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18 **UNITED STATES DISTRICT COURT**
19 **CENTRAL DISTRICT OF CALIFORNIA**
20 **SOUTHERN DIVISION**

21 RAFAEL RISHIK, KEITH GREEN,
22 STEPHEN J. ERDODY,
23
24 Plaintiffs,
25
26 v.
27
28 AMERICAN FEDERATION OF
MUSICIANS OF THE UNITED STATES
AND CANADA,
Defendant.

) Case No.: 09-CV-0359-AG-SS
)
) MEMORANDUM IN SUPPORT OF
) MOTION TO DISMISS BY DEFENDANT
) AMERICAN FEDERATION OF
) MUSICIANS OF THE UNITED STATES
) AND CANADA
)
) MOTION HEARING: NOVEMBER 9, 2009
) 10:00 A.M. BEFORE UNITED STATES
) DISTRICT JUDGE GUILFORD
)
)
)

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Fed. R. Civ. P. 12(b)(6)7

I. INTRODUCTION

1
2 On January 15, 2009, Plaintiffs Rafael Rishik, Keith Green, and Stephen
3 Erdody (“Plaintiffs”) brought a putative class action against Defendant
4 American Federation of Musicians of the United States and Canada (“AFM” or
5 “Federation”). As members of AFM, the Plaintiffs sought to prohibit the AFM
6 from collecting certain of the “Work Dues” which the AFM Bylaws require
7 union members to pay as a condition of membership.

8 In a July 27 order, this Court granted the AFM’s motion to dismiss the
9 Plaintiffs’ Complaint in its entirety, without prejudice to file an amended
10 complaint. *See* Order Granting Motion To Dismiss (Dkt.# 34) (“Order”). On
11 August 17, the Plaintiffs did file a First Amended Complaint (Dkt.# 35)
12 (“Amended Complaint”). The Amended Complaint repleads nearly verbatim
13 the allegations of the original Complaint, and adds sixty-eight new paragraphs
14 and one ostensibly new cause of action.

15 As we will explain, Plaintiffs’ Amended Complaint fails to offer any
16 reason or argument why Plaintiffs’ action should not be again dismissed. The
17 Amended Complaint almost entirely recycles theories of liability already
18 rejected by this Court. On essentially the same allegations they pled in their
19 original Complaint, Plaintiffs again contend that the dues at issue do not qualify
20 as “work dues,” as that term is defined in the AFM Bylaws; that the challenged
21 dues provision is impermissibly retroactive; that in amending the AFM Bylaws,
22 the AFM violated its duty of fair representation; and that the AFM made a clear
23 and unambiguous promise to the Plaintiffs that it would never enact or impose a
24 dues assessment like the one at issue. This Court has already considered and
25 rejected these claims. To be sure, the Plaintiffs do advance one new theory of
26 relief in their Amended Complaint: that the delegates at the 2007 AFM
27 Convention did not make an “informed” vote in enacting the dues assessment.
28 However, Plaintiffs’ pleading fails to establish any basis in law or fact to support

1 a plausible claim under this theory. Defendants accordingly request that the
2 Court dismiss Plaintiffs' Amended Complaint in its entirety.

3 **II. BACKGROUND**

4 Plaintiffs' Amended Complaint is based on the following allegations,
5 most of them repeated verbatim from the original Complaint. While many
6 allegations in the Amended Complaint are demonstrably false, we take them as
7 true for the purposes of this motion:

8 A. Compensation Under the SRLA

9 AFM is an international labor organization made up of chartered Local
10 Unions and individual musician members. *See* Am. Compl. ¶ 5. At all relevant
11 times, Plaintiffs were freelance musician members of AFM. *See id.* ¶ 4. AFM
12 members who work as recording musicians under the Sound Recording Labor
13 Agreement ("SRLA") – the collective bargaining agreement ("CBA") relevant
14 to Plaintiffs' claims – may receive at least two forms of compensation: wages,
15 paid to them at the time they record, and payments in connection with the Sound
16 Recording Labor Agreement Special Payment Fund ("SRLA-SPF"), established
17 under the SRLA for employers to provide additional income to musicians who
18 record music under that agreement. *Id.* ¶¶ 16-17, 19.

19 With respect to the first form of compensation, the SRLA sets the
20 minimum wage that employer signatories must meet or exceed. *Id.* ¶ 19; *see*
21 *also* Exhibit 1-1 at p. 38 (SRLA, Exhibit A).¹ These minimum wages are
22 described as "scale" wages. *See* Exhibit 5 at p. 190 (AFM Bylaws, Glossary).

23 With regard to the SRLA-SPF compensation, payments into and
24 distributions out of the SRLA-SPF are set out in the Sound Recording Special
25 Payments Fund Agreement ("SPF Agreement"), a document incorporated by
26

27 ¹ The Sound Recording Labor Agreement currently in effect and referenced
28 in Plaintiffs' Amended Complaint, *see* Am. Compl. ¶ 16, consists of Exhibits 1-
1, 1-2, 2, 3, & 4, attached hereto.

1 reference into the SRLA. *See* Am. Compl. ¶ 17; Exhibit 1-1 at p. 34 (SRLA, art.
2 23).² On a semi-annual basis, employers pay into the SRLA-SPF revenue from
3 the sale of each record created under the SRLA and sold in that six-month
4 period. *See* Exhibit 1-2 at pp. 93-95, 102-105 (SPF Agreement, art. 1(c) &
5 Addendum A, §§ 2-6).

