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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

12	ROSS KLEIN; KLEIN METALS,	)	CV 17-07003-RSWL-AS
	INC.; and KLEIN	)	
13	ENTERPRISES, INC.,	)	
		)	
14	Plaintiffs,	)	<b>ORDER re: Defendant's</b>
		)	<b>Motion to Dismiss Second</b>
15		)	<b>Amended Complaint</b>
		)	<b>Pursuant to F.R.C.P.</b>
16	v.	)	<b>12(b)(6) [45];</b>
		)	<b>Defendant's Motion to</b>
17	MONY LIFE INSURANCE COMPANY	)	<b>Strike and Dismiss</b>
	OF AMERICA,	)	<b>Plaintiffs' Requests for</b>
18		)	<b>Attorneys' Fees and</b>
		)	<b>Punitive Damages from</b>
19	Defendant.	)	<b>the Second Amended</b>
		)	<b>Complaint [46]</b>
20		)	
21		)	

22 Currently before the Court is Defendant MONY Life  
 23 Insurance Company of America's ("Defendant") Motion to  
 24 Dismiss Pursuant to Federal Rule of Civil Procedure  
 25 12(b)(6) ("Motion to Dismiss") [45] and Motion to  
 26 Strike and Dismiss Requests for Attorneys' Fees and  
 27 Punitive Damages from the Second Amended Complaint  
 28 ("Motion to Strike") [46]. Having reviewed all papers

1 submitted pertaining to these Motions, the Court **NOW**  
2 **FINDS AND RULES AS FOLLOWS:** the Court **GRANTS**  
3 Defendant's Motion to Dismiss **WITHOUT LEAVE TO AMEND**  
4 and **DENIES as MOOT** Defendant's Motion to Strike.

## 5 **I. BACKGROUND**

### 6 **A. Factual Background**

7 In 2004, Plaintiffs Ross Klein; Klein Metals, Inc.;  
8 and Klein Enterprises, Inc. (collectively,  
9 "Plaintiffs") sought advice from Defendant's purported  
10 agent, Kathleen Novotny ("Novotny"). Second Am. Compl.  
11 ("SAC") ¶ 16, ECF No. 44. According to the Second  
12 Amended Complaint ("SAC"), Novotny wrongfully advised  
13 Plaintiffs to invest in a Section 419 plan, called the  
14 PREPare Plan (the "Plan"), through which Defendant sold  
15 its insurance products. Id. ¶¶ 14-15. The Internal  
16 Revenue Service ("IRS") had issued a notice in 1995  
17 stating that such plans violated the Internal Revenue  
18 Code, and 2004 Treasury Regulations confirmed this  
19 prohibition because individualized accounting within a  
20 plan-like Defendant did with the Plan here-is  
21 considered a tax shelter. Id. ¶ 12. Nevertheless,  
22 Novotny prepared marketing materials promising that:  
23 (1) employers, such as Plaintiffs, may deduct  
24 contributions to the Plan; (2) Plaintiffs would receive  
25 tax savings for their first-year contributions; and  
26 (3) in each following year, Plaintiffs' after-tax cost  
27 would be reduced. Id. ¶¶ 18, 20, Ex. A.

28 Plaintiffs contributed to the Plan until 2010, in

1 reliance upon Novotny's alleged misrepresentations that  
2 the Plan was tax deductible and IRS-compliant. Id.  
3 ¶¶ 27, 32. Meanwhile, neither Novotny nor Defendant  
4 informed Plaintiffs that Defendant had a policy against  
5 selling its insurance products in such plans. Id.  
6 ¶¶ 28, 30-31. Eventually, the IRS audited Plaintiff  
7 Ross Klein and assessed significant back taxes,  
8 interest, and penalties. Id. ¶¶ 33-34. Specifically,  
9 the IRS took issue with Defendant's individualized  
10 accounting. Id. ¶ 34. Defendant's representatives  
11 admitted in depositions to Defendant's use of separate  
12 accounting for each employer within the Plan. Id.  
13 ¶ 24. Plaintiffs claim they discovered this practice  
14 after the depositions became public record in 2015.  
15 Id. ¶ 35.

