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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

MICHAEL J. FLYNN,
Plaintiff,

3:09-CV-00422-PMP-RAM

v.

LINER GRODE STEIN YANKELEVITZ
SUNSHINE REGENSTREIF & TAYLOR
LLP, DEBORAH A. KLAR, and TERI
PHAM,
Defendants.

ORDER

Presently before the Court is Defendant Liner Firm’s Motion to Dismiss First Amended Complaint (Doc. #86) and request for judicial notice (Doc. #87), filed on January 18, 2011. Plaintiff Michael Flynn filed an Opposition (Doc. #92) on February 2, 2011. Defendant filed a Reply (Doc. #95) on February 14, 2011. Defendants Deborah Klar and Teri Pham filed a Joinder in Motion to Dismiss First Amended Complaint Filed on Behalf of the Liner Firm (Doc. #91) on January 25, 2011, and Joinder in Reply to Plaintiff’s Response to Motion to Dismiss Filed on Behalf of the Liner Firm (Doc. #96) on February 15, 2011.

Also before the Court is Defendants Deborah Klar and Teri Pham’s Motion to Dismiss First Amended Complaint for Failure to State a Claim (Doc. #90), filed on January 25, 2011. Plaintiff Michael Flynn filed an Opposition (Doc. #97) on February 25, 2011. Defendants Deborah Klar and Teri Pham filed a Reply (Doc. #101) on March 14, 2011.

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1 **I. BACKGROUND**

2 Plaintiff Michael Flynn (“Flynn”) is an attorney licensed in Massachusetts who
3 appeared pro hac vice in this Court in the case of Dennis Montgomery v. eTreppid
4 Technologies, 3:06-CV-00056-PMP-VPC (“eTreppid case”). (Am. Compl. (Doc. #77) at
5 2.) Defendant Liner, Grode, Stein, Yankelevitz, Sunshine, Regenstreif & Taylor, LLP
6 (“Liner Firm”) is a law firm based in Los Angeles, California. (Id. at 1.) Defendants
7 Deborah Klar (“Klar”) and Teri Pham (“Pham”) are attorneys who previously were partners
8 in the Liner Firm. (Id.) Pham and Klar also appeared pro hac vice in the eTreppid case,
9 representing Dennis Montgomery (“Montgomery”) following Flynn’s withdrawal as
10 Montgomery’s attorney. (Id. at 1-2.)

11 Flynn alleges that Klar, Pham, and the Liner Firm initiated several state court and
12 administrative proceedings against him in an effort to force him to turn over Montgomery’s
13 client file without Montgomery having to pay attorney’s fees he owed Flynn or having to
14 post a bond for such fees. (Id. at 3.) Specifically, Flynn alleges Defendants initiated an
15 action in California superior court, filed an application for writ of possession in the
16 California superior court action, filed a fee arbitration petition in San Diego, filed a bar
17 complaint with the Massachusetts state bar, filed a perjurious declaration in the California
18 and Nevada proceedings, and filed other “pleadings” in the California and Nevada actions
19 in bad faith. (Id. at 3-4.) Flynn alleges Defendants did so in an abusive manner, relying on
20 a perjured affidavit by Montgomery, and knowing that no basis existed for pursuing the
21 actions in California. (Id. at 3-5.) Flynn further alleges Defendants engaged in these
22 activities in a concerted effort to circumvent Nevada law which permits Flynn to exercise a
23 retaining lien over the client file, to avoid this Court’s jurisdiction to enforce the retaining
24 lien, and to evade this Court’s supervision of state secrets contained within Montgomery’s
25 client file. (Id.)

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1 Flynn also alleges Defendants funded these various judicial and quasi-judicial
2 proceedings through a fraudulent financing scheme whereby Defendants assisted
3 Montgomery and his purported benefactor, Edra Blixseth, in obtaining millions of dollars in
4 loans from various banks which Flynn alleges were procured through fraudulent loan
5 applications and financial statements. (Id. at 6.) Flynn contends this activity led him to
6 incur \$400,000 in costs defending himself in the various proceedings.¹ (Id. at 16.)

