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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

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' REQUEST FOR JUDICIAL NOTICE

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

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INTRODUCTION

Plaintiffs' opposition to BlackRock's Request for Judicial Notice ("RJN") fails to grapple with the law clearly permitting judicial notice for the Plan-related documents in this ERISA case, both for their existence and content. Despite what plaintiffs contend, the Amended Complaint necessarily relies on—and thus incorporates for purposes of the RJN analysis—each document for which BlackRock seeks judicial notice. Plaintiffs' generalized attacks on authenticity also fail. Plaintiffs' sweeping disputes challenge the authenticity of public filings and even of those Plan-related documents from which they draw the very allegations that form the basis of their Amended Complaint. It is no surprise that plaintiffs' authenticity attacks lack any meaningful specificity: No genuine factual basis exists to dispute that the documents underpinning plaintiffs' allegations are indeed what they appear to be. Judicial notice is warranted for each document comprising Exhibits C–MM attached to defendants' motion to dismiss. *See* ECF Nos. 79-2–16.

Plaintiffs themselves acknowledge that the Amended Complaint is based on an investigation of publicly available documents, including filings with the Department of Labor ("DOL") and Securities and Exchange Commission ("SEC"). Amended Complaint ("AC") ¶ 9 (ECF No. 75). Plaintiffs concede that such documents are properly noticeable, yet they ask this Court to accept the contents of those documents ***only*** to the extent they support plaintiffs' own allegations, ignoring Ninth Circuit precedent instructing the Court to do otherwise. The law is not a one-way street, even on the pleadings. When a plaintiff's complaint incorporates a document by reference, "[t]he defendant may offer [it], and the district court may treat [it] as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *see also*, *e.g.*, *North Star Gas Co. v. Pac. Gas and Elec.*, 2016 WL 5358590, at *5 (N.D. Cal. Sept. 26, 2016) (Gilliam, J.). Plaintiffs cannot incorporate certain documents and then object to BlackRock relying on them, too. This explains why courts routinely take judicial notice of required DOL and SEC filings when evaluating challenges under ERISA, and why plaintiffs' proposed limitation on the Court's consideration of these documents misses the mark.

Plaintiffs provide no basis for the Court to disregard the Plan's and LifePath Index 2040

Fund's Form 5500 filings (Exs. C–F (ECF No. 79-2)), despite arguing about a few clerical errors in a small section of the filings. BlackRock does not rely on the Form 5500 sections that contain clerical errors, however. Plaintiffs' attempt to exploit since-explained variances does not trump the fact that each document is subject to notice both because it is a required public filing ***and*** because it is incorporated into plaintiffs' Amended Complaint. Plaintiffs themselves expressly refer to the Form 5500s—*e.g*, AC ¶¶ 139, 143, 145, 205—confirming that their intent is not for the Court to disregard the substance of those filings. The Court may consider these Form 5500s as plaintiffs use them, and as BlackRock offered them. Moreover, plaintiffs lack any argument as to why a clerical issue in the Form 5500s any way would prevent judicial notice of wholly separate fund prospectuses (Exs. G–L (ECF Nos. 79-2–3)), which plaintiffs directly quote or allude to in their Amended Complaint. *E.g*, AC ¶¶ 114–23, 128, 136–37, 215.

Likewise, plaintiffs offer no persuasive argument against the Court taking judicial notice of the ERISA Plan-related documents and participant fee disclosures, all of which are documents incorporated by reference into the Amended Complaint. Plaintiffs ignore that their claims explicitly incorporate many of these documents—including the Investment Management Agreement ("IMA"), Audited Financial Statements, and participant fee disclosures (Exs. T–Y (ECF Nos. 79-3–6)), as detailed in the RJN and again below. Moreover, plaintiffs also ignore the clear connection between their allegations and the other Plan-related documents that are subject to the RJN (Exs. M–S, Z–MM (ECF Nos. 79-3, 79-6–16)). The IMA expressly incorporates the Guideline and Fee Agreements, as well as the other documents setting forth the terms governing the CTFs, necessarily making those documents part of the IMA that was explicitly incorporated in the Amended Complaint. Courts regularly take notice of such agreements, including those made with service providers, when the underlying terms are put in question by plaintiffs claiming breach of fiduciary duty under ERISA. *E.g.*, *Lorenz v. Safeway, Inc.*, 241 F. Supp. 3d 1005, 1012 (N.D. Cal. 2017) (taking notice of master services agreement); *Terraza v. Safeway Inc.*, 241 F. Supp. 3d 1057, 1067 (N.D. Cal. 2017) (same); *In re Lehman Bros. Sec. & ERISA Litig.*, 2012 WL 6000575, at *1 n.2 (S.D.N.Y. Dec. 3, 2012) (taking notice of recordkeeping and trust agreement).

