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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BOARD OF TRUSTEES OF THE BAY
AREA ROOFERS HEALTH & WELFARE
TRUST FUND, et al.,

Plaintiffs,

v.

GUDGEL YANCEY ROOFING INC.,

Defendant.

Case No. 16-CV-04310-LHK

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

Re: Dkt. No. 15

Plaintiffs Board of Trustees of the Bay Area Roofers Health & Welfare Trust Fund; Pacific Roofers Pension Plan; East Bay/North Bay Roofers Vacation Trust Fund, Bay Area Counties Roofing Industry Promotion Fund, Bay Area Counties Roofing Industry Apprenticeship Training Fund; and Doug Ziegler, as Trustee (collectively, "Plaintiffs"), are multi-employer employee benefit plans. Plaintiffs bring this action against Defendant Gudgel Yancey Roofing, Inc. ("Defendant") alleging violations of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, and the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. ECF No. 1 ("Compl."). Before the Court is Defendant's motion to dismiss. ECF No. 15

1 (“Def. Mot.”). The Court finds this matter appropriate for determination without oral argument
2 and hereby VACATES the hearing set for December 8, 2016. *See* Civil L.R. 7-1(b). Having
3 considered the parties’ submissions, the relevant law, and the record in this case, the Court hereby
4 GRANTS Defendant’s motion to dismiss.

5
6 **I. BACKGROUND**

7 **A. Factual Background**

8 Plaintiffs are multi-employer employee benefit funds. Compl. ¶ 7. Plaintiffs receive
9 contributions from individuals who are parties to a collective bargaining agreement (“CBA”) that
10 exists between Local 81 of the United Union of Roofers, Waterproofers and Allied Workers, AFL-
11 CIO (“Local 81”), and the Associated Roofing Contractors of the Bay Area Counties, Inc.
12 (“Associated Roofing Contractors”). *Id.* ¶ 7; *see also* Compl. Ex. A.

13 Defendant is a roofing, waterproofing, and contracting business in Sacramento County,
14 California. Compl. ¶ 9. According to the Complaint, Defendant is bound to the CBA between
15 Local 81 and the Associated Roofing Contractors, and thus Defendant must comply with the terms
16 of the CBA. *Id.* ¶¶ 11–13. Specifically, Plaintiffs allege that Defendant became bound to the
17 CBA “by way of accepting a public works contract to train apprentices.” *Id.*

18 According to Plaintiffs, “Defendant accepted” a “Referral Page” from Local 81, and
19 Defendant thereby became bound to the CBA. *Id.* ¶ 13. Plaintiffs attached to their Complaint a
20 copy of the Referral Page. Compl., Ex. B. The Referral Page is on Local 81 letterhead and is
21 dated August 25, 2015. *Id.* The Referral Page lists the name “Isidro Quevedo” and states that the
22 individual is to “Report To: Gudgel Yancey Roof.” *Id.* The Referral Page is signed by a Local 81
23 “Member” and a “Dispatcher.” *Id.* The Referral Page contains the following “Note”:

24 By accepting this referral, the individual employer recognizes [Local
25 81] as the majority collective bargaining representative of his or its
26 employees employed in the counties covered by the [CBA] between
27 Local 81 and the Associated Roofing Contractors of the Bay Area
28 Counties and recognizes the Union as the exclusive collective
bargaining agent for such employees and further agrees that it is
bound to said [CBA] including all the wages, hours, and all other
terms and conditions of such [CBA] including the payment of all

1 wage scales and all trust fund contributions specific and required by
said [CBA].

