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8 **United States District Court**
9 **Central District of California**
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11 MELVYN L. DURHAM,

12 Plaintiff,

13 v.
14

15 THE PRUDENTIAL INSURANCE
16 COMPANY OF AMERICA; LOYOLA
17 MARYMOUNT UNIVERSITY; and
18 DOES 1–100, inclusive,

Defendants.

Case No. 2:16-cv-08202-ODW(KSx)

**ORDER DENYING DEFENDANTS’
MOTION TO DISMISS [10] AND
DENYING PLAINTIFF’S MOTION
TO REMAND [11]**

19 **I. INTRODUCTION**

20 Plaintiff Melvyn L. Durham alleges that Defendants The Prudential Insurance
21 Company of America (“Prudential”) and Loyola Marymount University (“LMU”)
22 wrongfully denied him disability benefits. Plaintiff filed a complaint in state court
23 asserting claims for breach of contract and breach of the implied covenant of good
24 faith and fair dealing. Defendants removed the case to federal court, arguing that the
25 Employee Retirement Income Security Act of 1974 (“ERISA”) completely preempts
26 Plaintiff’s state law claims. Plaintiff contends that the benefit plan at issue is a
27 “church plan,” and thus exempt from ERISA. Defendants now move to dismiss
28 Plaintiff’s First Amended Complaint based on ERISA preemption, and Plaintiff

1 moves to remand the case based on lack of subject matter jurisdiction and the
 2 existence of a forum selection clause. For the reasons discussed below, the Court
 3 **DENIES** both Motions. (ECF Nos. 10, 11.)¹

4 **II. BACKGROUND**

5 For approximately thirteen years, LMU employed Plaintiff as a Craft Shop
 6 Manager. (First Am. Compl. ¶ 10, ECF No. 1-5.) During this time, Plaintiff
 7 participated in a long-term disability plan administered by Prudential. (*Id.* ¶ 11.)
 8 Plaintiff alleges that Defendants wrongfully denied him benefits under the plan. (*See*
 9 *id.* ¶¶ 12–18.) In September 2016, Plaintiff filed this action in state court. (ECF No.
 10 1-2.) Three weeks later, Plaintiff filed a First Amended Complaint, in which he
 11 asserted state law claims for breach of contract and breach of the implied covenant of
 12 good faith and fair dealing. (First Am. Compl. ¶¶ 19–29.) Plaintiff specifically
 13 alleged that the benefit plan is a church plan as defined under ERISA, pointing to
 14 LMU’s mission statement describing the university as “institutionally committed to
 15 Roman Catholicism” and stating that its “Catholic identity and religious heritage
 16 distinguish LMU from other universities and provide touchstones for understanding
 17 our threefold mission.” (*Id.* ¶ 9.)

18 Defendants timely removed this action to federal court. (ECF No. 1.) In their
 19 Notice of Removal, Defendants contend that ERISA completely preempts Plaintiff’s
 20 state law claims, thereby conferring federal question jurisdiction. (Not. of Removal
 21 ¶¶ 5–17.) Defendants also submitted a declaration from LMU’s Vice President of
 22 Human Resources stating that while LMU is “affiliated with the Catholic Church, [it]
 23 is not a church in and of itself, is not operated by the Catholic Church, and does not
 24 receive most of its funding from the Catholic Church.” (Chandler Decl. ¶ 4, ECF No.
 25 1-11.) Thus, Defendants contend, the benefit plan at issue is not a church plan under
 26

27 ¹ After considering the papers filed in connection with both Motions, the Court deemed them
 28 appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15.

1 ERISA. (Not. of Removal ¶¶ 21–23.)²

2 After removal, Defendants moved to dismiss Plaintiff’s claims based on ERISA
3 preemption. (ECF No. 10.) Plaintiff then moved to remand the action to state court
4 based on lack of subject matter jurisdiction and the existence of a forum selection
5 clause in the benefit plan. (ECF No. 11.) Both parties opposed the other’s Motion.
6 (ECF Nos. 14, 16.) Those Motions are now before the Court for decision.

