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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

THE RICHARD MUSGRAVE BYPASS  
TRUST, BY HARRY D. KRAUSE,  
TRUSTEE,

Plaintiff,

v.

PEGGY B MUSGRAVE, et al.,  
Defendants.

Case No. 15-CV-02280-LHK

**ORDER GRANTING MOTION TO  
DISMISS**

Re: Dkt. No. 16

Defendants Dennis Book (“Book”) and Book & Book, LLP (collectively, the “Book Defendants”) have filed a motion to dismiss Counts 2, 14, 15, 16, and 17 of Plaintiff’s Complaint as to the Book Defendants. ECF No. 16. Having considered the parties’ submissions, the relevant law, and the record in this case, the Court GRANTS the Book Defendants’ motion.

**I. BACKGROUND**

**A. Factual Background**

Plaintiff The Richard Musgrave Bypass Trust (the “Bypass Trust”) brings this case through its current trustee, Harry D. Krause (“Krause”), for breaches of fiduciary duty, breaches of trust, conversion, and unjust enrichment. Complaint, ECF No. 1 (“Compl.”), ¶ 1. The Complaint brings causes of action against Peggy Musgrave, a former trustee of the Bypass Trust; Pamela Clyne, a

1 former trustee of the Bypass Trust; Dennis Book, the estate planning attorney who drafted the trust  
2 documents for the Bypass Trust and Peggy Musgrave’s former attorney in her capacity as trustee  
3 of the Bypass Trust; Book & Book LLP, the law firm of which Dennis Book is a principal; and  
4 Does 1 through 10.

5 This action concerns the creation of the Bypass Trust following the death of Richard  
6 Musgrave and the subsequent administration of the Bypass Trust. The Court briefly summarizes  
7 the history of the Bypass Trust, as alleged in the Complaint.

8 **1. The Richard and Peggy Musgrave Revocable Trust**

9 Richard and Peggy Musgrave were married in 1967. Compl. ¶ 19. Peggy had three  
10 children from a prior marriage: Pamela Richman (now Pamela Clyne), Roger Richman, and  
11 Thomas Richman. *Id.* ¶ 20. Richard did not have any children, but he did have a close  
12 relationship with his nephew Harry Krause, who considered Richard “a surrogate father.” *Id.*  
13 ¶¶ 20-21, 23-24.

14 In early 2002, Richard and Peggy Musgrave sought estate planning services from Book to  
15 arrange how their estate would be distributed upon the death of each spouse. *Id.* ¶ 26. The  
16 Musgraves had four goals for their estate planning: “to (1) leave the survivor with use of the estate  
17 to meet her (his) needs, (2) to keep the format of percentage distribution of bequests at second  
18 death, (3) to take advantage of both exemptions, and (4) to have our family lawyers [Harry Krause  
19 and Pamela Clyne’s husband James Clyne] serve as trustees but to see the details of bequests at  
20 second death only.” *Id.* At the time, the Musgraves prepared a “Summary of Finances” that  
21 estimated that Richard had assets worth approximately \$1,430,000 in his name, plus the right to  
22 approximately \$60,000 per year from Richard’s pensions so long as either he or Peggy remained  
23 alive. *Id.* ¶ 28-29. The Summary of Finances estimated that Peggy had assets worth  
24 approximately \$1,038,000 in her name. *Id.* ¶ 30-31. The Summary of Finances indicated that the  
25 parties had jointly-held real estate in Vermont and Santa Cruz valued at \$173,600 and \$300,000,  
26 respectively. *Id.* ¶ 33.

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1                                   **a. The Transfer of Assets to the Richard and Peggy Musgrave Revocable Trust**

2                   In early 2002, Book prepared a “Declaration of Trust,” a “Marital Property Declaration,”  
3                   and a “Comprehensive Transfer Agreement” for the Musgraves, all of which the Musgraves  
4                   executed in 2002. *Id.* ¶ 36, Ex. 1. The Declaration of Trust provided for a revocable trust, The  
5                   Richard and Peggy Musgrave Revocable Trust (“the Trust”), which would contain all of the  
6                   couple’s assets except “tax favored assets on which recognition of income has been deferred  
7                   including but not limited to IRAs, Roth IRAs, qualified plans under IRC § 401(a), tax sheltered  
8                   annuities, and nonqualified deferred compensation.” *Id.* ¶ 37-38, Ex. 1. In the Comprehensive  
9                   Transfer Document, the Musgraves effected the transfer of “any and all properties of all kinds,  
10                  whether presently owned or hereinafter acquired (regardless of the names by which acquired)” to  
11                  the Trust, except for the Musgraves’ “[t]ax-favored assets on which recognition of income has  
12                  been deferred.” *Id.* ¶ 52. In the Marital Property Declaration, each of the Musgraves transmuted  
13                  all of their separate property to community property. *Id.* ¶ 50-51.

14                  The Complaint alleges that the only assets listed in the Summary of Finances that qualified  
15                  for the “tax deferred” exclusion from transfer to the Trust were IRAs held by Richard, then worth  
16                  \$45,035, and IRAs held by Peggy, then worth \$206,626. *Id.* ¶ 39. Book advised the Musgraves  
17                  that these “Pensions, Profit Sharing, Benefits, IRS and similar types of retirement accounts”  
18                  “should name each other as primary beneficiary in order to preserve maximum tax flexibility” and  
19                  that the “Trust should be named as the secondary beneficiary.” *Id.* ¶ 40. The Complaint alleges  
20                  that the Musgraves followed Book’s advice for these assets. *Id.* The Complaint additionally  
21                  alleges that Peggy had an AIG annuity that was not included in her “tax deferred” IRA. *Id.* ¶ 39.

22                  Book advised the Musgraves to name the trustee of the Richard and Peggy Musgrave  
23                  Revocable Trust as the primary beneficiary of their life insurance policies, with each of the  
24                  Musgraves listing the other spouse as the secondary beneficiary. *Id.* ¶ 53. The Complaint alleges  
25                  that the Musgraves followed Book’s advice for their life insurance policies. *Id.* ¶ 54.

26                                   **b. Provisions in the Trust for the Death of the Musgraves**

27                  The Declaration of Trust provided that:

1 1. Upon the death of the first spouse, the Trustee(s) shall distribute \$50,000.00  
2 each to PAMELA CLYNE, ROGER RICHMAN, THOMAS RICHMAN, and  
3 HARRY CRAUSE [sic; Krause]. In the event any of the aforementioned do not  
survive the first spouse to die, their gift shall lapse.

4 . . . If Richard is the first to die, the Trustee (s) shall distribute the sum of  
\$20,000.00 to Harvard University . . . .

5 2. The surviving trustor's share of the net proceeds of this trust shall remain in the  
6 living trust with the surviving trustor as primary trustee and primary beneficiary.  
7 Debts of decedent-trustor, debts of this trust, and expenses of the last illness and  
8 funeral expenses of the decedent-trustor shall be paid from decedent-trustor's  
9 share. After said expenses are paid, our trustee(s) shall divide the decedent-  
10 trustor's share of net proceeds of this living trust into separate shares, hereinafter  
11 referred to as the Marital Deduction Share and the Non-Marital Share. Our  
trustee(s) may divide community property in a non pro rata manner and shall take  
into account any written agreement between the trustor [sic] providing for a non  
pro rata division of their community property and the effect of such agreement on  
community property passing outside the trust. The trustee(s) shall have the  
discretion to select the assets to be allocated, but such assets as are selected shall  
be valued as hereinafter provided.

12 *Id.* ¶ 41. The Declaration of Trust provided that the Non-Marital Share of the assets would then be  
13 used to fund an irrevocable "Bypass Trust." *Id.* ¶ 44.

14 The surviving spouse would become the sole trustee of both the original Trust and the  
15 Bypass Trust, with Harry Krause and James Clyne as the co-successor trustees of both trusts. *Id.*  
16 ¶ 45-46. The Declaration of Trust provided that "[t]he trustee shall pay to or use for the benefit of  
17 the surviving trustor so much of the net income and principal of the Bypass Trust as the trustee  
18 shall deem necessary for the health, education, maintenance, or support of the surviving trustor,  
19 taking into consideration all other means available to the surviving trustor for such purposes from  
20 all sources known to our trustee." *Id.* ¶ 97.