2 *Id.*

3 Plaintiffs also attached to their Complaint “a true and correct copy of the current [CBA]”
4 to which Plaintiffs allege that Defendant became bound by accepting the Referral Page. Compl. ¶
5 13. The title page of the CBA is dated August 1, 2011–July 31, 2015. Compl., Ex. A. The CBA
6 requires employers “to make timely monthly contributions to the Trust Funds for fringe benefits
7 for its covered employees and to submit to requested payroll audits for verification of accurate
8 employer contributions to employee benefits administered by Plaintiffs.” Compl. ¶ 13. Payments
9 that are “received later than the last day of the month following the month in which the hours were
10 worked are delinquent and liquidated damages shall be assessed on all delinquent contributions to
11 the Trust Funds along with interest.” *Id.* ¶ 14. Under the CBA, employers are also bound to
12 certain trust agreements, including the trust agreement for the Health and Welfare Trust (“Trust
13 Agreement”) which obligates employers “to make timely contributions to the Trust adopted by the
14 Board of Trustees of the Health and Welfare Trust.” *Id.* ¶ 16; *see also* Compl., Ex. C.

15
16 According to Plaintiffs, Defendant “failed to submit [to Plaintiffs] its employer
17 contribution report including payment owed for the months of April and May 2016,” as required
18 by the CBA and Trust Agreement. *Id.* ¶ 19. Further, on March 11, 2016, Defendant “initially
19 agreed to submit to an audit of its payroll records but was refusing to provide [to Plaintiffs] its
20 DE-9C (Quarterly Contribution Return and Report of Wages) or Cash Disbursement Journal for
21 the audit period of July 1, 2013 through September 30, 2013.” *Id.* ¶ 22.

22
23 On April 4, 2016, Defendant sent an email to Plaintiffs stating that Defendant was not a
24 signatory to the CBA, and that Defendant would “only be providing records to Plaintiff that apply
25 to apprentice contributions.” *Id.* ¶ 23.

26
27 On April 6, 2016, Plaintiffs told Defendant that Defendant “is bound to the CBA, including

1 applicable Trust Agreement(s)” since Defendant “accepted the public works contract award
2 referral.” *Id.* ¶ 24. Plaintiffs thus told Defendant that “the Trust Funds’ Auditor would need
3 access to the DE-9C (Quarterly Contribution Return and Report of Wages) or Cash Disbursement
4 Journal in order to ascertain whether Defendant was correctly reporting all its required hours to the
5 Trust Funds.” *Id.* Plaintiffs sent subsequent requests to Defendant “but Defendant has failed to
6 submit to an audit of its payroll records in accordance with the applicable CBA and/or Trust
7 agreement(s).” *Id.* ¶ 25. Further, according to the Complaint, “Defendant is continuing to breach
8 [the CBA] by fail[ing] to pay monies due thereunder to Plaintiffs.” *Id.* ¶ 26.

9
10 **B. Procedural History**

11 Plaintiffs filed a Complaint against Defendant in this Court on July 29, 2016. *See* Compl.
12 Plaintiffs’ Complaint alleges three causes of action.

13 Count One asserts that the CBA and applicable Trust Agreement authorize Plaintiffs “to
14 conduct an audit of the payroll books and records of employers,” and requests injunctive relief.
15 *Id.* ¶¶ 28–31. Plaintiffs thus “seek an injunctive order from this Court, requiring an audit of the
16 time period July 1, 2013 through September 30, 2013, and an order requiring all unpaid or
17 underpaid contributions, liquidated damages, and pre-judgment interest revealed to be due and
18 owing as a result of any such audit.” *Id.* ¶ 32.

19
20 Count Two alleges that Defendant violated ERISA, 29 U.S.C. § 1145, by failing to submit
21 monthly transmittals and make contributions to the Trusts. *Id.* ¶ 37. Specifically, in addition to
22 refusing an audit for the period of July 1, 2013 through September 30, 2013, Defendant has “failed
23 to submit employer contribution report [sic] including principal amount, liquidated damages, and
24 interest owed for the months of April and May 2016.” *Id.* ¶ 39. Plaintiffs further allege that
25 Defendant’s failure to submit reports and to make contributions constitute breach of the fiduciary
26 duty owed pursuant to ERISA. *Id.*

1 Count Three alleges that Defendant breached the CBA, in violation of the LMRA, 29
2 U.S.C. § 185(a), by failing to pay employer contributions as required by the CBA. *Id.* ¶¶ 42–45.

