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

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED CLASS ACTION COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 2

I. THE OPPOSITION DOES NOT IDENTIFY ANY PLAUSIBLE ALLEGATIONS OF FIDUCIARY BREACH OR PROHIBITED TRANSACTION IN THE STEWARDSHIP OF THE PLAN'S INVESTMENT LINEUP 2

A. Plaintiffs' Factual Allegations Do Not Permit Any Inference of Imprudence or Disloyalty in the Selection of the Plan's Investment Options 2

1. The Opposition Does Not Save Plaintiffs' Claim That the Plan's Fiduciaries Sought to Enrich BlackRock Affiliates Through the CTFs 3

2. Plaintiffs' Underperformance Allegations Do Not Improve Their Claims 6

3. Plaintiffs Do Not Plausibly Allege That the Plan Fiduciaries Breached Their Duties in Retaining Mutual Fund Options, or Replacing the Mutual Funds With CTFs as They Became Available 8

4. Plaintiffs' Diversification Challenges Are Meritless 10

B. Plaintiffs' Prohibited Transaction Claims Are Neither Timely nor Plausible 10

1. Plaintiffs Failed to Bring Their Prohibited Transaction Claims Within the Limitations Period 10

2. Plaintiffs' Prohibited Transaction Claims Are Implausible Under Facially Applicable Statutory and Regulatory Exemptions 11

C. Plaintiffs' Derivative Claims Must Be Dismissed 13

II. PLAINTIFFS' CLAIMS ON BEHALF OF BTC'S CLIENT PLANS FAIL 13

CONCLUSION 15

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. GreatBanc Tr. Co.,
835 F.3d 670 (7th Cir. 2016).. 12

Amgen Inc. v. Harris,
136 S. Ct. 758 (2016) 4

Barboza v. Cal. Ass'n of Prof'l Firefighters,
799 F.3d 1257 (9th Cir. 2015).. 13

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 4

Charters v. John Hancock Life Ins. Co.,
583 F. Supp. 2d 189 (D. Mass. 2008) 14

DeBruyne v. Equitable Life Assur. Soc. of U.S.,
920 F.2d 457 (7th Cir. 1990).. 6

Dupree v. Prudential Ins. Co. of Am.,
2007 WL 2263892 (S.D Fla. Aug. 10, 2007)... 12

Figas v. Wells Fargo & Co.,
2010 WL 2943155 (D. Minn. Apr. 6, 2010) 11

Hecker v. Deere & Co.,
556 F.3d 575 (7th Cir. 2009).. 10

Holomaxx Techs. v. Microsoft Corp.,
783 F. Supp. 2d 1097 (N.D. Cal. 2011) 12

In re Unisys Sav. Plan Litig.,
74 F.3d 420 (3d Cir. 1996).. 10

Jenkins v. Yager,
444 F.3d 916 (7th Cir. 2006).. 7, 10

Johnson v. Delta Air Lines, Inc.,
No. 1:17-cv-2608-TCB (N.D. Ga. Dec. 12, 2017).. 7

Kanawi v. Bechtel Corp.,
590 F. Supp. 2d 1213 (N.D. Cal. 2008) 14

Laboy v. Bd. of Trs. of Bldg. Serv. 32 BJ SRSP,
2012 WL 701397 (S.D.N.Y. Mar. 6, 2012) 4

Meiners v. Wells Fargo & Co.,
2017 WL 2303968 (D. Minn. 2017) 5, 8

Metzler v. Graham,
112 F.3d 207 (5th Cir. 1997).. 10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page(s)

Patelco Credit Union v. Sahni,
262 F.3d 897 (9th Cir. 2001).. 13

Rivera v. Peri & Sons Farms, Inc.,
735 F.3d 892 (9th Cir. 2013).. 12

Tibble v. Edison Int'l,
135 S. Ct. 1823 (2015)... 11

Tussey v. ABB, Inc.,
746 F.3d 327 (8th Cir. 2014).. 4

White v. Chevron Corp.,
2017 WL 2352137 (N.D. Cal. May 31, 2017) 10, 11

White v. Chevron Corp.,
2016 WL 4502808 (N.D. Cal. Aug. 29, 2016).. 3

Wright v. Or. Metallurgical Corp.,
360 F.3d 1090 (9th Cir. 2004).. 11

Young v. GM Inv. Mgmt. Corp.,
325 F. App'x 31 (2d Cir. 2009) 4

STATUTES

29 U.S.C. § 1106(a)(1)(D) 11

29 U.S.C. § 1108(b)(8)... 12

REGULATIONS

29 C.F.R. § 2550.404a-5(h)(5)(ii)... 5

81 Fed. Reg. 81870 5

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs are obviously determined to try to find a way to survive dismissal in this litigation. Defendants' motion presented overwhelming authorities reflecting that plaintiffs' theories of liability were both legally insufficient and demonstrably incorrect. Rather than address any of these deficiencies head on, however, plaintiffs' opposition sidesteps them and emphasizes new, and different, reasons why defendants purportedly breached ERISA. As with plaintiffs' other allegations, these new theories likewise cannot survive dismissal.

