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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

SCOTT HOLLAND,

No. CIV S-10-2110-GEB-CMK

Plaintiff,

vs.

FINDINGS AND RECOMMENDATIONS

TD AMERITRADE, INC.,

Defendant.

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Plaintiff, who is proceeding pro se, brings this civil action. Pending before the court is defendant's motion to dismiss (Doc. 15). A hearing on the motion was held on December 20, 2010, before the undersigned in Redding, California. Defense counsel Lois Rosenbaum appeared at the hearing; Plaintiff was not present.

**I. BACKGROUND**

Plaintiff originally filed this action in the Siskiyou County Superior Court. Defendants removed the case to this court on the basis of federal question and diversity jurisdiction. Plaintiff's complaint challenges the treatment he received from defendants over the past twelve years through his investment self directed account (SDA). The complaint raises the following claims: RICO, fraud, unfair trade practices, negligence, breach of duty, failure to protect, failure to supervise, securities fraud, violation of gaming laws, and violation of California's consumers legal remedies act.

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1                   **II.     MOTION TO DISMISS**

2                   A.     Motion

3                   Defendant brings this motion to dismiss the complaint on the grounds that it is  
4                   facially implausible and fails to state a claim.  Alternatively, defendant argues that if any claims  
5                   survive the motion to dismiss, plaintiff should be required to submit them to arbitration.

6                   Defendant’s underlying argument is that the complaint is deficient in meeting the pleading  
7                   requirements for plaintiff’s claims.  According to defendant, the complaint lacks sufficient facts  
8                   to support any of his claims, he fails to meet the heightened pleading standards, and fails to  
9                   identify any duty the defendants had to plaintiff.  In addition, defendant argues plaintiff lacks  
10                  standing to raise a criminal claim.

11                  No opposition to the motion has been filed.<sup>1</sup>

12                  B.     Standards

13                  In considering a motion to dismiss, the court must accept all allegations of  
14                  material fact in the complaint as true.  See Erickson v. Pardus, 551 U.S. 89, 93-94 (2007).  The  
15                  court must also construe the alleged facts in the light most favorable to the plaintiff.  See Scheuer  
16                  v. Rhodes, 416 U.S. 232, 236 (1974); see also Hosp. Bldg. Co. v. Rex Hosp. Trustees, 425 U.S.  
17                  738, 740 (1976); Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam).  All  
18                  ambiguities or doubts must also be resolved in the plaintiff’s favor.  See Jenkins v. McKeithen,  
19                  395 U.S. 411, 421 (1969).  However, legally conclusory statements, not supported by actual  
20                  factual allegations, need not be accepted.  See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50  
21                  (2009).  In addition, pro se pleadings are held to a less stringent standard than those drafted by  
22                  lawyers.  See Haines v. Kerner, 404 U.S. 519, 520 (1972).  “Although a pro se litigant ... may be

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24                  <sup>1</sup>                  Pursuant to the Eastern District of California Local Rule 230(c), if an opposition  
25                  to a motion is not timely filed, no party is entitled to be heard in opposition of the motion.  
26                  Plaintiff failed to file an opposition to the motion, so the court could have taken the hearing off  
                  calendar.  However, the court provided plaintiff the benefit of being heard in opposition to the  
                  motion at oral argument.  Plaintiff failed to avail himself of this additional opportunity.

1 entitled to great leeway when the court construes his pleadings, those pleadings nonetheless must  
2 meet some minimum threshold in providing a defendant with notice of what it is that it allegedly  
3 did wrong.” Brazil v. United States Dept of Navy, 66 F.3d 193, 199 (9th Cir. 1995).

