

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
JOHN MICHAEL PAULSON, as the
Executor or Statutory Executor of the
Estate of Allen E. Paulson, and
Individually; JAMES D. PAULSON, as
Statutory Executor of the Estate of Allen
E. Paulson; VIKKI E. PAULSON, as
Statutory Executor of the Estate of Allen
E. Paulson, as Trustee of Allen E. Paulson
Living Trust, and Individually;
CRYSTAL CHRISTENSEN, as Statutory
Executor of the Estate of Allen E.
Paulson, as Trustee of the Allen E.
Paulson Living Trust, and Individually;
MADELEINE PICKENS, as Statutory
Executor of the Estate of Allen E.
Paulson, as Trustee of the Marital Trust
created under the Allen E. Paulson Living
Trust, as Trustee of the Madeleine Anne
Paulson Separate Property Trust, and
Individually,
Defendants.

Case No.: 15cv2057-AJB-NLS

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS
VIKKI E. PAULSON AND CRYSTAL
L. CHRISTENSEN'S MOTION TO
DISMISS CROSS-CLAIMANT
MADELEINE PICKENS'S CROSS-
CLAIMS**

1 MADELEINE PICKENS, as Statutory
2 Executor of the Estate of Allen E.
3 Paulson, as Trustee of the Marital Trust
4 created under the Allen E. Paulson Living
5 Trust, as Trustee of the Madeleine Anne
6 Paulson Separate Property Trust, and
7 Individually,

8 Cross-claimant,

9 v.

10 JAMES D. PAULSON, as Statutory
11 Executor of the Estate of Allen E.
12 Paulson; VIKKI E. PAULSON, as
13 Statutory Executor of the Estate of Allen
14 E. Paulson, as Trustee of the Allen E.
15 Paulson Living Trust, and Individually;
16 and CRYSTAL CHRISTENSEN, as
17 Statutory Executor of the Estate of Allen
18 E. Paulson, as Trustee of the Allen E.
19 Paulson Living Trust, and Individually,

20 Cross Defendants.

21 On September 16, 2015, the United States of America instituted an action to recover
22 unpaid estate taxes, penalties, and interest from the Estate of Allen E. Paulson. (Doc. No.
23 1.) Presently before the Court is Vikki Paulson and Crystal Christensen’s (collectively
24 referred to as “Cross Defendants”) motion to dismiss Madeleine Pickens’s (“Ms. Pickens”)
25 first amended cross-claims. (Doc. No. 63.) Having reviewed the parties’ arguments, the
26 Court found this motion suitable for determination on the papers and without oral argument
27 in accordance with Civil Local Rule 7.1.d.1. For the reasons set forth more fully below, the
28 Court **GRANTS** Cross Defendants’ request for judicial notice and **GRANTS IN PART**
and **DENIES IN PART** Cross Defendants’ motion to dismiss Ms. Pickens’s amended
cross-claims.

///

///

1 **I. FACTUAL BACKGROUND¹**

2 As the Court is already well-versed as to the alleged facts in this case, for the sake
3 of brevity, the Court will only provide a brief summary of the events leading up to the
4 institution of this action.

5 On December 23, 1986, Allen Paulson (“Mr. Paulson”) established the Allen E.
6 Paulson Living Trust (hereafter referred to as “the Living Trust”). (Doc. No. 76 ¶ 6.) On
7 July 19, 2000, Mr. Paulson died. (*Id.* ¶ 9.) Mr. Paulson was survived by several heirs,
8 including his wife, Ms. Pickens, his three sons, Richard Paulson, James Paulson, and
9 Michael Paulson, and a granddaughter Crystal Christensen.² (*Id.* ¶ 10.) At the time of Mr.
10 Paulson’s death, the Living Trust held all of Mr. Paulson’s assets including real estate
11 valued at \$24,764,500, stocks and bonds valued at \$113,761,706, cash and receivables
12 valued at \$23,664,644, and miscellaneous assets valued at \$31,243,494. (*Id.* ¶ 16.)

