee and current Plan participant. AC ¶¶ 19, 21. The Amended Complaint also includes a new challenge to BTC's securities lending program. *Id.* ¶¶ 244-80.

LEGAL STANDARD

Motions to dismiss for failure to state a claim are "important mechanism[s] for weeding out meritless [ERISA] claims." *Fifth-Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014). To survive a motion to dismiss, plaintiffs must "allege enough facts to state a claim to

[3] These particular documents are cited as examples; these substantive terms were memorialized in the agreements throughout the putative class period. *See* Edwards Decl., Exs. Z-FF.

relief that is plausible on its face." *Turner v. City & Cty. of S.F.*, 788 F.3d 1206, 1210 (9th Cir. 2015) (quoting *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008)). The Court need not accept conclusory allegations, unreasonable inferences, or legal conclusions. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (a "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do" (alteration in original)). Plausibility requires "more than a sheer possibility that a defendant has acted unlawfully." *Turner*, 788 F.3d at 1210 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

When resolving "a Rule 12(b)(6) motion to dismiss," the Court "must consider the complaint in its entirety, as well as … documents incorporated … by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 322 (2007); *see also Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) ("the incorporation by reference" doctrine extends to situations "in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint"). Here, as explained more fully in BlackRock's Request for Judicial Notice, documents relating to the Plan may be considered in connection with BlackRock's arguments under Fed. R. Civ. P. 12(b)(6) because they are incorporated into, and centrally related to, plaintiffs' allegations about the Plan's investment options and expenses. *See Lorenz v. Safeway, Inc.*, No. 16-cv-04903-JST, 2017 WL 952883, at *3 (N.D. Cal. Mar. 13, 2017) (taking judicial notice of plan document, summary plan descriptions, Form 5500 filings submitted to the Department of Labor, participant fee disclosure notices, and a master services agreement, noting that "[c]ourts routinely take judicial notice of ERISA plan documents like those").

When the Court considers "documents subject to judicial notice … on a motion to dismiss," it "does not convert a motion to dismiss to one for summary judgment." *In re Zynga Inc. Sec. Litig.*, No. C 12-04007 JSW, 2014 WL 721948, at *2 (N.D. Cal. Feb. 25, 2014). Nevertheless, the Court may convert a dismissal motion to one for summary judgment if it

considers "matters outside the pleading [that] are presented to and not excluded by the court." Fed. R. Civ. P. 12(c); *see also Sulyma v. Intel Corp. Inv. Policy Comm.*, No. 15-cv-04977 NC, 2016 WL 7740523, at *2 (N.D. Cal. Aug. 18, 2016) (converting motion to dismiss ERISA claims into summary judgment motion). Plaintiffs have full notice of the documents that foreclose their claims, such that summary judgment may be granted against them if the Court determines not to resolve their claims on the pleadings. *See, e.g.*, *Densberger v. Sutter Home Winery Long Term Disability Benefits Plan*, No. C 99-0625 CRB, 1999 WL 592198, at *5 (N.D. Cal. Aug. 2, 1999) (granting summary judgment where "plaintiff has not 'made clear' what additional information he could acquire through further discovery" that could overcome defenses).

ARGUMENT

I. THE COMPLAINT DOES NOT STATE A CLAIM FOR FIDUCIARY BREACH BY THE PLAN'S FIDUCIARIES

ERISA's fiduciaries must act loyally and prudently "under the circumstances then prevailing." 29 U.S.C. § 1104(a)(1)(A), (B). ERISA's legal standard for fiduciary prudence is process-focused: it examines how a fiduciary "arriv[ed] at an investment decision," not on results. *In re Unisys Savs. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996).[4] The Amended Complaint permits no inference of a deficient or disloyal fiduciary process with respect to the Plan's fees or the performance of its investment options. *See, e.g., White v. Chevron Corp.*, No. 16-cv-0793-PJH, 2016 WL 4502808, at *19 (N.D. Cal. Aug. 29, 2016) ("*White I*") (dismissing claim where "[t]he facts as pled do not raise a plausible inference that defendants breached their fiduciary duties"); *In re Disney ERISA Litig.*, No. CV 16-2251 PA (JCx), 2016 WL 8192945, at *4 (C.D. Cal. Nov. 14, 2016) (dismissing claim where plaintiffs "alleged no facts plausibly suggesting any sort of self-dealing or other disloyal conduct by the [fiduciaries]").

[4] *See also, e.g., Kanawi v. Bechtel Corp.*, 590 F. Supp. 2d 1213, 1221, 1229-30 (N.D. Cal. 2008) (key to prudence is "the thoroughness of the fiduciary's decision making process"); *PBGC ex rel. St. Vincent Catholic Med. Ctrs., v. Morgan Stanley Inv. Mgmt., Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) (fiduciaries are judged "upon information available … at the time," not "hindsight" (quotation omitted)).

Significantly, ERISA explicitly permits financial services companies to make their products available for investment in their employees' retirement accounts—even when they actually charge fees for doing so, *see* 29 U.S.C. § 1108—because Congress recognized 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." Notice of Proposed Rulemaking and Withdrawal of Proposed Rule, Participant Directed Individual Account Plans, 56 Fed. Reg. 10,724, 10,730 (Mar. 13, 1991); H.R. Rep. No. 93-1280, at 475 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5094 (same); *see also, e.g.*, Class Exemption Involving Mutual Fund In-House Plans Requested by the Investment Company Institute, 42 Fed. Reg. 18,734, 18,734-35 (Apr. 8, 1977) ("PTE 77-3"). As Plaintiffs' original complaint noted, BlackRock is the largest asset manager in the world, attracting trillions of dollars in investment. Compl. (ECF No. 1) ¶ 5. The Plan fiduciaries obtained these high-quality funds for the Plan on extraordinarily favorable terms. Plaintiffs do not plead any facts remotely establishing that a prudent, loyal fiduciary "could not have concluded" that the BlackRock-managed funds, including the investment management fee-free CTFs, were reasonable options for the Plan. *Dudenhoeffer*, 134 S. Ct. at 2473. Their claim thus fails.

