APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED NOVEMBER 27, 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-55154

SOUTHWEST REGIONAL
COUNCIL OF CARPENTERS,

Plaintiff-Counter-Claim-Defendant-Appellee,

v.

MICHAEL MCCARRON,
AKA WILLIAM MICHAEL MCCARRON,

Defendant-Third-Party-Plaintiff-Appellant,

v.

DECARLO & SHANLEY, P.C.,

Third-Party-Defendant-Appellee.

D.C. No. 2:14-cv-02762-NS-JC

MEMORANDUM*

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appendix A

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Submitted November 25, 2019**
San Francisco, California

Before: THOMAS, Chief Judge, and TROTT and SILYERMAN, Circuit Judges.

Michael McCarron appeals prose the district court's judgment dismissing his third-party claims against the law firm DeCarlo & Shanley, P.C., and awarding costs in an action brought by Southwest Regional Council of Carpenters ("SWRCC") under the Labor Management Reporting and Disclosure Act ("LMRDA"). We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's dismissal for failure to state a claim. *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 652 (9th Cir.), *cert. denied,* No. 19-77, 2019 WL 4922669 (Oct. 7, 2019). We review the district court's award of costs for an abuse of discretion. *A.G. v. Paradise Valley Unified Sch. Dist. No. 69,* 815 F.3d 1195, 1202 (9th Cir. 2016). We affirm in part and vacate and remand in part.

The district court correctly concluded that McCatron's third-party claims under California law against DeCarlo & Shanley were preempted under the Employee Retirement Income Security Act's ("ERISA")

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

express preemption provision, 29 U.S.C. § 1144(a). McCarron's state-law claims were premised on the law firm's advice that he, as a trustee of Southwest Carpenters Training Fund, an ERISA trust fund, and an officer of SWRCC, should cause SWRCC to repay a lease overcharge because the lease was a prohibited transaction under ERISA. Accordingly, the state-law claims bore on an ERISA-regulated relationship and therefore were preempted. *See Depot, Inc.*, 915 F.3d at 666. We therefore affirm the district court's dismissal of McCarron's third-party claims.

The district court overlooked its responsibility under Fed. R. Civ. P. 54(d)(l) to provide reasons for its denial of costs to McCarron as a prevailing party against SWRCC on SWRCC's LMRDA claim. *See Ass'n of Mexican-American Educators v. State of California*, 231 F.3d 572, 591-92 (9th Cir. 2000) (en banc) (there is a presumption in favor of awarding costs to a prevailing party, and the district court must give reasons for its refusal to award costs). We therefore vacate the district court's judgment in part and remand with instructions for the district court to explain its ruling.

The motion for judicial notice (Docket Entry No. 14) is denied.

The parties shall bear their own costs on appeal.

AFFIRMED in part; VACATED and REMANDED in part.

APPENDIX B — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DATED JANUARY 4, 2019

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:14-CV-02762 JVS (JCx)

SOUTHWEST REGIONAL COUNCIL OF CARPENTERS, AN UNINCORPORATED ASSOCIATION,

Plaintiff,

v.

MICHAEL McCARRON, AN INDIVIDUAL,

Defendant.

AND RELATED COUNTERCLAIMS AND THIRD-PARTY CLAIM.

Honorable James V. Selna

AMENDED JUDGMENT

For the reasons so stated in its orders:

(1) The Court hereby enters judgment in favor of Defendant Michael McCarron, also known as William Michael McCarron, and against Plaintiff Southwest

Regional Council of Carpenters. Although Plaintiff Southwest Regional Council of Carpenters established liability on its sole remianing claim under Section 501(a) of the Labor Management Reporting and Disclosure Act (29 U.S.C. § 501(a)), Plaintiff Southwest Regional Council of Carpenters sustained no damages. Defendant Michael McCarron, also known as William Michael McCarron, is the prevailing party on this claim.

(2) The Court hereby enters judgment in favor of Counterdefendant Southwest Regional Council of Carpenters against Counterclaimant Michael McCarron, also known as William Michael McCarron, on all counterclaims. Counterclaimant shall take nothing.

(3) The Court hereby enters judgment in favor of Third-Party Defendant DeCarlo & Shanley, A Professional Corporation against Third-Party Plaintiff Michael McCarron, also known as William Michael McCarron, on all third-party claims. Third-Party Plaintiff shall take nothing.