4 Rule 8(a)(2) requires only “a short and plain statement of the claim showing that  
5 the pleader is entitled to relief” in order to “give the defendant fair notice of what the . . . claim is  
6 and the grounds upon which it rests.” Bell Atl. Corp v. Twombly, 550 U.S. 544, 555 (2007)  
7 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). However, in order to survive dismissal for  
8 failure to state a claim under Rule 12(b)(6), a complaint must contain more than “a formulaic  
9 recitation of the elements of a cause of action;” it must contain factual allegations sufficient “to  
10 raise a right to relief above the speculative level.” Id. at 555-56. The complaint must contain  
11 “enough facts to state a claim to relief that is plausible on its face.” Id. at 570. “A claim has  
12 facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
13 reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129 S. Ct. at  
14 1949. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more  
15 than a sheer possibility that a defendant has acted unlawfully.” Id. (quoting Twombly, 550 U.S.  
16 at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability,  
17 it ‘stops short of the line between possibility and plausibility for entitlement to relief.’” Id.  
18 (quoting Twombly, 550 U.S. at 557).

19 In deciding a Rule 12(b)(6) motion, the court generally may not consider materials  
20 outside the complaint and pleadings. See Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir. 1998);  
21 Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). The court may, however, consider: (1)  
22 documents whose contents are alleged in or attached to the complaint and whose authenticity no  
23 party questions, see Branch, 14 F.3d at 454; (2) documents whose authenticity is not in question,  
24 and upon which the complaint necessarily relies, but which are not attached to the complaint, see  
25 Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001); and (3) documents and materials  
26 of which the court may take judicial notice, see Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir.

1 1994).

2 Finally, leave to amend must be granted “[u]nless it is absolutely clear that no  
3 amendment can cure the defects.” Lucas v. Dep’t of Corr., 66 F.3d 245, 248 (9th Cir. 1995) (per  
4 curiam); see also Lopez v. Smith, 203 F.3d 1122, 1126 (9th Cir. 2000) (en banc).

5 C. Discussion

6 Plaintiff’s claims include RICO, fraud, negligence, deceptive trade practices,  
7 violation of gaming laws, and consumers legal remedies act.

8 1. RICO (Claim 1):

9 Plaintiff’s complaint states defendants violated RICO based on “conduct of an  
10 enterprise through a pattern of racketeering activity.” Predicate acts included sending bills  
11 though the USPS & using wire services to transmit funds. He also claims defendant’s violations  
12 “harmed Plaintiff.”

13 Defendant argues plaintiff fails to allege sufficient facts in support of the elements  
14 of a RICO claim, that he fails to allege any specific conduct, and fails to allege that some  
15 concrete financial loss was proximately caused by an alleged scheme.

16 The Racketeer Influenced and Corrupt Organizations Act (RICO) is codified at 18  
17 U.S.C. § 1961, *et seq.* Section 1962 provides:

18 (a) It shall be unlawful for any person who has received any  
19 income derived, directly or indirectly, from a pattern of  
20 racketeering activity or through collection of an unlawful debt in  
21 which such person has participated as a principal within the  
22 meaning of section 2, title 18, United States Code, to use or invest,  
23 directly or indirectly, any part of such income, or the proceeds of  
24 such income, in acquisition of any interest in, or the establishment  
25 or operation of, any enterprise which is engaged in, or the activities  
26 of which affect, interstate or foreign commerce. A purchase of  
securities on the open market for purposes of investment, and  
without the intention of controlling or participating in the control  
of the issuer, or of assisting another to do so, shall not be unlawful  
under this subsection if the securities of the issuer held by the  
purchaser, the members of his immediate family, and his or their  
accomplices in any pattern or racketeering activity or the collection  
of an unlawful debt after such purchase do not amount in the

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1 aggregate to one percent of the outstanding securities of any one  
2 class, and do not confer, either in law or in fact, the power to elect  
one or more directors of the issuer.

3 (b) It shall be unlawful for any person through a pattern of  
4 racketeering activity or through collection of an unlawful debt to  
5 acquire or maintain, directly or indirectly, any interest in or control  
of any enterprise which is engaged in, or the activities of which  
affect, interstate or foreign commerce.

6 (c) It shall be unlawful for any person employed by or associated  
7 with any enterprise engaged in, or the activities of which affect,  
8 interstate or foreign commerce, to conduct or participate, directly  
or indirectly, in the conduct of such enterprise's affairs through a  
pattern of racketeering activity or collection of unlawful debt.

9 (d) It shall be unlawful for any person to conspire to violate any of  
10 the provisions of subsection (a), (b), or (c) of this section.

