BRIAN D. BOYLE (S.B. #126576)
bboyle@omm.com
MEAGHAN VERGOW (admitted *pro hac vice*)
mvergow@omm.com
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006-4061
Telephone: +1 202 383 5300
Facsimile: +1 202 383 5414

RANDALL W. EDWARDS (S.B. #179053)
redwards@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, as individuals, and on behalf of all others similarly situated, and on behalf of the BlackRock Retirement Savings Plan,

Plaintiffs,

v.

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

Defendants.

Case No. 17-cv-01892-HSG

**RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR RELIEF UNDER FED. R. CIV. P. 56(D)**

**[Declaration of Meaghan VerGow Filed Concurrently Herewith]**

Hearing Date: January 25, 2018
Time: 2:00 p.m.
Place: Courtroom 2, Oakland Courthouse
Judge: Hon. Haywood S. Gilliam, Jr.

**TABLE OF CONTENTS**

**Page(s)**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**TABLE OF AUTHORITIES**
**(continued)**

**Page(s)**

**Other Authorities**

## INTRODUCTION

Plaintiffs seek to delay the reckoning on their deeply flawed ERISA fiduciary claims under Rule 56(d), but the effort fails.

Plaintiffs brought this action largely in an effort to challenge one alleged issue they believed existed with investments Plan fiduciaries had elected for BlackRock's Retirement Savings Plan (the "Plan"): layered or "hidden" investment management or administrative fees BlackRock supposedly charged the CTF investments. Amended Class Action Compl. ("AC") ¶¶ 12-16, 19-22 (ECF No. 75). Indeed, essentially all of plaintiffs' claims are premised on the fact that BlackRock charges such fees. In an effort to nip this litigation in the bud, defendants months ago provided plaintiffs with reams of documentation confirming that plaintiffs' entire case is based on a flawed factual theory. Indeed, the key materials were incorporated by reference in plaintiffs' Complaint, or are otherwise judicially noticeable—and defendants therefore attached them to their dismissal motions. These incorporated materials establish, among other things, that participants in the Plan pay ***no investment management fees at any level*** in connection with the collective trust funds ("CTFs") managed by BlackRock Institutional Trust Company ("BTC"), and that any other CTF expenses are paid to unaffiliated third parties and are capped across all layers at 2 basis points ("bps"). Mot. to Dismiss Plaintiffs' Am. Class Action Compl. ("MTD") 9-10 (ECF No. 79). The only CTF fees payable to BlackRock come out of the additional income generated by securities lending, but defendants have separately established (and plaintiffs do not question) that the securities lending terms enjoyed by the Plan were the same terms offered to all similarly sized plan investors—conclusively confirming their reasonableness. MTD 21; Decl. of Matthew Soifer in Support of MTD ("Soifer Decl.") ¶¶ 4-5 (ECF No. 79-19).

Undaunted, plaintiffs demand a delay under Rule 56(d), in essence seeking permission to litigate the entire case before facing scrutiny of the obvious legal and factual flaws in their claims. But a party seeking the protection of Rule 56(d) bears the burden of articulating ***specific facts*** likely to exist but yet to be discovered that are essential to providing a substantive response to the dispositive issues framed in the motion, and plaintiffs' motion falls woefully short on that

measure. Indeed, plaintiffs do not even attempt to identify potential facts contradicting the discrete proof set forth in defendants' showing on the fee layering share-class issues. And plaintiffs do not suggest that they require ***any*** additional information related to securities lending, much less identify specific facts that would preclude summary judgment on their securities lending claims. This is for good reason: the Amended Complaint contains no allegations suggesting that the asset management industry is anything but intensely competitive, and thus it would be implausible for plaintiffs to suggest that BlackRock could have obtained contracts to manage billions of dollars in plan assets when charging uncompetitive fees for securities lending, or any other service.

Instead, plaintiffs observe that discovery into the general workings of the BlackRock Retirement and Investment Committees, and communications among members of those committees, is not yet complete. This is true but irrelevant. Rule 56(d) does not protect plaintiffs who seek to prolong discovery while they shop for viable claims; nor does it authorize unjustified fishing expeditions on questions that do not relate to the material issues on which judgment is sought. Rather, it requires a showing of ***specific facts that are likely to exist and would preclude summary judgment***. Plaintiffs have not met and cannot meet that burden: the possible "facts" they identify in their Rule 56(d) Motion would be immaterial to the Court's resolution of BlackRock's motion.

