

1 **DISCUSSION**

2 **I. Screening the Complaint**

3 Federal courts must conduct a preliminary screening in any case in which a prisoner seeks
4 redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C.
5 § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims
6 that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek
7 monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),
8 (2).

9 In addition to the screening requirements under § 1915A, pursuant to the PLRA, a federal
10 court must dismiss a prisoner’s claims, “if the allegation of poverty is untrue,” or if the action “is
11 frivolous or malicious,” “fails to state a claim on which relief may be granted,” or “seeks monetary
12 relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2). Dismissal of a
13 complaint for failure to state a claim upon which relief may be granted is provided for in Federal
14 Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under Section 1915(e)(2)
15 when reviewing the adequacy of a complaint or amended complaint.

16 Review under Fed. R. Civ. P. 12(b)(6) is essentially a ruling on a question of law. *See*
17 *Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure
18 to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support
19 of the claim that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th
20 Cir. 1999). In making this determination, the Court takes as true all allegations of material fact
21 stated in the complaint, and the Court construes them in the light most favorable to the plaintiff.
22 *See Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations in a *pro se* complaint
23 are held to less stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*,
24 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*per curiam*). While the
25 standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must provide
26 more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-
27 1965 (2007). A formulaic recitation of the elements of a cause of action is insufficient. *Id.*, *See*
28 *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

1 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the
2 prisoner's claims lack an arguable basis either in law or in fact. This includes claims based on legal
3 conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or claims
4 of infringement of a legal interest which clearly does not exist), as well as claims based on fanciful
5 factual allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319,
6 327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

7 **II. Instant Complaint**

8 **A. Municipal Employee Liability Under § 1983 - Monell Claim**

9 42 U.S.C. § 1983 provides a cause of action against persons acting under color of state law
10 who have violated rights guaranteed by the Constitution. *See Buckley v. City of Redding*, 66 F.3d
11 188, 190 (9th Cir.1995). Traditionally, the requirements for relief under § 1983 have been
12 articulated as: (1) a violation of rights protected by the Constitution or created by federal statute, (2)
13 proximately caused (3) by conduct of a 'person' (4) acting under color of state law. *See Crumpton*
14 *v. Gates*, 947 F.2d 1418, 1420 (9th Cir.1991).

15 State officials sued in their official capacity for damages are not persons for purposes of §
16 1983. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 n. 24 (1997). Official-suits
17 filed against state officials are merely an alternative way of pleading an action against the entity of
18 which the defendant is an officer. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). Therefore, in an
19 official-capacity suit, the plaintiff must demonstrate that a policy or custom of the governmental
20 entity of which the official is an agent was the moving force behind the violation. *Id.*; *See also*
21 *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690-92 (1978).

22 State officials sued in their individual capacity are persons for purposes of § 1983. *See*
23 *Hafer v. Melo*, 502 U.S. 21, 31 (1991). Individual-capacity suits seek to impose personal liability
24 upon a government official for actions the official takes under color of state law. *See Kentucky v.*
25 *Graham*, 473 U.S. 159, 165 (1985). Liability in a individual-capacity suit can be demonstrated by
26 showing that the official caused the alleged constitutional injury. *See Id.* at 166. The official in an
27 individual-capacity suit may, depending upon the facts, be able to establish immunity from claims
28 for damages. *See Id.* at 166-67. Police officers, however, are not entitled to absolute immunity.

1 *See Imbler v. Pachtman*, 424 U.S. 409, 418–19 (1976).

2 **i. Fourth Amendment Claims for Unlawful Search and Seizure**

3 The Fourth Amendment protects the “right of the people to be secure in their persons,
4 houses, papers, and effects, against unreasonable searches and seizures.” A “seizure” of property
5 occurs whenever “there is some meaningful interference with an individual's possessory interests in
6 that property.” *Soldal v. Cook County, III*, 506 U.S. 56, 61 (1992). The destruction of property is
7 considered “meaningful interference” and qualifies as a seizure under the Fourth Amendment.
8 *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir.1994), *overruled on other grounds, Robinson v. Solano*
9 *County*, 278 F.3d 1007, 1013 (9th Cir.2002).