7 **III. MOTION TO REMAND**

8 Federal courts have subject matter jurisdiction only as authorized by the
9 Constitution and by Congress. U.S. Const. art. III, § 2, cl. 1; *Kokkonen v. Guardian*
10 *Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Federal courts have original
11 jurisdiction where an action arises under federal law, or where each plaintiff’s
12 citizenship is diverse from each defendant’s citizenship and the amount in controversy
13 exceeds \$75,000. 28 U.S.C. §§ 1331, 1332(a). A defendant may remove a case from
14 state court to federal court only if the federal court would have had original
15 jurisdiction over the suit. 28 U.S.C. § 1441(a). The removal statute is strictly
16 construed against removal, and “[f]ederal jurisdiction must be rejected if there is any
17 doubt as to the right of removal in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d
18 564, 566 (9th Cir. 1992). The party seeking removal bears the burden of establishing
19 federal jurisdiction. *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th
20 Cir. 2006).

21 Plaintiff advances three reasons why the Court should remand this case: (1) the
22 benefit plan at issue is a “church plan,” and thus Plaintiff’s state law claims are not
23 preempted by ERISA; (2) ERISA preemption does not in any event prohibit the
24 particular state law claims in this matter; and (3) the benefit plan contains a forum

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26 ² Defendants also contended that there is diversity jurisdiction because LMU, the only non-
27 diverse party, was fraudulently joined. (Not. of Removal ¶¶ 24–38.) As the Court concludes that
28 there is federal question jurisdiction based on complete preemption, the Court need not decide
whether there is also diversity jurisdiction.

1 selection clause that requires disputes arising therefrom to be litigated in state court.
 2 (ECF No. 11-1.) The Court finds none of these reasons persuasive.

3 **A. Complete Preemption Under ERISA**

4 Under the well-pleaded complaint rule, the court determines the existence of
 5 federal question jurisdiction by looking at the plaintiff's claims rather than the
 6 defendant's defenses. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 207 (2004). Thus, a
 7 federal defense—such as preemption—typically does not give rise to federal question
 8 jurisdiction. *Id.* The only exception is where “a federal statute wholly displaces the
 9 state-law cause of action through complete pre-emption.” *Id.* Federal question
 10 jurisdiction exists in those instances because the plaintiff's claim, “even if pleaded in
 11 terms of state law, is in reality based on federal law.” *Id.* at 207–08 (internal
 12 quotation marks omitted). The Supreme Court has adopted a two-part test for
 13 determining whether ERISA completely preempts state law claims: “if (1) ‘an
 14 individual, at some point in time, could have brought [the] claim under ERISA
 15 § 502(a)(1)(B),’ and (2) ‘where there is no other independent legal duty that is
 16 implicated by a defendant's actions.’” *Marin Gen. Hosp. v. Modesto & Empire*
 17 *Traction Co.*, 581 F.3d 941, 946 (9th Cir. 2009) (quoting *Davila*, 542 U.S. at 210).

18 **1. First Prong of *Davila***

19 Under § 502(a)(1)(B), a participant in or beneficiary of a “plan” may bring a
 20 civil action “to recover benefits due to him under the terms of his plan.” 29 U.S.C.
 21 § 1132(a)(1)(B). ERISA defines “plan” to include an “employee welfare benefit
 22 plan,” *id.* § 1002(3), and in turn defines “employee welfare benefit plan” as “any plan,
 23 fund, or program . . . established or maintained by an employer or by an employee
 24 organization . . . for the purpose of providing for its participants or their beneficiaries
 25 . . . disability . . . benefits.” *Id.* § 1002(1). Here, Plaintiff alleges that he was covered
 26 under a plan maintained by LMU, his employer, that provides eligible employees with
 27 long-term disability benefits, and that he was wrongfully denied disability benefits
 28 under that plan. (First Am. Compl. ¶¶ 12–18.) Thus, the plan qualifies as an

1 “employee welfare benefit plan,” § 1002(1), and the wrongful denial of benefits under
2 that plan entitles Plaintiff to bring an action under § 502(a)(1)(B).

3 Plaintiff does not dispute this, but rather argues that the plan is nonetheless
4 exempt from ERISA as a “church plan.” See 29 U.S.C. § 1003(a)(b)(2) (“The
5 provisions of this subchapter shall not apply to any employee benefit plan if such plan
6 is a church plan . . .”). ERISA defines a “church plan” as “a plan **established** and
7 **maintained** . . . for its employees (or their beneficiaries) by a church or by a
8 convention or association of churches.” 29 U.S.C. § 1002(33)(A) (emphasis added).
9 ERISA further provides:

10 A plan established and maintained for its employees (or their
11 beneficiaries) by a church or by a convention or association of churches
12 includes a plan **maintained** by an organization, whether a civil law
13 corporation or otherwise, the principal purpose or function of which is
14 the administration or funding of a plan or program for the provision of
15 retirement benefits or welfare benefits, or both, for the employees of a
16 church or a convention or association of churches, if such organization is
controlled by or associated with a church or a convention or association
of churches.