3 On September 2, 2016, Defendant filed a motion to dismiss the Complaint. Def. Mot. at 1.
4 Specifically, Defendant argued that Plaintiffs’ Complaint failed to state a claim because the
5 Complaint fails to allege sufficient facts to establish that Defendant was bound to the CBA
6 between Local 81 and the Associated Roofing Contractors. *Id.* at 2.

7 On September 15, 2016, Plaintiffs filed a response in opposition to Defendant’s motion to
8 dismiss. ECF No. 16 (“Pl. Opp.”). Plaintiffs asserted that their Complaint adequately alleged that
9 Defendant was bound to the CBA. *Id.* at 2. In support of its opposition to Defendant’s motion to
10 dismiss, Plaintiffs attached a declaration and several exhibits in support of Plaintiffs opposition.
11 *See* Pl. Opp., Exs. 1–5.
12

13 On September 23, 2016, Defendant filed a reply. ECF No. 17 (“Def. Reply”). Defendant
14 again argued that Plaintiffs’ Complaint failed to state a claim, and Defendant further asserted that
15 Plaintiffs’ additional arguments and documents attached to its response were not alleged or
16 included in the Complaint, and thus could not be considered in ruling on Defendant’s motion to
17 dismiss. *Id.* at 1–4.
18

19 **II. LEGAL STANDARD**

20 **A. Motion to Dismiss Under Rule 12(b)(6)**

21 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an
22 action for failure to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell*
23 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the
24 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
25 defendant is liable for the misconduct alleged. The plausibility standard is not akin to a
26 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted
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1 unlawfully.” *Ashcroft v. Iqbal*, 566 U.S. 662, 678 (2009) (internal citation omitted).

2 For purposes of ruling on a Rule 12(b)(6) motion, the Court “accept[s] factual allegations
3 in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving
4 party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

5 However, a court need not accept as true allegations contradicted by judicially noticeable facts,
6 *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and a “court may look beyond the
7 plaintiff’s complaint to matters of public record” without converting the Rule 12(b)(6) motion into
8 one for summary judgment, *Shaw v. Hahn*, 56 F.3d 1061, 1064 (9th Cir. 2011). Mere “conclusory
9 allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.”
10 *Adams v. Johnson*, 355 F.3d 1179 1183 (9th Cir. 2004).

11
12 **B. Leave to Amend**

13 If the court concludes that a motion to dismiss should be granted, it must then decide
14 whether to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave
15 to amend “shall be freely given when justice so requires,” bearing in mind “the underlying purpose
16 of Rule 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or
17 technicalities.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (citation omitted).

18 Nonetheless, a district court may deny leave to amend a complaint due to “undue delay, bad faith
19 or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments
20 previously allowed, undue prejudice to the opposing party by virtue of allowance of the
21 amendment, [and] futility of amendment.” *See Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d
22 522, 532 (9th Cir. 2008) (alteration in original).

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24
25 **III. DISCUSSION**

26 Defendant argues in its motion to dismiss that Plaintiffs cannot state a claim in Counts One
27 through Three because Defendant is not bound by the CBA between Local 81 and the Associated

1 Roofing Contractors. Def. Mot. at 2. Accordingly, Defendant argues, it cannot be held liable
2 under ERISA or the LMRA for failure to comply with the CBA’s and Trust Agreement’s
3 contribution and audit requirements. *Id.* at 5. Plaintiffs contend, however, that although
4 Defendant is not a signatory to the CBA, Defendant has nonetheless become bound to the CBA.
5 Pl. Opp. at 3–4.