11 The Private Securities Litigation Reform Act (PSLRA), codified in relevant part  
12 at 18 U.S.C. § 1964(c), amended RICO to state:

13 Any person injured in his business or property by reason of a  
14 violation of [RICO] may sue therefor in any appropriate United  
15 States district court ..., except that no person may rely upon any  
conduct that would have been actionable as fraud in the purchase  
or sale of securities to establish a violation of [RICO].

16 “The elements of a civil RICO claim are as follows: ‘(1) conduct (2) of an  
17 enterprise (3) through a pattern (4) of racketeering activity (known as ‘predicate acts’) (5)  
18 causing injury to plaintiff’s business or property.’” Living Designs, Inc. V. E.I. Dupont de  
19 Nemours & Co., 431 F.3d 353, 361 (9th Cir. 2005) (quoting Grimmett v. Brown, 75 F.3d 506,  
20 510 (9th Cir. 1996); 18 U.S.C. § 1964(c), 1962(c)).

21 Here, plaintiff’s conclusory allegations do no more than state the elements of the  
22 claim. His RICO claim centers around the entire industry’s method of allowing people access to  
23 securities trading without oversight. He seems to argue that defendant, as well as similar  
24 businesses, take advantage of people like plaintiff in order to make money. He claims  
25 defendant’s advertisement misrepresents the services provided, that defendant uses the  
26 information obtained from plaintiff and the trades he makes, to make additional money which

1 causes plaintiff to lose money, and then defendant reinvests that money to make more. However,  
2 he fails to allege clear actions on the part of defendant, and what specific conduct constitutes the  
3 racketeering activity, or the predicate acts. Nowhere in his complaint does plaintiff specify  
4 explicit actions, much less then when, where and how those actions are in violation of RICO.

5 In addition, pursuant to the PSLRA, a securities fraud claim cannot form the basis  
6 of a RICO claim. See Howard v. America Online Inc., 208 F.3d 741, 749-50 (9th Cir. 2000).  
7 The same is true for claims arising from mail fraud, wire fraud and bank fraud as the predicate  
8 acts to support a RICO action. See Bald Eagle Area School Dist. v. Keystone Financial, Inc., 189  
9 F.3d 321, 329-30 (3d Cir. 1999); see also Swartz v. KPMG. LLC, 401 F. Supp. 2d 1146, 1151  
10 (W.D. Wash 2004 ) (citing Howard, 208 F.3d at 749-50) (aff'd in part, rev'd in part by Swartz v.  
11 KPMG. LLC, 476 F.3d 756 (9th Cir. 2007)).

12 Accordingly, Plaintiff cannot claim violation of RICO based on securities fraud,  
13 mail fraud, or wire fraud. The motion to dismiss the RICO claims should be granted, with no  
14 leave to amend.

15 2. Fraud:

16 (Claim 2): Plaintiff claims he relied on defendant's advertisements and license as  
17 inducements to enter into contract. Defendant failed to disclose their violation of laws and  
18 standards of duty. Thus the arbitration clause is unenforceable. He also claims defendants had a  
19 duty to inform Plaintiff of the conflicts of interests inherent in defendant's business model. If the  
20 conflict of interest had not been concealed, Plaintiff would not have entered into contract.  
21 "TDA's actions harmed Plaintiff."

22 (Claim 3): Plaintiff also claims he believed he was dealing with a securities  
23 broker operating legally, but defendant was not. Defendant concealed conflict of interests  
24 harmful to plaintiff knowing plaintiff's beliefs, and with the intent to harm him. Plaintiff relied  
25 on defendant's statements; defendant had duty to inform plaintiff of the conflict of interest and  
26 took unfair advantage of him. Plaintiff claims he would not have contracted with defendant if

1 the conflict of interest and superior trading programs were known.

2 Defendant argues plaintiff's allegations of fraud are vague and conclusory and  
3 therefore insufficient to state a plausible claim. In addition, defendant contends the fraud  
4 allegations fail to meet the heightened pleading requirements of Rule 9(b).