A. Plaintiffs' Claims With Respect to the CTF Investments are Baseless

1. The CTFs Pay No Investment Management Fees at Any Level

As with the prior complaint, plaintiffs' primary challenge to the fiduciaries' prudence and loyalty is based on alleged "hidden" and "excessive" fees within the Plan's BTC-managed CTFs, even though judicially noticeable documents that BlackRock produced after the initial complaint was filed irrefutably and unambiguously show that no such hidden fees exist. AC ¶ 91; *see also id.* ¶¶ 100, 147. The Plan enjoyed exceptionally ***favorable*** terms for its investment in the CTFs. Plaintiffs' claims fail accordingly.

Plaintiffs' "hidden" fee theory is contradicted by a slew of judicially noticeable documents. For example, the IMA and GLFAs establish that BTC agreed to waive its investment management fees for the Plan—the CTFs were made available to the Plan participants for "***0 basis points***." Edwards Decl., Oct. 2016 GLFA, at BAIRD_0000425 (investment management

services are provided gross of fees).[5] The Plan's fee disclosures to participants reflect that these options bear no investment management fees. *E.g.*, *id.* Ex. W ("Aug. 2013 Participant Fee Disclosure"), at BAIRD_0000676-77; *id.* Ex. X ("Oct. 2016 Participant Fee Disclosure"), at BAIRD_0000746-47; *id.* Mar. 2017 Participant Fee Disclosure, at BAIRD_0000736-37. The Plan's Form 5500s (annual reports) filed with the Department of Labor ("DOL") name, as Plan investments, CTFs that bear no investment management fees. *Id.* 2015 RSP Form 5500, at BAIRD_0000343; *id.* 2011 RSP Form 5500, at BAIRD_0039637; *id.* Ex. C (2010 RSP Form 5500), at BAIRD_0046140. The audited financial statements for these CTFs reflect that they have no investment management expenses; their expenses (across all investment layers) were limited to administrative expenses paid to third parties, which were capped at 2 basis points (that is, 0.0002%) for most of the class period and are now capped at 1 basis point. *E.g.*, *id.* Ex. U ("2016 F Series Audited Financial Statements"), at BAIRD_0001128-29. BlackRock itself pays all expenses above this cap. *See id.* 2015 Audited Financial Statements, at BAIRD_0028383-84 (listing "[r]eceivable from investment advisor" and "operating expenses borne by BTC"). In short, the Plan totally avoided the investment management fees that other unaffiliated plan fiduciaries freely agree to, in the independent exercise of their judgment, in order to make these CTFs available to their own plans.

Plaintiffs misread the CTF financial statements as allowing the payment of investment management fees in the underlying fund layers. *See, e.g.*, AC ¶ 103. The statements themselves foreclose that reading: they reflect that investment management fees ***are not paid to BlackRock at any level***; the funds incur only third-party administrative expenses. The audited financial statements for the CTFs at every level confirm that the funds incur only these third-party expenses; BlackRock itself ***injects*** assets into the CTFs (or pays third parties directly) when necessary to bring total third-party expenses within the cap. *See, e.g.*, Edwards Decl., 2016 F

[5] *See also* Edwards Decl., Ex. R (Dec. 2015 GLFA), at BAIRD_0000440 (same); *id.* Ex. Q (Apr. 2015 GLFA), at BAIRD_0000411 (same); *id.* Ex. P (Nov. 2014 GLFA), at BAIRD_0000128 (same); *id.* Ex. O (June 2014 GLFA), at BAIRD_0000419 ("investment management fee rate of 0 basis points"); *id.* Ex. N (Jan. 2013 GLFA), at BAIRD_0000405 ("Flat Fee 0 bps"); *id.* Ex. M (Nov. 2010 GLFA), at BAIRD_0000435 (same); *id.* IMA, at BAIRD_0000361 (incorporating the GLFA).

Series Audited Financial Statements, at BAIRD_0000939, 0001128-29; *see also id.* 2015 Audited Financial Statements at BAIRD_0025697-700, BAIRD_0026656-58, BAIRD_0027685-87, BAIRD_0028366-69, BAIRD_0028382-85 (financial statements for all CTF layers in Russell 2000 Alpha Tilts Fund F in 2015).[6] The financial statements further confirm that the only income received by BTC in connection with the CTFs derives from the securities lending services provided for the funds—exactly as BTC's agreements with the Plan provide. *Id.*[7]

Undaunted, plaintiffs insist that the Plan was invested in share classes of the CTFs that pay investment management fees, as opposed to the investment management fee-free "F Class" for those funds. This assertion flatly contradicts the Plan's IMA and GLFAs, which establish that the Plan participates in the F Class of the CTFs, for an investment management fee of "0 basis points." It likewise contradicts the Plan's annual Form 5500s, and the fee disclosures and quarterly statements participants received, which uniformly identify the Plan's investment in the F Class of the subject CTFs. For plaintiffs, it is enough that certain filings, standing alone, may be read to suggest otherwise: (1) while the Plan's Form 5500s correctly identify the Plan's CTF investments by name, plaintiffs point out that the identification number ("EIN") for a different, investment management fee-bearing class is noted on a Form schedule for one fund, and (2) the Plan is identified as a "participating plan" in the Form 5500s for certain investment management fee-bearing CTFs (as well as in the Form 5500s for the fee-free classes of those strategies). AC ¶¶ 139, 143. These easily explained discrepancies in naming conventions cannot tip plaintiffs' Amended Complaint over the plausibility threshold. The fact that these are errors is made obvious by the Plan's governing agreements, fee disclosures, and audited filings. *Supra* at 8-9.

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[6] The example in the text covers every layer of the Russell 2000 Alpha Tilts Fund F featured by plaintiffs in the Amended Complaint (AC ¶¶ 194-95). But the same holds true across every CTF subject to challenge in this action, as confirmed by the financial statements for every layer of the Plan's CTFs, which have been produced to plaintiffs. This exercise is unnecessary because the financial statements for the "top-layer" funds (AC ¶ 195) make clear the absence of investment management fees and the application of the administrative expense cap. The example is included here simply to illustrate that the financial statements for the "top-layer" CTFs (i.e., the "F Class" CTFs in the Plan lineup) really do mean what they say.

