



1 of Ethics and Professional Responsibility. On January 11, 2013, Plaintiff filed his  
2 Second Amended Complaint.

### 3 **II. LEGAL STANDARD**

4 On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), all allegations of material  
5 fact are assumed to be true and construed in the light most favorable to the nonmoving  
6 party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Dismissal under Rule  
7 12(b)(6) can be based on “the lack of a cognizable legal theory” or “the absence of  
8 sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police*  
9 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). To avoid dismissal, a complaint need contain  
10 only “enough facts to state a claim for relief that is plausible on its face.” *Bell Atl. Corp.*  
11 *v. Twombly*, 550 U.S. 544, 570 (2007). The principle that a court accepts as true all of the  
12 allegations in a complaint does not apply to legal conclusions or conclusory factual  
13 allegations. *Ashcroft v. Iqbal*, 566 U.S. 662, 678 (2009).

14 Generally, material beyond the pleadings may not be considered in deciding a  
15 Rule 12(b)(6) motion. However, a court may consider evidence on which the complaint  
16 necessarily relies if (1) the complaint refers to the document, (2) the document is central  
17 to the plaintiff’s claim, and (3) no party questions the authenticity of the copy of the  
18 document submitted to the court. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

### 19 **III. FACTS ASSUMED TO BE TRUE**

20 In 1994, Plaintiff acquired the right to use certain trademarks and service marks  
21 registered to the Defendant, which allowed him to hold himself out to the public as a  
22 Certified Financial Planner<sup>TM</sup> (“CFP®”). He practiced as a CFP® until March 2011  
23 when his right to use the marks was suspended. In 1998, a complaint against Plaintiff  
24 was submitted to Defendant, which resulted in the issuance of a Private Censure to  
25 Plaintiff. In September 2007, a complaint against Plaintiff was submitted to Defendant  
26 and to the Florida Bar regarding Plaintiff’s representation of an elderly client as her  
27 attorney and financial advisor, including making a number of changes to her investments  
28 and estate planning documents shortly before her death.

1           On January 11, 2011, Defendant directed Plaintiff to show cause why his right to  
2 use the CFP® marks should not be placed on interim suspension pending the completion  
3 of Defendant’s investigation. On February 21, 2011, Defendant’s Disciplinary and Ethics  
4 Commission (“the Commission”) held a show cause hearing. Article 4, Section 5.6 of  
5 Defendant’s *Disciplinary Rules and Procedures* states:

6                     An interim suspension will be issued when the Commission  
7 determines that the certificant or registrant has failed to  
8 provide evidence which establishes, by a preponderance of  
9 the evidence, that the certificant or registrant does not pose an  
10 immediate threat to the public and that the gravity of the  
nature of the certificant’s or registrant’s conduct does not  
impinge upon the stature and reputation of the marks.

11           On March 11, 2011, the Commission issued its decision that Plaintiff failed to  
12 meet his burden of proof to establish why his certification should not be suspended  
13 during the pendency of Defendant’s investigation. After considering the evidence  
14 presented during the show cause hearing, the Commission determined that Plaintiff’s  
15 conduct did not pose an immediate threat to the public because the main conduct at issue  
16 involved conduct occurring in 2006 and there were no other recent client issues reported.  
17 However, the Commission found that the gravity of the nature of Plaintiff’s conduct  
18 impinged upon the stature and reputation of the CFP® marks. Because Plaintiff failed to  
19 provide evidence to establish both that he did not pose an immediate threat to the public  
20 and that the gravity of his conduct does not impinge upon the stature and reputation of the  
21 marks, the Commission suspended Plaintiff’s right to use the marks pending the outcome  
22 of Defendant’s investigation.

23           The Commission’s March 11, 2011 Interim Suspension Order describes in detail  
24 the misconduct which caused the Commission to be deeply concerned. On February 19,  
25 2010, the Florida Bar filed a complaint against Plaintiff in the Supreme Court of Florida,  
26 and on December 17, 2010, the referee appointed to the matter recommended that  
27 Plaintiff be disbarred. The referee found that Plaintiff “served simultaneously as an  
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1 estate planner, trustee and successor trustee, financial products salesperson, personal  
2 representative and an attorney for a client.” In his response to the Florida Bar  
3 investigation, Plaintiff admitted that, after his recently widowed client learned in the last  
4 week of July 2006 that her cancer had returned, he drafted estate planning documents for  
5 her effecting the following:

6           inserting himself as personal representative under a new will;  
7           inserting himself as executor of [the client’s] estate; inserting  
8           himself as trustee of [the client’s] trust, replacing a corporate  
9           trustee that was inserted 3 years prior to the change; and  
          creating and inserting himself as successor trustee of two new  
          trusts. . . .