(4) Plaintiff/Counterdefendant Southwest Regional Council of Carpenters and Third-Party Defendant DeCarlo & Shanley are prevailing parties and shall recover their costs.

(5) This certified final judgment ends all claims, counterclaims, and third-party claims among the Southwest Regional Council of Carpenters, DeCarlo & Shanley, A Professional Corporation, and Michael McCarron, also known as William Michael McCarron.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DATED NOVEMBER 19, 2018

CV 14-2762 JVS (JCx)

SOUTHWEST REGIONAL COUNCIL OF CARPENTERS

v.

MCCARRON

ORDER REGARDING THIRD-PARTY DEFENDANT'S MOTION TO DISMISS

Third-Party Defendant DeCarlo & Shanley, A Professional Corporation ("D&S") moved to dismiss Defendant Michael McCarron's ("McCarron") First Amended Third-Party Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6). Mot., Docket No. 500. McCarron filed an opposition. Opp'n, Docket No. 501. D&S replied. Reply, Docket No. 502.

For the following reasons, the Court **grants** the motion to dismiss. The Court dismisses McCarron's claims against D&S with prejudice.

Appendix C

I. BACKGROUND[1]

McCarron alleges the following. The Southwest Carpenters Training Fund ("Training Fund") is a multi-employer benefit plan that provides an apprenticeship program for union carpenters. Docket No. 329 ¶ 7. As a multi-employer benefit plan, the Training Fund is regulated under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a) *et seq.* The Southwest Regional Council of Carpenters ("Council") is a labor organization affiliated with the United Brotherhood of Carpenters and Joiners of America ("UBC"), and its members receive education and training from the Training Fund. *Id.* ¶ 5. McCarron served as Executive Secretary-Treasurer of the Council from August 1999 to August 2013. *Id.* ¶ 14. As Executive Secretary-Treasurer, McCarron was the Council's chief executive officer and responsible for the Council's day-to-day business activities. *Id.* D&S is counsel to the Training Fund, the Council, and the UBC. *Id.* ¶¶ 8, 16.

The Training Fund leased properties from the Council for use as training facilities. *Id.* ¶ 17. D&S, fearing that McCarron would replace it as counsel to the Council,

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1. In support of its motion to dismiss, D&S requests judicial notice of (1) 29 documents already filed on the docket for this action, and (2) McCarron's opening appellate brief in his appeal to the Ninth Circuit of the Court's grant of summary judgment to the Council. Request for Judicial Notice, Docket No. 500-2. Courts may take judicial notice of federal court filings. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). The Court therefore **grants** the requests for judicial notice.

conspired with the Training Fund to manufacture grounds for McCarron's removal. *Id.* ¶ 16. In so doing, D&S and the Training Fund conspired to submit bills for alleged overcharge leases, advised McCarron to pay the bills on behalf of the Council, had the Training Fund accept the payments, and then later removed McCarron for his role in paying the overcharge bills. *Id.*

In May 2013, the Training Fund told McCarron that certain leases were overcharged and requested a refund for two separate periods totaling $5,364,970,10. *Id.* ¶ 17. D&S attorney John DeCarlo instructed McCarron that he "better pay this money back," immediately because the Training Fund was facing an audit from the Department of Labor, and the financial books needed to be balanced. *Id.* ¶¶ 18, 19. McCarron, as the Council's Executive Secretary-Treasurer, relied on this advice and refunded the Training Fund the full requested amount on behalf of the Council. *Id.* ¶¶ 18, 22. D&S never advised McCarron that he should refrain from refunding the money to the Training Fund. *Id.* ¶ 21. Nor did D&S request the return of the money from the Training Fund despite its knowledge that the leases were not overcharged. *Id.* ¶ 24.

In April 2014, the Council sued McCarron for breach of fiduciary duty in violation of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 501(a), alleging that McCarron breached his fiduciary duties by failing to obtain authorization from the Council's governing board before refunding the lease overcharges. Docket No. 1. The Court granted the Council's motion for summary judgment, finding that McCarron breached the

LMRDA and that his breach caused damages, in part because of McCarron's own admissions under Federal Rule of Civil Procedure 36 that the rents were set at fair market rates, and entered judgment against McCarron for $5,364,970.10. Docket No. 191 at 14–16; Docket No. 339. The judgment was then reversed on appeal by the Ninth Circuit because the Council could not be entitled to the amount it wrongfully overcharged the Training Fund, and thus the Council's allegations did not form the basis for actual damages. Docket No. 494 at 3. The Ninth Circuit upheld the Court's finding that McCarron violated the LMRDA by paying the overcharge bills without presenting them to the Council's trustees for approval in violation of the Council's bylaws. *Id.* at 2–3.