13 In 2003, Ms. Pickens entered into a settlement agreement with Michael Paulson
14 individually, and as co-trustee of the Living Trust (hereafter referred to as the “2003
15 Settlement”). (*Id.* ¶ 19.) The 2003 Settlement was meant to resolve prolonged litigation
16 regarding Ms. Pickens’s right to certain properties pursuant to the Living Trust and the
17 Antenuptial Agreement, which Michael Paulson refused to transfer to her.³ (*Id.* ¶¶ 19, 20.)
18 Specifically, the 2003 Settlement provides that Ms. Pickens is entitled to receive those trust
19 properties free and clear of any liabilities for estate tax. (*Id.* ¶ 21.) Furthermore, Ms.
20 Pickens alleges that until she receives all of the trust property to which she is entitled under
21 the 2003 Agreement free of any estate taxes, her interest in the Living Trust continues. (*Id.*
22 ¶ 41.)

23 After Mr. Paulson’s death, Michael Paulson and Edward White were the first trustees
24 appointed to serve as co-executors of the Living Trust. (*Id.* ¶ 15.) On March 24, 2009, the

25 ¹The following facts are taken from the cross-claim and construed as true for the limited purpose of
26 resolving the pending motion. *See Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994).

27 ² Vikki Paulson is one of the Cross Defendants in the present matter and is the wife of Richard Paulson.
(Doc. No. 76 ¶ 10.)

28 ³According to the tax court decision, all of the transfers to Ms. Pickens qualified for the marital deduction.
(*Id.* ¶ 29.)

1 Probate Court removed Michael Paulson as co-trustee of the Living Trust for misconduct
2 and gross mismanagement of the Living Trust's assets. (*Id.* ¶ 31.) The court then appointed
3 Vikki Paulson and James D. Paulson as co-trustees. (*Id.* ¶ 32.) In April of 2009, the net
4 value of the assets of the Living Trust totaled \$13,738,727. (*Id.*) On June 10, 2010, James
5 D. Paulson was removed as co-trustee for breach of court orders. (*Id.* ¶ 33.) Vikki E.
6 Paulson thus served as the sole trustee of the Living Trust until February 28, 2011, when
7 Crystal Christensen was appointed to serve as co-trustee with her. (*Id.*) The net value of
8 the assets of the Living Trust in 2011 totaled \$8,802,034. (*Id.*)

9 On January 16, 2005, the IRS determined there existed a deficiency in estate tax in
10 the amount of \$37,801,245. (*Id.* ¶ 28.) On December 2, 2005, the IRS and Michael Paulson
11 agreed upon an estate tax deficiency in the amount of \$6,699,477. (*Id.* ¶ 29.)

12 On January 15, 2013, Cross Defendants, as co-trustees of the Living Trust, entered
13 into a settlement agreement with Michael Paulson to which they distributed substantially
14 all of the remaining assets of the Living Trust to Michael Paulson free of any
15 encumbrances. (*Id.* ¶ 37.) Ms. Pickens claims that the Living Trust still has properties that
16 could be applied to reduce the outstanding balance of the estate tax. (*Id.* ¶ 38.) However,
17 Cross Defendants allegedly continue to refuse to apply such properties to the payment of
18 estate tax. (*Id.*)

19 In sum, Ms. Pickens alleges that pursuant to California Probate Code §§ 16000-
20 16015, James Paulson, and Cross Defendants had a duty to administer the Living Trust
21 according to its terms, to act impartially in investing, to refrain from using or dealing with
22 the property of the Living Trust for his or her own profit, and to take reasonable steps to
23 control and preserve the property of the Living Trust for the benefit of all beneficiaries.
24 (*Id.* ¶ 46.) However, Ms. Pickens claims Cross Defendants breached their fiduciary duties
25 to Ms. Pickens by failing to pay the estate tax from the Living Trust, and by distributing
26 the remaining properties of the Living Trust to Michael Paulson, thereby wrongfully
27 subjecting Ms. Pickens to liabilities for estate tax. (*Id.* ¶¶ 47-48.)