16 **B. Procedural Background**

17 On September 22, 2017, Plaintiffs filed their  
18 Complaint [1] against Defendant. Thereafter, on  
19 November 8, 2017, Plaintiffs filed their First Amended  
20 Complaint ("FAC") [18]. The Court dismissed the FAC  
21 with leave to amend [43] on February 27, 2018, warning  
22 Plaintiffs of the possibility of dismissal with  
23 prejudice for a subsequent, deficient pleading.

24 On March 19, 2018, Plaintiffs filed their SAC [44].  
25 Defendant filed the instant Motion to Dismiss [45] and  
26 Motion to Strike [46] on April 2, 2018. Plaintiffs  
27 timely opposed [49, 51], and Defendant timely replied  
28 [53, 54].



1 factual allegations, a plaintiff must provide more than  
2 "labels and conclusions" or "a formulaic recitation of  
3 the elements of a cause of action." Bell Atl. Corp. v.  
4 Twombly, 550 U.S. 544, 555 (2007).

5 **B. Analysis**

6 1. Request for Judicial Notice

7 Defendant requests the Court take judicial notice  
8 of the following: (1) the Plan proposal provided to  
9 Plaintiffs on November 30, 2004; (2) the restatement of  
10 the Plan provided to Plaintiffs in December 2004;  
11 (3) the Plan joinder agreement executed by Plaintiff  
12 Ross Klein on December 11, 2004; (4) the release  
13 executed by Plaintiff Ross Klein on December 11, 2004;  
14 (5) certain filings in Plaintiffs' first Texas action;  
15 (6) certain filings in the second Texas action;  
16 (7) Plaintiffs' original complaint against their  
17 accountants filed in Los Angeles Superior Court; (8) a  
18 subpoena served on Defendant in December 2014 in  
19 connection with the first Texas action; and (9) a  
20 records affidavit served in response to the subpoena.  
21 Def.'s Req. for Judicial Notice ("RJN"), ECF No. 45-10.  
22 Plaintiffs only oppose judicial notice of the purported  
23 disclaimers, maintaining that they are neither attached  
24 to the SAC nor referred to in the SAC. Pls.' Opp'n to  
25 Def.'s Mot. to Dismiss ("Opp'n") 10:24-11:3, ECF No.  
26 51.

27 The court may consider unattached evidence that a  
28 complaint "necessarily relies" on; this includes

1 documents that the complaint refers to, are central to  
2 the claim, and no party questions their authenticity.  
3 United States v. Corinthian Colls., 655 F.3d 984, 999  
4 (9th Cir. 2011) (citations omitted). Here, Plaintiffs  
5 allege Defendant "created false and fraudulent  
6 documents purporting to disclaim responsibility for  
7 providing any tax advice." SAC ¶ 39. This allegation  
8 refers to the "Multiple Employer Welfare Benefit Plan  
9 Joinder Agreement" and "Statement of Understanding and  
10 Release," which accordingly are subject to judicial  
11 notice. See RJN, Exs. 3-4. The SAC quotes directly  
12 from and attaches the Plan proposal, so the Court takes  
13 judicial notice of the proposal document as well.  
14 Compare SAC ¶ 20, Ex. A, with RJN, Ex. 1. Plaintiffs  
15 further aver that Defendant's agent presented the Plan  
16 to Plaintiff Ross Klein in 2004, SAC ¶ 18, which  
17 parallels Plaintiffs' receipt of the Plan restatement  
18 in December 2004, RJN ¶ 2. As such, the Court takes  
19 judicial notice of the restatement. See RJN, Ex. 2.

20 A district court may take judicial notice under  
21 Federal Rule of Evidence 201 of "undisputed matters of  
22 public record, including documents on file in federal  
23 or state courts." Harris v. Cty. of Orange, 682 F.3d  
24 1126, 1131-32 (9th Cir. 2012) (internal citation  
25 omitted). As such, the filings in the Texas actions  
26 and Los Angeles Superior Court are appropriate for  
27 judicial notice. See RJN, Exs. 5-18, 21-22.