Plaintiffs' Motion to defer consideration of defendants' Motion for Summary Judgment should be denied, and the Court should reach the merits of BlackRock's summary judgment arguments to the extent it declines to dismiss under Rule 12(b)(6).

## LEGAL STANDARD

"[A] party seeking continuance must conclusively justify his entitlement to the shelter of [Rule 56(d)] by presenting specific facts explaining the inability to make a substantive response" to a summary judgment motion. *Duarte & Witting, Inc. v. Universal Underwriters Ins. Co.*, 2006 WL 2130743, at *6 (N.D. Cal. July 27, 2006), *aff'd*, 291 F. App'x 807 (9th Cir. 2008) (quotation

omitted).[1] "The moving party must 'specifically identif[y]' the relevant information, show 'some basis for believing that the information actually exists', and that this information would 'prevent summary judgment.'" *Washburn v. Fagan*, 2006 WL 1072057, at *7 (N.D. Cal. Apr. 21, 2006), *aff'd*, 331 F. App'x 490 (9th Cir. 2009) (quoting *VISA Int'l Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir. 1986)). Plaintiffs also must establish that they diligently pursued previous opportunities for discovery on the subject.

When plaintiffs cannot explain how the requested discovery would defeat summary judgment, a continuance is unwarranted. *Gofron v. Picsel Techs., Inc.*, 804 F. Supp. 2d 1030, 1039 (N.D. Cal. 2011); *Monolithic Power Sys., Inc. v. O2 Micro Int'l Ltd.*, 2007 WL 801886, at *3 (N.D. Cal. Mar. 14, 2007) (plaintiffs must show the "sought-after facts are 'essential' to resist the summary judgment motion" (quoting *California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998)). "[T]he mere hope that further evidence may develop prior to trial is an insufficient basis for a continuance." *Cont'l Maritime of S.F., Inc. v. Pac. Coast Metal Trades Dist. Council*, 817 F.2d 1391, 1395 (9th Cir. 1987); *accord Skinner v. City of Union City*, 2013 WL 5423451, at *5 (N.D. Cal. Sept. 27, 2013). Similarly, that plaintiffs have outstanding discovery requests or seek depositions is immaterial where the information sought is not determinative of either party's summary judgment arguments. *1-800-BAR NONE v. Brandow's Fairway Chrysler Jeep, Inc.*, 2007 WL 39372, at *9-10 (N.D. Cal. Jan. 4, 2007) (denying request for continuance despite outstanding discovery requests where plaintiff "point[ed] to no potential discovery requests that would pertain to the . . . claim at issue").

## ARGUMENT

### I. THE MERE FACT THAT THERE ARE OUTSTANDING DISCOVERY REQUESTS DOES NOT JUSTIFY DELAY UNDER FED. R. CIV. P. 56(D)

Plaintiffs purport to justify their bid to delay judgment under Rule 56(d) primarily on the basis that they have served an avalanche of discovery requests and defendants have not completed

[1] Prior to 2010, Rule 56(d) was codified at 56(f); no substantive changes were made when it was moved to a new subsection. *See* Fed. R. Civ. P. 56(d) advisory committee's note to 2010 Amendment ("Subdivision (d) carries forward without substantial change the provisions of former subdivision (f). A party who seeks relief under subdivision (d) may seek an order deferring the time to respond to the summary-judgment motion.").

their responses. But this mundane observation does not come close to meeting plaintiffs' burden under Rule 56(d). *Clauder v. Cty. of San Bernardino*, 2016 WL 145864, at *4 (C.D. Cal. Jan. 11, 2016), *appeal dismissed*, 2017 WL 3527896 (9th Cir. June 2, 2017) ("Plaintiff's counsel's laundry list of additional discovery does not identify with specificity the facts he hopes to obtain."); *1-800-BAR NONE*, 2007 WL 39372, at *9-10; *Duarte & Witting, Inc.*, 2006 WL 2130743, at *6 (quotation omitted). The primary question that defendants have put in issue is whether, as judicially noticeable and incorporated materials creditable under Rule 12 establish, the Plan invests in classes of BlackRock CTFs that do not charge investment management fees.[2] MTD 8-9 (citing Declaration of Randall Edwards in Support of MTD ("Edwards Decl."), Exs. N-S (ECF No. 79-1)). The bulk of plaintiffs' Rule 56(d) request does not address this issue at all, but rather simply details elements of the litany of discovery requests that remain unfulfilled.