Plaintiffs' conclusory challenges to the authenticity of the Plan-related documents are

likewise unconvincing. Plaintiffs provide ***zero*** support raising a genuine dispute that these documents are not what BlackRock claims them to be. Instead, they seem to challenge the authenticity of the documents on the basis that the documents contradict allegations in the Amended Complaint. The proper interpretation of a document has no bearing on its authenticity. *See* Fed. R. Evid. 901 (authentication shows that an "item is what the proponent claims it is"). Moreover, the Court is not required to assume the truth of allegations in the Amended Complaint "that contradict matters properly subject to judicial notice or by exhibit." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008); *see also Parks v. Port of Oakland*, 2017 WL 2840704, at *1 (N.D. Cal. July 3, 2017) (Gilliam, J.); *Vigdor v. Super Lucky Casino, Inc.*, 2017 WL 2720218, at *1 (N.D. Cal. June 23, 2017) (Gilliam, J.).

Plaintiffs cannot shield their defective claims from this Court's proper consideration of controlling documents that are public filings, incorporated into the Amended Complaint, or both. Courts in similarly positioned ERISA cases routinely take judicial notice of these types of documents. This Court has every reason to do the same.

ARGUMENT

This Court should grant judicial notice and consider Exhibits C through MM because they are public records, documents incorporated into the Amended Complaint, or both, and their authenticity cannot be reasonably questioned.[1]

I. DOL FORM 5500 FILINGS (C-F)

Plaintiffs incorrectly argue that the Court may take judicial notice only of the existence of the Form 5500s and not the facts contained in them. Mem. in Opp. to Defs.' Request for Jud. Notice ("RJN Opp.") 3–4 (ECF No. 83). To the contrary, courts "routinely take judicial notice" of these documents in ERISA cases without imposing such a limitation. *Terraza*, 241 F. Supp. 3d at 1067, 1072 (taking judicial notice of Form 5500 filings and considering fees disclosed in

[1] Exhibits A and B to the Edwards Declaration are not subject to BlackRock's RJN. *See* ECF No. 79-2. However, those documents—plaintiffs' quarterly account statements—properly may be considered for purposes of BlackRock's Article III standing arguments to dismiss under Fed. R. Civ. P. 12(b)(1). *See* Mot. to Dismiss Pls.' Am. Class Action Compl. ("MTD") 12, 20. The quarterly account statements show that, during the statutory period, plaintiff Baird did not invest in any LifePath funds, and that neither plaintiff invested in any of the six BlackRock-affiliated funds added to the Plan lineup over the past two three-year periods. *Id.*

them).[2] And as explained in more detail below, the principal case plaintiffs offer to support their argument has no bearing on the propriety of taking judicial notice of the DOL filings at issue. *Contra Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) (limiting judicial notice of another court's opinion to existence of that opinion). The Court may fully consider the Form 5500 filings attached to BlackRock's motion to dismiss.

Judicial notice of the Form 5500s is proper because they are "undisputed matters of public record." *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004). As records filed with a federal agency, their authenticity is not subject to reasonable dispute. *E.g., Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Grp., Inc.*, 99 F. Supp.3d 1110, 1126 (C.D. Cal. 2015) (taking judicial notice of 5500s as matters of public record). This is one of the reasons why, at the motion to dismiss stage and without limiting consideration to the mere existence of such documents, "[c]ourts routinely take judicial notice of ERISA plan documents like [Form 5500s]." *Lorenz*, 241 F. Supp. 3d at 1012.

