

1
2
3 **UNITED STATES DISTRICT COURT**

4 EASTERN DISTRICT OF CALIFORNIA

5
6 MARY J. BRYANT,

7 Plaintiff,

8 v.

9
10 TULARE COUNTY, et al.,

11 Defendants.

CASE NO. 1:16-CV-1542-LJO-SKO

**FINDINGS AND RECOMMENDATIONS
THAT PLAINTIFF’S AMENDED
COMPLAINT BE DISMISSED WITH
PREJUDICE AND WITHOUT LEAVE
TO AMEND**

OBJECTIONS DUE: 21 DAYS

(Doc. 7.)

12 **I. INTRODUCTION**

13 On October 13, 2016, Plaintiff Mary J. Bryant, proceeding pro se, filed a complaint against
14 Tulare County, Neil Pilegard, and Phil Cox. (Doc. 1 (“Compl.”).) Plaintiff also filed an
15 application to proceed *in forma pauperis* (IFP). (Doc. 2.) On November 29, 2016, the
16 undersigned dismissed Plaintiff’s complaint for failure to state a claim and granted Plaintiff
17 twenty-one (21) days leave to file an amended complaint curing the pleading deficiencies
18 identified in the Order. (Doc. 6.) Plaintiff’s amended complaint was due to be filed by December
19 20, 2016. (*See id.* and Docket.) On January 3, 2017, Plaintiff filed an amended complaint against
20 Tulare County (“the County”), Neil Pilegard (“Pilegard”), Phil Cox (“Cox”), and Kathleen Bales-
21 Lange (“Bales-Lange”) (collectively “Defendants”). (Doc. 7 (“Am. Compl.”).)

22 After screening Plaintiff’s amended complaint, the Court finds that despite the explicit
23 recitation of the deficiencies of Plaintiff’s original complaint, Plaintiff has failed to demonstrate
24 any violation of federal law. Accordingly, the Court RECOMMENDS that Plaintiff’s amended
25 complaint be DISMISSED with prejudice and without leave to amend.¹

26
27 ¹ The untimeliness of Plaintiff’s amended complaint is alone grounds for dismissal with prejudice. *See* Rule 183(a) of
28 the Local Rules of the United States District Court, Eastern District of California (“Any individual representing himself or herself without an attorney is bound by the Federal Rules of Civil or Criminal Procedure, these Rules, and all other applicable law. All obligations placed on ‘counsel’ by these Rules apply to individuals appearing in propria

1 continue to further the organization with a pattern of criminal activity.” (*Id.* at p. 4.) Defendant
2 Bales-Lange is “Attorney for County Supervisors . . . who had [Plaintiff] jailed for 3 days
3 intentionally to miss hearing for Robert Turner,” and was also the “[a]ttorney . . . when Robert
4 Turner was whistle-blower against Tulare County.” (*Id.* at p. 7.) Robert Turner “was a retired
5 Tulare County worker” and “head groundskeeper for 15 years.” (*Id.* at p. 12.) “Robby” “testified
6 before the Grand Jury and trial of criminal activities by the County,” and was “also [Plaintiff’s]
7 witness before the Grand Jury [in] February 2015.” (*Id.* at p. 13.) Defendant Bales-Lange “had
8 [Plaintiff] arrested on false ‘elder abuse’ accusations,” and Plaintiff “was jailed for 3 days
9 intentional to miss a hearing, [n]o charges were filed.” (*Id.*) “Robby” died while Plaintiff was
10 “going through the court system to bring him home,” and Defendant Tulare County “took him
11 from the only person he trusted, the only family member we each have was each other.” (*Id.* at p.
12 14.) The “report from Orange County Probate Court blasts Tulare County for the misconduct . . .
13 stealing Robby’s pension, charging to him every phone call.” (*Id.*) Defendant Tulare County was
14 “negligent to every extent, including refusing to pay for his meds.” (*Id.*) Defendant Tulare
15 County “was [r]etaliating against an informant for his pension, and against [Plaintiff] for [her]
16 work against County and uncovering the truth and exposing County and [Defendant] Phil Cox and
17 [Defendant] Neil Pilegard for pattern of criminal [r]acketeering, animal abuse, etc.” (*Id.*)

18 Plaintiff alleges her causes of action under 18 U.S.C. §§ 1961 and 1962 (civil RICO) and
19 criminal codes 18 U.S.C. §§ 1341, 1343, 1512, and 1513. (*Id.* at pp. 1, 2.) Plaintiff also attaches
20 to her amended complaint a “Criminal Complaint” on a pre-printed form, which is accompanied
21 by three (3) handwritten pages. (*Id.* at pp. 18–21.)

