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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Liberty Life Insurance Company,)

No. CV 10-2024-PHX-JAT

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Plaintiff,)

ORDER

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vs.)

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Eric L. Myers; Donald D. Myers and Joan)
L. Myers; Anne R. Myers; Erin Sarah)
Stoloff; Kirsten Anne Myers; the Erin)
Myers Trust dated August 13, 1993; the)
Kirsten Myers Trust dated August 13,)
1993; Brooke Myers Wilson; Sean Edwin)
Lung,)

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Defendants.)

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Currently pending before the Court are Defendant Eric Myers’s Motion to Dismiss (Doc. 18) and Motion Requesting Appointment of Pro Bono Counsel (Doc. 24) and Plaintiff Liberty Life Insurance Company’s Motion to Dismiss Defendant Eric Myers’ Counterclaim (Doc. 27). The Court now rules on the Motions.

23

BACKGROUND

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Plaintiff Liberty Life Insurance Company (“Liberty”) issued a life insurance policy (the “Policy”) on the life of Defendant Eric Myers with a death benefit of \$800,000 on July 4, 1989. Eric attended a real estate conference in San Diego in late June, 1991. On Sunday, June 30, 1991, Eric failed to return home to Arizona. Eric’s family hired a private investigator to investigate Eric’s disappearance, but received no results.

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1 On August 14, 1991, Anne Myers filed a petition for divorce from Eric; the Arizona
2 Superior Court dissolved the marriage on March 19, 1992. On August 27, 1991, Donald
3 Myers, Eric's father, petitioned the Arizona Superior Court to be appointed conservator of
4 Eric's estate. On September 17, 1993, Donald was issued Amended Letters of Special
5 Conservatorship authorizing him to execute any and all paperwork necessary to effect a
6 change in beneficiary on the Policy. Donald took the necessary steps to change the Policy
7 beneficiaries to the Erin Myers Trust dated August 16, 1993 ("Erin's Trust") and the Kirsten
8 Myers Trust ("Kirsten's Trust"), collectively the "Trusts." Donald was the Trustee of the
9 Trusts.

10 On December 16, 1996, Donald petitioned the Arizona Superior Court to issue a
11 presumptive death certificate, pursuant to A.R.S. §14-1107, declaring Eric dead. Arizona
12 issued a presumptive death certificate for Eric on March 6, 1997. Donald submitted a proof
13 of loss to Liberty that included the presumptive death certificate. On February 18, 1998,
14 Liberty paid out \$870,103.80 under the Policy. Erin's Trust and Kirsten's Trust were funded
15 with \$435,051.90 each of the Policy proceeds.

16 Beginning in 2003, Eric sent faxes to Donald's office that went unanswered. From
17 about 2005 to 2007, Eric sent email communications to members of his family. Eric came
18 out of hiding in October of 2007, and all his family members knew at that time that he was
19 alive. He had allowed his family and friends to believe he was dead. Liberty alleges,
20 however, that at least Donald might have known all along that Eric was alive.

21 On January 25, 2008, after Eric's reappearance to his family and friends, Donald
22 authorized and caused the distribution of \$159,000 to Erin, Eric's daughter, from the Erin
23 Trust. On January 25, 2008, Donald authorized and caused the distribution of \$274,000 to
24 Kirsten, another daughter, from Kirsten's Trust. On April 15, 2009, Erin received a final
25 distribution of \$2,143.52 from Erin's Trust; Kirsten received a \$1,262.06 final distribution.

26 Liberty filed this action on September 21, 2010 to recover insurance proceeds paid out
27 under the Policy. Liberty named Eric Myers; Donald Myers; Joan Myers, Eric's mother;
28 Anne Myers; Erin Stoloff, Eric's daughter; Kirsten Ruggiano, Eric's other daughter; the Erin

1 Myers Trust dated August 13, 1993; the Kirsten Myers Trust dated August 13, 1993; Brooke
2 Myers Wilson, Eric's sister; and Sean Lung, Eric's partner/husband as Defendants. Liberty
3 alleges the following Counts: Count One for Declaratory Judgment/Mistake/Constructive
4 Trust; Count Two for Fraud/Extrinsic Fraud; Count Three for Breach of Duty by a Fiduciary;
5 Count Four for Constructive Fraud; Count Five for Conversion; and Count Six for Unjust
6 Enrichment.