[7] The Amended Complaint loosely alleges that BTC used affiliates to provide other services to the CTFs for a fee; the audited financial statements likewise foreclose this allegation.

Plaintiffs are not entitled to proceed on an inference that is contradicted by a careful reading of all incorporated or noticeable materials together.

Nevertheless, if the Court is left with any doubt, BlackRock is tendering with this motion the official records of the Plan's actual investments during the class period, as maintained by the Plan's third-party recordkeeper, as well as declarations explaining the origin of the naming errors on which plaintiffs try to capitalize. Declaration of Jason Boultbee, Ex. A (Plan Investment Holdings Spreadsheet).[8] BlackRock respectfully invites the Court, in the alternative, to grant summary judgment on this issue: the Plan was indisputably invested in classes of the CTFs in the Plan lineup that bore no investment management fees, and thus plaintiffs' claim that the fiduciaries selected the BTC-managed CTFs to increase BlackRock's investment management revenue fails.

2. Plaintiffs' Allegations Relating to the Securities Lending Split Do Not Raise an Inference of an Inadequate Process

Plaintiffs cannot establish that the fiduciaries breached duties when they agreed to the Plan's payment of securities lending compensation in connection with the CTF investments.[9] The Plan paid ***only*** securities lending compensation, whereas other investors generally ***also*** pay an investment management fee; the Plan's superior arrangement for these CTFs cannot remotely be construed as unreasonable. *Cf. Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009) (rejecting excessive fee claim where the challenged funds "were also offered to investors in the

[8] The identification of the Plan as an investor in the other DFE 5500s was a function of the accounting for plans associated with an "omnibus account" for a single recordkeeper, in which every plan in the account is identified as an investor in a fund if any plan is an investor. Declaration of Ryan Henige, ¶ 3. Thus, for example, the Plan is identified as a participating plan in the M Class and S Class for the LifePath Funds (in which it did not invest), as well as the F Class of those strategies (in which it did). Edwards Decl., Exs. F(a) & F(b) (5500s for the LifePath Index 2040 Fund). BlackRock is adopting different identification processes going forward to remove the potential for misinterpretation. The use of the incorrect EINs in the Plan's Form 5500s was human error, and BlackRock is in the process of submitting corrected versions. Declaration of Jason Herman, ¶¶ 3-6.

[9] The Amended Complaint attributes fiduciary responsibility for this compensation to BTC, as part of a putative "class of plans" claim. *See infra* at 23-24. In fact, the Investment Committee was the responsible fiduciary, since it explicitly approved the terms of the Plan's investment in the IMA and GLFAs (and the documents those agreements incorporate). *Supra* at 8-9.

general public, and so the expense ratios necessarily were set against the backdrop of market competition"); *Dupree v. Prudential Ins. Co. of Am.*, No. 99-8337-Civ-JORDAN, 2007 WL 2263892, at *41 (S.D. Fla. Aug. 7, 2007) (holding that fiduciary did not violate ERISA in offering plan participants option of investing in investment account at fee that "unrelated plans' fiduciaries, independent of the [defendant], have determined is reasonable"). Indeed, the CTF investment management fee concession was just one of many—including recordkeeping fee payments, the administrative expense cap, and matching contributions—that the Plan enjoyed from BlackRock. Plaintiffs compare the Plan's agreed 50/50 split of securities lending income with BTC unfavorably to the splits allegedly offered by other asset managers (AC ¶¶ 262-65), or to other BlackRock clients (*id.* ¶¶ 258-60). But plaintiffs allege nothing about the overall economic bargain of which those arrangements are a part: a manager may agree to lower securities lending compensation if its investment management fees are higher, and vice versa. *See Hecker*, 556 F.3d at 586 (explaining that "the total fee," not how it is broken down for various services, "is the critical figure for someone interested in the cost of including a certain investment in her portfolio and the net value of that investment"); *see Young v. G.M. Inv. Mgmt. Corp.*, 325 F. App'x 31, 33 (2d Cir. 2009) (Sotomayor, J.) (affirming dismissal where plaintiff failed to allege fees were "excessive relative to the services rendered" (quotation omitted)). Here, of course, the Plan does not pay any investment management fees at all. Plaintiffs are in essence demanding that BlackRock should have awarded them even higher benefits, which ERISA does not require. *See Loomis v. Exelon Corp.*, 658 F.3d 667, 671 (7th Cir. 2011).

3. Plaintiffs' Allegations of Deficient Performance by Certain CTFs Support No Inference of Breach

Plaintiffs separately attempt to infer a fiduciary breach from the allegation that the LifePath Funds "underperformed" various alternatives, looking backwards over the class period.[10]

[10] Plaintiffs also lack standing to challenge the performance of the LifePath Funds, except for the LifePath 2050 Index Fund in which plaintiff Slayton was invested during the class period. Edwards Decl., Ex. B (Slayton Participant Account Statements). The alleged underperformance of distinct funds in which neither plaintiff was invested can have caused them no constitutionally sufficient injury. *See infra* at 14.

AC ¶ 172. This is an impermissible hindsight critique: it does not support any inference that the Plan fiduciaries, "at the time they engaged in the challenged transactions, [failed to] employ[] the appropriate methods to investigate the merits of the investment." *White I*, 2016 WL 4502808, at *6 (quoting *Tibble v. Edison Int'l*, 729 F.3d 1110, 1136 (9th Cir. 2013) ("*Tibble I*"), *vacated on other grounds*, 135 S. Ct. 1823 (2015)); *see supra* at n. 4. The Court cannot infer deficient fiduciary monitoring even from consistent underperformance over a period of years, much less from the cumulative, backward-looking examination of returns alleged here. After all, "a fiduciary may—and often does—retain investments through a period of underperformance as part of a long-range investment strategy." *Id.* at *17-18 (citing *Jenkins v. Yager*, 444 F.3d 916, 926 (7th Cir. 2006) (no breach of fiduciary duty where fiduciary chose funds based on "long-term growth potential," notwithstanding short term underperformance)). Indeed, it could be ***imprudent*** for fiduciaries to constantly change options based on short-term returns. Thus, even if it were true that the LifePath Funds have not, in retrospect, produced returns matching those of some other cherry-picked offerings over the past six years, that allegation does not support the conclusion that the Investment Committee used imprudent methods to select these funds. *St. Vincent*, 712 F.3d at 721-24 (dismissing claims based on a backward-looking critique of performance).

