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2 NOT FOR PUBLICATION

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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9	In re Dennis Andrew Ball, personally and	No. CV-08-0746-PHX-GMS
	as Beneficiary of the Eleanor R. Ball)	
10	IrreLvg Trust 05/10/01.) No. CV-09-0065-PHX-GMS
) No. CV-09-0066-PHX-GMS
11) No. CV-09-0085-PHX-GMS
) No. CV-09-0086-PHX-GMS
12) No. CV-09-0122-PHX-GMS
) No. CV-09-0123-PHX-GMS
13		(Consolidated)
14		ORDER

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17 In this case, Plaintiff Dennis Andrew Ball has sued various individuals, businesses,
18 and government entities, apparently under the theory that they conspired together to defraud
19 the trust of which he is a beneficiary. There are a variety of motions outstanding in the case,
20 all involving to one degree or another the deficiency of the Complaints Mr. Ball has filed.
21 This Order rules on the motions and attempts to explain to Mr. Ball what precisely would be
22 required to render his case fit to proceed.

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BACKGROUND

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Mr. Ball has initiated seven lawsuits in this District against a variety of different parties. (See Dkt. # 32.) Specifically, Mr. Ball has sued: the estate of Jonathan P. Schubert; First Mercury Insurance; the State of Arizona; the City of Peoria; the Peoria Police Department; Morgan Stanley Trust Company; Jaburg & Wilk, P.C.; Kevin Rattay; Carol Stevens-Gobillard; Arthur Paul Blunt; Southwest Fiduciary, Inc.; Gregory P. Dovico; Peggy

1 Ann Dovico; Diane Levine; Anna Dovico; Fidelity & Deposit Corporation; Encore Senior
2 Village; and Bruce M. Tripp. (Dkt. # 47.)

3 In one of these cases, Defendants Southwest Fiduciary, Gregory P. Dovico, Peggy
4 Ann Dovico, and Anna Dovico filed a Motion to Dismiss. (CV-09-00122 Dkt. # 27.)
5 Defendants Gregory P. Dovico, Peggy Ann Dovico, and Anna Dovico moved for dismissal
6 in their individual capacities only. (*See id.* at 1.) Defendant Fidelity & Deposit Corporation
7 (“Fidelity”) later joined in the motion to dismiss. (CV-09-00122 Dkt. # 40.)

8 On March 27, 2009, before the motion to dismiss was ruled on, this Court
9 consolidated the seven cases.¹ (Dkt. # 32.) In the consolidation Order, the Court directed
10 Mr. Ball to file a Second Amended Complaint² incorporating his various claims. The Court
11 also pointed out that the Complaints filed by Mr. Ball in the seven cases were “vague,
12 amorphous, and voluminous, and they do not state clearly either the legal nature of Plaintiff’s
13 claims against each specific defendant or the factual conduct upon which each claim is
14 ostensibly predicated.” (*Id.* at 2.) The Court went on to explain how the Complaints are
15 deficient under the pleading standards of Federal Rules of Civil Procedure 8, 9, and 10, and
16 the Court specifically noted that Mr. Ball must plead certain claims with particularity. The
17 Court also explained to Mr. Ball that if he failed to comply with the relevant pleading rules
18 in filing his Second Amended Complaint, the Court could dismiss the action with prejudice
19 pursuant to Federal Rule of Civil Procedure 41(b). *See Ferdik v. Bonzelet*, 963 F.2d 1258,

21 ¹The Court has declined to consolidate two other cases Mr. Ball has filed in this
22 District (the first is a case against Mr. Ball’s sister and her husband, and the second is a case
23 against the City and Police Department of Peoria, which are also parties to this action). (*See*
24 Dkt. # 42.)

25 Also, the Court consolidated the cases under the name “In re Dennis Andrew Ball,
26 personally and as *Benefactor* of the Eleanor R. Ball IrreLvg Trust 05/10/01.” (Dkt. # 32 at
27 3.) The proper title should be “In re Dennis Andrew Ball, personally and as *Beneficiary* of
28 the Eleanor R. Ball IrreLvg Trust 05/10/01.” The parties are directed to utilize the amended
caption on all future filings.

²Mr. Ball amended his Complaint once in the lead case before consolidation. (Dkt.
23.)

1 1260 (9th Cir. 1992) (holding that a district court did not abuse its discretion in dismissing
2 a pro se plaintiff's complaint for failing to comply with the court's order directing proper
3 pleading under the Federal Rules of Civil Procedure).

4 The Court also conducted a hearing with Mr. Ball on April 15, 2009, in order to
5 facilitate resolution of the case. Specifically, the Court explained, as had been noted in
6 several previous orders (Dkt. ## 7, 17), that Mr. Ball cannot represent the trust before this
7 Court because he is not an attorney admitted to practice within this District. *See C.E. Pope*
8 *Equity Trust v. United States*, 818 F.2d 696, 698 (9th Cir. 1987). Mr. Ball represented to the
9 Court at the April 15 hearing that he did not intend to bring any claim on behalf of the trust.