28 ///

///

1 **II. PROCEDURAL BACKGROUND**

2 On September 16, 2015, the United States of America filed a complaint against John
3 Michael Paulson, James D. Paulson, Cross Defendants, and Madeleine Pickens for unpaid
4 taxes. (*See generally* Doc. No. 1.) On September 20, 2016, Ms. Pickens filed a cross-claim
5 against Cross Defendants and James Paulson. (Doc. No. 55.) On October 14, 2016, Cross
6 Defendants filed a motion to dismiss, (Doc. No. 63), which was granted in part and denied
7 in part on January 4, 2017. (Doc. No. 75.) On January 18, 2017, Ms. Pickens filed her first
8 amended cross-claim (“ACC”). (Doc. No. 76.) On February 1, 2017, Cross Defendants
9 filed the present motion, its second motion to dismiss. (Doc. No. 77.)

10 **III. LEGAL STANDARD**

11 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a plaintiff’s
12 complaint and allows a court to dismiss a complaint upon a finding that the plaintiff has
13 failed to state a claim upon which relief may be granted. *See Navarro v. Block*, 250 F.3d
14 729, 732 (9th Cir. 2001). “[A] court may dismiss a complaint as a matter of law for (1) lack
15 of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim.”
16 *SmileCare Dental Grp. v. Delta Dental Plan of Cal.*, 88 F.3d 780, 783 (9th Cir. 1996)
17 (citations omitted). However, a complaint will survive a motion to dismiss if it contains
18 “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v.*
19 *Twombly*, 550 U.S. 544, 570 (2007). In making this determination, a court reviews the
20 contents of the complaint, accepting all factual allegations as true, and drawing all
21 reasonable inferences in favor of the nonmoving party. *Cedars-Sinai Med. Ctr. v. Nat’l*
League of Postmasters of U.S., 497 F.3d 972, 975 (9th Cir. 2007).

22 Notwithstanding this deference, the reviewing court need not accept “legal
23 conclusions” as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is also improper for a
24 court to assume “the [plaintiff] can prove facts that [he or she] has not alleged.” *Associated*
25 *Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526
26 (1983). However, “[w]hen there are well-pleaded factual allegations, a court should assume
27 their veracity and then determine whether they plausibly give rise to an entitlement to
28 relief.” *Iqbal*, 556 U.S. at 679.

1 **IV. DISCUSSION**

2 A. Judicial Notice

3 As an initial matter, Cross Defendants ask the Court to take judicial notice of the
4 2003 Settlement in support of their motion to dismiss. (Doc. No. 77-2.) Federal Rule of
5 Evidence 201 allows a court to take judicial notice of facts that can be “accurately and
6 readily determined from sources whose accuracy cannot be reasonably be questioned.”
7 Fed. R. Evid. 201(b)(2); *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6
8 (9th Cir. 2006). Additionally, a court may take judicial notice of a document on a motion
9 to dismiss pursuant to Rule 12(b)(6), if the unattached document is “evidence on which the
10 complaint ‘necessarily relies’ if: (1) the complaint refers to the document; (2) the document
11 is central to the plaintiff’s claim; and (3) no party questions the authenticity of the
12 document.” *U.S. v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011) (citation
13 omitted).

14 The Court notes that it has already taken judicial notice of the 2003 Settlement in its
15 previous Order dated January 4, 2017. (Doc. No. 75 at 7.) In addition, the Court again finds
16 the 2003 Settlement to be central to the present matter, and that neither party disputes the
17 authenticity nor opposes the use of the 2003 Settlement. As a result, the Court **GRANTS**
18 Cross Defendants’ request for judicial notice. *See Tekle v. United States*, No. CV 01-11096
19 RSWL EX., 2002 WL 1988178, at *3 (C.D. Cal. Apr. 30, 2002) (holding that a court may
20 take judicial notice of a prior complaint with exhibits).