Plaintiffs' performance comparisons are particularly inapt given that the LifePath Funds offer target date strategies. Target date funds do not follow a single strategy for allocating risk over the life of the funds, which may be as long as 45 years; rather, they vary considerably in their asset allocations and "glide paths." *See* SEC and DOL, Notice of Hearing, Hearing on Target Date Funds and Similar Investment Options, at 1-2 (May 19, 2009), *available at* https://www.sec.gov/rules/other/2009/ic-28725.pdf (target-date or life-cycle funds "allocate their investments among various asset classes and automatically shift that allocation to more conservative investments as a 'target' date approaches. This … 'glide path,' may differ significantly among funds with the same target date."). The returns of target date funds built on passively-managed underlying funds, like the LifePath Funds, will vary simply because of these structural variations—reflecting the manager's fully-disclosed judgment about how to allocate

risk over the life of the fund. Yet plaintiffs offer no critique of the LifePath asset allocations, glide paths, or any other structural features that actually have accounted for the funds' performance. They thus offer no basis to question the Plan fiduciaries' decision to offer participants the option of investing in a target date suite that has attracted, on its merits, billions in dollars in invested retirement assets from independent plan fiduciaries across the country. *See, e.g.* Edwards Decl., 2016 F series Audited Financial Statements, at BAIRD_0000929, 993, 937, 941, 945, 949, 953, 957, 961.

Recently, the District of Minnesota dismissed with prejudice a similar complaint challenging the offering of proprietary target date funds in Wells Fargo's 401(k) plan, on account of deficiencies similar to those here: The plaintiffs could not plausibly allege a fiduciary breach by pointing out performance differences between two different target date funds (nor could they plausibly allege excessive fees merely by comparing the affiliated options' expenses to two alternatives). *Meiners v. Wells Fargo & Co.*, No. 16-3981 (DSD/FLN), 2017 WL 2303968, at *2-4 (D. Minn. May 25, 2017) ("Taken as a whole, the complaint merely supports an inference that Wells Fargo continued to invest in affiliated target date funds when its rate of return was lower than Vanguard, which had a different investment strategy, and that was more expensive than Vanguard and Fidelity funds. These allegations do not give rise to an inference of a breach of fiduciary duty."). Plaintiffs' claims here likewise fail.[11]

B. Plaintiffs Similarly Fail to Plausibly Allege Any Fiduciary Breach in the Selection and Monitoring of the Mutual Fund Options They Attack

The Amended Complaint offers no allegations permitting an inference that the Plan fiduciaries disloyally or imprudently included the Low Duration Bond Fund or Global Allocation Fund in the Plan lineup along with a handful of other, unaffiliated mutual fund options.

Plaintiffs' challenge to the Low Duration Bond Fund fails at the threshold because neither plaintiff ever invested in it, and therefore plaintiffs lack constitutional standing to bring this claim

[11] Plaintiffs also make claims related to the iShares Russell 2000 Index Collective Fund F, but like plaintiffs' fund layering allegations, these claims are founded on faulty premises: while the Plan's 2015 GLFA allowed investment in that fund, the 5500s for the Plan confirm that the Plan did not invest in it. *See* 2015 RSP 5500 at BAIRD_0000316-19.

(which is based on allegations distinct from their other claims). *See, e.g.*, *Bendaoud v. Hodgson*, 578 F. Supp. 2d 257, 264 (D. Mass. 2008) ("[I]f an asset in a defined contribution plan is harmed, the loss is not spread. It is visited entirely on the participant or participants who hold the impaired asset."); *Caltagirone v. N.Y. Cmty. Bancorp, Inc.*, 257 F. App'x 470, 473 (2d Cir. 2007) (holding that the plaintiff lacked standing to challenge shares she never held because she "is not within the group she defines as injured as a result of the alleged fiduciary breaches"); *Jones v. Nutiva, Inc.*, No. 16-cv-00711-HSG, 2016 WL 5210935, at *4-6 (N.D. Cal. Sept. 22, 2016) (Gilliam, J.) (deciding plaintiff's standing to assert putative class claims on motion to dismiss).

The claim is meritless in any event. Plaintiffs allege that the Low Duration Bond Fund was improperly selected because the fund charged higher fees than, and underperformed, an allegedly comparable Vanguard fund. AC ¶¶ 126-35. But merely identifying a single allegedly "better" alternative never permits an inference of fiduciary breach. *See Terraza v. Safeway Inc.*, No. 16-CV-03994-JST, 2017 WL 952896, at *12-13 (N.D. Cal. Mar. 13, 2017) ("[T]hat some other funds might have had even lower [expense] ratios is beside the point," ERISA does not require "fiduciar[ies] to scour the market [for] the cheapest possible fund (which might … be plagued by other problems)." (quoting *Hecker*, 556 F.3d at 586)); *White v. Chevron Corp.*, No. 16-cv-0793-PJH, 2017 WL 2352137, at *7-9 (N.D. Cal. May 31, 2017) ("*White II*") (similar); *Meiners*, 2017 WL 2303968, at *3-4 & n.4 (similar). What matters is whether a prudent, loyal fiduciary could have selected the Low Duration Bond Fund for its plan. *Dudenhoeffer*, 134 S. Ct. at 2473.

