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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 RICHARD G. LEMKE,

12 Plaintiff,

13 v.

14 GARY D. JANDER,

15 Defendant.

Case No.: 20-CV-362 JLS (KSC)

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

(ECF No. 9)

16
17 Presently before the Court is Defendant Gary Jander's Motion to Dismiss Plaintiff's
18 First Amended Complaint ("Mot.," ECF No. 9). Plaintiff Richard Lemke, proceeding *pro*
19 *se*, filed an Opposition to the Motion ("Opp'n," ECF No. 11), and Defendant filed a Reply
20 in Support of the Motion ("Reply," ECF No. 12). The Court took the matter under
21 submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). *See* ECF No.
22 13. Having carefully reviewed Plaintiff's First Amended Complaint ("FAC," ECF No. 8),
23 the Parties' arguments, and the law, the Court **GRANTS** Defendant's Motion.

24 **BACKGROUND**

25 Plaintiff's claims stem from a probate action in the San Diego Superior Court's
26 Central Probate Division, Case No. 27-2017-00000227-PR-TR-CTL. *See generally* FAC.
27 Plaintiff alleges he was appointed to serve as successor trustee to the Moore Family Trust.
28 FAC ¶ 12. However, Plaintiff claims the state court judge overseeing the probate action

1 “abused his discretion, violation Judicial Canons 1 – 4 and committed fraud upon the court”
2 by removing Plaintiff as trustee. *Id.* ¶ 18. The state court appointed Interim Trustee
3 Elizabeth del Pozo. *Id.* ¶ 19. Plaintiff claims that the “California Superior Court County
4 of San Diego Probate Division did not have jurisdiction over the Marvin G. Moore Trust
5 Yet they proceeded with litigation against the Plaintiff[’]s real and personal property
6” *Id.* Defendant is an attorney who represents Ms. del Pozo and was Plaintiff’s
7 opposing counsel in the probate action, Mot. at 1; however, Plaintiff alleges that Defendant
8 is not the attorney of record for Ms. del Pozo because Defendant intentionally
9 misrepresented that he has standing to file documents in California state court, FAC ¶¶ 51–
10 56.

11 Plaintiff alleges that Defendant made “misrepresentation[s] of material fact,” filed
12 fraudulent pleadings, and made false and untrue statements to the court in the state court
13 probate action. FAC ¶¶ 21–22, 24–25, 34, 41, 48–49, 51–56, 62, 65. Plaintiff contends
14 that the state courts, including the California Court of Appeal, issued orders related to the
15 Moore Family Trust based on Defendant’s fraudulent misrepresentations. *See id.* Plaintiff
16 further alleges that Defendant “aided and abetted” Ms. del Pozo in failing to pay state and
17 federal taxes. *Id.* ¶ 60. Plaintiff alleges Defendant conspired with others to defraud the
18 Internal Revenue Services (“IRS”). *Id.* ¶ 61. Plaintiff claims Defendant “intentionally
19 made misrepresentation[s] of material fact which involved conspiracy with” several
20 parties, including other attorneys in state court proceedings and the state court judge. *Id.*
21 ¶ 62. Additionally, Plaintiff alleges that Defendant conspired with these parties to
22 perpetuate fraud upon the court and “steal Plaintiff’s inheritance.” *Id.*

23 **LEGAL STANDARD**

24 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the
25 defense that the complaint “fail[s] to state a claim upon which relief can be granted,”
26 generally referred to as a motion to dismiss. The Court evaluates whether a complaint
27 states a cognizable legal theory and sufficient facts in light of Federal Rule of Civil
28 Procedure 8(a), which requires a “short and plain statement of the claim showing that the

1 pleader is entitled to relief.” Although Rule 8 “does not require ‘detailed factual
2 allegations,’ . . . it [does] demand more than an unadorned, the-defendant-unlawfully-
3 harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
4 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a plaintiff’s obligation to
5 provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and
6 conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
7 *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A
8 complaint will not suffice “if it tenders ‘naked assertion[s]’ devoid of ‘further factual
9 enhancement.’” *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at 557).