Plaintiffs originally filed this action on the theory that BlackRock packed the Plan's lineup with affiliated collective trust funds ("CTFs") bearing excessive investment management fees, to drive fee income to itself. Plaintiffs should have known, however, that the CTFs do not charge the Plan ***any*** investment management fees, at ***any*** level, because BlackRock Institutional Trust Company ("BTC") has agreed to waive them. In reality, the Plan gets to invest for virtually nothing in highly popular investment options that other retirement plans willingly pay for.

Plaintiffs' opposition pays lip service to this fully debunked theory, but plaintiffs mostly shift to an argument that the CTFs are loaded with other, "hidden" fees that make them unreasonable. These allegations are equally untenable. The CTFs' expenses are clearly set forth in documents that plaintiffs incorporate into the Amended Complaint. None of the expenses are paid to BlackRock affiliates, save for compensation associated with securities lending, which benefits the funds through extra income. Plaintiffs do not seriously defend the argument that the Plan's uniquely favorable fee arrangement rendered the CTF investments unreasonable. Nor could they, since other (non-BlackRock Plan) investors in these CTFs paid ***both*** securities lending ***and*** investment management compensation, while the BlackRock Plan paid ***only*** securities lending compensation. The Plan's exceptionally advantageous fee terms foreclose any inference that the fiduciaries were motivated to benefit BlackRock over Plan participants when they made decisions about the Plan's investment lineup.

Plaintiffs' opposition equally fails to salvage the other hodgepodge allegations they claim signify defective fiduciary decision-making. Plaintiffs allege that the fiduciaries should have

selected different mutual funds that performed better in hindsight, or cost less, but this shopworn pleading model has regularly been rejected at the Rule 12 stage. Plaintiffs do not plausibly allege that BlackRock used Plan assets to "seed" CTF versions of highly successful mutual funds. And plaintiffs' "fund manager diversification" theory is as meritless as it is novel. These allegations, alone and together, do not support any inference that the Plan fiduciaries failed to prudently and loyally select funds for the Plan's investment lineup. The implausibility of plaintiffs' breach theories spells the implausibility of their (untimely) prohibited transaction theories as well.

The opposition also does not rehabilitate the new "CTI Class Claim" pleaded on behalf of other BTC client plans. BTC is not a fiduciary with respect to decisions that its clients make in their ***own*** fiduciary capacities, like BTC's appointment as lending agent and its compensation for securities lending services. Plaintiffs attempt to avoid this black-letter principle of ERISA fiduciary law mainly by ignoring BTC's agreements with the plans, which BlackRock attached to its motion to dismiss. Plaintiffs' speculation that BTC uses affiliates to provide services to the CTFs for a fee is also refuted by the incorporated documents. There are no such fees. The administrative expenses incurred by the CTFs go to third parties. Plaintiffs cannot survive dismissal by inventing fee payments that the incorporated documents refute.

BlackRock was forthcoming with plaintiffs from the beginning of this litigation about the deficiencies in their theories and the authoritative documents that show them to be wrong. Refusing to acknowledge those basic facts does not make them go away. The Amended Complaint should be dismissed.

ARGUMENT

I. THE OPPOSITION DOES NOT IDENTIFY ANY PLAUSIBLE ALLEGATIONS OF FIDUCIARY BREACH OR PROHIBITED TRANSACTION IN THE STEWARDSHIP OF THE PLAN'S INVESTMENT LINEUP

A. Plaintiffs' Factual Allegations Do Not Permit Any Inference of Imprudence or Disloyalty in the Selection of the Plan's Investment Options

Plaintiffs now all but acknowledge that the Plan did ***not*** pay excessive investment management fees for the affiliated CTFs. The Plan uniquely benefits from an agreement by BTC to ***waive*** its investment management fees altogether for the Plan. This arrangement is uniformly

confirmed by the Plan's agreements with BTC, the CTFs' audited financial statements, the Plan's fee disclosures, and the third-party recordkeeper's official records of the Plan's actual holdings over the class period. Mot. to Dismiss Pls.' Am. Class Action Compl. ("Mot.") 9-11 & n.8 (ECF No. 79). While plaintiffs faintly suggest that further inquiry is warranted, Mem. in Opp. to Mot. to Dismiss Am. Compl. ("Opp.") 12-13 (ECF No. 84); Mot. for Relief Under Fed. R. Civ. P. 56(D) ("56(d) Mot.") 9-10 (ECF No. 85), they do so based on fiduciary committee materials that actually ***further confirm*** the Plan's investment in the investment management fee-free F Class of the CTFs throughout the class period. *See* 56(d) Opp. 6.

In the face of this insurmountable defect in their primary theory of liability, plaintiffs' opposition turns to other theories—that the Plan paid other, "hidden" fees to BlackRock affiliates through the CTFs, that some CTFs underperformed funds with different strategies, and that the Amended Complaint's other allegations somehow combine to permit the inference that the Plan's fiduciaries used a flawed process in making lineup decisions. These other theories add up to nothing. Even if plaintiffs prove every single fairly pled allegation in their Amended Complaint, the only conclusion that can be drawn is that the Plan's fiduciaries succeeded in offering to Plan participants a diverse lineup of hugely popular, high-quality, low-cost investment options in which to grow their retirement savings.