The Court may take judicial notice of the contents of the Form 5500 filings for the independent reason that they are incorporated into the allegations in plaintiffs' Amended Complaint. Plaintiffs acknowledge that their claims are based on an investigation of public documents, including filings with the DOL. AC ¶ 9. This explicitly includes the Form 5500s, *see* AC ¶¶ 139, 143, 145, 205, a point which plaintiffs do not dispute in their opposition brief. Plaintiffs may not expressly rely on these documents to allege, for example, that certain fund fees "cannibalize[] a substantial portion of the participant's return[,]" AC ¶ 145, but then complain when BlackRock relies on ***the very same documents*** to show that the CTFs "bear ***no*** investment management fees[,]" MTD 9 (emphasis added). Plaintiffs' opposition does not address the Amended Complaint's own reliance on the content of these documents.

Against this backdrop, plaintiffs' reliance on the Ninth Circuit's decision in *Lee* is misplaced. *Lee* holds only that a court's consideration of another court's opinion is limited to the

[2] *See also Lorenz*, 241 F. Supp. 3d at 1012 (taking judicial notice of Form 5500s incorporated into plaintiff's complaint); *Powell v. Unum Life Ins. Co. of Am.*, 2016 WL 8731383, at *1 n.2 (E.D. Cal. Sept. 30, 2016) (taking judicial notice of Form 5500 as an undisputed matter of public record); *Knight v. Standard Ins. Co.*, 2008 WL 343852, at *2 (E.D. Cal. Feb. 6, 2008) (taking judicial notice of Form 5500 as a record or report of an administrative body).

existence of that opinion, and not for the facts recited in the other opinion. *See* 250 F.3d at 690. Since *Lee* was decided, however, this Court and others have continued to recognize that they properly may consider the contents of public filings incorporated into a plaintiff's complaint or otherwise subject to judicial notice. *E.g.*, *North Star Gas Co.*, 2016 WL 5358590, at *5 ("[T]he district court may treat [a document incorporated by reference] as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)") (quoting *Ritchie*, 342 F.3d at 908). The case law is replete with examples of courts taking judicial notice of DOL filings without plaintiffs' proposed limitation against considering the contents. *E.g.*, *Lorenz*, 241 F. Supp. 3d at 1012 (taking judicial notice of 5500s); *Terraza*, 241 F. Supp. 3d at 1067 (same, and discussing fees disclosed therein).[3] And given that plaintiffs have ***expressly*** incorporated each of the Form 5500s into their Amended Complaint, there is no basis for this Court to limit its consideration of the documents to their mere existence, even if judicial notice principles could otherwise support that limitation. Indeed, ignoring the contents of the Form 5500s would gut the Amended Complaint itself.[4]

Finally, plaintiffs cannot defeat judicial notice by attempting to capitalize on discrete clerical errors in the Form 5500s. First, plaintiffs appear to be disputing the interpretation of the documents rather than their "authenticity." *Cf.* Fed. R. Evid. 901 (authentication relates to whether a document is "what the proponent claims it is"). The proper interpretation of these documents is not determinative of whether judicial notice is proper. Second, plaintiffs fail to explain how isolated clerical errors in Schedule D of the Form 5500s filed with the DOL preclude consideration of the entirety of those filings. That failure is fatal where, as here, different sections of the documents are offered for a limited purpose. *Compare* MTD 3–4, 9 (citing supplemental

[3] *Accord Powell*, 2016 WL 8731383, at *1 n.2; *Knight*, 2008 WL 343852, at *2; *see also Hilton Worldwide, Inc. Glob. Benefits Admin. Comm. v. Caesars Entm't Corp.*, 532 B.R. 259, 269 n.6 (E.D. Va. 2015) (taking judicial notice of Form 5500 contents to determine whether plan met ERISA's minimum funding standard).