22 III. DISCUSSION

23 A. Screening Standard

24 District courts “may authorize the commencement . . . of any suit, action or proceeding,
25 civil or criminal . . . without prepayment of fees or security therefor, by a person who submits an
26 affidavit that includes a statement of all assets such [person] possess that the person is unable to
27 pay such fees or give security therefor.” 28 U.S.C. § 1915(a)(1). A district court “shall dismiss
28 the case at any time if the court determines” that the action is frivolous or malicious, or fails to

1 state a claim on which relief may be granted. 28 U.S.C. § 1915(e)(2)(B); *O'Neal v. Price*, 531
2 F.3d 1146, 1153 (9th Cir. 2008). An action is “frivolous” if it has no arguable basis in fact or law;
3 the term embraces both inarguable legal conclusions and fanciful factual allegations. *Neitzke v.*
4 *Williams*, 490 U.S. 319, 325 (1989); *DeRock v. Sprint-Nextel*, 584 Fed. Appx. 737 (9th Cir. 2014);
5 *see also Tripati v. First Nat'l Bank & Trust*, 821 F.2d 1368, 1370 (9th Cir. 1987). “A district
6 court may deny leave to proceed *in forma pauperis* at the outset if it appears from the face of the
7 proposed complaint that the action is frivolous or without merit.” *Minetti v. Port of Seattle*, 152
8 F.3d 1113, 1115 (9th Cir. 1998); *Tripati*, 821 F.2d at 1370. However, the “denial of leave to
9 proceed *in forma pauperis* is an abuse of discretion unless the district court first provides a
10 plaintiff leave to amend the complaint or finds that amendment would be futile.” *Rodriguez v.*
11 *Steck*, 795 F.3d 1187, 1188 (9th Cir. 2015); *see Tripati*, 821 F.2d at 1370. If a court denies a
12 motion to proceed *in forma pauperis* because the complaint is frivolous and cannot be cured by
13 amendment, then the denial of the motion acts as a dismissal under 28 U.S.C. § 1915(e).
14 *Rodriguez*, 795 F.3d at 1188.

15 A complaint may be dismissed as a matter of law for failure to state a claim for two
16 reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal
17 theory. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Plaintiff must
18 allege a minimum factual and legal basis for each claim that is sufficient to give each defendant
19 fair notice of what plaintiff's claims are and the grounds upon which they rest. *See, e.g., Brazil v.*
20 *U.S. Dep't of the Navy*, 66 F.3d 193, 199 (9th Cir. 1995); *McKeever v. Block*, 932 F.2d 795, 798
21 (9th Cir. 1991). In order to properly allege a claim, the complaint must contain sufficient factual
22 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,
23 556 U.S. 662, 678 (2009). “A claim has facial plausibility when the plaintiff pleads factual
24 content that allows the court draw the reasonable inference that the defendant is liable for the
25 misconduct alleged.” *Id.* “Plausibility” means “more than a sheer possibility,” but less than a
26 probability, and facts that are “merely consistent” with liability fall short of “plausibility.” *Id.*
27 Further, although a court must accept as true all factual allegations contained in a complaint, a
28 court need not accept a plaintiff's legal conclusions as true. *Id.* “Threadbare recitals of the

1 elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*
2 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Allegations of a pro se
3 complainant are held to less stringent standards than formal pleadings drafted by lawyers. *Haines*
4 *v. Kerner*, 404 U.S. 519, 520 (1972).

5 **B. Plaintiff’s Claims Under 18 U.S.C. §§ 1341, 1343, 1512, and 1513 Are Not Cognizable.**

6 Plaintiff alleges that Defendants committed criminal mail fraud (18 U.S.C. § 1341), wire
7 fraud (18 U.S.C. § 1343), witness tampering (18 U.S.C. § 1512), and retaliation against a witness
8 (18 U.S.C. § 1513). (Am. Compl. at pp. 1, 2.) Title 18 of the United States Code covers crimes
9 and criminal procedures. Such criminal allegations are not properly brought forth in a civil
10 complaint. *See Dyson v. Utigard*, 163 F.3d 607, 607 (9th Cir. 1998); *Aldabe v. Aldabe*, 616 F.2d
11 1089, 1092 (9th Cir. 1980) (no basis for civil liability under Title 18); *Hacker v. Hacker*, No. 1:15-
12 cv-01258 JAM MJS, 2015 WL 8780561, at *3 (E.D. Cal. Dec. 15, 2015) (“[C]ourts have
13 consistently found that mail and wire fraud statutes do not confer a private right of action.”);
14 *Aguirre v. Cal–W. Reconveyance Corp.*, No. CV 11–6911 CAS (AGR_x), 2012 WL 273753, at *10
15 (C.D. Cal. Jan. 30, 2012) (holding section 1341 is a criminal statute that does not provide a private
16 right of action); *Schneider v. Bank of Am. N.A.*, No. 2:11–cv–2953 LKK DAD PS, 2012 WL
17 761975, at *8 (E.D. Cal. Mar. 6, 2012) (holding that bank fraud, wire fraud, and mail fraud are
18 criminal statutes with no private right of action); *Thomas v. Bryant*, No. C09-5189-RBL, 2009 WL
19 2473662, at *2 (W.D. Wash. Aug. 7, 2009) (finding no private right of action under 18 U.S.C. §§
20 1512 and 1513).