7 Based on this conduct, Flynn brought suit in this Court asserting claims against
8 Liner Firm, Klar, and Pham for abuse of process under Nevada law (count one), malicious
9 prosecution under California law (count two), aiding and abetting violations of 18 U.S.C.
10 § 1030 (count three), intentional infliction of emotional distress (count four), negligent
11 infliction of emotional distress (count five), violation of rules and statutes (count six),
12 invasion of privacy (count seven), negligence (count eight), and conspiracy (count nine).
13 (Compl.) This Court previously granted Defendants’ motions to dismiss these claims, but
14 with leave to amend to correct the identified deficiencies with respect to some of the claims.
15 (Orders (Doc. ##70-71).)

16 Flynn’s First Amended Complaint asserts claims against Liner Firm, Klar, and
17 Pham for violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”)
18 (counts four and six) and civil conspiracy (count seven). Flynn further alleges that
19 Defendants aided and abetted Montgomery hacking into Flynn’s computer and used the
20 information obtained in the fee dispute proceedings. (Id. at 6-7.) Flynn brings claims for
21 aiding and abetting violations of 18 U.S.C. § 1030 (count one), aiding and abetting
22 violations of the Stored Communications Act (count two), and aiding and abetting invasion
23

24 ¹ Flynn also contends Defendants’ conduct caused him to lose \$630,000 in attorney’s fees
25 which Montgomery owes Flynn. However, as this Court previously explained, Defendants’ alleged
26 conduct did not cause Flynn to “lose” fees for which he received a Judgment which since has become
uncollectible due to Montgomery’s bankruptcy. (Order (Doc. #71) at 21.)

1 of privacy (count three) based on these allegations.²

2 Defendants Liner Firm, Klar, and Pham now move to dismiss the First Amended
3 Complaint, arguing Plaintiff fails to state a claim on each count of the First Amended
4 Complaint for various reasons. Defendants also contend Plaintiff should not be permitted
5 to assert new claims where the Court's prior Order permitted Plaintiff only to correct the
6 identified deficiencies in the prior Complaint. Plaintiff opposes the motion, and requests
7 leave to amend to add the new claims.

8 **II. LEGAL STANDARD**

9 In considering a motion to dismiss, "all well-pleaded allegations of material fact
10 are taken as true and construed in a light most favorable to the non-moving party." Wyler
11 Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation
12 omitted). However, the Court does not necessarily assume the truth of legal conclusions
13 merely because they are cast in the form of factual allegations in the plaintiff's complaint.
14 See Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). There is a
15 strong presumption against dismissing an action for failure to state a claim. Ileto v. Glock
16 Inc., 349 F.3d 1191, 1200 (9th Cir. 2003). A plaintiff must make sufficient factual
17 allegations to establish a plausible entitlement to relief. Bell Atl. Corp. v Twombly, 550
18 U.S. 544, 556 (2007). Such allegations must amount to "more than labels and conclusions,
19 [or] a formulaic recitation of the elements of a cause of action." Id. at 555.

20 **A. Aiding and Abetting 18 U.S.C. § 1030 Violation - Count One**

21 Defendants argues Flynn's claim under 18 U.S.C. § 1030 fails because the First
22 Amended Complaint fails to allege he suffered physical injury as defined under the
23 applicable statute. Defendants also argue the First Amended Complaint fails to allege what
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25 ² The counts in the First Amended Complaint are misnumbered, as there is no count five. For
26 ease of reference, the Court will refer to the counts as they are numbered in the First Amended
Complaint.

1 acts Defendants undertook to aid and abet Montgomery’s alleged hacking of Flynn’s
2 computer. Defendants further contend no claim exists under § 1030 for aiding and abetting.
3 Defendants Klar and Pham also argue that Flynn’s § 1030 claim is barred by the statute of
4 limitations.

