

1
2 UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4 OAKLAND DIVISION
5

6 ELLEN BROOKS,

7 Plaintiff,

8 vs.

9 RUTHE GOMEZ, et al.,

10 Defendants.
11
12

Case No: C 10-01873 SBA

**ORDER GRANTING DEFENDANT
LEGENT CLEARING, LLC'S
MOTION TO DISMISS AND
GRANTING IN PART AND
DENYING IN PART DEFENDANTS
GOMEZ AND ADVISORY
FINANCIAL CONSULTANTS, INC.'S
MOTION TO DISMISS**

Dkts. 15, 16

13 Plaintiff brings this action against Defendants arising from the management of her
14 retirement account. The parties are presently before the Court on Defendant Legent Clearing,
15 LLC's ("Legent") Motion to Dismiss and Defendants Ruthe Gomez ("Gomez") and Advisory
16 Financial Consultants, Inc.'s ("AFC") Motion to Dismiss. Having read and considered the
17 papers filed in connection with these matters and being fully informed, the Court hereby
18 GRANTS Legent's Motion to Dismiss, and GRANTS IN PART and DENIES IN PART
19 Gomez and AFC's Motion to Dismiss, for the reasons set forth below. The Court, in its
20 discretion, finds these matters suitable for resolution without oral argument. See Fed.R.Civ.P.
21 78(b).

22 **I. FACTUAL BACKGROUND**

23 Plaintiff alleges that she invested in a 403(b) retirement account and, for many years,
24 the account was managed by Defendants Gomez and AFC. First Amended Complaint ("FAC")
25 ¶¶ 1, 12. Plaintiff further alleges that, in or about December 2006, Gomez and AFC transferred
26 her account to Enterprise Trust Company ("Enterprise"), which was represented by Defendant
27 TradeRight Securities, Inc. ("TradeRight"). Id. ¶ 15. Plaintiff asserts that Gomez and AFC
28 failed to perform due diligence to determine whether the account was being transferred to a

1 legitimate company. Id. ¶ 15. Plaintiff also asserts that, in January 2007, Gomez and AFC sent
2 her a letter stating that Enterprise would handle her account “without any significant changes.”
3 Id. ¶ 17. Plaintiff claims, however, that Gomez and AFC failed to explain that the transfer of
4 Plaintiff’s account gave Enterprise, TradeRight, and Gomez “full discretion” to invest
5 Plaintiff’s funds without consulting her, and failed to inform her of a material change to her
6 account. Id. ¶¶ 18-19. She alleges that because it was a “full discretion” account that each of
7 the Defendants undertook fiduciary responsibilities to her. Id. ¶ 20. She also alleges that, soon
8 after the transfer, Plaintiff’s account was swept into an omnibus account and illegally used as
9 margin collateral for the benefit of the Defendants. Id. ¶¶ 21-27.

10 In March 2008, a receiver was appointed for Enterprise, and Plaintiff’s account was
11 frozen. Id. ¶ 28. Plaintiff alleges that she has received only \$250,000 from the receiver out of
12 the “approximately \$600,000 she should have received.” Id.

13 **II. PROCEDURAL BACKGROUND**

14 Plaintiff filed her original complaint on March 5, 2010 in the Superior Court of
15 California, County of Alameda, against Defendants Gomez, AFC, Legent, and TradeRight, as
16 well as TradeRight’s employees Kimble Mason and George Dragel. Legent removed this
17 action on April 30, 2010 based on federal question jurisdiction. On May 7, 2010, the parties
18 filed a stipulation providing that Plaintiff shall file a FAC by May 28, 2010. Plaintiff filed her
19 FAC on August 25, 2010, after Legent filed an application for an Order to Show Cause as to
20 why the case should not be dismissed in view of Plaintiff’s failure to file her FAC. The Court
21 subsequently denied Legent’s application as moot, in view of Plaintiff’s filing of her FAC.

22 In her FAC, Plaintiff brings the following claims against all Defendants: (1) Fraud; (2)
23 Conspiracy to Commit Fraud/Aiding and Abetting Fraud; (3) Breach of Fiduciary Duty; (4)
24 Conspiracy to Breach Fiduciary Duty/Aiding and Abetting Breach of Fiduciary Duty; (5)
25 Negligence; (6) Violations of Securities Laws and California State Blue Sky Laws; and (7)
26 Violation of Business & Professions Code §§ 17200, et seq.