In any event, plaintiffs materially understate the extent of the discovery they have already received. Plaintiffs argue that the financial statements for the underlying fund layers must be consulted to compute the expenses for those layers, and that they have served specific discovery requests to obtain them. Mot. for Relief Under Fed. R. Civ. P. 56(d) ("Mot.") 8-9 (ECF No. 85). But defendants already had provided to plaintiffs ***all*** financial statements for ***all*** layers before Plaintiffs even served their requests, and BlackRock even had attached to its motion to dismiss examples illustrating fund expense of every layer of a Plan CTF. MTD 9-10 & n.6. There is of course no need to delay for discovery to obtain already-produced materials. What is worse, plaintiffs "excessive fees" theory cannot survive an examination of these financial statements, so the request is futile for that reason as well. These documents not only handily confirm the absence of any investment management fee payments to anyone (the linchpin of defendants' summary judgment request), they also establish that expenses were paid exclusively to unaffiliated third parties in an amount not exceeding 2 bps in aggregate at all levels. MTD 9-10 & n.5. Plaintiffs also surmise that somehow there must be "substantial fees and expenses" not

[2] As explained above, defendants have also established that the securities lending fees charged by BTC out of the additive income generated for the Plan were the same fees offered to other similarly sized investors in the Plan's CTFs. Soifer Decl., ¶¶ 4-5. But by failing to request any additional information regarding the securities lending program in their Motion, plaintiffs have effectively conceded this point.

disclosed to participants given that a top-layer financial statement also quoted in their Amended Complaint states: "the expenses incurred by underlying funds in which the [Active Stock Fund F] invests are not included in [its] expense ratio." Mot. 9 (quoting Edwards Decl., Ex. U, at BAIRD_0000836); *accord* AC ¶ 101. Yet this cherry-picked documentary reference does not contradict defendants' showing at all. It accurately reports that expenses in the underlying funds are not included in the fund expense ratio, but it does not purport to speak to their amount. And in any event the amount is well established: expenses are capped at 2 bps.

Plaintiffs also state that they have been provided only "a handful of meeting minutes for the Investment Committee"; in fact, they have received minutes from ***every*** Investment Committee meeting and Retirement Committee meeting that occurred during the class period. [3] While irrelevant to the discrete grounds on which defendants seek summary judgment, plaintiffs' representations that the minutes reveal no substantive deliberations are also contradicted by the materials they received, which included hundreds of pages of briefing materials that the Investment Committee considered in documented deliberations that accompanied each change to the Plan's investment options. Those briefing materials ***confirm*** the Plan's investment in the fee-free share classes, as every package includes a summary of the Plan's investment options and their expense ratios. *See infra* at 11-12.

Plaintiffs also mention in passing that they require "subcommittee minutes." Mot. 5. Yet despite having received the briefing materials from every Investment and Retirement Committee meeting, they have identified no instance in which a relevant issue was delegated to a subcommittee for consideration, and no basis for believing that any subcommittee deliberative materials will contradict the facts establishing that the Plan's CTFs do not bear investment management fees. *Monolithic Power Sys., Inc.*, 2007 WL 801886, at *3 (continuance is unwarranted unless the "sought-after facts are 'essential' to resist the summary judgment motion").[4]

[3] The Retirement Committee met only twice during the class period because its responsibilities were delegated in large part to the Investment Committee and another subcommittee, the Administrative Committee.