21 B. Ms. Pickens’s Allegedly Inconsistent Allegations

22 Next, both parties dispute whether or not the factual allegations in the ACC are
23 consistent with the terms of Ms. Pickens’s previous cross-claim and the 2003 Settlement.
24 (Doc. No. 77-1 at 13; Doc. No. 79 at 7.) Cross Defendants contend that Ms. Pickens’s
25 breach of fiduciary duty claim should be dismissed as the new allegations in the ACC are
26 irreconcilably inconsistent with her prior pleading, and the express language of the 2003
27 Settlement. (Doc. No. 77-1 at 8.) In opposition, Ms. Pickens asserts that the initial cross-
28 claim and the current operative cross-claim are not inconsistent, as she is only re-stating
her principal and alternate legal positions. (Doc. No. 79 at 7.)

1 At issue is Ms. Pickens’s assumption that the distributions she received from the
2 2003 Settlement will only constitute full and complete satisfaction of any and all rights she
3 has under the Living Trust if she is not required to pay any estate tax and is true only if she
4 is not required to pay any estate tax. (Doc. No. 76 ¶ 22.) After reviewing Ms. Pickens’s
5 ACC in conjunction with the initial cross-claim, the Court finds that the allegedly new
6 allegations do not contradict Plaintiff’s prior pleading. In Ms. Pickens’s initial cross-claims
7 she argues that: (1) Cross Defendants owed fiduciary duties to Ms. Pickens; (2) Cross
8 Defendants breached those duties when failing to apply the assets of the Living Trust to
9 pay the estate taxes; and (3) if Ms. Pickens is ultimately held liable for unpaid estate tax it
10 will be due to Cross Defendants’ breach of their fiduciary duties to her. (Doc. No. 55 ¶¶
11 40-57.) The Court finds that these allegations closely mimic the contentions pled in the
12 ACC, but are simply expressed in a different manner.

13 Moreover, the Court notes that it finds that Cross Defendants have misunderstood
14 the law. Referring to a case cited by Cross Defendants in their motion to dismiss, the Ninth
15 Circuit’s decision in *PAE Gov’t Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856 (9th Cir. 2007)
16 accepts that “parties are often uncertain about the facts” when they file their complaint, but
17 “[a]s the litigation progresses, and each party learns more about its case and that of its
18 opponents, some allegations fall by the wayside as legally or factually unsupported.” *Id.* at
19 858–59. Thus, the court in *PAE* concluded that the presence of inconsistent allegations is
20 accepted as part of litigation. *Id.* at 859. Accordingly, the Court disagrees with Cross
21 Defendants and declines to disregard the allegedly new assumptions present in Ms.
22 Pickens’s ACC.

23 C. Cross-Defendants’ Motion to Dismiss

24 Cross Defendants argue that Ms. Pickens’s breach of fiduciary duty claim fails as a
25 matter of law because no fiduciary duty is owed to Ms. Pickens, and Ms. Pickens has again
26 failed to allege damages. (Doc. No. 77-1 at 17-22.) In addition, Cross Defendants renew
27 their motion to dismiss Ms. Pickens’s indemnity claims to the extent they seek any recovery
28 from Cross Defendants in their individual capacity. (*Id.* at 23.)

1 In direct opposition, Ms. Pickens alleges that she did not release Cross Defendants
2 from their fiduciary duty, Cross Defendants continue to owe Ms. Pickens a fiduciary duty
3 to pay estate tax, and that Ms. Pickens has alleged damages as a proximate result of Cross
4 Defendants' alleged breach. (Doc. No. 79 at 11-19.) Furthermore, Ms. Pickens contends
5 that Cross Defendants do not contest the validity of her claims under the indemnity
6 provision of the 2003 Settlement, as she is only seeking liability against Cross Defendants
7 in their representative capacity. (*Id.* at 6.)