21 The Bypass Trust would be distributed to the beneficiaries named by the first spouse to die  
22 upon the death of the surviving spouse. *Id.*, Ex. 1, Third Amendment. In the Third Amendment to  
23 the Trust, Richard specified that his beneficiaries would be: (1) Doctors Without Borders USA, to  
24 receive 10% of his share of the trust; (2) Alzheimer's Disease Research (now Brightfocus), to  
25 receive 10%; (3) Harry Krause, to receive 20%; (4) Harry Krause's three siblings—Beate  
26 Eisenfuehr, Angela Feddersen, and Detlev Dorendorf—each to receive 12%; (5) Harry Krause's  
27 three sons—Philip, Thomas, and Peter Krause—each to receive 8%. *Id.* ¶ 55.

1 Richard Musgrave passed away in early 2007, leaving Peggy as the surviving spouse. *Id.*  
2 ¶ 55-56.

3 **2. The Creation of the Bypass Trust**

4 **a. Events Involving the AIG Annuity, the MetLife Insurance Policy, and the**  
5 **Riversource Insurance Policy**

6 Upon Richard’s death in 2007, the Musgraves’ investment advisor faxed Book a list of the  
7 couple’s assets at the time of Richard’s death. *Id.* ¶ 56. The list indicated that the Trust included  
8 an AIG annuity, valued at \$560,392.49, and a MetLife insurance policy, valued at \$80,861.48. *Id.*

9 Shortly thereafter, Peggy sold the AIG annuity and used the proceeds to purchase an  
10 Allstate annuity of approximately the same value. *Id.* ¶ 58. She purchased the Allstate annuity in  
11 her own name and listed as the primary beneficiary “The Survivor’s Trust of the Richard and  
12 Peggy Musgrave Trust 04/03/2002,” which would be Peggy’s resulting trust after the Richard and  
13 Peggy Musgrave Revocable Trust was divided to create Richard’s Bypass Trust. *Id.*

14 Around the same time, the MetLife insurance policy was sold and a second MetLife  
15 insurance policy naming different beneficiaries was purchased in its place. *Id.* ¶ 56, 59-62. The  
16 Complaint does not specify who sold the MetLife insurance policy. *See id.*

17 In early 2007, Peggy and Book both contacted the Riversource Insurance company  
18 regarding a life insurance policy in Richard’s name. *Id.* ¶ 65-66. The Riversource insurance  
19 policy was valued at \$82,105 at the time of Richard’s death and named the Trust as a beneficiary.  
20 *Id.* ¶ 65. On behalf of the Trust, Book then received \$82,105 from the Riversource Insurance  
21 company. *Id.* ¶ 66.

22 **b. Events Involving the Trust Beneficiaries**

23 In May 2007, Book sent checks for \$50,000 each to Roger Richman, Pamela Clyne,  
24 Thomas Richman, and Harry Krause, and a check for \$20,000 to Harvard University. *Id.* ¶ 68.  
25 Harry Krause wrote a letter to Book on June 4, 2007 confirming receipt of the \$50,000 check and  
26 asking for any information about Richard Musgrave’s estate to which Harry Krause was entitled.  
27 *Id.* ¶ 69. Krause repeated his request on July 3, 2007 and July 20, 2007. *Id.* ¶ 70. Book

1 responded to Krause on July 24, 2007 and sent Krause a copy of the Declaration of Trust,  
2 including the Third Amendment. *Id.* ¶ 71. Neither Book, Peggy Musgrave, nor Pamela Clyne  
3 alerted either of the charitable beneficiaries named in the Third Amendment of their status as  
4 beneficiaries of Richard’s estate. *Id.* ¶ 73. Richard Musgrave’s will was never filed with probate.  
5 *Id.* ¶ 90.

6 **c. The Property Division**

7 Richard’s Bypass Trust was funded on about March 8, 2008. *Id.* ¶ 75. The funding  
8 allocated to the Bypass Trust was determined as follows:

9 First, the value of the assets deemed within the Richard and Peggy Musgrave Revocable  
10 Trust at the time of Richard’s death was determined to be \$2,678,545. *Id.* ¶ 76. This amount was  
11 divided in half to obtain Richard’s half-share of the Trust, \$1,339,273. *Id.* The amount of  
12 Richard’s half-share was determined to be equivalent to 72% of the Trust’s “stock” holdings at the  
13 time of his death. *Id.* “Stock” holdings included “everything other than cash, royalties, or real  
14 estate.” *Id.* The Bypass Trust was then funded with 72% of the stock holdings, worth  
15 \$1,514,466.00 at the date of the property division in 2008. *Id.* The full amount of the  
16 distributions made to Peggy’s children, Krause, and Harvard (\$220,000); Richard’s memorial  
17 service expenses (\$10,382); the attorney’s fees associated with the property division (\$20,000);  
18 and appraisal fees (\$750) were deducted from the Bypass Trust. *Id.* This left the Bypass Trust  
19 with \$1,263,334. *Id.*

20 The remainder of the funds from the Richard and Peggy Musgrave Revocable Trust at the  
21 time of the property division became Peggy’s share of the Trust. *Id.* ¶ 77. Peggy’s share of the  
22 Trust was worth an estimated \$1,566,626 at the time of the property division. *Id.* Additionally,  
23 several assets were considered to be assets outside the Trust and were not considered when  
24 determining how to allocate funds to the Bypass Trust. *Id.* ¶ 81-82. These assets were: (1) IRAs  
25 worth \$245,835; (2) annuities worth \$560,392; (3) life insurance worth \$82,105; and (4)  
26 personalty worth \$62,500. *Id.* ¶ 82. The Complaint suggests that the \$82,105 in life insurance  
27 was the proceeds of the Riversource insurance policy and that the \$560,392 in annuities was the

1 Allstate annuity purchased with the proceeds of the AIG annuity. *Id.* ¶ 84-85. Finally, Peggy held  
2 several educational accounts in her name on behalf of her grandchildren and great-grandchild that  
3 were not considered when determining how to fund the Bypass Trust. *Id.* ¶ 95. These accounts  
4 were worth a total of \$185,943.76. *Id.*

5 The Complaint alleges that the Allstate annuity, the proceeds of the Riversource insurance  
6 policy, and the Musgraves’ personalty should have been deemed Trust assets at the time of the  
7 property division. *Id.* ¶¶ 83-85, 92-94. The Complaint further alleges that the Bypass Trust was  
8 underfunded because it was not compensated for Richard’s half-share of all assets held outside the  
9 Trust, including the IRAs, the annuities, the life insurance, the personalty, and the educational  
10 accounts. *Id.* ¶ 86-88, 95. Additionally, the Complaint alleges that the Bypass Trust was  
11 underfunded because Peggy’s half-share of the Trust assets exceeded Richard’s half-share prior to  
12 deductions for expenses by more than \$52,000; and because at least the \$220,000 in distributions  
13 to Peggy’s children, Harry Krause, and Harvard should have been divided between the Bypass  
14 Trust and Peggy’s surviving trust instead of charged solely to the Bypass Trust. *Id.* ¶ 78-79.

15 **3. The Bypass Trust under Peggy Musgrave’s Trusteeship**

16 Peggy Musgrave was the original trustee of the Bypass Trust. *Id.* ¶¶ 2, 97, 102. A  
17 “Memorandum of Allocation” produced by Book contemporaneous with the property division, *id.*  
18 ¶ 80, stated that the surviving spouse, in this case Peggy, was entitled to “quarter-annual or more  
19 frequent” distributions of “[s]uch amount of net income from the Bypass Trust, as needed for the  
20 health, maintenance and support in accordance with his or her accustomed standard of living.” *Id.*  
21 ¶ 96. The Complaint alleges that this provision in the Memorandum of Allocation contradicted  
22 the Declaration of Trust, which entitled Peggy to income from the Bypass Trust only if “necessary  
23 for the health, education, maintenance, or support of the surviving trustor, taking into  
24 consideration all other means available to the surviving trustor for such purposes from all sources  
25 known to our trustee.” *Id.* ¶¶ 96-98.