[4] Plaintiffs also cite a single case in the Central District where the district court took judicial notice of the content of SEC Forms 4 but not the truth of the content. RJN Opp. 3 (citing *Patel v. Parnes*, 253 F.R.D. 531, 546 (C.D. Cal. 2008)). Judge Koh later rejected this argument in *City of Royal Oak Retirement System v. Juniper Networks, Inc.*, on the ground that "Ninth Circuit precedent says otherwise." 880 F. Supp. 2d 1045, 1059 (N.D. Cal. 2012). And as noted, any limitation on the consideration of public filings for their truth could not apply when a plaintiff herself relies on the filings as true in her own pleading.

financial statements and schedule of assets to show administrative fees and range of investment options), *with* Decl. of Jason Herman ¶ 3 (ECF No. 79-17) (explaining incorrect EIN for a handful of Plan investment options in Schedule D).

For the foregoing reasons, this Court may fully consider the Form 5500s attached as Exhibits C–F to the motion dismiss.

II. FUND PROSPECTUSES (EXHIBITS G–L)

The Court likewise should reject plaintiffs' assertion that the Court may take judicial notice only of the existence of the fund prospectuses, but not the facts contained in them. Like the Form 5500s, the Court may take judicial notice of the fund prospectuses because they are "undisputed matters of public record." *Disabled Rights Action Comm.*, 375 F.3d at 866 n.1; *see also Smilovits v. First Solar Inc.*, 119 F. Supp. 3d 978, 1010 (D. Ariz. 2015) (taking judicial notice of facts in "reliable" SEC filings). Fund prospectuses are public filings with the SEC, and courts in this Circuit frequently grant judicial notice of SEC filings on motions to dismiss. *E.g.*, *Norfolk Cty. Ret. Sys. v. Solazyme, Inc.*, 2016 WL 7475555, at *1 n.1 (N.D. Cal. Dec. 29, 2016) (taking judicial notice of SEC filings) (citing *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1064 n.7 (9th Cir. 2008) (same) and *Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n.2 (9th Cir. 2006) (noting SEC filings are subject to judicial notice)); *City of Royal Oak Ret. Sys.*, 880 F. Supp. 2d at 1059 (taking judicial notice of SEC filings); *In re Silicon Graphics, Inc. Sec. Litig.*, 970 F. Supp. 746, 758 (N.D. Cal. 1997) (same), *aff'd*, 183 F.3d 970 (9th Cir. 1999); *Plevy v. Haggerty*, 38 F. Supp. 2d 816, 821 (C.D. Cal. 1998) (taking judicial notice of "public records required by the SEC to be filed").

And again like the Form 5500s discussed above, the Court also may consider the fund prospectuses on the independent ground that they are incorporated by reference into plaintiffs' Amended Complaint. Plaintiffs acknowledge their claims are based on an investigation of SEC filings, AC ¶ 9, and they directly quote from and refer to the BlackRock Low Duration Bond Portfolio prospectus, AC ¶¶ 128, 215. In addition, plaintiffs' allegations relate to, among other things, the investment strategy, expense ratio, and performance of the BlackRock-affiliated funds within the Plan and comparator funds outside the Plan. *See* AC ¶¶ 114–23 (assessing merits of

investing in BlackRock Global Allocation Fund as compared to American Funds Capital Income Builder and DFA Global Allocation 60/40 Portfolio); *id.* ¶¶ 136–37 (alleging excessive expenses for BlackRock Total Return Fund as compared to similar non-proprietary funds). These allegations "necessarily rely upon" and thus incorporate the fund prospectuses—making them appropriate for judicial notice. *Lorenz*, 241 F. Supp. 3d at 1012 (finding judicial notice proper where complaint necessarily relies upon a document or its contents, even if not explicitly so) (citing *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) and *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005)). *Lee v. City of Los Angeles* does not apply to the Court's consideration of the fund prospectuses filed with the SEC for similar reasons that it does not apply to the Form 5500s. Plaintiffs' proposal is inconsistent with multiple later court decisions that have explicitly taken judicial notice of the contents of SEC filings on motions to dismiss. *E.g.*, *City of Royal Oak Ret. Sys.*, 880 F. Supp. 2d at 1059 (taking judicial notice of SEC filings and assuming their contents are true); *In re Silicon Graphics*, 970 F. Supp. at 758 (taking judicial notice of "contents of relevant public disclosure documents required to be filed with the SEC" *and* incorporated by reference) (quoting *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991).[5] And *Lee* on its own terms does not limit a court's consideration of a document that a complaint explicitly relies upon.

