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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS - 6

BRIAN RUBIN, an individual;)	Case No. CV 12-10140 DDP (Ex)
HYDRO THERM TECHNOLOGIES)	
GROUP, LLC, a Tennessee)	ORDER GRANTING DEFENDANTS' MOTION
limited liability company,)	TO DISMISS
)	
Plaintiffs,)	[Dkt. No. 9]
v.)	
)	
MICHAEL BRISCOE, an)	
individual; WESTBRIDGE)	
MUTUAL, LLC, a California)	
Limited Liability Company;)	
DAYO BEVERLY, an individual;)	
DANNY GOTVALD, an)	
individual; JESSE HATHORN,)	
an individual; JON DIVENS,)	
an individual; CHIP)	
CANTRELL, an individual; LAW)	
OFFICE OF JOHN DIVENS, LLC,)	
a business entity of unknown)	
form; et al.)	
)	
Defendants.)	
)	
_____)	

On November 28, 2012, Plaintiffs Brian Rubin and Hydro Therm Technologies Group, LLC, filed this action against numerous defendants alleging ten causes of action for civil RICO violations, fraud, breach of contract, and negligence. On December 18, 2012, the Court issued an Order to Show Cause requiring Plaintiffs to

1 file a Federal Claims Case Statement with respect to the RICO
2 claim, to which Plaintiffs responded on January 4, 2013. On March
3 21, 2013, the Court dismissed Hydro Therm from the case as an
4 improperly joined plaintiff, leaving Rubin as the sole Plaintiff.

5 Presently before the Court is the Motion to Dismiss
6 Plaintiff's Complaint as to Defendants Jon Divens and Law Offices
7 of Jon Divens & Associates, LLC (collectively "Divens Defendants").
8 (Dkt. No. 9.) Having considered the parties' pleadings and the
9 arguments therein, the Court GRANTS Defendants' Motion to Dismiss.

10 **I. BACKGROUND**

11 Plaintiff's Complaint alleges a host of facts against eighteen
12 defendants (plus twenty Doe Defendants), many of which are entirely
13 unrelated to the Divens Defendants. Only the facts relevant to
14 Plaintiff Rubin's claims against the Divens Defendants are recited
15 here.

16 In September 2010, Plaintiff sought to obtain a Standby Letter
17 of Credit ("SBLC"), a financial instrument used in business
18 transactions as proof of a buyer's credit quality and repayment
19 abilities. (Compl. ¶¶ 33, 60.) At that time, to assist him with
20 obtaining the SBLC, Plaintiff was referred to Defendant Linda
21 Jamison, who in turn referred Plaintiff to Defendant Michael
22 Briscoe, a member of Defendant Unity Bankcard Services, LLC
23 ("UBS"), and Defendants Hilary Whitfield and Tom Okeyo, controlling
24 members of Defendant BDP Worldwide, LLC ("BDP"). (*Id.* ¶¶ 13, 20,
25 61.) On September 23, 2010, Plaintiff entered into a Funding
26 Agreement with BDP whereby BDP would procure the SBLC and Plaintiff
27 would contribute \$200,000 toward the \$500,000 fee to participate in
28 an SBLC funding program. (*Id.* ¶ 62 & Ex. C.) Plaintiff and

1 Whitfield, on behalf of BDP, signed the agreement. (*Id.* Ex. C.)
2 Divens, an attorney, drafted the BDP Funding Agreement. (*Id.* ¶
3 62.) Plaintiff wired the \$200,000 directly into Divens's escrow
4 account. (*Id.*)

5 On October 1, 2010, BDP, represented by Whitfield, and UBS,
6 represented by Briscoe, entered into a second Funding Agreement
7 whereby UBS would assist BDP in obtaining the SBLC. (*Id.* ¶ 63 &
8 Ex. D.) The agreement provided that BDP and UBS would each advance
9 \$500,000 toward the cost of the SBLC, to be deposited into a
10 designated escrow account. (*Id.*) Plaintiff alleges that his
11 \$200,000 was included in the \$500,000 that BDP was to contribute
12 pursuant to this agreement, but he was not expressly a party to the
13 agreement or named in its provisions. (*Id.* ¶ 63.) Also on October
14 1, 2010, Briscoe (in his own name, and not as a representative of
15 UBS), BDP (represented by Whitfield), and Divens entered into an
16 Escrow Agreement whereby Divens would serve as the escrow agent for
17 the funds contributed by the other two parties, which would be
18 maintained in Divens's escrow account. (*Id.* ¶¶ 64-65 & Ex. E.)
19 Again, Plaintiff was not a party to or mentioned in the Escrow
20 Agreement. (*Id.* Ex. E.)

