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NOT FOR PUBLICATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NICHOLAS MURRAY, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

TIME INC.,

Defendant.

No. C 12-00431 JSW

**ORDER GRANTING MOTION TO
DISMISS, WITH LEAVE TO
AMEND**

INTRODUCTION

This matter comes before the Court upon consideration of the Motion to Dismiss filed by Defendant Time, Inc. (“Time”). The Court has considered the parties’ papers, relevant legal authority, including the statements of recent decisions filed by Time, and the record in this case. The Court HEREBY GRANTS Time’s motion, and it GRANTS Plaintiff leave to amend.

BACKGROUND

Plaintiff, Nicholas Murray (“Murray”), is a California resident, who subscribed to *Time* magazine, which is owned by Time. (Notice of Removal, Ex. B (Complaint (“Compl.”) ¶¶ 35-36).) When he subscribed, Murray provided personal information to Time, including “*inter alia*, his full name, mailing address, e-mail address, ZIP code, telephone number, gender, birth date, and credit card information.” (*Id.* ¶ 37.) Murray alleges that personal data, like the data he provided to Time, has commercial value. (*Id.* ¶¶ 14-20, 54.)

1 In 2003, the California legislature passed the “Shine the Light” Act (the “STL Law”).

2 The STL Law provides, *inter alia*, that:

3 if a business has an established business relationship with a customer and
4 has within the immediately preceding calendar year disclosed personal
5 information that corresponds to any of the categories of personal
6 information set forth in paragraph (6) of subdivision (e) to third parties, and
7 if the business knows or reasonably should know that the third parties used
8 the personal information for the third parties’ direct marketing purposes,
9 that business shall, after the receipt of a written or electronic mail request,
10 or if the business chooses to receive requests by toll-free telephone or
11 facsimile numbers, a telephone or facsimile request from the customer,
12 provide [specified] information to the customer free of charge....

9 Cal. Civ. Code § 1798.83(a)(1)-(2).

10 A business required to comply with this section shall designate a mailing
11 address, electronic mail address, or, if the business chooses to receive
12 requests by telephone or facsimile, a toll-free telephone or facsimile
13 number, to which customers may deliver requests pursuant to subdivision
14 (a). A business required to comply with this section shall, at its election,
15 do at least one of the following:

16 (A) Notify all agents and managers who directly supervise employees who
17 regularly have contact with customers of the designated address or
18 numbers or the means to obtain those addresses or numbers and instruct
19 those employees that customers who inquire about the business’s privacy
20 practices or the business’s compliance with this section shall be informed
21 of the designated addresses or numbers or the means to obtain the
22 addresses or numbers.

23 (B) Add to the home page of its Web site a link either to a page entitled
24 “Your Privacy Rights” or add the words “Your Privacy Rights” to the
25 Home page’s link to the business’s privacy policy. ...

26 (C) Make the designated addresses, or means to obtain the designated
27 addresses or numbers, readily available upon request at every place of
28 business in California where the business or its agents regularly have
contact with customers.

22 *Id.* § 1798.83(b).

23 If a business that is required to comply with this section adopts and
24 discloses to the public, in its privacy policy, a policy of not disclosing
25 personal information of customers to third parties for the third parties’
26 direct marketing purposes unless the customer first affirmatively agrees to
27 that disclosure, or of not disclosing the personal information of customers
28 to third parties for the third parties’ direct marketing purposes if the
customer has exercised an option that prevents that information from being
disclosed to third parties for those purposes, as long as the business
maintains and discloses the policies, the business may comply with
subdivision (a) by notifying the customer of his or her right to prevent
disclosure of personal information, and providing the customer with a cost-
free means to exercise that right.

1 *Id.* § 1798.83(c)(2).