17 29 U.S.C. § 1002(33)(C)(i) (emphasis added). For shorthand, the Court refers to such
18 organizations as “principal purpose organizations.”

19 Plaintiff’s main argument with respect to ERISA’s church plan exemption is
20 that under subsection (33)(C)(i), a plan is a “church plan” if it is *maintained* by a
21 principal purpose organization, regardless of who- or whatever initially *established*
22 the plan. (Mot. to Remand at 5–6.) Plaintiff argues that LMU is a principal purpose
23 organization that maintains the plan, and thus it qualifies as a “church plan.” (*Id.*)
24 Plaintiff argues in the alternative that if the Court reads ERISA to require that the plan
25 also be established by a church, LMU is in fact a church. (*Id.*) Both arguments fail.

26 **i. Whether a Church Plan Must be Established by a Church**

27 The Third Circuit, Seventh Circuit, and Ninth Circuit have each held that “a
28 plan must have been [1] established by a church *and* [2] maintained either by a church

1 or by a principal-purpose organization” in order to qualify for the church plan
2 exemption; it is insufficient that the plan is simply maintained by a principal purpose
3 organization. *Rollins v. Dignity Health*, 830 F.3d 900, 905 (9th Cir. 2016), *cert.*
4 *granted*, 137 S. Ct. 547 (2016); *see also Kaplan v. Saint Peter’s Healthcare Sys.*, 810
5 F.3d 175, 180–81 (3d Cir. 2015); *Stapleton v. Advocate Health Care Network*, 817
6 F.3d 517, 523–27 (7th Cir. 2016). Plaintiff argues that the Ninth Circuit’s opinion in
7 *Rollins* is not binding on this Court because the Supreme Court granted a stay pending
8 resolution of the petition for writ of certiorari. *See Dignity Health v. Rollins*, 137 S.
9 Ct. 28 (2016). After briefing on this Motion was complete, the Supreme Court
10 granted certiorari, and thus the stay remains in effect until the Court issues its
11 judgment. *See id.*; *Dignity Health v. Rollins*, 137 S. Ct. 547 (2016).

12 Plaintiff’s argument is unpersuasive for two reasons. First, it is not clear that
13 the Supreme Court’s stay disturbs the precedential effect of *Rollins*. The granting of a
14 writ of certiorari always acts to stay enforcement of the circuit court’s judgment. *See*
15 *Waskey v. Hammer*, 179 F. 273, 274 (9th Cir. 1910) (“A certiorari to a subordinate
16 court or tribunal operates as a stay of proceedings from the time of its service or of
17 formal notice of its issuance.”). Nonetheless, the default rule (at least in the Ninth
18 Circuit) is that “once a federal circuit court issues a decision, the district courts within
19 that circuit are bound to follow it and have no authority to await a ruling by the
20 Supreme Court before applying the circuit court’s decision as binding authority.”
21 *Yong v. I.N.S.*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000). Thus, it appears that a stay of
22 proceedings pending Supreme Court review does not normally affect the precedential
23 value of the circuit court’s opinion. As there is no indication that the particular stay in
24 *Rollins* was greater in scope than that normally imposed when writs of certiorari
25 issue,³ the Court assumes the stay was not intended to disturb the default rule
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27 ³ While the Supreme Court likely issued the stay initially under 28 U.S.C. § 2101(f), that
28 subsection authorizes a stay only for the purpose of “obtain[ing] a writ of certiorari from the
Supreme Court.” Now that the Court has granted the writ, it does not appear that this statute

1 regarding the binding effect of the circuit court's opinion pending Supreme Court
 2 review. Second, even if *Rollins* is no longer binding authority due to the Supreme
 3 Court's stay, it is at the very least persuasive authority. And because the Court finds
 4 both its reasoning and the reasoning of the Third and Seventh Circuits persuasive, the
 5 Court concludes that a plan is not a church plan unless it is established by a church.
 6 *Rollins*, 830 F.3d at 905; *Kaplan*, 810 F.3d at 180–81; *Stapleton*, 817 F.3d at 523–27.