7 **MYERS'S MOTION TO DISMISS**

8 Defendant Eric Myers filed an Answer on October 19, 2010 that he labeled an
9 "Answer to Complaint & Motion for Dismissal & Counter Claim." (Doc. 18.) The portion
10 of the omnibus pleading relating to the dismissal reads, in total:

11 It is obvious [Plaintiff's counsel] does not have sufficient facts
12 to merit a genuine case (based on factual issues) or a
13 Declaratory Judgment and **THEREFORE**, I, Eric L. Myers,
14 move that this Court dismiss Liberty's Complaint for lack of
15 evidence, failure to state a claim upon which relief can be
16 granted per Federal Rule of Civil Procedure 12(b)(6) due to the
17 error of Liberty not maintaining a business relationship with the
proceeds recipients by means of an indemnity agreement to
assure restitution covering its decision to ignore the risk of a
presumptive life and also because the statute of limitations
precludes any further actions on Liberty's mistake made in
1998 when it knew of the risks and did not prudently protect
itself and its shareholders.

18 (Doc. 18 p.26.)

19 Eric's purported Motion to Dismiss does not specify which claims he believes fail as
20 a matter of law. He does not recite the elements of a single claim. He does not indicate
21 which statutes of limitation apply to the six Counts in the Complaint and whether tolling
22 could apply. Nor does he cite to a single case in support of his "motion." He provides no
23 basis for granting a motion to dismiss, other than his unsupported statute of limitation
24 arguments and his theory that Liberty should have obtained an indemnity agreement from the
25 Trusts before paying out the Policy proceeds. The Court will not grant such a cursory,
26 legally unsupported Motion.

1 **MOTION TO APPOINT COUNSEL**

2 Eric petitions the Court to appoint a pro bono attorney to represent him in this case.
3 He claims that he does not have the resources to retain legal counsel and that appointment
4 of counsel “will help the case procedurally and help assure that I receive appropriate legal
5 advice and representation.” (Doc. 24, p.1.)

6 There is no constitutional right to appointment of counsel in a civil case. *Ivey v. Bd.*
7 *of Regents of Univ. of Alaska*, 673 F.2d 266, 269 (9th Cir. 1982). The Court, however, does
8 have the discretion to allow litigants to proceed in forma pauperis and to appoint counsel in
9 “exceptional circumstances.” See 28 U.S.C. § 1915; *Wilborn v. Escalderon*, 789 F.2d 1328,
10 1331 (9th Cir. 1986). In order to determine whether exceptional circumstances exist, the
11 Court evaluates the petitioner's “‘likelihood of success on the merits [and] the ability of the
12 petitioner to articulate his or her claim pro se in light of the complexity of the legal issues
13 involved.’” *Richard v. Harper*, 864 F.2d 85, 87 (9th Cir. 1988)(quoting *Weygant v. Look*,
14 718 F.2d 952, 954 (9th Cir. 1983)). Neither factor is determinative, and the Court must
15 consider both factors before reaching a decision on a request for appointment of counsel. *See*
16 *Wilborn*, 789 F.2d at 1331.

17 Having considered both factors, the Court finds that Eric has not demonstrated either
18 a likelihood of success on the merits or that any difficulty he is experiencing in attempting
19 to litigate his case is due to the complexity of the issues involved. Undoubtedly, all legal
20 cases seem complex to a lay person, but this case does not present unusually complex legal
21 issues. The case therefore does not present “exceptional circumstances” requiring the
22 appointment of counsel. The Court will deny the Motion Requesting Appointment of Pro
23 Bono Counsel.

24 **PLAINTIFF’S MOTION TO DISMISS COUNTERCLAIM**

25 Liberty filed its Motion to Dismiss Eric’s Counterclaim on November 4, 2010. (Doc.
26 27.) Eric’s Counterclaim is found in the last paragraph of his omnibus Answer. That
27 paragraph reads:

28 **FURTHERMORE**, I hereby Counterclaim for relief from

1 Liberty for the Invasion of my Privacy in that Liberty, on
2 instructions of [Plaintiff's counsel], placed the advertisement
3 herein pasted on Exhibit "H", in the Prescott Newspaper, The
4 Daily Courier on October 11, 2010. Firstly, this is in direct
5 violation of the Standard Civil Track Initial Order, as stipulated
6 by Judge James A. Tielborg [sic], dated September 22, 2010.
7 The posting is deceptive. It does not identify to the readers, the
8 entity behind the posting nor the purpose of the posting, which is
9 surely to interrogate my friends and acquaintances. This method
10 of data collection, as perpetrated, is an illegal intrusion into my
11 personal life. For damages, I beseech the Court to Order the
12 Plaintiff to cease any further efforts to delve into my personal
13 life.