1. The Opposition Does Not Save Plaintiffs' Claim That the Plan's Fiduciaries Sought to Enrich BlackRock Affiliates Through the CTFs

Plaintiffs claim that the Plan fiduciaries gave "preferential treatment" to the CTF investments to drive "illegal profit[s]" to BlackRock affiliates. Opp. 1, 7. But the Amended Complaint does not remotely allege facts supporting the conclusion that the Plan fiduciaries selected the CTFs to benefit themselves or BlackRock at the expense of Plan participants. *See White v. Chevron Corp.*, 2016 WL 4502808, at *5 (N.D. Cal. Aug. 29, 2016) (dismissing disloyalty where "the complaint pleads no facts sufficient to raise a plausible inference that defendants took any of the actions alleged for the purpose of benefitting themselves . . . ***at the expense of the Plan participants***[.]" (emphasis added)).

Plaintiffs argue that the mere fact that the Plan was invested in BlackRock-managed CTF

is proof in itself that Plan fiduciaries acted disloyally. Opp. 7. But ERISA explicitly permits the offering of affiliated CTFs (Mot. 8.), and the opposition identifies no facts showing that the decision to do so here was imprudent or disloyal. On the contrary, BTC's extraordinary waiver of the very investment management fees that thousands of unaffiliated plans with billions of dollars in assets have agreed to when selecting these CTFs for their own investment lineups makes obvious the prudent, loyal basis for the decision to offer the funds to Plan participants. The fee concession the Plan fiduciaries negotiated was, if anything, an action ***against*** BlackRock's interest. While plaintiffs themselves emphasize the centrality of fees in investment selection, Am. Class Action Compl. ("AC") ¶¶ 6, 83, 91 (ECF No. 75); Opp. 2, 10-12, their opposition makes no attempt to grapple with the strong inference of fiduciary care that follows from the fee waiver. The Court cannot conclude that any prudent, loyal fiduciary would have rejected the CTFs on these terms, as it would have to do to find plaintiffs' claims plausible. *Amgen Inc. v. Harris*, 136 S. Ct. 758, 760 (2016); *cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (it is insufficient to allege facts merely consistent with illegal conduct).

In light of the fee waiver negotiated by the Plan fiduciaries, plaintiffs focus their opposition on purportedly "hidden" securities lending and other fees that they suggest reflect a disloyal process. These allegations do not make plaintiffs' claims any more plausible.

Plaintiffs' opposition emphasizes the one fee that BTC receives from the Plan (in connection with securities lending services BTC provides), and suggests that the Court may infer fiduciary disloyalty from BlackRock's receipt of ***any*** fees—even reasonable ones—in connection with the Plan's investments. That is not the law. Plaintiffs simply ignore the legal precedent requiring them to plausibly allege that the challenged fees are "excessive relative to the services rendered," Mot. 12 (quoting *Young v. GM Inv. Mgmt. Corp.*, 325 F. App'x 31, 33 (2d Cir. 2009)), arguing that they can avoid that pleading standard if they allege disloyal conduct. Opp. 12. Plaintiffs' logic is circular, given that they are attempting to infer disloyalty ***from excessive fees***.[1]

[1] Plaintiffs also misrepresent the cases they cite. *See Laboy v. Bd. of Trs. of Bldg. Serv. 32 BJ SRSP*, 2012 WL 701397, at *2 (S.D.N.Y. Mar. 6, 2012) (applying *Young* to dismiss claim where the plaintiff "failed to allege facts indicating that the [fund] fees were excessive in light of the services rendered"); *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014) (distinguishing non-

Their argument would turn ERISA's express allowance of affiliated offerings on its head: The Court cannot infer disloyalty merely from the inclusion of affiliated funds, much less from the inclusion of affiliated funds on uniquely advantageous terms. *See* Mot. 8; *see Meiners v. Wells Fargo & Co.*, 2017 WL 2303968, at *3-4 (D. Minn. 2017) (dismissing challenge to selection of affiliated funds where complaint did not plausibly allege fees were excessive).[2]

The opposition also cannot salvage plaintiffs' conclusory allegations that BTC's securities lending compensation was excessive. Given the investment management fee waiver, the Plan paid less than others for its investment in these CTFs, and the securities lending terms alone were the same as those agreed to by all similarly-situated plan investors in these funds. Mot. 11-12, 21. Plaintiffs' factual allegations do not support the inference that the Plan's payment of securities lending-related fees to BTC made the terms of its investment in the CTFs unreasonable.

Plaintiffs' allegations that the Plan paid other types of "hidden" fees to BTC are even further off the mark. Plaintiffs speculate that the CTFs paid a laundry list of fees to BlackRock affiliates, Opp. 11, but the allegation is refuted by documents incorporated into the Amended Complaint. The CTF financial statements make clear that the funds pay administrative expenses ***only to third parties unaffiliated with BlackRock***. *E.g.*, Decl. of Randall W. Edwards in Support of Defs.' Mot. to Dismiss Am. Class Action Compl. ("Edwards Decl."), Ex. U (2016 F Series Audited Financial Statements) at BAIRD_0001128-29. Plaintiffs contend that the statements for

---

disloyalty cases, where sponsor allegedly enjoyed corporate benefits from a third party in exchange for selecting higher-cost funds managed by the third party).