21 Plaintiff alleges that the SBLC was not obtained and that at
22 some point Divens released the subject funds to an unknown third
23 party without Plaintiff's knowledge or consent. (*Id.* ¶ 66.) When
24 Plaintiff learned this information, he contacted Divens, Briscoe,
25 Whitfield, Okeyo, and Jamison. (*Id.* ¶ 67.) In each of these
26 conversations, Plaintiff was given an excuse for why the SBLC had
27 not been obtained. (*Id.*) On one occasion, Divens allegedly told
28 Plaintiff that the transaction was delayed because bank personnel

1 were on vacation, and on another occasion, Whitfield told Plaintiff
2 not to worry because "Briscoe always closed the deal with the
3 banks." (*Id.*) Eventually, only Divens continued to communicate
4 with Plaintiff, reassuring him in frequent conversations that
5 Plaintiff would obtain the SBLC. (*Id.* ¶ 68.) By May 2011,
6 Plaintiff's funds had still not been returned. (*Id.*)

7 At this time, Divens offered to provide his services to
8 Plaintiff, representing that he would help Plaintiff obtain the
9 SBLC and recoup Plaintiff's \$200,000. (*Id.* ¶ 69.) Divens also
10 allegedly told Plaintiff that Plaintiff's money was being held by
11 Defendant Pelico International Funding and Development. (*Id.* ¶
12 70.) On May 26, 2011, Plaintiff and Divens entered into a Contract
13 Agreement whereby Divens would procure and share in the funds from
14 the SBLC. (*Id.* ¶ 71 & Ex. F.) According to the contract,
15 Plaintiff would contribute \$210,000 toward the cost of the SBLC.
16 (*Id.* Ex. F.) Divens allegedly told Plaintiff that he was in
17 possession of Plaintiff's \$200,000, which had been returned from
18 Pelico, and therefore that this amount would be credited toward
19 Plaintiff's contribution under the Contract Agreement. (*Id.* ¶ 72.)
20 Plaintiff then paid Divens the \$10,000 balance. (*Id.*)

21 In May 2012, Plaintiff demanded from Divens the return of the
22 \$210,000. (*Id.* ¶ 73.) Divens told Plaintiff that the money was
23 being held in the client trust account of a "major, reputable law
24 firm," but that he could not disclose the identify of the firm.
25 (*Id.*) Divens told Plaintiff that he was therefore unable to return
26 Plaintiff's money. (*Id.*) As of November 2012, the SBLC had not
27 been funded and Plaintiff's money had not been returned. (*Id.* ¶
28 75.)

1 **II. LEGAL STANDARD**

2 **A. Rule 12(b)(6)**

3 Rule 8 of the Federal Rules of Civil Procedure "requires more
4 than labels and conclusions, and a formulaic recitation of the
5 elements of a cause of action will not do . . . Factual
6 allegations must be enough to raise a right to relief above the
7 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
8 555 (2007). When considering a 12(b)(6) motion to dismiss for
9 failure to state a claim, "all allegations of material fact are
10 accepted as true and should be construed in the light most
11 favorable to the plaintiff." *Resnick v. Hayes*, 213 F.3d 443, 447
12 (9th Cir. 2000).

13 A court need not accept as true conclusory allegations or
14 allegations stating a legal conclusion. *In re Stac Elecs. Sec.*
15 *Litig.*, 89 F.3d 1399, 1403 (9th Cir. 1996); *Iqbal v. Ashcroft*, 129
16 S.Ct. 1937, 1940-41 (2009) ("mere conclusions[] are not entitled to
17 the assumption of truth."). A court properly dismisses a complaint
18 on a Rule 12(b)(6) motion based upon the "lack of a cognizable
19 legal theory" or "the absence of sufficient facts alleged under the
20 cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901
21 F.2d 696, 699 (9th Cir. 1990). The plaintiffs must allege
22 "plausible grounds to infer" that their claims rise "above the
23 speculative level." *Twombly*, 127 S. Ct. at 1965. That is, the
24 plaintiffs' obligation requires more than "labels and conclusions"
25 or a "formulaic recitation of the elements of a cause of action."
26 *Id.* at 1964-65.

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1 **III. DISCUSSION**

2 Plaintiff's claims against the Divens Defendants include civil
3 RICO violations pursuant to 18 U.S.C. § 1962(c) and (d), fraud, and
4 breach of contract.

5 **A. RICO**

6 Plaintiff's RICO claim is pled against all Defendants. The
7 claim therefore includes, but is not limited to, the Divens
8 Defendants, although only those Defendants' motion is presently
9 before the Court.