28 Finally, the Court takes judicial notice of the

1 fact of service of and response to the subpoena, but  
2 not the truth of the facts recited therein. See RJN,  
3 Exs. 19-20; Gallagher v. United States, No. 17-cv-  
4 00586-MEJ, 2017 U.S. Dist. LEXIS 163995, at \*9 (N.D.  
5 Cal. Oct. 3, 2017) (citing Lee v. City of L.A., 250  
6 F.3d 668, 689-90 (9th Cir. 2001)).

7 In sum, Defendant's Request for Judicial Notice is  
8 **GRANTED** in its entirety.

9 2. Motions to Dismiss and Strike

10 Preliminarily, because Plaintiffs allege Defendant  
11 is liable for intentional misrepresentation under an  
12 agency theory, see SAC ¶ 11, Federal Rule of Civil  
13 Procedure 9(b) requires that Plaintiffs allege with  
14 particularity facts supporting the existence of an  
15 agency relationship, Palomares v. Bear Stearns  
16 Residential Mortg. Corp., 07cv01899 WQH (BLM), 2008  
17 U.S. Dist. LEXIS 19407, at \*12 (S.D. Cal. 2008) (citing  
18 Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th Cir.  
19 2007)). Particularity means "the who, what, when,  
20 where, and how." Davidson v. Kimberly-Clark Corp., 873  
21 F.3d 1103, 1110 (9th Cir. 2017) (quotation omitted).

22 An agent is a person who represents another in  
23 dealings with third persons. Cal. Civ. Code § 2295.  
24 To establish actual agency, Plaintiffs must allege  
25 Defendant consented to Novotny acting on Defendant's  
26 behalf and subject to Defendant's control, and Novotny  
27 also consented to so act. Van't Rood v. Cty. of Santa  
28 Clara, 6 Cal. Rptr. 3d 746, 764 (Ct. App. 2003)

1 (quoting Edwards v. Freeman, 212 P.2d 883 (Cal. 1949)).  
2 Importantly, there is no agency without the right to  
3 control. Id. Moreover, a principal is not liable for  
4 acts beyond the scope of the agent's actual or  
5 ostensible authority. Id. at 765 (citing Ernst v.  
6 Searle, 22 P.2d 715 (Cal. 1933)).

7 In the SAC, Plaintiffs allege that Novotny was  
8 Defendant's "agent" and Defendant "consented to  
9 Novotny's marketing and promotion of [its] insurance  
10 policies and Section 419 plan that is the subject of  
11 this lawsuit." SAC ¶ 11. Plaintiffs further aver that  
12 Defendant consented to Novotny acting on Defendant's  
13 behalf and subject to its control, giving Novotny agent  
14 code 936665 and compensating her for her acts. Id.  
15 ¶¶ 12-13. Contrary to Defendant's contention  
16 otherwise, see Def.'s Reply in Supp. of Mot. to Dismiss  
17 4:2-4, ECF No. 53, Plaintiffs do allege Novotny's  
18 consent, i.e., that she requested and received  
19 Defendant's "permission and license to promote and  
20 market [Defendant]'s policies in connection with the  
21 Section 419 plan on [Defendant]'s behalf and performed  
22 such acts in accordance with the scope of [Defendant]'s  
23 authority granted to Novotny," SAC ¶ 12.

24 Fatally, however, Plaintiffs' control allegation is  
25 conclusory. Plaintiffs fail to allege any facts  
26 showing Defendant's right to control Novotny's actions,  
27 let alone specific facts to satisfy a heightened  
28 pleading standard. The Court already specifically



1 informed Plaintiffs of this deficiency when it  
2 dismissed the FAC with leave to amend. See Order re:  
3 Def.'s Mot. to Strike, Def.'s Mot. to Dismiss, & Pls.'  
4 Mot. to Correct 14:9-10, ECF No. 43. Because  
5 Plaintiffs were warned to correct the deficiencies in  
6 the FAC or face dismissal with prejudice, id. at 18:21-  
7 28, leave to amend the SAC is not warranted.