6 Specifically, Plaintiffs rely on the “adoption by conduct” doctrine and the Ninth Circuit’s
7 decision in *Southern California Painters & Allied Trade District Council No. 36 v. Best Interiors,*
8 *Inc.*, 359 F.3d 1127, 1131–33 (9th Cir. 2004), to argue that Defendant became bound by the CBA
9 because Defendant accepted a Referral Page—and, the Court assumes from Plaintiffs’ factual
10 allegations, accepted a corresponding apprentice—and because Defendant complied with the
11 terms of the CBA. Pl. Opp. at 5–6, 8. Thus, to resolve the instant motion, the Court must decide
12 whether Plaintiffs have adequately alleged facts that show that Defendant became bound to the
13 CBA between Local 81 and the Associated Roofing Contractors by its conduct. Accordingly, the
14 Court first examines the case law regarding the adoption by conduct doctrine. The Court then
15 examines whether Plaintiffs’ factual allegations here, taken as true, are sufficient to show that
16 Defendant bound itself to the CBA by its conduct.
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19 **i. The Adoption by Conduct Doctrine**

20 The Ninth Circuit has recognized that a party who is not a signatory to a CBA “can adopt
21 a labor agreement by conduct.” *Best Interiors, Inc.*, 359 F.3d at 1131–33. In determining whether
22 an employer has adopted a CBA by conduct, “the relevant inquiry is whether the party has
23 displayed ‘conduct manifesting an intention to abide by the terms of the agreement.’” *Id.* at 1133
24 (quoting *NLRB v. Haberman Constr. Co.*, 651 F.2d 356 (5th Cir. 1981) (en banc)).
25

26 In *Best Interiors*, the Ninth Circuit considered whether an employer had manifested “an
27 intention to abide by the terms of” a CBA. *Id.* In that case, the defendant Best Interiors was a
28

1 signatory from 1998 until 2000 to an industry-wide CBA. *Id.* at 1128. The CBA expired in 2000,
2 and Best Interiors informed the union that it would cease to be a party to the CBA. *Id.* An
3 employer association negotiated another CBA with the union that spanned from 2000 until 2003.
4 *Id.* Although Best Interiors did not sign the 2000-2003 CBA, the Ninth Circuit held that “[a] jury
5 could conclude that, by its conduct, Best adopted the” new 2000-2003 CBA because Best Interiors
6 “voluntarily implemented the new terms of the Agreement by applying them to its drywall
7 finishers,” and that Best Interiors had “even g[iven] the workers a dollar per hour wage increase
8 that was mandated under the new” 2000-2003 CBA. *Id.* at 1133.

10 In so holding, the Ninth Circuit in *Best Interiors* considered case law from other Circuits in
11 which courts found that an employer had manifested an intention to adopt a CBA, despite not
12 being a signatory to the CBA. *Id.* at 1133. For example, in *Haberman Construction Company*,
13 the Fifth Circuit upheld the National Labor Relation Board’s (“NLRB”) finding that an employer
14 was bound to a CBA because the record showed that the employer had “contribut[ed] to the
15 Union’s trust funds from May 1973 through February 1977,” used “union members exclusively,”
16 used the union for referrals, and increased wages to match the union wage scale. *Haberman*, 641
17 F.2d at 355–56; *see Best Interiors*, 359 F.3d at 1133 (quoting and discussing *Haberman*).

19 Similarly, in *Arco Electric Company v. NLRB*, the Tenth Circuit held that an employer that was a
20 party to a CBA for several years, but never assented to a newly negotiated CBA, nonetheless
21 “considered itself bound to the [new CBA] for a period of over 15 months after [the new CBA]
22 became effective” because the employer “availed itself of the benefits of the union hiring hall for
23 referral of employees,” “deducted union assessments and remitted them to [the union]; made
24 appropriate deductions for various funds,” “reported the fund payments on forms provided [under
25 the CBA]” and paid its employees the CBA wage scale. 618 F.2d 698, 699–700 (10th Cir. 1980);
26 *see Best Interiors*, 359 F.3d at 1133 (relying on *Arco*).