5 Title 18 U.S.C. § 1030(a)(2)(C) imposes criminal penalties on a person who
6 “intentionally accesses a computer without authorization or exceeds authorized access,” and
7 thereby obtains information from a protected computer. Section 1030(b) also imposes
8 liability for any person who “conspires to commit or attempts to commit an offense under
9 subsection (a).” Section 1030(g) provides a civil action for “[a]ny person who suffers
10 damage or loss by reason of a violation of this section.”

11 The statute’s plain language sets forth who is liable under § 1030: a primary
12 violator, a person who attempts a primary violation, and a co-conspirator of a primary
13 violator. Section 1030 does not provide for aiding and abetting liability. See
14 Moreno-Morante v. Gonzales, 490 F.3d 1172, 1175 (9th Cir. 2007) (stating that court’s
15 “starting point” for statutory construction is the statute’s plain language, and if it is
16 unambiguous, the court’s inquiry is at an end). Had Congress intended for aiding and
17 abetting civil liability to apply, it could and would have said so. Freeman v. DirecTV, Inc.,
18 457 F.3d 1001, 1006 (9th Cir. 2006) (reaching a similar conclusion with respect to 18
19 U.S.C. §§ 2702, 2707). The Court therefore will dismiss this claim with prejudice, as
20 aiding and abetting civil liability does not exist under § 1030.

21 Moreover, even if such liability existed, Flynn has failed to allege facts that
22 Defendants aided and abetted Montgomery’s hacking. Flynn alleges Defendants were
23 “recipients of the ‘hacked’ information” and used the hacked information knowing its illicit
24 source. (First Am. Compl. at ¶¶ 10, 17, 28.) However, Flynn does not allege Defendants
25 substantially assisted, or even encouraged or induced, Montgomery in the primary violation,
26 the hacking itself. See Ponce v. S.E.C., 345 F.3d 722, 737 (9th Cir. 2003) (stating that

1 aiding and abetting in context of the securities laws involves (1) a primary violation of the
2 relevant securities laws; (2) the aider and abettor knew of the primary violation and of his or
3 her own role in furthering it; and (3) the aider and abettor provided substantial assistance in
4 the primary violation). Defendants' alleged use of hacked information after the fact does
5 not state a claim that Defendants aided and abetted the hacking.

6 Aiding and abetting liability does not exist as a matter of law under § 1030. The
7 Court therefore will dismiss Flynn's claim in count one with prejudice as to all Defendants.

8 **B. Aiding and Abetting Violations of 18 U.S.C. § 2707 (Count Two)**

9 Defendants move to dismiss this claim, contending that aiding and abetting
10 liability also does not exist under 18 U.S.C. § 2707. Flynn does not respond on this point.
11 Flynn's failure to respond constitutes a consent to granting the motion. LR 7-2(d).
12 Moreover, aiding and abetting liability does not exist under 18 U.S.C. § 2707 as a matter of
13 law. Freeman, 457 F.3d at 1005-06. The Court therefore will dismiss count two with
14 prejudice as to all Defendants.

15 **C. Aiding and Abetting Invasion of Privacy (Count Three)**

16 Defendants argue this claim should be dismissed because to the extent it is based
17 on Defendants' alleged use of hacked information in the various judicial and quasi-judicial
18 proceedings, such actions are privileged. Defendants also argue Flynn has failed to allege
19 facts of what they did to aid and abet Montgomery's invasion of privacy, what damages
20 Flynn suffered as a result, and why he had an expectation of privacy in his computer after
21 he knew Montgomery had been hacking his computer.

22 Flynn responds that the litigation privilege does not apply because he is not
23 alleging public disclosure of private facts, he is alleging the tort of intrusion. Flynn
24 contends he has alleged sufficient facts regarding Defendants' aiding and abetting, that he
25 suffered emotional and physical damages due to the stress of the hacking and the disclosed
26 information, and that he had a reasonable expectation of privacy in his own personal

1 computer.