26 In late 2008, Peggy mentioned to Krause that Peggy no longer wished to serve as Trustee  
27 of the Bypass Trust and offered to resign in favor of Krause. *Id.* ¶ 102. Subsequently, Krause

1 received a statement of the Bypass Trust’s holdings in November 2008 that showed that Peggy  
2 was paying herself the income of the Bypass Trust on a quarterly basis. *Id.* ¶ 103. Harry Krause  
3 consulted with his son Thomas Krause, who is also a lawyer, and the two of them concluded that  
4 Peggy was not entitled to the Bypass Trust income unless necessary, as defined in the Declaration  
5 of Trust. *Id.* ¶ 104.

6 From January 2009 through March 2009, Harry Krause and Peggy exchanged several  
7 letters in which they disputed Peggy’s entitlement to income from the Bypass Trust. *Id.* ¶ 106.  
8 Krause additionally sent a letter to Book on January 29, 2009 explaining the alleged income  
9 discrepancy. *Id.* ¶ 105. Book responded to Krause on April 3, 2009, and agreed with Krause that  
10 Peggy was not entitled to collect the Bypass Trust income on an unrestricted basis. *Id.* ¶ 107.  
11 Book’s letter to Krause further informed Krause that Peggy had decided not to resign as Trustee of  
12 the Bypass Trust. *Id.*

13 In December 2009, Peggy informed Krause that Peggy had discussed the trusts with James  
14 Clyne (Pamela Clyne’s husband, also an attorney); that Peggy had fired Book and retained new  
15 counsel; and that Peggy’s new attorney had redrafted Peggy’s survivor’s trust. *Id.* ¶ 110; *see also*  
16 ECF No. 17 ¶ 1 (Book Declaration, stating that Book ceased representing Peggy Musgrave in  
17 2009). The Complaint alleges that Krause was not named as a co-successor trustee of the  
18 redrafted survivor’s trust. Compl. ¶ 112.

19 In August 2013, Peggy appointed her daughter, Pamela Clyne, as co-trustee of the Bypass  
20 Trust without notifying the beneficiaries of the Bypass Trust of the appointment. *Id.* ¶ 114. The  
21 appointment was prepared by attorney Minda Parrish, who received \$1,975 out of the Bypass  
22 Trust in compensation. *Id.*

23 In early 2014, Pamela Clyne, Peggy Musgrave, and Harry Krause discussed a possible  
24 agreement to pay Peggy Musgrave a lump sum from the Bypass Trust in exchange for Peggy  
25 Musgrave relinquishing any interest she had in the interest and principal of the Bypass Trust, thus  
26 permitting the Bypass Trust to be dissolved and distributed. *Id.* ¶¶ 116-22. Pamela Clyne, Peggy  
27 Musgrave, and Harry Krause planned to discuss the proposed agreement with Minda Parrish on



1 April 17, 2014. *Id.* ¶ 122. On April 17, 2014, Pamela Clyne informed Krause that Minda Parrish  
2 was not willing to dissolve the Bypass Trust but that instead trusteeship of the Bypass Trust could  
3 be passed solely to Krause. *Id.* ¶ 124. During a conference call the same day between Minda  
4 Parrish, Pamela Clyne, Harry Krause, and Thomas Krause, Parrish reiterated that she was  
5 unwilling to act as the attorney in the dissolution of the Bypass Trust. *Id.* ¶ 125.

6 On May 21, 2014, Parrish sent Harry Krause a letter indicating that Peggy Musgrave had  
7 relinquished her interest in the trust; that Peggy Musgrave and Pamela Clyne had both resigned as  
8 trustees; that James Clyne had “declined to act;” and that Peggy Musgrave had paid herself  
9 \$44,371.52 from the Bypass Trust as trustee fees for the period of 2007-2014. *Id.* ¶ 131. The  
10 letter gave Harry Krause the opportunity to accept the trusteeship of the Bypass Trust, which  
11 Krause accepted. *Id.* ¶¶ 131-32.

12 **4. The Bypass Trust under Harry Krause’s Trusteeship**

13 In June 2014, Krause wrote to Parrish requesting documents related to the Bypass Trust.  
14 *Id.* ¶¶ 134-36. In response, Parrish sent Krause “documents purporting to be her complete file on  
15 the matter, as well as files she had received from Dennis Book.” *Id.* ¶ 137. The Complaint alleges  
16 that the first time Krause received “any information about the March 2008 property division” was  
17 when he received the files from Parrish in the summer of 2014. *Id.* ¶ 138. Harry Krause asked his  
18 son, Thomas Krause, to review the files. *Id.*

19 On September 20, 2014, Thomas Krause delivered a memo to Harry Krause regarding the  
20 documents in the Bypass Trust file and detailing alleged errors in funding the Bypass Trust. *Id.*  
21 ¶ 139, Ex. 2 (the September 20, 2014 memo). Harry Krause sent a copy of the September 20  
22 memo together with attachments, including a list of requested documents related to the Bypass  
23 Trust, to Minda Parrish and Peggy Musgrave on September 22, 2014. *Id.* ¶ 140, Ex. 2. Parrish  
24 responded that she no longer represented Peggy Musgrave. *Id.* ¶ 141.

25 Thomas Krause then sent the September 20 memo and its attachments to Pamela Clyne on  
26 October 5, 2014, and suggested that the parties jointly contact Book to discuss the memo. *Id.*  
27 ¶ 142. Thomas Krause and James Clyne had a conversation about the September 20 memo and

1 began an email exchange regarding the Bypass Trust. *Id.* ¶¶ 143, 145-46. Thomas Krause, James  
2 Clyne, attorney Chris McPhillips, and Pamela Clyne continued to discuss the Bypass Trust  
3 through email exchanges and phone calls through the end of December 2014. *Id.* ¶¶ 145-46, 148-  
4 50, 152-54, 156-62, 164, 167-69. Throughout these conversations, Thomas Krause repeatedly  
5 requested documents from Peggy Musgrave and Pamela Clyne but did not receive the requested  
6 documents. *Id.* ¶¶ 157-59, 161-63.

7 The Complaint alleges that sometime in the fall of 2014, despite Thomas Krause’s  
8 suggestion that the parties contact Book together, Pamela Clyne “contacted Mr. Book unilaterally”  
9 and “gave Dennis Book false and/or misleading information about Richard’s heirs and  
10 beneficiaries.” *Id.* ¶ 144.

11 On November 10, 2014, Harry Krause wrote a letter to Book asking Book to send Krause a  
12 copy of Richard Musgrave’s will and a response to the September 20 memo. *Id.* ¶ 147. Krause  
13 requested a response by December 1, 2014. *Id.* After Book did not respond by December 1,  
14 Thomas Krause left a voicemail for Book on December 3, 2014, and sent an email to Book and  
15 Book’s law partners on December 4, 2014. *Id.* ¶ 151. On December 8, 2014, Book provided  
16 Thomas Krause with a copy of Richard Musgrave’s will. *Id.* ¶ 155. Book agreed to participate in  
17 a single interview about the Bypass Trust with Krause’s then-attorney, on condition that neither  
18 Thomas nor Harry Krause attend the interview. *Id.* On January 27, 2015, Book met with  
19 Lawrence Brenner, Harry Krause’s then-attorney in Krause’s capacity as Trustee for the Bypass  
20 Trust. *Id.* ¶ 172. In that conversation, Book “acknowledged that the Riversource insurance  
21 proceeds should not have been removed from the trust, and acknowledged the Bypass Trust’s  
22 arguments as to the personalty and at least \$200,000 of the \$220,000 distributions.” *Id.* Book  
23 maintained that the annuity and Peggy’s IRA were properly Peggy’s separate property. *Id.* After  
24 this interview, Book failed to respond to further requests for documents and declined to engage in  
25 further discussions with Krause. *Id.*

26 In January 2015, Stephen Picone wrote to Harry Krause to inform Krause that Picone was  
27 Peggy Musgrave’s attorney. *Id.* ¶ 170. Krause responded to Picone and asked Picone for

1 documents related to the Bypass Trust. *Id.* ¶ 171. Harry and Thomas Krause reiterated the  
2 requests for documents to Picone several times throughout February 2015. *Id.* ¶ 173. On March  
3 10, 2015, Picone sent a letter to Harry Krause asking for “a precise list of the documents” that  
4 Krause sought, to which Harry and Thomas Krause replied on March 17, 2015. *Id.* ¶ 174.  
5 Following a conversation about document production between Picone, Thomas Krause, Harry  
6 Krause, Harry Krause’s attorney Erin Kolko, and the Musgraves’ investment adviser Kevin Mize,  
7 Thomas Krause received a letter from Mize attaching 24 pages of documents whose release had  
8 been authorized by Peggy Musgrave and Pamela Clyne. *Id.* ¶ 177-78. As of the time of the filing  
9 of the Complaint, Harry Krause asserts that he has not received any other documents from Peggy  
10 Musgrave, Pamela Clyne, or their representatives in response to the September 20 memo and  
11 Krause’s other efforts to obtain documents. *Id.* ¶ 179.