6 Annual distributions to musicians of money from the SRLA-SPF occur
7 every May. *See* Exhibit 1-2 at pp. 95-96 (Agreement, art. 2(a)). The amount
8 each musician receives in that distribution is determined in a multi-step process
9 by comparing the total SRLA “scale wages” earned by the musician over the
10 preceding five-year period against the SRLA scale wages earned by all other
11 musicians during those same five years. More specifically, each of the
12 Plaintiffs’ annual payments under the SRLA-SPF is established by calculating
13 the amount of scale wages payable to him under the SRLA over the prior five
14 years and weighting the amount earned in each year on a sliding scale, with
15 scale wages payable for work done in more distant years being weighted less
16 than scale wages payable for work done in more recent years. *See id.* Each
17 Plaintiff’s five-year weighted scale wages amount is then divided by the sum of
18 the weighted scale wages for all musicians who worked under the SRLA during
19 that same time period. When that fraction is then multiplied by the total amount
20 available in the Fund for distribution that year, the result is the amount to which
21 the musician is entitled. *See* Am. Compl. ¶ 17.

22 B. Recording Musicians’ Work Dues On Their Income
23

24 ² In reviewing a motion to dismiss, the Court may consider, in addition to
25 facts alleged in the pleadings, documents incorporated by reference in the
26 Complaint or on which the Complaint necessarily relies. *See Knievel v. ESPN*,
27 393 F.3d 1068, 1076 (9th Cir. 2005). The Plaintiffs’ Amended Complaint relies
28 on and refers to the SRLA and to provisions of the SPF Agreement, which is a
part of the SRLA. *See, e.g.*, Am. Compl. ¶¶ 16-19. Consequently, the Court
may consider the SPF Agreement in its disposition of this motion to dismiss.

1 The AFM's governing document – its Bylaws – lays out the “Work Dues”
2 to be paid to the AFM as a condition of union membership.³ Article 9, § 32 of
3 the Bylaws explains that “work dues” constitute a basic membership obligation:
4 “All AFM members, as a condition of membership, shall be required to pay dues
5 based on scale earnings (Work Dues) for all musical services performed under
6 AFM-negotiated Agreements, AFM touring Pamphlets, and employment with
7 any Symphonic Orchestra.” Exhibit 5 at p. 177 (Bylaws, art. 9, § 32).

8 Under Section 32 of Article 9, AFM members performing recording work
9 under AFM-negotiated agreements (such as the SRLA) owe two different forms
10 of work dues: first, work dues imposed upon earnings they receive in the first
11 instance for performing the recording work, *see* Ex. 5 at p. 177 (Bylaws, art. 9, §
12 32(b)); and second, work dues imposed upon the supplemental distributions they
13 receive from electronic media supplemental market funds like the SRLA-SPF,
14 *see* Ex. 5 at p. 178 (Bylaws, art. 9, § 32(f)).

15 This second work dues obligation is the provision challenged in this case.
16 At AFM's 2007 national convention, a majority vote of delegates from AFM's
17 local unions adopted the provision as an amendment to AFM's Bylaws. Am.
18 Compl. ¶¶ 28, 71. Plaintiffs allege that the Convention delegates were not
19 provided with certain information regarding the operation and effect of this dues
20 provision prior to voting on it. *Id.* ¶¶ 45-58. The amendment adopted by the
21

22
23
24 ³ Articles 5, 9, 10, 18 and the Glossary of the AFM Bylaws, referenced and
25 relied on in Plaintiffs' Complaint, *see* Am. Compl. ¶¶ 16, 20-21, 25, are attached
26 hereto as Exhibit 5. (The complete Bylaws were attached as Exhibit 5 to
27 Defendant's original Motion to Dismiss (Dkt.# 11).) In addition to Work Dues,
28 AFM members are required as a condition of membership to pay initiation fees
and annual dues. *See* Exhibit 5 at 163, 172 (Bylaws, art. 5, § 47(a) & art. 9, §
2). Those initiation fees and annual dues are not at issue in this case, and neither
are other forms of work dues.

1 2007 Convention is now set out in the 2007 AFM Bylaws at Article 9, § 32(f),
2 and it reads:

3 SECTION 32(f). Federation Work Dues⁴ on payments to
4 musicians from supplemental market funds that are established by
5 AFM-negotiated collective bargaining agreements covering
6 electronic media work (e.g., distributions from the Sound
7 Recordings Special Payment Fund, the Film Musicians Secondary
8 Markets Fund and the Canadian equivalents) shall be 2% of the
9 gross distribution to which the musician is entitled, except for
10 distributions that would generate less than \$50 in Federation Work
11 Dues.

12 Exhibit 5 at p. 178 (Bylaws, art. 9, § 32(f)). In accordance with the Bylaws, the
13 Work Dues provisions of section 32(f) went into effect on September 15, 2007.
14 *See* Am. Compl. ¶ 28; Exhibit 5 at p. 187 (Bylaws, art. 18, § 10). Plaintiffs
15 allege that the bulk of these dues assessments will fall on AFM members
16 concentrated in a handful of local unions. *See* Am. Compl. ¶¶ 37, 73-76. Under
17 this provision, Plaintiffs, who allegedly received more than \$2500 in SRLA
18 distributions, have been assessed Work Dues by AFM in the amount of 2% of
19 their 2008 distribution.⁵ *See* Am. Compl. ¶ 95.