Finally, this Court should flatly reject plaintiffs' half-hearted attempt to connect the Form 5500 clerical errors with the fund prospectuses. The Form 5500 filings and fund prospectuses are entirely distinct documents, filed by separate entities with separate federal agencies pursuant to separate statutory requirements. Plaintiffs cannot genuinely dispute the authenticity of one set of documents by pointing to typos in another, and they do not come close to doing so. This Court may fully consider the fund prospectuses attached as Exhibits G–L to the motion to dismiss.

III. OTHER ERISA PLAN-RELATED DOCUMENTS (EXHIBITS M–V, Z–MM)

Plaintiffs argue that the Guideline and Fee Agreements ("GLFAs"), Investment

[5] *See also Renfro v. Unisys Corp.*, 2010 WL 1688540, at *2 (E.D. Pa. Apr. 26, 2010) (taking judicial notice of fee information in prospectuses), *aff'd*, 671 F.3d 314 (3d Cir. 2011); *Hecker v. Deere & Co.*, 496 F. Supp. 2d 967, 972 (W.D. Wis. 2007) (taking judicial notice of prospectuses, without limiting consideration to their existence, as being "fundamental to the complaint [and] widely circulated publicly available documents"), *aff'd*, 556 F.3d 575 (7th Cir. 2009).

Management Agreement ("IMA"), Audited Financial Statements, and other plan-related documents do not meet the requirements for judicial notice. RJN Opp. 4. BlackRock addresses each argument in turn.

First, plaintiffs contend that an unspecified twenty-one of these twenty-four documents are not incorporated by reference into the Amended Complaint. As a starting point, the Amended Complaint expressly incorporates the IMA (Ex. T), *see* AC ¶¶ 59-64, and Audited Financial Statements for the BlackRock CTFs (Exs. U–V), *see id.* ¶¶ 101, 103, 198. The Court may thus consider those documents to the extent they support ***or*** contradict plaintiffs' claims. *In re Gilead Scis.*, 536 F.3d at 1055 (when considering motion to dismiss, court need not accept truth of allegations contradicted by matters otherwise properly under consideration).

In addition, numerous authorities confirm that an express reference is not required for the incorporation by reference doctrine to apply. *E.g.*, *Shrem v. Sw. Airlines Co.*, 2016 WL 4170462, at *1 (N.D. Cal. Aug. 8, 2016) (the incorporation by reference doctrine allows courts to consider a document upon which a plaintiff's claim depends, "even though the plaintiff does not ***explicitly*** allege the contents of that document in the complaint") (emphasis added) (quoting *Knievel*, 393 F.3d at 1076). That is why courts routinely take judicial notice of ERISA plan documents, including agreements with third party service providers, at the motion to dismiss stage. *Lorenz*, 241 F. Supp. 3d at 1012 (taking judicial notice of the plan, summary plan descriptions, fee disclosures, and master services agreement); *Terraza*, 241 F. Supp. 3d at 1067 (same); *In re Lehman Bros.*, 2012 WL 6000575, at *1 n.2 (taking notice of recordkeeping and trust agreement).[6]

Here, plaintiffs' argument against incorporation ignores the clear connection between the