1 Thus, as this case law demonstrates, courts considering whether an employer has adopted a
2 CBA by conduct “have emphasized, among other factors, the payment of union wages, the
3 remission of union dues, the payment of fringe benefit contributions, the existence of other
4 agreements evidencing assent and the submission of the employer to union jurisdiction, such as
5 that created by grievance procedures.” *Bricklayers Local 21 of Ill. Apprenticeship & Training*
6 *Program v. Banner Restoration, Inc.*, 385 F.3d 761, 766 (7th Cir. 2004) (citing case law across
7 Circuits); *see also Trs. of the Plumbers & Pipefitters Nat. Pension Fund v. Plumbing Servs., Inc.*,
8 791 F.3d 436, 448 (4th Cir. 2015) (finding, after joining other Circuits in recognizing the
9 adoption-by-conduct doctrine, that an employer manifested an intent to be bound to a CBA where
10 the employer signed a Letter of Assent and made contributions to a trust fund in accordance with
11 the CBA for thirteen years); *Alaska Trowel Trades Pension Trust v. Rady Concrete Const., LLC*,
12 2016 WL 6518430 (D. Ala. Nov. 2, 2016) (citing *Best Interiors*, *Bricklayers*, and other cases
13 across Circuits to find that an employer had not adopted a CBA by its conduct).
14

15 **ii. Plaintiffs’ Factual Allegations Regarding Defendant’s Conduct**

16 Here, Plaintiffs rely on *Best Interiors* and the “adoption by conduct doctrine” to argue that
17 Defendant, in requesting and accepting apprentices from Local 81 and complying with the terms
18 of the CBA, became bound by the CBA. Pl. Opp. at 5–6, 8. As discussed further below, the Court
19 agrees with Defendant that the allegations contained within Plaintiffs’ Complaint are not sufficient
20 to show that Defendant bound itself to the CBA by its conduct.
21

22 Significantly, the only allegation in the Complaint that refers to Defendant’s conduct
23 binding Defendant to the CBA is that Defendant became bound to the CBA “by way of accepting
24 a public works contract to train apprentices” and that “Defendant accepted” a “Referral Page.”
25 Compl. ¶ 12. The single “Referral Page” that Plaintiffs allege that Defendant accepted is attached
26 to Plaintiffs’ Complaint. Compl., Ex. B. The attached “Referral Page” is on Local 81 letterhead
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1 and is dated August 25, 2015. *Id.* It contains a “Note” stating that “[b]y accepting this referral,
2 the individual employer recognizes [Local 81] as the majority collective bargaining representative
3 of his or its employees employed in the counties covered by the [CBA] . . . and further agrees that
4 [the employer] is bound to said [CBA] including all the wages, hours, and all other terms and
5 conditions of such [CBA] including the payment of all wage scales and all trust fund contributions
6 specific and required by said [CBA].” *Id.* The Referral Page is signed by a Local 81 “Member”
7 and a “Dispatcher.” *Id.*

8
9 As Defendant asserts in its motion to dismiss, the Referral Page “is filled out by the union,
10 not [Defendant],” and the Complaint contains “no allegations regarding who at [Defendant]
11 purportedly received” the Referral Page or when the Referral Page was “accepted” by Defendant.
12 *See* Def. Mot. at 7; *see also* Compl., Ex. B. Indeed, the only Referral Page that Defendant
13 allegedly accepted is dated August 25, 2015, Compl. Ex. B, but, the title page of the CBA
14 attached to Plaintiffs’ Complaint is dated “August 1, 2011–July 31, 2015,” and Plaintiffs request
15 an audit of Defendant from “the time period July 1, 2013 through September 30, 2013,” a time
16 well before the August 25, 2015 date. Compl. Exs. A & B; Compl. ¶ 22.