In May 2015, McCarron was granted leave to file a third-party complaint against D&S and the Training Fund.[2] Docket No. 274. As to D&S, McCarron alleges federal law claims for indemnity and contribution[3] and

2. On May 16, 2016, the Court granted the Training Fund's motion to dismiss McCarron's First Amended Third-Party Complaint in its entirety as to the Training Fund. Docket No. 458-1. The Court dismissed all claims against the Training Fund with prejudice because (1) McCarron failed to show he can seek contribution or indemnity under the LMRDA, and (2) the state-law claims against the Training Fund for restitution, conversion, money had and received, mistaken receipt, and conspiracy were preempted by ERISA. *Id.*

3. McCarron does not expressly style his claims for indemnity and contribution as federal claims. Docket No. 329 ¶¶ 27–31. However, the Court has already determined that McCarron cannot sue for indemnity or contribution under state law because he brings those

state-law claims for negligence, breach of fiduciary duty, breach of contract, fraud, and conspiracy. Docket No. 329 ¶¶ 27–31, 39–70. McCarron seeks recovery of the $5,364,970.10 and damages incurred for McCarron's loss of employment. *Id.*, Prayer for Relief. D&S now seeks to dismiss the First Amended Third-Party Complaint in its entirety. Mot., Docket No. 500.[4]

II. LEGAL STANDARD

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Rule 12(b)(6) requires courts to dismiss a complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6). To overcome a motion to dismiss under Rule 12(b)(6), a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for

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claims for breach of fiduciary duty in violation of the LMRDA, and federal law determines whether defendants held liable under a federal statute may seek indemnity and contribution from a third party. Docket No. 458-1 at 3 n.6; *see also Mortgages, Inc. v. U.S. Dist. Court for Dist. of Nev.*, 934 F.2d 209, 212 (9th Cir. 1991) (per curiam). The Court therefore construes McCarron's claims for indemnity and contribution against D&S as federal claims.

4. D&S previously moved to dismiss the First Amended Third-Party Complaint on essentially the same grounds as the instant motion. Docket No. 479. However, the Court granted McCarron's simultaneous motion to stay and denied the motion to dismiss without ruling on the merits. Docket No. 485 at 5.

the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In resolving a 12(b)(6) motion under *Iqbal* and *Twombly*, courts must follow a two-pronged approach. First, courts must accept all well-pleaded factual allegations as true. *Iqbal*, 556 U.S. at 678. At this step, courts can only consider the complaint, materials incorporated into the complaint by reference, and matters subject to judicial notice. *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008). Second, assuming the well-pleaded factual allegations are true, courts must "determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. This determination is "context-specific," requiring courts to draw on their experience and common sense. *Id.* There is no plausibility, however, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Id.*

III. DISCUSSION

A. The Court has already determined that federal law provides no right to indemnity or contribution under the LMRDA.

McCarron seeks indemnification and contribution against D&S for his breach of fiduciary duty in violation of section 501(a) of the LMRDA. "A defendant held liable under a federal statute has a right to indemnification or contribution from another only if such right arises: (1) through the affirmative creation of a right of action by

Congress, either expressly or implicitly, or (2) under the federal common law." *Doherty v. Wireless Broad. Sys. of Sacramento, Inc.*, 151 F.3d 1129, 1130-31 (9th Cir. 1998) (citing *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638 (1981)).

In its order dismissing McCarron's claims against the Training Fund, the Court declined to find a right to indemnity or contribution under the LMRDA. Order, Docket No. 458-1 at 4. The Court determined that Congress has not affirmatively created a right to indemnity or contribution under the LMRDA, nor is there such a right under federal common law. *Id.* The Court therefore dismisses McCarron's federal claims for indemnity and contribution against D&S with prejudice.[5]

B. McCarron's state-law claims against D&S are preempted by ERISA.

The Court recited the relevant standard for ERISA preemption in the order dismissing McCarron's claims against the Training Fund, but repeats it here. Docket No. 458-1 at 7–8. ERISA provides for the comprehensive federal regulation of multi-employer benefit plans such as the Training Fund. *Metropolitan Life Ins. Co. v. Parker*, 436 F.3d 1109, 1111 (9th Cir. 2006). To that end, ERISA includes two preemption provisions that defeat certain state law claims: "complete preemption" under ERISA

5. For a more detailed explanation of the Court's reasoning on this point, which applies here with equal force, refer to the Court's order granting the Training Fund's motion to dismiss McCarron's third-party claims. Docket No. 458-1 at 4–7.

section 502(a) and "conflict preemption" under ERISA section 514(a). D&S argues that all of McCarron's state-law claims are preempted under ERISA's conflict preemption provisions. The Court agrees.

