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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

PAUL MULA, JR.,
Plaintiff,
v.
HELENE MULA-STOUKY, et al.,
Defendants.

Case No. 21-cv-04540-BLF

**ORDER GRANTING DEFENDANT
KRISTOFER BIORN’S MOTION TO
DISMISS THE FIRST AMENDED
COMPLAINT WITH LEAVE TO
AMEND**

[Re: ECF 59]

Plaintiff Paul Mula, Jr. (“Paul Jr.”) sues members of his family, court-appointed conservators and attorneys, and others, claiming that they have engaged in a RICO¹ conspiracy to deprive him of assets of his deceased grandmother’s trust that were intended for him. This order addresses a motion to dismiss the first amended complaint (“FAC”) brought by Defendant Kristofer Biorn, an attorney retained by Paul Jr. in 2012, pursuant to Federal Rule of Civil Procedure 12(b)(6). The motion is GRANTED WITH LEAVE TO AMEND.

I. BACKGROUND

Paul Jr. filed this action on June 11, 2021, and thereafter filed the operative FAC as of right. *See* Compl., ECF 1; FAC, ECF 53. He alleges the following facts, which are accepted as true for purposes of evaluating the motion to dismiss.

The Ogier Trust

Paul Jr.’s grandmother, Sara Mula-Ogier (“Sarah”), accumulated millions of dollars in assets during her lifetime, including real estate, stocks, bonds, cash, and personal property. FAC ¶ 10. Sarah had three children: Alan Mula (“Alan”), Helene Mula-Stouky (“Helene”), and Paul

¹ Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.*

1 Mula, Sr. (“Paul Sr.”). *Id.* ¶ 11. Neither Alan nor Helene had children, but Paul Sr. fathered Paul
2 Jr. and, much later, a daughter who is not a party to this action. *Id.* On August 17, 2000, Sarah
3 formed the Ogier Trust, naming Paul, Jr. as the beneficiary of the bulk of its assets. *Id.* ¶ 14.
4 Sarah named her daughter, Helene, as her successor Trustee. *Id.* ¶ 15. A sub-trust of the Ogier
5 Trust was to be established to support Helene for her lifetime, and upon Helene’s death the assets
6 of the sub-trust were to be distributed to Paul Jr. when he turned 50 years old. *Id.*

7 *Transfer of Assets out of the Ogier Trust*

8 In 2005, weeks before she died, Sarah signed quitclaim deeds to four real properties
9 previously held in the Ogier Trust. *Id.* ¶¶ 17-20. The beneficiaries of those quitclaim deeds were
10 Alan, Helene, and Paul Sr. *Id.* In 2006, Helene retained an attorney, Terry Campbell Wallace
11 (“Campbell”), to petition the Probate Court for an order confirming the 2005 transfers. *Id.* ¶ 24.
12 Paul Jr. did not receive notice of the 2006 petition. *Id.* ¶ 24. The Probate Court granted the
13 petition and allowed transfer of the four real properties to Alan, Helene, and Paul Sr. *Id.*

14 Helene allowed her brothers, Alan and Paul Sr., to convert assets of the Ogier Trust. *Id.* ¶
15 29. Helene also comingled assets of the Ogier Trust with her own Stouky Trust, such that Ogier
16 Trust assets were placed in the Stouky Trust. *Id.* ¶ 40.

17 *Stouky Trust*

18 In 2012, Helene was conserved. FAC ¶ 31. The Probate Court appointed Robert
19 Temmerman (“Temmerman”) as Helene’s attorney, and Paul Jr.’s half-sister, Christina Smith
20 Weiss (“Weiss”), as the Conservator of Helene’s person. *Id.* ¶ 31. The Probate Court appointed
21 Patricia Bye (“Bye”) as the Conservator of Helene’s estate and as the successor Trustee of the
22 Stouky Trust. *Id.* ¶ 32.

23 Paul Jr. was the principal beneficiary of the Stouky Trust. FAC ¶ 27. However, after
24 Helene was conserved, Temmerman and Bye obtained amendments to the Stouky Trust that
25 reduced Paul Jr.’s interest as a beneficiary of the Stouky Trust, and dissipated the assets of the
26 Stouky Trust, many of which were former assets of the Ogier Trust. *Id.* ¶¶ 35-53. Trust assets
27 valued at approximately \$3,600,000 intended for Paul Jr. have been bequeathed and gifted to
28 Weiss. *Id.* ¶¶ 43-44.