12 **B. Procedural History**

13 Harry Krause filed suit on behalf of the Bypass Trust in Krause’s capacity as Trustee of the  
14 Bypass Trust on May 20, 2015. ECF No. 1. The Complaint asserts 17 causes of action related to  
15 the funding of the Bypass Trust and Krause’s efforts to obtain documents related to the Bypass  
16 Trust. *Id.* Pamela Clyne and Peggy Musgrave filed their Answer to the Complaint on June 30,  
17 2015. ECF No. 14. The case was assigned to the undersigned judge on July 30, 2015. ECF No.  
18 28.

19 On July 14, 2015, Pamela Clyne and Peggy Musgrave filed a Third Party Complaint  
20 against Minda Parrish. ECF No. 24. On September 11, 2015, Minda Parrish filed a motion to  
21 dismiss. ECF No. 39. Pamela Clyne and Peggy Musgrave did not oppose Parrish’s motion to  
22 dismiss and instead filed a First Amended Third Party Complaint on October 16, 2015. ECF Nos.  
23 42, 49. The Court accordingly denied Parrish’s motion to dismiss as moot on October 29, 2015.  
24 ECF No. 64.

25 On July 6, 2015, the Book Defendants filed the instant motion to dismiss. ECF No. 16.  
26 Krause filed an opposition on July 20, 2015. ECF No. 29. Krause filed a corrected opposition on  
27 July 21, 2015. ECF No. 30. The Book Defendants filed a reply on July 31, 2015. ECF No. 33.

1 Also pending in this case is Krause’s motion for partial summary judgment against Pamela  
2 Clyne and Peggy Musgrave, filed September 28, 2015 and set for hearing on January 28, 2016.  
3 ECF No. 41. Pamela Clyne and Peggy Musgrave filed their response on October 20, 2015. ECF  
4 No. 51. Pursuant to the parties’ stipulation, Krause’s reply is due November 17, 2015. ECF No.  
5 63.

6 **II. LEGAL STANDARD**

7 **A. Federal Rule of Civil Procedure 12(b)(6)**

8 Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint  
9 for failure to state a claim upon which relief can be granted. Such a motion tests the legal  
10 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In considering  
11 whether the complaint is sufficient, the Court must accept as true all of the factual allegations  
12 contained in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). However, the Court need  
13 not accept as true “allegations that contradict matters properly subject to judicial notice or by  
14 exhibit” or “allegations that are merely conclusory, unwarranted deductions of fact, or  
15 unreasonable inferences.” *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)  
16 (citation omitted). While a complaint need not allege detailed factual allegations, it “must contain  
17 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”  
18 *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim  
19 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
20 reasonable inference that the defendant is liable for the misconduct alleged. The plausibility  
21 standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that  
22 a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (citation omitted).

23 **B. Leave to Amend**

24 If the court concludes that the complaint should be dismissed, it must then decide whether  
25 to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend  
26 “shall be freely given when justice so requires,” bearing in mind “the underlying purpose of Rule  
27 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or technicalities.” *Lopez*

28

1 v. *Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (citation omitted). Nonetheless, a district  
2 court may deny leave to amend a complaint due to “undue delay, bad faith or dilatory motive on  
3 the part of the movant, repeated failure to cure deficiencies by amendments previously allowed,  
4 undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of  
5 amendment.” See *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008).

6 **III. DISCUSSION**

7 The Book Defendants move to dismiss Counts 2, 14, 15, 16, and 17 as to the Book  
8 Defendants under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which  
9 relief can be granted. Count 2 is a claim against Book and Peggy Musgrave for breach of  
10 fiduciary duty as to individual assets in the Richard and Peggy Musgrave Revocable Trust.  
11 Compl. ¶¶ 189-97. Count 14 is a claim against the Book Defendants for aiding and abetting Peggy  
12 Musgrave’s breach of fiduciary duty, breach of trust, and conversion. *Id.* ¶¶ 250-52. Count 15 is a  
13 claim against Book for aiding and abetting Pamela Clyne’s breaches of fiduciary duty and failure  
14 to stop breach of trust. *Id.* ¶¶ 253-54. Count 16 is a claim against the Book Defendants for legal  
15 malpractice related to the funding of the Bypass Trust. *Id.* ¶ 255-60. Count 17 is a claim against  
16 the Book Defendants for violation of California Probate Code § 8200 for failure to file Richard  
17 Musgrave’s will in probate. *Id.* ¶¶ 261-65.

18 The Book Defendants argue that Counts 2, 14, 16, and 17 are untimely as to the Book  
19 Defendants, and that Krause has not alleged the necessary elements of Count 15. The Court  
20 begins by addressing the statute of limitations for Counts 2, 14, 16, and 17 together, and then  
21 addresses whether Count 15 states a claim.

22 **A. Counts 2, 14, 16, and 17**

23 The Book Defendants move to dismiss Counts 2, 14, 16, and 17 as to the Book Defendants  
24 as untimely. ECF No. 16 at 4-8. The Book Defendants argue that these claims are subject to the  
25 statute of limitations in California Code of Civil Procedure § 340.6(a) because the claims allege  
26 wrongdoing by the Book Defendants in the course of performing legal services for the Bypass  
27 Trust. California Code of Civil Procedure § 340.6(a) provides:

28

1 (a) An action against an attorney for a wrongful act or omission, other than for  
2 actual fraud, arising in the performance of professional services shall be  
3 commenced within one year after the plaintiff discovers, or through the use of  
4 reasonable diligence should have discovered, the facts constituting the wrongful  
5 act or omission, or four years from the date of the wrongful act or omission,  
6 whichever occurs first. . . . Except for a claim for which the plaintiff is required to  
7 establish his or her factual innocence, in no event shall the time for  
8 commencement of legal action exceed four years except that the period shall be  
9 tolled during the time that any of the following exist:

- 10 (1) The plaintiff has not sustained actual injury.
- 11 (2) The attorney continues to represent the plaintiff regarding the specific  
12 subject matter in which the alleged wrongful act or omission occurred.
- 13 (3) The attorney willfully conceals the facts constituting the wrongful act  
14 or omission when such facts are known to the attorney, except that this  
15 subdivision shall toll only the four-year limitation.
- 16 (4) The plaintiff is under a legal or physical disability which restricts the  
17 plaintiff's ability to commence legal action.

18 The Book Defendants contend that the statute of limitations on Counts 2, 14, 16, and 17  
19 began to run no later than 2009 and that Krause has not pled the applicability of any of the tolling  
20 provisions. Thus, the Book Defendants argue that the statute of limitations expired no later than  
21 2013—four years after the claims accrued.

22 Krause does not dispute that California Code of Civil Procedure § 340.6(a) provides the  
23 statute of limitations for Counts 2, 14, 16, and 17. However, Krause argues that Counts 2, 14, 16,  
24 and 17 are within California Code of Civil Procedure § 340.6(b), which provides:

25 (b) In an action based upon an instrument in writing, the effective date of which  
26 depends upon some act or event of the future, the period of limitations provided for  
27 by this section shall commence to run upon the occurrence of that act or event.