10 As a result of the April 15 hearing, the Court extended the time limit for Mr. Ball to
11 file a Second Amended Complaint consolidating his various claims. (Dkt. # 42.) The Court
12 reiterated that Mr. Ball's Second Amended Complaint must conform to the requirements of
13 the federal and local rules. The Court further pointed out that Mr. Ball must be represented
14 by an attorney if he intends to bring claims on behalf of the trust. The Court also extended
15 the time for Mr. Ball to respond to the pending motion to dismiss through May 4, 2009. On
16 May 4, Mr. Ball filed a response to the motion to dismiss (Dkt. # 49, 50), a Motion to Deny
17 Fidelity's Joinder in the Motion to Dismiss (Dkt. # 48), and a Second Amended Complaint
18 (Dkt. # 47).

19 DISCUSSION

20 The Court will first discuss Mr. Ball's motion to deny Fidelity's joinder in the motion
21 to dismiss and will then evaluate the motion to dismiss itself. The Court will conclude by
22 explaining to Mr. Ball the nature of the deficiencies in his pleadings and will grant him leave
23 to replead with specific instructions on how to do so.

24 I. The Motion to Deny Joinder

25 Mr. Ball argues that counsel for Fidelity has failed to file a notice of appearance in
26 this matter, and thus its joinder in the motion to dismiss is improper. (Dkt. # 48.) Mr. Ball
27 is correct. Although Fidelity has filed a notice of filing waiver of service of summons (CV-
28 09-00122 Dkt. # 31), its counsel has never filed a notice of appearance either in this case or

1 in the original case that has been consolidated into this action. Thus, the joinder was not
2 properly filed. LRCiv 83.3 (“[N]o attorney shall appear in any action *or file anything* in any
3 action without first appearing as counsel of record.”) (emphasis added). Fidelity therefore
4 will not be permitted to join in the instant motion to dismiss.

5 **II. The Motion to Dismiss³**

6 Defendants make four arguments in their motion to dismiss: (1) that there is no
7 diversity jurisdiction; (2) that Mr. Ball’s Complaint is too incomprehensible to state a claim;
8 (3) that Mr. Ball’s Complaint is barred by res judicata; and (4) that federal courts cannot
9 exercise subject matter jurisdiction over guardianship and conservatorship actions.⁴

10 Defendants assert that diversity jurisdiction is not present in this case for two reasons.
11 Defendants first argue that Mr. Ball “waived his diversity argument by voluntarily submitting
12 to the jurisdiction of the Superior Court of Arizona . . . by noticing his appearance in such
13 Court.” (CV-09-00122 Dkt. # 27 at 7.) Defendants cite no authority for the proposition that
14 a party “waives” the right to assert diversity jurisdiction simply by appearing in a court
15 proceeding, nor will the Court find such waiver on its own. *See Doty Props., LLC v. APC*
16 *Partners II, LLC*, No. 3:06CV62-P-A, 2006 WL 1580000, at *2 (N.D. Miss. June 2, 2006)
17 (rejecting the argument that a party waived the right to diversity jurisdiction in federal court
18 simply by filing a suit in state court). Defendants also argue that there is an insufficient
19 amount in controversy: “According to the final accounting submitted by the Conservator
20 [Southwest Fiduciary] and approved by the Probate Court on June 27, 2007, there were no
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22 ³Mr. Ball appears to request a jury trial on the motion to dismiss pursuant to Federal
23 Rule of Civil Procedure 38. (Dkt. # 49 at 1.) Mr. Ball is not entitled to a jury trial on a
24 motion to dismiss. *Pouncy v. First Va. Mortgage Co.*, No. 94-2086, 1995 WL 140729, at *3
25 n.2 (4th Cir. 1995) (affirming a district court’s denial of a jury trial on a motion to dismiss
because “ruling on a Rule 12(b)(6) motion involves only questions of law, [and thus] there
is no role for a factfinder at this stage of the litigation”).

26 ⁴Defendants make several new arguments in their reply brief. (*See* CV-09-00122 Dkt.
27 # 44.) The Court will not consider these arguments. *See Zamani v. Carnes*, 491 F.3d 990,
28 997 (9th Cir. 2007) (“The district court need not consider arguments raised for the first time
in a reply brief.”).

1 assets remaining in the Conservatorship upon determination of the issues related to the
2 Conservatorship administration, [and] thus there was no controversy involving \$75,000.00
3 or more.” (CV-09-00122 Dkt. # 27 at 8.) Mr. Ball’s various Complaints, however, allege
4 that Defendants are responsible for the loss of over \$800,000 in assets. Because the Court
5 does not yet have a basis on which to conclude that this amount was claimed in bad faith, Mr.
6 Ball’s allegation of damages is sufficient to survive a motion to dismiss. *See St. Paul*
7 *Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938) (“The rule governing
8 dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law
9 gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently
10 made in good faith.”). Thus, the Court will not dismiss the case under this reasoning.