10 "The Racketeer Influenced and Corrupt Organizations ("RICO")
11 Act, passed in 1970 as Title IX of the Organized Crime Control Act,
12 provides for both criminal and civil liability." *Odom v. Microsoft*
13 *Corp.*, 486 F.3d 541, 545 (9th Cir. 2007). To state a claim under §
14 1962(c), a plaintiff must allege "(1) conduct (2) of an enterprise
15 (3) through a pattern (4) of racketeering activity." *Sedima,*
16 *S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

17 Here, Plaintiff alleges that "[a]ll defendants collectively
18 constitute [an] enterprise" engaged in a racketeering scheme.
19 (Federal Claims Case Statement at 17.) Plaintiff claims that the
20 purpose of the enterprise was to defraud Plaintiff of his funds.
21 Specifically, he claims that all of the defendants engaged in wire
22 fraud, 18 U.S.C. § 1343, and money laundering, 18 U.S.C. § 1956 "by
23 accepting the victim's wire transfers with the intent to defraud
24 the victims out of the money without providing the loan the parties
25 contracted for." (*Id.* at 15.) Plaintiff also claims that
26 "Defendants attempted to conceal their fraud by shuffling the
27 victims' funds from various bank accounts; for instance, Defendant
28 Briscoe allegedly transferred HydroTherm's funds to an unknown law

1 firm and it is believed that Defendants Morelli and Divens each
2 transferred Plaintiff Rubin's funds in a similar fashion." (*Id.* at
3 15-16.)

4 The first flaw in Plaintiff's pleadings is that he fails to
5 allege how all of the various defendants—some of whom only
6 transacted with the dismissed plaintiff Hydro Therm—together
7 constitute a single enterprise. Plaintiff's complaint contains a
8 section titled "General Allegations Regarding the Criminal
9 Enterprise," which is broken down into additional sections,
10 including a "General Overview of the Scheme," "Allegations Related
11 to Hydro," and "Allegations Related to Rubin." The latter section
12 is further divided into two sections: "Allegations Related to the
13 Briscoe/Divens Scheme" and "Allegations Common to the
14 Darkshore/Morelli Scheme." (Compl. ¶¶ 32-85.) All of the
15 transactions alleged in these various schemes are distinct from one
16 another and contain no specific allegations of interrelated
17 conduct. Further, the "General Allegations" section precedes the
18 RICO cause of action, which incorporates by reference the general
19 allegations and adds conclusory allegations that "the Defendants
20 within the enterprise maintained a relationship with each and every
21 other Defendant for the common purpose of carrying out racketeering
22 activity." (*Id.* ¶ 90.)

23 With respect to an association-in-fact enterprise, the type of
24 enterprise Plaintiff alleges here, the Supreme Court has stated:

25 [A]n association-in-fact enterprise must have at least
26 three structural features: a purpose, relationships
27 among those associated with the enterprise, and
28 longevity sufficient to permit these associates to
pursue the enterprise's purpose. As we succinctly put
it in *Turkette*, an association-in-fact enterprise is 'a

1 group of persons associated together for a common
2 purpose of engaging in a course of conduct.'

3 *Boyle v. United States*, 556 U.S. 938, 946 (2009) (quoting *United*
4 *States v. Turkette*, 452 U.S. 576, 583 (1981)). Although the
5 complaint alleges that all of the defendants had the common
6 purpose of defrauding the plaintiffs, it fails to allege any
7 relationship among the various defendants. Only two of the
8 eighteen named defendants were allegedly involved in more than one
9 of the three distinct schemes alleged in the Complaint. Defendant
10 Briscoe was allegedly involved in the BDP/UBS scheme that also
11 allegedly involved the Divens Defendants, and Briscoe was
12 allegedly involved in the Hydro Therm scheme, which is no longer
13 at issue in this case. Defendant Jamison was allegedly involved
14 in both schemes related to Rubin—the scheme involving the Divens
15 Defendants and a separate scheme that is not at issue in the
16 motion before the Court. However, Plaintiff alleges no facts to
17 show any relationship between schemes other than that they share a
18 few common participants and the same victim (Plaintiff Rubin).
19 There are no allegations that any of the defendants involved in
20 each of the schemes were even aware of the defendants involved in
21 other schemes. This is insufficient to support the existence of
22 an associated-in-fact RICO enterprise comprised of all of the
23 named defendants, and for similar reasons, the allegations are
24 insufficient to establish a "pattern" of racketeering activity
25 across all of the defendants. See *Howard v. Am. Online Inc.*, 208
26 F.3d 741, 749 (9th Cir. 2000) ("[M]erely having the same
27 participants is insufficient to establish relatedness. . . . To
28 hold that Plaintiffs have established relatedness solely because

1 they implicate the same participants makes that requirement
2 virtually meaningless.").