20 C. Prior Proceedings

21 Plaintiffs originally filed this action against AFM to enjoin the further
22 application of Section 32(f) to them and to recover, *inter alia*, the dues collected
23 from members of the putative class (those receiving more than \$2,500 in
24 distributions) since the first assessment was imposed in October 2008. *See*

25
26 ⁴ As defined in Section 32(b), “Federation Work Dues” are simply Work
27 Dues owed to the Federation (i.e., AFM) as opposed to locals of the Federation.

28 ⁵ A \$2500 distribution would produce a \$50 Work Dues obligation and is
the threshold for creating any obligation under section 32(f).

1 *generally* Compl. (Dkt.# 1). Plaintiffs alleged four causes of action: **first**, under
2 Section 301 of the Labor-Management Relations Act (“LMRA”), 29 U.S.C. §
3 185, that enactment of Section 32(f) by the AFM Convention violated the
4 Bylaws’ definition of “Work Dues” as an assessment “against earnings that are
5 not scale earnings or wages,” Compl. ¶ 64(a), and also violated the Bylaws as a
6 retroactive assessment against distributions “computed on work performed at a
7 time in the past when the new Section 32(f) did not exist,” Compl. ¶ 64(b);
8 **second**, under Section 101(a)(3) of the Labor Management Reporting and
9 Disclosure Act (“LMRDA”), 29 U.S.C. § 411(a)(3), that Bylaw § 32(f) is a
10 retroactive dues increase, and “an exploitative and discriminatory assessment
11 upon a small minority membership group,” Compl. ¶ 70; **third**, AFM violated
12 the duty of fair representation by “impos[ing] a heavy annual assessment on a
13 minority voting group within the membership,” Compl. ¶ 74;⁶ and **fourth**, AFM
14 was “estopped” from “violat[ing] the collective bargaining agreements’
15 exclusion of Fund earnings from the contractual definition of ‘scale earnings,’”
16 Compl. ¶ 78.

17 On July 27, after briefing and argument by the parties of the AFM’s
18 Motion to Dismiss, this Court dismissed that original Complaint in its entirety.
19 With regard to Plaintiffs’ first cause of action, the Court found that it was
20 “simply inaccurate” to claim that Section 32(f) violated the Bylaws’ definition
21 of Work Dues, because “the dues claimed by Section 32(f) are, in fact, based on
22 ‘scale earnings.’” Order at 6. The Court also concluded that Plaintiffs’ claim of
23 retroactivity failed, because the mere fact that an assessment taxes prospective
24

25
26 ⁶ In support of their duty of fair representation claim, Plaintiffs additionally
27 alleged that Defendants had “threaten[ed] to reopen and renegotiate collective
28 bargaining agreements” in retaliation against members who refused to pay Work
Dues under Section 32(f), but did not allege any injury resulting from the
purported “threat.” Compl. ¶ 76.

1 fund distributions based on work performed prior to the date of its enactment
2 “does not make the assessment retroactive.” *Id.* Second, Plaintiffs’ claim under
3 the LMRDA was dismissed, the Court holding that “Section 101(a)(3) does not
4 impose substantive requirements on dues increases levied by labor unions.”
5 Order at 8. Third, as to the duty of fair representation, the Court dismissed the
6 claim, holding that such duty simply did not arise on the facts alleged, because
7 “the duty of fair representation regulates only a union’s activities in dealing with
8 employers on behalf of union members, and not its internal affairs” at issue in
9 this lawsuit. *Id.* Finally, the Court dismissed Plaintiffs’ allegations of estoppel,
10 because Plaintiffs’ allegations failed to show “that AFM made any clear promise
11 or representation that Fund distributions would never be subject to work dues.”
12 *Id.* at 9. The Court’s dismissal was without prejudice to Plaintiffs’ right to file
13 an amended complaint.

14 On August 17, Plaintiffs filed their Amended Complaint.

15 III. ARGUMENT

16 A motion to dismiss tests the legal sufficiency of the complaint, and in
17 order to survive a motion under Fed. R.Civ. P. 12(b)(6) a complaint must allege
18 facts—and not legal conclusions—that, accepted as true, “state a claim to relief
19 that is plausible on its face.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L.
20 Ed.2d 868 (2009) (quoting *Twombly*, 550 U.S. 554, 570, 167 L.E.2d 929, 127 S.
21 Ct. 1955 (2007)).

22 In seeking to strike down the dues assessment contained in AFM Bylaw
23 Article 9, § 32(f), Plaintiffs assert each of the four causes of action found in their
24 original Complaint, as well as one additional cause of action, styled a “Breach of
25 Contract.” In light of this Court’s thorough consideration and rejection of
26 Plaintiffs’ arguments underpinning these causes of action, nearly all of these
27 claims are due to be summarily dismissed. Indeed, the reach and reasoning of
28 the Court’s July 27 Opinion and Order extends even to the Amended

1 Complaint's "Breach of Contract" claim, which upon closer inspection reveals
2 itself to be little more than a dressed up version of Plaintiffs' estoppel claim that
3 was rejected by the terms of this Court's July 27 Order.⁷

4 Finally, while the Amended Complaint advances new allegations to
5 support a new theory of recovery under LMRDA § 101(a)(3), this theory is
6 unsupportable as a matter of law.