ERISA's conflict preemption provisions provide that ERISA "shall supersede any and all State laws insofar as they may . . . relate to any employee benefit plan." 29 U.S.C. § 1144(a) (emphasis added). For purposes of ERISA preemption, a state-law claim "relate[s] to" an ERISA plan if the claim either makes "reference to" or holds a "connection with" an ERISA plan. *Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 324 (1997). A state-law claim has an impermissible "connection with" an ERISA plan when the claim "governs . . . a central matter of plan administration," "interferes with nationally uniform plan administration," or "if acute, albeit indirect, economic effects of the state law force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers." *Gobeille v. Liberty Mut. Ins. Co.*, --- U.S. ---, 136 S. Ct. 936, 943 (2016) (internal quotations omitted). The Ninth Circuit takes a "purposive and relationship-focused approach" to this analysis. *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1221 (9th Cir.), *opinion amended on denial of reh'g*, 208 F.3d 1170 (9th Cir. 2000). Under the Ninth Circuit's "relationship test," "a state law claim is preempted under the "connection with" prong when the claim bears on an ERISA-regulated relationship." *Paulsen v. CNF, Inc.*, 559 F.3d 1061, 1082 (9th Cir. 2009) (citing *Providence Health Plan v. McDowell*, 385 F.3d 1168, 1172 (9th Cir. 2004)). Accordingly, "[t]he

key to distinguishing between what ERISA preempts and what it does not lies . . . in recognizing that the statute comprehensively regulates certain *relationships*: for instance, the relationship between plan and plan member, between plan and employer, between employer and employee (to the extent an employee benefit plan is involved), and between plan and trustee." *Gen. Amer. Life. Ins. Co. v. Castonguay*, 984 F.2d 1518, 1521 (9th Cir. 1993) (emphasis in original).

McCarron asserts state-law claims against D&S for negligence, breach of fiduciary duty, breach of contract, fraud, and conspiracy. Docket No. 329 ¶¶ 41–70. D&S argues that McCarron's state-law claims are preempted by ERISA under the same reasoning the Court applied to determine that McCarron's state-law claims against the Training Fund were preempted – the claims arise from and depend on ERISA-governed relationships. Mot., Docket No. 500 at 12–15; Reply, Docket No. 502 at 2–4; *see also* Docket No. 458-1 at 7–8. McCarron responds in opposition that the Court's findings with respect to the Training Fund have no bearing on McCarron's claims against D&S, and that the claims here are not preempted because they do not concern an ERISA-regulated relationship, but the relationship between a law firm and a union employee. Opp'n, Docket No. 501 at 5–6.

Here, like his state-law claims against the Training Fund, McCarron's state-law claims against D&S bear on ERISA-regulated relationships. The Court recognizes that traditional state-law claims, including those based in tort and breach of contract, often fall outside the purview

of ERISA preemption. *See Castonguay*, 984 F.2d at 1522. However, the claims at issue here are preempted because they affect relations between principal ERISA entities. D&S acts as counsel to an ERISA party-in-interest, the Council, and an ERISA plan, the Training Fund. D&S is therefore an ERISA party-in-interest. *Rutledge*, 201 F.3d at 1221 (citing *Nieto v. Ecker*, 845 F.2d 868, 873 (9th Cir.1988)). Furthermore, the Court has already determined that McCarron was not an individual client of D&S. Docket Nos. 214, 294. Rather, the relationship between McCarron and D&S existed only in McCarron's capacity as an ERISA fiduciary to the Council. Accordingly, under McCarron's theory, an ERISA party-in-interest (D&S) is liable for advice given to another ERISA party-in-interest (the Council, through McCarron) regarding ERISA-regulated transactions (the lease agreements) with an ERISA plan (the Training Fund). In this context, the claims bear on ERISA-regulated relationships. At the core of McCarron's state-law claims is whether the lease agreements were prohibited under ERISA § 406(a) or fell within an exception under § 408, which in turn informs whether D&S's conduct in the context of those transactions gives rise to liability.[6] Moreover, the Court already determined that McCarron's conspiracy claim, asserted against both D&S and the Training Fund, is preempted because it