In that regard, the Amended Complaint does not remotely allege that a fiduciary could not reasonably include an option with the risk profile, expense ratio, and history of the Low Duration Bond Fund in a diversified investment lineup. *See, e.g.*, 29 C.F.R. § 2550.404a-1(b)(i) (fiduciaries must consider "those facts and circumstances … relevant to the particular … including the role the investment … plays in that portion of the plan's investment portfolio."); *Loomis*, 658 F.3d at 670 (dismissing challenges to mutual funds with fees as high as 96 bps, noting that these expense ratios "were set against the backdrop of market competition"). Indeed, judicially noticeable materials establish that the Fund has been performing extremely well relative

to its benchmark, net of fees, since its addition to the Plan. Edwards Decl., Ex. G ("2016 BlackRock Low Duration Bond Fund Prospectus"), at 19 (showing positive annual returns relative to benchmark at one, five, and ten years). Plaintiffs can cast this track record as "underperformance" only with a meaningless comparison to a different fund with a different mandate. AC. ¶¶ 128-29 (reflecting that the Vanguard fund maintains a duration of between 1 and 4 years, and that the BlackRock fund maintains a duration of between 0 and 3 years); *see also White II*, 2017 WL 2352137, at *10-11 (longer duration funds are riskier).

Second, plaintiffs challenge the offering of the Global Allocation Fund, contending that it was improperly selected in the face of cheaper alternatives. Tellingly, plaintiffs have dropped the comparison funds offered in the original complaint, which were revealed to be ***more expensive*** than the BlackRock Global Allocation mutual fund. Defs.' Mot. to Dismiss Pls.' Class Action Compl. (ECF No. 35) at 15. Plaintiffs now offer two fresh comparators, theorizing that because these lower-cost alternatives were available the fiduciaries must have been motivated to benefit BlackRock through the selection of the BlackRock-managed option. Once again, however, the existence of lower-priced options is insufficient to draw the fiduciaries' diligence into question. As the Plan fiduciaries readily chose unaffiliated mutual funds when they concluded those options were right for the Plan, the fiduciaries' decision to offer BlackRock's Global Allocation Fund even if it was not the cheapest possible fund does not indicate a flawed process. *Supra* at 15.

Moreover, plaintiffs have once more selected inapt comparators with investment strategies that differ from the Global Allocation Fund's strategy, producing divergent returns. The BlackRock Global Allocation Fund seeks to provide a "high total investment return through" both capital growth and investment income, *see* Edwards Decl., Ex. H (2014 MALOX Prospectus), at 17. The American Funds Capital Income Builder Fund, by contrast, focuses almost exclusively on income producing investments, not capital growth. *See id.* Ex. I (2014 American Funds Capital Income Builder Prospectus), at 5 (at least 90% of holding must be in income producing investments). And the DFA Global Allocation 60/40 uses a fund-of-funds strategy that has produced significantly lower returns over the past 10 years than the BlackRock Global Allocation Fund. *Compare id.* 2014 MALOX Prospectus, at 13, *with id.* Ex. K (2014 DFA Global

Allocation 60/40 Portfolio Prospectus), at 306. Plaintiffs allege nothing supporting the inference that a prudent, loyal fiduciary could not have selected the Global Allocation mutual fund—a fund that has been consistently highly successful in the market—during the period when it was in the Plan. *Id.* 2014 MALOX Prospectus, at 73-77 (reflecting over $55 billion in investment in the Fund).

As plaintiffs concede, the Plan fiduciaries shifted to the CTF for the Global Allocation strategy when it became available in 2014. Plaintiffs attack this choice, too, on the ground that the fiduciaries were driven to "seed" the new CTF. But in 2014, when the CTF for this strategy was launched, the mutual fund version had been around for 25 years and was enormously popular, as noted *supra*; there is no basis to infer that BlackRock needed the Plan's investment to make a lower-cost institutional alternative for the identical strategy succeed. The only plausible inference is that the Plan fiduciaries opted to make the investment management fee-free version of this product available to the Plan—reducing the Plan's investment management costs—when BlackRock made the business decision to create the CTF alternative. (The same logic defeats the analogous challenge offered against the Total Return CTF, which likewise had longstanding success and billions of dollars of invested assets in its mutual fund form. *See id.* Ex. J (2016 BlackRock Total Return Fund Prospectus), at 62-67.

C. Plaintiffs' Remaining Allegations Do Not Support Any Inference of Imprudence or Disloyalty

Plaintiffs offer a few additional attacks, none of which advance their Complaint across the plausibility threshold. Plaintiffs fault BlackRock for failing to include more "passively managed" investment options. AC ¶¶ 14-52. But there is no requirement under ERISA that fiduciaries offer some particular helping of passive strategies—on the contrary, courts recognize that fiduciaries may in their judgment select the mix they determine is appropriate. *Loomis*, 658 F.3d at 673-74 (dismissing claims challenging a fiduciary's selection of a mix of higher-cost actively managed funds and lower-cost passively managed funds); *Taylor v. United Techs. Corp.*, No. 3:06cv1494 (WWE), 2009 WL 535779, at *10 (D. Conn. Mar. 3, 2009) (fiduciaries are not required to choose index funds over actively managed funds "so long as the fiduciary's decision meets the prudent

person standard"), *aff'd*, 354 F. App'x 525 (2d Cir. 2009). In any event, the LifePath Funds—the Plan's default investment alternatives, holding more than 32% of the Plan's assets—are composed entirely of passive funds, meaning that more than half of the options in the Plan lineup follow that investment style. *See, e.g.*, Edwards Decl., 2015 RSP Form 5500 at, BAIRD_0000316-18 (reflecting "index" style).

Plaintiffs also contend that the density of BlackRock-managed options in the Plan lineup had the effect of concentrating systemic cybersecurity and operational risk. AC ¶¶ 216-17. This claim is utterly frivolous. The assets in the mutual funds and CTFs challenged here are not commingled together, but rather are invested in independent vehicles, separated from the assets of the trustee or management company. *See* AC ¶ 154; 15 U.S.C. §§ 80a-4, 80a-5; SEC, *Investment Company Registration and Regulation Package*, https://www.sec.gov/investment/fast-answers/divisionsinvestmentinvcoreg121504htm.html (last visited November 8, 2017). And it is not plausible that diversifying across investment management companies or trustees would necessarily have reduced "cyber" risk, as opposed to ***enlarging*** it, by increasing the number of the Plan's counterparties and thus the odds that one of them would be subject to a cyberattack compromising sensitive Plan information. Even accepting the Amended Complaint's characterization of systemic risks, plaintiffs identify no reason why the fiduciaries should have prioritized diversification of these types of risk over other considerations, such as expenses and potential returns, which ERISA expressly ***directs*** fiduciaries to consider. *See, e.g.*, 29 U.S.C. § 1104(a)(1)(A) (stating that fiduciaries must act "for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; (ii) and defraying reasonable expenses"). This theory also fails.