27 Now, Defendants Legent, and Defendants Gomez and AFC, separately move to dismiss
28 Plaintiff’s FAC under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

1 **III. LEGAL STANDARD**

2 A Rule 12(b)(6) dismissal for failure to state a claim can be based on either: (1) the lack
3 of a cognizable legal theory; or (2) insufficient facts to support a cognizable legal claim.
4 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). In considering a Rule
5 12(b)(6) motion, the court is to “accept all factual allegations in the complaint as true and
6 construe the pleadings in the light most favorable to the nonmoving party.” Outdoor Media
7 Group, Inc. v. City of Beaumont, 506 F.3d 895, 899-900 (9th Cir. 2007). The plaintiff’s
8 factual allegations “must be enough to raise a right to relief above the speculative level.” Bell
9 Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007). A complaint that raises only “the mere
10 possibility of misconduct” does not establish that the plaintiff is entitled to relief. Ashcroft v.
11 Iqbal, 129 S.Ct. 1937, 1950 (2009). “[A] plaintiff’s obligation to provide the ‘grounds’ of his
12 ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of
13 the elements of a cause of action will not do.” Twombly, 550 U.S. at 555. “If a complaint is
14 dismissed for failure to state a claim, leave to amend should be granted unless the court
15 determines that the allegation of other facts consistent with the challenged pleading could not
16 possibly cure the deficiency.” Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc., 806
17 F.2d 1393, 1401 (9th Cir. 1986).

18 **IV. LEGENT’S MOTION TO DISMISS**

19 Legent moves to dismiss each of the causes of action in Plaintiff’s FAC. In her
20 opposition, Plaintiff fails to provide any argument in opposition to Legent’s motion. Instead,
21 Plaintiff states that she “has learned additional facts ... and seeks leave to file an amended
22 complaint to allege these and other related facts.” Dkt. 19, Plf.’s Opp. at 4. Plaintiff also
23 provides a three-page recitation of additional factual allegations directed to Legent’s alleged
24 misconduct. In view of Plaintiff’s failure to provide a meaningful opposition to Legent’s
25 motion to dismiss, the Court GRANTS Legent’s motion in its entirety. See Ghazali v. Moran,
26 46 F.3d 52, 53-54 (9th Cir. 1995) (a court may grant an unopposed motion to dismiss).
27 Plaintiff, however, is granted leave to amend her complaint. See Schreiber, 806 F.2d at 1401
28 (“If a complaint is dismissed for failure to state a claim, leave to amend should be granted

1 unless the court determines that the allegation of other facts consistent with the challenged
2 pleading could not possibly cure the deficiency.”) (emphasis added).¹

3 **V. GOMEZ AND AFC’S MOTION TO DISMISS**

4 **A. FRAUD (FIRST CAUSE OF ACTION)**

5 A claim for fraud requires: (1) a misrepresentation or concealment; (2) knowledge of
6 the falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damages. See Okun
7 v. Morton, 203 Cal.App.3d 805, 828 (1988). Federal Rule of Civil Procedure 9(b) requires
8 that, when fraud is alleged, “a party must state with particularity the circumstances constituting
9 fraud” The circumstances must “be specific enough to give defendants notice of the
10 particular misconduct ... so that they can defend against the charge and not just deny that they
11 have done anything wrong.” Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)
12 (internal citations omitted). “Averments of fraud must be accompanied by ‘the who, what,
13 when, where, and how’ of the misconduct charged.” Id. A party alleging fraud must “set forth
14 more than the neutral facts necessary to identify the transaction.” Id. Where a plaintiff asserts
15 claims based on fraudulent conduct against multiple defendants, the plaintiff is required to
16 “identify the role of each defendant in the alleged fraudulent scheme.” Swartz v. KPMG LLP,
17 476 F.3d 756, 765 (9th Cir. 2007) (internal brackets and citation omitted).

18 Here, Plaintiff alleges that Gomez and AFC sent her a letter in January 2007, in which
19 they “misrepresented to [Plaintiff] and others that Enterprise was a trustworthy company that
20 would handle [Plaintiff’s] account without any significant changes.” FAC ¶ 17. Plaintiff
21 further alleges that “Gomez and AFC failed to disclose, and intentionally concealed that
22 Enterprise and TradeRight were not trustworthy companies and that they were recommending
23 that [Plaintiff] transfer her account to Enterprise and TradeRight because Gomez received
24 financial gain from doing so.” Id. ¶ 34. Plaintiff also alleges that Gomez and AFC “concealed
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26 ¹ In its reply brief, Legent argues that leave to amend should not be granted because of
27 Plaintiff’s undue delay and lack of diligence in seeking amendment, and the fact that she has
28 previously amended her complaint. In view of the Ninth Circuit’s liberal standard for
permitting leave to amend when granting a motion to dismiss, Legent’s argument is
unpersuasive.