[4] Plaintiffs also complain that BlackRock has not produced "board books," Mot. 5, but neither set of Requests for Production that they have served uses this term. Plaintiffs do not explain what

Plaintiffs also argue that the Court should not resolve the "dispute" plaintiffs have purportedly raised concerning the investment management fees and expenses borne by the Plan's CTFs until plenary email discovery is complete. Mot. 6-7. This makes no sense. Plaintiffs identify no specific facts likely to be contained in committee members' emails that would be expected to contradict BlackRock's showing (through the averment of the Plan recordkeeper (Bank of America Merrill Lynch) as to the Plan's CTF share classes, and through the CTFs' judicially noticeable financial statements) that there are no CTF investment management fees or "hidden" expenses paid to affiliates. Declaration of Jason Boultbee in Support of MTD, Ex. A (ECF No. 79-21). Indeed, the fees and expenses charged by the CTFs do not rationally depend in any measure on the subjective musings of individual committee members. Plaintiffs' chief theory of fiduciary breach is that "layers" of CTF investment management fees and expenses unnecessarily dragged down the Plan's performance, and yet they fail to explain how emails among committee members could be expected to creditably contradict the official records of the Plan's investments in this respect—and no such explanation is imaginable.

The sole example plaintiffs offer as to how emails might bear on material issues under Rule 56(d) proves defendants' point. Plaintiffs note that one of the Investment Committee's votes on changing the Plan's investment in the BlackRock Equity Dividend Fund from a mutual fund to a CTF (as summarized in meeting minutes) was conducted by email, and argue that they need to examine these and related emails before responding to defendants' summary judgment motion. But this chain of communication has no logical relationship to whether the Plan's CTFs paid investment management fees to BlackRock or its affiliates. Even if the Committees' "deliberations" were relevant to confirming that the Plan's CTFs do not bear investment management fees, the cited minutes make clear that BlackRock has disclosed them. The results of the referenced vote, as plaintiffs concede, were fully disclosed in the meeting minutes plaintiffs have already received. Plaintiffs' assertion that this vote evinces "substantive deliberations"

---

they mean by "board books," as distinct from the Investment Committee briefing material they have already received but fail to acknowledge in their motion. In any event, plaintiffs do not explain why "board books" should be considered "essential" to plaintiffs' effort to challenge the absence of CTF investment management fees.

occurring outside of committee meetings is, of course, entirely speculative. *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 1013 n.29 (9th Cir. 2013) ("The evidence sought in a Rule 56(f) motion must be more than the object of mere speculation."). But the more important point is that plaintiffs have failed to establish that inquiry into these communications may creditably contradict official investment records and financial statements detailing the absence of CTF investment management fees. Plaintiffs cannot rely "on vague assertions that discovery will produce needed, but unspecified, facts" and are required "to identify with greater particularity what type of evidence they believed existed . . . that could bolster their arguments." *Id.*[5]

The mere fact that plaintiffs have other outstanding discovery requests is similarly immaterial. A party does not meet its burden under Rule 56(d) by simply citing interrogatories and requests for production that have not yet been fully answered. *See, e.g.*, *1-800-BAR NONE*, 2007 WL 39372, at *9-10 ("These broad statements are not sufficient to comply with the requirements of [Rule 56(d)]. As the Ninth Circuit instructs, Rule 56(d) requires affidavits setting forth the particular facts expected from the movant's discovery." (quotation omitted)). Plaintiffs do not explain how their interrogatories bear on the discrete factual issues on which defendants seek summary judgment. Once again, in fact, the example they offer demonstrates the absence of any such relationship. Plaintiffs point to their interrogatory requesting the identity of "all Persons employed by BlackRock, a BlackRock subsidiary, or a BlackRock affiliate that make or made any decisions regarding the management of the assets in any of the BlackRock CTIs during the Relevant Time Period," Mot. 7, yet it should be obvious that understanding the full range of BlackRock employees who were involved in portfolio management activities for the CTFs is unlikely to help test the accuracy of the Plan recordkeeper's official records of the Plan's CTF

[5] *Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation.*, 323 F.3d 767 (9th Cir. 2003), which plaintiffs cite, does not hold otherwise. In that case, the defendants filed a motion for summary judgment 20 days after the filing of the complaint, and plaintiffs had not "had any realistic opportunity to pursue discovery." *Id.* at 773. Plaintiffs in this case have received thousands of pages of documents, and the materials that defendants have provided conclusively rebut their only barely plausible theory of imprudence. Notably, the *Burlington* court expressly held that Rule 56(d) motions should be denied where the requested "discovery would be futile" and to that end granted summary judgment on one of plaintiffs' claims. *Id.* at 774.

share classes and the CTFs' annual financial statements. In short, BlackRock's response to this interrogatory would have no bearing on the parties' fee and expense arguments, and cannot meet plaintiffs' burden under Rule 56(d). Plaintiffs' other interrogatories, which go unmentioned in plaintiffs' Motion, fare the same.