10 These documents were executed on August 10, 2006, and Plaintiff’s client passed away  
11 on August 19, 2006. The referee also found that Plaintiff billed and received \$7,500 for  
12 making changes to the estate and \$22,000 in advance fees for future trustee services,  
13 which he never provided because the client’s family’s challenge to his appointment  
14 caused him to resign as trustee. Rather than refund the \$22,000, however, Plaintiff  
15 credited it toward legal bills the trusts incurred as a result of Plaintiff defending his  
16 appointment as trustee and filed a claim against the estate to recover the outstanding legal  
17 fees. The referee also found that in 1997 and 1998, Plaintiff was suspended from the  
18 practice of law in New Hampshire, Florida, and Massachusetts because he ignored  
19 several court orders requiring him to return a retainer fee. In 2001, the Massachusetts  
20 Bar denied Plaintiff reinstatement after the suspension upon finding Plaintiff caused  
21 several Form U-4s to be filed in which he made material misrepresentations and  
22 omissions. In addition to his disciplinary history, the referee found as aggravating factors  
23 that Plaintiff acted with a selfish motive, refused to acknowledge the wrongful nature of  
24 his misconduct, and had substantial experience in the practice of law. The referee did not  
25 find any mitigating factors.

26           On January 17, 2012, the Supreme Court of Florida approved the referee’s  
27 recommendation and disbarred Plaintiff effective February 16, 2012. It held that Plaintiff  
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1 violated ethical rules by failing to disclose his financial interest in certain transactions to  
2 the client in writing, his actions amounted to egregious misconduct, and his conduct  
3 created a clear conflict of interest. He advised his client to select various means of estate  
4 planning and wealth management that would earn him a personal financial benefit, and he  
5 participated in a business transaction with his client without disclosing his substantial  
6 interest in the transaction.

7 On August 21, 2012, as a result of its investigation, Defendant determined there  
8 was probable cause to submit a complaint to the Commission alleging violations of  
9 Defendant's *Code of Ethics* and seeking discipline under Defendant's *Disciplinary Rules*  
10 *and Procedures*.

#### 11 **IV. ANALYSIS**

12 Plaintiff's Second Amended Complaint alleges that a contract was formed when  
13 Plaintiff acquired the right to use Defendant's marks and that Defendant breached the  
14 contract by issuing the interim suspension in violation of Article 4, Section 5.6 of  
15 Defendant's *Disciplinary Rules and Procedures*. As alleged, Section 5.6 required  
16 Defendant to issue an interim suspension if the Commission determined that Plaintiff  
17 failed to provide evidence which established, by a preponderance of the evidence, that he  
18 does not pose an immediate threat to the public and that the gravity of the nature of his  
19 conduct does not impinge upon the stature and reputation of Defendant's marks. As  
20 alleged, Defendant complied with Section 5.6 by issuing an interim suspension because  
21 the Commission found that Plaintiff did not establish that the gravity of the nature of his  
22 conduct does not impinge upon the stature and reputation of Defendant's marks.

23 Plaintiff's Second Amended Complaint further alleges "the hearing panel failed to  
24 articulate how the plaintiff had engaged in actual conduct that impinged upon the stature  
25 and reputation of the defendant's federally registered marks." However, as summarized  
26 above, the Commission's March 11, 2011 Interim Suspension Order articulates in great  
27 detail Plaintiff's actual conduct—which he admitted to the Florida Bar—that impinged  
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1 upon the stature and reputation of Defendant's marks. The Interim Suspension Order  
2 also states:

3 The Commission is deeply concerned, however, about the  
4 potential conflicts of interest present in [Plaintiff's] service to  
5 his client and [Plaintiff's] failure to provide any disclosures  
6 regarding the conflicts of interest. In particular, the  
7 Commission was concerned about [Plaintiff's] own admission  
8 that he did not believe that his outstanding financial  
9 obligations with Consec represented a conflict of interest  
10 when he recommended Consec products to Mrs. Smith.

11 Therefore, Plaintiff's Second Amended Complaint fails to state a claim upon  
12 which relief can be granted.

13 **V. LEAVE TO AMEND**

14 Although leave to amend should be freely given "when justice so requires," Fed.  
15 R. Civ. P. 15(a)(2), the Court has "especially broad" discretion to deny leave to amend  
16 where the plaintiff already has had one or more opportunities to amend a complaint.  
17 *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1161 (9th Cir. 1989). "Leave to  
18 amend need not be given if a complaint, as amended, is subject to dismissal." *Moore v.*  
19 *Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). Plaintiff already has  
20 been given two opportunities to amend his complaint and has failed to state a claim upon  
21 which relief can be granted. No further leave to amend will be granted.

22 IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss Second  
23 Amended Complaint (Doc. 14) is granted.

24 IT IS FURTHER ORDERED that Plaintiff's Second Amended Complaint (Doc.  
25 13) is dismissed with prejudice for failure to state a claim upon which relief can be  
26 granted.

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IT IS FURTHER ORDERED that the Clerk shall enter judgment dismissing this action with prejudice and shall terminate this case.

Dated this 6th day of March, 2013.



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Neil V. Wake  
United States District Judge