2 According to Murray, “Time shares its subscribers’ personal information... to third party
3 direct marketing companies for direct marketing purposes,” but Time has not designated a
4 mailing address, electronic mail address telephone number or facsimile number where
5 customers can direct requests, as required by Section 1798.83(b)(1). (Compl. ¶¶ 31, 53.)
6 Murray also alleges that Time “as a business operating almost exclusively online, does not
7 have ‘employees who regularly have contact with customers,’” and therefore cannot utilize the
8 notice provision provided by Section 1798.83(b)(1)(A). (*Id.* ¶ 49.) Murray also alleges, “upon
9 information and belief, [that] Time does not instruct or otherwise train its employees to respond
10 to customer inquiries about obtaining Time’s Shine the Light Disclosures as required by Section
11 1798.83(b)(1)(A). (*Id.* ¶ 50.) Thus, according to Murray, Time must rely exclusively on the
12 method of notice provided by Section 1798.83(b)(1)(B), and he alleges that Time fails to
13 comply with those requirements. (*Id.* ¶¶ 52-53, Exs. A-B.) Murray neither alleges that he made
14 a request for information pursuant to Section 1798.83(a) nor alleges that he would have
15 requested such information, if Time had provided the requisite contact information.

16 Murray asserts that Time’s actions: (1) are a willful and intentional violation of the STL
17 law; and (2) a violation California Business and Professions Code Sections 17200, *et seq.* (the
18 “UCL”). Murray seeks, *inter alia*, a declaration that Time has violated the Shine the Light Act,
19 an injunction prohibiting Time from engaging in the conduct alleged in the complaint and
20 requiring Time to add the information required by Section 1798.83(b)(1)(B) to its website,
21 damages, and civil penalties. (Compl., Prayer for Relief.)

22 **ANALYSIS**

23 Time moves to dismiss on the basis that: (1) Murray lacks statutory standing to pursue
24 his claim for a violation of Section 1798.83; (2) Murray lacks statutory standing to pursue his
25 UCL claim; (3) Murray lacks standing under Article III of the United States Constitution; (4)
26 Murray fails to state a claim for relief under Section 1798.83; and (5) Murray fails to state a
27 claim for relief under the UCL. Because the Court finds that Murray lacks standing to pursue
28 his claims, it does not reach each of Time’s alternative arguments in favor of dismissal.

1 **A. Applicable Legal Standards.**

2 **1. Federal Rule of Civil Procedure 12(b)(1).**

3 Time moves to dismiss, in part, on the basis that Murray lacks Article III standing. In
4 order to resolve a motion to dismiss for lack of standing under Rule 12(b)(1), the Court “must
5 accept as true all material allegations in the complaint, and must construe the complaint in”
6 Plaintiffs’ favor. *Chandler v. State Farm Mut. Auto Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir.
7 2010); *see also Lujan*, 504 U.S. at 561 (“At the pleading stage, general factual allegations of
8 injury resulting from the defendant’s conduct may suffice, for on a motion dismiss, [courts]
9 presume that general allegations embrace those specific facts that are necessary to support the
10 claim.”) (internal cite and quotations omitted).

11 **2. Federal Rule of Civil Procedure 12(b)(6).**

12 Time also moves to dismiss, in part, on the basis that Murray lacks statutory standing.
13 The Court evaluates that aspect of Time’s motion under Rule 12(b)(6). *See, e.g., Maya v.*
14 *Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) (noting that lack of statutory standing
15 requires dismissal for failure to state a claim). A motion to dismiss is proper under Federal
16 Rule of Civil Procedure 12(b)(6) where the pleadings fail to state a claim upon which relief can
17 be granted. The complaint is construed in the light most favorable to the non-moving party and
18 all material allegations in the complaint are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478,
19 481 (9th Cir. 1986). However, even under the liberal pleading standard of Federal Rule of Civil
20 Procedure 8(a)(2), “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to
21 relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a
22 cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing
23 *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

24 Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is conceivable but
25 must instead allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at
26 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the
27 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
28 *Ashcroft v. Iqbal*, 556 U.S.662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). “The plausibility

1 standard is not akin to a probability requirement, but it asks for more than a sheer possibility
2 that a defendant has acted unlawfully.... When a complaint pleads facts that are merely
3 consistent with a defendant’s liability, it stops short of the line between possibility and
4 plausibility of entitlement to relief.” *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal quotation
5 marks omitted). If the allegations are insufficient to state a claim, a court should grant leave to
6 amend, unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc.*, 912 F.2d 291,
7 296 (9th Cir. 1990); *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242,
8 246-47 (9th Cir. 1990).