28 Krause contends that Counts 2, 14, 16, and 17 are based upon an instrument in writing  
whose effective date depends upon Peggy Musgrave's future death. ECF No. 30 at 7-9. Thus,  
Krause argues that the statute of limitations for Counts 2, 14, 16, and 17 has not yet begun to run.

Alternately, Krause argues that the statute of limitations was tolled under § 340.6(a)  
because (1) Krause has not suffered actual injury, (2) Krause was under a "legal disability" prior  
to his appointment as trustee, and (3) the Book Defendants willfully concealed their wrongdoing.  
ECF No. 30 at 9-19.

The Court first addresses the applicability of § 340.6(b). Because the Court concludes that  
§ 340.6(b) does not apply, the Court then turns to whether Krause has alleged any of the tolling

1 provisions of § 340.6(a).

2 **1. California Code of Civil Procedure § 340.6(b)**

3 California Code of Civil Procedure § 340.6(b) applies only to actions “based upon an  
4 instrument in writing, the effective date of which depends upon some act or event in the future.”  
5 Krause argues that the claims are based upon the 2002 Declaration of Trust. ECF No. 30 at 7.  
6 According to Krause, the 2002 Declaration of Trust will not become effective until Peggy  
7 Musgrave’s death because the 2002 Declaration of Trust provides that the proceeds of the Bypass  
8 Trust are to be distributed upon Peggy Musgrave’s death. *Id.* However, this runs contrary to  
9 California trust law.

10 Courts in California deem trusts effective upon transfer of assets into the trust. *See Estate*  
11 *of Powell v. Powell (“In re Estate of Powell”)*, 83 Cal. App. 4th 1434, 1438 (2000) (revocable  
12 *inter vivos* trust by two married settlors providing for distribution of trust assets upon the death of  
13 both settlors deemed effective when trust assets were made part of the trust); *Platt v. Wells Fargo*  
14 *Bank Am. Trust Co.*, 222 Cal. App. 2d 658, 670 (1963) (irrevocable trust deemed effective when  
15 trust assets were distributed to the trust). Even if the trust provides for the distribution of the trust  
16 assets upon the death of one or all of the settlors of the trust, the trust is still deemed effective  
17 when the trust is funded. *See In re Estate of Powell*, 83 Cal. App. 4th at 1438 (revocable *inter*  
18 *vivos* trust by two married settlors providing for distribution of trust assets upon the death of both  
19 settlors deemed effective when trust assets were made part of the trust).

20 In this case, Krause alleges that assets were transferred to the Richard and Peggy Musgrave  
21 Revocable Trust in 2002 upon execution of the Comprehensive Transfer Document. Compl. ¶ 52,  
22 Ex. 1. Krause alleges that assets were transferred to the Bypass Trust in 2008. *Id.* ¶ 75. Under  
23 California law, the Richard and Peggy Musgrave Revocable Trust became effective in 2002 and  
24 the Bypass Trust became effective in 2008. Because both trusts were effective in 2009, when the  
25 Book Defendants argue that the statute of limitations began to run, California Code of Civil  
26 Procedure § 340.6(b) does not delay the running of the statute of limitations.

27 Therefore, the Court analyzes the statute of limitations as to the Book Defendants for

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1 Counts 2, 14, 16, and 17 under California Code of Civil Procedure § 340.6(a).

2 **2. California Code of Civil Procedure § 340.6(a)**

3 Counts 2, 14, 16, and 17 all allege wrongdoing by the Book Defendants in the course of  
4 providing estate planning legal services to Richard and Peggy Musgrave and providing legal  
5 services to Peggy Musgrave in her capacity as Trustee of the Bypass Trust. *See* Compl. ¶¶ 189-97  
6 (Count 2: breach of fiduciary duty in the distribution of assets to the Bypass Trust); 250-52 (Count  
7 14: aiding and abetting breach of fiduciary duty in distribution of assets to the Bypass Trust); 255-  
8 60 (Count 16: legal malpractice for errors made in the distribution of assets to the Bypass Trust);  
9 261-65 (Count 17: violation of Cal. Probate Code § 8200 for failure to deliver Richard Musgrave’s  
10 will to probate within 30 days of learning of Richard Musgrave’s death). The Book Defendants  
11 ceased representing Peggy Musgrave by December 2009. *Id.* ¶ 110. Thus all of the wrongful acts  
12 or omissions committed by the Book Defendants in their representation of Richard and Peggy  
13 Musgrave occurred prior to December 2009. California Code of Civil Procedure § 340.6(a)  
14 provides that the statute of limitations for all claims arising from the Book Defendants’ legal  
15 services expired no later than “four years from the date of the wrongful act or omission” unless one  
16 of four tolling provisions applies. Absent tolling, the statute of limitations for Counts 2, 14, 16,  
17 and 17 expired no later than December 2013.

18 Krause argues that the statute of limitations was tolled under § 340.6(a)(1) because Krause  
19 did not sustain actual injury prior to filing this lawsuit; under § 340.6(a)(4) because Krause was  
20 under a legal disability prior to becoming Trustee for the Bypass Trust; and under § 340.6(a)(3)  
21 because the Book Defendants willfully concealed their wrongdoing. The Court addresses each  
22 argument in turn.

23 **a. Actual Injury**

24 California Code of Civil Procedure § 340.6(a)(1) tolls the statute of limitations during the  
25 time that “[t]he plaintiff has not sustained actual injury.” Krause argues that this section should  
26 apply because Krause did not sustain actual injury prior to filing the lawsuit because he is only a  
27 contingent beneficiary under the Bypass Trust and thus is not yet entitled to any of the proceeds of

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1 the Bypass Trust. ECF No. 30 at 16-18.

2         Despite Krause’s argument in opposition to the motion to dismiss that Krause seeks  
3 damages as a contingent beneficiary of the Bypass Trust, *see* ECF No. 30 at 16-17, the Complaint  
4 does not include any causes of action brought on Krause’s behalf as a contingent beneficiary. *See*  
5 Compl. Instead, the Complaint alleges causes of action by Krause only in his capacity as Trustee  
6 of the Bypass Trust on behalf of the Bypass Trust itself. *See* Compl. Krause seeks damages from  
7 the Book Defendants to compensate the Bypass Trust for the alleged underfunding of the Bypass  
8 Trust in 2008. *See* Compl. at 50-54 (Prayer for Relief), ¶¶ f, o-p, r. Under section 340.6(a)(1), a  
9 plaintiff has sustained actual injury if “the plaintiff has sustained any damages compensable in an  
10 action, other than one for actual fraud, against an attorney for a wrongful act or omission arising in  
11 the performance of professional services.” *Jordache Enters., Inc. v. Brobeck, Phleger &*  
12 *Harrison*, 18 Cal. 4th 739, 751 (1998). The Bypass Trust sustained the alleged compensable  
13 damages from underfunding in 2008, so the Bypass Trust suffered an alleged actual injury in  
14 2008. *See Jordache Enters.*, 18 Cal. 4th at 751 (actual injury occurs where the plaintiff has  
15 sustained any compensable damages). Because the Bypass Trust, the named plaintiff in this case,  
16 sustained actual injury in 2008, the tolling provision of § 340.6(a)(1) does not apply.

17         To the extent Krause argues that there was no actual injury prior to Krause’s appointment  
18 as Trustee because Krause could not personally have brought this suit for compensable damages  
19 against the Book Defendants prior to his appointment as Trustee of the Bypass Trust, Krause is  
20 incorrect. The relevant question is not whether Harry Krause personally suffered actual injury  
21 because Harry Krause as an individual is not the plaintiff in this case. Rather, Harry Krause brings  
22 suit as Trustee on behalf of the Bypass Trust, and the Bypass Trust itself is the named plaintiff in  
23 the case. *See* Compl. Thus, the relevant injury is injury to the Bypass Trust, and the Bypass Trust  
24 suffered actual injury in 2008.

