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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ARLENE CORONA,
Plaintiff,
v.
AZUL VISTA, LLC, a Nevada limited liability company; MICHAEL J. MARTINEZ, an individual, DOES 1-100, ABC CORPORATIONS 1-100, XYZ, LLC's 1-100.
Defendants.

Case No.: 16cv1594-JAH (BGS)
ORDER GRANTING DEFENDANT'S MOTION TO DISMISS [DOC. NO. 4]

INTRODUCTION

Pending before the Court is Defendant Michael J. Martinez's ("Defendant") motion to dismiss pro se Plaintiff Arlene Corona's ("Plaintiff") verified complaint for damages, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. See Doc. No. 4. Defendant's motion has been fully briefed by the parties. See Doc. Nos. 6, 7. After a careful review of the pleadings and for the reasons set forth below, Defendant's motion is **GRANTED.**

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1 **BACKGROUND**

2 The instant action arises from Plaintiff’s allegation that, on March 25, 2016, she
3 received a text message, on her personal cell phone, from a phone number registered to
4 AZUL VISTA, LLC, a Nevada limited liability corporation alleged to be owned by
5 Defendant. See Doc. No. 1-2, Exh. A. Plaintiff had expressly informed the public not to
6 make solicitation calls and/or texts on her personal cellular phone via national do-not-call
7 registration. Id.

8 On April 27, 2016, Plaintiff, proceeding pro se, filed suit in the Superior Court of
9 California, County of San Diego, alleging violations under the Racketeering Influence and
10 Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1964; and violations under the
11 Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227. Id. Plaintiff also alleged
12 violations under Cal. Pub. Util. Code § 2873, for using an automated dialer and automated
13 answering device to call/text Plaintiff; violations under Cal. Bus. & Prof. Code § 17200,
14 for engaging in illegal business activity; as well as trespass to chattels. Id. Plaintiff seeks
15 statutory damages, punitive damages, injunctive relief, and payment of reasonable
16 attorney’s fees and costs. Id.

17 On June 23, 2016, Defendant removed the matter to this Court. See Doc. No. 1. On
18 June 30, 2016, Defendant moved to dismiss Plaintiff’s complaint for failure to state a claim
19 upon which relief can be granted. See Doc. No. 4. On August 5, 2016, Plaintiff filed a
20 response in opposition, and on August 15, 2016, Defendant filed a reply. See Doc. Nos. 6,
21 7. On August 18, 2016, the Court deemed the matter suitable for disposition without oral
22 argument, pursuant to CivLR 7.1 (d.1). See Doc. No. 8.

23 **DISCUSSION**

24 **I. Legal Standard**

25 A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint.
26 Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule
27 12(b)(6) where the complaint lacks a cognizable legal theory. See Robertson v. Dean Witter
28 Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984); Neitzke v. Williams, 490 U.S. 319, 326

1 (1989) (“Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive
2 issue of law”). Alternatively, a complaint may be dismissed where it presents a cognizable
3 legal theory yet fails to plead essential facts under that theory. Robertson, 749 F.2d at 534.
4 While a plaintiff need not give “detailed factual allegations,” he must plead sufficient facts
5 that, if true, “raise a right to relief above the speculative level.” Bell Atlantic Corp. v.
6 Twombly, 550 U.S. 544, 545 (2007).

7 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
8 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal,
9 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 547). A claim is facially
10 plausible when the factual allegations permit “the court to draw the reasonable inference
11 that the Defendant is liable for the misconduct alleged.” Id. In other words, “the non-
12 conclusory ‘factual content,’ and reasonable inferences from that content, must be
13 plausibly suggestive of a claim entitling the plaintiff to relief.” Moss v. U.S. Secret Service,
14 572 F.3d 962, 969 (9th Cir. 2009). “Determining whether a complaint states a plausible
15 claim for relief will . . . be a context-specific task that requires the reviewing court to draw
16 on its judicial experience and common sense.” Iqbal, 129 S. Ct. at 1950.