11 Defendants’ third and fourth arguments fail for the same reason that their second
12 argument succeeds: the Court simply cannot tell what claims Mr. Ball is attempting to plead,
13 and which of Defendants are allegedly responsible, either from the original Complaint
14 against these Defendants or the Second Amended Complaint. The deficiencies of the Second
15 Amended Complaint are detailed *infra* at Part III.B, and the deficiencies of the original
16 Complaint (under which the instant motion to dismiss was filed) are even more glaring. (*See*
17 *CV-09-00122 Dkt. # 1.*) The original Complaint contains no discernable legal theories
18 beyond the general assertion that Defendants’ conduct somehow damaged Mr. Ball by loss
19 of trust assets, and it contains an amalgamation of disjointed factual assertions from which
20 none of Defendants could be expected to be put on notice of the nature of Mr. Ball’s claims.
21 Defendants are thus correct in arguing that the Complaint is insufficiently definite to state
22 a claim for relief. Because the pleading of Mr. Ball’s claims is so amorphous, however, the
23 Court is unable to agree with Defendants that the claims Mr. Ball is attempting to assert are
24 barred either by the doctrine of res judicata or as state guardianship/conservatorship
25 proceedings – the Court simply cannot say what Mr. Ball’s claims are. The proper course
26 of action in these circumstances is to give Mr. Ball the opportunity to replead his claims. *See*
27 *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (explaining that “a district court should
28 grant leave to amend even if no request to amend the pleading was made, unless it determines

1 that the pleading could not possibly be cured by the allegation of other facts”) (quoting *Doe*
2 *v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)). Mr. Ball has had just such an opportunity
3 in filing his Second Amended Complaint. As discussed below, his pleading nevertheless
4 remains deficient.

5 **III. The Second Amended Complaint**

6 As explained above, Mr. Ball’s original Complaint – indeed, all seven original
7 Complaints – fail to state a claim upon which relief can be granted. In order for Mr. Ball to
8 better understand what he must do to render his case fit to proceed, the Court will first detail
9 several relevant provisions of the Federal Rules of Civil Procedure and then explain why Mr.
10 Ball’s Second Amended Complaint fails to satisfy them.

11 **A. The Federal Rules of Civil Procedure**

12 Rules 8, 9, 10, and 12(b)(6) are of the greatest importance here, and each will be
13 discussed in turn.

14 **1. Rule 8**

15 Rule 8 governs the general rules of pleading. Rule 8(a)(1) requires that a plaintiff
16 provide “a short and plain statement of the grounds for the court’s jurisdiction.” Likewise,
17 Rule 8(a)(2) requires a plaintiff to set forth a “short and plain statement of the claim showing
18 that the [plaintiff] is entitled to relief,” in order to “give the defendant fair notice of what the
19 claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
20 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Additionally, under Rule 8(d),
21 “each allegation must be simple, concise and direct.”

22 **2. Rule 9**

23 Rule 9 governs the pleading of special matters, several of which are at issue in this
24 case. Rule 9(b) is of particular importance. If a complaint includes allegations of fraud, Rule
25 9(b) requires the “party [to] state with particularity the circumstances constituting fraud.”
26 This requires that the party alleging fraud include an account of the “time, place, and specific
27 content of the false representations as well as the identities of the parties to the
28 misrepresentation.” *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004).

1 “Rule 9(b) does not allow a complaint to merely lump multiple defendants together but
2 require[s] plaintiffs to differentiate their allegations when suing more than one defendant and
3 inform each defendant separately of the allegations surrounding his alleged participation in
4 the fraud.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (citation and ellipsis
5 omitted). “To comply with Rule 9(b), allegations of fraud must be specific enough to give
6 defendants notice of the particular misconduct which is alleged to constitute the fraud
7 charged so that they can defend against the charge and not just deny that they have done
8 anything wrong.” *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (internal
9 quotations omitted).

10 Additionally, “[t]he Ninth Circuit has held that allegations of predicate acts under
11 RICO must comply with Rule 9(b)’s specificity requirements.” *U.S. Concord, Inc. v. Harris*
12 *Graphics Corp.*, 757 F. Supp. 1053, 1061 (N.D. Cal. 1991) (citing *Schreiber Distrib. Co. v.*
13 *Serv-Well Furniture Co.*, 806 F.2d 1393, 1400-01 (9th Cir. 1986)). This means that the same
14 pleading requirements for fraud (time, place, specific content, and identity of parties) apply
15 to the pleading of civil RICO claims as well. *Edwards*, 356 F.3d at 1066. Furthermore, in
16 alleging a civil conspiracy, “a plaintiff must plead, at a minimum, the basic elements of a
17 civil conspiracy if the object of the conspiracy is fraudulent.” *Wasco Prods., Inc. v. Sw.*
18 *Tech., Inc.*, 435 F.3d 989, 991 (9th Cir. 2006); *see also id.* (citing with approval the Tenth
19 Circuit’s holding that “allegations of specific facts showing an agreement and concerted
20 action” were required to allege a civil conspiracy claim) (quoting *Montgomery v. City of*
21 *Ardmore*, 365 F.3d 926, 940 (10th Cir. 2004)).

