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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHAD J. ROMINE,
Plaintiff,
v.
BIG O TIRES CORPORATE
HEADQUARTERS, et al.,
Defendants.

No. 2:15-cv-0401 GEB KJN PS (TEMP)

ORDER AND
FINDINGS AND RECOMMENDATIONS

This matter came before the court on June 26, 2015, for hearing of defendants’ motion to dismiss pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Attorney David Wallis appeared on behalf of the defendants. There was no appearance by, or on behalf of, plaintiff Chad J. Romine. After hearing oral argument, defendants’ motion was taken under submission.

For the reasons stated below, the undersigned recommends that defendants’ motion to dismiss be granted in part.

BACKGROUND

Plaintiff commenced this action on February 20, 2015, by paying the required filing fee and filing a complaint. (Dkt. No. 1.) On April 10, 2015, plaintiff filed a motion for leave to file an amended complaint, (Dkt. No. 13), and on May 8, 2015, plaintiff filed a proposed amended

1 complaint. (Dkt. No. 19.) On May 12, 2015, the court granted plaintiff's motion for leave to file
2 an amended complaint and deemed the proposed amended complaint filed May 8, 2015, to be the
3 operative pleading in this action. (Dkt. No. 20.)

4 On May 28, 2015, defendants filed the motion to dismiss now pending before the court.
5 (Dkt. No. 21.) Plaintiff filed an opposition on June 3, 2015.¹ (Dkt. No. 24.) Defendants filed a
6 reply on June 10, 2015. (Dkt. No. 27.)

7 STANDARDS

8 I. Legal Standards Applicable to Motions to Dismiss Pursuant to Rule 12(b)(1)

9 Federal Rule of Civil Procedure 12(b)(1) allows a defendant to raise the defense, by
10 motion, that the court lacks jurisdiction over the subject matter of an entire action or of specific
11 claims alleged in the action. "A motion to dismiss for lack of subject matter jurisdiction may
12 either attack the allegations of the complaint or may be made as a 'speaking motion' attacking the
13 existence of subject matter jurisdiction in fact." Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.,
14 594 F.2d 730, 733 (9th Cir. 1979).

15 When a party brings a facial attack to subject matter jurisdiction, that party contends that
16 the allegations of jurisdiction contained in the complaint are insufficient on their face to
17 demonstrate the existence of jurisdiction. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039
18 (9th Cir. 2004). In a Rule 12(b)(1) motion of this type, the plaintiff is entitled to safeguards
19 similar to those applicable when a Rule 12(b)(6) motion is made. See Sea Vessel Inc. v. Reyes,
20 23 F.3d 345, 347 (11th Cir. 1994); Osborn v. United States, 918 F.2d 724, 729 n.6 (8th Cir.
21 1990). The factual allegations of the complaint are presumed to be true, and the motion is granted
22 only if the plaintiff fails to allege an element necessary for subject matter jurisdiction. Savage v.
23 Glendale Union High Sch. Dist. No. 205, 343 F.3d 1036, 1039 n.1 (9th Cir. 2003); Miranda v.
24 Renó, 238 F.3d 1156, 1157 n.1 (9th Cir. 2001). Nonetheless, district courts "may review
25 evidence beyond the complaint without converting the motion to dismiss into a motion for
26

27 ¹ In addition to his opposition, plaintiff has filed several documents styled as motions but which
28 were not properly noticed for hearings. Accordingly, those motions will be denied without
prejudice.

1 summary judgment” when resolving a facial attack. Safe Air for Everyone, 373 F.3d at 1039.

2 When a Rule 12(b)(1) motion attacks the existence of subject matter jurisdiction, no
3 presumption of truthfulness attaches to the plaintiff’s allegations. Thornhill Publ’g Co., 594 F.2d
4 at 733. “[T]he district court is not restricted to the face of the pleadings, but may review any
5 evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of
6 jurisdiction.” McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988). When a Rule
7 12(b)(1) motion attacks the existence of subject matter jurisdiction in fact, plaintiff has the burden
8 of establishing that such jurisdiction does in fact exist. Thornhill Publ’g Co., 594 F.2d at 733.

