

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 * * *

4 ARIEL MORALES BRACHO,

Case No.: 2:20-cv-01306-RFB-EJY

5 Plaintiff,

6 **ORDER****and****REPORT AND RECOMMENDATION**

7 v.

RE: ECF Nos. 1-1, 1-2, and 1-3

8 JORGE AUGUSTO CALDERON, HERTY
CARVAJAL; JUAN MIRANDA; YOENDRI
CARBALLEDO HERNANDEZ,

9 Defendants.

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11 Before the Court is Plaintiff Ariel Morales Bracho's Application to Proceed *in forma*
12 *pauperis* (ECF No. 4), his July 15, 2020 Complaints against Yoendri Carballedo Hernandez
13 ("Hernandez"), Juan Miranda ("Miranda"), Herty Carvajal ("Carvajal"), and Jorge Augusto
14 Calderon ("Calderon") (ECF No. 1-1), and a duplicate set of complaints against these same four
15 defendants dated July 16, 2020 (ECF Nos. 1-2 through 1-5). Also before the Court is Plaintiff's
16 Motion for Remo[v]al of Judge Elayna J. Youchah from his case. ECF No. 4-1.

17 **I. IN FORMA PAUPERIS APPLICATION**

18 Plaintiff filed a complete application to proceed *in forma pauperis* in compliance with 28
19 U.S.C. § 1915(a) showing an inability to prepay fees and costs or give security for them. ECF No.
20 4. Accordingly, Plaintiff's request to proceed *in forma pauperis* is granted.

21 **II. SCREENING THE COMPLAINT**

22 Upon granting a request to proceed *in forma pauperis*, a court must screen the complaint
23 under 28 U.S.C. § 1915(e)(2). When screening the complaint, a court must identify cognizable
24 claims and dismiss claims that are frivolous, malicious, fail to state a claim on which relief may be
25 granted or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
26 § 1915(e)(2). Dismissal for failure to state a claim under § 1915(e)(2) incorporates the standard for
27 failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Watison v. Carter*, 668 F.3d
28 1108, 1112 (9th Cir. 2012). To survive § 1915 review, a complaint must "contain sufficient factual

1 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556
2 U.S. 662, 678 (2009). The court liberally construes *pro se* complaints and may only dismiss them
3 “if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which
4 would entitle him to relief.” *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014) (quoting *id.*).

5 When considering whether the complaint is sufficient to state a claim, all allegations of
6 material fact are taken as true and construed in the light most favorable to the plaintiff. *Wyer Summit*
7 *P’ship v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). Although
8 the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must
9 provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
10 (2007). A formulaic recitation of the elements of a cause of action is insufficient. *Id.* Unless it is
11 clear the complaint’s deficiencies could not be cured through amendment, a *pro se* plaintiff should
12 be given leave to amend the complaint with notice regarding the complaint’s deficiencies. *Cato v.*
13 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

14 **III. PLAINTIFF’S COMPLAINTS**

15 Plaintiff’s July 15, 2020 Complaints against defendants Hernandez, Miranda, Carvajal, and
16 Calderon all rely on the same essential set of facts. Plaintiff claims that in July 2018 he received a
17 complaint filed with “the police,” together with a temporary protective order (“TPO”) accusing him
18 of threatening Bellagio Hotel and Casino with an act of terrorism. Plaintiff alleges that defendants
19 alleged he “threatened to return and shoot everyone in the department with a firearm.” Plaintiff says
20 that these defendants made false accusation, violated what the judge ordered in the TPO, and
21 defamed and harassed him “causing serious problems in the social life of Plaintiff.” Plaintiff also
22 asserts a series of allegations against a Las Vegas Metropolitan Police Department Detective who is
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1 not named by Plaintiff as a defendant and then states that defendants violated NRS 200.571,¹
 2 202.448,² 207.280,³ 200.510,⁴ and engaged in Defamation per se.⁵ Plaintiff's July 16, 2020
 3 Complaints against defendants are identical to his July 15, 2020 Complaint against defendants.