10 To survive a motion to dismiss, “a complaint must contain sufficient factual matter,
11 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting
12 *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible
13 when the facts pled “allow the court to draw the reasonable inference that the defendant is
14 liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at
15 556). That is not to say that the claim must be probable, but there must be “more than a
16 sheer possibility that a defendant has acted unlawfully.” *Id.* Facts “‘merely consistent
17 with’ a defendant’s liability” fall short of a plausible entitlement to relief. *Id.* (quoting
18 *Twombly*, 550 U.S. at 557). Further, the Court need not accept as true “legal conclusions”
19 contained in the complaint. *Id.* This review requires context-specific analysis involving
20 the Court’s “judicial experience and common sense.” *Id.* at 678 (citation omitted).
21 “[W]here the well-pleaded facts do not permit the court to infer more than the mere
22 possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the
23 pleader is entitled to relief.’” *Id.*

24 Courts have a duty to construe a *pro se* litigant’s pleadings liberally. *See Karim-*
25 *Panahi v. L.A. Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988). The district court should
26 grant leave to amend if it appears “at all possible that the plaintiff can correct the defect,”
27 unless the court determines that “the pleading could not possibly be cured by the allegation
28 of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130–31 (9th Cir. 2000) (en banc) (citing

1 *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995); *Balistreri v. Pacifica Police Dep’t*,
2 901 F.2d 696, 701 (9th Cir. 1990)).

3 ANALYSIS

4 In his operative First Amended Complaint, Plaintiff alleges four causes of action:
5 (1) fraud upon the court pursuant to Federal Rules of Civil Procedure 60(b)(3), (c)(1), and
6 (d)(3); (2) civil action for deprivation of rights pursuant to 42 U.S.C. § 1983; (3) attempt
7 to evade or defeat tax pursuant to 26 U.S.C. § 7201; and (4) conspiracy to commit an
8 offense or defraud the United States pursuant to 18 U.S.C. § 371. FAC ¶¶ 50–62. The
9 Court addresses the sufficiency of these claims in turn.

10 I. Rules 60(b)(3), (c)(1), and (d)(3)

11 Defendant argues that Plaintiff “makes conclusory allegations” in support of his
12 fraud on the court claim. Mot. at 6. Further, Defendant argues that “Plaintiff’s entire
13 Amended Complaint stems from Plaintiff’s dissatisfaction in the Probate action, which is
14 governed by state law. Federal courts are without jurisdiction of Probate matters.” *Id.*
15 (citing *Fouvergne v. New Orleans*, 59 U.S. 470 (1856); *Carstensen v. United States Fidelity*
16 *& Guaranty Co.*, 27 F.2d 11 (9th Cir. 1928)).

17 Rule 60(b)(3) provides that a court “may relieve a party” from a “final judgment,
18 order, or proceeding” for “fraud . . . , misrepresentation, or misconduct by an opposing
19 party.” Rule 60(c)(1) sets a one-year time limit for a Rule 60(b)(3) motion; however, Rule
20 60(d)(3) provides that “[t]his rule does not limit a court’s power to . . . set aside a judgment
21 for fraud on the court.” Rule 60(d)(1) empowers the court to “entertain an independent
22 action to relieve a party from a judgment, order, or proceeding.” Generally, the rendering
23 court is the preferred forum for an independent action seeking relief from judgment.
24 *Treadway v. Acad. of Motion Picture Arts & Scis.*, 783 F.2d 1418, 1421 n.2 (9th Cir. 1986).
25 “[C]onsiderations of comity and orderly administration of justice demand[] that the
26 nonrendering court should decline jurisdiction of such an action and remand the parties to
27 the rendering court, so long as it is apparent that a remedy is available there.” *Id.* at 1421

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1 (internal quotation marks and brackets omitted) (quoting *Lapin v. Shulton*, 333 F.2d 169
2 (9th Cir. 1964)).

