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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ANTON EWING,

12 Plaintiff,

13 v.

14 DANIEL KLEIN,

15 Defendant.

Case No.: 18-cv-0429-WQH-LL

ORDER

16 HAYES, Judge:

17 The matter before the Court is the Motion to File a First Amended Complaint filed
18 by Plaintiff Anton Ewing. (ECF No. 50).

19 **I. Background**

20 On August 14, 2018, the Court granted Defendant Daniel Klein’s Motion to Dismiss
21 and dismissed the complaint without prejudice. (ECF No. 47). In dismissing Plaintiff’s
22 complaint, the Court found:

23 Ewing alleges that he “has been injured in his business and property as a direct
24 and proximate cause of Defendants[’] . . . racketeering activity,” “has suffered
25 a significant economic downturn as a direct and proximate [result] of
26 Defendants[’] racketeering activities,” and “has lost money and revenues that
27 could have been earned but for Defendants racketeering activity.” Compl. at
28 ¶ 94. The Court finds that these allegations are conclusory and amount to a
formulaic recitation of some of the elements of a RICO cause of action.
Twombly, 550 U.S. at 555. The Court concludes that Ewing has not

1 adequately alleged facts that support a racketeering activity that caused him a
2 concrete financial loss, and that Ewing does not have standing to bring his
3 claim against Klein for RICO conspiracy.

4 *Id.* at 5. On August 30, 2018, Plaintiff filed a Motion to File a First Amended Complaint.
5 (ECF No. 50). On September 24, 2018, Defendant filed Opposition to Plaintiff's Motion
6 to Amend. (ECF No. 51). On October 3, 2018, Plaintiff filed a Reply. (ECF No. 52).

7 **II. Proposed First Amended Complaint**

8 Plaintiff contends that his proposed "FAC comports with rules and rectifies the
9 deficiencies noted in the original complaint." (ECF No. 50 at 4). With respect to
10 establishing a concrete financial loss caused by Defendant's alleged illegal activities,
11 Plaintiff alleges in the proposed FAC that,

12 Plaintiff charge's [sic] clients \$75 per hour for tax preparation work. Each
13 hour that Plaintiff could not work cost Plaintiff \$75 in lost income. The exact
14 method and manner in which this predicate act negatively impacted Plaintiff
15 business and property is as follows: Klein made the blackmail threats via
16 email which constitutes the use of the wires, the threats caused Plaintiff to
17 panic, lose sleep and require mental health treatment which in fact Plaintiff
18 sought and obtained. During this entire time in 2016, 2017 and 2018, Plaintiff
19 was unable to work diligently on his client's tax returns to earn money in his
20 business. Plaintiff's business was harmed. The revenues of Plaintiff's business
21 decreased substantially. Plaintiff's business was not profitable during this
22 time when it was in fact profitable prior to Klein's onslaught of blackmail.
23 Plaintiff has reports and documented meetings with a Ph.D. psychologist and
24 MD psychiatrist to prove mental anguish and suffering. These facts cannot be
25 made up. They happened. They are documented.

26 (Proposed FAC, ECF No. 50-1 ¶ 7). Plaintiff further alleges in the proposed FAC,

27 On the days that Plaintiff received each of Defendant's threatening and
28 extortionate emails, Plaintiff was unable to meet with tax clients, which
thereby cost Plaintiff to lose out on \$225 in revenue for each client and a
permanent loss of an otherwise good clients. In other words, the injury is
ongoing and continuing. Each client loss is also lost future income, year after
year, for tax preparation.

Id. ¶ 8.

Klein in fact took \$2,000 on February 22, 2018 out of Plaintiff's bank account.

1 This is a real, tangible injury to property. \$2,000 is concrete and not de
2 minimis, illusory or precatory. Plaintiff deposited the \$2,000 check at his bank
3 and Klein went to Wells Fargo Bank to stop payment by fraudulently
4 informing Wells Fargo that the check was lost. Klein was being dishonest and
5 in fact engaged in bank fraud by making false official and material statements
6 to a federal financial institution. Klein used Wells Fargo as the enterprise to
7 commit this wrongful predicate act. In fact, Klein has taken actual property
8 from Plaintiff. This is concrete injury and it is directly related to the predicate
9 acts. Plaintiff also suffered fees and charges for the bounced check in the
10 amount of \$19. The \$2019 is and was undeniably concrete injury in fact.
11 Plaintiff had the money and then it was taken from Plaintiff by Klein.