Plaintiffs' insistence that they are entitled to obtain testimony under their broad-reaching Rule 30(b)(6) notice similarly does not advance their Rule 56(d) request. Plaintiffs argue that they need to examine BlackRock witnesses about the "[t]he processes for selecting, retaining, maintaining, and removing investment options for the Plan during the Relevant Period, including all practices, policies, and procedures," Mot. 7, but they fail to identify any nexus between these questions and the dispositive factual issues articulated in BlackRock's summary judgment motion—and none is evident. *Krav Maga Ass'n of Am., Inc. v. Yanilov*, 464 F. Supp. 2d 981, 991 (C.D. Cal. 2006) (denying Rule 56 continuance despite deposition requests where "the plaintiffs failed to make clear what facts they intend to elicit from the . . . declarants or how such facts would help the plaintiffs survive summary judgment on the [relevant] issue"); *see also Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008) (affirming denial of Rule 56(d) motion where evidence sought was "only generically relevant" and thus not "essential to oppose summary judgment").

## II. PLAINTIFFS' FEW CITED EXAMPLES OF DISCREPANCIES IN DOCUMENTS ADDRESSING THE FEES AND EXPENSES OF THE PLAN'S CTFs DO NOT JUSTIFY A POSTPONEMENT

Plaintiffs try to cinch their request for a postponement by identifying stray passages in a few documents that—viewed alone—are consistent with the notion that the Plan invests in CTF share classes that have investment management fees, and bear other expenses paid to BlackRock that reduce returns. However, none of these remotely justifies the plenary discovery that plaintiffs seek under Rule 56(d), and indeed none is sufficient to justify further discovery even into the fee and expense issues that frame defendants' summary judgment motion.

Plaintiffs advert to documents in BlackRock's production suggesting that the Plan's CTFs bear brokerage expenses (and, in turn, that BlackRock receives so-called "soft-dollar" research services and other accommodations in connection with brokerage payments to aid its portfolio

management work). True enough: all pooled investments have to bear brokerage expenses. But documents already provided to plaintiffs (and incorporated by reference in the Amended Complaint) establish that the broker-dealers receiving these expenses are all independent of BlackRock: a BlackRock affiliated broker-dealer, BlackRock Execution Services ("BES"), is used ***only*** for transition management services, and the CTFs use a "best execution" approach to brokerage services.[6] Edwards Decl., Ex. GG (Aug. 2011 Managing ERISA Assets), at BAIRD_0001884 (ECF No. 79-6); *see also id.* at BAIRD_0001883 (explaining transition management services involve "liquidating or restructuring a portfolio")[7]; *id.* Ex. Z (Aug. 2011 16 Things), at BAIRD_0001596-1597 (explaining BES may provide transition services) (ECF No. 79-6).[8] While the Plan's Investment Management Agreement ("IMA") does include an Appendix setting forth the parameters of the transition management program if the Plan were ever to use it—requiring, among other things, a separate agreement between BTC and the Plan—plaintiffs do not and cannot allege that the Plan ever engaged BTC to provide those services. In any event, plaintiffs make no plausible allegations in their Amended Complaint—or, indeed, any allegations at all—that the CTFs' brokerage expenses were unreasonable.[9] It follows that, even if the Plan had paid indirect fees to BES, plaintiffs have not attempted to plausibly connect these alleged fees

[6] Plaintiffs' Amended Complaint does not allege that affiliated broker-dealers were ever used to trade CTF portfolio securities.