3 Plaintiff is seeking relief from judgments entered against him in San Diego Superior
4 Court's Central Probate Division, as well as the California Court of Appeal. *See generally*
5 FAC. Plaintiff alleges that Defendant made "misrepresentation[s] of material fact," filed
6 fraudulent pleadings, and made false and untrue statements to the state court. FAC ¶¶ 21–
7 22, 24–25, 34, 41, 48–49, 51–56, 62, 65. Plaintiff raised these claims of fraud in the state
8 court action. *See, e.g., id.* ¶ 18. Plaintiff repeatedly asserts that, in addition to Defendant's
9 alleged fraud, the Superior Court judge "committed fraud upon the court" by "allowing
10 strangers off the streets . . . to submit fake documentation as beneficiaries." *Id.* ¶¶ 18–19.
11 To the extent Plaintiff disagreed with the state court judge's rulings, he utilized the state
12 court appeal process. *See, e.g., id.* ¶ 51. Plaintiff had the opportunity to raise these claims
13 of fraud against Defendant at the Probate Court and the Court of Appeal. *See, e.g., id.*

14 The Court finds Plaintiff has not provided any reason in his First Amended
15 Complaint or in his Opposition why he could not have brought this claim in the rendering
16 court. Accordingly, the Court declines to "interfere[] with and usurp[] the power of the
17 rendering court." *Treadaway*, 783 F.2d at 1422 ("Although justice may occasionally
18 demand that sort of interference, the identification of those rare situations is committed to
19 the sound discretion of the district court."). In the interest of comity, the Court declines to
20 exercise jurisdiction over Plaintiff's fraud on the court claim and **GRANTS** Defendant's
21 Motion to Dismiss as to that claim. *In re Reyes*, No. BAP EC-18-1229-BSL, 2019 WL
22 1759749, at *5 (B.A.P. 9th Cir. Apr. 19, 2019), *aff'd*, No. 19-60027, 2020 WL 3832557
23 (9th Cir. July 8, 2020) ("The law is quite clear that Civil Rule 60(b) applies to relief from
24 judgment of a federal court; it does not provide a basis for subject matter jurisdiction over
25 a claim for relief from a state court judgment." (emphasis omitted)); *Holder v. Simon*, 384
26 F. App'x 669 (9th Cir. 2010) ("Rule 60(b) does not provide a basis for subject matter
27 jurisdiction over a claim for relief from a state court judgment."); *Garcia v. Honeywell*
28 *Int'l, Inc.*, No. 13CV2399 DMS (WVG), 2014 WL 12199981, at *4 (S.D. Cal. Jan. 28,

1 2014) (dismissing with prejudice fraud on the court claim that could have been pursued in
2 the rendering court). Plaintiff’s fraud on the court claim is **DISMISSED WITHOUT**
3 **PREJUDICE**.

4 **II. 42 U.S.C. § 1983**

5 Defendant argues that Plaintiff’s allegations under 42 U.S.C. § 1983 are conclusory
6 and fail to state a plausible claim for relief. Mot. at 6–7. Plaintiff argues that Defendant
7 “violated the Plaintiff[’]s rights in due process of the law” because Defendant “aid[ed] and
8 abett[ed]” the state court judge to appoint Ms. del Pozo as trustee of the Moore Family
9 Trust. Opp’n at 3. Additionally, Plaintiff alleges he “never had a hearing pursuant to
10 [California Probate Code §§] 1310(b) and 1310(d).” *Id.*

11 Section 1983 provides a cause of action against any person who, under color of state
12 law, deprives another of any rights, privileges, or immunities secured by the Constitution
13 and laws of the United States. Section 1983 is not a source of substantive rights but merely
14 a method for vindicating federal rights established elsewhere. *Graham v. Connor*, 490
15 U.S. 386, 393–94 (1989). To succeed on a § 1983 claim, a plaintiff must show “(1) that a
16 right secured by the Constitution or the laws of the United States was violated, and (2) that
17 the alleged violation was committed by a person acting under color of State law.” *Long v.*
18 *Cnty. of L.A.*, 442 F.3d 1178, 1185 (9th Cir. 2006).