3 Even if the Court were to read the Complaint as alleging
4 multiple separate enterprises—which it need not do, and which both
5 the Complaint and Plaintiff’s Federal Claims Case Statement make
6 clear is not Plaintiff’s intention—Plaintiff fails to plead the
7 predicate acts engaged in by the Divens Defendants with sufficient
8 particularity to sustain his RICO claim. The two predicate acts
9 alleged by Plaintiff are wire fraud and money laundering. Both
10 are predicate acts defined by Section 1961 of RICO. See 18 U.S.C.
11 § 1961(1).

12 Federal Rule of Civil Procedure 9(b) requires that fraud be
13 pled with particularity. It provides: “In all averments of fraud
14 . . . , the circumstances constituting fraud . . . shall be stated
15 with particularity. Malice, intent, knowledge, and other
16 condition of mind of a person may be averred generally.” “Rule
17 9(b) ‘requires the identification of the circumstances
18 constituting fraud so that the defendant can prepare an adequate
19 answer from the allegations.’” *Odom*, 486 F.3d at 553 (quoting
20 *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393,
21 1400 (9th Cir. 1986)). “[T]he pleader must state the time, place,
22 and specific content of the false representations as well as the
23 identities of the parties to the misrepresentation.” *Id.*
24 (internal quotation marks omitted). In short, the factual
25 circumstances of the fraud itself must be alleged with
26 particularity. See *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541,
27 1547 (9th Cir. 1994). This heightened pleading requirement

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1 applies to fraud-based predicate acts in RICO causes of action.
2 See *Odom*, 486 F.3d at 553-54.

3 "[A] wire fraud violation consists of (1) the formation of a
4 scheme or artifice to defraud; (2) use of the United States wires
5 or causing a use of the United States wires in furtherance of the
6 scheme; and (3) specific intent to deceive or defraud." *Id.* at
7 554. Although Plaintiff alleges that he wired \$200,000 to
8 Divens's escrow account, and although the exhibit attached to the
9 Complaint lists a Bank of America account number for Divens,
10 Plaintiff never specifically alleges when he wired the money, from
11 what institution he wired it, or to which institution it was
12 delivered. (See Compl. ¶ 62 & Ex. C.) Neither does Plaintiff
13 allege the dates of his conversations with Divens about the money
14 once he discovered it had been released to "an unknown third
15 party." (See *Id.* ¶¶ 66-70.) He does not allege when or how he
16 paid Divens the additional \$10,000 required by the parties'
17 Contract Agreement. (See *Id.* ¶ 72.) As these were conversations
18 in which Plaintiff participated and wire transfers that he
19 initiated, he should be able "to plead the factual circumstances
20 of the alleged fraud with the requisite level of particularity."
21 *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 558-59 (9th Cir.
22 2010).

23 With respect to the predicate act of money laundering, 18
24 U.S.C. § 1957 "makes it unlawful to 'knowingly engage[] or
25 attempt[] to engage in a monetary transaction in criminally
26 derived property of a value greater than \$10,000,' if that
27 property 'is derived from specified unlawful activity.'" *United*
28 *States v. Phillips*, 704 F.3d 754, 763 (9th Cir. 2012). The Divens

1 Defendants' alleged wire fraud could constitute the "specified
2 unlawful activity" in this case, see 18 U.S.C. § 1957(f)(3); 18
3 U.S.C. §§ 1956(c)(7)(A), 1961(1)(B), however, Plaintiff does not
4 even attempt to connect any particular monetary transactions or
5 unlawful activity to the money laundering predicate, nor does he
6 allege whether the Divens Defendants "had the requisite intent to
7 launder funds in furtherance of a RICO scheme." *Desoto v. Condon*,
8 371 Fed. App'x. 822, 824 (9th Cir. 2010).

9 Indeed, Plaintiff's RICO allegations state:

10 Defendants engaged in "racketeering activity" within
11 the meaning of 18 U.S.C. § 1961(1) by engaging in the
12 acts set forth above. The acts set forth above
13 constitute a violation of one or more of the following
14 statutes: 18 U.S.C. § 1343 and 18 U.S.C. § 1957. The
15 Conspiring Defendants and the other conspirators each
16 committed and/or aided and abetted the commission of
17 two or more of these acts of racketeering activity.

18 (Compl. ¶ 92.)