1 and failed to disclose that the account was being transferred ... to give Enterprise and Gomez
2 full discretion over the account.” Id.

3 These allegations are not sufficiently plead under Rule 9(b) or California law.
4 Specifically, Plaintiff does not allege facts showing that Gomez and AFC had knowledge of the
5 untrustworthiness of Enterprise and TradeRight, and therefore, also had knowledge of the
6 falsity of their representations regarding these companies. While Plaintiff alleges that Gomez
7 and AFC had “sufficient public information available to them” regarding the illegal activities
8 of Enterprise and TradeRight “from which they could have and should have refused to transfer
9 [Plaintiff’s] account,” Plaintiff has plead no facts supporting this conclusion. Id. ¶ 16
10 (emphasis added). Nor does Plaintiff allege specific facts indicating that Gomez and AFC had
11 an intent to defraud Plaintiff by transferring her account.

12 Plaintiff’s remaining fraud allegations are generally directed, without distinction, to all
13 Defendants, and therefore, are not plead with sufficient particularity under Swartz. Id. ¶¶ 31-
14 33, 35-36.

15 In her opposition, Plaintiff does not meaningfully respond to Gomez and AFC’s
16 challenge to her fraud claim. Instead, she generally asserts that she has made specific fraud
17 allegations against Gomez and AFC, and that the allegations made against all Defendants “can
18 and would be alleged directly against Gomez and AF[C].” Dkt. 20, Plf.’s Opp. at 4.
19 Moreover, as in her opposition to Legent’s motion, Plaintiff sets forth additional factual
20 allegations, asserting that any deficiencies in her fraud claim can be cured by amendment.

21 As such, Gomez and AFC’s motion to dismiss Plaintiff’s fraud claim (First Cause of
22 Action) is GRANTED with leave to amend.

23 **B. BREACH OF FIDUCIARY DUTY (THIRD CAUSE OF ACTION)**

24 To state a claim for breach of fiduciary duty, a plaintiff must allege facts showing: (1)
25 the existence of a fiduciary relationship; (2) a breach of that duty; and (3) resulting damages.
26 See Brown v. Cal. Pension Admin. & Consult. Inc., 45 Cal.App.4th 333, 347-48 (1996).
27 “[B]efore a person can be charged with a fiduciary obligation, he must either knowingly
28 undertake to act on behalf and for the benefit of another, or must enter into a relationship which

1 imposes that undertaking as a matter of law.” City of Hope Nat. Med. Ctr. v. Genentech, Inc.,
2 43 Cal.4th 375, 386 (2008) (internal quotation omitted). To satisfy the “knowingly undertake”
3 requirement, a plaintiff must show that the defendant “entered into [the contractual
4 relationship] with the view of acting primarily for the benefit of [plaintiff]” and
5 “subordinat[ing] its interests to those of [plaintiff].” Id. (bracketed material added).

6 In this case, Plaintiff has adequately plead her breach of fiduciary duty claim as against
7 Gomez and AFC. Specifically, Plaintiff alleges that Gomez and AFC undertook a special
8 relationship of trust and confidence in managing, on Plaintiff’s behalf, her investment account,
9 which she alleges provided them with full discretion as to how the account was managed. FAC
10 ¶¶ 19, 20, 45, 46. Plaintiff further alleges that Gomez and AFC breached their duties by
11 investing her assets in speculative investment strategies that were contrary to the agreed-upon
12 objections of Plaintiff, and were intended, instead, to profit Gomez and AFC. Id. ¶ 46.
13 Furthermore, Plaintiff alleges that Gomez and AFC used her assets to provide margin collateral
14 for trading strategies that were not intended to benefit her, and which caused her to suffer
15 financial loss. Id.

16 For these reasons, Gomez and AFC’s motion to dismiss Plaintiff’s claim for breach of
17 fiduciary duty (Third Cause of Action) is DENIED.