17 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the
18 truth of all factual allegations and must construe all inferences from them in the light most
19 favorable to the nonmoving party. Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002);
20 Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). However, legal
21 conclusions need not be taken as true merely because they are cast in the form of factual
22 allegations. Iletto v. Glock, Inc., 349 F.3d 1191, 1200 (9th Cir. 2003); Western Mining
23 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). When ruling on a motion to dismiss, a
24 court may consider the facts alleged in the complaint, documents attached to the complaint,
25 documents relied upon but not attached to the complaint when authenticity is not contested,
26 and matters of which a court takes judicial notice. Lee v. City of Los Angeles, 250 F.3d 668,
27 688-89 (9th Cir. 2001). If a court determines that a complaint fails to state a claim, the
28 court should grant leave to amend unless it determines that the pleading could not possibly

1 be cured by the allegation of other facts. See *Doe v. United States*, 58 F.3d 494, 497 (9th
2 Cir. 1995).

3 **II. Analysis**

4 Defendant moves this Court for an order dismissing all of Plaintiff’s federal and state
5 law claims for failure to state a claim upon which relief may be granted. See Doc. No. 4.

6 **A. Failure to State a Civil RICO Claim**

7 RICO focuses on “racketeering activity,” which the statute defines as a number of
8 specific criminal acts under federal and state laws. See 18 U.S.C. § 1961(1) (emphasis
9 added). Under § 1962(c), it is illegal for any person “to conduct or participate, directly or
10 indirectly, in the conduct of [an] enterprise’s affairs through a pattern of racketeering
11 activity,” where that enterprise affects interstate commerce. It is also illegal for any person
12 to conspire to do so. 18 U.S.C. § 1962(d). A “pattern of racketeering activity” requires at
13 least two predicate acts of racketeering activity, as defined in 18 U.S.C. § 1961(1), within
14 a period of ten years. 18 U.S.C. § 1961(5).

15 Under RICO’s civil enforcement mechanism, “[a]ny person injured in his business
16 or property by reason of a violation of [18 U.S.C. § 1962] may sue therefor in any
17 appropriate United States district court and shall recover threefold the damages he sustains
18 and the cost of the suit, including a reasonable attorney’s fee[.]” 18 U.S.C. § 1964(c). To
19 have standing under § 1964(c), a civil RICO plaintiff must show: (1) that his alleged harm
20 qualifies as injury to his business or property; and (2) that his harm was “by reason of” the
21 RICO violation, which requires the plaintiff to establish proximate causation. *Holmes v.*
22 *Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992); *Sedima, S.P.R.L. v. Imrex Co.*, 473
23 U.S. 479, 496 (1985).

24 Defendant contends that Plaintiff cannot state a cognizable RICO claim, as to it,
25 because (1) Plaintiff fails to allege a pattern of racketeering activity; (2) Plaintiff has
26 insufficiently alleged the existence of an enterprise; (3) Plaintiff has failed to prove
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1 proximate cause; and (4) Plaintiff fails to allege a conspiracy under 18 U.S.C. § 1961(d).¹
2 See Doc. No. 4-1 at 3-7. As a matter of law, the Court agrees.

3 A review of the complaint reveals that Plaintiff pleads no facts alleging that either
4 Defendant committed any of the enumerated criminal acts recognized as “racketeering
5 activity” under 18 U.S.C. § 1961(1). Instead, Plaintiff alleges that, on March 25, 2016,
6 without her consent, Defendants contacted her cell phone on March 25, 2016. The Court
7 finds this omission alone fatal. Moreover, assuming arguendo that the predicate act
8 Plaintiff alleges constituted racketeering activity under § 1961(1)—which it does not—
9 Plaintiff’s RICO claim would still fail to state a cognizable claim because a pattern of
10 racketeering requires “at least two acts of racketeering activity” within “ten years” of each
11 other. 18 U.S.C. § 1961(5). The Court finds that Plaintiff’s Civil RICO claim fails, and, as
12 a matter of law, is suitable for dismissal **WITH PREJUDICE**.