19 To plead a claim under § 1983, Plaintiff must allege sufficient facts to show that a
20 constitutional or federal right was violated, and that the violation was committed by
21 Defendant while he was acting under color of law. Plaintiff alleges in conclusory terms
22 that the state court judge violated Plaintiff’s Fifth and Fourteenth Amendment rights. FAC
23 ¶¶ 16, 19, 21, 23, 24, 26, 27, 31, 33, 34. The Fifth Amendment applies to federal actors
24 and the Fourteenth Amendment applies to state actors. *Betts v. Brady*, 316 U.S. 455, 462
25 (1942) (“Due process of law is secured against invasion by the federal Government by the
26 Fifth Amendment and is safeguarded against state action in identical words by the
27 Fourteenth.”) (*overruled on other grounds by Gideon v. Wainwright*, 372 U.S. 335 (1963)).
28 Plaintiff alleges that Defendant assisted the state court judge in depriving Plaintiff of

1 meaningful hearings and an opportunity to be heard pursuant to California Probate Code
2 §§ 1310(b) and 1310(d). *See* Cal. Prob. Code § 1310(b) (“Notwithstanding that an appeal
3 is taken from the judgment or order, . . . the trial court may direct the exercise of the powers
4 of the fiduciary, or may appoint a temporary guardian or conservator of the person or estate
5 . . . to exercise the powers, from time to time, as if no appeal were pending.”). The
6 California Probate Code is not a source of substantive federal rights. In addition, the state
7 court judge is not a party to the present action. *See Patterson v. Moench*, 138 F. App’x
8 904, 906 (9th Cir. 2005) (holding a state court judge is immune from § 1983 liability as
9 long as his “ultimate acts” were “judicial actions taken within the court’s subject matter
10 jurisdiction” (quoting *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (en banc)).
11 Plaintiff may not rely on unsubstantiated allegations against the state court judge to
12 maintain an action against Defendant, who was merely Plaintiff’s opposing counsel in the
13 state court action. Plaintiff’s FAC fails to plausibly allege a violation of a federal right
14 committed by Defendant.

15 Further, Plaintiff’s allegations as to Defendant are unavailing because Plaintiff does
16 not allege Defendant is a federal or state actor. *Guillen v. Black*, 914 F.2d 262 (9th Cir.
17 1990) (holding the plaintiff could not state a § 1983 claim against his attorney, a private
18 person who does not act under color of law); *Keane v. Artz*, 162 F. App’x 748, 749 (9th
19 Cir. 2006) (holding a private attorney was not acting under color of state law when he
20 represented the plaintiff’s spouse in a custody dispute). Therefore, Plaintiff cannot invoke
21 this Court’s jurisdiction based on allegations that Defendant violated Plaintiff’s
22 constitutional rights because Plaintiff has not adequately alleged a federal right that
23 Defendant violated or that Defendant was acting under color of law.

24 Accordingly, the Court **GRANTS** Defendant’s Motion to Dismiss as to this claim.
25 This claim is **DISMISSED WITHOUT PREJUDICE**.

26 **III. 26 U.S.C. § 7201 and 18 U.S.C. § 371**

27 Plaintiff alleges causes of action under two federal criminal statutes, 26 U.S.C.
28 § 7201 and 18 U.S.C. § 371. Defendant argues that “Plaintiff[] fails to plead sufficient

1 facts to state a claim upon which relief may be granted because [the causes of action are]
2 brought pursuant to . . . statute[s] that contains no private right of action.” Mot. at 12.
3 Plaintiff contends he states plausible claims for relief because “in instances where no
4 express private right of action exists in a statute, a private plaintiff seeking to enforce such
5 a statute has an alternative source of relief: a judicially implied private right of action.”
6 Opp’n at 8.

7 “The fact that a federal statute has been violated and some person harmed does not
8 automatically give rise to a private right of action.” *Touche Ross & Co. v. Redington*, 442
9 U.S. 560, 568 (1979). “Instead, the statute must either explicitly create a right of action or
10 implicitly contain one.” *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1230 (9th
11 Cir. 2008). Legislative intent to create a private right of action is necessary for an implied
12 private right of action under a criminal statute: “An evaluation of the other elements is not
13 necessary if the court finds that Congress did not intend to create a private right of action.”
14 *Stupy v. USPS*, 951 F.2d 1079, 1081 (9th Cir. 1981).