[2] Plaintiffs also suggest that BTC's securities lending compensation was not properly disclosed. In fact, the compensation is clearly disclosed to client plans in the CTFs' audited financial statements and other disclosure documents. *See, e.g.*, Edwards Decl., Ex. V (2015 Russell 2000 Index Fund financial statement), at BAIRD_0025680-97. And BlackRock's Plan participant-facing fee disclosures comply with the applicable DOL regulation, which follows the SEC's Form N-1A requirements regarding the calculation of a fund's total annual operating expense ratio that is shown in the fund's prospectus fee table, which does not include securities lending fees. *See* Investment Co. Reporting Modernization, 29 C.F.R. § 2550.404a-5(h)(5)(ii); 81 Fed. Reg. 81870, 81,887-90, 81,940, 81,961-65, 81,991-93 (Nov. 18, 2016) (explaining that "the information that funds are [currently] required to report about securities lending activity … is limited," and adopting new going-forward disclosure requirements to aid in the agency's oversight that still do not require the inclusion of securities lending fees in the calculation of a fund's total annual operating expense ratio that is included in the Form N-1A prospectus fee table).

the underlying CTF layers may reveal fees paid to BlackRock affiliates. They apparently fail to appreciate that representative examples of the financial statements—showing all the building blocks for a given fund, through to the bottom layer that holds securities—were attached to the motion to dismiss, showing that the administrative expenses were capped at all levels and paid only to third parties. Mot. 9-10.[3]

Finally, plaintiffs claim without any basis that the CTFs used affiliated broker-dealers for the trading of securities. This allegation is also refuted by the incorporated documents. BTC's agreements and disclosures with client plans make clear that it uses an affiliated broker-dealer only when separately engaged by plans to provide "transition management" services for "liquidating or restricting a portfolio." Edwards Decl., Ex. GG (Aug. 2011 *Managing ERISA Assets*) at BAIRD_0001884-86; *id.*, Ex. Z (Aug. 2011 *16 Things You Should Know*) at BAIRD_0001595. Plaintiffs do not (and cannot) allege that the Plan has ever used BTC for transition management, however, and so this allegation adds nothing.[4] BTC otherwise follows a "best execution" model for the procurement of brokerage services. *Id.*, Ex. GG at BAIRD_0001885.

2. Plaintiffs' Underperformance Allegations Do Not Improve Their Claims

Plaintiffs contend that the Court may infer fiduciary imprudence from allegations that the LifePath funds underperformed peers and benchmarks during the class period, and that the Active Stock and the Global Allocation CTFs underperformed their benchmarks. Plaintiffs apparently concede, however, that performance-based hindsight critiques are not cognizable under ERISA, which demands "fiduciary … prudence, not prescience." *DeBruyne v. Equitable Life Assur. Soc.*

[3] Plaintiffs served a discovery request for the production of all the financial statements on November 20, nearly five weeks after BlackRock produced all of them. 56(d) Opp. 4.

[4] Plaintiffs allege that BTC received "soft dollar" benefits from the broker-dealers BTC used to execute trades for the CTFs, but the applicable disclosure, Managing ERISA Assets, states that the "value of products, research, or services given to BTC currently do not factor into BTC's broker selection process or the determination of reasonable brokerage commissions." Edwards Decl., Ex. GG at BAIRD_0001885. Plaintiffs allege no basis to question that disclosure, much less allege any basis by which to conclude that the ***Plan fiduciaries*** were motivated by the possibility of soft-dollar benefits to BTC when selecting Plan options.

of U.S., 920 F.2d 457, 465 (7th Cir. 1990); Mot. 7, 13. They are incorrect in arguing that their performance allegations nevertheless amplify their claims of disloyalty.

To begin, while plaintiffs suggest that their performance critique rests on the alleged "cannibalization" of the CTFs' returns by excessive fees, Opp. 15, that theory withers with their failed excessive-fee allegations. Without the fee theory, plaintiffs' performance critique is ***entirely*** an impermissible hindsight-based judgment.

The Amended Complaint also does not actually allege that the fiduciaries have retained investments through "extended periods of underperformance," Opp. 8, at all. Rather, plaintiffs carefully select figures over disparate time periods as support for their broad accusations of underperformance. For example, plaintiffs note that in January 2017 the Active Stock Fund was 17 bps behind its benchmark on a 10-year trailing basis, Opp. 14, but omit that at that time the Fund was ***outperforming*** its benchmark by 54 bps, 102 bps, and 16 bps on a 1-year, 5-year, and 13-year trailing basis. Edwards Decl., Ex. Y (Mar. 2017 Participant Fee Disclosure) at BAIRD_0000736. The Amended Complaint specifically alleges only one year of underperformance by the Global Allocation Fund.[5] And plaintiffs' allegations regarding the LifePath Funds are contradicted by Plan disclosures reflecting the Funds' ***excess*** performance relative to their benchmarks on a short- and long-term trailing basis during the class period. *Id.* at BAIRD_0000736-37.[6] These figures do not support the inference that the fiduciaries lack a monitoring process. And, in any event, it is settled law that fiduciaries may prudently ride out periods of low returns. Mot. 13; *Jenkins v. Yager*, 444 F.3d 916, 926 (7th Cir. 2006) (affirming summary judgment where defendants retained plan options "during years of lower performance").