18 **C. CONSPIRACY (SECOND AND FOURTH CAUSES OF ACTION)**

19 Plaintiff’s Second and Fourth Causes of Action are for Conspiracy to Commit Fraud
20 and Conspiracy to Breach Fiduciary Duty, respectively. To establish a civil conspiracy, a
21 plaintiff must show (1) the formation and operation of a conspiracy, (2) wrongful conduct in
22 furtherance of a conspiracy, and (3) damages arising from the wrongful conduct. Kidron v.
23 Movie Acquisition Corp., 40 Cal.App.4th 1571, 1581 (1995). Conspiring defendants must
24 have actual knowledge that a tort is planned, concur in the tortious scheme with knowledge of
25 its unlawful purpose, and intend to aid in its commission. Id. at 1582.

26 Here, Plaintiff only provides barebones allegations that Defendants, as a group,
27 “actively aided, abetted, and conspired” with each other (FAC ¶¶ 40, 55), but she provides no
28 factual allegations establishing the formation of a conspiracy. The Supreme Court rejected

1 such a pleading in Twombly, 550 U.S. at 555-59; see also Benson v. JPMorgan Chase Bank
2 N.A., 2010 WL 1526394, at * 6 (N.D. Cal. April 15, 2010) (dismissing conspiracy claim where
3 the complaint lacked factual allegations showing an agreement between defendants to defraud
4 plaintiff).

5 In her opposition, Plaintiff argues simply that she has adequately plead her conspiracy
6 claims because she “has sufficiently plead[] the fraud and breach of fiduciary duty claims,” and
7 again asserts that any deficiency in her claims can be cured by amendment. Plf.’s Opp. at 6.
8 As indicated herein, Plaintiff has not sufficiently plead her fraud claim, so Plaintiff’s argument
9 as to her fraud claim fails. Moreover, with her argument, Plaintiff ignores the additional
10 factors that she must plead for a conspiracy claim, as set forth in Kidron, i.e., formation and
11 operation of a conspiracy, and wrongful conduct in furtherance of a conspiracy.

12 Thus, Gomez and AFC’s motion to dismiss Plaintiff’s conspiracy claims (Second and
13 Fourth Causes of Action) is GRANTED with leave to amend.

14 **D. NEGLIGENCE (FIFTH CAUSE OF ACTION)**

15 “The elements of a cause of action for negligence are ... (a) a legal duty to use due care;
16 (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the
17 resulting injury.” Ladd v. County of San Mateo, 12 Cal.4th 913, 917-918 (1996) (internal
18 quotations omitted). Here, contrary to Gomez and AFC’s assertions, Plaintiff has adequately
19 plead her negligence claim as against these defendants. Specifically, Plaintiff alleges that
20 Gomez and AFC owed her a duty to use reasonable care in managing her investments. FAC ¶
21 11. Plaintiff further alleges that they breached this duty by “acting irresponsibly, failing to
22 perform due diligence, failing to supervise her portfolio or those managing her portfolio, failing
23 to inquire about the margin investing by Enterprise, and failing to make prudent investments.”
24 Id. ¶ 61. Finally, Plaintiff asserts that, as a proximate result of the breaches, she has suffered
25 damages in excess of \$60,000. Id. ¶ 62.

26 Gomez and AFC also move to dismiss Plaintiff’s negligence claim on the ground that it
27 is time barred. A claim for negligence must be brought within two years. Cal. Code Civ. Pro.
28 § 339.1. The statute “begins to run when the Plaintiff suspects or should suspect that her injury

1 was caused by wrongdoing” Jolly v. Eli Lilly & Co., 44 Cal.3d 1103, 1110 (1988). A
2 claim may be dismissed because it is barred by the relevant statute of limitations when the
3 running of the statute “is apparent from the face of the complaint.” Ledesma v. Jack Stewart
4 Produce, Inc., 816 F.2d 482, 484 n. 1 (9th Cir. 1987). In this case, Plaintiff alleges her account
5 was transferred from AFC to Enterprise/TradeRight in December 2006. FAC ¶ 15. Plaintiff
6 also describes a letter, dated January 2007, in which Gomez and AFC “misrepresented to
7 [Plaintiff] and others that Enterprise was a trustworthy company that would handle [Plaintiff’s]
8 account without any significant changes.” *Id.* ¶ 17. However, Plaintiff alleges that she did not
9 discover her loss until “March of 2008,” after she was notified that her assets were frozen. *Id.*
10 ¶ 28. Plaintiff filed her complaint on March 5, 2010. Thus, it is not apparent from the face of
11 her complaint that her negligence claim is time barred.

12 For these reasons, Gomez and AFC’s motion to dismiss Plaintiff’s negligence claim
13 (Fifth Cause of Action) is DENIED.