19 To the extent that the particular relevant facts are buried
20 in the "General Allegations" section—the only possible "acts set
21 forth above"—which comprises 54 paragraphs over 11 pages, the
22 Court is not required to sift through the allegations to find the
23 facts that relate to each cause of action. See *Izenberg v. ETS*
24 *Services, LLC*, 589 F. Supp. 2d 1193, 1203-04 (C.D. Cal. 2008)
25 ("[T]he court need not guess which activities allegedly constitute
26 predicate acts."); *Graf v. Peoples*, 2008 WL 4189657 (C.D. Cal.
27 Sept. 4, 2008) ("Plaintiff's RICO claims incorporate the
28 Complaint's initial lengthy description of many different asserted
acts of wrongdoing by various Defendants. Plaintiff does not
expressly identify any RICO predicate acts, but simply
incorporates his previous allegations. Such 'shotgun' pleading is

1 insufficient to plead a RICO claim.").

2 The Court previously required that the Plaintiff specify
3 precisely the facts that supported his RICO claim in a Federal
4 Claims Case Statement. However, Plaintiff's statement does little
5 to clarify the Complaint and fails to expressly answer each of the
6 required categories of information. The statement repeats almost
7 verbatim different sections of the Complaint, and in certain
8 places, instead of providing the requested information, it refers
9 the Court to a previous section where that information is
10 purportedly, but not always, provided (for example, the dates of
11 the predicate acts requested in Section 5(b)).

12 Because Plaintiff has insufficiently plead a plausible claim
13 for damages under RICO, the Court grants Defendants' motion to
14 dismiss this claim with prejudice.

15 **B. Remaining State Law Claims**

16 Plaintiff's RICO claim provides the sole basis for federal
17 question jurisdiction. While federal courts may exercise
18 supplemental jurisdiction over state-law claims "that are so
19 related to claims in the action within [the court's] original
20 jurisdiction that they form part of the same case or controversy
21 under Article III of the United States Constitution," 28 U.S.C. §
22 1367(a), a court may decline to exercise supplemental jurisdiction
23 where it "has dismissed all claims over which it has original
24 jurisdiction," *id.* § 1367(c)(3). Indeed, unless "considerations
25 of judicial economy, convenience[,] and fairness to litigants"
26 weigh in favor of the exercise of supplemental jurisdiction, "a
27 federal court should hesitate to exercise jurisdiction over state
28 claims." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966);

1 see also *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)
2 (“[A] federal court should consider and weigh in each case, and at
3 every stage of the litigation, the values of judicial economy,
4 convenience, fairness, and comity.”).

5 Accordingly, the court declines to exercise its supplemental
6 jurisdiction here.

7 **IV. CONCLUSION**

8 Plaintiff has had two opportunities to adequately plead his
9 claims—once in his Complaint, and once in his Federal Claims Case
10 Statement in response to the Court’s Order to Show Cause. In that
11 Order, the Court warned Plaintiff that “[f]ailure to adequately
12 respond to this Order may result in the dismissal with prejudice
13 of all federal claims for relief.” For the foregoing reasons, the
14 Court GRANTS the Divens Defendants’ motion to dismiss Plaintiff’s
15 RICO claim with prejudice.

16 The Court also GRANTS the Divens Defendants’ motion to
17 dismiss Plaintiff’s fraud and breach of contract claims as to the
18 Divens Defendants. The Court recognizes, however, that if true,
19 Plaintiff’s allegations are serious, and the Court therefore
20 dismisses Plaintiff’s state law claims without prejudice as to his
21 re-filing in state court with appropriate allegations of fraud.¹

22 Finally, because Plaintiff’s RICO claim is pled against all
23 Defendants and Plaintiff has insufficiently alleged an
24 association-in-fact enterprise consisting of all Defendants, the
25 RICO claim is dismissed with prejudice as to all remaining
26 Defendants. See *Sparling v. Hoffman Const. Co.*, 864 F.2d 635, 638

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28 ¹ The Court notes that any relevant statues of limitations are likely subject to equitable tolling.

1 (9th Cir. 1988) ("A trial court may act on its own initiative to
2 note the inadequacy of a complaint and dismiss it for failure to
3 state a claim The court must give notice of its intention
4 to dismiss and give the plaintiff some opportunity to respond
5 unless the plaintiffs cannot possibly win relief." (internal
6 quotation marks omitted)). Plaintiff cannot possibly win RICO
7 damages against the remaining Defendants as he has failed to
8 allege the existence of an enterprise. For the same reasons as
9 with the state law claims against the Divens Defendants, the Court
10 also dismisses the fraud, breach of contract, and negligence
11 claims as to all remaining Defendants, without prejudice as to
12 their re-filing in state court.

13 IT IS SO ORDERED.

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Dated: April 18, 2013



DEAN D. PREGERSON
United States District Judge