25         As to Krause’s argument that Krause could not bring this lawsuit prior to becoming  
26 Trustee, that argument is identical to Krause’s argument that he was under a legal disability prior  
27 to his appointment as Trustee. The Court now turns to whether Krause is entitled to tolling

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1 because of a legal disability.

2 **b. Legal Disability**

3 California Code of Civil Procedure § 340.6(a)(4) tolls the statute of limitations during the  
4 time that “[t]he plaintiff is under a legal or physical disability which restricts the plaintiff’s ability  
5 to commence legal action.” As previously discussed, the plaintiff in this case is not Krause in his  
6 individual capacity but The Richard Musgrave Bypass Trust. Krause advances no arguments for  
7 why the Bypass Trust was under a legal disability prior to Krause’s appointment as Trustee, *see*  
8 ECF No. 30 at 13-15, so the Bypass Trust is not entitled to tolling under § 340.6(a)(4).

9 Nonetheless, Krause argues that he was under a legal disability prior to becoming Trustee  
10 of the Bypass Trust in 2014 because, according to Krause, he could not file a lawsuit against the  
11 Book Defendants on behalf of the Bypass Trust in his capacity as a mere contingent beneficiary.  
12 ECF No. 30 at 13-15. As discussed above, Krause did not file this lawsuit in his capacity as a  
13 mere contingent beneficiary. Moreover, even if Krause had done so, Krause’s argument is based  
14 on a misunderstanding of California trust law.

15 California permits contingent beneficiaries of irrevocable trusts to bring suit on behalf of  
16 the trust. *Estate of Girdalin v. Girdalin* (“*In re Estate of Girdalin*”), 55 Cal. 4th 1058, 1069  
17 (2012). Specifically, the California Supreme Court has held that “a contingent beneficiary may  
18 petition the court subject only to the limitations provided in section 15800,” and “[n]othing in  
19 section 15800 limits the ability of beneficiaries to petition the court *after* the trust becomes  
20 irrevocable.” *Id.*; *see also* Cal. Prob. Code § 15800(a) (the person holding the power to revoke,  
21 not the beneficiary, has the rights afforded beneficiaries so long as the trust is revocable). The  
22 Bypass Trust in this case was irrevocable since its funding in 2008, so Krause could have sued on  
23 behalf of the Bypass Trust in his capacity as a contingent beneficiary and sought damages from the  
24 Book Defendants as early as 2008. *See* Cal. Prob. Code § 17200 (“[A] trustee or beneficiary of a  
25 trust may petition the court” in order to, *inter alia*, “(12) [c]ompel[] redress of a breach of the trust  
26 by any available remedy.”).

27 Indeed, California courts have repeatedly recognized that where, as Plaintiff alleges

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1 occurred here, an attorney participates in a trustee's breach of fiduciary duty or breach of trust, the  
2 trust beneficiaries may bring suit against the attorney. *See Stueve Bros. Farms, LLC v. Berger*  
3 *Kahn*, 222 Cal. App. 4th 303, 325-26 (2013) (attorney may be held liable by trust beneficiaries for  
4 participating in conspiracy to commit fraud, aiding and abetting fraud, and participating in  
5 breaches of fiduciary duty and trust); *Wolf v. Mitchell, Silberberg & Knupp*, 76 Cal. App. 4th 1030  
6 (1999) (attorney liable for participation in breach of trust); *Pierce v. Lyman*, 1 Cal. App. 4th 1093  
7 (1991) (attorney liable for participation in trustees' breach of fiduciary duty), *superseded by*  
8 *statute on other grounds as stated in Pavicich v. Santucci*, 85 Cal. App. 4th 382, 396 (2000).  
9 California courts have also held that a trust's intended beneficiaries may bring claims for legal  
10 malpractice against the trust's attorney. *See Osornio v. Weingarten*, 124 Cal. App. 4th 304, 338  
11 (2004) (concluding that beneficiaries of decedent's will could amend their complaint to assert a  
12 cause of action for malpractice against decedent's attorney because attorney could be held liable  
13 for malpractice to the beneficiaries); *Lombardo v. Huysentruyt*, 91 Cal. App. 4th 656 (2001)  
14 (holding that there were triable issues of fact in a legal malpractice case brought by individuals  
15 named as beneficiaries of an attempted amendment to a trust).

16 Therefore, contrary to Krause's assertion, Krause could have filed suit on behalf of the  
17 Bypass Trust for damage caused to the Bypass Trust in his capacity as a contingent beneficiary.  
18 Krause is not entitled to tolling under California Code of Civil Procedure § 340.6(a)(4).

19 **c. Willful Concealment**

20 California Code of Civil Procedure § 340.6(a)(3) tolls the statute of limitations during the  
21 time that "[t]he attorney willfully conceals the facts constituting the wrongful act or omission  
22 when such facts are known to the attorney."

23 The Complaint itself never says that the Book Defendants willfully concealed the facts  
24 constituting their wrongful acts or omissions. Instead, Krause argues that he is entitled to tolling  
25 for willful concealment because the Book Defendants failed to file Richard Musgrave's will in  
26 probate, failed to inform the charitable beneficiaries that they were beneficiaries of the Bypass  
27 Trust, and failed to respond promptly to requests for information from Krause. ECF No. 30 at 18-

1 19. Krause concedes in opposition to the motion to dismiss that “Mr. Book’s general and  
2 longstanding non-responsiveness could be attributed to disorganization or obstinacy” but  
3 nevertheless maintains that “the most obvious inference is that of willful concealment.” *Id.* at 19.

4 In order to meet the pleading standard of Federal Rule of Civil Procedure 12(b)(6), the  
5 Complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that  
6 is plausible on its face.’” *Iqbal*, 556 U.S. at 678. The Court concludes that the factual allegations  
7 in the Complaint do not support a finding of willful concealment.

8 As an initial matter, in order for the Book Defendants’ conduct to toll the statute of  
9 limitations, the willful concealment must occur during the limitations period. *See* Cal. Code Civ.  
10 Proc. § 340.6(a) (“[T]he period shall be tolled during the time that any of the following exist: . . .  
11 (3) The attorney willfully conceals the facts constituting the wrongful act or omission.”). The only  
12 conduct Krause points to that occurred prior to the expiration of the limitations period in  
13 December 2009 is the failure to file Richard Musgrave’s will, the failure to inform the charitable  
14 beneficiaries that they were beneficiaries, a less than two month delay in responding to a letter in  
15 2007, and a two month delay in responding to a letter in 2009. *See* ECF No. 30 at 18-19. The  
16 remaining conduct—failing to respond to allegations of misconduct in the September 20, 2014  
17 memo; refusing to talk to Thomas or Harry Krause personally after the September 20, 2014  
18 memo; and failing to respond to requests for documents and interviews in January and February  
19 2015—all occurred after December 2013, when the statute of limitations for Counts 2, 14, 16, and  
20 17 expired. *See id.*

21 None of the conduct that occurred during the limitations period constitutes willful  
22 concealment of the wrongful acts or omissions at issue in this case. The first conduct Krause  
23 argues shows willful concealment, failing to file Richard Musgrave’s will in probate, is the  
24 wrongful act at issue in Count 17. *See* Compl. ¶¶ 261-65. Although failing to file the will was  
25 itself a wrongful act, Krause does not allege or argue what wrongful act or omission the Book  
26 Defendants *concealed* by failing to file Richard Musgrave’s will in probate. Similarly, Krause  
27 does not identify what information related to Book’s alleged wrongdoing Krause would have

1 obtained had the will been filed with probate that Krause did not obtain when he received a copy  
2 of the 2002 Declaration of Trust from the Book Defendants in 2007. *See* ECF No. 71. Richard  
3 Musgrave’s will stated that:

4 I [Richard Musgrave] give all my interest in the residue of my estate, including all  
5 my intangible property and tangible personal property and my interest in my  
6 residences, to the Trustees of the Trust, to be held in trust. All property passing to  
7 the Trustees of the Trust shall immediately be added to and merged with and into  
8 the Trust to the same effect as if the property were an asset of the Trust at my  
9 death. All property added to the Trust shall be held, administered, allocated, and  
10 distributed according to its terms, including any amendments made to the Trust  
11 during my lifetime.