15 Plaintiff’s third cause of action alleges violation of 26 U.S.C. § 7201. This is a
16 criminal provision of the Internal Revenue Code that prescribes penalties for attempting to
17 evade or defeat taxes. Pursuant to 26 U.S.C. § 7401, “[n]o civil action for the recovery of
18 taxes, or of any fine, penalty, or forfeiture shall be commenced unless the Secretary
19 authorizes or sanctions the proceedings and the Attorney General or his delegate directs
20 that the action be commenced.” Accordingly, courts that have considered whether § 7201
21 provides for a private right of action have concluded that it does not. *See, e.g., Troy McRae*
22 *v. Joseph Norton*, No. 12-CV-1537 (KAM), 2012 WL 1268295, at *4 (E.D.N.Y. Apr. 13,
23 2012) (relying upon § 7401 to conclude that no private right of action exists under § 7201);
24 *see also U.S. ex rel. Lissack v. Sakura Glob. Capital Markets, Inc.*, 377 F.3d 145, 153 (2d
25 Cir. 2004) (“[T]he IRS has exclusive jurisdiction over tax matters[.]”). Therefore, the
26 Court finds there is no private right of action in 26 U.S.C. § 7201 and **GRANTS**
27 Defendant’s Motion to Dismiss as to this claim.

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1 Plaintiff's fourth cause of action alleges conspiracy under 18 U.S.C. § 371. This is
2 a criminal statute and similarly does not provide a private cause of action. *See Rockefeller*
3 *v. U.S. Court of Appeals Office for Tenth Circuit Judges*, 248 F. Supp. 2d 17, 23 (D.D.C.
4 2003) (dismissing claims brought pursuant to 18 U.S.C. § 371 "because, as [a] criminal
5 statute[], [it] do[es] not convey a private right of action"); *Lamont v. Haig*, 539 F. Supp.
6 552, 558 (D.S.D. 1982) (same); *Sauls v. Bristol-Myers Co.*, 462 F. Supp. 887, 889
7 (S.D.N.Y. 1978) (same). Accordingly, the Court **GRANTS** Defendant's Motion to
8 Dismiss as to this claim.

9 Because the Court finds that no amendment could state a claim under these statutes,
10 Plaintiff's claims under 26 U.S.C. § 7201 and 18 U.S.C. § 371 are **DISMISSED WITH**
11 **PREJUDICE**.

12 CONCLUSION

13 The Court therefore **GRANTS** Defendant's Motion to Dismiss (ECF No. 9).
14 Plaintiff's First and Second Causes of Action is dismissed **WITHOUT PREJUDICE**.
15 Plaintiff's Third and Fourth Causes of Action are dismissed **WITH PREJUDICE**.
16 Plaintiff may file an amended complaint, if any, within thirty (30) days from the date this
17 Order is electronically docketed. Any amended filing must be complete in itself without
18 reference to Plaintiff's First Amended Complaint. Any claim not re-alleged in Plaintiff's
19 amended complaint will be considered waived. *See* S.D. Cal. Civ. R 15.1; *Hal Roach*
20 *Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) ("[A]n
21 amended pleading supersedes the original."); *see also Lacey v. Maricopa Cty.*, 693 F.3d
22 896, 928 (9th Cir. 2012) (noting that claims dismissed with leave to amend which are not
23 re-alleged in an amended pleading may be "considered waived if not repled."). Failure to
24 file within the time allotted may result in the dismissal of this action in its entirety. *See*
25 *Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) ("If a plaintiff does not take advantage

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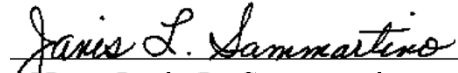
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1 of the opportunity to fix his complaint, a district court may convert the dismissal of the
2 complaint into dismissal of the entire action.”).

3 **IT IS SO ORDERED.**

4 Dated: March 1, 2021


5 Hon. Janis L. Sammartino
6 United States District Judge

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