8 i. Breach of Fiduciary Duty

9 Cross Defendants ask the Court to dismiss Ms. Pickens's ACC with prejudice. Cross
10 Defendants predicate their request on the fact that Ms. Pickens is still unable to successfully
11 plead the first and third elements of a claim for breach of fiduciary duty. (Doc. No. 77-1 at
12 20-22.) The elements of a cause of action for breach of fiduciary duty are: (1) existence of
13 a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by
14 the breach. *See Pierce v. Lyman*, 1 Cal. App. 4th 1093, 1101 (1991). "The absence of any
15 one of these elements is fatal to the cause of action." *Id.*

16 First, the Court concludes that even drawing all reasonable inferences in Ms.
17 Pickens's favor, she has again failed to jump the first hurdle in establishing a breach of
18 fiduciary duty, i.e. the existence of a fiduciary duty. The crux of Ms. Pickens's argument
19 is that until she receives the 2003 Settlement properties free and clear of any estate taxes,
20 she is still a beneficiary of the Living Trust. (Doc. No. 79 at 14.) However, though the
21 Court agrees that Section 21 of the 2003 Settlement clearly states that Ms. Pickens will
22 have no liability for the payment of estate taxes, the Court is still unsure of how Ms. Pickens
23 is owed a fiduciary duty when Section 6 of the 2003 Settlement confirms that the
24 distribution of assets under the agreement constitutes "full and complete satisfaction of any
25 and all rights [Ms. Pickens] has to the distribution of assets under the Trust." (Doc. No. 77-
26 3 at 27) (emphasis added).

26 Ms. Pickens argues that she only agreed to the release in section 6 under the
27 assumption that she would not be required to pay any estate tax and that section 6 is only
28 true if she is not required to pay any estate tax. (Doc. No. 76 ¶ 22.) However, the Court is

1 unable to find a provision in the 2003 Settlement that repeats this assertion. *See In re*
2 *Leapfrog Enter., Inc. Sec. Litig.*, 200 F. Supp. 3d 987, 993 (N.D. Cal. 2016) (“Under the
3 incorporation by reference doctrine, if a document is referenced in a complaint, a court
4 may ‘properly consider the [document] in its entirety.’”); *see also In re NVIDIA Corp. Sec.*
5 *Litig.*, 768 F.3d 1046, 1058 n.10 (9th Cir. 2014) (“Once a document is deemed incorporated
6 by reference, the entire document is assumed to be true for purposes of a motion to dismiss
7 . . . and the Court [is] free to refer to any of its contents.”). Thus, reviewing Ms. Pickens’s
8 allegations in conjunction with the 2003 Settlement, the Court concludes that Ms. Pickens
9 has failed to allege facts to establish the existence of a fiduciary duty.

10 Second, the Court notes that Ms. Pickens’s breach of fiduciary claim still suffers
11 from the same glaring oversight present in her initial cross-claim. As currently pled, the
12 ACC again fails to assert any actual damages from the alleged breach of fiduciary duty.
13 Ms. Pickens asserts that she has pled damages as a “proximate result” and that Federal Rule
14 of Civil Procedure (“FRCP”) 13 provides that a cross-claim may assert a claim that a
15 coparty “may be liable” to the cross-claimant. (Doc. No. 79 at 16.) In opposition, Cross
16 Defendants argue that Ms. Pickens must plead actual suffered damages to sustain a motion
17 to dismiss. (Doc. No. 77-1 at 21-22.)

18 Based on the allegations present in Ms. Pickens’s ACC, the Court finds that Ms.
19 Pickens has only alleged theoretical future damages that are dependent on how the
20 underlying complaint with the United States of America is decided. However, whereas
21 here, damages are an element of the cause of action, the cause of action “does not accrue
22 until the damages have been sustained.” *See Thomson v. Canyon*, 198 Cal. App. 4th 594,
23 604 (2011) (“Mere threat of future harm, not yet realized, is not enough.”); *see also Hasso*
24 *v. Hapke*, 227 Cal. App. 4th 107, 152 (2014) (“In order to prevail on his cause of action for
25 breach of fiduciary duty, Hasso had the *burden to prove the existence of . . .* damages
26 proximately caused by the breach.”) (emphasis added); *Shopoff & Cavallo LLP v. Hyon*,
27 167 Cal. App. 4th 1489, 1508–12 (2008) (noting that as all of the damages plaintiff alleged
28 were potential, speculative, and dependent on the outcome of the liquidation of the

1 recovery proceeds, the court found that plaintiff did not plead a cause of action for breach
2 of fiduciary duty).