9 II. Legal Standards Applicable to Motions to Dismiss Pursuant to Rule 12(b)(6)

10 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal
11 sufficiency of the complaint. N. Star Int’l v. Ariz. Corp. Comm’n, 720 F.2d 578, 581 (9th Cir.
12 1983). “Dismissal can be based on the lack of a cognizable legal theory or the absence of
13 sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica Police Dep’t, 901
14 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege “enough facts to state a claim to
15 relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). “A
16 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw
17 the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v.
18 Iqbal, 556 U.S. 662, 678 (2009).

19 In determining whether a complaint states a claim on which relief may be granted, the
20 court accepts as true the allegations in the complaint and construes the allegations in the light
21 most favorable to the plaintiff. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Love v.
22 United States, 915 F.2d 1242, 1245 (9th Cir. 1989). In general, pro se complaints are held to less
23 stringent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519,
24 520-21 (1972). However, the court need not assume the truth of legal conclusions cast in the
25 form of factual allegations. United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th
26 Cir. 1986). While Rule 8(a) does not require detailed factual allegations, “it demands more than
27 an unadorned, the defendant-unlawfully-harmed-me accusation.” Iqbal, 556 U.S. at 678. A
28 pleading is insufficient if it offers mere “labels and conclusions” or “a formulaic recitation of the

1 elements of a cause of action.” Twombly, 550 U.S. at 555. See also Iqbal, 556 U.S. at 676
2 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory
3 statements, do not suffice.”). Moreover, it is inappropriate to assume that the plaintiff “can prove
4 facts which it has not alleged or that the defendants have violated the . . . laws in ways that have
5 not been alleged.” Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,
6 459 U.S. 519, 526 (1983).

7 In ruling on a motion to dismiss brought pursuant to Rule 12(b)(6), the court is permitted
8 to consider material which is properly submitted as part of the complaint, documents that are not
9 physically attached to the complaint if their authenticity is not contested and the plaintiff’s
10 complaint necessarily relies on them, and matters of public record. Lee v. City of Los Angeles,
11 250 F.3d 668, 688-89 (9th Cir. 2001).

12 ANALYSIS

13 The minimum requirements for a civil complaint in federal court are as follows:

14 A pleading which sets forth a claim for relief . . . shall contain (1) a
15 short and plain statement of the grounds upon which the court’s
16 jurisdiction depends . . . , (2) a short and plain statement of the
claim showing that the pleader is entitled to relief, and (3) a demand
for judgment for the relief the pleader seeks.

17 FED. R. CIV. P. 8(a).

18 Although the Federal Rules of Civil Procedure adopt a flexible pleading policy, a
19 complaint must give the defendant fair notice of the plaintiff’s claims and must allege facts that
20 state the elements of each claim plainly and succinctly. FED. R. CIV. P. 8(a)(2); Jones v.
21 Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). “A pleading that offers ‘labels
22 and conclusions’ or ‘a formulaic recitation of the elements of cause of action will not do.’ Nor
23 does a complaint suffice if it tenders ‘naked assertions’ devoid of ‘further factual
24 enhancements.’” Ashcroft v. Iqbal, 556 U.S.662, 678 (2009) (quoting Twombly, 550 U.S. at 555,
25 557). A plaintiff must allege with at least some degree of particularity overt acts which the
26 defendants engaged in that support the plaintiff’s claims. Jones, 733 F.2d at 649.

27 Moreover, jurisdiction is a threshold inquiry that must precede the adjudication of any
28 case before the district court. Morongo Band of Mission Indians v. Cal. State Bd. of

1 Equalization, 858 F.2d 1376, 1380 (9th Cir. 1988). Federal courts are courts of limited
2 jurisdiction and may adjudicate only those cases authorized by federal law. Kokkonen v.
3 Guardian Life Ins. Co., 511 U.S. 375, 377 (1994); Willy v. Coastal Corp., 503 U.S. 131, 136-37
4 (1992). “Federal courts are presumed to lack jurisdiction, ‘unless the contrary appears
5 affirmatively from the record.’” Casey v. Lewis, 4 F.3d 1516, 1519 (9th Cir. 1993) (quoting
6 Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 546 (1986)).

7 Lack of subject matter jurisdiction may be raised by the court at any time during the
8 proceedings. Attorneys Trust v. Videotape Computer Prods., Inc., 93 F.3d 593, 594-95 (9th Cir.
9 1996). A federal court “ha[s] an independent obligation to address sua sponte whether [it] has
10 subject-matter jurisdiction.” Dittman v. California, 191 F.3d 1020, 1025 (9th Cir. 1999). It is the
11 obligation of the district court “to be alert to jurisdictional requirements.” Grupo Dataflux v.
12 Atlas Global Group, L.P., 541 U.S. 567, 593 (2004). Without jurisdiction, the district court
13 cannot decide the merits of a case or order any relief. See Morongo, 858 F.2d at 1380.