5 The elements of a California fraud claim are: (1) misrepresentation (false  
6 representation, concealment or nondisclosure); (2) knowledge of the falsity (or "scienter"); (3)  
7 intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. Lazar  
8 v. Superior Court, 49 Cal. Rptr. 2d 377, 380-81 (Cal. 1996). In addition, Federal Rule of Civil  
9 Procedure 9(b) requires that "the circumstances constituting fraud or mistake shall be stated with  
10 particularity." This heightened pleading standard "requires a pleader of fraud to detail with  
11 particularity the time, place, and manner of each act of fraud, plus the role of each defendant in  
12 each scheme." Lancaster Cmty. Hosp. v. Antelope Valley Dist., 940 F.2d 397, 405 (9th Cir.  
13 1991). Thus, "allegations of fraud must be specific enough to give defendants notice of the  
14 particular misconduct which is alleged to constitute the fraud charged so that they can defend  
15 against the charge and not just deny that they have done anything wrong." Bly-Magee v.  
16 California, 236 F.3d 1014, 1019 (9th Cir. 2001) (citation and internal quotations omitted).

17 Rule 9(b)'s heightened pleading standard "is not an invitation to disregard Rule  
18 8's requirement of simplicity, directness, and clarity" and "has among its purposes the avoidance  
19 of unnecessary discovery." McHenry v. Renne, 84 F.3d 1172, 1178 (9th Cir. 1996). "A pleading  
20 is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the  
21 defendant can prepare an adequate answer from the allegations." Neubronner v. Milken, 6 F.3d  
22 666, 671-672 (9th Cir. 1993) (internal quotations omitted; citing Gottreich v. San Francisco Inv.  
23 Corp., 552 F.2d 866, 866 (9th Cir. 1997)). The Ninth Circuit Court of Appeals has explained:

24 Rule 9(b) requires particularized allegations of the circumstances  
25 *constituting* fraud. The time, place and content of an alleged  
26 misrepresentation may identify the statement or the omission  
complained of, but these circumstances do not "constitute" fraud.  
The statement in question must be false to be fraudulent.  
Accordingly, our cases have consistently required that

1 circumstances indicating falseness be set forth. . . . [W]e [have]  
2 observed that plaintiff must include statements regarding the time,  
3 place, and *nature* of the alleged fraudulent activities, and that  
4 “mere conclusory allegations of fraud are insufficient.” . . . The  
5 plaintiff must set forth what is false or misleading about a  
6 statement, and why it is false. In other words, the plaintiff must set  
7 forth an explanation as to why the statement or omission  
8 complained of was false or misleading. . . . In certain cases, to be  
9 sure, the requisite particularity might be supplied with great  
10 simplicity.

11 In Re Glenfed, Inc. Sec. Litig., 42 F.3d 1541, 1547-1548 (9th Cir. 1994) (en banc) (italics in  
12 original) *superseded by statute on other grounds as stated in* Marksman Partners, L.P. v. Chantal  
13 Pharm. Corp., 927 F. Supp. 1297 (C.D. Cal. 1996); *see* Cooper v. Pickett, 137 F.3d 616, 627 (9th  
14 Cir. 1997) (“fraud allegations must be accompanied by “the who, what, when, where, and how”  
15 of the misconduct charged).

16 Here, plaintiff’s claims are vague, and are not set forth with any specificity. He  
17 appears to be arguing that defendant’s advertisement was misleading, they knew it was  
18 misleading, created the misleading advertisement with the intent to induce plaintiff into entering  
19 into a contract with them, that plaintiff justifiably relied on that misleading advertisement, which  
20 caused him damages. However, that is basically a simple recitation of the elements of the cause  
21 of action, which is insufficient. He fails to allege what the advertisement was and how it was  
22 misleading. It appears, but is not all together clear, that plaintiff somehow thought the agreement  
23 he entered into was a full service brokerage account, providing him with experts to assist him,  
24 rather than a self directing account, or at least that the defendant’s employees would be helping  
25 plaintiff. However, he does not say as much in his complaint. The court is also unable to gather  
26 whether plaintiff maintains that defendant offered the public a full service brokerage account.  
When questioned during the hearing on defendants’ motion to dismiss, counsel for the  
defendants represented that defendants did not offer full service brokerage accounts to the public.  
If so, the court finds it difficult to understand how plaintiff could have been misled since the  
option he claims existed, apparently did not. Without resolving this contradiction, plaintiff



1 should be permitted to amend.