22 3. Rule 10

23 Rule 10 governs the form of pleadings. Rule 10(b) is most applicable here; it provides
24 that “[a] party must state its claims . . . in numbered paragraphs, each limited as far as
25 practicable to a single set of circumstances.” Rule 10(b) further provides that “[i]f doing so
26 would promote clarity, each claim founded on a separate transaction or occurrence . . . must
27 be stated in a separate count.” The import of these rules is that a plaintiff should present each
28 claim in a distinct, self-contained count, and that each paragraph within that count should be

1 composed of only one set of related factual allegations. To the extent a plaintiff desires to
2 restate factual allegations made earlier, Rule 10(c) permits him to do so by reference.

3 **4. Rule 12(b)(6)**

4 Rule 12(b)(6) is the standard of pleading required to withstand a motion to dismiss for
5 failure to state a claim, and it governs the factual allegations a plaintiff must provide. To
6 avoid dismissal pursuant to Rule 12(b)(6), a complaint must contain more than a “formulaic
7 recitation of the elements of a cause of action”; it must contain factual allegations sufficient
8 to “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. “The
9 pleading must contain something more . . . than . . . a statement of facts that merely creates
10 a suspicion [of] a legally cognizable right of action.” *Id.* (quoting 5 Charles Alan Wright &
11 Arthur R. Miller, *Federal Practice and Procedure* § 1216 (3d ed. 2004)). While “a
12 complaint need not contain detailed factual allegations . . . it must plead ‘enough facts to state
13 a claim to relief that is plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d
14 1017, 1022 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). Likewise, the Court will not
15 assume that the plaintiff can prove facts different from those alleged in the complaint, *see*
16 *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526
17 (1983); *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027,
18 1035 (9th Cir. 2005), and “conclusory allegations of law and unwarranted inferences are not
19 sufficient to defeat a motion to dismiss.” *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir.
20 1998).

21 **B. Mr. Ball’s Second Amended Complaint**

22 Mr. Ball’s Second Amended Complaint fails to meet the requirements of these rules,
23 fails to state cognizable claims, and fails to comply with the Court’s previous Orders.

24 **1. Trust Claims**

25 In the Second Amended Complaint, Mr. Ball continues to purport to bring claims on
26 behalf of the trust. (*See, e.g.*, Dkt. # 47 at 1 (asserting his claims as both “Dennis Andrew
27 Ball & Trustee for the Eleanor R. Ball Irrevocable Living Trust”).) Moreover, Mr. Ball
28 continues to assert in various filings that he is acting as “the office of the trustee.” (*See, e.g.*,

1 Dkt. # 51.) The Court has discussed this issue with Mr. Ball, both by written Order (Dkt. ##
2 7, 17) and in person at the April 15 hearing, at which time Mr. Ball expressly represented to
3 the Court that he does not intend to assert claims on behalf of the trust. Any complaint Mr.
4 Ball files therefore *should not* assert any claims on behalf of the trust. If Mr. Ball wishes to
5 assert such claims, he *must* retain an attorney to represent the trust before the Court.

6 **2. Review of State Court Proceedings**

7 Mr. Ball's Second Amended Complaint provides that "Plaintiff is of the opinion that
8 Justice delayed is Justice denied in any Court and in this case has been denied in the State
9 Court *on all Counts of the filed Complaint.*" (Dkt. # 47 at 3 (emphasis added).) This is but
10 one of Mr. Ball's statements that the claims he advances in the Second Amended Complaint
11 have already been denied in the state courts. Although the precise nature of the state court
12 proceedings to which Mr. Ball refers is not clear from his pleadings, Mr. Ball should be
13 aware that this Court lacks jurisdiction to review state court proceedings. *See Noel v. Hall*,
14 341 F.3d 1148, 1162-63 (9th Cir. 2003). Likewise, this Court cannot relitigate issues or
15 claims already decided by a state court. *See, e.g., Chao v. A-One Med. Servs., Inc.*, 346 F.3d
16 908, 921 (9th Cir. 2003). If that is what Mr. Ball is seeking, the state appellate courts are the
17 only appropriate forum for pursuing his claims. Any complaint Mr. Ball files *must not* raise
18 issues already decided by the state courts.

19 **3. Count One**

20 The gravamen of Mr. Ball's case has always appeared to be a claim of conspiracy
21 between various individuals, businesses, and government entities to harm the trust, and by
22 extension, to harm him. (*See* Dkt. # 47 at 1 ("[Mr. Ball] affirms, deposes and believes that
23 the defendants together conspired to defraud the plaintiff by looting the estate and trust [of]
24 Eleanor R. Ball[.]").) The Second Amended Complaint's conspiracy claim (count one),
25 however, purports to be brought pursuant to 18 U.S.C. § 371. (*Id.* at 6-8.) That statute is a
26 criminal law prohibiting conspiracy to commit an offense against the United States or to
27 defraud the United States. Mr. Ball does not represent the United States, nor does he
28 anywhere allege that the United States has been harmed. Moreover, Mr. Ball cannot state

1 a *civil* claim under this *criminal* statute. *D’Amato v. Rattoballi*, 83 F. App’x 359, 360 (2d
2 Cir. 2003); *see also Rapoport v. Republic of Mexico*, 619 F. Supp. 1476, 1480 (D.D.C. 1985)
3 (“[I]t is clear that no private right of action can exist under 18 U.S.C. § 371.”). Therefore,
4 the very essence of Mr. Ball’s case, and of his Second Amended Complaint, is improper.