14 The burden of establishing jurisdiction rests upon plaintiff as the party asserting
15 jurisdiction. Kokkonen, 511 U.S. at 377; see also Hagans v. Lavine, 415 U.S. 528, 543 (1974)
16 (acknowledging that a claim may be dismissed for lack of jurisdiction if it is “so insubstantial,
17 implausible, . . . or otherwise completely devoid of merit as not to involve a federal controversy
18 within the jurisdiction of the District Court”); Bell v. Hood, 327 U.S. 678, 682-83 (1946)
19 (recognizing that a claim is subject to dismissal for want of jurisdiction where it is “wholly
20 insubstantial and frivolous” and so patently without merit as to justify dismissal for lack of
21 jurisdiction); Franklin v. Murphy, 745 F.2d 1221, 1227 n.6 (9th Cir. 1984) (holding that even
22 “[a] paid complaint that is ‘obviously frivolous’ does not confer federal subject matter jurisdiction
23 . . . and may be dismissed sua sponte before service of process.”).

24 Here, a reading of the amended complaint reveals that this court lacks subject matter
25 jurisdiction over this action. In this regard, the thrust of plaintiff’s amended complaint is that in
26 December of 2014 plaintiff, a resident of Shingle Springs, California, visited Big O Tires stores in
27 Placerville, California, and Cameron Park, California, and became embroiled in a dispute over the
28 repair of his vehicle which ended in an altercation with several Big O Tires’ employees. Based

1 on these allegations, the amended complaint makes several vague and conclusory allegations,
2 including that this “action is being brought pursuant to various United States Code-setting the
3 stage for folly, pen ultimately ending in the RICO Act 18 U.S.C. 1958-64” (Am. Compl.
4 (Dkt. No. 19) at 1.²)

5 However, to state a cognizable RICO claim, a plaintiff must allege: (1) conduct, (2) of an
6 enterprise, (3) through a pattern, (4) of racketeering activity (known as “predicate acts”), (5)
7 causing injury to plaintiff’s business or property. Sanford v. Memberworks, Inc., 625 F.3d 550,
8 557 (9th Cir. 2010); Walter v. Drayson, 538 F.3d 1244, 1247 (9th Cir. 2008); Grimmett v. Brown,
9 75 F.3d 506, 510 (9th Cir. 1996). The alleged enterprise must exist “separate and apart from that
10 inherent in the perpetration of the alleged [activity].” Chang v. Chen, 80 F.3d 1293, 1300-01 (9th
11 Cir. 1996). See also Rae v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984) (“If Union Bank is
12 the enterprise, it cannot also be the RICO defendant.”). A “pattern of racketeering activity”
13 means at least two criminal acts enumerated by statute. 18 U.S.C. § 1961(1), (5) (including,
14 among many others, mail fraud, wire fraud, and financial institution fraud). These so-called
15 “predicate acts” under RICO must be alleged with specificity in compliance with Rule 9(b) of the
16 Federal Rules of Civil Procedure.³ Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d
17 1393, 1400-01 (9th Cir. 2004). See also Lancaster Community Hospital v. Antelope Valley
18 Hospital Dist., 940 F.2d 397, 405 (9th Cir. 1991) (holding with respect to the predicate act of mail

20 ² Page number citations such as this one are to the page number reflected on the court’s CM/ECF
21 system and not to page numbers assigned by the parties.

22 ³ Circumstances that must be stated with particularity pursuant to Rule 9(b) include the “time,
23 place, and specific content of the false representations as well as the identities of the parties to the
24 misrepresentations.” Sanford v. Memberworks, Inc., 625 F.3d 550, 558 (9th Cir. 2010) (quoting
25 Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004)). See also Swartz v. KPMG
26 LLP, 476 F.3d 756, 764 (9th Cir. 2007); Miscellaneous Serv. Workers, Drivers & Helpers v.
27 Philco-Ford Corp., 661 F.2d 776, 782 (9th Cir. 1981) (affirming the district court’s dismissal of
28 the plaintiffs’ deceit and misrepresentation claims where plaintiffs failed to allege with sufficient
particularity the content of the false representations and identities of the parties to the
misrepresentations). “In the context of a fraud suit involving multiple defendants, a plaintiff
must, at a minimum, ‘identif[y] the role of [each] defendant[] in the alleged fraudulent scheme.’”
Swartz, 476 F.3d at 765 (quoting Moore v. Kayport Package Express, 885 F.2d 531, 541 (9th Cir.
1989)).