2           Plaintiff also makes some claim about a conflict of interest and unfair advantage.  
3 These allegations are unclear. Plaintiff does not clarify what the conflict of interest was. It  
4 appears he may be claiming that because he only had a self directed account, and defendant had  
5 other customers with full service accounts, there was some sort of conflict. But again, it is  
6 unclear. Similarly, his claim of unfair advantage is unclear. Plaintiff fails to set forth how  
7 defendant put plaintiff at a disadvantage and who he was at a disadvantage to. Perhaps he means  
8 the customers with a full service account had an unfair advantage because they were able to  
9 obtain advice from defendant's employees whereas he was not. However, even if that was the  
10 allegations, the full service customers were presumably paying for that service, where plaintiff  
11 was not.

12           If plaintiff can somehow plead facts to support his claim that he was induced into  
13 entering into a misleading contract, wherein the defendants misrepresented that what he was  
14 paying for was a full service contract instead of the self directed account he received, perhaps the  
15 defects in his claim are curable. As plead now, however, the complaint fails to meet the pleading  
16 standards.

17           The motion to dismiss the fraud allegations should be granted, but plaintiff should  
18 be provided leave to file an amended complaint on the limited basis of amending his fraud claim.

19           3. Unfair Trade Practices/Consumer Legal Remedies (claim 4):

20           Plaintiff next claims that defendant offended public policy by its deceptive  
21 practices. Defendant intended plaintiff to rely on the misrepresentation knowing it was likely to  
22 harm him. Defendant concealed knowledge that SDA accounts statistically lose money.  
23 Defendant deceived plaintiff by its advertisement. Violated deceptive trade practices act and  
24 consumers legal remedies act, which harmed plaintiff.

25           Defendant argues that California adopted the Unfair Competition Law (UCL),  
26 Cal. Bus. & Prof. Code § 17200 *et seq.*, instead of the Deceptive Trade Practices Act. The UCL

1 defines unfair competition as any unlawful, unfair or fraudulent business practice. The  
2 Consumer Legal Remedies Act (CLRA) proscribes 24 specific “unfair methods of competition  
3 and unfair or deceptive acts or practices undertaken by any person in a transaction intended to  
4 result or which results in the sale or lease of goods or services to any consumer.” Cal. Civ. Code  
5 § 1770. Defendant states that plaintiff’s conclusory statements regarding fraud, unfair  
6 advertisements, and concealment that SDA accounts statistically lose money are insufficient to  
7 state a claim. In addition, since both of these claims are based on fraud, plaintiff fails to meet the  
8 heightened pleading requirements.

9           The UCL provides in part: “[U]nfair competition shall mean and include any  
10 unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading  
11 advertising.” Cal. Bus. & Prof. Code § 17200. This statute mirrors the federal counterpart, the  
12 Federal Trade Commission (FTC), 15 U.S.C. § 45 *et seq.* See Bowen v. Ziasun Technologies,  
13 Inc., 11 Cal. Rptr. 3d 522, 529 (Cal. App. 2004). As with the FTC, the UCL does not apply to  
14 securities transactions. See id. at 529-31; see also Feitelberg v. Credit Suisse First Boston, LLC,  
15 36 Cal. Rptr. 3d 592, 599 (Cal. Ct. App. 2005).

16           “The CLRA was enacted ‘to protect consumers against unfair and deceptive  
17 business practices and to provide efficient and economical procedures to secure such  
18 protection.’” McKell v. Washington Mut., Inc., 49 Cal. Rptr. 3d 227, 253 (Cal. Ct. App. 2006)  
19 (quoting Cal. Civ. Code § 1760). The CLRA makes unlawful certain “unfair methods of  
20 competition and unfair or deceptive acts or practices undertaken by any person in a transaction  
21 intended to result or which results in the sale or lease of goods or services to any consumer.”  
22 Cal. Civ. Code § 1770(a). “Goods” are defined as “tangible chattels bought or leased for use  
23 primarily for personal, family, or household purposes.” Cal. Civ. Code § 1761(a). “Services”  
24 are defined as “work, labor, and services for other than a commercial or business use, including  
25 services furnished in connection with the sale or repair of goods.” Cal. Civ. Code § 1761(b).