[6] *See also White v. Chevron Corp.*, 2017 WL 2352137, at *5, 7 (N.D. Cal. May 31, 2017) (taking judicial notice of several plan-related documents, including participant newsletter); *Watkins v. Citigroup Ret. Sys.*, 2015 WL 9581838, at *2 (S.D. Cal. Dec. 30, 2015) (taking judicial notice of ERISA Pension Plan on motion to dismiss); *Koblentz v. UPS Flexible Emp. Benefit Plan*, 2013 WL 4525432, at *1–2 (S.D. Cal. Aug. 23, 2013) (considering ERISA plan provisions, correspondences, and related documents on motion to dismiss); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2016 WL 4507117, at *3–4 (C.D. Cal. Aug. 5, 2016) (taking judicial notice of ERISA "Plan Document" on motion to dismiss); *Care First Surgical Ctr. v. ILWU-PMA Welfare Plan*, 2014 WL 6603761, at *4 (C.D. Cal. July 28, 2014) (taking judicial notice of plan agreements on motion to dismiss).

allegations in the Amended Complaint and the nature of the GLFAs and BTC-authored documents, which are ***binding Plan agreements***. *See* Edwards Decl., Ex. T (IMA) at BAIRD_0000353 (incorporating BTC's "*Managing ERISA Assets*" and "*16 Things*" documents into agreement) and BAIRD_0000347–348 (incorporating GLFAs into agreement). By expressly incorporating the IMA into their Amended Complaint, AC ¶¶ 59-64, plaintiffs necessarily have also incorporated those governing Plan documents, which are incorporated as part of the IMA.[7] BlackRock seeks to highlight for this Court the many contradictions between plaintiffs' interpretation of Plan features and the ***actual*** Plan features set forth in the documents upon which plaintiffs rely. Plaintiffs may not, for example, allege hidden fees or question BTC's securities lending compensation while shielding from this Court the incorporated documents that defeat those very allegations. *See generally* Exs. U–V (showing actual fund fees); Exs. Z–FF (setting forth terms of BTC's securities lending engagement).

Second, plaintiffs' attack on the authenticity of these documents is inadequate. Plaintiffs' authenticity challenge is made on a general basis that the documents are not publicly available and have not been properly authenticated. RJN Opp. 5. Yet plaintiffs fail to dispute any particular facts or otherwise articulate why the documents are not what BlackRock claims them to be. *See* Fed. R. Evid. 901. Even the cases plaintiffs rely upon suggest that to put authenticity in dispute, something more is required than a mere conclusory assertion that the issue is disputed. *See, e.g.*, *Fitzhenry-Russell v. Coca-Cola Co.*, 2017 WL 4680073, at *1 n.1 (N.D. Cal. Oct. 18, 2017) (denying judicial notice of product packaging, in part because plaintiff contended it was not the same packaging affixed to the product she purchased); *Barney Ng v. Wells Fargo Foothill LLC*, 2013 WL 12084726, at *3 (C.D. Cal. July 30, 2013), *aff'd sub nom. Ng v. Wells Fargo Foothill, LLC*, 2016 WL 6661339 (C.D. Cal. Mar. 28, 2016) (denying judicial notice of credit agreement because plaintiff asserted he was not a party to the agreement). As plaintiffs have

[7] Unable to establish otherwise, Plaintiffs cite two cases in support of the unremarkable proposition that courts decline to take judicial notice of ***unincorporated*** documents. *See Duguid v. Facebook, Inc.*, 2016 WL 1169365, at *1 (N.D. Cal. Mar. 24, 2016); *Colodney v. Cty. of Riverside*, 2013 WL 12200649, at *2 (C.D. Cal. Aug. 16, 2013), *aff'd*, 651 F. App'x 609 (9th Cir. 2016) (declining to take judicial notices as to documents for which no request was made). These cases are irrelevant to determining whether the documents at issue are, in fact, incorporated.

offered no such reasoning, their generalized refusal to concede authenticity does not create a genuine dispute sufficient to defeat judicial notice.