1 fraud that a plaintiff must allege with “particularity the time, place, and manner of each act of
2 fraud, plus the role of each defendant in each scheme”); Alan Neuman Productions, Inc. v.
3 Albright, 862 F .2d 1388, 1392-93 (9th Cir. 1988). Here, the amended complaint fails to allege
4 the elements of a RICO claim.

5 The amended complaint also cites to 42 U.S.C. § 1983. Title 42 U.S.C. § 1983 provides
6 that,

7 [e]very person who, under color of [state law] ... subjects, or causes
8 to be subjected, any citizen of the United States ... to the
9 deprivation of any rights, privileges, or immunities secured by the
Constitution and laws, shall be liable to the party injured in an
action at law, suit in equity, or other proper proceeding for redress.

10 In order to state a cognizable claim under § 1983 the plaintiff must allege facts
11 demonstrating that he was deprived of a right secured by the Constitution or laws of the United
12 States and that the deprivation was committed by a person acting under color of state law. West
13 v. Atkins, 487 U.S. 42, 48 (1988). It is the plaintiff’s burden in bringing a claim under § 1983 to
14 allege, and ultimately establish, that the named defendants were acting under color of state law
15 when they deprived him of a federal right. Lee v. Katz, 276 F.3d 550, 553-54 (9th Cir. 2002).
16 Here, the amended complaint fails to plausibly allege, nor could it under the facts alleged, that
17 defendants Big O Tires #5085, Big O Tires #5251 and Parent Company Big O Tires Inc., all
18 private entities engaged in commerce, were acting under color of state law when they deprived
19 plaintiff of a federal right.

20 The amended complaint also alleges a violation of 18 U.S.C. § 241, (Am. Compl. (Dkt.
21 No. 19) at 4), which prohibits two or more persons from conspiring to “injure, oppress, threaten,
22 or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to
23 him by the Constitution or laws of the United States” The amended complaint, however,
24 fails to allege how any two defendants conspired or undertook any action relating to plaintiff’s
25 rights or privileges secured to him by the Constitution or laws of the United States.

26 The amended complaint also alleges a violation of 18 U.S.C. § 242, (Am. Compl. (Dkt.
27 No. 19) at 4), which prohibits “under color of any law, statute, ordinance, regulation, or custom,”
28 the “deprivation of any rights, privileges, or immunities secured or protected by the Constitution

1 or laws of the United States” The amended complaint, however, fails to plausibly allege that
2 any defendant violated plaintiff’s rights as secured by the Constitution or laws of the United
3 States.

4 The amended complaint also alleges a violation of 18 U.S.C. § 245(a)(2)(b)(1)(E), (Am.
5 Compl. (Dkt. No. 19) at 4), which prohibits any person “acting under color of law,” from injuring
6 or intimidating another from “participating in or enjoying the benefits of any program or activity
7 receiving Federal Financial assistance.” The amended complaint, however, fails to plausibly
8 allege that any defendant was acting under color of law or that plaintiff was discouraged from
9 participating in any program or activity.

10 The amended complaint also cites in passing 17 U.S.C. §§ 102, 202, 18 U.S.C. §§ 1958,
11 1959, 1964 and 1968, 28 U.S.C. §§ 1343, 1345, 1349 and 1350, and 42 U.S.C. §§ 1981-1990,
12 1992 and 2000dd. However, passing references to federal statutes do not create a substantial
13 federal question. See Easton v. Crossland Mortg. Corp., 114 F.3d 979, 982 (9th Cir. 1997) (“the
14 mere reference of a federal statute in a pleading will not convert a state law claim into a federal
15 cause of action”).