26           The California Supreme Court has recently held that life insurance is a contract of

1 indemnity, which is not a tangible chattel or service as defined in the CLRA. See Fairbanks v.  
2 Superior Court, 205 P.3d 201, 282 (Cal. 2009). “California’s Consumers Legal Remedies Act . .  
3 does not apply to intangible property or goods, and . . . it contains a restrictive definition of  
4 ‘services’.” Id. at 284. Mortgage loan transactions and issuance of credit have similarly been  
5 found not to involve goods or services, and therefore do not fall within the scope of the CLRA.  
6 See Consumer Solutions REO, LCC v. Hillery, 658 F. Supp. 2d 1002 (N.D. Cal. 2009); Berry v.  
7 American Exp. Publishing, Inc., 54 Cal. Rptr. 3d 91 (Cal. Ct. App. 2007); but see Hernandez v.  
8 Hilltop Financial Mortg., Inc., 622 F. Supp. 2d 842 (N.D. Cal 2007) (finding services went  
9 beyond merely providing loan).

10 Defendant does not cite any case holding whether the CLRA applies to securities  
11 transactions, nor has the court found any. However, as the CLRA only applies to tangible  
12 chattel, it would be inapplicable here as to the sale of the securities. See Fairbanks, 205 P.3d at  
13 284. If plaintiff is basing his CLRA claim on the services defendant provided, it is possible, in  
14 so far as no case has held otherwise, that such a claim may fall under the CLRA. However,  
15 plaintiff’s complaint is full of conclusory statements. He fails to allege any specific facts on  
16 which to base this claim. His general allegations that the defendant’s advertisement was  
17 misleading, fails to allege how the advertisement was misleading. Therefore, the complaint fails  
18 to state a claim. In addition, as fraud is clearly alleged, he must meet those heightened pleading  
19 standards in pleading the particulars of his claims.

20 Therefore, the motion to dismiss the claims based on the UCL should be granted  
21 without leave to amend; the motion to dismiss the claims based on the CLRA should be granted,  
22 with limited leave to amend to the extent plaintiff can plead a claim based on the services  
23 defendant provided.

24 4. Negligence Claims:

25 Gross Negligence (Claim 5):

26 Plaintiff claims defendant failed to set up safeguards to identify and/or protect

1 plaintiff against harmful trading. Plaintiff demonstrated a lack of understanding and need for  
2 protection and/or supervision, but defendant allowed plaintiff to continue to act even after  
3 knowing the harm to plaintiff. This allowed defendant to continue to profit from Plaintiff's  
4 harm.

5 Negligence (Claim 6):

6 Plaintiff also claims defendant failed to set up safeguards against harmful trading.  
7 Plaintiff demonstrated a lack of understanding and need for protection or supervision. Defendant  
8 was negligent in allowing plaintiff to continue trading after knowing the need for protection.

9 Breach of Duty (Claim 7):

10 Plaintiff further claims defendant breached its duty to plaintiff by failing to  
11 disclose conflicts of interest, unfair advantage, and illegal activities. Defendant also breached its  
12 duty by failing to protect plaintiff after plaintiff showed a lack of understanding, and allowing  
13 him to continue to trade.

14 Failure to Protect (Claim 8):

15 Plaintiff next claims that "TDA had a duty to protect Plaintiff's SDA." Plaintiff  
16 demonstrated a lack of understanding and need for protection which defendant ignored.  
17 Repeated losses caused Plaintiff extreme financial and psychological harm. Defendant's intent  
18 was to keep plaintiff trading knowing he would continue to harm himself and it would profit.

19 Failure to Supervise (Claim 8a):

20 Finally, plaintiff claims "TDA had a duty to supervise Plaintiff's SDA." Plaintiff  
21 demonstrated a lack of understanding and need for supervision. Defendant's intent was to keep  
22 plaintiff trading knowing he would continue to harm himself and it would profit.