9 **B. Murray Lacks Standing to Pursue His Claims.**

10 **1. The Shine the Light Claim.**

11 Time argues that Murray does not have statutory standing to pursue his STL Law claim,
12 because he did not make a request for information.¹ Murray argues that Time violated the STL
13 Law by failing to provide the contact information required by Section 1798.83(b) and argues
14 that violation injured him in two ways: (1) it diminished the economic value of his personal
15 information (“economic injury”); and (2) it deprived him of information to which he is
16 statutorily entitled (“informational injury”). There are very few cases interpreting the STL law,
17 but courts in neighboring districts recently rejected these theories in similar cases and granted
18 motions to dismiss for lack of statutory standing. *See Boorstein v. Men’s Journal, LLC*, 12-CV-
19 771 DSF, Order Granting Motion to Dismiss Second Amended Complaint (C.D. Cal. Aug. 17,
20 2012) (“*Boorstein II*”)²; *Boorstein v. Men’s Journal, LLC*, 2012 WL 2152815 (C.D. Cal. June
21 14, 2012) (“*Boorstein I*”); *see also King v. Conde Nast Publications*, 2012 WL 3186578 (C.D.

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24 ¹ At least one state court sustained a demurrer to a similar challenge on the
25 basis that “[a] statute designed to provide useful information to a customer, *upon request*,
26 cannot be violated if there was no request made. No violation means there was no injury as
27 a result of the alleged statutory violation.” (*See* Doc. No. 40-1, *Reguiero v. XO Group, Inc.*,
Case No. 30-2012-00535636, Order Ruling on Demurrer at 2:8-11(Orange Co. Sup. Ct. July
3, 2012); *see also id.* at 5:1-21 (finding that facts alleged did not establish injury or damages
and dismissing claim under the UCL, because plaintiff failed to allege facts showing loss of
money or property).)

28 ² Attached as Exhibit A to Docket No. 43-1, Time’s Statement of Recent
Decision.

1 Cal. Aug. 3, 2012) (following *Boorstein I*); *Miller v. Hearst Communications, Inc.*, 2012 WL
2 3205241 (C.D. Cal. Aug. 3, 2012) (same).

3 **a. Economic Injury.**

4 In *Boorstein I*, the court rejected the plaintiff’s theory of economic injury on the basis
5 that “even if cognizable, ... the statute requires that [a plaintiff’s] injury be caused by a violation
6 of the statute.” 2012 WL 2152815, at *2. The court noted that the STL Law was designed to
7 require companies to disclose to customers the information they do sell and to whom. The court
8 reasoned that, because the STL Law does not preclude a company from selling personal
9 information, even a company did provide the contact information required under Section
10 1798.83(b), a failure to comply with that provision would “not reduce the value of” a plaintiff’s
11 personal information. *Id.*, 2012 WL 2152815, at *2. The court also concluded that the market
12 value of a plaintiff’s personal information would likely be diminished by the time a plaintiff
13 made a request for information under the STL Law, because it only relates to disclosure of
14 personal information “within the immediately preceding calendar year,” rather than potential
15 future disclosures of personal information. *Id.* On that basis, the court the alleged violation
16 “was not the cause of the purported economic injury,” and found that the plaintiff’s theory of
17 economic injury did not provide him “with statutory standing to sue.” *Id.*, 2012 WL 2152815,
18 at *3.

19 Although Murray may face difficulties in proving causation, at this stage, the Court
20 cannot find that Murray would never be able to show Time’s conduct caused the value of his
21 personal information to be diminished. However, he has failed to allege sufficient facts to
22 establish such an injury. Murray alleges that consumer data has “inherent monetary value,” that
23 “consumers engage in *quid pro quo* transactions with online business whereby individuals
24 exchange personal information for services,” and that “companies now offer individuals the
25 opportunity to sell their personal information themselves.” (Compl., ¶¶ 16-17, 19.) However,
26 Murray does not connect these general allegations to facts relating to the value of *his* personal
27 information. Murray also has not alleged that, if he had the contact information required under
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1 Section 1798.83(b), he would have attempted to sell his information and lost the opportunity to
2 do so.