17
18 Significantly, “the extent of [Defendant’s] liability” is necessarily “dependent upon
19 whether [Defendant] was a party to the [CBA] during the time it employed” the apprentices and
20 did not comply with the applicable CBA in effect. *See Gariup v. Birchler Ceiling & Interior Co.*,
21 777 F.2d 370, 376 (7th Cir. 1985). Here, Plaintiffs’ Complaint contains no factual allegations
22 suggesting when Defendant accepted the Referral Page attached to the Complaint or when
23 Defendant first began accepting apprentices, let alone how many or over what time period. *See*
24 Compl. ¶¶ 11–13. Thus, the Complaint lacks sufficient factual allegations to show that Defendant
25 bound itself to the CBA such that it is liable for the misconduct alleged in the Complaint. *See*
26 *Gariup*, 777 F.2d at 376; *see also Sutherland v. Francis*, 2013 WL 2558169, at *4 (N.D. Cal. June
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1 10, 2013) (dismissing complaint in breach-of-contract case where the plaintiff alleged only “vague
2 stretches of time” rather than a contract date).

3 Apart from Plaintiffs’ vague and unspecified allegation that “Defendant accepted” a single
4 “Referral Page” dated August 25, 2015, Plaintiffs’ Complaint contains no further facts to suggest
5 that Defendant intended to be bound by the CBA, let alone when Defendant became bound.
6 Indeed, Plaintiffs themselves acknowledge that Plaintiffs do not “directly [allege] in the
7 Complaint” that Defendant ever “pa[id] union wages and benefits” or that Defendant ever
8 “voluntarily implement[ed] the terms of the CBA and Trust Agreements.” Pl. Opp. at 2. As
9 discussed above, courts have found these factors significant in finding that an employer bound
10 itself to a CBA through its conduct. *See, e.g., Bricklayers*, 385 F.3d at 766; *Best Interiors*, 359
11 F.3d at 1132–33.
12

13 Here, Plaintiffs’ Complaint alleges only that Defendant “has failed to submit its employer
14 contribution report including payment owed for the months of April and May 2016” and that
15 Defendant “initially agreed to submit to an audit of its payroll records” but refused to provide
16 essential documents to Plaintiff. Compl. ¶ 22. Plaintiffs’ allegations demonstrate only that
17 Defendant has *not* complied with the CBA; the Complaint contains no indication as to when, if
18 ever, Defendant was in compliance with the CBA or when, if ever, Defendant implemented the
19 CBA’s terms. *See generally* Compl. ¶¶ 14–22.
20

21 The threadbare nature of the factual allegations in Plaintiffs’ Complaint is made clear by
22 the allegations that Plaintiffs *do* raise in their opposition to Defendant’s motion to dismiss. In
23 their opposition, Plaintiffs contend that Defendant accepted “[a]pprentice [r]eferrals” from Local
24 81 “[o]n multiple occasions over a period of many years.” *Id.* at 6. Plaintiffs assert that
25 “Defendant through its agents Miguel Troy (on August 25, 2015) and Mike Sperling (on
26 November 19, 2012), requested and accepted apprentices from the Roofers Local 81” apprentice
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1 program “by accepting [a Referral Page], which contain language binding [Defendant] to the
2 CBA.” *Id.* at 8. Moreover, Plaintiffs attached to its opposition several documents that show that
3 “Defendant through its office manager and agent, Nancy White, completed and agreed to train
4 apprentices from the Roofers Local 81 JATC program” and that “Defendant through its then
5 superintendent and agent Mike Sperling also completed a Request for Dispatch of Apprentice
6 Form requesting apprentice(s) to report to Defendant’s jobsite on November 15, 2012.” *Id.* at 6–7;
7 *see* Pl. Opp., Exs. A&B. Plaintiffs also argued in its response that Defendant consented to be
8 bound by the CBA by “reporting and paying fringe benefits to the Trust Funds pursuant to the
9 CBA.” *Id.* at 10; *see also* Pl. Opp., Exs. C &D. According to Plaintiffs, this “conduct
10 unequivocally shows Defendant’s intent to be bound to the CBA for those apprentices.” Pl. Opp.
11 at 10.
12