7 **A. PLAINTIFFS' ALLEGATIONS UNDER LMRDA § 101(a)(3) FAIL**
8 **TO STATE A CLAIM BECAUSE THE WORK DUES**
9 **AMENDMENT ENACTED AT THE AFM CONVENTION FULLY**
10 **COMPLIED WITH THE PROCEDURAL REQUIREMENTS OF**
11 **THAT SECTION**

12 In Plaintiffs' first cause of action, they claim that Bylaw section 32(f)
13 violates section 101(a)(3) of the LMRDA because (1) it was not ratified by the
14 individual members of various local unions affiliated with AFM under the
15 provisions of § 101(a)(3)(A), Am. Compl. ¶¶ 113-15; (2) it "deliberately
16 targeted professional recording artists for the purpose of imposing upon them,
17 and only them, the entire dues burden," Am. Compl. ¶ 116; (3) it is retroactive
18 in effect, *see* Am. Compl. ¶¶ 121-22; (4) the delegates who passed Section 32(f)
19 at the AFM convention did not enjoy an "informed" vote, Am. Compl. ¶¶ 117,
20

21 ⁷ Under the law of the case doctrine, courts refrain from reconsidering
22 issues that were "decided at an earlier stage of the litigation, either explicitly or
23 by necessary inference from the disposition of the issues." *Magnesystems, Inc.*
24 *v. Nikken, Inc.*, 933 F. Supp. 944, 949 (C.D. Cal. 1996) (citations and internal
25 quotation marks omitted). Certain "exceptional" circumstances may warrant a
26 court to depart from the law of the case, such as when there is "(1) an
27 intervening change in controlling law; (2) new evidence has surfaced; or (3) the
28 previous disposition has resulted in clear error or manifest injustice." *Id.* at 949.
Since the Court's July 27 Order, however, neither the controlling rules of law,
the facts alleged by the Plaintiffs, nor anything else has changed that would
merit reconsideration of that Order.

1 119-20; and (5) it “unlawfully vests enforcement of the new dues in the AFM’s
2 and film industry membership’s exercise of discretion,” Am. Compl. ¶ 118.
3 Each of Plaintiffs’ claims rests upon a significant misreading of the scope of
4 Section 101(a)(3), 29 U.S.C. § 411(a)(3).

5 1. The first three bases for Plaintiffs’ LMRDA claim were pled in their
6 original Complaint and argued in opposition to AFM’s motion to dismiss that
7 Complaint. *See* Compl. ¶ 70, Pls.’ Am. Mem. of P. & A at 8-9 (Dkt.# 21)
8 (contending that national dues increase must be ratified by members of
9 individual local unions under LMRDA § 101(a)(3)(A)); Compl. ¶ 70, Pls.’ Am.
10 Mem. of P. & A. at 8-10 (contending that section 32(f) is substantively unfair to
11 Plaintiffs as a discriminatory dues increase); Compl. ¶¶ 67-69, Pls.’ Am. Mem.
12 of P. & A. at 13-15 (contending that section 32(f) constitutes an improperly
13 retroactive dues increase). This Court has already rejected each of these bases
14 for relief. *See* Order at 7 (“Nowhere do Plaintiffs allege that AFM violated the
15 procedures set forth in [LMRDA] Section 101(a)(3)(B)(i).”); *id.* at 8 (“Section
16 101(a)(3) does not impose substantive requirements on dues increases levied by
17 labor unions.”); *id.* at 6 (holding that Section 32(f) is not retroactive because
18 “the fact that distributions made after [Section 32(f) was adopted] were based on
19 work performed before that date does not make the assessment retroactive”).
20 Plaintiffs cannot breath life into these arguments simply by repleading them in
21 an amended complaint.

22 As this Court has held, LMRDA “Section 101(a)(3) does not impose
23 substantive requirements on dues increases levied by labor unions. The section
24 simply sets forth a list of procedural requirements.” Order at 8. Because, on
25 Plaintiffs’ own allegations, Section 32(f) was enacted in conformity with the
26 procedural requirements set out in LMRDA § 101(a)(3)(B)(i), Plaintiffs cannot
27 plead a viable claim under Section 101(a)(3) simply by dubbing Section 32(f) a
28 “discriminatory” or “retroactive” dues increase.

1 2. As to the one new LMRDA theory of liability Plaintiffs advance in their
2 Amended Complaint—that “[t]he AFM deprived Convention delegates of an
3 informed vote on new Section 32(f), in violation of the voting rights guaranteed
4 by 29 U.S.C. § 411(a)(3),” Am. Compl. ¶ 120—Plaintiffs likewise fail to state a
5 plausible claim that can survive a motion to dismiss. In this Circuit, there exists
6 no cause of action under Section 101(a)(3) for “uninformed voting” amongst the
7 union rank-and-file, much less a cause of action based upon the notion that
8 convention *delegates* were uninformed of a dues assessment’s import. But even
9 if such a cause of action did exist, Plaintiffs’ contentions fail to call into
10 question the fundamental aspects of the convention’s democratic process and are
11 insufficient to make out any colorable claim for “uninformed voting.”

12 First and most importantly, nothing in the text of Section 101(a)(3)(B)
13 suggests that the section requires an “informed” membership vote to make a
14 national union dues increase valid—or, indeed, any membership vote at all. In
15 sharp distinction to Sections 101(a)(1) and (2) – which respectively provide
16 individual union members sweeping substantive guarantees of equal rights and
17 the freedom of speech and assembly – Section 101(a)(3)(B) sets forth specific,
18 mechanical rules by which unions may enact dues increases by action of the
19 international union’s convention delegates, *see* 29 U.S.C. § 411(a)(3)(B)(i), or
20 the international union’s executive board, *see id.* § 411(a)(3)(B)(iii), as well as
21 by votes of the union’s rank-and-file membership, *see id.* § 411(a)(3)(A) &
22 (B)(ii). Indeed, in contrast to LMRDA § 101(a)(3)(A), which concerns local
23 union dues increases, § 101(a)(3)(B) requires no membership vote at all for a
24 national union to enact a national union dues increase.