12 Compl. ¶ 89. The will is in large part duplicative of the Comprehensive Transfer Document  
13 executed as part of the 2002 Declaration of Trust, in which Richard Musgrave transferred “any  
14 and all properties of all kinds, whether presently owned or hereafter acquired (regardless of the  
15 names by which acquired),” except for certain tax-favored assets, to the Richard and Peggy  
16 Musgrave Revocable Trust. *Id.* ¶ 52. Finally, Krause does not allege or argue that the Book  
17 Defendants concealed the existence of Richard Musgrave’s will. Indeed, when Krause asked  
18 Book for a copy of Richard Musgrave’s will, Book responded by sending the will to Krause less  
19 than a month later. Compl. ¶¶ 147, 155.

20 Krause’s next argument for an act of willful concealment is the Book Defendants’ failure  
21 to inform the charitable beneficiaries of their status as beneficiaries. However, Krause alleges that  
22 Book sent Krause a copy of the trust documents for the Richard and Peggy Musgrave Revocable  
23 Trust in 2007. Compl. ¶ 71. Those trust documents lay out the terms of the Bypass Trust and  
24 identify the charitable beneficiaries of the Bypass Trust, so the Book Defendants did not conceal  
25 the existence of the charitable beneficiaries. *See* Compl. Ex. 1.

26 The remaining pre-2013 conduct by the Book Defendants pertains to two delays in  
27 providing information, each of approximately two months in length. In 2007, the Book  
28 Defendants allegedly delayed a month and a half in responding to Krause’s request for information  
about Richard Musgrave’s estate. Compl. ¶¶ 69-71. Krause alleges, however, that the Book  
Defendants responded to this request for information by sending Krause the 2002 Declaration of

1 Trust, which explained how the assets in the Richard and Peggy Musgrave Revocable Trust would  
2 be divided upon the death of either Richard or Peggy Musgrave. *See* Compl. ¶ 71, Ex. 1. Krause  
3 alleges that the Book Defendants also sent Krause the Third Amendment to the Declaration of  
4 Trust, which listed the beneficiaries of the Bypass Trust at the time of Richard Musgrave’s death.  
5 *Id.* Notably, this exchange occurred in June and July of 2007, more than seven months prior to the  
6 alleged wrongful distribution of assets to the Bypass Trust in March 2008. *See* Compl. ¶ 75  
7 (Bypass Trust funded in March 2008). Krause does not explain how the Book Defendants could  
8 have willfully concealed in June and July of 2007 wrongful acts or omissions that would not occur  
9 until March 2008. Moreover, these allegations show the Book Defendants responding to Krause’s  
10 requests for information. Krause does not explain how the Book Defendants concealed any  
11 wrongdoing by complying with Krause’s request for information less than two months after  
12 Krause requested the information.

13 Finally, Krause alleges that on January 29, 2009, Krause wrote to Book to explain  
14 Krause’s belief that Peggy Musgrave was taking improper income from the Bypass Trust. Compl.  
15 ¶ 105. Krause alleges that Book did not respond until April 3, 2009, at which time Book *agreed*  
16 with Krause that Peggy Musgrave was taking improper income from the Bypass Trust. *Id.* ¶ 107.  
17 Krause does not explain how Book concealed any wrongdoing by responding to Krause’s inquiry  
18 and agreeing with Krause that the funds in the Bypass Trust were being misused.

19 Because Krause has not alleged any acts of willful concealment by the Book Defendants,  
20 Krause is not entitled to tolling under § 340.6(a)(3).

21 **d. Conclusion**

22 Because Krause has not alleged facts to support the application of any of the tolling  
23 provisions of section 340.6(a), the statute of limitations on Counts 2, 14, 16, and 17 as to the Book  
24 Defendants expired no later than December 2013—four years after the Book Defendants ceased  
25 legal representation of Peggy Musgrave and the Bypass Trust. Krause’s complaint, filed on May  
26 20, 2015, was untimely as to the Book Defendants on Counts 2, 14, 16, and 17.

27 Therefore, the Court GRANTS the Book Defendants’ motion to dismiss Counts 2, 14, 16,

1 and 17 as to the Book Defendants. This dismissal is without prejudice because the Court  
2 concludes that amendment would not necessarily be futile, as Krause may be able to allege  
3 sufficient facts to support his claim of tolling for willful concealment under § 340.6(a)(3). *See*  
4 *Leadsinger*, 512 F.3d at 532.

5 **B. Count 15**

6 Book moves to dismiss Count 15, a claim for aiding and abetting Pamela Clyne’s breaches  
7 of fiduciary duty and failure to stop Peggy Musgrave’s breach of trust brought solely against  
8 Defendant Book, on the grounds that Krause has not pled all of the necessary elements of the  
9 claim. ECF No. 16 at 8-9.

10 The elements of a claim for aiding and abetting a breach of fiduciary duty in California are:  
11 (1) “a third party’s breach of fiduciary duties owed to plaintiff;” (2) “defendant’s actual  
12 knowledge of that breach of fiduciary duties;” (3) “substantial assistance or encouragement by  
13 defendant to the third party’s breach;” and (4) “defendant’s conduct was a substantial factor in  
14 causing harm to plaintiff.” *Nasrawi v. Buck Consultants LLC*, 231 Cal. App. 4th 328, 343 (2014).  
15 Book argues in his motion to dismiss that Krause has not alleged that Book had actual knowledge  
16 of Pamela Clyne’s breach of fiduciary duties or that Book provided substantial assistance or  
17 encouragement to Pamela Clyne’s breach. ECF No. 16 at 9. In his reply brief, Book further  
18 argues that Krause has failed to allege that Book’s conduct was a substantial factor in causing  
19 harm to Krause. ECF No. 33 at 10.

20 The Court addresses each of the elements of aiding and abetting in turn.

21 **1. Element One: Breach of Fiduciary Duty by a Third Party**

22 Book does not dispute that the Complaint alleges a breach of fiduciary duty by Pamela  
23 Clyne. ECF No. 16 at 9; ECF No. 33 at 10. According to the Complaint, Pamela Clyne breached  
24 her fiduciary duty to the Bypass Trust by withholding documents from Peggy Musgrave’s files  
25 relating to the Bypass Trust and by providing “false and/or misleading information” to Book.  
26 Compl ¶¶ 232-38. The Complaint alleges that the document requests to which Pamela Clyne  
27 failed to respond were directed to Peggy Musgrave and sought documents in Peggy Musgrave’s

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1 possession. *Id.* ¶¶ 139, 142, 232-38. The Complaint further alleges that Pamela Clyne failed “to  
2 stop Peggy Musgrave’s breach of trust.” Compl. ¶ 254.

3 **2. Element Two: Defendant’s Actual Knowledge of the Third Party’s Breach**

4 As to Book’s knowledge of Pamela Clyne’s breach of fiduciary duty, Krause argues that  
5 this element is satisfied because Book was aware of the 2008 breach of trust allegedly committed  
6 by the Book Defendants and Peggy Musgrave and because Book knew that Pamela Clyne owed a  
7 fiduciary duty to Krause. ECF No. 30 at 20. Krause states that based on these two allegations, “it  
8 is reasonable to assume that [Book], as an estate planning attorney, understood that Ms. Clyne had  
9 a duty to rectify Ms. Musgrave’s breaches of fiduciary duty and trust.” *Id.* Krause further points  
10 to the allegation that Pamela Clyne called Book sometime around October 2014. *Id.*; Compl.  
11 ¶ 144. Krause argues that in this phone call, Book “presumably learned that Ms. Clyne was not  
12 inclined to rectify her mother’s breaches.” ECF No. 30 at 20. Krause further argues that Book  
13 obtained knowledge of Pamela Clyne’s breach of fiduciary duty through Krause’s November 10,  
14 2014 letter to Book, Book’s interview with Krause’s then-attorney, and Krause’s subsequent  
15 efforts to communicate with Book. *Id.*

16 The allegations regarding the phone call between Pamela Clyne and Book are insufficient  
17 to establish Book’s knowledge of Pamela Clyne’s breach of fiduciary duties. The entirety of  
18 Krause’s allegations regarding this phone call are that “[d]espite Thomas’s request that the parties  
19 jointly contact Dennis Book, Pamela Clyne contacted Mr. Book unilaterally. On information and  
20 belief, Pamela Clyne gave Dennis Book false and/or misleading information about Richard’s heirs  
21 and beneficiaries.” Compl. ¶ 144. Krause does not allege that Pamela Clyne told Book about  
22 Krause’s requests for information, nor does Krause allege that Pamela Clyne told Book that  
23 Pamela Clyne and Peggy Musgrave would not comply with Krause’s requests.