13 **B. Failure to State a TCPA Claim**

14 The TCPA is codified at 47 U.S.C. § 227. The statute contains prohibitions
15 concerning calls made to residential telephone lines and prohibitions concerning calls made
16 to wireless telephone lines. 47 U.S.C. § 227(b)(1)(B); 47 U.S.C. § 227(b)(1)(A)(iii). Under
17 the prohibition related to residential lines, the Federal Communications Commission
18 (“FCC”) is permitted to make exceptions for certain calls that are not made for a
19 commercial purpose or those made for a commercial purpose that do not contain an
20 unsolicited advertisement and will not adversely affect privacy rights. 47 U.S.C. §
21 227(b)(2)(B). The statute does not permit the FCC to make similar exceptions for calls
22 made to wireless numbers.

23 The TCPA clearly prohibits making any call “using any automatic telephone dialing
24 system or an artificial or prerecorded voice” to a wireless number. 47 U.S.C. §
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27 ¹ Because the Court ultimately finds that Plaintiff fails to allege any “racketeering
28 activity” as defined in 18 U.S.C. § 1961(1), the Court need not address Defendant’s
alternate theories for dismissing the Complaint.

1 227(b)(1)(A). Since the applicable section is written in the disjunctive, a violation may
2 occur if any one of an automated telephone dialing system, an artificial voice, or a
3 prerecorded voice is used to make the call. In re Pacific–Atlantic Trading Co., 64 F.3d
4 1292, 1302 (9th Cir.1995). The only statutory exceptions to the wireless number
5 prohibition are calls made for emergency purposes or with the prior consent of the call
6 recipient. 47 U.S.C. § 227(b)(1)(A). The TCPA prohibits making offending calls to a
7 cellular number in addition to other services for which the called party is charged, but there
8 is no statutory requirement that a recipient be charged for an incoming call on a cellular
9 line in order for a violation to occur. 47 U.S.C. § 227(b)(1)(A)(iii). In sum, the TCPA
10 clearly prohibits using an automated telephone dialing system, an artificial voice, or a
11 prerecorded voice to make a call to a cellular phone number where prior consent was not
12 obtained except for emergency purposes.

13 Defendant contends that Plaintiff’s allegations are insufficient to support her TCPA
14 claim because Plaintiff does not allege that her phone number was, during the relevant time
15 period, on the national do-not-call list. See Doc. No. 4-1 at 8. In opposition, Plaintiff argues
16 that her number was registered on the national do-not-call list more than 31 days prior to
17 her receipt of the March 25, 2016 text message, but that a personal cell phone is not
18 required to be listed on the do-not-call registry in order to receive protection from spam
19 telemarketers. See Doc. No. 6 at 6. In reply, Defendant maintains that Plaintiff’s complaint
20 fails to include allegations that she received more than one text message, on one date, from
21 the Defendant. See Doc. No. 7 at 3.

22 Drawing all inferences in the light most favorable to Plaintiff, the Court finds that
23 Plaintiff fails to plead plausible facts sufficient to state a claim under the TCPA. Although
24 Plaintiff’s complaint alleges that she expressly informed the public to not make solicitation
25 calls and/or texts via the national do-not-call registration of her personal cell phone
26 number, Plaintiff does not allege that she was contacted more than once by Defendant.
27 Indeed, this omission is fatal to Plaintiff’s TCPA claim because, under 47 U.S.C. §
28 227(c)(5) (Private Right of Action), she lacks standing. Section 227(c) provides that only

1 “[a] person who has received more than one telephone call within any 12-month period by
2 or on behalf of the same entity in violation of the regulations prescribed under this
3 subsection may bring an action for injunctive relief, damages, or both.” Accordingly, the
4 Court finds that Plaintiff lacks standing to bring her TCPA claim, and, as a matter of law,
5 cannot state a claim upon which TCPA relief can be granted.