4 Plaintiff fails to allege any claim over which this Court has jurisdiction. Plaintiff does not
 5 allege (nor does it appear he can allege) a constitutional violation against defendants each of whom
 6 is a private citizen. 42 U.S.C. § 1983; *Mizkun v. Blanas*, 11 Fed.Appx. 839, 840 (9th Cir. 2001).
 7 Plaintiff also does not allege that any defendant engaged in a violation of a federal law over which

8 ¹ Nevada Revised Statute NRS 200.571 is titled "Harassment: Definition; penalties" and states that: 1. A person
 9 is guilty of harassment if: (a) Without lawful authority, the person knowingly threatens: (1) To cause bodily injury in
 10 the future to the person threatened or to any other person; (2) To cause physical damage to the property of another
 11 person; (3) To subject the person threatened or any other person to physical confinement or restraint; or (4) To do any
 12 act which is intended to substantially harm the person threatened or any other person with respect to his or her physical
 13 or mental health or safety; and (b) The person by words or conduct places the person receiving the threat in reasonable
 14 fear that the threat will be carried out. 2. Except where the provisions of subsection 2, 3 or 4 of NRS 200.575 are
 15 applicable, a person who is guilty of harassment: (a) For the first offense, is guilty of a misdemeanor. (b) For the second
 16 or any subsequent offense, is guilty of a gross misdemeanor. 3. The penalties provided in this section do not preclude
 17 the victim from seeking any other legal remedy available.

18 ² NRS 202.448 is titled "Making threats or conveying false information concerning acts of terrorism, weapons
 19 of mass destruction, lethal agents or toxins prohibited; penalty" and states: 1. A person shall not, through the use of any
 20 means of oral, written or electronic communication, knowingly make any threat or convey any false information
 21 concerning an act of terrorism or the presence, development, manufacture, production, assemblage, transfer,
 22 transportation, acquisition, retention, storage, testing, possession, delivery, dispersion, release, discharge or use of any
 23 weapon of mass destruction, any biological agent, chemical agent, radioactive agent or other lethal agent or any toxin
 24 with the intent to: (a) Injure, intimidate or alarm any person, whether or not any person is actually injured, intimidated
 25 or alarmed thereby; (b) Cause panic or civil unrest, whether or not such panic or civil unrest actually occurs; (c) Extort
 26 or profit thereby, whether or not the extortion is actually successful or any profit actually occurs; or (d) Interfere with
 27 the operations of or cause economic or other damage to any person or any officer, agency, board, bureau, commission,
 28 department, division or other unit of federal, state or local government, whether or not such interference or damage
 actually occurs. 2. A person who violates any provision of subsection 1 is guilty of a category B felony and shall be
 punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not
 more than 20 years, and may be further punished by a fine of not more than \$5,000. 3. The provisions of this section
 do not apply to any act that is committed in a lawful manner and in the course of a lawful business, event or activity.

³ NRS 207.280 False reporting of crimes unlawful. Every person who deliberately reports to any police
 officer, sheriff, district attorney, deputy sheriff, deputy district attorney or member of the Department of Public Safety
 that a felony or misdemeanor has been committed, which causes a law enforcement agency to conduct a criminal or
 internal investigation, knowing such report to be false, is guilty of a misdemeanor.

⁴ **NRS 200.510 is titled "Definition; penalties; truth may be given in evidence; jury to determine law and fact" and states:** 1. A libel is a malicious defamation, expressed by printing, writing, signs, pictures or the like, tending
 to blacken the memory of the dead, or to impeach the honesty, integrity, virtue, or reputation, or to publish the natural
 defects of a living person or persons, or community of persons, or association of persons, and thereby to expose them to
 public hatred, contempt or ridicule. 2. Every person, whether the writer or publisher, convicted of the offense is guilty
 of a gross misdemeanor. 3. In all prosecutions for libel the truth may be given in evidence to the jury, and, if it shall
 appear to the jury that the matter charged as libelous is true and was published for good motive and for justifiable ends,
 the party shall be acquitted, and the jury shall have the right to determine the law and the fact.