24 Similarly, Krause’s November 10, 2014 letter to Book, Book’s interview with Krause’s  
25 then-attorney, and Krause’s subsequent efforts to contact Book are insufficient to establish Book’s  
26 knowledge of Pamela Clyne’s breach of fiduciary duty. Krause’s November 10 letter to Book,  
27 which requested a copy of Richard Musgrave’s will from Book and included a copy of the



1 September 20, 2014 memo describing the alleged breaches of fiduciary duty by Peggy Musgrave,  
2 alerted Book only to Peggy Musgrave’s alleged continuing breach of fiduciary duty. Compl.  
3 ¶ 147. The September 20 memo attached to the letter indicated that Krause had requested  
4 documents from Peggy Musgrave, including a copy of Richard Musgrave’s will. *Id.* The  
5 September 20 memo further detailed the alleged breaches of fiduciary duty and trust committed by  
6 Peggy Musgrave. *Id.*; Compl. Ex. 2 (the September 20 memo). However, the September 20  
7 memo does not mention any conduct by Pamela Clyne nor any efforts by Krause to obtain  
8 documents from Pamela Clyne. *See* Compl. Ex. 2. The Complaint does not allege that Krause’s  
9 November 10 letter to Book made any mention of Pamela Clyne. Compl. ¶ 147. The Complaint  
10 also does not allege that Pamela Clyne was discussed or mentioned at Book’s interview or in any  
11 of Krause’s later emails or phone calls to Book. Compl. ¶¶ 144; 151; 155; 172.

12 In short, the Complaint does not contain any factual allegations indicating that Book was  
13 informed of Pamela Clyne’s alleged breach of fiduciary duty. *See Iqbal*, 556 U.S. at 678 (Federal  
14 Rule of Civil Procedure 12(b)(6) requires a plaintiff to allege “sufficient factual matter, accepted  
15 as true, to ‘state a claim to relief that is plausible on its face.’”). Krause thus has not adequately  
16 pled the second element of aiding and abetting.

17 **3. Element Three: Substantial Assistance or Encouragement by the Defendant to the**  
18 **Third Party’s Breach**

19 Krause argues that Book’s failure to cooperate with Krause’s requests for information  
20 constitutes substantial assistance or encouragement to Pamela Clyne’s breach. Specifically,  
21 Krause alleges that Book failed to respond to unspecified emails and that Book only consented to  
22 a single interview with Krause’s then-attorney. Compl. ¶ 144. According to Krause, “[i]t is also  
23 reasonable to infer that Mr. Book’s subsequent failure to respond to Harry and Thomas’s  
24 subsequent requests for information . . . were a result of whatever was communicated” in the  
25 phone call between Pamela Clyne and Book in approximately October 2014. ECF No. 30 at 21.

26 However, by the time of Krause’s November 10, 2014 letter that alerted Book to Pamela  
27 Clyne’s breach of fiduciary duties, Minda Parrish had already provided Krause with files

1 containing many of the documents requested by Krause. Compl. ¶ 147. In Krause’s November 10  
2 letter, Krause asked Book for only one of the eleven documents originally requested from Peggy  
3 Musgrave and Pamela Clyne—a copy of Richard Musgrave’s will. *Id.* Book complied with  
4 Krause’s request and sent Krause a copy of Richard Musgrave’s will on December 8, 2014—less  
5 than a month after Krause’s request. *Id.* ¶ 155. Although Book did not provide a written response  
6 to the September 20 memo, Book did agree to an interview regarding the events described in the  
7 memo, and that interview took place on January 27, 2015. *Id.* ¶¶ 155, 172. In that interview,  
8 Book agreed with Krause’s position as to the Riversource insurance proceeds and concurred at  
9 least in part with Krause’s arguments as to Peggy Musgrave’s accounting for personalty and the  
10 \$220,000 in distributions made upon Richard Musgrave’s death. *Id.* ¶ 172.

11           These allegations show that Book attempted to rectify the failure to produce documents to  
12 Krause, that Book was willing to meet with Krause’s attorney, and that Book acknowledged errors  
13 in distributing funds to the Bypass Trust. These actions all occurred within three months of  
14 Book’s receipt of Krause’s November 10 letter. Rather than showing aiding and abetting of  
15 Pamela Clyne’s breach of fiduciary duties, the allegations in the Complaint show efforts by  
16 Krause to timely mitigate any breach of fiduciary duties.

17           Therefore, Krause also has not adequately alleged the third element of aiding and abetting  
18 a breach of fiduciary duty.

19           **4. Element Four: Defendant’s Conduct Was a Substantial Factor in Causing Harm**  
20           **to the Plaintiff**

21           Book did not challenge the fourth element of aiding and abetting in his motion to dismiss,  
22 raising it for the first time on reply. *See* ECF No. 16 at 9; ECF No. 33 at 10. Correspondingly,  
23 Krause did not address causation in his opposition brief. *See* ECF No. 30. The Court need not  
24 address causation because the Court has already concluded that Krause has failed to adequately  
25 allege the second and third elements of aiding and abetting. Moreover, “[t]he district court need  
26 not consider arguments raised for the first time in a reply brief.” *Zamani v. Carnes*, 491 F.3d 990,  
27 997 (9th Cir. 2007).

1           However, the Court notes that it is skeptical that Krause has adequately alleged that Book’s  
2 conduct in allegedly aiding and abetting Pamela Clyne’s breach of fiduciary duty was a substantial  
3 factor in causing harm to Krause. The Complaint alleges that Book complied with Krause’s  
4 request for a copy of Richard Musgrave’s will, that Book complied with Krause’s request for an  
5 interview, and that Book agreed with Krause as to some of the alleged misconduct. Compl.  
6 ¶¶ 155, 172. Krause does not allege or explain how Book’s “great reluctance to cooperate” with  
7 Krause in 2014 and 2015 caused harm to Krause in light of the fact that Book ultimately *did*  
8 cooperate with Krause’s request for documents and an interview. *Id.* ¶¶ 144, 155, 172.

9           The Court therefore GRANTS Book’s motion to dismiss Count 15. This dismissal is  
10 without prejudice because the Court concludes that amendment would not necessarily be futile, as  
11 Krause may be able to allege sufficient facts to support his claim for aiding and abetting. *See*  
12 *Leadsinger*, 512 F.3d at 532.

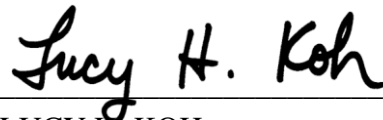
13 **IV. CONCLUSION**

14           For the foregoing reasons, the Court GRANTS the Book Defendants’ motion to dismiss  
15 Counts 2, 14, 15, 16, and 17 as to the Book Defendants. Should Krause elect to file an Amended  
16 Complaint curing the deficiencies identified herein, Krause shall do so within 30 days of the date  
17 of this Order. Failure to meet the 30-day deadline to file an Amended Complaint or failure to cure  
18 the deficiencies identified in this Order will result in a dismissal of Counts 2, 14, 15, 16, and 17 as  
19 to the Book Defendants with prejudice. Krause may not add new causes of action or parties  
20 without leave of the Court or stipulation of the parties pursuant to Federal Rule of Civil Procedure  
21 15.

22 **IT IS SO ORDERED.**

23

24 Dated: November 10, 2015



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LUCY H. KOH  
United States District Judge

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