II. PLAINTIFFS' PROHIBITED TRANSACTION CLAIMS SHOULD BE DISMISSED BECAUSE THEY ARE BOTH TOO LATE AND IMPLAUSIBLE

Plaintiffs allege that the Plan's investment in BlackRock-managed funds constituted prohibited transactions in violation of ERISA § 406(a)(1)(A), (a)(1)(D), and (b)(1), 29 U.S.C. § 1106(a)(1)(A), (a)(1)(D), and (b)(1) . *See* AC ¶¶ 308-15. These claims are time-barred, and implausibly alleged.

A. Plaintiffs' Prohibited Transaction Claims Are Untimely

Plaintiffs' prohibited transaction claims are time-barred under ERISA's three-year statute of limitations. 29 U.S.C. § 1113(2). ERISA claims must be brought within three years of the "earliest date on which the plaintiff had actual knowledge of the breach or violation." *Id.*; *see Phillips v. Alaska Hotel & Rest. Emps. Pension Fund*, 944 F.2d 509, 520 (9th Cir. 1991) ("The earliest date on which a plaintiff became aware of any breach … start[s] the limitation period of § 1113[](2) running."). The relevant transaction is the initial inclusion of a fund in the Plan lineup. *See Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1101 (9th Cir. 2004) (explaining that the decision to "continue to hold" a particular investment is "not a transaction" for § 406 purposes (internal quotations marks omitted)); *David v. Alphin*, 704 F.3d 327, 340-41 (4th Cir. 2013) (the "only action that can support an alleged prohibited transaction is the initial selection of the affiliated funds").[12] The "earliest date" on which plaintiffs "became aware of any breach … start[s] the limitation period." *Phillips*, 944 F.2d at 520; *see also Lorenz*, 2017 WL 952883, at *7 (same).[13]

Plaintiffs' prohibited transaction claims depend upon the funds' affiliation with BlackRock. It is well settled that plaintiffs are charged with knowledge of information in plan disclosures and other participant communications. *See, e.g.*, *Lorenz*, 2017 WL 952883, at *7 ("when the [relevant] Participant Disclosure Notice was available to him" plaintiff had actual knowledge "regardless of whether [he] actually read [it]"); *Sulyma v. Intel Corp. Inv. Policy Comm.*, No. 15-cv-04977 NC, 2017 WL 1217185, at *11 (N.D. Cal. Mar. 31, 2017), *appeal filed*, No. 17-15864 (9th Cir. Apr. 27, 2017) ("disclosures gave [plaintiff] 'actual knowledge' of the

[12] Subsequent fee payments cannot be prohibited transactions because they are solely attributable to individual participants, who cause those payments when they invest their Plan accounts. *See, e.g.*, *Figas v. Wells Fargo & Co.*, No. 08-4546 (PAM/FLN), 2010 WL 2943155, at *3 (D. Minn. Apr. 6, 2010) (rejecting argument that "statute of limitations has not run because each new investment in a [proprietary] fund constitutes a separate violation" as unsupported by "[any] binding authority").

[13] In this way, prohibited transaction claims are different from fiduciary duty to monitor claims. A fiduciary has a continuous duty to monitor plan investments, but a transaction occurs at a particular point in time, as the Ninth Circuit has recognized. *See White II*, 2017 WL 2352137, *22 ("[T]here is no such thing as a 'continuing' prohibited transaction – as the plain meaning of 'transaction' is that it is a point-in-time event." (citing *Wright*, 360 F.3d at 1101)).

transactions constituting the alleged violations"). Because participant disclosures made clear that the challenged funds were managed by BlackRock affiliates more than three years before the Complaint was filed, plaintiffs' prohibited transaction claims are time-barred. *See* Aug. 2013 Participant Fee Disclosure, at BAIRD_0000676-77.[14]

Plaintiffs' prohibited transaction claims are also untimely under ERISA's statute of repose. ERISA flatly requires plaintiffs to file suit within six years of the date of the alleged transaction, regardless of their knowledge. 29 U.S.C. § 1113(1). Plaintiffs cannot challenge funds added to the Plan lineup more than six years before this suit was brought.

B. The Purported Prohibited Transactions in the Amended Complaint Fall Within Established Statutory and Regulatory Exemptions

ERISA § 406 prohibits certain transactions involving a plan and either a fiduciary or a party in interest, subject to explicit authorization in § 408 and its implementing regulations of transactions that meet certain conditions. *See* 29 U.S.C. §§ 1106, 1108. The Amended Complaint itself shows that the relevant exemptions for affiliated investments in § 408 apply.[15]

Section 408(b)(8) permits transactions between a plan and a collective trust maintained by a party in interest provided that (1) the transaction is a "sale or purchase of an interest in the fund"; (2) the transaction is expressly permitted by the plan document or by a fiduciary with

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[14] Plaintiffs did not allocate their accounts to any of the four Blackrock-affiliated funds added to the Plan lineup within the past three years (the Short Term Investment Fund, Strategic Income Opportunities Fund, Russell 2000 Alpha Tilts Fund, and LifePath 2060 Fund), or to the two other BlackRock-affiliated funds added in the three years before that (the Low Duration Bond Fund and the Equity Dividend Fund), and thus lack standing to challenge those funds. *See* Edwards Decl., Ex. A (Baird Plan Participant Statements); *id.* Slayton Plan Participant Statements. And while the fiduciaries switched the vehicles for two investment strategies (Global Allocation and Total Return) from mutual funds to collective trusts in that period, plaintiffs' complaints about those collective trusts fail for the reasons discussed *infra* at 21-22.