Moreover, even if nitpicked data reflecting alleged underperformance in certain cherry-picked periods were sufficient to sustain a claim of imprudence, plaintiffs have no response to the

---

[5] The opposition mischaracterizes the Amended Complaint's actual allegations on this front. *Compare* Compl. ¶ 123 (alleging underperformance for one year by 82 bps), *with* Opp. 14 (asserting that Global Allocation has underperformed by 82 bps "since being added to the Plan").

[6] Because the named plaintiffs did not invest in all but one of the LifePath CTFs, they could not have been injured by individualized decisions respecting the retention of particular funds and lack standing to challenge them. Mot. 14 (citing cases); Order, *Johnson v. Delta Air Lines, Inc.*, No. 1:17-cv-2608-TCB (N.D. Ga. Dec. 12, 2017) (ECF No. 53).

1 problems with their target date fund comparisons. The Amended Complaint fails to allege facts
2 showing why a prudent fiduciary could not favor the glide path, asset allocations, and other
3 structural features of the passively managed LifePath Funds. As the district court recognized in
4 *Meiners*, comparing a target date fund's performance to one with a different investment
5 strategy—as the Amended Complaint attempts to do here—does not support an inference of
6 disloyalty or imprudence. 2017 WL 2303968, at *2-3. Plaintiffs implicitly admit this hole in
7 their Amended Complaint, labeling this problem as "factual," Opp. 15, but in fact the deficiency
8 is a legal one: if a plaintiff does not plausibly allege that a fund comparator follows a closely
9 comparable strategy, then even protracted alleged "underperformance" relative to the comparator
10 says nothing about the plan fiduciaries' decisionmaking process in retaining a fund.[7] Plaintiffs do
11 not even acknowledge the *Meiners* decision—involving materially identical allegations, except
12 for the fee waiver present here—in their opposition. They clearly have no answer to it.

13 **3. Plaintiffs Do Not Plausibly Allege That the Plan Fiduciaries Breached**
14 **Their Duties in Retaining Mutual Fund Options, or Replacing the Mutual Funds With CTFs as They Became Available**

15 Plaintiffs apparently concede that that they cannot successfully state a claim for fiduciary
16 breach by alleging that the fiduciaries failed to select a cheaper option for the Plan's Global
17 Allocation and Low Duration Bond mutual fund alternatives. Opp. 13; *see* Mot. 15. But
18 plaintiffs insist that their theory is different: now they claim that the Court may infer from the
19 selection of BlackRock-advised mutual funds that the fiduciaries' process excluded the
20 consideration of third-party alternatives. Opp. 13. It is impossible to draw that inference here,
21 however, because the lineup in fact ***included*** non-proprietary mutual funds. Edwards Decl., Ex.
22 C (2010 RSP Form 5500) at BAIRD_0046140. The ***only*** plausible inference is that the
23 fiduciaries considered both proprietary and non-proprietary alternatives when selecting mutual
24 funds for the lineup, and picked the ones they concluded were better for the Plan.[8]

25 [7] Contrary to plaintiffs' suggestion, this is not to say that benchmarking for target date funds is
26 inappropriate in all contexts. Opp. 15. Rather, a performance critique must be attentive to the ***reasons*** for relative performance, and for a target date fund, the reasons for different performance
27 are directly attributable to strategic asset class allocation decisions that plaintiffs do not criticize.

28 [8] Plaintiffs also do not have standing to challenge the Low Duration Bond Fund, in which neither plaintiff never invested. *Supra* n.6.

Moreover, as the motion to dismiss explained, plaintiffs' mutual fund comparisons fail because plaintiffs point to funds with distinct features and profiles, and nowhere allege that a fiduciary could not prudently select funds like the Plan's actual options. Mot. 15-16. An apples-to-oranges comparison does not support an inference of breach as a matter of law. Plaintiffs do not and cannot allege that the alternative funds were materially identical to the funds included in the Plan, and thus cannot conclude that an improper motive—not the funds' distinct features—must have driven their selection.

Plaintiffs continue to argue that the Court may infer a fiduciary breach based on their theory that the Plan was used to "seed" newly created CTFs in the Total Return and Global Allocation strategies. Opp. 16. These allegations are nonsensical. As the motion to dismiss explained—and the opposition does not dispute—these new CTFs utilized the same investment strategies and were run by the same teams as longstanding, highly successful mutual funds. Mot. 17. The Plan was simply moved into significantly cheaper versions of near-identical products managed by the same portfolio managers. Rather than address these facts, plaintiffs argue that it is "meaningful" when different BlackRock affiliates are named as the investment advisor because CTFs and mutual funds have different regulatory features. *See* Opp. 16. They do not explain, however, how the different regulatory features suggest an imprudent or disloyal fiduciary process when the Plan fiduciaries simply selected the same investment strategy for a substantially lower fee.[9] Indeed, plaintiffs themselves alleged that the Plan should have moved to these CTFs earlier. Compl. ¶ 140. The prudent, loyal rationale for making the switch to lower-cost versions of these strategies is obvious, and plaintiffs allege no facts from which to infer anything different.[10]

---

[9] Plaintiffs incorrectly assert that BlackRock previously stated that the Global Allocation CTF did not have a track record sufficient to support a switch before 2014. Opp. 16 n.19. The Global Allocation CTF did not exist ***at all*** before 2014; when BlackRock did launch a CTF variant, it had the same investment strategy.