1 *Biorn’s 2012 Legal Services to Paul Jr.*

2 In 2012, Paul Jr. sought legal advice. FAC ¶ 102. Temmerman referred Paul Jr. to Biorn,
3 and Paul Jr. retained Biorn for advice regarding the 2005 quitclaim deeds signed by Sarah. *Id.* ¶¶
4 8.10, 102-103. Biorn advised that the statute of limitations had elapsed with respect to any claims
5 arising from the 2005 transfers. *Id.* ¶ 103. Biorn did not inform Paul Jr. that the 2005 transfers
6 were ineffective, and did not inform him about the 2006 probate proceedings. *Id.*

7 *The Present Lawsuit*

8 Paul Jr. sues the following individuals for RICO violations and related claims: Alan;
9 Helene; Temmerman; Temmerman’s law firm, Temmerman, Cilley & Kohlmann, LLP; Bye;
10 Bye’s employer, Bye & Bye Services; Bye’s attorney, Alexandra Martin (“Martin”); Martin’s law
11 firm, Aaron, Riechert, Carpol & Riffle, APC; Bye’s former attorney, Howard G. Frank (“Frank”);
12 Weiss; Campbell; Biorn; and Biorn’s law firm, Crist, Schulz, Biorn & Shepherd APC.

13 The FAC asserts the following claims: (1) a RICO claim against all defendants; (2) breach
14 of fiduciary duties against Bye as the Conservator of Helene’s estate; (3) breach of fiduciary duties
15 against Bye as Trustee of the Stouky Trust; (4) breach of fiduciary duties against Helene and Bye
16 as Trustees of the Ogier Trust; (5) aiding and abetting breach of fiduciary duties against all
17 defendants; (6) conspiracy to breach fiduciary duties against all defendants; (7) unjust enrichment
18 against Weiss; (8) intentional interference with expectancy of inheritance against Temmerman and
19 Bye; (9) unfair competition against Temmerman and Bye; (10) violation of the Fair Debt
20 Collection Practices Act against Bye and Martin; (11) legal malpractice against Biorn; and (12)
21 conversion against Alan, Helene, Bye, and Weiss.

22 **II. LEGAL STANDARD**

23 “A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a
24 claim upon which relief can be granted tests the legal sufficiency of a claim.” *Conservation Force*
25 *v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quotation marks and citation omitted). While
26 a complaint need not contain detailed factual allegations, it “must contain sufficient factual matter,
27 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556
28 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

1 **III. DISCUSSION**

2 Four of the FAC’s twelve claims are asserted against Defendant Biorn: Claim 1 for
3 violations of RICO, Claim 5 for aiding and abetting breach of fiduciary duties, Claim 6 for
4 conspiracy to breach fiduciary duties, and Claim 11 for legal malpractice. Biorn seeks dismissal
5 of all claims under Rule 12(b)(6). Plaintiff Paul Jr. contends that his claims are adequately pled.

6 The Court agrees with Biorn that the FAC fails to state a claim against him, as discussed
7 below. The Court notes that although the Notice of Motion states expressly that the motion is
8 brought under Rule 12(b)(6), the supporting memorandum contains two passing references to Rule
9 12(b)(1). *See* Biorn Mot. at 7, 25, ECF 59-1. Because Biorn did not adequately notice or brief a
10 motion to dismiss under Rule 12(b)(1), the Court considers only the Rule 12(b)(6) motion.

11 **A. Claim 1 – RICO**

12 “The RICO statute sets out four elements for a primary violation: a defendant must
13 participate in (1) the conduct of (2) an enterprise that affects interstate commerce (3) through a
14 pattern (4) of racketeering activity or collection of unlawful debt.” *Eclectic Properties E., LLC v.*
15 *Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014).

16 Claim 1 alleges that all Defendants engaged in a pattern of wrongful conduct to allow them
17 to acquire and maintain control of the Ogier Trust and the Stouky Trust, and to plunder the assets
18 of those Trusts. FAC ¶¶ 73-78. However, the only conduct alleged as to Biorn relates to his
19 retention by Paul Jr. in 2012. FAC ¶¶ 8, 10, 48, 102-105. Paul Jr. sought advice regarding the
20 2005 transfers, and Biorn allegedly advised that any claims arising out of those transfers were
21 time-barred. *Id.* ¶ 103. According to Paul Jr., that was not true, and “[b]ut for Biorn’s negligence
22 Paul, Jr, would have learned of the 2006 probate proceeding and instructed Biorn to move to set it
23 aside as a fraud on the court.” *Id.* ¶ 104. Paul Jr. does not allege any facts suggesting that Biorn’s
24 legal malpractice in 2012 was pursuant to or in furtherance of the alleged RICO conspiracy.