2 This Court previously dismissed Flynn’s invasion of privacy claim in the original
3 Complaint because Flynn failed to allege facts in support of his invasion of privacy claim.
4 The Court noted that Flynn did not identify when Montgomery hacked into his computer,
5 what information he obtained, what acts Defendants undertook that invaded Flynn’s
6 privacy, or how Defendants used the information Montgomery obtained. The Court
7 dismissed this claim without prejudice.

8 According to the First Amended Complaint, Defendants used the hacked
9 information “against [Flynn] in the litigation in Nevada and California,” and that such use
10 caused injury to Flynn’s reputation, humiliation, and embarrassment. (First Am. Compl.
11 ¶¶ 38-39.) While Flynn denies he is asserting a claim based Defendants’ alleged disclosure
12 of private facts in the judicial and quasi-judicial proceedings Defendants initiated against
13 Flynn, that is what he has alleged in the First Amended Complaint. Flynn does not clarify
14 under what law he brings this claim, but if it is California law, this tort is barred by the
15 litigation privilege in California. Cal. Civ. Code § 47(b); Rusheen v. Cohen, 128 P.3d 713,
16 718 (Cal. 2006). If the claim is brought under Nevada law, Flynn has failed to allege any
17 private facts Defendants publicly disclosed which would be “offensive and objectionable to
18 a reasonable person of ordinary sensibilities.” Montesano v. Donrey Media Group, 668
19 P.2d 1081, 1084 (Nev. 1983). The only facts which Flynn alleges Defendants revealed
20 about him as a result of Montgomery’s hacking was that Flynn maintained client files in
21 California. (First Am. Compl. ¶ 29.) No reasonable jury could conclude that the revelation
22 that Flynn stored client files in California would be offensive to a reasonable person of
23 ordinary sensibilities.

24 Further, even if Flynn were alleging only intrusion, rather than public disclosure
25 of private facts, Flynn’s First Amended Complaint suffers from the same defects as his
26 original Complaint. Under Nevada law, to recover for the tort of intrusion, a plaintiff must

1 allege “(1) an intentional intrusion (physical or otherwise); 2) on the solitude or seclusion of
2 another; 3) that would be highly offensive to a reasonable person.” People for Ethical
3 Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269, 1279 (Nev. 1995); see also
4 Folgelstrom v. Lamps Plus, Inc., 195 Cal. App. 4th 986, 992 (Cal. App. Ct. 2011) (stating
5 elements for tort of intrusion as “(1) intrusion into a private place, conversation or matter,
6 (2) in a manner highly offensive to a reasonable person”). Although the First Amended
7 Complaint identifies when Montgomery hacked into Flynn’s computer, the First Amended
8 Complaint does not identify what acts Defendants took that aided and abetted
9 Montgomery’s hacking that would support a viable intrusion claim other than that
10 Defendants used and disclosed the hacked information in litigation. As discussed with
11 respect to Flynn’s § 1030 claim, Defendants’ alleged after-the-fact use of hacked
12 information does not amount to aiding and abetting the hacking itself. Moreover, Flynn
13 denies that he is alleging public disclosure of private facts, and Defendants’ use of the
14 information in the judicial and quasi-judicial proceedings is privileged in any event.

15 Flynn does not request leave to further amend this claim, nor does he explain
16 what he would allege if given another opportunity to amend, other than his attempt to
17 morph his public disclosure of private facts allegations into a claim for intrusion. As
18 explained above, such a claim would not survive dismissal because Flynn does not identify
19 any factual allegations he could make as to what acts Defendants took to aid and abet
20 Montgomery’s alleged hacking. The Court therefore will dismiss this claim with prejudice
21 as to all Defendants.