25 Ninth Circuit precedent similarly lends no support for Plaintiffs’ claim
26 that an “informed voting” cause of action lies under Section 101(a)(3)(B). The
27 one Ninth Circuit case to consider whether any “informed vote” requirement
28 exists under any part of LMRDA Title I, rejects any right to an “informed vote”

1 under the LMRDA, except *possibly* where the statute *requires* that members be
2 permitted a vote. *See Ackley v. Western Conference of Teamsters*, 958 F.2d
3 1463, 1476 (9th Cir. 1992) (“[A]lthough the LMRDA guarantees members the
4 right to vote in union elections, it does not guarantee them the right to vote on
5 other questions not covered by the statute.”) (quoting *Stelling v. Int’l Bhd. of*
6 *Elec. Workers Local Union No.1547*, 587 F.2d 1379, 1385 (9th Cir. 1978)
7 (internal quotation marks omitted)); *see also id.* (“We note that even the first
8 amendment does not contain a requirement that adequate information be
9 provided.”). And, as noted above, national dues increases like those at issue
10 here may properly be enacted under the statute without any membership vote.

11 Even outside the Ninth Circuit, we have not found a single reported case
12 in which a court has found a violation of Section 101(a)(3)(B)(i) because
13 delegates to an international union’s convention were denied an “informed”
14 vote. This is unsurprising, because unlike rank-and-file union members – a
15 voting population that is often diffuse, difficult to assemble, and lacking in time
16 and informational resources with which to educate itself – delegates to
17 international union conventions have been singled out by their local unions for
18 the specific purpose of representing those locals’ interests at the convention.⁸

21 ⁸ To the extent that other circuits have recognized a cause of action for
22 “informed voting,” they have found the cause of action to exist under Section
23 101(a)(1) or (2), not Section 101(a)(3). *See Sim v. New York Mailers’ Union*
24 *No. 6*, 166 F.3d 465, 471 (2d Cir. 1999); *Corea v. Welo*, 937 F.2d 1132, 1139-41
25 (6th Cir. 1991); *Bunz v. Moving Picture Mach. Operators’ Protective Union,*
26 *Local 224*, 567 F.2d 1117, 1120 (D.C. Cir. 1977) (“Bunz cannot base federal
27 jurisdiction on a violation of any right enunciated in the ‘dues and assessments’
28 provision of § 101(a)(3).”). We are aware of no case that even contemplates the
possibility of an “informed voting” cause of action under Section 101(a)(3)(B),
whereby a union member could bring suit to invalidate a dues assessment
because the union had deprived the union member—let alone union convention

1 But even were an “informed voting” cause of action one that could be
2 pled under Section 101(a)(3)(B)(i), Plaintiffs’ own complaint demonstrates that
3 here the delegates enjoyed all the features of a meaningful voting process,
4 rendering the claim of “uninformed voting” implausible.⁹ Nowhere do Plaintiffs
5 allege that the delegates to the 2007 AFM Convention were ever denied access
6 to the text of Section 32(f) or of the SRLA, that they had the text of either
7 document misrepresented to them, or that they lacked notice that Section 32(f)
8 would be put to a vote at the Convention. Absent also are any credible
9 allegations that the text itself of Section 32(f) was ambiguous or deceptive as it
10 was written. Plaintiffs omit any allegation that the Convention’s debate on
11 Section 32(f) lasted insufficiently long to allow for discussion of relevant issues,
12 or that it was conducted in an unfair manner. Along these same lines, Plaintiffs
13 conspicuously make no allegation that delegates from the local unions
14 supposedly most affected by Section 32(f)’s passage, or representatives of the

15
16 delegates—of an “informed vote,” either by withholding information or
17 otherwise.

18 ⁹ Under recent Supreme Court guidance, the “oft-cited maxim” in Rule
19 12(b)(6) rulings – “that ‘a complaint should not be dismissed for failure to state
20 a claim unless it appears beyond doubt that the plaintiff can prove no set of facts
21 in support of his claim which would entitle him to relief’” – “set the bar too
22 low.” *Moss v. U.S. Secret Service*, 572 F.3d 962, 968 (9th Cir. 2009) (quoting
23 *Twombly*, 550 U.S. at 561-62). Under the now applicable standard, a plaintiff
24 must plead “sufficient factual matter, accepted as true, to ‘state a claim to relief
25 that is plausible on its face’” in order to avoid dismissal under Rule 12(b)(6).
26 *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). This “plausibility
27 standard,” although not a “probability requirement,” does “ask[] for more than a
28 sheer possibility that a defendant has acted unlawfully.” *Moss*, 572 F.3d at 969
(quoting *Iqbal*, 129 S. Ct. at 1949). “Where a complaint pleads facts that are
‘merely consistent with’ a defendant’s liability, it stops short of the line between
possibility and plausibility of entitlement to relief.” *Id.* (quoting *Iqbal*, 129 S.
Ct. at 1949).

1 Recording Musicians Association, were themselves uninformed, denied an
 2 opportunity to speak, or prevented from challenging alleged misrepresentations
 3 by those seeking to enact the bylaw.