[7] *See also* Edwards Decl., Ex. HH (Aug. 2012 Managing ERISA Assets), at BAIRD_0002059, 2058 (similar) (ECF Nos. 79-8-9); *id.* Ex. II (Jun. 2013 Managing ERISA Assets), at BAIRD_0002181, 2080 (similar) (ECF No. 79-10); *id.* Ex. JJ (Jun. 2014 Managing ERISA Assets), at BAIRD_0002298, 2297 (similar) (ECF No. 79-10); *id.* Ex. KK (Jun. 2015 Managing ERISA Assets), at BAIRD_0002426, 2425 (similar) (ECF No. 79-12); *id.* Ex. LL (Jun. 2016 Managing ERISA Assets), at BAIRD_0002558, 2557 (similar) (ECF No. 79-14); *id.* Ex. MM (Jun. 2017 Managing ERISA Assets), at BAIRD_0002698, 2697 (similar) (ECF No. 79-16).

[8] *See also* Edwards Decl., Ex. AA (Aug. 2012 16 Things), at BAIRD_0001635-1636 (similar) (ECF No. 79-6); *id.* Ex. BB (Jun. 2013 16 Things), at BAIRD_0001676 (similar); *id.* Ex. CC (Jun. 2014 16 Things), at BAIRD_0001718 (similar) (ECF No. 79-6); *id.* Ex. DD (Jun. 2015 16 Things), at BAIRD_0001762-1763 (similar); *id.* Ex. EE (Jun. 2016 16 Things), at BAIRD_0001814-1815 (similar) (ECF No. 79-6); *id.* Ex. FF (Jun. 2017 16 Things), at BAIRD_0001862-1863 (similar) (ECF No. 79-6).

[9] BlackRock has already explained that the collective trust funds do not use BlackRock affiliates for "trade execution" services. Declaration of Meaghan VerGow in Support of BlackRock's Response to Rule 56(d) Motion ("VerGow Decl."), Ex. A, (BlackRock's Objections and Responses to Plaintiffs' First Set of RFAs), at 5.

to their summary judgment arguments at all, must less have they established the requisite "inability to make a substantive response" that Rule 56(d) requires. *Duarte & Witting, Inc.*, 2006 WL 2130743, at *6.

Plaintiffs point to a small number of clerical errors in other documents, arguing that these references negate BlackRock's conclusive showing that the Plan invested in classes of CTFs without investment management fees. Mot. 9. Yet these stray errors are flatly inconsistent with authoritative Plan-related documents and financial statements now before the Court. As explained in BlackRock's motion to dismiss, the Plan's IMA, Guideline and Fee Agreements ("GFLAs"), and annual Form 5500s make clear that the Plan invested only in the F Class. MTD 10-11. Official records of the Plan's actual investments during the class period—from the third party financial institution responsible for keeping the Plan's official shareholding records—confirm that those are precisely the share classes in which the Plan invested. *See supra* at 6. BlackRock also has submitted testimony explaining each of the naming errors and other anomalies plaintiffs focus on in an attempt to manufacture ambiguity. *See* Declaration of Jason Herman in Support of MTD, ¶¶ 3-6 (ECF No. 79-17); Declaration of Ryan Henige in Support of MTD, ¶ 3 (ECF No. 79-18). Plaintiffs have not identified any "specific facts" that they would hope to develop to counter this showing with the plenary discovery they needlessly seek in search of a claim. Indeed, plaintiffs fail to justify even depositions of BlackRock's declarants in an attempt to impeach their credibility, perhaps because it is well-settled that credibility challenges do not create a genuine dispute of material fact that precludes summary judgment. *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001) ("A party opposing summary judgment may not simply question the credibility of the movant to foreclose summary judgment."); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983) (rejecting asserted biases of witnesses as ground to deny summary judgment; holding that "neither a desire to cross-examine an affiant nor an unspecified hope of undermining his or her credibility suffices to avert summary judgment").

The single error plaintiffs identify in a Plan investment review from third party Mercer Investment Consulting, the Plan's Investment Consultant (identifying an investment management