25 Biorn’s motion to dismiss is GRANTED as to Claim 1.

26 **B. Claim 5 – Aiding and Abetting Breach of Fiduciary Duties**

27 “The elements of a claim for aiding and abetting a breach of fiduciary duty in California
28 are: (1) a third party’s breach of fiduciary duties owed to plaintiff; (2) defendant’s actual

1 knowledge of that breach of fiduciary duties; (3) substantial assistance or encouragement by
2 defendant to the third party’s breach; and (4) defendant’s conduct was a substantial factor in
3 causing harm to plaintiff.” *Gregory v. Harris*, No. 21-CV-03311-VKD, 2022 WL 62539, at *5
4 (N.D. Cal. Jan. 6, 2022) (internal quotation marks and citation omitted).

5 Claim 5 alleges only the first element, identifying Bye as the Trustee of the Ogier and
6 Stouky Trusts, and alleging that Bye breached fiduciary duties she owed to Paul Jr. as a
7 beneficiary of those Trusts. FAC ¶¶ 86-87. The FAC does not allege that Biorn had actual
8 knowledge of Bye’s breach of fiduciary duties (second element), that Biorn rendered substantial
9 assistance or encouragement to Bye (third element), or that Biorn’s conduct was a substantial
10 factor in the harm Bye’s breach of fiduciary duties caused to Paul Jr. (fourth element).

11 Biorn’s motion to dismiss is GRANTED as to Claim 5.

12 **C. Claim 6 – Conspiracy to Breach Fiduciary Duties**

13 Under California law, “[t]he elements of a civil conspiracy are (1) the formation of a group
14 of two or more persons who agreed to a common plan or design to commit a tortious act; (2) a
15 wrongful act committed pursuant to the agreement; and (3) resulting damages.” *City of Indus. v.*
16 *City of Fillmore*, 198 Cal. App. 4th 191, 212 (2011). To be liable, a defendant must “have actual
17 knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful
18 purpose.” *Kidron v. Movie Acquisition Corp.*, 40 Cal. App. 4th 1571, 1582 (1995).

19 Claim 6 alleges that “[a]ll of the Defendants knowingly participated in a common scheme
20 to assist Bye in her breach of the fiduciary duties she owed to Paul, Jr., as set forth above, with a
21 view to the furtherance of a common purpose or design.” FAC ¶ 91. However, the FAC does not
22 contain any facts supporting those conclusory allegations with respect to Biorn. The FAC does
23 not allege that Biorn had actual knowledge Bye planned to breach her fiduciary duties, nor does it
24 allege that Biorn concurred in that scheme with knowledge of its unlawful purpose.

25 Biorn’s motion to dismiss is GRANTED as to Claim 6.

26 **D. Claim 11 – Legal Malpractice**

27 “In civil malpractice cases, the elements of a cause of action for professional negligence
28 are: (1) the duty of the attorney to use such skill, prudence and diligence as members of the

1 profession commonly possess; (2) a breach of that duty; (3) a proximate causal connection
2 between the breach and the resulting injury; and (4) actual loss or damage.” *Wiley v. Cty. of San*
3 *Diego*, 19 Cal. 4th 532, 536 (1998) (internal quotation marks and citation omitted).

4 The FAC alleges that Paul Jr. learned in 2012 of Sarah’s 2005 transfers of real properties
5 from the Ogier Trust. FAC ¶ 8.10. Paul Jr. sought legal advice from Biorn, and paid him \$5,000.
6 *Id.* ¶¶ 8.10, 48, 102. Biorn “intentionally or negligently advised him that any potential claims
7 arising out of those transfers were time-barred.” *Id.* ¶ 103. Biorn did not advise Paul Jr. that the
8 2005 transfers were ineffective, and that a 2006 order from the Probate Court had to be obtained to
9 make the transfers effective. *Id.* ¶¶ 103-04. Paul Jr. asserts that “[b]ut for Biorn’s negligence
10 Paul, Jr, would have learned of the 2006 probate proceeding and instructed Biorn to move to set it
11 aside as a fraud on the court.” *Id.* ¶ 104. The FAC alleges that “Paul, Jr. did not learn about the
12 2006 order ratifying the 2005 deathbed transfers until June 12, 2019.” *Id.* ¶ 26.