7 **ii. Whether LMU is a “Church”**

8 Plaintiff argues half-heartedly that LMU is itself a “church,” and thus the
 9 disability plan at issue qualifies as a church plan even under *Rollins*. (Mot. to Remand
 10 at 5.) In support of this argument, Plaintiff points to various websites highlighting
 11 LMU's affiliation with the Catholic Church. (Graham Decl., Exs. 1–2, ECF No. 11-2;
 12 Graham Decl., Exs. A–D.) Defendants respond by pointing to the declaration of
 13 LMU's Vice President of Human Resources, wherein she states that while LMU is
 14 “affiliated with the Catholic Church, [it] is not a church in and of itself.” (Chandler
 15 Decl. ¶ 4.)⁴

16 ERISA does not appear to define what constitutes a “church.” Moreover,
 17 whether an institution is a “church” appears to be a question of fact rather than a
 18 question of law. See *Credit Managers Ass'n of S. Cal. v. Kennesaw Life & Acc. Ins.*
 19 *Co.*, 809 F.2d 617, 625 (9th Cir. 1987) (“[T]he existence of an ERISA plan is a
 20 question of fact, to be answered in the light of all the surrounding circumstances from
 21 the point of view of a reasonable person.”); see *Torres v. Bella Vista Hosp., Inc.*, 523
 22 F. Supp. 2d 123, 135 (D.P.R. 2007) (whether a plan is a church plan is a question of
 23 fact). Normally, a court may weigh evidence and resolve factual disputes concerning
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25 supplies the basis for the continuance of the stay. Moreover, the Court in any event would not
 26 construe a stay under § 2101(f) to affect the precedential value of the circuit court's opinion either.

27 ⁴ The Court declines to rule on Plaintiff's objections to paragraphs 1–3 of Chandler's declaration
 28 as the Court does not rely on the facts in those paragraphs to which Plaintiff objects. (ECF No. 11-
 3.) With respect to paragraph 4, the Court overrules Plaintiff's objections. Defendants' evidence is
 not inadmissible just because it contradicts Plaintiff's evidence.

1 the court's subject matter jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035,
 2 1039 (9th Cir. 2004) (brackets, citations, and internal quotation marks omitted).
 3 However, the court cannot do so where "the jurisdictional issue and substantive issues
 4 are so intertwined that the question of jurisdiction is dependent on the resolution of
 5 factual issues going to the merits of an action." *Id.* In those situations, the court must
 6 instead apply "the standard applicable to a motion for summary judgment, as a
 7 resolution of the jurisdictional facts is akin to a decision on the merits. Therefore, the
 8 moving party should prevail only if the material jurisdictional facts are not in dispute
 9 and the moving party is entitled to prevail as a matter of law. Unless that standard is
 10 met, the jurisdictional facts must be determined at trial by the trier of fact." *Augustine*
 11 *v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); *Leite v. Crane Co.*, 749 F.3d
 12 1117, 1122 n.3 (9th Cir. 2014) ("[A] court must leave the resolution of material
 13 factual disputes to the trier of fact when the issue of subject-matter jurisdiction is
 14 intertwined with an element of the merits of the plaintiff's claim.").

15 Here, there is no doubt that the question whether the plan is a "church plan" is
 16 central to both the Court's jurisdiction and the merits of the action, because ERISA
 17 both provides the basis for the Court's subject matter jurisdiction and a complete
 18 affirmative defense to Plaintiff's state law claims. *See, e.g., Steen v. John Hancock*
 19 *Mut. Life Ins. Co.*, 106 F.3d 904, 910 (9th Cir. 1997) ("[T]he existence of an ERISA
 20 plan . . . [is a] factual determination[] necessary to establish both the merits of the
 21 Trustees' claims and ERISA jurisdiction."); *Zeiger v. Zeiger*, 131 F.3d 150 (9th Cir.
 22 1997) (unpublished) ("Because [the plaintiff] brought her action under ERISA, the
 23 issue of whether the court had subject matter jurisdiction under that statute was
 24 intertwined with the merits of her claims."); *Torres*, 523 F. Supp. 2d at 135; *Puccio v.*
 25 *Standard Ins. Co.*, No. 12-CV-04640-JST, 2013 WL 1411155, at *4 (N.D. Cal. Apr.
 26 8, 2013) ("[T]he jurisdictional question is significantly intertwined with the
 27 underlying facts of the case because ERISA provides the basis for both subject matter
 28 jurisdiction and Puccio's claim for relief."). Consequently, the Court should apply a

1 summary judgment-like standard, and remand the case only if the plaintiff establishes
2 that there is no genuine dispute that the welfare benefit plan is not an ERISA plan.