8 Agent code 936665, allegedly provided to Novotny,  
9 does not save the SAC. See SAC ¶ 12. Even assuming  
10 the transaction at issue (i.e., Plaintiffs' adoption of  
11 the Plan) involved the direct sale of insurance  
12 policies to Plaintiffs, a non-exclusive agent, like  
13 Novotny, is the agent of the insured, like Plaintiffs,  
14 not the insurer, like Defendant. Mercury Ins. Co. v.  
15 Pearson, 87 Cal. Rptr. 3d 310, 318 (Ct. App. 2008)  
16 (quotation omitted). Thus, Plaintiffs still fail to  
17 properly allege an agency relationship.

18 Moreover, the alleged scope of Novotny's authority,  
19 "including the authority to represent [Defendant] and  
20 discuss the qualities, characteristics and all aspects  
21 of [Defendant's] insurance policies issued to  
22 Plaintiffs, as well as the Section 419 plan, which the  
23 [] insurance policies funded," SAC ¶ 13, does not  
24 include making representations about the tax  
25 consequences of the Plan.<sup>1</sup> An inference that her

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26  
27 <sup>1</sup> Plaintiffs' allegation that all of Novotny's  
28 representations were made within the scope of her authority is  
conclusory and thus insufficient to withstand dismissal. See SAC

1 authority included such representations would be  
2 unreasonable in light of Defendant's explicit  
3 disclaimers. Cf. Klarfeld, 944 F.2d at 585 (requiring  
4 courts to draw all *reasonable* inferences in favor of  
5 the nonmovant). For instance, the Plan brochure states  
6 that Defendant "shall not be deemed to be a party to  
7 the Plan." SAC, Ex. A at 12. The disclosures that  
8 Plaintiffs signed state that no "[i]nsurer or its  
9 agents can guarantee or promise that the anticipated  
10 favorable tax results will in fact be achieved," RJN,  
11 Ex. 3 at 41, and neither Defendant nor its agents "have  
12 made any representations regarding the tax consequences  
13 of participation in the [Plan]," id., Ex. 4 at 44.<sup>2</sup> It  
14 simply is not plausible that Defendant would grant  
15 Novotny authority that directly conflicts with the  
16 disclaimers provided to Plaintiffs. Since Plaintiffs  
17 do not, and cannot plausibly, allege Novotny had  
18 authority to make tax representations, Defendant is not  
19 vicariously liable for such representations (assuming  
20 Novotny was Defendant's agent).

21 Without adequate agency allegations, there is no  
22 basis to hold Defendant liable. Therefore, the Motion

23 \_\_\_\_\_  
24 ¶¶ 11-12.

25 <sup>2</sup> Despite Plaintiffs' argument that the disclaimers are a  
26 factual issue, are void, and were fraudulently obtained, Opp'n  
27 11:5-7, the disclaimers, even if unenforceable as to Plaintiffs,  
28 limit Novotny's alleged authority. Indeed, agency forms from the  
principal's words or conduct. Secci v. United Independant Taxi Drivers, Inc., 214 Cal. Rptr. 3d 379, 385 (Ct. App. 2017)  
(quotation omitted).

1 to Dismiss is **GRANTED** in its entirety **WITHOUT LEAVE TO**  
2 **AMEND**. See Zucco Partners, LLC v. Digimarc Corp., 552  
3 F.3d 981, 1007 (9th Cir. 2009) (affirming dismissal  
4 with prejudice where plaintiff "failed to correct the[  
5 first amended complaint's] deficiencies in its [s]econd  
6 [a]mended [c]omplaint," indicating that there were "no  
7 additional facts to plead" (quotation omitted)).  
8 Because the entire SAC is dismissed, the Motion to  
9 Strike is **DENIED as MOOT**.

10 **III. CONCLUSION**

11 Based on the foregoing, the Court **GRANTS**  
12 Defendant's Motion to Dismiss [45] **WITHOUT LEAVE TO**  
13 **AMEND**, and, accordingly, **DENIES** Defendant's Motion to  
14 Strike [46] **as MOOT**.

15 The clerk shall close this action.

16 **IT IS SO ORDERED.**

17  
18 DATED: May 30, 2018 s/ RONALD S.W. LEW

19 HONORABLE RONALD S.W. LEW  
20 Senior U.S. District Judge  
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