[10] The Complaint focuses on the Total Return and Global Allocation CTFs (*see* AC ¶¶ 114-35), but plaintiffs now suggest that they have plausibly alleged an improper motive with respect to the selection of other funds that did not have three-year performance histories when added to the Plan lineup, citing a single sentence in their Complaint. *See* Opp. 16 (citing AC ¶ 95). The Complaint does not develop this theory with any factual allegations, and in any event these CTFs generally likewise had longstanding mutual fund predicates. The MSCI ASCI Ex-US IMI Fund had no mutual fund antecedent, but it was added to the Plan fully two years after it was launched, and

4. Plaintiffs' Diversification Challenges Are Meritless

Plaintiffs do not defend their claim that the Plan included too few passively managed options, now that BlackRock has explained that more than half of the Plan's options follow that investment style. Mot. 17-18. The point is apparently conceded.

Plaintiffs do attempt to defend their fanciful "manager concentration" theory, but they glaringly cite no authority to support it, and in fact the theory departs radically from current law. The duty to diversify concerns the diversification of ***investments***, not investment ***managers***, as the sole case cited by plaintiffs itself illustrates. *See Metzler v. Graham*, 112 F.3d 207, 209 (5th Cir. 1997) (discussing relevant factors in context of challenge to plan investment in a single real property); *see also In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 438 (3d Cir. 1996) (noting that "a fiduciary's performance of the duty [to diversify] may be measured by the diversity it has achieved in a particular investment vehicle and, ***where the management of a plan's investments is distributed among several managers***, in the segment of the plan for which it has responsibility" (emphasis added)). Plans commonly use a single manager for most or even all of a plan's investments, which can benefit the plan with favorable pricing or other terms. *See, e.g.*, *Hecker v. Deere & Co.*, 556 F.3d 575, 579 (7th Cir. 2009) ("Fidelity Research served as the investment advisor for 23 out of the 26 investment options in the Plans."); *White v. Chevron Corp.*, 2017 WL 2352137, *2 (N.D. Cal. May 31, 2017) (discussing lineup in which Vanguard managed 25 of 31 options); *Jenkins*, 444 F.3d at 919 (single fund family for all plan options). What's more, plaintiffs admit that the risks they hypothesize ***have never materialized***, much less caused any losses to the Plan. Opp. 17. That plaintiffs continue to base their claims on an admittedly theoretical and speculative "risk" speaks volumes to the frailty of their allegations.

B. Plaintiffs' Prohibited Transaction Claims Are Neither Timely nor Plausible

1. Plaintiffs Failed to Bring Their Prohibited Transaction Claims Within the Limitations Period

For funds that were added to the Plan lineup outside the limitations period, plaintiffs all

---

plaintiffs do not allege that it had failed on its own merits to attract substantial assets from unaffiliated investors before then. *See* Edwards Decl., Ex. X (Oct. 2016 Participant Fee Disclosure) at BARID_0000746.

1 but concede, as they must, that their claims under ERISA § 406(a)(1)(A) are untimely. Opp. 18.
2 Each subsequent "purchase" of an interest in the affiliated funds offered in the lineup is, as a
3 matter of law, not a separate "transaction" that was ***caused by any Plan fiduciaries*** under
4 § 406(a)(1)(A). Mot. 19.

5 Plaintiffs are incorrect when they assert that their claims under § 406(a)(1)(D) and (b)(1)
6 fare differently under that standard, however. Those provisions likewise depend on transactions
7 caused by plan fiduciaries, not plan participants, *viz.*, the original inclusion of the affiliated
8 options in the Plan lineup. *See* 29 U.S.C. § 1106(a)(1)(D), (b)(1); *Figas v. Wells Fargo & Co.*,
9 2010 WL 2943155, at *3 (D. Minn. Apr. 6, 2010) (dismissing § 406 claim, stating that plaintiff
10 "offers no binding authority … and the Court has found none" for the proposition that "the statute
11 of limitations has not run because each new investment in a [proprietary] fund constitutes a
12 separate violation"). It makes no difference that plaintiffs purport to challenge the extraction of
13 "hidden" securities lending fees from the CTFs. *Cf.* Opp. 18. Those fees are part of the terms on
14 which the Plan fiduciaries originally selected CTFs for the Plan lineup, more than six years ago.
15 Mot. 8-9, 19.

16 Plaintiffs note that fiduciaries have a continuing duty to monitor the funds in an
17 investment lineup under ERISA § 404. Opp. 19 (citing *Tibble v. Edison Int'l*, 135 S. Ct. 1823,
18 1828 (2015). True enough, but as other courts have recognized, that does not make the failure to
19 ***remove*** a given fund a "prohibited transaction" under ERISA § 406. *See, e.g.*, *White II*, 2017 WL
20 2352137, at *22 ("[T]here is no such thing as a 'continuing' prohibited transaction … [T]he cited
21 ruling in *Tibble*[] is inapplicable as it is tethered to the 'duty to monitor' incorporated into
22 § 1104's duty of prudence …." (citing *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1101
23 (9th Cir. 2004))). Nothing in *Tibble* suggests otherwise.