4 Rather, Plaintiffs allege that the AFM deceived the delegates by
 5 concealing Section 32(f)'s "retroactive" nature, *see* Am. Compl. ¶ 120. But
 6 such an allegation is inherently implausible as the basis for any "informed vote"
 7 cause of action because—as this Court has correctly held—section 32(f) is
 8 simply not retroactive. As to the remaining allegations – that the AFM
 9 leadership failed to provide delegates sufficient information about the impact of
 10 the dues increase on a minority of the AFM's membership and "deliberately and
 11 without cause inflame[ed] the delegates' sentiments against the small minority
 12 of members to be subjected to the new dues," Am. Compl. ¶ 117 – it is
 13 implausible to conclude that this alleged action could render the resulting vote
 14 so uninformed or unfair as to be undemocratic.¹⁰

15 In sum, under Ninth Circuit precedent, LMRDA § 101(a)(3) cannot
 16 support Plaintiffs' "informed voting" cause of action. But, even under the
 17 assumption that LMRDA § 101(a)(3) could admit of an "informed voting"
 18 requirement in some circumstances, no reading or extension of the statute can
 19 support a claim on Plaintiffs' allegations here.¹¹

21
 22 ¹⁰ We note that Plaintiffs' own Amended Complaint alleges the vote to have
 23 been extremely close, with the delegates of the large locals alleged to be
 24 disproportionately affected by the increase fully represented. *See* Am. Compl.
 25 ¶¶ 71-76.

26 ¹¹ Plaintiffs' final claim under Section 101(a)(3) relates to the enforcement
 27 of Section 32(f), alleging that Section 32(f) "vests enforcement of the new dues
 28 in the AFM's and film industrys membership's exercise of discretion," in
 violation of Section 101(a)(3). Am. Compl. ¶ 118. But, as this Court has held,
 Section 101(a)(3) sets procedural requirements for the *enactment* of dues
 increases, *see* Order at 8; it does not address the application or enforcement of

1 **B. PLAINTIFFS’ BREACH OF THE AFM BYLAWS CLAIM FAILS**
2 **BECAUSE AFM’S APPLICATION OF ART. 9, § 32(f) TO SRLA-**
3 **SPF PAYMENTS MADE AFTER SEPTEMBER 15, 2007 IS**
4 **EXPRESSLY PROVIDED BY AND CONSISTENT WITH THE**
5 **AFM BYLAWS**

6 In their cause of action under LMRA § 301, Plaintiffs allege that the
7 “Work Dues” imposed by Article 9, Section 32(f) of the Bylaws violates the
8 AFM Bylaws in two respects: first, because Section 32(f) is retroactive in effect,
9 *see* Am. Compl. ¶ 126; and second, because the Work Dues assessment
10 provided for in Section 32(f) does not fit within the Bylaws’ definition of “Work
11 Dues” because it is not based on scale wages, *see id.* ¶ 127. Plaintiffs made
12 these same allegations in their original Complaint, *see* Compl. ¶¶ 61-62, 64(a) &
13 (b); Pls.’ Am. Mem. of P. & A. at 19-22. The Court rejected both contentions.
14 *See* Order at 5-6. First, this Court held both that Section 32(f) is not
15 “retroactive,” and that “Plaintiffs do not allege that any provision of the bylaws
16 explicitly prohibits amendments with retroactive effect.” Order at 6. Second,
17 this Court, reviewing the same allegations advanced in the Amended Complaint,
18 concluded that “[i]t is simply inaccurate for Plaintiffs to assert that the 32(f)
19 assessment is not based on ‘scale earnings.’” *Id.* No more need be said in
20 connection with this claim than the Court has already written in its July 27
21 Order.

22 We hasten to add only one additional point. Even were Section 32(f) in
23 tension with earlier-enacted definitions of “Work Dues” in the Bylaws—and it is
24 not—under fundamental principles of contract and constitutional interpretation
25 that still would not constitute a breach of the Bylaws. First, a properly adopted
26
27
28 dues increases. Plaintiffs’ allegations thus fall well outside the ambit of Section
101(a)(3)’s concern.

1 amendment to a union's governing document cannot constitute a breach of that
2 document. *See Sapiro v. Musicians' Union of San Francisco, Local No. 6*, No.
3 C-87-850, 1987 WL 58071, at *3 (N.D. Cal. Dec. 21, 1987) (finding no LMRA
4 § 301 breach of contract where AFM local's Bylaws had at all relevant times
5 been subject to amendment by union). In that regard, Plaintiffs do not identify a
6 single provision within the Bylaws that prohibits the imposition of additional
7 dues or categories of dues. Second, to the extent that Section 32(f) imposes
8 "Work Dues" in a different manner from earlier Bylaw provisions, as a later
9 enacted amendment it modifies any preexisting definition of "Work Dues"
10 contained in the Bylaws and, therefore, controls that earlier definition of "Work
11 Dues." *See Jackson v. Dravo Corp.*, 603 F.2d 156, 157 (10th Cir. 1979).
12 Plaintiffs do not, and cannot, identify any Bylaw provision that limits AFM's
13 right to enact dues increase amendments like section 32(f); as such, Plaintiffs'
14 request to invalidate a properly enacted union bylaw that is reasonably within
15 the power of the union to enact should thus be rejected as an improper
16 interference with internal union governance under any circumstances. *See Local*
17 *1052, United Bhd. of Carpenters v. Los Angeles County Dist. Council of*
18 *Carpenters*, 944 F.2d 610, 617 (9th Cir. 1991) ("It is only when a specific
19 limitation in a union constitution or bylaw has been violated that a court should
20 interfere with the efforts of a union to manage its internal affairs.").