13 However, as discussed above, Plaintiffs’ Complaint does not contain the above-described
14 facts. *See* Pl. Opp. at 2. To the contrary, the facts to which Plaintiffs refer in their opposition are
15 largely drawn from exhibits that Plaintiffs attached to their opposition. *See* Pl. Opp., Exs. 1–5.
16 For purposes of ruling on a motion to dismiss under Rule 12(b)(6), the Court is limited to
17 “allegations contained in the pleadings, exhibits attached to the complaint, and matters properly
18 subject to judicial notice.” *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012). Accordingly, in
19 ruling on Defendant’s motion to dismiss, the Court may not consider the declaration and exhibits
20 that Plaintiff has attached to its opposition, nor may the Court consider the facts that Plaintiff
21 asserts only in its opposition. *See id.*
22

23 Considering only Plaintiff’s complaint and the exhibits attached to Plaintiffs’ Complaint,
24 the Court agrees with Defendant that Plaintiffs have failed to state a claim for relief. As stated
25 above, the Complaint alleges only that “Defendant accepted,” at an unspecified time, a single
26 Referral Page, dated August 25, 2015. Compl. ¶ 12. The Complaint contains no allegations
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1 suggesting who at Defendant accepted the Referral Page, when it was accepted, or when
2 Defendant began accepting documents such as the Referral Page. *See generally id.* ¶¶ 12–14. At
3 the same time, the Complaint contains no indication that Defendant was ever in compliance with
4 the CBA or Trust Agreement. *See Pl. Opp.* at 2. The sparse and unspecified factual allegations in
5 Plaintiffs’ Complaint, taken as true, fall far short of evincing the type of conduct that courts have
6 found sufficient to manifest an employer’s intent to abide by the terms of a CBA. *See, e.g., Rady*
7 *Concrete Const. LLC*, 2016 WL 6518430, at *6 (finding that an employer had not adopted a CBA
8 by conduct where “[u]nlike in *Best Interiors* . . . [the employer] had not ‘voluntarily implemented’
9 or ‘fully complied with’ the [CBA]”); *see also Fiorentino v. Bricklayers & Allied Craftworkers*
10 *Local 4 Pension Plan*, 2016 WL 5723660 (D.N.J. Sept. 30, 2016) (finding the plaintiff “had not
11 come close to” establishing that an employer adopted a CBA by conduct where there was no
12 evidence that the employer had, for example, remitted union dues, paid union wages, or submitted
13 to an audit).

14
15 Accordingly, because the Complaint does not sufficiently allege facts that demonstrate
16 Defendant’s intent to be bound by the CBA, and because Plaintiff’s arguments in response to
17 Defendant’s motion to dismiss are largely drawn from documents that the Court cannot consider
18 in ruling on Defendant’s motion, the Court GRANTS Defendant’s motion to dismiss Plaintiffs’
19 Complaint. Leave to amend will be granted because the Court finds that amendment may not
20 necessarily be futile. *Lopez*, 203 F.3d at 1127 (holding that leave to amend should be granted
21 unless the Court “determines that the pleading could not possibly be cured by the allegation of
22 other facts”).
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25 **IV. CONCLUSION**

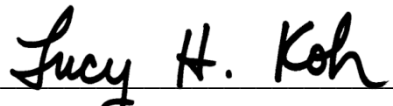
26 For the foregoing reasons, the Court GRANTS Defendant’s motion to dismiss. Should
27 Plaintiffs elect to file an amended complaint curing the deficiencies identified herein, Plaintiffs

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shall do so within (30) days of this Order. Failure to meet the thirty-day deadline to file an amended complaint or failure to cure the deficiencies in this Order will result in dismissal with prejudice of Plaintiffs' claims. Plaintiffs may not add new causes of action or parties without leave of the Court or stipulation of the parties pursuant to Rule 15 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated: December 5, 2016



LUCY H. KOH
United States District Judge