3 In light of the undisputable holdings in cases from this district, the Court concludes
4 that Plaintiff's alleged damages are not enough to withstand Cross Defendants' motion to
5 dismiss. Therefore, based on the above, the Court finds that Ms. Pickens has failed to plead
6 both the existence of a fiduciary duty and damages. Accordingly, Ms. Pickens's breach of
7 fiduciary duty cause of action is **DISMISSED**.

8 ii. Indemnity Agreement

9 Cross Defendants argue that the indemnity causes of action should also be dismissed
10 to the extent that they are alleged against Cross Defendants as individuals. (Doc. No. 77-1
11 at 23.) Ms. Pickens alleges that she has made clear that she is asserting liability against
12 Cross Defendants for indemnity only in their representative capacities. (Doc. No. 79 at 6-
13 7.)

14 Looking to the ACC, Ms. Pickens alleges that the term "Co-Trustees" includes any
15 "successor of Michael Paulson in his or her capacity as Co-Trustee of the Living Trust, and
16 any other person appointed to serve as Co-Trustee." (Doc. No. 76 ¶ 26.) The ACC
17 continues to state that pursuant to section 39, "every obligation imposed by the 2003
18 Settlement Agreement on Michael Paulson, in his capacity as Co-Trustee of the Living
19 Trust, is binding upon his successor." (*Id.* ¶ 27) (emphasis added.) Moreover, the 2003
20 Settlement clearly states that as Cross Defendants were ordered to serve as successor
21 trustees of the Living Trust, per section 39, they are considered successors to the 2003
22 Settlement, and are thus bound by the indemnification provisions of the 2003 Settlement.
23 (*Id.* ¶ 33.) Furthermore, the Court finds that the ACC makes no reference and does not
24 attempt to hold Cross Defendants personally liable for the damages Ms. Pickens's allegedly
25 sustained. Accordingly, Cross Defendants' motion to dismiss Ms. Pickens's indemnity
26 cause of action is **DENIED**.

26 D. Leave to Amend

27 The Court now has to balance whether Ms. Pickens should be granted leave to
28 amend. Cross Defendants request that Ms. Pickens's claims be dismissed with prejudice.


1 However, the Court notes that “dismissal with prejudice and without leave to amend is not
2 appropriate unless it is clear on de novo review that the complaint could not be saved by
3 amendment.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)
4 (citation omitted). Here, Ms. Pickens has only been allowed one chance to amend. Thus,
5 in the Court’s discretion, the Court will grant Ms. Pickens a second chance to amend her
6 cross-claim. *See Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996).
7 Consequently, Cross Defendants’ request that Ms. Pickens’s claims be dismissed with
8 prejudice is **DENIED**.

9 **CONCLUSION**

10 Based on the foregoing, the Court **GRANTS** Cross Defendants’ motion to dismiss
11 Ms. Pickens’s claims for breach of fiduciary duty **WITHOUT PREJUDICE**, and
12 **DENIES** Cross Defendants’ motion to dismiss Ms. Pickens’s claim for indemnity. If Ms.
13 Pickens may plausibly allege additional facts to cure the deficiencies noted herein, she may
14 file a second amended cross-claim within **fourteen (14) days** of the date of this order.
15 Cross Defendants are otherwise ordered to file an answer to the cross-claim, as applicable,
16 within fourteen (14) days of the date of this order or within fourteen (14) days of a second
17 amended cross-claim being filed, whichever is later.

18 **IT IS SO ORDERED.**

19 Dated: April 11, 2017

20 
21 Hon. Anthony J. Battaglia
22 United States District Judge
23
24
25
26
27
28