21 **C. PLAINTIFFS' ESTOPPEL CLAIM SHOULD BE DISMISSED FOR**
22 **THE REASONS SET OUT IN THE COURT'S PRIOR ORDER OF**
23 **DISMISSAL**

24 Plaintiffs' fifth cause of action reasserts the estoppel claim Plaintiffs
25 presented in their original Complaint. As in their original Complaint, *see*
26 Compl. ¶¶ 78-79, Plaintiffs' Amended Complaint alleges that the SRLA
27 contains a promise that Section 32(b)'s 1½% assessment on scale earnings
28 would be the only work dues ever imposed upon income stemming from

1 recording work performed prior to the date of Section 32(f)'s enactment: "the
2 SRLA and the AFM Bylaws clearly and unambiguously promised [the
3 Plaintiffs] that the only work dues they would have to pay with respect to such
4 work and the compensation generated by that work would be 1½% of the scale
5 wages which they were paid for the work." Am. Compl. ¶ 145.

6 Plaintiffs have already presented this theory to the Court in their original
7 Complaint and accompanying Memorandum of Points and Authorities. *See*
8 Compl. ¶¶ 78-79; Pls.' Am. Mem. of P. & A. at 22-23. The Court rejected this
9 claim when it dismissed Plaintiffs' original Complaint:

10 Here, Plaintiffs do not allege that AFM made any clear promise or
11 representation that Fund distributions would never be subject to work
12 dues. Instead, Plaintiffs allege only that the AFM bylaws historically
13 levied work dues only on scale earnings, and that the Sound Recording
14 Labor Agreement treated Fund distributions as separate from scale
15 earnings subject to work dues. Neither of these past practices constitutes
16 a clear representation by AFM that its practices would never change.

17 Plaintiffs have not stated a claim for estoppel.

18 Order at 9.

19 As law of the case, the Court's July 27 Order thus disposes of Plaintiffs'
20 allegation of a "clear and unambiguous promise" and, in turn, of Plaintiffs'
21 entire fifth cause of action.¹²

22
23
24 ¹² By extension, since reliance upon a non-existent promise is *per se*
25 unreasonable, as is the expectation that anyone would rely on such a promise,
26 Plaintiffs also fail to plead a plausible basis for two of the other four elements of
27 promissory estoppel. *See Aguilar v. Int'l Longshoremen's Union Local # 10*,
28 966 F.2d 443, 445-46 (9th Cir. 1992) (holding that, to support a claim for
promissory estoppel, a litigant must prove (1) the existence of a clear and
unambiguous promise, (2) which the promisor reasonably should have expected
to induce the promisee's reliance, (3) that the promisee actually induced such

D. PLAINTIFFS' CLAIM TO A VESTED RIGHT TO PAY NO MORE THAN 1½% WORK DUES ON ANY INCOME THEY RECEIVE UNDER AN AFM-NEGOTIATED CONTRACT FINDS NO SUPPORT WHATSOEVER IN THE BYLAWS OR THE SRLA

Plaintiffs' fourth cause of action purports to assert a new claim, one alleging that, in adopting Section 32(f), AFM violated Plaintiffs' "vested" rights under the SRLA, thereby giving rise to a breach of contract claim. This is simply an implausible reading of the SRLA, and its reading of these documents has already been rejected by the Court in its disposition of Plaintiffs' original estoppel claim. *See supra* at 15-16. Under the *Iqbal* "plausibility" standard, this "breach of contract" claim cannot survive a motion to dismiss.

According to the Plaintiffs' allegations, the SRLA incorporates the terms of the AFM Bylaws, including the Bylaws' provisions regarding work dues. *See* Am. Compl. ¶ 139(b); Ex. 1-1 at p. 31 (SRLA, § 13). Plaintiffs further allege that whenever they performed work under the SRLA prior to the adoption of Section 32(f), they accrued a "vested" right to pay no additional work dues on *any* income based on that work (regardless when or how they received that

reliance, (4) that such reliance is reasonable, and (5) that injustice can only be avoided by enforcement of the promise). Finally, Plaintiffs have also failed to plead plausible allegations of the third element, actual reliance. Plaintiffs allege in highly conclusory fashion that "Plaintiffs reasonably relied on these promises by going forward to perform the work." Am. Compl. ¶ 146. Such an allegation, besides being conclusory, is patently silly on its face. In effect, Plaintiffs allege that, prior to the date of Section 32(f)'s adoption, they would have not gone forward in pursuing their livelihood and recording music under the SRLA if they had known that annual royalty payments on their recorded work in excess of \$2500 could be subjected to a 2% assessment. For these reasons, Plaintiffs' bare assertion of their reliance – like the Plaintiff's bare assertion of the U.S. Attorney General's unlawful discriminatory intent in *Iqbal* – fails to rise above "a sheer possibility," and therefore cannot support their claim for estoppel. *See Moss*, 572 F.3d at 969 (quoting *Iqbal*, 129 S. Ct. at 1951, 1949).

1 income) other than work dues that were already provided for by the Bylaws at
2 the moment the work was performed. *See* Am. Compl. ¶¶ 139-43. On that
3 basis, and that basis alone, Plaintiffs claim that Section 32(f) constitutes a breach
4 of Plaintiffs’ vested rights under the SRLA, because Section 32(f)’s 2%
5 assessment will be imposed on fund distributions that are themselves “based” on
6 scale earnings for work in years prior to Section 32(f)’s passage.¹³ *See* Am.
7 Compl. ¶ 144; Ex. 1-2 at pp. 95-96 (SRLA-SPF, art. 2(a)).