23 Defendant argues all of these claims are negligence based, but plaintiff fails to  
24 identify any legal duty defendant owed plaintiff. Defendant states it had no duty to protect  
25 plaintiff from his own action and brokers have no duty to advise self directing account  
26 customers. In addition, there is no allegation that plaintiff's damages are a result of defendant's

1 breach of duty, but rather the damages arise from plaintiff's own actions.

2           The elements for a negligence claim are: duty, breach of duty, legal cause; and  
3 damages. See Friedman v. Merck & CO., 131 Cal. Rptr. 2d 885, 890 (Cal. Ct. App. 2003)  
4 (citations omitted). "The existence of a duty is the threshold element of a negligence cause of  
5 action." Id. (citing Paz v. State of California, 994 P.2d 975 (Cal. 2000)).

6           Here, plaintiff's claim is insufficient in that there is no clear duty that was  
7 breached. Plaintiff's allegations all relate to some failure to protect plaintiff from his own  
8 actions. He argues the defendant should have known that plaintiff needed protection as plaintiff  
9 had called for advice and informed defendant's employees that he did not understand the system.  
10 However, he fails to identify what legal duty was owed him.

11           It does not seem plausible that plaintiff can plead some legal duty defendant owed  
12 him in order to state a claim for negligence. It therefore appears these claims should be  
13 dismissed without leave to amend. See Iqbal, 129 S. Ct. at 1949.

14           5. Securities Fraud (Claim 9):

15           Here, plaintiff claims defendant fraudulently concealed conflicts of interest related  
16 to securities transactions between the parties, concealed violations of law related to the  
17 transactions, and intended for Plaintiff to trade securities using TDA, from which it profited.  
18 Plaintiff was harmed by the securities fraud.

19           Here again, defendant argues plaintiff fails to meet the heightened pleading  
20 standards for fraud. Plaintiff fails to plead any material statement or omission, the complaint  
21 lacks facts indicating the falsity of any such statements or omissions, there are no particular facts  
22 plead as to scienter, and no allegation that plaintiff's losses were tied to or caused by defendant's  
23 misrepresentation or omission.

24           Section 10b of the Securities Exchange Act of 1934 provides:

25           It shall be unlawful for any person ... To use or employ, in  
26 connection with the purchase or sale of any security ... any  
manipulative or deceptive device or contrivance in contravention  
of such rules and regulations as the Commission may prescribe as

1 necessary or appropriate in the public interest or for the protection  
2 of investors.

3 15 U.S.C. § 78j(b)

4 In cases involving publically traded securities and  
5 purchases or sales in public securities markets, the action's basic  
6 elements include: (1) a material misrepresentation (or omission);  
7 (2) scienter, i.e., a wrongful state of mind; (3) in connection with  
8 the purchase or sale of a security; (4) reliance . . .; (5) economic  
9 loss; and (6) "loss causation," i.e., a causal connection between the  
10 material misrepresentation and the loss.

11 Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341-42 (2005) (citations omitted). In addition,  
12 "[t]he statute insists that securities fraud complaints "specify" each misleading statement; that  
13 they set forth the facts "on which [a] belief" that a statement is misleading was "formed"; and  
14 that they "state with particularity facts giving rise to a strong inference that the defendant acted  
15 with the required state of mind." Id. at 345 (quoting 15 U.S.C. §§ 78U-4(b)(1), (2)).

16 Here, plaintiff's complaint fails to meet these pleading requirements. He alleges  
17 the defendant concealed some conflicts of interests, presumably the alleged omission. However,  
18 he fails to identify in an understandable way what the alleged conflict of interest was, and how  
19 defendant concealed it. In addition, there is nothing in the complaint indicating how plaintiff  
20 relied on this omission or concealment, and how that omission resulted in economic loss.  
21 However, as with the fraud claims above, it is possible that the defects in this claim may be cured  
22 though amendment.