8 (Doc. 18, p. 26.) The Daily Courier advertisement referenced in the Counterclaim reads,
9 "Seeking Any Information SEEKING ANY INFORMATION on the whereabouts of Eric
10 Lillevig Myers from June 30, 1991 through the present. Anyone with information is
11 encouraged to send an email to informationonelm@gmail.com" (Doc. 18, Ex. H.)

12 The Court may dismiss a claim pursuant to Federal Rule of Civil Procedure 12(b)(6)
13 for two reasons: 1) lack of a cognizable legal theory and 2) insufficient facts alleged under
14 a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
15 1990).

16 To survive a 12(b)(6) motion for failure to state a claim, a complaint must meet the
17 requirements of Federal Rule of Civil Procedure 8(a)(2). Rule 8(a)(2) requires a "short and
18 plain statement of the claim showing that the pleader is entitled to relief," so that the
19 defendant has "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell*
20 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)(quoting *Conley v. Gibson*, 355 U.S. 41,
21 47 (1957)).

22 Although a complaint attacked for failure to state a claim does not need detailed
23 factual allegations, the pleader's obligation to provide the grounds for relief requires "more
24 than labels and conclusions, and a formulaic recitation of the elements of a cause of action
25 will not do." *Twombly*, 550 U.S. at 555 (internal citations omitted). The factual allegations
26 of the complaint must be sufficient to raise a right to relief above a speculative level. *Id.*
27 Rule 8(a)(2) "requires a 'showing,' rather than a blanket assertion, of entitlement to relief.
28 Without some factual allegation in the complaint, it is hard to see how a claimant could

1 satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also
2 ‘grounds’ on which the claim rests.” *Id.* (citing 5 C. Wright & A. Miller, Federal Practice
3 and Procedure §1202, pp. 94, 95(3d ed. 2004)).

4 Rule 8’s pleading standard demands more than “an unadorned, the-defendant-
5 unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)(citing
6 *Twombly*, 550 U.S. at 555). A complaint that offers nothing more than naked assertions will
7 not suffice. To survive a motion to dismiss, a complaint must contain sufficient factual
8 matter, which, if accepted as true, states a claim to relief that is “plausible on its face.” *Iqbal*,
9 129 S.Ct. at 1949. Facial plausibility exists if the pleader pleads factual content that allows
10 the court to draw the reasonable inference that the defendant is liable for the misconduct
11 alleged. *Id.* Plausibility does not equal “probability,” but plausibility requires more than a
12 sheer possibility that a defendant has acted unlawfully. *Id.* “Where a complaint pleads facts
13 that are ‘merely consistent’ with a defendant’s liability, it ‘stops short of the line between
14 possibility and plausibility of entitlement to relief.’” *Id.* (citing *Twombly*, 550 U.S. at 557).

15 In deciding a motion to dismiss under Rule 12(b)(6), the Court must construe the facts
16 alleged in the complaint in the light most favorable to the drafter of the complaint and the
17 Court must accept all well-pleaded factual allegations as true. *See Shwarz v. United States*,
18 234 F.3d 428, 435 (9th Cir. 2000). Nonetheless, the Court does not have to accept as true
19 a legal conclusion couched as a factual allegation. *Papasan v. Allain*, 478 U.S. 265, 286
20 (1986).

21 Eric alleges a Counterclaim for invasion of privacy. Arizona has adopted the
22 Restatement Second of Tort’s four-part classification of the tort of invasion of privacy.
23 *Godbehere v. Phoenix Newspapers*, 783 P.2d 781, 784 (Ariz. 1989); *Hart v. Seven Resorts*
24 *Inc.*, 947 P.2d 846, 853 (Ariz. Ct. App. 1997). The following four claims fall under the
25 invasion of privacy tort: 1) intrusion on seclusion or private affairs; 2) public disclosure of
26 private facts; 3) publicity placing the plaintiff in a false light in the public eye; and 4)
27 appropriation of the plaintiff’s name or likeness for the defendant’s advantage. *Godbehere*,
28 783 P.2d at 784. Only the first three of those claims could apply here.