8 This fourth cause of action is a patently implausible reading of the SRLA
9 and the AFM Bylaws. Plaintiffs contend that the SRLA – an agreement between
10 an employer and a union – can be read to limit the AFM’s right to regulate
11 internal union membership rights, including dues obligations imposed as a
12 condition of membership. The SRLA, however, contains no limit on AFM’s
13 right to assess membership dues, nor does it address the issue of union dues at
14 all. Instead, Article 12(b) of the SRLA explicitly recognizes that the SRLA’s
15 reach does *not* intrude on employees’ membership obligations owed to the
16 AFM: “nothing in this contract shall ever be construed so as to interfere with
17 any obligation which [the member musicians engaged under the stipulations of
18 this contract] may owe to the American Federation of Musicians of the United
19 States and Canada as members thereof.” Ex. 1-1 at p. 30 (SRLA, art. 12(b)).

20 In the face of the explicit language of SRLA Article 12(b), Plaintiffs’
21 attempt to cobble together two unrelated fragments of the SRLA’s language –
22 one stipulating the employer’s payment obligations, *see* Ex. 1-1 at p. 28 (SRLA,
23 § 4), the other providing that changes to the Bylaws shall not be effective to
24

25
26 ¹³ Specifically, AFM musicians’ distributions from the SRLA-SPF in 2008,
27 2009, 2010, 2011, and 2012 will in part be “based on scale earnings” earned
28 prior to September 15, 2007; therefore, according to Plaintiffs’ theory, the
application of Section 32(f) in each of these five years will involve the breach of
some “vested” right under the SRLA.

1 contravene provisions of the SRLA, *see* Ex. 1-1 at p. 31 (SRLA, § 13) – simply
2 cannot be read as addressing work dues at all, much less as a statement that the
3 work dues in place at the time recording work is performed under the SRLA
4 represent the only work dues that will ever be levied on any income based upon
5 that work, regardless when or how that income is earned. In fact, just as the
6 Court has held that Plaintiffs—who previously referenced the SRLA as a basis
7 for their estoppel claim—did not allege a “clear promise or representation that
8 Fund distributions would never be subject to work dues,” Order at 9, they cannot
9 now advance that same theory as a basis for a breach of contract claim.

10 Thus, because the SRLA does not limit, and cannot plausibly be read to
11 limit, the AFM’s right to assess work dues on SPF payments, Plaintiffs’ fourth
12 cause of action is due to be dismissed. *See Moss*, 592 F.3d at 969 (citing *Iqbal*,
13 129 S. Ct. at 1949).

14 **E. THE AFM HAS NOT VIOLATED ITS DUTY OF FAIR**
15 **REPRESENTATION BY ADOPTING AND APPLYING SECTION**
16 **32(f) SINCE SUCH DUTY CONCERNS REPRESENTATION OF**
17 **THE PLAINTIFFS IN COLLECTIVE BARGAINING AND HAS**
18 **NOTHING WHATSOEVER TO DO WITH INTERNAL UNION**
19 **GOVERNANCE**

20 Plaintiffs’ third cause of action alleges that, in adopting Section 32(f),
21 AFM breached its duty of fair representation twofold: “by adopting a
22 discriminatory provision imposing a heavy annual assessment on a minority
23 group within the [AFM] membership,” Am. Compl. ¶¶ 134-37; and by
24 breaching the SRLA, *see id.* ¶¶ 129-33.

25 This is the second time Plaintiffs have pled a claim of breach of the duty
26 of representation, having alleged the same in their original Complaint. *See*
27 Compl. ¶¶ 73-76; Pls.’ Am. Mem. of P. & A. at 15-19. This Court dismissed
28 this same set of allegations. *See* Order at 8 (“[T]he duty of fair representation

1 regulates only a union's activities in dealing with employers on behalf of union
2 members, and not its internal affairs. While Plaintiffs point out that AFM's
3 adoption of Section 32(f) affects its rights under the Sound Recording Labor
4 Agreement, Plaintiffs are not challenging AFM's conduct in negotiating or
5 executing that agreement on their behalf. Plaintiffs' claim for breach of the duty
6 of fair representation fails.'").

7 Insofar as Plaintiffs' claim for breach of the duty of fair representation in
8 their Amended Complaint differs at all from their same claim in their original
9 Complaint, that difference solely consists in Plaintiffs' more explicit suggestion
10 that the AFM breached the duty of fair representation by breaching the SRLA.
11 *See* Am. Compl. ¶¶ 129-33. To the extent it depends on AFM's breach of the
12 SRLA, however, Plaintiffs' duty of fair representation claim fails for the same
13 reason Plaintiffs' fourth cause of action fails: Plaintiffs cannot make out a
14 plausible claim that the SRLA was breached, much less that the AFM's conduct
15 in enforcing the dues obligation was arbitrary or discriminatory in their
16 representation of musicians vis-à-vis any SRLA-signatory employer. *See supra*,
17 Section III.D. Where a duty of fair representation claim predicates itself upon
18 an alleged contractual breach, an inability to prove that contractual breach itself
19 defeats the claim for breach of the duty of fair representation. *See, e.g., Bliesner*
20 *v. Commc'n Workers of Am.*, 464 F.3d 910, 914 (9th Cir. 2006).

21 Conclusion

22 For the foregoing reasons, Plaintiffs' Amended Complaint should be
23 dismissed.

24
25
26 Respectfully submitted,

27 _____/s/_____
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1
2 **UNITED STATES DISTRICT COURT**
3 **CENTRAL DISTRICT OF CALIFORNIA**
4
5 **WESTERN DIVISION**

6 I hereby certify that on September 14, 2009, I served the document
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