5 Moreover, count one does not meet the pleading standards of the Federal Rules of
6 Civil Procedure. Mr. Ball states that “defendants” crafted “a plan” “before, during and after
7 [a June 8, 2004] meeting to create a plot to cause permanent injury to the trust and estate of
8 a vulnerable adult and the plaintiff, Dennis Andrew Ball.” (Dkt. # 47 at 7.) He then states
9 that Jonathan Schubert, a now-deceased attorney, was “present at [a] deposition without
10 Plaintiff or his Counsel, Nancy D. Petersen, noticed or present” and that as a result “the
11 defendants damaged the estate and trust of their client and the plaintiff.” (*Id.*) Mr. Ball then
12 states that “funds were wasted by the defendants on themselves” and that there was a
13 “fraudulent conveyance giveaway of Trust property for nothing to [third] party Banks,”
14 apparently as the result of foreclosure on the properties in the trust. (*Id.* at 7-8.) Mr. Ball
15 concludes that Defendants as a group took actions that were “totally and completely
16 unacceptable to preserve and protect [his mother’s] liquidity and property,” and that “in
17 violation of Title 18 United States Code, Sections 371 and 2,⁵ the defendants have damaged
18 the plaintiff and handed him a bill to cure the damages they have caused [to] their client’s
19 trust and estate and the damage inflicted on the plaintiff as her benefactor.” (Dkt. # 47 at 8.)

20 These allegations are vague, circuitous, and make passing references to unexplained
21 facts that, although apparently essential to the nature of the claim, are nevertheless left
22 ambiguous. As explained above, under Rule 9, civil conspiracy claims (and fraud claims,
23 which Mr. Ball also seems to be alleging) must be pled with particularity, and a plaintiff
24 cannot simply lump together “the defendants” in asserting his claim. Mr. Ball’s allegations

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26 ⁵18 U.S.C. § 372 prohibits conspiracy to impede or injure an officer of the United
27 States. As above, Mr. Ball does not purport to bring any claim for injury to an officer of the
28 United States, and in any event Mr. Ball cannot bring a *civil* action under this *criminal*
statute.

1 that actions were “unacceptable,” or that they violated criminal statutes, likewise do not state
2 legal claims. Additionally, the allegation that unspecified Defendants planned “before,
3 during, and after” a meeting is not pleading with particularity. The Court also notes that in
4 this count Mr. Ball again purports to bring a claim on behalf of the trust (indeed, that seems
5 to be the essence of Mr. Ball’s claim). As discussed, this is improper because Mr. Ball is
6 unrepresented. In sum, it is unclear what the precise injury to Mr. Ball was, which of
7 Defendants caused that injury, and how Mr. Ball can state a claim for relief. Count one
8 therefore does not raise the right to relief above the speculative level or give Defendants fair
9 notice of what Mr. Ball’s claim is and the grounds upon which it rests. *See Twombly*, 550
10 U.S. at 555.

11 **4. Count Two**

12 Count two purports to bring claims for “fraud, embezzlement, collusion, conversion,
13 & diversion of funds,” ostensibly under state law. (Dkt. # 47 at 9.) Mr. Ball suggests that
14 an audit of the trust took place, from which he concludes that “the defendants” fraudulently
15 took funds from the trust. (*See id.*) Mr. Ball alleges that they did so by “collaborating
16 amongst themselves” in some unspecified way to “use[] the Maricopa County Superior Court
17 as a legal shield to protect themselves from any and all accountability and prosecution by the
18 Arizona Appellate and Supreme Courts.” (*Id.* at 9-10.) The only specific fact in this section
19 is the statement that, on September 19, 2004, “defendants” transferred money from a bank
20 without his approval. (*Id.* at 10.) Mr. Ball then goes on to state that he has not “been given
21 an evidentiary hearing or ‘due process,’” although the import of these statements is unclear.

22 Like count one, count two fails to state a claim under the Federal Rules of Civil
23 Procedure. It is impossible to determine which of Defendants are supposed to have
24 committed the various torts listed in the count’s title or in what way they are supposed to
25 have done so. Mr. Ball’s reference to using the state courts as a “legal shield” is confusing
26 in the absence of any context, and it further raises the probability that Mr. Ball is attempting
27 to collaterally attack a state court judgment (as do the references to evidentiary hearings and
28

1 due process).⁶ Again, the allegations of fraud must be pled with particularity under Rule
2 9(b), including a pleading of the “time, place, and specific content of the false representations
3 as well as the identities of the parties to the misrepresentation.” *Edwards*, 356 F.3d at 1066.
4 Count two contains none of these, other than a reference to a bank transfer arranged by
5 “defendants” without sufficient context from which any Defendant could be put on notice
6 of the nature of the claim and against which of Defendants it is asserted. In short, Mr. Ball
7 has not pled factual allegations sufficient to raise the right to relief above the speculative
8 level or to give Defendants fair notice of this claim. *See Twombly*, 550 U.S. at 555.