3 Accordingly, the Court concludes that Murray has not alleged sufficient facts to show he
4 suffered an economic injury.³ *See also King*, 2012 WL 3186578, at *3; *cf. LaCourt v. Specific*
5 *Media, Inc.*, 2011 WL 2473399, at * 4 (C.D. Cal. Apr. 28, 2011) (noting that court “probably
6 would decline to say that it was categorically impossible for [p]laintiffs to allege some property
7 interest” relating to value of personal information, but finding that the plaintiffs failed to
8 “identify a single individual who was foreclosed from entering into a ‘value-for-value
9 exchange’” as a result of defendant’s practices).

10 **b. Informational Injury.**

11 Murray also claims to have suffered injury on the basis that he was deprived of
12 information to which he was statutorily entitled. Murray relies in part on a line of cases that
13 recognize that an injury can “exist solely by virtue of ‘statutes creating legal rights, the invasion
14 of which creates standing.’” *Edwards v. First Am. Financial Corp.*, 610 F.3d 514, 517 (9th Cir.
15 2010) (quoting *Fulfillment Servs., Inc. v. United Parcel Serv., Inc.*, 528 F.3d 614, 618-19 (9th
16 Cir. 2008)). Murray also relies on cases in which courts have found a plaintiff to have standing
17 when he or she “fails to obtain information which must be publicly disclosed pursuant to a
18 statute.” *Federal Elec. Com’n v. Akins*, 524 U.S. 11, 21 (1998); *see also Public Citizen v. Dep’t*
19 *of Justice*, 491 U.S. 440, 449 (1989); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374
20 (1982).

21 The *Boorstein I* court considered, and rejected, these same arguments, in part on the
22 basis that “the STL [L]aw does not allow a cause of action based solely on a failure to comply
23 with the statute.” *Boorstein I*, 2012 WL 2152815, *see also King*, 2012 WL 3186578, at *3-4.
24 Again, Murray neither alleges that he requested information from Time nor alleges that he
25 would requested information from Time, if Time provided him with the means to do so. The

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27 ³ In *Boorstein I*, the court did not specifically address whether a plaintiff also
28 must establish injury to seek civil penalties or injunctive relief. That court recently granted a
motion to dismiss the plaintiff’s second amended complaint and concluded that the plaintiff
was required to establish injury in order to sue for civil penalties and injunctive relief. *See*
Docket No. 43-1, Ex. A, *Boorstein II*, Slip. Op. at 1.

1 *Boorstein I* court also rejected the plaintiff’s theory of informational injury on the basis that
2 “[c]ourts have also recognized that a cognizable ‘informational injury’ must be distinct from a
3 mere ‘procedural injury.’” *Boorstein I*, 2012 WL 2152815, at *4 (citing *Wilderness Society, Inc.*
4 *v. Rey*, 622 F.3d 1251, 1258-60 (9th Cir. 2010)); *see also Summers v. Earth Island Inst.*, 555
5 U.S. 488, 496 (2009) (“[D]eprivation of a procedural right without some concrete interest that is
6 affected by the deprivation - a procedural right *in vacuo* - is insufficient to establish Article III
7 standing.”).

8 In *Wilderness Society*, the plaintiffs challenged certain United States Forest Service
9 regulations, which limited the scope of and availability of notice and appeals procedures under
10 the Forest Service Decisionmaking and Appeals Reform Act (“ARA”). The plaintiffs in that
11 case argued that these restrictions caused them informational injury. The Ninth Circuit held
12 that the plaintiffs lacked standing, reasoning that:

13 Congress’s *purpose* in mandating notice in the context of the ARA was
14 not to disclose information, but rather to allow the public opportunity to
15 comment on the proposals. Notice is provided as a predicate for public
16 and to participation. Even though these rights necessarily involve the
17 dissemination of information, they are not thereby *tantamount* to a right to
18 information per se.