6 **C. Claims Arising Under State Law**

7 Defendant moves this Court, under Fed. R. Civ. P. 12(b)(6), for an order dismissing
8 Plaintiff’s supplemental state law claim for trespass to chattels. See Doc. No. 1-2 at 4. The
9 Court finds that Plaintiff’s state law claims “form part of the same case or controversy” as
10 those alleged in Plaintiff’s federal causes of action, and therefore exercises supplemental
11 jurisdiction over it. 28 U.S.C. § 1367(a).

12 **(i) Trespass to Chattels**

13 “Trespass to chattels ‘lies where an intentional interference with the possession of
14 personal property has proximately cause[d] injury.’” *eBay, Inc. v. Bidder’s Edge, Inc.*, 100
15 F.Supp.2d 1058, 1069 (N.D. Cal. 2000) (quoting *Thrifty-Tel v. Bezenek*, 46 Cal.App. 4th
16 1559 (1996)). Although Plaintiff sufficiently alleges ownership of the property in question,
17 see *Intel Corp. v. Hamidi*, 30 Cal.4th 1342, 1350 (2003), the Court finds that Plaintiff’s
18 complaint lacks sufficient allegations with respect to injury to said property, proximately
19 caused by either Defendant. See generally Doc. No. 1-2, Exh. A.

20 **D. Leave to Amend**

21 A pro se litigant must be given leave to amend their pleading to state a claim unless
22 it is absolutely clear the deficiencies cannot be cured by amendment. See *Lopez*, 203 F.3d
23 at 1130 (noting that leave to amend should be granted when a complaint is dismissed “if it
24 appears at all possible that the plaintiff can correct the defect[.]”). Therefore, while the
25 Court finds Plaintiff’s complaint fails to state a claim upon which relief can be granted, it
26 will provide her a chance to cure the pleading deficiencies discussed in this order, if she
27 can. See *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citing *Ferdik v. Bonzelet*,
28 963 F.2d 1258, 1261 (9th Cir. 1992)).

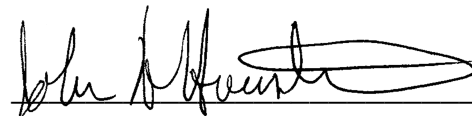
1 **CONCLUSION AND ORDER**

2 For the foregoing reasons, **IT IS HEREBY ORDERED** that Defendant’s motion to
3 dismiss for failure to state a claim is **GRANTED**.

- 4 1. Plaintiff’s Civil RICO claim brought pursuant to 18 U.S.C. § 1961, et seq. is
5 **DISMISSED WITH PREJUDICE**, as to both Defendants;
- 6 2. Plaintiff’s federal TCPA claim, and supplemental state law claims alleged
7 against Defendant Michael J. Martinez are **DISMISSED WITHOUT**
8 **PREJUDICE**;
- 9 2. Plaintiff is **GRANTED fourteen (14) days leave to file an Amended**
10 **Complaint which cures all the deficiencies of pleading described in this**
11 **Order**. Plaintiff is cautioned, however, that should she choose to file an
12 Amended Complaint, it must be complete by itself, comply with the Federal
13 Rules of Civil Procedure, including Rule 8(a), and that any claim not re-
14 alleged will be considered waived. See S.D. CAL. CIVLR 15.1; Hal Roach
15 Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1546 (9th Cir.
16 1989) (“[A]n amended pleading supersedes the original.”); Lacey v. Maricopa
17 Cnty., 693 F.3d 896, 928 (9th Cir. 2012) (noting that claims dismissed with
18 leave to amend which are not re-alleged in an amended pleading may be
19 “considered waived if not repled.”);

20 **IT IS SO ORDERED.**

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22 DATED: March 31, 2017

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24 JOHN A. HOUSTON
25 United States District Judge