24 **2. Plaintiffs' Prohibited Transaction Claims Are Implausible Under**
25 **Facially Applicable Statutory and Regulatory Exemptions**

26 The Amended Complaint itself establishes that the relevant prohibited transaction
27 exemptions in ERISA § 408 and PTE 77-3 apply. Mot. 20-22. Plaintiffs argue that they are not
28

required to plead the ***absence*** of these exemptions,[11] but they do not and cannot deny that a prohibited transaction claim must be plausibly alleged—and that a claim is implausible when the plaintiffs' own allegations establish the prohibited transaction exemption. Mot. 20 & n.15; *see 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"); *Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1103 (N.D. Cal. 2011) (considering affirmative defenses "apparent from the face of the [c]omplaint"); *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 677 (7th Cir. 2016) (recognizing that *Iqbal*/*Twombly* pleading standards apply to prohibited transaction claims).

Plaintiffs implausibly allege that the Plan paid unreasonable fees for the CTF investments. *Supra* at 3-5. Even in seeking Rule 56(d) relief, they make no attempt to respond to the fact that the Plan's securities lending terms are the same as the ones agreed to by all other similarly situated plans, ***which also pay investment management fees*** for these CTFs. And they acknowledge that the Plan was invested in the lowest-cost share class of the mutual fund options. Mot. 22. Their prohibited transaction claims are accordingly facially implausible.

Plaintiffs argue that PTE 77-3 is somehow not met because they allege that the mutual funds rely on BlackRock affiliates to provide services for a fee. Opp. 20. But they do not explain how that makes the Plan's dealings with the mutual funds any less favorable than other investors' dealings with the fund. It does not, as made obvious by plaintiffs' reliance on the prospectus applicable to ***all investors***. *Id.*

Plaintiffs also argue that ERISA § 408(b)(8) exemption for affiliated CTFs does not apply to § 406(b) violations. The text of the statute says otherwise—it expressly provides that the "prohibitions provided in [section 1106] of this title ***shall not apply*** to" the affiliated collective trust investments authorized by § 408(b)(8). 29 U.S.C. § 1108(b)(8); *see Dupree v. Prudential Ins. Co. of Am.*, 2007 WL 2263892, at *43 (S.D Fla. Aug. 10, 2007) ("ERISA § 408(b)(8) exempts potential violations of both § 406(a) and § 406(b)."). The Department of Labor has

[11] Plaintiffs suggest that BlackRock's implausibility argument is preserved only in a footnote. Opp. 20 n.23. The cited footnote simply explains the split on the question whether a plaintiff must plead the non-applicability of a PTE, which is not the basis for BlackRock's motion. The implausibility argument is developed on pages 20 to 22 of the motion to dismiss.

recognized the same. *See* DOL Adv. Op. No. 96-15A, 1996 ERISA LEXIS 27, at *8 n.3 (Aug. 7, 1996) ("Section 408(b)(8) provides a statutory exemption from the provisions of section 406 for the purchase or sale by a plan of an interest in a collective fund maintained by a state or federally regulated bank or trust company that is a party in interest to the plan"). The cases cited by plaintiffs do not hold otherwise—they involve distinct prohibited transaction exemptions (§ 408(b)(2) and § 408(c)(2)), not the § 408(b)(8) exemption that permits the offering of affiliated collective trusts for a reasonable fee. *Barboza v. Cal. Ass'n of Prof'l Firefighters*, 799 F.3d 1257, 1269 (9th Cir. 2015); *Patelco Credit Union v. Sahni*, 262 F.3d 897, 910 (9th Cir. 2001).

C. Plaintiffs' Derivative Claims Must Be Dismissed

Plaintiffs acknowledge that their derivative claims for failure to monitor and co-fiduciary liability depend on the survival of their underlying claims for breach. Opp. 21; *see* Mot. 22. Because those underlying claims are implausible, the derivative claims are, too.

II. PLAINTIFFS' CLAIMS ON BEHALF OF BTC'S CLIENT PLANS FAIL

In their opposition, plaintiffs appear confused about the parameters of BTC's fiduciary responsibility. BTC is unquestionably a fiduciary with respect to the management of the CTF assets. But it is equally clear that BTC was ***not*** a fiduciary with respect to its appointment as securities lending agent, or its receipt of compensation for securities lending services—any more than it is a fiduciary as to its appointment as investment manager of the CTFs. Those decisions are made by independent plan fiduciaries when they approve agreements with BTC to invest in the CTFs.