9 **5. Count Three**

10 Count three purports to bring a RICO (Racketeer Influenced and Corrupt
11 Organizations) claim, presumably under federal law, 8 U.S.C. § 1964(c), although Mr. Ball
12 does not so specify. Mr. Ball’s single paragraph on this issue asserts that “defendants have
13 participated in defrauding other unsuspecting clients” by “engag[ing] in unlawful activities
14 designed to profit and cause further injury to families of dysfunction and abusive behavior
15 by sibling rivalry, competition, arrogance or feuding.” (Dkt. # 47 at 11.)

16 Like the other counts, count three is improperly pled. RICO claims must be pled with
17 particularity. Mr. Ball’s allegation that “defendants” have violated the RICO Act is
18 insufficient to state a claim. *See Weiszmann v. Kirkland & Ellis*, 732 F. Supp. 1540, 1546
19 (D. Colo. 1990) (“[I]n a complaint alleging a civil RICO violation, the plaintiff must identify
20 specifically each person who is alleged to be liable under RICO. *Merely collectivizing*
21 *defendants in an alleged pattern of racketeering activity will not suffice.*”) (emphasis added).
22 On the substance of the RICO claim, Mr. Ball has provided nothing more than a vague and
23 conclusory allegation that Defendants have committed fraud somehow relating to family
24 disharmony. This is not sufficient to state a RICO claim. Indeed, this count is so amorphous

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26 ⁶Mr. Ball may also be attempting to refer to bankruptcy proceedings that he alleges
27 earlier in the Second Amended Complaint. (*See* Dkt. # 47 at 4.) From the case number
28 provided by Mr. Ball, it appears that the case was summarily dismissed for failure to pay
required fees. (*See* No. 2:05-BK-21529-GBN Dkt. # 120.)

1 and lacking in factual context that, under *Twombly*, it fails to state any claim. Furthermore,
2 the relief Mr. Ball requests is for this Court to order criminal proceedings against Defendants.
3 (Dkt. # 47 at 11 (“Plaintiff requests relief by ‘Grand Jury’ be convened to investigate these
4 claims and allegations and make recommendations to the United States Attorney’s Office For
5 The District of Arizona.”).) This is a civil case; the Court has no authority to provide such
6 remedies.

7 **6. Count Four**

8 Court four, titled “Legal Negligence Against [a] Vulnerable Adult” (Dkt. # 47 at 12),
9 is also deficient. This count states that Defendants “induced both the Guardian Southwest
10 Fiduciary, Inc. *et al* to abandon their fiduciary duty to their client and engage in a course of
11 tortuous [sic] conduct to injure the plaintiff and cause their clients [sic] trust and estate to be
12 irreparably damaged by their actions.” (*Id.*) It then goes on to state that Mr. Ball “has been
13 damaged by the defendants Morgan Stanley & Co., Inc. [sic] for their [sic] failure to protect
14 their client Eleanor R. Ball by the deliberate and methodic plotting to permanently injure the
15 plaintiff by ‘Mail & Wire Fraud.’” (*Id.*)

16 The Court presumes from the title’s reference to a “Vulnerable Adult” that Mr. Ball
17 is attempting to invoke the Arizona Adult Protective Services Act (“APSA”), *see* Ariz. Rev.
18 Stat. § 46-451 *et seq.*, specifically the “Duty to an Incapacitated or Vulnerable Adult”
19 section, *see id.* § 46-456. However, such claims must be brought “by or on behalf of an
20 incapacitated or vulnerable adult.” *Id.* § 46-456(C). Mr. Ball, however, does not attempt to
21 assert claims on behalf of his mother or her estate. Rather, the substance of this claim seems
22 merely to recapitulate Mr. Ball’s belief that he has been injured in some way by someone –
23 although which of Defendants is unclear. Mr. Ball alleges that “the defendants” are
24 responsible; then he singles out Defendants Blunt, Stevens-Gobillard, and Schubert “in
25 particular”; he next states that Southwest Fiduciary “*et al.*” were “induced . . . to abandon
26 their fiduciary duty”; and finally he states that he was somehow damaged by “defendants
27 Morgan Stanley & Co” (presumably a reference to Defendant Morgan Stanley Trust
28 Company). (Dkt. # 47 at 12.) It is impossible to determine from the allegations in this

1 section which specific parties are the subject of the claim and the basis on which they could
2 be responsible to Mr. Ball. Mr. Ball’s invocation of mail and wire fraud is likewise
3 inexplicable in this context. No Defendant could be expected to be put on notice of the
4 nature of this claim from the way Mr. Ball has pled it. *See Twombly*, 550 U.S. at 555.
5 Moreover, Mr. Ball states that he has made “repeated attempts . . . to request Court Action
6 by the Arizona State Court Commissioners and Judges” but was “overruled and denied on
7 every count[,] *including the current matters brought to this honorable court.*” (Dkt. # 47 at
8 12 (emphasis added).) As explained, Mr. Ball may not pursue his claim in this Court if that
9 is the case. Rather, he must pursue the issue through the state appellate courts.