16 Accordingly, defendant’s motion to dismiss for lack of subject matter jurisdiction should
17 be granted.

18 LEAVE TO AMEND

19 The undersigned has found that the amended complaint fails to provide the court a basis
20 for subject matter jurisdiction over this action. Accordingly, plaintiff’s amended complaint
21 should be dismissed. The undersigned has carefully considered whether plaintiff may further
22 amend his pleading to state a claim over which the court would have subject matter jurisdiction.
23 “Valid reasons for denying leave to amend include undue delay, bad faith, prejudice, and futility.”
24 California Architectural Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1472 (9th Cir. 1988).
25 See also Klamath-Lake Pharm. Ass’n v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th
26 Cir. 1983) (holding that while leave to amend shall be freely given, the court does not have to
27 allow futile amendments). In light of this court’s obvious lack of subject matter jurisdiction over
28 this action, the undersigned finds that it would be futile to grant plaintiff further leave to amend in

1 this case.⁴

2 SUPPLEMENTAL JURISDICTION

3 In addition to the federal causes of action addressed above, plaintiff's amended complaint
4 also asserts a number of state law causes of action. A district court may decline to exercise
5 supplemental jurisdiction over state law claims if the district court has dismissed all claims over
6 which it has original jurisdiction. 28 U.S.C. § 1367(c)(3). The court's discretion to decline
7 jurisdiction over state law claims is informed by the values of judicial economy, fairness,
8 convenience, and comity. Acri v. Varian Associates, Inc., 114 F.3d 999, 1001 (9th Cir. 1997) (en
9 banc). In addition, "[t]he Supreme Court has stated, and [the Ninth Circuit] ha[s] often repeated,
10 that 'in the usual case in which all federal-law claims are eliminated before trial, the balance of
11 factors . . . will point toward declining to exercise jurisdiction over the remaining state-law
12 claims.'" Acri, 114 F.3d at 1001 (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.
13 7 (1988)). See also Satey v. JP Morgan Chase & Co., 521 F.3d 1087, 1091 (9th Cir. 2008)
14 (recognizing this principle but noting that dismissal of the remaining state law claims is not
15 mandatory).

16 Of course, "primary responsibility for developing and applying state law rests with the
17 state courts." Curiel v. Barclays Capital Real Estate Inc., Civ. No. S-09-3074 FCD KJM, 2010
18 WL 729499, at *1 (E.D. Cal. Mar. 2, 2010). Here, consideration of judicial economy, fairness,
19 convenience, and comity all point toward declining to exercise supplemental jurisdiction.
20 Therefore, the undersigned also recommends that the assigned District Judge decline to exercise
21 supplemental jurisdiction over the amended complaint's state law claims.

22 CONCLUSION

23 Accordingly, IT IS HEREBY ORDERED that Plaintiff's March 3, 2015 motion to compel
24 (Dkt. No. 5), March 3, 2015 motion for access to ECF (Dkt. No. 6), June 3, 2015 motion to join
25 defendants (Dkt. No. 23), June 3, 2015 motion in opposition (Dkt. No. 24), July 8, 2015 motion

26 ⁴ On July 22, 2015, plaintiff filed a proposed second amended complaint. (Dkt. No. 35.) In
27 evaluating whether granting further leave to amend would be futile, the undersigned has reviewed
28 the proposed second amended complaint and finds that the proposed second amended complaint
suffers from the same defects as those found in the amended complaint.


1 to compel (Dkt. No. 32), July 8, 2015 motion to lodge draft arguments (Dkt. No. 33), and July 22,
2 2015 motion to amend (Dkt. No. 34) are denied without prejudice.

3 Also, IT IS HEREBY RECOMMENDED that:

- 4 1. Defendants' May 28, 2015 motion to dismiss (Dkt. No. 21) be granted in part;
- 5 2. Plaintiff's May 8, 2015 amended complaint (Dkt. No. 19) be dismissed without
6 prejudice for a lack of subject matter jurisdiction;
- 7 3. The court decline to exercise supplemental jurisdiction over the amended complaint's
8 various state law claims; and
- 9 4. This action be closed.

10 These findings and recommendations are submitted to the United States District Judge
11 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
12 after being served with these findings and recommendations, any party may file written
13 objections with the court and serve a copy on all parties. Such a document should be captioned
14 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
15 shall be served and filed within seven days after service of the objections. The parties are advised
16 that failure to file objections within the specified time may waive the right to appeal the District
17 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

18 Dated: November 16, 2015

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21 KENDALL J. NEWMAN
22 UNITED STATES MAGISTRATE JUDGE
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