21 Plaintiff’s claims under these statutes should be dismissed with prejudice.

22 **C. Plaintiff’s RICO Claim is Subject to Dismissal.**

23 Under Fed. R. Civ. P. Rule 8, a plaintiff must “plead a short and plain statement of the
24 elements of his or her claim” *Bautista v. Los Angeles Cty.*, 216 F.3d 837, 840 (9th Cir.
25 2000). “Each allegation must be simple, concise, and direct.” Fed. R. Civ. P. 8(d)(1). Dismissal
26 is appropriate under Rule 8 where a complaint is “argumentative, prolix, replete with redundancy
27 and largely irrelevant.” *McHenry v. Renne*, 84 F.3d 1172, 1177, 1178–79 (9th Cir. 1996); *see also*
28 *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir. 1981) (affirming dismissal of a

1 “verbose, confusing and almost entirely conclusory” complaint under Rule 8). “Something
2 labeled a complaint but . . . prolix in evidentiary detail, yet without simplicity, conciseness and
3 clarity as to whom plaintiff[] [is] suing for what wrongs, fails to perform the essential functions of
4 a complaint.” *McHenry*, 84 F.3d at 1180. Here, Plaintiff’s amended complaint remains prolix and
5 replete with redundant, irrelevant details, subjecting it to dismissal under Rule 8. *See id.* at 1178–
6 79.

7 Moreover, even liberally construed, the amended complaint does not contain “sufficient
8 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556
9 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Plaintiff’s remaining cause of action, brought
10 under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), fails to state a claim.
11 RICO allows a private citizen to recover damages for conduct of an enterprise through a pattern of
12 racketeering activity or the collection of an unlawful debt. 18 U.S.C. § 1960, *et seq.* At a
13 minimum, the elements of a RICO claim, 18 U.S.C. § 1962(a)–(d), are “(1) conduct (2) of an
14 enterprise (3) through a pattern (4) of racketeering activity (known as ‘predicate acts’) (5) causing
15 injury to plaintiff’s business or property.”² *Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*,
16 431 F.3d 353, 361 (9th Cir. 2005). *See also Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496
17 (1985). In addition, to establish a pattern, Plaintiff must “show that the racketeering predicates are
18 related [to each other], *and* that they amount to or pose a threat of continued criminal activity.”
19 *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). The failure to establish any of
20 these elements is fatal to a RICO claim. *See, e.g., Rae v. Union Bank*, 725 F.2d 478, 480–81 (9th
21 Cir. 1984) (affirming Rule 12(b) dismissal of RICO claim where plaintiff failed to meet the
22 “enterprise” requirement).

23 Here, as with Plaintiff’s original complaint, Plaintiff’s RICO allegations remain confusing
24 because it remains unclear, even after amendment, what “enterprise” was conducted and what
25 predicate acts Plaintiff alleges occurred. Plaintiff’s amended complaint makes reference to
26 phrases such as “conspiracy against informants,” “wire fraud,” “mail fraud,” “tampering with

27 ² To plead a RICO conspiracy claim under 18 U.S.C. § 1962(d), the plaintiff must first adequately plead a substantive
28 violation of RICO. *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 557 (9th Cir. 2010).