19 622 F.3d at 1259 (emphasis in original). Although the plaintiffs in *Wilderness Society* urged the
20 court “to recognize an informational injury as a result of a procedural deprivation,” the court
21 declined to do so, because that approach would re-frame “every procedural deprivation in terms
22 of informational loss. This approach would allow an end run around the Supreme Court’s
23 procedural injury doctrine and render its direction in *Summers* meaningless.” *Id.* at 1260.

24 The *Boorstein I* court found the plaintiff’s theory of informational injury to be analogous
25 to the theory advanced by the plaintiffs in *Wilderness Society*.

26 As in *Wilderness Society*, the alleged violations here do not inflict an
27 informational injury by depriving [p]laintiff of statutorily-required
28 disclosures about how his personal information is used. Instead, it
deprives the [p]laintiff of [d]efendants’ *contact information* - information
meant to facilitate requests for disclosures. The STL law’s requirements
are not designed to ensure that consumers have access to contact
information for its own sake, and thus the failure to provide that
information inflicts merely a procedural injury.

1 *Boorstein I*, 2012 WL 2152815, at *4.

2 Murray does not allege that Time deprived him of the identity of any entities with which
3 Time shared Murray's personal information. Rather, he claims that Time deprived him of the
4 ability to obtain that information by failing to provide its contact information. Further, Murray
5 does not allege that he would have requested the information required to be disclosed under the
6 STL Law if Time had provided the contact information. Murray also premises his claims solely
7 on a violation of Section 1798.83(b), rather than alleged violations of the STL Law's provisions
8 requiring disclosure of specific information. The Court finds that Murray's allegations are no
9 more than an attempt to re-frame an alleged procedural deprivation into an informational injury.
10 Under *Wilderness Society*, those allegations are insufficient. *See also Boorstein I*, 2012 WL
11 2152815, at *4.

12 Accordingly, the Court finds that Murray lacks statutory standing to pursue the STL
13 Law claim on this basis as well.

14 **2. The UCL Claim.**

15 To establish standing under the UCL, a plaintiff must "(1) establish a loss or deprivation
16 of money or property sufficient to qualify as an injury in fact, i.e., *economic injury*, and (2)
17 show that the economic injury was the result of, i.e., *caused by*, the unfair business practice."
18 *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 322 (2011) (emphasis in original). A plaintiff
19 can show "injury in fact" by showing "a distinct and palpable injury suffered as a result of the
20 defendant's actions," or "an invasion of a legally protected interest which is (a) concrete and
21 particularized; and (b) actual or imminent, not conjectural or hypothetical[.]" *Peterson v.*
22 *Cellco Partnership*, 164 Cal. App. 4th 1583, 1590 (2008) (internal citations and quotations
23 omitted).

24 For the reasons set forth above, the Court concludes that Murray has not alleged
25 sufficient facts to show economic injury. Accordingly, Murray fails to sufficiently allege that
26 he lost money or property as a result of Time's allegedly wrongful business practices and lacks
27 statutory standing to pursue the UCL claim.

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3. Injunctive Relief.

Murray also seeks injunctive relief pursuant to Section 1798.84(e), which provides that “[a]ny business that violates, proposes to violate, or has violated this title may be enjoined.” (Compl., Prayer for Relief, ¶ C.) Assuming *arguendo* that this provision of the STL Law does not require a plaintiff to show injury to establish *statutory* standing, Murray still must establish that he has Article III “standing for each type of relief” he seeks. *Summers*, 555 U.S. at 493. “To seek injunctive relief, a plaintiff must show that he is under threat of suffering ‘injury in fact’ that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.” *Id.* (citing *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-181 (2000)).

For the same reasons the Court concludes that Murray fails to allege facts to show an injury for purposes of statutory standing, it also finds he fails to allege facts showing Article III standing seek injunctive relief on either of his claims.

CONCLUSION

For the foregoing reasons, the Court GRANTS Time’s motion to dismiss. Because the Court cannot find that Murray would be unable to allege facts to show injury, it GRANTS him leave to amend by no later than September 27, 2012. The Court does not grant Murray leave to amend to include additional plaintiffs or defendants. If Murray fails to file an amended complaint, the Court shall dismiss this case with prejudice, and shall enter a judgment in Time’s favor.

IT IS SO ORDERED.

Dated: August 24, 2012



JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

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