10 **7. Count Five**

11 Count five, which is essentially only one sentence in length, is entitled “Contributory
12 Negligence Against [a] Vulnerable Adult.” (Dkt. # 47 at 13.) It is impossible to determine
13 from Mr. Ball’s single sentence on the subject precisely what legal right he is attempting to
14 vindicate, whether it is on behalf of himself or his mother’s estate, and which of Defendants
15 are supposed to have violated that right. The count’s title suggests an APSA claim, although
16 Mr. Ball also states that Defendants “contribute[d] to the alienation of affection of [his]
17 mother.” (*Id.*) Whichever (if either) is the case, and if such claims are cognizable under
18 Arizona law,⁷ the Court is still unable to determine whether Mr. Ball is attempting to assert
19 a claim on his own behalf or on behalf of his mother’s estate. Further, Mr. Ball lists as
20 involved “Encore Senior [Village]”; “Arizona *et al.*”; the “City of Peoria”; and “Arizona and
21 City of Peoria Police Department *et al.*” (*Id.*) It is unclear to which parties, if any, the “*et*
22

23
24 ⁷If Mr. Ball is attempting to assert a claim for alienation of affections, such a claim
25 does not appear to be cognizable under Arizona law. *See McNelis v. Bruce*, 90 Ariz. 261,
26 265, 367 P.2d 625, 627 (1961) (relying on the Restatement of Torts and providing that “[t]he
27 gist of an action for alienation of affections is founded upon facts which support an injured
28 *spouse’s* claim that there has been an unprivileged, intentional interference with the legally
protected *marital rights* of the aggrieved spouse”) (emphases added); Restatement (Second)
of Torts §§ 699, 702A (1977) (providing that there is no cause of action for alienation of
affections between parents and children).

1 *al.*” references are meant to refer. It is likewise unclear how any of Defendants are supposed
2 to have committed any wrong, as there is absolutely no factual context provided by Mr. Ball.
3 In sum, no Defendant can be expected to have been put on fair notice of the nature of Mr.
4 Ball’s claim from the pleading of this court. *See Twombly*, 550 U.S. at 555.

5 **IV. Leave to Amend**

6 For the reasons explained above, Mr. Ball’s Second Amended Complaint falls far
7 short of the pleading requirements of the Federal Rules of Civil Procedure and fails to
8 conform to the Court’s Orders. The Court is not compelled to grant Mr. Ball leave to amend
9 if an amendment would be futile. *Bonanno v. Thomas*, 309 F.2d 320, 322 (9th Cir. 1962).
10 Although it is unclear whether Mr. Ball can cure the deficiencies of the Second Amended
11 Complaint, in deference to Mr. Ball’s unrepresented status, and out of an abundance of
12 caution, the Court will give Mr. Ball **ONE** more opportunity to file a proper complaint, if in
13 fact he has claims that can be brought before this Court. If Mr. Ball fails to timely file a
14 Third Amended Complaint that complies with the dictates of this Order, the Court **WILL**
15 dismiss this case with prejudice.

16 In filing a Third Amended Complaint, Mr. Ball is specifically directed to take note
17 that:

18 (1) He cannot represent the trust or his mother’s estate in this
19 matter, as he is not an attorney licensed to appear in this District.
20 Mr. Ball has represented to the Court that he does not intend to
21 bring any claims on behalf of the trust. Given that
22 representation, Mr. Ball should not assert any claims on behalf
23 of the trust in the Third Amended Complaint.

24 (2) This is a civil case. Mr. Ball cannot bring claims pursuant
25 to criminal statutes unless they authorize civil suits, nor should
26 Mr. Ball bring claims requesting that this Court pursue criminal
27 action against any of Defendants.

28 (3) Mr. Ball must plead any fraud, civil conspiracy, and RICO
claims with particularity. He must also plead sufficient facts on
all of his claims to raise the possibility of relief above the
speculative level. This requires a sufficient factual context from
which each specific Defendant can reasonably be expected to be
put on notice of the nature of Mr. Ball’s claims against that
Defendant. It also requires factual allegations that are
comprehensible and do not presuppose Mr. Ball’s own
knowledge or beliefs.

1 (4) A complaint is simply a means of informing the Court and
2 Defendants of what specific claims Mr. Ball is asserting and, to
3 the extent necessary, the factual background for those claims.
4 Mr. Ball should therefore not include any ad hominem asides
5 attacking Defendants. Mr. Ball also need not employ
6 exclamation points or quotation marks (other than to enclose an
7 actual quotation) in pleading his claims.

8 (5) Each legal claim Mr. Ball brings should be asserted in its
9 own separate count of the Third Amended Complaint. Each
10 count should contain a citation to or explanation of the legal
11 right on which the claim is based, and Mr. Ball *must not* seek
12 relief under any statute or legal theory that does not authorize
13 such relief. The Court directs Mr. Ball to carefully consider the
14 legal assessments provided in this Order in crafting any further
15 pleadings. Specifically, Mr. Ball *must not* assert any claims he
16 has or could have brought in the state court proceedings.