Plaintiffs argue that it is "impossible" for the fiduciaries of individual plans to appoint BTC as lending agent and approve its compensation. Opp. 22. The argument is unintelligible. That appointment and compensation are set forth in agreements between BTC and CTF investors. Plaintiffs do not argue that these agreements are invalid, or inoperative for any reason. Under ERISA, when an independent plan fiduciary engages a service provider on agreed-upon terms, the service provider is not a fiduciary with respect to those terms. That's not a debatable question of

1 law. *See* Mot. 24 n.18.[12]

2 Indeed, plaintiffs effectively recognize as much, in arguing that the client plan fiduciaries
3 (which are generally not parties to this action) may ***also*** bear fiduciary responsibility for the CTF
4 fees. Opp. 23. Plaintiffs are half right—the client plan fiduciaries make the fiduciary decision to
5 appoint BTC as the securities lending agent for the agreed-upon fees but that means BTC does
6 not have fiduciary discretion over that decision. *See, e.g.*, *Schulist v. Blue Cross of Iowa*, 717
7 F.2d 1127, 1132 (7th Cir. 1983) (holding that ERISA fiduciary was not a fiduciary with respect to
8 "the terms and conditions upon which it became a provider," and that the "responsibility for
9 ensuring a prudent choice" of provider "rested upon" the client plan fiduciaries). No one has
10 "contract[ed] around ERISA's fiduciary rules." Opp. 25. The agreements simply make clear who
11 bears fiduciary responsibility for what.

12 Plaintiffs suggest that BTC's individual agreements with the Plan leave open the questions
13 whether BTC will act as securities lending agent and on what terms. But plaintiffs simply fail to
14 acknowledge—and therefore have no response to—BTC's *16 Things* agreement with its client
15 plans, which is facially binding and also incorporated into the Plan's IMA. *See* Mot. 24; *see also*
16 Edwards Decl., Aug. 2011 *16 Things You Should Know*, at BAIRD_0001597 ("Through a client's
17 continued participation in a Fund or Account thirty days subsequent to receipt of this and similar
18 disclosures, … a client consents to such practices to the extent such consent is required …."). *16*
19 *Things* provides that BTC is the "lending agent for each Lending Fund or Lending Account," and
20 sets forth BTC's compensation both for securities lending generally and for the management of
21 funds in which the cash collateral is held. *See id.* at BAIRD_0001580 ("With respect to each
22 Lending Fund, BTC and the Lending Fund divide such net income equally"); *id.* at
23 BAIRD_0001583 (setting forth cash collateral management fees); *see also* Mot. 24. BTC does
24 not have fiduciary discretion over its selection as securities lending agent, its compensation in that
25

26 [12] The *Kanawi* and *Charters* cases are readily distinguishable and, if anything, support BTC's
27 position. *Cf.* Opp. 23. In both cases, the defendants were held to have fiduciary status only as to
matters over which they exercised discretionary authority or control. *See Kanawi v. Bechtel*
28 *Corp.*, 590 F. Supp. 2d 1213, 1224-25 (N.D. Cal. 2008); *Charters v. John Hancock Life Ins. Co.*,
583 F. Supp. 2d 189, 196-97 (D. Mass. 2008).

1 role, or the choice of cash collateral funds used in relation to the securities lending program.[13]

2 Plaintiffs thus implausibly claim that BTC violated ERISA's prohibited transaction rules

3 by "engag[ing] affiliates to provide services to the BlackRock CTIs for a fee." Opp. 25; *see also,*

4 *e.g.*, AC ¶¶ 343-44. For the same reason that BTC does not have fiduciary responsibility for its

5 selection as securities lending agent, BTC is not the fiduciary that "causes" itself to be hired by

6 client plans to provide securities lending on agreed-upon terms—the client plans' own fiduciaries

7 are. And because plaintiffs have not alleged facts showing that the Plan invested in the CTFs on

8 unreasonable terms, any prohibited transaction claim against the Plan fiduciaries fails as

9 implausible. *Supra* at 3-5.

10 Plaintiffs also do not plausibly allege that BTC engages in prohibited transactions by

11 using affiliates to provide other services to the CTFs for a fee. While plaintiffs argue, in support

12 of their prohibited transaction claim, that the CTF financial statements refer to expenses incurred

13 by the underlying funds, plaintiffs ***do not and cannot*** assert that the financial statements suggest

14 in any way that the expenses are paid to BlackRock affiliates. As BlackRock has repeatedly

15 explained, the financial statements explicitly state that the expenses are paid ***to third parties***.

16 Mot. 9-10; *see supra* at 5-6.[14] This claim must be dismissed.

17 **CONCLUSION**

18 For these reasons and those in defendants' motion to dismiss, the Court should dismiss the

19 Amended Complaint or, in the alternative, award summary judgment to defendants.

20

21

22

[13] Plaintiffs recognize that these securities lending terms were added directly to the Plan's GLFA during the putative class period (in addition to being incorporated in the parties' agreement through *16 Things*), but suggest that the Plan's GLFA with BTC should be disregarded because it "cannot reasonably be treated as arm's length." Opp. 24. If the argument is accepted, then plaintiffs obviously cannot represent the putative class they propose, encompassing all of BTC's unaffiliated client plans as to whom plaintiffs' challenge to the "arm's length" nature of the agreement would be incoherent. But the argument is also beside the point, since *16 Things* has made the securities lending terms applicable all along.

[14] Despite having the financial statements for every CTF and every fund layer, *supra* n.3; Mot. 9-10, plaintiffs have not come forward with ***any*** statement suggesting that administrative fees are not capped, or are paid to BlackRock affiliates.

23 24 25 26 27 28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: December 22, 2017

O'MELVENY & MYERS LLP

By: */s/ Meaghan VerGow*
Meaghan VerGow

Attorneys for Defendants