23 The motion to dismiss the securities fraud claims should be granted, with leave to  
24 amend.

25 6. Violation of Gambling/Gaming Laws (Claim 10):

26 Plaintiff claims defendant was operating as a de facto gambling operation, which  
is illegal, by: operating a computerized trading program using faster access to trading platforms  
than plaintiff; using information plaintiff could not access; using plaintiff's own trading  
information against him; using information on a time basis not available to and harmful to  
plaintiff; using large pools of money undisclosed to plaintiff to manipulate short-term outcomes

1 of securities trades. Essentially using concealed house advantages. They created an unfair  
2 trading program.

3 Defendant argues that plaintiff fails to identify the state or federal law that forms  
4 the basis for this claim and that entitles him to relief. He also fails to provide for a private right  
5 of action or standing to assert this claim.

6 Plaintiff's claim appears to be a criminal claim which he would have no standing  
7 to assert. He fails to identify the basis of his claim, which makes it difficult to determine whether  
8 he would have standing. It does not appear as though he would as he specifically alleges illegal  
9 operations. Such illegal activity would not be actionable in a private action. This claim is  
10 implausible on its face. See Iqbal, 129 S. Ct. at 1449.

11 The motion to dismiss the gaming violations claims should be dismissed without  
12 leave to amend.

13 7. Violation of California's Consumers Legal Remedies Act (Claim 11):

14 Finally, plaintiff again argues that defendant offended public policy by its  
15 deceptive practices, which harmed Plaintiff. Defendant's intention was for Plaintiff to rely on its  
16 deliberate misrepresentation, with knowledge that it was likely to harm plaintiff. Concealed  
17 knowledge that SDAs lose money, yet created an illusion that SDA trading is a good way to  
18 invest even for an amateur. Deceptive advertisement induced plaintiff, who relied on it.

19 This claim is duplicative of claim 4, above. The conclusory allegations are  
20 insufficient to state a claim. However, as provided above, plaintiff should be provided leave to  
21 amend both his fraud claims as well as a limited CLRA violation as to the services defendant  
22 provided. As this claim is duplicative of the above claims, the leave to amend should encompass  
23 this claim.

24 The motion to dismiss the CLRA claim should be granted with limited leave to  
25 amend, as set forth above.

1                   **III.    ARBITRATION**

2                   Defendant argues that if any claim survives the motion to dismiss, the remaining  
3 claims should be dismissed as plaintiff is bound by an arbitration clause in their contract. The  
4 contract, and arbitration clause, was attached to counsel’s declaration which was stricken as  
5 failing to comply with local rules. While the court may have taken judicial notice of the  
6 arbitration clause as it was referred to in the complaint, the contract with the arbitration clause is  
7 no longer in the record. There is no arbitration clause available, therefore, to review and decide if  
8 the claims are barred thereby. If counsel wishes to invoke the arbitration clause, it would appear  
9 more appropriate to do so in a separate motion or in response to any amended complaint plaintiff  
10 may file. Therefore, the request to dismiss the entire case and refer it to arbitration should be  
11 denied.

12                   **IV.    CONCLUSION**

13                   Plaintiff’s complaint is full of conclusory statements, and lacks factual support for  
14 any of his claims. His complaint simply recites the elements of each claim without factual  
15 support, which is insufficient. Some of plaintiff’s claims should be dismissed without leave to  
16 amend as indicated above. However, his claims for fraud, which are insufficient in his current  
17 complaint, may be curable and leave to amend should be granted. Similarly, his claim of  
18 violation of the CLRA may be curable, and limited leave to amend should be granted.

19                   Based on the foregoing, the undersigned recommends that defendant’s motion to  
20 dismiss (Doc. 14) be granted with limited leave to amend, as set forth above. Any amended  
21 complaint should be filed within 30 days of the date these findings and recommendations are  
22 adopted.

23                   These findings and recommendations are submitted to the United States District  
24 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days  
25 after being served with these findings and recommendations, any party may file written  
26 objections with the court. Responses to objections shall be filed within 14 days after service of



1 objections. Failure to file objections within the specified time may waive the right to appeal.  
2 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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DATED: January 3, 2011

  
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**CRAIG M. KELLISON**  
UNITED STATES MAGISTRATE JUDGE