6. ERISA section 406(a) prohibits an ERISA fiduciary from causing an ERISA plan to enter into any transaction that constitutes the "direct or indirect . . . leasing[] of any property between the plan and a party in interest," 29 U.S.C. § 1106(a)(1)(A), unless the lease agreement is for "office space, legal accounting, or other services necessary for the establishment or operation of the plan" and "no more than reasonable compensation is paid therefor," *Id.* § 1108(b)(2).

bears on ERISA-regulated relationships. Docket No. 458-1 at 8. The Court finds no compelling reason to alter that conclusion as to the remaining state-law claims against D&S. The Court finds that McCarron's state-law claims depend upon the ERISA-governed relationships between the Training Fund, the Council, and D&S.

McCarron relies on *Coyne & Delany Co. v. Selman*, 98 F.3d 1454 (4th Cir. 1996) to support the argument that his state-law claims do not implicate ERISA and thus are not preempted. Opp'n, Docket No. 501 at 5–6. However, the instant case is distinguishable from *Coyne*, which held that an insurance malpractice claim was not preempted in part because the claim did not affect relations between principal ERISA entities. *Coyne*, 98 F.3d at 1471–72. The court explained:

> Defendants' malpractice, if any, occurred before the faulty plan went into effect and before defendants began to act as Plan Administrator and Plan Supervisor. Accordingly, the claim is asserted by [plaintiff], in its capacity as employer, against the defendants in their capacities as insurance professionals, not in their capacities as ERISA fiduciaries..... The malpractice claim would still exist if [plaintiff] had hired someone other than the defendants to serve as Plan Administrator and Plan Supervisor.

Id. Here, as noted, D&S did not represent McCarron in his individual capacity, and thus unlike the insurance

professionals in *Coyne*, D&S advised McCarron only in the context of his role as an ERISA fiduciary. Furthermore, in *Coyne*, the existence of an ERISA plan was not critical to the malpractice claim because the alleged wrongful acts took place before any ERISA plan came into effect. *Id.* at 1472. Thus, *Coyne* rejected preemption in part because the malpractice claim would still have existed if the defendants had not procured any plan at all. *Id.* Here, by contrast, the ERISA plan is critical to McCarron's state-law claims, none of which would exist independent of the ERISA-regulated relationships between the Council, the Training Fund, and D&S.

Therefore, McCarron's state-law claims against D&S are preempted under ERISA's conflict preemption provisions. The Court dismisses McCarron's state law claims against D&S with prejudice.[7]

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7. The Court notes that McCarron's attorney-advice claims for negligence and breach of fiduciary duty are also barred by the one-year statute of limitations under Cal. Code Civ. Proc. § 340.6. *See Prakashpalan v. Enstrom, Lipscomb & Lack*, 223 Cal. App. 4th 1105, 1121 (2014) (the statute does not apply to fraud, but does apply to "breach of fiduciary duty arising out of the performance of an attorney's professional duties . . . [and] any act or omission arising out of the performance of an attorney's professional duties").

D&S also advances several alternative arguments for dismissal of McCarron's state-law claims. Mot., Docket No. 500 at 15–22. Because the Court has determined that McCarron's state-law claims must be dismissed with prejudice under ERISA preemption, the Court declines to consider alternative arguments for dismissal. For the same reason, the Court **denies** McCarron's request for leave to amend the First Amended Third-Party Complaint. Opp'n, Docket No. 501 at 3–4.

Appendix C

IV. CONCLUSION

For the foregoing reasons, the Court **grants** the motion to dismiss with prejudice.

IT IS SO ORDERED.

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED DECEMBER 16, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-55154
D.C. No. 2:14-cv-02762-JVS-JC
Central Distroct of California
Los Angeles

SOUTHWEST REGIONAL COUNCIL
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MICHAEL MCCARRON,

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Third-Party-Defendant-Appellee.

Appendix D

ORDER

Before: THOMAS, Chief Judge, and TROSS and SILVERMAN, Circuit Judges.

Appellant's petition for panel rehearing is DENIED.