Third, plaintiffs question the propriety of taking judicial notice of "self-created" documents such as BTC's "*Managing ERISA Assets*" and "*16 Things*" documents. RJN Opp. 5–6. They refer to *SolarCity Corp. v. Salt River Project Agricultral Improvement & Power District*, where the District Court of Arizona relied on Fed. R. Evid. 201 to decline judicial notice of the defendant's two website postings and response letter. *See* 2015 WL 6503439, at *4 (D. Ariz. Oct. 27, 2015), *appeal dismissed*, 859 F.3d 720 (9th Cir. 2017), *cert. granted* 2017 WL 3980792 (U.S. Dec. 1, 2017). But that decision did not consider whether the documents at issue were incorporated by reference into the complaint. *SolarCity* thus does not apply to this case, where BlackRock has asked this Court to take judicial notice of the BTC documents because they are ***binding agreements*** incorporated by reference into the Amended Complaint. *See supra*, at 8–9; RJN 6. That these vital Plan-related documents are "self-created" does not by itself shield them from consideration. Such a rule would foreclose consideration of ***any*** ERISA plan-related documents, which by their nature are self-created, and run counter to clearly established authority in this Circuit. *See Lorenz*, 241 F. Supp. 3d at 1012 ("Courts routinely take judicial notice of ERISA plan documents").

For the reasons set forth above, the Court may fully consider the Plan-related documents attached as Exhibits M–V and Z–MM to the motion to dismiss.

IV. PARTICIPANT FEE DISCLOSURES (EXHIBITS W–Y)

Plaintiffs argue that the participant fee disclosures are not proper for judicial notice because (1) they are not incorporated by reference into the Amended Complaint and (2) their authenticity is in question. RJN Opp. 7. BlackRock again addresses each argument in turn.

First, the language of the Amended Complaint plainly contradicts plaintiffs' assertion that the fee disclosures are not incorporated by reference. Plaintiffs explicitly question the adequacy of the fee disclosures received by Plan participants at various points throughout the Amended Complaint. *See* AC ¶ 5 (alleging "excessive and undisclosed fees and expenses"); *id.* ¶ 168 (alleging "unnecessary and undisclosed expenses"); *id.* ¶ 199 (alleging unreported "additional

fees/expenses"). The incorporation by reference doctrine applies where a claim depends on the contents of a document. *See Knievel*, 393 F.3d at 1076. Therefore, plaintiffs' allegations about the transparency of the fee disclosures necessarily incorporates those fee disclosures.

Second, plaintiffs also do not—and cannot—reasonably dispute the authenticity of the fee disclosures. Yet again plaintiffs fail to articulate any reason why these documents may be inauthentic—likely because plaintiffs, as Plan participants, received these same disclosures over the time periods they cover. Courts frequently take judicial notice of such disclosures on motions to dismiss, thereby recognizing their authenticity. *See, e.g.*, *Lorenz*, 241 F. Supp. 3d at 1012 (taking judicial notice of participant fee disclosure notices); *Terraza*, 241 F. Supp. 3d at 1067 (same); *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1159 (9th Cir. 2012) (affirming judicial notice of fee disclosure and other disclosures). This Court may likewise take judicial notice of the participant fee disclosures.

Plaintiffs also argue that the fee disclosures are in any event irrelevant to the Court's determination of the motion to dismiss because they are inconsistent with allegations in the Amended Complaint regarding "hidden" investment management fees. While allegations in a complaint must ordinarily be accepted as true on a motion to dismiss, courts "need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *In re Gilead Scis.*, 536 F.3d at 1055; *accord Parks*, 2017 WL 2840704, at *1; *Vigdor*, 2017 WL 2720218, at *1. Regardless, the mere existence of contradiction does not preclude the judicial notice itself. The Court, therefore, may fully consider the incorporated fee disclosures even though they contradict plaintiffs' allegations.

CONCLUSION

For the foregoing reasons, the Court should take judicial notice of Exhibits C through MM submitted in support of BlackRock's motion to dismiss. The Court may also consider Exhibit A and Exhibit B, regardless of whether they are subject to judicial notice, as they relate to BlackRock's standing arguments under Federal Rule of Civil Procedure 12(b)(1).

Dated: December 22, 2017

O'MELVENY & MYERS LLP

By: */s/ Meaghan VerGow*
Meaghan VerGow

Attorneys for Defendants