12 *Id.* ¶ 9.

13 To be clear, Plaintiff is expressly alleging that Klein’s acts of extortion,
14 obstruction of justice, and wire fraud all directly and significantly impacted
15 Plaintiff’s business and property by costing Plaintiff money. Plaintiff is
16 entitled to business relations with his clients unhampered by Klein’s schemes
17 which prohibited and obstructed Plaintiff in his business. Klein’s predicate
18 acts as alleged herein have caused an intentional interference with Plaintiff’s
19 contracts with Plaintiff’s clients and a substantial interference with Plaintiff’s
20 prospective business relations with Plaintiff’s clients. Moreover, if Klein
21 actually carried out his extortionate threat to put Plaintiff in jail, then Plaintiff
22 “could not fulfill his employment contract or pursue valuable employment
23 opportunities because he” (*Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005))
24 would have been incarcerated.

25 *Id.* ¶ 13.

26 Ever since Klein began his onslaught of extortion and threats, Plaintiff has
27 had to seek, and in fact has had, to regularly attend counseling for the extreme
28 stress that has been put upon him by Klein. Plaintiff can provide
documentation of regular and continuous visits with a psychologist and
psychiatrist for the emotional and mental upset caused by Klein’s racketeering
activities. The stress and emotional upset has caused, directly and
proximately, Plaintiff’s business to take a marked and significant downturn.
Plaintiff’s business has suffered a drastic decrease in revenue because Klein
has caused, directly, through Klein’s fraudulent use of the wires (namely his
cell phone and emails), severe emotional upset to Plaintiff by Klein’s
extortion and threats to put Plaintiff in jail. Plaintiff has not been able to work
effectively or as efficiently as before Klein’s acts of extortion. Since Plaintiff
could not work, and had to seek mental, emotional and psychological therapy
and counselling, his business and property have been injured. Plaintiff used to

1 be able to earn enough income in this business, before Klein’s racketeering
2 acts described above, sufficient to maintain a reasonable lifestyle. Now, since
3 Klein’s extortion and threats, Plaintiff has not been able to devote the time,
4 effort and energy needed to maintain the business, to keep up with continuing
5 education, to market for new clients, or to meet the needs of existing clients.
6 The evidence of this is clear, convincing and compelling.

7 *Id.* ¶ 27.

8 Defendant contends that Plaintiff’s proposed amended complaint is futile because
9 “Plaintiff’s amended complaint has not adequately alleged facts that support a racketeering
10 activity that cause him financial loss, and, accordingly, Plaintiff does not have standing to
11 bring his claim against Defendant for RICO conspiracy.” (ECF No. 51 at 2). Defendant
12 contends that Plaintiff’s admissions in a related proceeding¹ “contradict[] Plaintiff’s
13 allegations in the [c]omplaint and in his opposition that he sustained injury to his business”
14 and “it conclusively follows that Plaintiff does not have standing to bring his civil action
15 against Klein.” (ECF No. 51 at 4–5). Defendant also contends that Plaintiff has failed to
16 provide any facts to establish his extortion claim because “Plaintiff makes no argument and
17 fails to allege any facts in his Proposed Amended Complaint that support a finding that
18 Defendant actually obtained money or property from Plaintiff.” *Id.* at 6.

19 Plaintiff contends that he “is not an employee with a W-2 job and does not have a
20 boss” and asserts that he has suffered an injury to his to his tax preparation business, which
21 he operates as a sole proprietorship. (ECF No. 52 at 3); *see* Ewing Decl., ECF No. 50-2 ¶
22 26 (“[W]hen Klein stated he was going to contact the FBI I could not sleep or work for
23 days after each incident. I was forced to cancel appointments with clients and could not
24 earn money during those times as a result of Klein’s threats.”); Proposed FAC, ECF No.