⁵ In Nevada, "the general elements of a defamation claim require a plaintiff to prove: '(1) a false and defamatory
 statement by [a] defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting
 to at least negligence; and (4) actual or presumed damages.'" *Pegasus v. Reno Newspapers*, 57 P.3d 82, 90 (2002)
 (citing *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 851 P.2d 459, 462 (1993)).

1 this Court may exercise jurisdiction. *See Bey v. City of Oakland*, Case No. 14-cv-01626-JSC, 2014
2 WL 4220319, at *3 (N.D. Cal. Aug. 25, 2014) (citing *Ou-Young v. Vasquez*, Case No. 12-CV-02789-
3 LHK, 2012 WL 5471164, at *4 (N.D. Cal. Nov. 9, 2012)).

4 More importantly, Plaintiff does not allege facts supporting an exercise of diversity
5 jurisdiction. 28 U.S.C. § 1332. That is, Plaintiff does not plead that he is a citizen of one state and
6 defendants are citizens of other states. The federal statute establishing diversity jurisdiction, which
7 allows a federal court to exercise jurisdiction over state law claims such as those Plaintiff alleges,
8 requires a plaintiff to plead that the amount in controversy exceeds \$75,000 and that the dispute is
9 between “citizens of different States.” 28 U.S.C. § 1332(a)(2). While Plaintiff arguably meets the
10 amount in controversy requirement in his pleadings, he does not meet the requirement demonstrating
11 he is a citizen of one state and defendants are citizens of other states.

12 Plaintiff does not identify his state of residency in his pleadings; however, he does repeatedly
13 provide his address showing that he lives in Las Vegas, Nevada strongly suggesting he is a citizen
14 of the State of Nevada. ECF Nos. 1-1 through 1-5 at 1. Further, Plaintiff repeatedly alleges that
15 defendants were his coworkers at Bellagio Hotel and Casino. ECF Nos. 1-1 at 4 ¶ 1; 1-1 at 7 ¶ 1; 1-
16 1 at 12 ¶ 1; 1-3 ¶ 1; 1-4 ¶ 1; 1-5 ¶ 1. This leads to the reasonable inference that defendants are also
17 citizens of the State of Nevada.

18 On the basis of the information Plaintiff has placed before the Court as summarized above,
19 Plaintiff fails to allege sufficient facts to allow the Court to exercise jurisdiction over this dispute.

20 **IV. PLAINTIFF’S MOTION TO REMOVE**

21 Plaintiff’s Motion to Remove the undersigned fails as a matter of law. “Whenever a party to
22 any proceeding in a district court makes and files a timely and sufficient affidavit that the judge
23 before whom the matter is pending has a personal bias or prejudice either against him or in favor of
24 any adverse party, such judge shall proceed no further therein, but another judge shall be assigned
25 to hear such proceeding.” 28 U.S.C. § 144. The legal sufficiency of a motion for recusal is
26 determined by the judge against whom recusal is sought. *U.S. v. Azhocar*, 581 F.2d 735, 738 (9th
27 Cir. 1978). Only after the legal sufficiency of the required affidavit is determined does it become
28 the duty of the judge to “proceed no further” in the case. *Id.* (internal citations omitted). The

1 affidavit must “state facts and reasons which tend to show personal bias and prejudice regarding
2 justiciable matter[s] pending and must give support to the charge of a bent of mind that may prevent
3 or impede impartiality of judgment.” *Hussein v. Univ. and Cmty. Coll. Sys. of Nev.*, Case Nos. 3:04-
4 CV-0455 JCM (GWF), 3:05-CV-0076 JCM (GWF), 2010 WL 3385298, at *1 (D. Nev. Aug. 24,
5 2010), *citing Berger v. U.S.*, 255 U.S. 22, 33 (1921). Further, the facts alleged must be “sufficient
6 to convince a reasonable man” of the judge’s actual bias or prejudice. *Curry v. Jensen*, 523 F.2d
7 387, 388 (9th Cir. 1975).