[15] Because the Amended Complaint establishes that exemptions apply, it fails under ordinary 12(b)(6) standards, even though some courts have held that the application of an exemption is an affirmative defense. *See, e.g., Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 676 (7th Cir. 2016) (noting prohibited transaction claims are subject to *Twombly*/*Iqbal* pleading requirements); *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013) (affirming dismissal based on affirmative defenses "obvious on the face of [the] complaint"); *see also Mehling v. N.Y. Life Ins. Co.*, 163 F. Supp. 2d 502, 510 (E.D. Pa. 2001) (dismissing complaint failing to allege exemption 77-3 did not apply).

authority to manage and control the assets of the plan; and (3) the manager "receives not more than reasonable compensation." The Amended Complaint alleges the first two conditions. *See* AC ¶¶ 73, 310-12. And because judicially noticeable materials establish that BTC's compensation for the Plan's investments consists only of securities lending compensation—with ***no*** investment management fees, and third party administrative expenses capped at no more than 2 bps—the CTF fees are necessarily not "more than reasonable." *Supra* at 9.

The same conclusion would follow if the Court were inclined to resolve the application of the prohibited transaction exemption as an affirmative defense, through summary judgment. The Plan's payment of only securities lending compensation, with no investment management fees, is self-evidently reasonable. *See* ERISA § 408(b)(8); *supra* at 11-12. Moreover, the Plan enjoyed the same securities lending terms as every other similarly-sized investor in these CTFs. Declaration of Matthew Soifer, ¶ 4-5. BTC's securities lending compensation is thus reasonable even if it is examined solely by reference to BTC's securities lending services. *See also* Class Exemption to Permit Certain Loans of Securities by Employee Benefit Plans, 71 F.R. 63,786, 63,796-97 (Oct. 31, 2006) ("PTE 2006-16") (providing exemption for "the payment to a fiduciary (the Lending Fiduciary) of compensation for services rendered in connection with loans of plan assets that are securities" so long as, among other things, "the compensation is reasonable"). As the DOL has explained, it is "just to assume that reasonable and true compensation is only such amount as would ordinarily be paid for ***like services by like enterprises under like circumstances.***" 26 C.F.R. § 1.162-7(b)(3) (emphasis added); *see supra* at 11-12.[16]

Plaintiffs' claim that the Plan's mutual fund investments were prohibited by ERISA is foreclosed by the DOL's PTE 77-3. PTE 77-3 permits offering affiliated mutual funds if the "dealings between the plan and the affiliated fund [are] 'on a basis no less favorable to the plan than such dealings are with other shareholders,'" the plan does not pay redemption fees or sales commissions in connection with the sale or acquisition of its shares, and the plan does not pay an

[16] *See* 29 C.F.R. § 2550.408b-2(d) ("Section 2550.408c-2 of these regulations contains provisions relating to what constitutes reasonable compensation for the provision of services."); 29 C.F.R. § 2550.408c-2(b)(5) ("[A]ny compensation which would be considered excessive under 26 CFR 1.162-7 … will not be 'reasonable compensation.'").

investment advisory fee to the mutual fund (though the mutual fund may pay such fees to its managers). *Leber v. Citigroup, Inc.*, No. 07 civ. 9329(SHS), 2010 WL 935442, at *10 (S.D.N.Y. Mar. 16, 2010) (quoting PTE 77-3, 42 Fed. Reg. 18,734-35). The Plan was invested in the lowest-cost share class for the challenged mutual funds, *see supra* at 14-17, and thus its terms necessarily were no less favorable than other shareholders'; plaintiffs do not allege that the Plan paid other fees to the mutual funds outside their expense ratios, and the incorporated documents confirm it did not.[17] Plaintiffs' prohibited transaction challenge to the mutual funds is thus also implausible (and suitable for summary judgment in the alternative, if the Court finds the exemption appropriate to resolve as an affirmative defense).

III. PLAINTIFFS' DERIVATIVE CLAIMS AND CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS FAIL

The claims against the individual defendants and the derivative claims in Counts III and IV fail along with plaintiffs' deficient underlying fiduciary breach claims.

Plaintiffs bring claims against the individual members of the Retirement Committee and Investment Committee, and against fiduciaries with appointment or monitoring responsibility. *See, e.g.*, AC ¶¶ 316-28. These derivative claims depend entirely on the underlying breaches alleged by plaintiffs, and must be dismissed with those claims. *See, e.g.*, *In re HP Erisa Litig.*, No. C-12-6199 CRB, 2014 WL 1339645, at *8 (N.D. Cal. Apr. 2, 2014) (dismissing derivative failure-to-monitor and co-fiduciary breach claims along with underlying prudence and disclosure claims); *Romero v. Nokia, Inc.*, No. C 12-6260 PJH, 2013 WL 5692324, at *5 (N.D. Cal. Oct. 15, 2013) (same); *Sulyma*, 2017 WL 1217185, at *11 ("[c]o-fiduciary liability can only attach to live primary liability").

IV. PLAINTIFFS' CTF CLAIMS ON BEHALF OF BTC'S CLIENT PLANS MUST BE DISMISSED

Plaintiffs assert two new claims against BTC with respect to ***all*** its client plans, alleging

[17] *Compare, e.g.*, Edwards Decl., Aug. 2013 Participant Fee Disclosure, at BAIRD_0000677 (noting Global Allocation Fund fee of 88 basis points), *with id.* 2014 MALOX Prospectus, at 4 (noting fee of 88 basis points); *and id.* Oct. 2016 Participant Fee Disclosure, at BAIRD_0000736 (noting Low Duration Bond fee of 42 basis points), *with id.* BlackRock 2016 Low Duration Bond Fund Prospectus, at 110 (noting fee of 42 basis points).

that BTC compensated itself excessively for securities lending services to all the CTFs and drove revenue to affiliates by selecting them to provide services to the CTFs in which any client plan invested. *E.g.*, AC ¶¶ 6, 241, 246-80, Claims V, VI. But plaintiffs do not and cannot allege that BTC acted in a fiduciary capacity with respect to its own securities lending compensation, nor do they plausibly allege that BTC engaged any affiliates to provide services to the funds for additional fees. The incorporated documents show, to the contrary, that BTC's compensation was approved by independent fiduciaries to the investing plans and that BTC relied only on ***third parties*** to provide services (other than investment management and securities lending) to the CTFs. Plaintiffs' claim for fiduciary breach therefore fails. Plaintiffs' second claim, for prohibited transactions under ERISA § 406, is deficient for similar reasons: because BTC was not a fiduciary with respect to its own securities lending compensation, it did not "cause" the Plan to engage in any prohibited transactions.