14 **E. VIOLATION OF SECURITIES LAWS AND CALIFORNIA BLUE SKY LAWS (SIXTH**
15 **CAUSE OF ACTION)**

16 In her Sixth Cause of Action, Plaintiff broadly asserts that all Defendants violated “the
17 California Private Securities Reform Act of 1995, the Securities Act of 1933, and the Securities
18 and Exchange Act of 1934, Section 10b-5.” FAC, ¶ 64. Plaintiff, however, fails to identify
19 with particularity the provisions of those Acts that Defendants are alleged to have violated, or
20 how each Defendant is alleged to have violated such provisions. Under Twombly, a plaintiff
21 must “give the defendant fair notice of what the ... claim is and the grounds upon which it
22 rests.” 550 U.S. at 555 (internal quotations and citation omitted). Plaintiff has entirely failed
23 to provide such fair notice with her Sixth Cause of Action. Moreover, Plaintiff has failed to
24 provide any meaningful argument to the contrary in her opposition; yet again, she simply
25 requests leave to amend her claim. Plf.’s Opp. at 5.

26 As such, Gomez and AFC’s motion to dismiss Plaintiff’s claim for violation of
27 securities laws and California blue sky laws (Sixth Cause of Action) is GRANTED with leave
28 to amend.

1 **F. CALIFORNIA BUSINESS & PROFESSIONS CODE §§ 17200, ET SEQ. (SEVENTH**
2 **CAUSE OF ACTION)**

3 “To state a claim for unfair competition pursuant to California Business and Professions
4 Code § 17200 (Section 17200), a ‘plaintiff must establish that the practice is either unlawful
5 (i.e., is forbidden by law), unfair (i.e., harm to victim outweighs any benefit) or fraudulent (i.e.,
6 is likely to deceive members of the public).’” Sonoma Foods, Inc. v. Sonoma Cheese Factory,
7 LLC, 634 F. Supp. 2d 1009, 1022 (N.D. Cal. 2007) (quoting Albillo v. Intermodal Container
8 Services, Inc., 114 Cal.App.4th 190, 206 (2003)).

9 As Plaintiff concedes in her opposition, her Section 17200 claim is predicated on the
10 other claims asserted in her FAC, and she has provided no additional argument against
11 dismissal of this claim. Plf.’s Opp. at 5-6; FAC ¶ 76.² Thus, Plaintiff’s Section 17200 claim
12 (Seventh Cause of Action) is DISMISSED with leave to amend.

13 **VI. CONCLUSION**

14 For the foregoing reasons,

15 IT IS HEREBY ORDERED THAT:

16 1. Legent’s Motion to Dismiss is GRANTED. Plaintiff’s First through Seventh
17 Causes of Action as against Legent are dismissed with leave to amend.

18 2. Gomez and AFC’s Motion to Dismiss Plaintiff’s First, Second, Fourth, Sixth,
19 and Seventh Causes of Action is GRANTED; these causes of action are dismissed as against
20 Gomez and AFC with leave to amend.

21 3. Gomez and AFC’s Motion to Dismiss Plaintiff’s Third Cause of Action (Breach
22 of Fiduciary Duty) and Fifth Cause of Action (Negligence) is DENIED.

23 4. Plaintiff shall have twenty-one (21) days from the date this Order is filed to file a
24 second amended complaint. If Plaintiff timely amends her pleading, Defendants shall respond
25 consistent with the Federal Rules of Civil Procedure.

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28 ² Nor has Plaintiff argued, or provided any authority to indicate, that allegations relating
to her breach of fiduciary duty or negligence claims against Gomez and AFC – the only claims
to withstand their motion to dismiss – can support a Section 17200 claim.

1 5. The December 14, 2010 hearing on Defendant's Motions to Dismiss is
2 VACATED.

3 6. The December 14, 2010 Case Management Conference is CONTINUED; a
4 telephonic Case Management Conference is scheduled in this matter for **April 7, 2011 at 2:45**
5 **p.m.** The parties shall meet and confer prior to the conference and shall prepare a joint Case
6 Management Conference Statement which shall be filed no later than ten (10) days prior to the
7 Case Management Conference that complies with the Standing Order for All Judges of the
8 Northern District of California and the Standing Order of this Court. Plaintiff shall be
9 responsible for filing the statement as well as for arranging the conference call. All parties
10 shall be on the line and shall call (510) 637-3559 at the above indicated date and time.

11 7. This Order terminates Dockets 15 and 16.

12 IT IS SO ORDERED.

13 Dated: December 13, 2010


SAUNDRA BROWN ARMSTRONG
United States District Judge

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