3 Plaintiff has far from established this. LMU submits a declaration attesting that
4 it is not a church, that it hires both Catholic and non-Catholic professors, and that it
5 receives funding from sources outside the Catholic Church. Plaintiff's evidence, on
6 the other hand, has little tendency to show that LMU is a church. For example,
7 Plaintiff submits evidence suggesting that LMU has a church on campus, but this does
8 not mean the university is itself a church. (See Graham Decl., Ex. A–C, ECF No. 18.)
9 Plaintiff also refers to LMU's mission statement and two statements regarding LMU's
10 history, but they at best show that LMU is simply affiliated with the Catholic Church.
11 (See First Am. Compl. ¶ 9; Graham Decl., Exs. 1–2, ECF No. 11-2; Graham Decl.,
12 Ex. D, ECF No. 18.) Thus, Plaintiff clearly has not established the absence of a
13 genuine dispute as to whether the plan at issue is church plan; to the contrary, the
14 evidence submitted heavily suggests that the plan is *not* a church plan.

15 In sum, Defendants have shown that “an individual, at some point in time,
16 could have brought [the] claim under ERISA § 502(a)(1)(B),” thus satisfying the first
17 prong of *Davila*. 542 U.S. at 210.

18 **2. Second Prong of *Davila***

19 The second prong of *Davila* requires that there be no other independent legal
20 duty implicated by the defendant's actions. Plaintiff argues that “[a]ll individuals
21 have a general duty not to engage in tortious conduct . . . [t]herefore, Plaintiff has a
22 legal right to assert emotional distress claims.” (Opp'n at 9-10.) This argument
23 borders on frivolous. The purported “tortious conduct” giving rise to Plaintiff's
24 emotional distress claim is the denial of benefits. Defendants' duties with respect to
25 reviewing and deciding benefit claims in ERISA-covered benefit plans are covered
26 exclusively by ERISA. There simply is no independent duty implicated by
27 Defendants' actions here. See *Davila*, 542 U.S. 200, 213 (holding that there is no
28 independent legal duty where “potential liability . . . derives entirely from the

particular rights and obligations established by the benefit plan[]”). Consequently, the Court concludes that Plaintiff’s claims are completely preempted by ERISA.

B. Forum Selection Clause

As an alternative argument for remand, Plaintiff claims that the benefit plan contains a forum selection clause requiring that claims arising under the plan be litigated in California state court. (Mot. to Remand at 2–4.) The Court disagrees.

A federal court may remand a case to state court based on a forum selection clause. *See, e.g., Kamm v. ITEX Corp.*, 568 F.3d 752, 757 (9th Cir. 2009); *Pelleport Inv’rs, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276 (9th Cir. 1984). In the Ninth Circuit, courts interpret forum selection clauses under federal common law. *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083 (9th Cir. 2009); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988). “A written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations.” *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999). “Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself.” *Id.* Where the language of a forum selection clause is “plain and unambiguous,” the court must enforce the clause as worded without reference to extrinsic evidence. *Doe 1*, 552 F.3d at 1081.

Plaintiff points to a provision in the insurance contract between LMU and Prudential stating that the contract is to be “governed by the laws of the Governing Jurisdiction.” (Petrone Decl., Ex. 1, ECF No. 1-7.) The contract then identifies the “Governing Jurisdiction” as the State of California. (*Id.*) However, the law governing the interpretation of the contract has nothing to do with *where* a lawsuit arising under the contract may be brought. Moreover, it is not clear that this language even applies to benefit determinations under the plan. The contract in which Plaintiff finds this language is between LMU and Prudential, not the beneficiary. The plan summary issued to the beneficiary, in contrast, repeatedly refers to the rights and obligations of

1 both the beneficiary and the plan administrator under ERISA, *not* state law. (See
 2 *generally* Petron Decl., Ex. 3.) In short, the Court is not persuaded that the language
 3 Plaintiff points to mandates a state court forum for denial of benefit claims.⁵

4 **C. Attorneys' Fees and Costs**

5 Plaintiff seeks an award of attorneys' fees and costs in the amount of \$10,750
 6 on the basis that Defendants' removal of the case was frivolous. (Mot. at 10.)
 7 Because the Court declines to remand the action, the Court also denies Plaintiff's
 8 request for fees and costs. See 28 U.S.C. § 1447(c) (authorizing fees and costs only
 9 where the court remands the case).