17 Mr. Ball must also keep in mind that, like an attorney, he is subject to Federal Rule
18 of Civil Procedure 11.⁸ If Mr. Ball cannot, in good faith, advance any or all of the claims he

19 ⁸The Court will withhold judgment on Defendants’ request for sanctions under Rule
20 11 pending submission of Mr. Ball’s Third Amended Complaint. So that Mr. Ball is aware
21 of his obligations, the Court notes that Federal Rule of Civil Procedure 11(b) provides:

22 By presenting to the court a pleading, written motion, or other
23 paper . . . an attorney or unrepresented party certifies that to the
24 best of the person’s knowledge, information, and belief, formed
25 after an inquiry reasonable under the circumstances:

26 (1) it is not being presented for any improper purpose,
27 such as to harass, cause unnecessary delay, or needlessly
28 increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are
warranted by existing law or by a nonfrivolous argument for
extending, modifying, or reversing existing law or for
establishing new law;

(3) the factual contentions have evidentiary support or, if
specifically so identified, will likely have evidentiary support
after a reasonable opportunity for further investigation or
discovery; and

(4) the denials of factual contentions are warranted on the
evidence or, if specifically so identified, are reasonably based on

1 asserted in the Second Amended Complaint (for instance, if the statute or legal theory on
2 which they are based provides no remedy or if they are claims that have already been
3 litigated in state court), then Mr. Ball *must not* assert them in the Third Amended Complaint.
4 If he does so, he may be subject to sanctions, including monetary sanctions, pursuant to Rule
5 11.

6 This Court is permitted to recommend that Mr. Ball retain an attorney. *See, e.g.,*
7 *Cunningham v. Ridge*, 258 F. App'x 221, 223 (10th Cir. 2007) (“The magistrate judge wisely
8 recommended Cunningham retain a lawyer to assist with the procedural requirements . . .”);
9 *Kim v. U.S. Dep’t of Labor*, No. 1:06-CV-683, 2007 WL 844871, at *2 (W.D. Mich. Mar.
10 16, 2007) (“The court strongly recommends that plaintiff retain a competent attorney to
11 represent him in this matter.”). Because it appears from the pleadings on file that Mr. Ball
12 may not fully appreciate the nature of his claims, the requirements of the procedural rules,
13 and how the two interact, the Court strongly recommends that Mr. Ball retain an attorney to
14 represent him in this matter.⁹

15 However, the Court also wishes to make it very clear to Mr. Ball that he has had
16 ample time to either retain an attorney or to craft a proper complaint on his own in this
17 matter. Thus, the Court is disinclined to grant Mr. Ball any additional extensions of time,
18 and will not do so absent a showing of good cause. If Mr. Ball wishes to file a Third
19 Amended Complaint or to retain an attorney to do so for him, he should act *promptly* on this
20 matter so that he does not miss the filing deadline.

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22 _____
23 belief or a lack of information.

24 Federal Rule of Civil Procedure 11(c) further provides that if a court concludes that a party
25 has violated Rule 11(b), the court may impose sanctions “to deter repetition of the conduct
or comparable conduct by others similarly situated.”

26 ⁹A list of lawyer referral services and legal services organizations is available on the
27 District’s internet page, <http://www.azd.uscourts.gov>, under “Self-Help Tools” and “Filing
28 on Your Own Behalf.” This list may also be obtained by visiting or calling the Clerk’s
office, with which Mr. Ball is already familiar.

1 **CONCLUSION**

2 For the foregoing reasons:

3 **IT IS ORDERED** that the Motion to Dismiss of Defendants Southwest Fiduciary,
4 Gregory P. Dovico, Peggy Ann Dovico, and Anna Dovico (CV-09-0122 Dkt. # 27) is
5 **GRANTED IN PART** and **DENIED IN PART**.

6 **IT IS FURTHER ORDERED** that Mr. Ball's Motion to Deny Joinder (Dkt. # 48)
7 is **GRANTED**.


8 **IT IS FURTHER ORDERED** that Mr. Ball's Motion for Leave to Amend (Dkt. #
9 46) is **DENIED AS MOOT**.

10 **IT IS FURTHER ORDERED** that all future case filings in this matter shall utilize
11 this amended caption: *In re Dennis Andrew Ball, personally and as Beneficiary of the*
12 *Eleanor R. Ball IrreLvg Trust 05/10/01*.

13 **IT IS FURTHER ORDERED** that Mr. Ball shall have until **June 22, 2009** in which
14 to file a Third Amended Complaint that conforms to the Federal Rules of Civil Procedure,
15 the District's Local Rules, and the dictates of the Court's Orders.

16
17 **IT IS FURTHER ORDER** that if Mr. Ball does not comply with this Order, the
18 Clerk of the Court is directed to dismiss this action without further notice.

19 DATED this 21st day of May, 2009.

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22 _____
23 G. Murray Snow
24 United States District Judge
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