25 ¹ Under Federal Rule of Evidence 201, a court may take judicial notice of “matters of public record.” *Lee*
26 *v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (citation omitted). Defendant’s request for
27 judicial notice of Plaintiff’s Notice of Appeal of Magistrate Judge (ECF No. 145) in *Ewing v. K2 Property*
28 *Development, LLC*, 16-cv-678-LAB is granted. In *Ewing v. K2 Property Development, LLC*, Plaintiff
asserted that he “is unemployed and has not been able to find a regular job for several years,” “has lost his
CPA license,” and “does not have the income or assets to pay \$2214 and imposition would render a serious
financial hardship and be unjust under the circumstances.” (ECF No. 51-2 at 9–10).

1 50-1 ¶ 19 (Plaintiff alleging that Defendant’s calls and emails have left him “even to this
2 day . . . shaken to the core.”).

3 **III. Legal Standard**

4 Federal Rule of Civil Procedure 15 mandates that leave to amend “be freely given
5 when justice so requires.” Fed. R. Civ. P. 15(a). In *Foman v. Davis*, 371 U.S. 178 (1962),
6 the Supreme Court offered several factors for district courts to consider in deciding whether
7 to grant a motion to amend under Rule 15(a):

8 In the absence of any apparent or declared reason—such as undue delay, bad
9 faith or dilatory motive on the part of the movant, repeated failure to cure
10 deficiencies by amendments previously allowed, undue prejudice to the
11 opposing party by virtue of allowance of the amendment, futility of
12 amendment, etc.—the leave sought should, as the rules require, be “freely
13 given.”

14 *Foman*, 371 U.S. at 182; *see also Smith v. Pac. Prop. Dev. Co.*, 358 F.3d 1097, 1101 (9th
15 Cir. 2004). “Not all of the [*Foman*] factors merit equal weight. As this circuit and others
16 have held, it is the consideration of prejudice to the opposing party that carries the greatest
17 weight.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).
18 “The party opposing amendment bears the burden of showing prejudice.” *DCD Programs,*
19 *Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). “Absent prejudice, or a strong showing
20 of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor
21 of granting leave to amend.” *Eminence Capital*, 316 F.3d at 1052. “[T]he grant or denial
22 of an opportunity to amend is within the discretion of the District Court . . .” *Foman*, 371
23 U.S. at 182. “[W]e have held that a district court does not abuse its discretion in denying
24 a motion to amend where the movant presents no new facts but only new theories and
25 provides no satisfactory explanation for his failure to fully develop his contentions
26 originally.” *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995); *see also Boehm v.*
27 *Shemaria*, 478 Fed. App’x. 457, 457 (9th Cir. 2012). “[L]eave to amend need not be given
28 if a complaint, as amended, is subject to dismissal.” *Moore v. Kayport Package Express*,

1 *Inc.*, 885 F.2d 531, 538 (9th Cir. 1989); *Carrico v. City & Cty. of San Francisco*, 656 F.3d
2 1002, 1008 (9th Cir. 2011); *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002).

3 **IV. Discussion**

4 In this case, Plaintiff alleges that “[t]he stress and emotional upset has caused,
5 directly and proximately, Plaintiff’s business to take a marked and significant downturn.
6 Plaintiff’s business has suffered a drastic decrease in revenue because Klein has caused,
7 directly, through Klein’s fraudulent use of the wires (namely his cell phone and emails),
8 severe emotional upset to Plaintiff” (Proposed FAC, ECF No. 50-1 ¶ 27). Loss of
9 revenue to a sole proprietorship is an injury cognizable under RICO. *Diaz v. Gates*, 420
10 F.3d 897, 905 (9th Cir. 2005) (Reinhardt, J., concurring) (“[A] sole proprietor of a service
11 business unquestionably runs a ‘business.’”). Plaintiff has not, however, provided any facts
12 to establish that Plaintiff’s business lost clients, and Plaintiff has not provided sufficient
13 factual evidence to establish a plausible claim that any alleged loss in revenue was caused
14 by Defendant’s actions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–679 (2009) (“A claim
15 has facial plausibility when the plaintiff pleads factual content that allows the court to draw
16 the reasonable inference that the defendant is liable for the misconduct alleged. . . .
17 Determining whether a complaint states a plausible claim for relief will . . . be a context-
18 specific task that requires the reviewing court to draw on its judicial experience and
19 common sense.”). Consequently, Plaintiff’s allegations of harm to Plaintiff’s business
20 caused by Defendant’s emails and calls would not survive a 12(b)(6) motion to dismiss.
21 *Id.* (“To survive a motion to dismiss, a complaint must contain sufficient factual matter,
22 accepted as true, to ‘state a claim to relief that is plausible on its face.’”) (quoting *Twombly*,
23 550 U.S. at 570).