22 **D. RICO and RICO Conspiracy (Counts Four and Six)**

23 Defendants object to Flynn pleading new RICO claims when the Court did not
24 grant Flynn leave to do so. Defendants also argue that Flynn cannot state a RICO injury or
25 causation because the only predicate criminal acts Flynn identifies are bank fraud and
26 related mail and wire fraud. Defendants contend the primary victims of these predicate acts

1 are the allegedly defrauded banks, not Flynn, and that his alleged injury of having to defend
2 litigation funded by this alleged fraud is too remote and attenuated to support causation
3 under the antitrust laws. Flynn responds that he is a direct victim of the RICO enterprise
4 because Defendants used the fraudulently obtained funds to wage a litigation war against
5 him. Flynn also requests that, to the extent the prior Court's Orders did not grant him leave
6 to add these new claims, he be given such leave now.

7 Pursuant to 18 U.S.C. § 1962(c), it is unlawful “for any person employed by or
8 associated with any enterprise engaged in, or the activities of which affect, interstate or
9 foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such
10 enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.”
11 RICO provides a civil cause of action for “[a]ny person injured in his business or property
12 by reason of a violation of section 1962.” 18 U.S.C. § 1964(c). “To have standing under
13 § 1964(c), a civil RICO plaintiff must show: (1) that his alleged harm qualifies as injury to
14 his business or property; and (2) that his harm was ‘by reason of’ the RICO violation, which
15 requires the plaintiff to establish proximate causation.” Canyon County v. Syngenta Seeds,
16 Inc., 519 F.3d 969, 972 (9th Cir. 2008).

17 For proximate cause to exist, there must be “some direct relation between the
18 injury asserted and the injurious conduct alleged.” Holmes v. Sec. Investor Protection
19 Corp., 503 U.S. 258, 268 (1992). A plaintiff's injury is too attenuated from the RICO
20 violation where, for example, the cause of the plaintiff's asserted harms arises from a set of
21 actions “entirely distinct from the alleged RICO violation.” Anza v. Ideal Steel Supply
22 Corp., 547 U.S. 451, 458 (2006).

23 For example, in Anza, the plaintiff sold steel mill products and related supplies
24 and services. Id. at 453. The defendant was engaged in a similar business. Id. at 454. The
25 plaintiff alleged the defendant “adopted a practice of failing to charge the requisite New
26 York sales tax to cash-paying customers,” which allowed the defendant to “reduce its prices

1 without affecting its profit margin.” Id. The plaintiff alleged the defendant submitted
2 fraudulent tax returns to the New York State Department of Taxation and Finance to
3 conceal its conduct. Id. Based on this alleged fraud, the plaintiff asserted two RICO
4 claims. Id. The United States Supreme Court held that proximate cause was lacking
5 because the plaintiff’s asserted harms arose from “a set of actions (offering lower prices)
6 entirely distinct from the alleged RICO violation (defrauding the State).” Id. at 458.

7 In addition to comparing the relationship between the harm and the RICO
8 violation, courts consider the underlying principles motivating the direct injury requirement.
9 Id. at 458-59. Among these considerations are the difficulty in determining the amount of
10 the plaintiff’s damages resulting from the defendant’s conduct, the complexities involved in
11 apportioning damages to avoid the risk of multiple recoveries by different victims, and
12 whether there are more direct victims of the alleged wrongful conduct who can be counted
13 on to vindicate the law. Holmes, 503 U.S. at 269-71.

14 Here, the alleged RICO violations (bank fraud and related mail and wire fraud)
15 are too remote from the asserted injury (expenses incurred by a person other than the
16 defrauded banks in entirely separate and unrelated litigation). Flynn’s asserted harms of
17 incurring litigation costs in various civil suits and bar complaints arise from a set of actions
18 entirely distinct from the alleged RICO violations of bank fraud. Proximate cause is
19 therefore lacking as a matter of law.