1 informant witness,” a “pattern of criminal activity,” and a “pattern of criminal racketeering.”
2 (Am. Compl. at pp. 1, 2, 4, 7, 14.) While a violation of these criminal statutes may serve as
3 predicate acts under RICO, *see Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 557 (9th Cir. 2010)
4 – even though Plaintiff cannot directly sue Defendants under them, *see III.B, supra* – Plaintiff’s
5 factual allegations do not establish any of these predicates.³ “[A] plaintiff’s obligation to provide
6 the ‘grounds’ of [her] ‘entitle[ment] to relief’ requires more than labels and conclusions, and a
7 formulaic recitation of the elements of a cause of action will not do Factual allegations must
8 be enough to raise a right to relief above the speculative level.” *See Twombly*, 550 U.S. at 555
9 (internal citations omitted); *see also Iqbal*, 556 U.S. at 678. Further, Plaintiff’s request for
10 \$1,000,000 in “damages, etc.” (Am. Compl. at p. 17) is not only implausible but is conclusory, in
11 that Plaintiff’s allegations are insufficient to describe a “proof of concrete financial loss” that was
12 “proximately caused by the [prohibited] conduct” that is necessary to establish a RICO violation.
13 *See Chaset v. Fleer/Skybox Int’l, LP*, 300 F.3d 1083, 1086–87 (9th Cir. 2002).

14 Accordingly, Plaintiff has failed to state a cognizable claim for a violation of RICO, and
15 this claim against Defendants should be dismissed.

16 **D. Amendment Would Be Futile.**

17 Plaintiff has demonstrated that she is unable to marshal facts sufficient to constitute a
18 cognizable federal claim, and her amended complaint must be dismissed. Plaintiff has been
19 granted leave to amend, but her amendment shows that the addition of more detailed factual
20 allegations or revision of Plaintiff’s claims will not cure the many defects of her amended
21

22 ³ Wire or mail fraud consists of the following elements: “(1) formation of a scheme or artifice to defraud; (2) use of
23 the United States mails or wires, or causing such a use, in furtherance of the scheme; and (3) specific intent to deceive
24 or defraud.” *Turner v. Cook*, 362 F.3d 1219, 1229 (9th Cir. 2004). The amended complaint is devoid of any facts in
25 support of these elements.

26 Further, witness tampering in violation of 18 U.S.C. § 1512 requires Plaintiff to allege facts showing that
27 Defendants “knowingly corruptly persuad[ed] another” with intent to “influence, delay or prevent the testimony of
28 any person in any official proceeding.” *Natomas Gardens Inv. Grp. LLC v. Sinadinis*, No. CIV.S–08–2308
FCD/KJM, 2009 WL 1363382, at *21 (E.D. Cal. May 12, 2009); *see also* 18 U.S.C. § 1512(b). Witness retaliation
under 18 U.S.C. § 1513 similarly requires factual allegations that Defendants intended to retaliate because of the
victim’s status as a witness in a past or present official proceeding “and thereby cause[d] bodily injury to [the victim]
or damages the tangible property of [the victim], or threatens to do so.” *United States v. Calvert*, 511 F.3d 1237, 1244
(9th Cir. 2008); 18 U.S.C. § 1513(b). Plaintiff’s allegations regarding Mr. Turner’s grand jury testimony and
testimony at “trial of criminal activities by the County” fall far short of stating a claim to relief under RICO based on
witness tampering and/or witness retaliation that is “plausible on its face.” *Iqbal*, 556 U.S. at 678 (2009).

1 complaint. “Complaints that are filed in repeated and knowing violation of Federal Rule 8’s
2 pleading requirements are a great drain on the court system, and the reviewing court cannot be
3 expected to ‘fish a gold coin from a bucket of mud.’” *Knapp v. Hogan*, 738 F.3d 1106, 1111 (9th
4 Cir. 2013) (quoting *U.S. ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 378 (7th Cir.
5 2003)). Accordingly, leave to amend would be futile and the action should be dismissed with
6 prejudice. *See, e.g., Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 339 (9th Cir. 1996); *McHenry*,
7 84 F.3d at 1177–78, 1180 (dismissal with prejudice appropriate where deficiencies of complaint
8 were explained, time was afforded to amend, and the plaintiff was warned that failure to cure
9 deficiencies would result in dismissal).

10 **IV. CONCLUSION AND RECOMMENDATION**

11 Accordingly, IT IS HEREBY RECOMMENDED that Plaintiff’s amended complaint be
12 DISMISSED with prejudice and without leave to amend.

13 These findings and recommendations are submitted to the district judge assigned to this
14 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court’s Local Rule 304. Within twenty-one
15 (21) days of service of this recommendation, any party may file written objections to these
16 findings and recommendations with the Court and serve a copy on all parties. The document
17 should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The
18 district judge will review the magistrate judge’s findings and recommendations pursuant to 28
19 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified
20 time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th
21 Cir. 2014).

22
23 IT IS SO ORDERED.

24 Dated: February 17, 2017

/s/ Sheila K. Oberto
25 UNITED STATES MAGISTRATE JUDGE