24 Plaintiff’s remaining alleged predicate offenses are “bank fraud by making false
25 official and material statements to a federal financial institution” in connection with a
26 \$2,000 cashier’s check from Defendant that Defendant canceled after Plaintiff informed
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1 him that he would not be cashing the check,² ECF No. 50 ¶¶ 5–6, and “obstruction of justice
2 in a federal matter” in connection with statements Defendant made regarding the
3 scheduling of a deposition, *id.* ¶ 4. Plaintiff alleges that he has standing under RICO
4 because his tax preparation business suffered a financial injury when he could not work
5 because he was experiencing emotional distress caused by various phone calls and emails
6 sent by Defendant—not as a result of the alleged bank fraud or obstruction of justice. Thus,
7 even if Plaintiff had plausibly stated claims for bank fraud and obstruction of justice,
8 Plaintiff has failed to plausibly allege that “the conduct constituting the violation both
9 directly and proximately caused the alleged injury.” *Resolution Tr. Corp. v. Keating*, 186
10 F.3d 1110, 1117 (9th Cir. 1999). Plaintiff has failed to establish a RICO claim that would
11 survive a 12(b)(6) motion to dismiss.

12 **V. Conclusion**

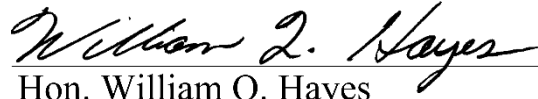
13 The Court finds that Plaintiff’s proposed FAC would be futile because the proposed
14 FAC would be dismissed on a 12(b)(6) motion to dismiss. *See Gordon v. City of Oakland*,
15 627 F.3d 1092, 1094 (9th Cir. 2010) (“Leave may be denied if amendment of the complaint
16 would be futile.”). Having reviewed two iterations of Plaintiff’s complaint, the Court also
17 finds that Plaintiff’s RICO claim appears frivolous, and declines to grant Plaintiff further
18 opportunity to amend.³ IT IS HEREBY ORDERED that Plaintiff’s Motion to File a First
19 Amended Complaint (ECF No. 50-1) is DENIED. IT IS FURTHER ORDERED that this
20

21 ² Defendant states that he tendered the \$2,000 cashier’s check to Plaintiff in connection with a settlement
22 agreement in *Ewing v. K2 Property Development, LLC*, but “placed a stop payment on the check with the
23 issuing bank” once he “received an email from Plaintiff where he said he does not intend to deposit the
24 check.” (Klein Decl., ECF No. 51-3 ¶¶ 4–7). *See* Email from Pl. to Def., Klein Decl. Ex. A, ECF No. 51-
25 4 at 2 (Plaintiff: “The new settlement that was put on the record with the Magistrate which expressly
26 revoked the prior agreement that you seem to think is still valid . . . I have not accepted payment. I have
not and do not intend to deposit the check.”). Plaintiff has not plausibly alleged that he suffered an injury
when Defendant canceled the cashier’s check after Plaintiff informed him that he would not be cashing it.

27 ³ The Court is aware that Plaintiff is proceeding pro se and that pro se filings are generally held to less
28 exacting standards than those filed by attorneys. The Court is also aware, however, that Plaintiff has
alleged RICO claims in at least 12 separate actions filed in this district alone over the past five years and
has significant experience with the statute.

1 action is dismissed with prejudice and the Clerk of Court shall enter judgment in favor of
2 Defendant and close the case.

3 Dated: January 8, 2019



Hon. William Q. Hayes

United States District Court

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