fee of 15 bps for the BlackRock LifePath funds), is even more squirrely. Declaration of Mary J. Bortscheller, Ex. D, at BAIRD_0041855 (ECF No. 85-5).[10] The very same investment review on which plaintiffs rely reflects the correct 0-2 bps expense information in its "Performance Summary," prepared specifically to detail the fees, market value, and performance of the funds in the Plan's investment lineup. VerGow Decl., Ex. D (Aug. 2011 Committee Investment Agenda), at BAIRD_0041842-43.[11] Moreover, the specific graph plaintiffs rely on was included by Mercer in 18 investment reviews between February 2011 and September 2015, and almost always correctly reflects the 0 to 2 bps effective expense level paid by Plan participants in the BlackRock CTFs. *Id.*, Ex. E (Feb. 2011 Investment Committee Agenda), at BAIRD_0041529; *id.* Ex. F (Nov. 2011 Investment Committee Agenda), at BAIRD_0042070; *id.* Ex. G (Sept. 2012 Investment Committee Agenda), at BAIRD_0042375; *id.* Ex. H (Dec. 2012 Investment Committee Agenda), at BAIRD_0042611; *id.* Ex. I (Mar. 2013 Investment Committee Agenda), at BAIRD_0042714; *id.* Ex. J (Jun. 2013 Investment Committee Agenda), at BAIRD_0042862; *id.* Ex. K (Sept. 2013 Investment Committee Agenda), at BAIRD_0042983; *id.* Ex. L (Dec. 2013 Investment Committee Agenda), at BAIRD_0043091; *id.* Ex. M (Mar. 2014 Investment Committee Agenda), at BAIRD_0043205; *id.* Ex. N (Jun. 2014 Investment Committee Agenda), at BAIRD_0043452; *id.* Ex. O (Sept. 2014 Investment Committee Agenda), at BAIRD_0043708; *id.* Ex. P (Dec. 2014 Investment Committee Agenda), at BAIRD_0043840; *id.* Ex. Q (Mar. 2015 Investment Committee Agenda), at BAIRD_0044084; *id.* Ex. R (Jun. 2015 Investment Committee Agenda), at BAIRD_0044084; *id.* Ex. S (Sept. 2015 Investment Committee Agenda), at BAIRD_0044282. Thus, even viewed alone, the Mercer investment reviews—every one of which have been produced to plaintiffs—confirm that Plan participants paid CTF expenses fees of no more than 2 bps during the class period, and that the stray references plaintiffs point to are obviously in error. *Accord e.g.*, Edwards Decl., Ex. W (Aug. 2013 Participant Disclosure), at

[10] This error was also transcribed in two other performance evaluation reports. VerGow Decl., Ex. B (May 2011 Investment Committee Agenda), at BAIRD_0041716; *id.* Ex. C (Mar. 2012 Investment Committee Agenda), at BAIRD_0042209.

[11] *See also* VerGow Decl., Ex. B (May 2011 Investment Committee Agenda), at BAIRD_0041704-05 (same); *id.* Ex. C (Mar. 2012 Investment Committee Agenda), at BAIRD_0042205-06 (same).

BAIRD_0000677 (reflecting fees of 2 bps) (ECF No. 79-5); *id.* Ex. X (Oct. 2016 Participant Disclosure), at BAIRD_0000746 (same) (ECF No. 79-5); *id.* Ex. Y (Mar. 17 Participant Disclosure), at BAIRD_0000737 (same) (ECF No. 79-6). On top of this, of course, the official records of the Plan's shareholdings maintained by the Plan's third-party recordkeeper show that the Plan invested exclusively in classes of the LifePath CTFs (and all of the other BTC-sponsored CTFs) that do not bear investment management fees. *Supra* at 6. The judicially noticeable financial statements for the Plan's CTFs show that third-party expenses are capped at 2 bps. There is no genuine factual dispute here.

In the end, none of the stray anomalies plaintiffs refer to warrants even limited additional discovery, much less the plenary discovery for which plaintiffs seek a postponement. It is obvious that plaintiffs seek additional, time-consuming discovery not to counter the facts on which defendants seek judgment, but to fish for grounds for additional claims. That motivation finds no support in Rule 56(d).

**CONCLUSION**

Plaintiffs have failed to meet their burden under Rule 56(d) to establish specific facts that would be revealed in further discovery to preclude an order of summary judgment on the grounds BlackRock has urged in its motion. If the Court determines that it must looks beyond judicially noticeable materials in order to rule on BlackRock's dispositive motion, plaintiffs' Rule 56(d) request should be denied, and this Court should reach the merits of BlackRock's alternative summary judgment motion.

Dated: December 22, 2017

O'MELVENY & MYERS LLP

By: */s/ Meaghan VerGow*
Meaghan VerGow

Attorneys for Defendants