10 **IV. MOTION TO DISMISS**

11 Defendants move to dismiss Plaintiff's state law claims based on ERISA
 12 preemption. (See *generally* ECF No. 10.) However, neither the facts pleaded in the
 13 complaint nor any facts subject to judicial notice establishes this defense. Thus, the
 14 Court denies Defendants' Motion.

15 A court may dismiss a complaint under Rule 12(b)(6) for lack of a cognizable
 16 legal theory or insufficient facts pleaded to support an otherwise cognizable legal
 17 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To
 18 survive a dismissal motion, the complaint must "contain sufficient factual matter,
 19 accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v.*
 20 *Iqbal*, 556 U.S. 662, 678 (2009). The determination whether a complaint satisfies the
 21 plausibility standard is a "context-specific task that requires the reviewing court to
 22 draw on its judicial experience and common sense." *Id.* at 679. A court is generally
 23 limited to the pleadings and must construe all "factual allegations set forth in the
 24 complaint . . . as true and . . . in the light most favorable" to the plaintiff. *Lee v. City*
 25 *of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). But a court need not blindly accept
 26 conclusory allegations, unwarranted deductions of fact, and unreasonable

27 ⁵ To the extent this provision could be construed as a choice-of-law provision, see *Wang Labs.,*
 28 *Inc. v. Kagan*, 990 F.2d 1126, 1128 (9th Cir. 1993), the Court considers any such argument waived.

1 inferences. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

2 “Ordinarily[,] affirmative defenses may not be raised by motion to dismiss.”
 3 *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984). The only exception is where
 4 the defendant can establish the affirmative defense through either facts that the
 5 plaintiff had pleaded or facts that are subject to judicial notice. *See ASARCO, LLC v.*
 6 *Union Pac. R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014); *Albino v. Baca*, 747 F.3d
 7 1162, 1169 (9th Cir. 2014) (noting that motions to dismiss based on affirmative
 8 defenses are “rare because a plaintiff is not required to say anything about [the facts
 9 concerning affirmative defenses] in his complaint”); *Jones v. Bock*, 549 U.S. 199, 216
 10 (2007) (same).

11 Because ERISA preemption is an affirmative defense, *see, e.g., Mastaler v.*
 12 *Unum Life Ins. Co.*, No. 11CV1210 DMS NLS, 2012 WL 579537, at *2 (S.D. Cal.
 13 Feb. 22, 2012), Defendants must show that the facts pleaded in the complaint or
 14 subject to judicial notice conclusively establish the defense. Defendants do not show
 15 this. Instead, Defendants argue that Plaintiff has not pleaded sufficient facts to
 16 establish that the plan is a church plan. (Mot. to Dismiss at 10; Reply to Mot. to
 17 Dismiss at 3–4.) However, it is not Plaintiff’s burden to plead facts negating
 18 Defendants’ affirmative defenses; indeed, the complaint need not say anything at *all*
 19 about Defendants’ affirmative defenses.⁶ *See ASARCO*, 765 F.3d at 1004; *Albino*, 747
 20 F.3d at 1169. Because nothing pleaded in the complaint conclusively establishes that
 21 the plan is not a church plan and thus subject to ERISA, Defendants’ argument fails.

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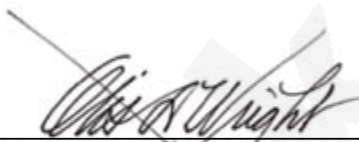
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 25 ⁶ The Court also cannot consider the declarations submitted by Defendants in support of their
 26 Notice of Removal and their Opposition to Plaintiff’s Motion to Remand. *See, e.g., Anderson v.*
 27 *Angelone*, 86 F.3d 932, 934 (9th Cir. 1996) (court cannot consider declarations on a motion to
 28 dismiss); *see also, e.g., Cycle Barn, Inc. v. Arctic Cat Sales Inc.*, 701 F. Supp. 2d 1197, 1203 (W.D.
 Wash. 2010) (same); *Chung v. Strategic Decisions Grp.*, No. CIV.08-1480-ST, 2009 WL 1117492,
 at *2 (D. Or. Apr. 23, 2009) (same).

1 **V. CONCLUSION**

2 For the foregoing reasons, the Court **DENIES** Plaintiff's Motion to Remand,
3 and **DENIES** Defendants' Motion to Dismiss. (ECF Nos. 10, 11.)

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5 **IT IS SO ORDERED.**

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7 February 10, 2017

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10 **OTIS D. WRIGHT, II**
11 **UNITED STATES DISTRICT JUDGE**
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