20 The considerations underlying the directness requirement support this conclusion.
21 First and foremost, the banks are the direct victims of the alleged fraud, and can be
22 expected to vindicate any fraud perpetrated against them. There will be no complicated
23 evaluation of damages in such a case, as the question of the amount of loss in relation to a
24 fraudulent loan would be a relatively straightforward determination.

25 In contrast, it would be difficult to determine the amount of Flynn’s damages
26 resulting from Defendants’ alleged conduct because such an inquiry would involve

1 resolution of complex and uncertain factual questions, such as whether Defendants would
2 have taken the same actions against Flynn even without the alleged bank fraud. There are
3 many reasons why clients and counsel decide to take, or not to take, certain acts in
4 litigation. The availability of funds certainly is a consideration, but it is not the only one.

5 There does not appear to be a risk of multiple recoveries by different victims, as
6 the banks would be seeking to recover any defrauded funds, while Flynn seeks to recover
7 his personal litigation expenses. Nevertheless, the remoteness of the injury in relation to the
8 RICO acts, the availability of a direct victim to vindicate the law, and the difficulty of
9 determining the amount of Flynn’s damages caused by the RICO violations compel the
10 conclusion that proximate cause is lacking as a matter of law. The Court therefore will
11 dismiss the RICO claims with prejudice as to all Defendants.

12 **E. Conspiracy (Count Seven)**

13 Defendants argue that because Flynn fails to plead any viable claim for relief, his
14 conspiracy claim cannot survive. Defendants Klar and Pham further argue that an attorney
15 cannot conspire with her client. Flynn responds that his conspiracy claim incorporates by
16 reference all of the allegations in the Complaint, that he alleges Defendants acted together
17 to achieve the unlawful object of precluding Plaintiff from recovering his fees and costs,
18 and Defendants took predicate acts such as using Montgomery’s perjured affidavit to
19 support the various court and state bar proceedings.

20 Under California law, conspiracy “is not a cause of action, but a legal doctrine
21 that imposes liability on persons who, although not actually committing a tort themselves,
22 share with the immediate tortfeasors a common plan or design in its perpetration.” Applied
23 Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 457 (Cal. 1994). “By participation
24 in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other
25 coconspirators within the ambit of the conspiracy.” Id. Consequently, a civil conspiracy
26 “does not give rise to a cause of action unless a civil wrong has been committed resulting in

1 damage.” Id. (quotation omitted). Nevada law is in accord. Jordan v. State ex rel. Dep’t of
2 Motor Vehicles & Pub. Safety, 110 P.3d 30, 51 (Nev. 2005) (per curiam) (stating that “an
3 underlying cause of action for fraud is a necessary predicate to a cause of action for
4 conspiracy to defraud”), abrogated on other grounds by Buzz Stew, LLC v. City of N. Las
5 Vegas, 181 P.3d 670, 672 n.6 (Nev. 2008).

6 Because Plaintiff has failed to allege an underlying tort, the Court also will
7 dismiss the conspiracy claim. Flynn does not request leave to further amend this claim, nor
8 does he explain what he would allege if given another opportunity to amend. The Court
9 therefore will dismiss this claim with prejudice as to all Defendants.


10 **III. CONCLUSION**

11 IT IS THEREFORE ORDERED that Defendant Liner Firm’s Motion to Dismiss
12 First Amended Complaint (Doc. #86) is hereby GRANTED.

13 IT IS FURTHER ORDERED that Defendants Deborah Klar and Teri Pham’s
14 Motion to Dismiss First Amended Complaint for Failure to State a Claim (Doc. #90) is
15 hereby GRANTED.

16 IT IS FURTHER ORDERED that Judgment is hereby entered in favor of
17 Defendants Liner, Grode, Stein, Yankelevitz, Sunshine, Regenstreif & Taylor, LLP;
18 Deborah Klar; and Teri Pham, and against Plaintiff Michael Flynn.

19
20 DATED: July 15, 2011

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22 PHILIP M. PRO
23 United States District Judge
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