1 The Restatement describes the tort of intrusion upon seclusion as follows: “One who
2 intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or
3 his private affairs or concerns, is subject to liability to the other for invasion of his privacy,
4 if the intrusion would be highly offensive to a reasonable person.” *Hart*, 947 P.2d at 853
5 (citing Restatement (Second) of Torts §652B (1977)). The Comments to the Restatement
6 further define the contours of the tort:

7 The invasion may be by physical intrusion into a place in which
8 the plaintiff has secluded himself, as when the defendant forces
9 his way into the plaintiff’s room in a hotel or insists over the
10 plaintiff’s objection in entering his home. It may also be by the
11 use of the defendant’s senses, with or without mechanical aids,
12 to oversee or overhear the plaintiff’s private affairs, as by
13 looking into his upstairs windows with binoculars or tapping his
14 telephone wires. It may be by some other form of investigation
15 or examination into his private concerns, as by opening his
16 private and personal mail, searching his safe or his wallet,
17 examining his private bank account, or compelling him by a
18 forged court order to permit an inspection of his personal
19 documents . . .

20 Restatement (Second) of Torts §652B cmt. b (1977). The placement of an advertisement in
21 a newspaper inquiring about Eric’s whereabouts does not constitute the sort of intrusion upon
22 seclusion described above. The investigator did not force his way into Eric’s home or any
23 other place where Eric had an expectation of privacy, did not eavesdrop or spy on Eric, did
24 not illegally intercept his emails or mail, and did not engage in any type of similar activity.
25 To the extent Eric attempts to state a claim for intrusion upon seclusion, that claim fails.

26 Nor has Eric sufficiently alleged a claim for publicity given to private life. The
27 Restatement provides that “One who gives publicity to a matter concerning the private life
28 of another is subject to liability to the other for invasion of his privacy, if the matter
publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is
not of legitimate concern to the public.” Restatement (Second) of Torts §652D (1977). The
advertisement did not disclose any facts about Eric. Instead, it sought facts about his life.
The ad therefore cannot serve as a basis for a publicity given to private life claim.

 Similarly, any attempt at a false light claim fails as a matter of law because the
advertisement did not place Eric in any light whatsoever, let alone a false light. The

1 Restatement creates a cause of action for publicity placing a person in false light where:

2 One who gives publicity to a matter concerning another that
3 places the other before the public in a false light is subject to
4 liability to the other for invasion of his privacy, if (a) the false
5 light in which the other was placed would be highly offensive to
6 a reasonable person, and (b) the actor had knowledge of or acted
7 in reckless disregard as to the falsity of the publicized matter
8 and the false light in which the other would be placed.

9 Restatement (Second) of Torts §652E (1977). Again, the advertisement did not portray Eric
10 in any way because it said nothing about him. The ad simply solicited information about
11 him.

12 Because the advertisement seeking information about Eric's whereabouts does not
13 satisfy the criteria for intrusion upon seclusion, unreasonable publicity, or false light, Eric
14 failed to state a claim for invasion of privacy. The Court therefore grants Plaintiff's Motion
15 to Dismiss the Counterclaim.

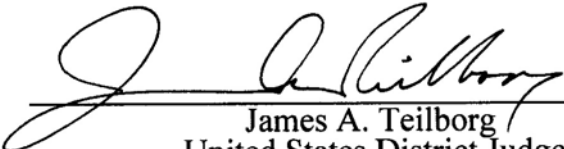
16 Accordingly,

17 **IT IS ORDERED** DENYING Defendant Eric Myers's Motion for Dismissal (Doc.
18 18).

19 **IT IS FURTHER ORDERED** DENYING Defendant Eric Myers's Motion
20 Requesting Appointment of Pro Bono Counsel (Doc. 24).

21 **IT IS FURTHER ORDERED** GRANTING Plaintiff Liberty Life Insurance
22 Company's Motion to Dismiss Defendant Eric Myers' Counterclaim (Doc. 27).

23 DATED this 1st day of August, 2011.

24 
25 James A. Teilborg
26 United States District Judge

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