A. Plaintiffs' Claim for Breach of Fiduciary Duty Fails Because BTC Is Not a Fiduciary With Respect to Its Securities Lending Compensation

Plaintiffs' securities lending claims against BTC fail because BTC was not a fiduciary with respect to its appointment as the lending agent for the CTFs, and its resulting compensation.

Under ERISA, fiduciary status is functional in nature, and a party is a fiduciary only with respect to matters over which it has (or exercises) discretionary authority or control. *See* 29 U.S.C. § 1002(21)(A). A "person may be an ERISA fiduciary with respect to certain matters but not others, for he has that status only to the extent that he has or exercises the described authority or responsibility." *Harris Trust and Savs. Bank v. John Hancock Mut. Life Ins. Co.*, 302 F.3d 18, 28 (2d Cir. 2002) (quotation omitted); *see Pegram v. Herdrich*, 530 U.S. 211, 225-26 (2000); *Renfro v. Unisys Corp.*, 671 F.3d 314, 321-22 (3d Cir. 2011); *Carter v. San Pasqual Fiduciary Tr.*, No. SACV 15-01507 JVS (JCGx), 2016 WL 6803768, at *3 (C.D. Cal. Apr. 18, 2016). In "every case charging breach of ERISA fiduciary duty, then, the threshold question is … whether th[e] person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram*, 530 U.S. at 226; *Carter*, 2016 WL 6803768, at *3 ("[T]o state a claim for breach of fiduciary duty . . . the plaintiff must first allege that the

defendant was acting as an ERISA fiduciary when committing the alleged ERISA violation."); *McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d 998, 1002-05 (8th Cir. 2016) (same); *Renfro*, 671 F.3d at 321-22 (same).

Plaintiffs allege that BTC breached its fiduciary duties to the plans by appointing itself as securities lending agent to the CTFs and "pay[ing] itself excessive fees for securities lending services." *E.g.*, AC ¶¶ 6-7, 246-80, 334-35. But the terms of BTC's appointment and its securities lending compensation, including the management fees associated with the funds used to invest the cash collateral, are set forth in BTC's agreements with the Plan. *Supra* at 21. These agreements are, by implication, representative of the agreements governing the other plans in the putative class. Indeed, the "16 Things" document incorporated into the IMA, which has set forth the securities lending terms throughout the class period, is generally applicable to CTF investors (except those who have agreed to different terms by separate agreement). *See* Edwards Decl., Aug. 2011 "16 Things", at BAIRD_0001580 (setting forth securities lending terms, providing that "BTC and the Lending Fund divide such [securities lending] income equally" and "income divided is net of cash collateral management fees and the accrued borrower rebate fees. BTC bears all operational costs directly related to securities loan transactions."); *id.* Ex. AA (Aug. 2012 "16 Things"), at BAIRD_0001617 (same); *id.* Ex. BB (June 2013 "16 Things"), at BAIRD_0001657 (providing that "BTC is paid 50% of the net income earned from securities lending transactions,"); *id.* Ex. CC (June 2014 "16 Things"), at BAIRD_0001696 (same); *id.* Ex. DD (June 2015 "16 Things"), at BAIRD_0001738 (same); *id.* Ex. EE (June 2016 "16 Things"), at BAIRD_0001789 (same); *id.* Ex. FF (June 2017 "16 Things"), at BAIRD_0001837 (same); *see also, e.g.*, *id.* 2011 "16 Things" at BAIRD_0001583 (discussing cash collateral fund management fees). BTC's plan fiduciary counterparts, not BTC, have fiduciary responsibility for approving the compensation BTC receives for securities lending. *Pegram*, 530 U.S. at 225-26.[18]

The remainder of this claim is makeweight: plaintiffs allege that BTC engaged affiliates to

[18] *See also Hecker*, 556 F.3d at 583; *Renfro*, 671 F.3d at 324; *Schulist v. Blue Cross of Iowa*, 717 F.2d 1127, 1130-32 (7th Cir. 1983); *Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905, 911-12 (7th Cir. 2013); *Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co. (U.S.A.)*, 768 F.3d 284, 293 (3d Cir. 2014); *McCaffree Fin. Corp.*, 811 F.3d at 1003.

provide services to the CTFs for a fee, but the financial statements for the funds establish that the CTFs incur only capped administrative expenses paid to third parties. *Supra* at 9. This claim must be dismissed.[19]

B. BTC Did Not Violate ERISA's Prohibited Transaction Rules in Providing Securities Lending Services

Plaintiffs allege that BTC caused prohibited transactions under ERISA § 406 by collecting fees for its securities lending services. BTC's lack of fiduciary status with respect to its compensation defeats this claim, too: BTC did not "cause" the Plan to engage its securities lending services on these terms, nor did it "deal with the assets of the [P]lan in [its] own interest" when it collected the agreed-upon compensation. 29 U.S.C. § 1106(a)(1)(C), (D), (b)(1). The Investment Committee bore fiduciary responsibility for the reasonableness of BTC's compensation for the Plan's CTF investments, and as explained *supra* at 11-12, the only inference that may be drawn from the allegations in the Amended Complaint is that the Committee executed that responsibility faithfully and well.

CONCLUSION

The Court should dismiss the Complaint with prejudice.

Dated: November 8, 2017

O'MELVENY & MYERS LLP

By: */s/ Randall W. Edwards*
Randall W. Edwards

Attorneys for Defendants

[19] The Plan's uniquely favorable terms for its CTF investments also make plaintiffs uniquely ill-situated to represent a putative class encompassing other plans, which may have paid investment management fees in connection with their CTF investments.