13 Biorn argues that it appears on the face of these allegations that the legal malpractice claim
14 is time-barred. “An action against an attorney for a wrongful act or omission, other than for actual
15 fraud, arising in the performance of professional services shall be commenced within one year
16 after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the
17 facts constituting the wrongful act or omission, or four years from the date of the wrongful act or
18 omission, whichever occurs first.” Cal. Civ. Proc. Code § 340.6(a). Biorn’s alleged negligence
19 occurred in 2012, and Paul Jr. filed this suit more than four years later, in 2021. The four-year
20 limitations period is tolled during any period that “[t]he attorney willfully conceals the facts
21 constituting the wrongful act or omission when those facts are known to the attorney.” Cal. Civ.
22 Proc. Code § 340.6(a)(3). Tolling does not appear on the face of the FAC, however, because the
23 FAC does not allege that the circumstances of the 2005 transfers and 2006 Probate Court order
24 were known to Biorn in 2012, or that he willfully concealed those facts from Paul Jr. The Court
25 thus agrees with Biorn that the legal malpractice claim appears to be time-barred.

26 In opposition to Biorn’s motion to dismiss, Paul Jr. argues that Biorn relies on the wrong
27 statutory limitations period. California Code of Civil Procedure § 340.6, cited by Biorn and
28 discussed above, is the statute applicable to claims of attorney malpractice “other than for actual

1 fraud.” Cal. Civ. Proc. Code § 340.6(a). Paul Jr. argues that his attorney malpractice claim is
2 based on actual fraud, and therefore is governed by California Code of Civil Procedure § 338(d),
3 which provides a three year limitations period for “[a]n action for relief on the ground of fraud or
4 mistake.” Cal. Civ. Proc. Code § 338(d). “The cause of action in that case is not deemed to have
5 accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.”
6 *Id.* Paul Jr. asserts that he discovered Biorn’s misconduct until June 2019, and he filed suit less
7 than three years later in June 2021.

8 In reply, Biorn argues that Paul Jr.’s legal malpractice claim is not currently framed as a
9 claim for actual fraud. The Court agrees. To the extent Paul Jr. asserts a claim based on Biorn’s
10 alleged fraudulent concealment of the circumstances regarding the 2005 transfers and 2006
11 Probate Court order, the FAC does not allege that Biorn knew those circumstances at the time he
12 rendered Paul Jr. legal services in 2012.

13 Biorn’s motion to dismiss is GRANTED as to Claim 6.

14 **E. Leave to Amend**

15 Having determined that the claims against Biorn are subject to dismissal, the Court must
16 decide whether leave to amend is warranted. Leave ordinarily must be granted unless one or more
17 of the following factors is present: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated
18 failure to cure deficiencies by amendment, (4) undue prejudice to the opposing party, and (5)
19 futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Eminence Capital,*
20 *LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (discussing *Foman* factors).

21 The Court finds no undue delay (factor 1) or bad faith (factor 2). While Paul Jr. did amend
22 once as of right, he has not had an opportunity to amend after receiving guidance from the Court,
23 and therefore cannot be said to have repeatedly failed to cure his pleading’s deficiencies (factor 3).
24 At this early stage in the proceedings, the Court finds that granting further opportunity to amend
25 would not impose undue prejudice on Biorn (factor 4). Finally, it is not clear that amendment
26 would be futile (factor 5). Having weighed these factors, the Court determines that leave to amend
27 is appropriate. Plaintiff is advised that because all of his claims sound in fraud, the amended
28 complaint must comply with the pleading standard in Federal Rule of Civil Procedure 9(b).

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IV. ORDER

- (1) Defendant Biorn’s motion to dismiss is GRANTED WITH LEAVE TO AMEND as to all claims asserted against him, that is, Claims 1, 5, 6, and 11.
- (2) Plaintiff Paul Jr.’s deadline to amend shall be thirty days after the Court’s ruling on the last of the three motions to dismiss filed by Defendants.
- (3) This order terminates ECF 59.

Dated: April 21, 2022



BETH LABSON FREEMAN
United States District Judge