8 Here, Plaintiff has not submitted the required affidavit of prejudice and, therefore, any
9 request for recusal is improper. *Cf. U.S. v. Perry*, Case No. CR-LV-118-HDM, 1990 WL 43730, at
10 *2 (D. Nev. Feb. 12, 1990) (“The court concludes, on the basis of the information provided to the
11 court . . . in his motion and accompanying affidavit, that he has failed to set forth a basis for
12 concluding that there is a statutory bias on the part of the undersigned against the movant”).
13 Moreover, the content of Plaintiff’s motion are almost indecipherable. Plaintiff states he “strongly
14 disagrees” with the conclusion the undersigned reached regarding Plaintiff’s failure to file a proper
15 *in forma pauperis* application and alleges corruption, but fails to identify any facts that would support
16 either concern. Accordingly, Plaintiff’s Motion to Remove the undersigned is denied.

17 **V. Order**

18 IT IS HEREBY ORDERED that Plaintiff’s Application for Leave to Proceed *in forma*
19 *pauperis* (ECF No. 4) is GRANTED. Plaintiff will not be required to pay the filing fee in this action.
20 Plaintiff is permitted to maintain this action to conclusion without the necessity of prepayment of
21 any additional fees or costs or the giving of a security for fees or costs. This Order granting leave to
22 proceed *in forma pauperis* does not extend to the issuance of subpoenas at government expense.

23 IT IS FURTHER ORDERED that Plaintiff’s Motion to Remo[ve] (ECF No. 4-1) is DENIED.

24 **VI. Recommendation**

25 IT IS HEREBY RECOMMENDED that Plaintiff’s Complaints (ECF Nos. 1-1, 1-2, 1-3, 1-
26 4, and 1-5) be DISMISSED without prejudice to allow Plaintiff to include information in his pleading
27 demonstrating that the U.S. District Court for the District of Nevada has jurisdiction over this
28 dispute.

1 IT IS FURTHER ORDERED that if Plaintiff chooses to file an amended complaint, Plaintiff
2 must file the amended complaint within **thirty (30) days** of the date of this Order. If Plaintiff
3 chooses to file an amended complaint, the document **must be titled** “Amended Complaint.” The
4 amended complaint **must** provide sufficient facts to demonstrate this federal court has jurisdiction
5 over the state law claims asserted. The amended complaint must also contain a short and plain
6 statement describing the basis for each of Plaintiff’s claims against each named defendant. The
7 claims must include enough specificity to provide each defendant with sufficient notice of the alleged
8 conduct or action that Plaintiff alleges constitutes a violation of the laws described above.

9 Plaintiff is advised that if he chooses to file an amended complaint, the existing Complaints
10 (ECF Nos.1-1 through 1-5) will no longer have any effect. For this reason, **the amended complaint**
11 **must be complete in and of itself without reference to prior pleadings or other documents.** The
12 Court cannot refer to the prior complaint to make Plaintiff’s second amended complaint sufficient
13 under the law.

14 Dated this 23rd day of November, 2020

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16 
17 ELAYNA J. YOUCHAK
18 UNITED STATES MAGISTRATE JUDGE

19 **NOTICE**

20 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be
21 in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has
22 held that the courts of appeal may determine that an appeal has been waived due to the failure to file
23 objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also
24 held that (1) failure to file objections within the specified time and (2) failure to properly address
25 and brief the objectionable issues waives the right to appeal the District Court’s order and/or appeal
26 factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir.
27 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

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