10 To succeed on a Fourth Amendment claim for unlawful seizure, a plaintiff must not only
11 show that a seizure occurred, but also that the seizure was unreasonable. *Brower v. County of Inyo*,
12 489 U.S. 593, 599 (1989). A court must consider the totality of the circumstances and balance “the
13 nature of the quality and quantity of the intrusion on the individual's Fourth Amendment interests
14 against the countervailing governmental interests at stake” to determine whether the force used to
15 effect a particular seizure was reasonably necessary. *Graham v. Connor*, 490 U.S. 386, 396
16 (1989)(internal quotations and citation omitted), “The calculus of reasonableness must embody
17 allowance for the fact that police officers are often forced to make split-second judgments—in
18 circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is
19 necessary in a particular situation.” *Id.* at 396–97, Fourth amendment claims are reviewed for
20 objective reasonableness because the subjective intent of the defendant is irrelevant. *Brower*, 489
21 U.S. at 599.

22 Here, Plaintiffs list 49 officers (including Caption Maczala) as defendants in this case both
23 in their official and individual capacities. Plaintiffs argue that these officers conducted an illegal
24 search and seizure of their home, which has caused them significant hardship. Specifically, on
25 October 15, 2009, Plaintiffs reported an attempted robbery of their residence which resulted in one
26 man being fatally shot. Plaintiffs assert that rather than being treated as the victims they were, the
27 listed officers arrested Plaintiffs for murder and then illegally searched their residence claiming
28 exigent circumstances. This search allegedly resulted in significant property damage to the home

1 and in the loss of marijuana “growing equipment” including a significant amount of marijuana that
2 Plaintiffs allegedly sold to individuals who held a Nevada Medical Marijuana card as well as local
3 dispensaries. Plaintiffs additionally argue that the Las Vegas Metropolitan Police Department has a
4 policy, practice or custom of improperly claiming exigent circumstances and ignoring victims
5 statements in order to conduct improper searches and seizures. *Second Amended Complaint* (ECF
6 No. 10), 4.

7 Based on the allegations contained in Plaintiffs second amended complaint, the Court finds
8 that Plaintiffs have sufficiently stated a Fourth Amendment claim against the Defendant officers in
9 both their official and individual capacities.

10 **ii. Fifth Amendment Due Process Violation**

11 The Due Process Clause of the Fourteenth Amendment protects individuals from arbitrary
12 government action by prohibiting states from depriving people of “life, liberty, or property without
13 due process of law.” U.S. Const. amend. XIV. In order to prevail on a claim of deprivation of
14 liberty without due process of law, a plaintiff must first establish the existence of a liberty interest.
15 After meeting this threshold requirement, the plaintiff must then demonstrate that defendants failed
16 to provide the process due. *Wolff v. McDonnell*, 418 U.S. 539 (1974). Plaintiffs’ due process
17 claim asserts the same factual circumstances that give rise to their Fourth Amendment claim.
18 Therefore, it must be dismissed. *See United States v. Lanier*, 520 U.S. 259, 272 n. 7 (1997) (“[I]f a
19 constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth
20 Amendment, the claim must be analyzed under the standard appropriate to that specific provision,
21 not under the rubric of substantive due process.”); *See also Graham*, 490 U.S. at 394.

22 **B. Plaintiffs’ Claims for Libel and Slander**

23 Plaintiffs assert claims for libel and slander that resulted from the media’s portrayal of them
24 as murderers. Plaintiffs assert that because they were wrongfully charged with murder (which,
25 allegedly, was later dropped) the media wrote articles entitled “Two brothers charged with murder.”
26 *Second Amended Complaint* (ECF No. 10), 11. Plaintiffs argue that they continue to suffer the
27 ramifications from these articles because they will now have difficulty finding employment.

28 Defamation is a false written or oral statement that damages another's reputation. Black's

1 Law Dictionary (10th ed. 2014). To assert a defamation of character claim in Nevada, the plaintiff
2 must prove (1) a false and defamatory statement by a defendant concerning the plaintiff; (2) an
3 unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual
4 or presumed damages. *See Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 718, 57 P.3d 82, 90
5 (2002); Restatement (Second) of Torts § 558 (1977).

6 Plaintiffs' complaint states that Lieutenant L. Roberts "was the officer who went on the
7 news, and made the false statements against the plaintiffs. These statements were erroneous, and
8 have had long lasting ill-effects against the plaintiffs." *Second Amended Complaint* (ECF No. 10),
9 9. Based on this allegation, the Court finds that Plaintiffs have sufficiently stated a claim for
10 defamation and it may proceed.

11 **C. Plaintiffs Fraud Claim**

12 Plaintiffs's second amendment complaint states that they are bringing a claim for "fraud."
13 However, there are no specific facts to support a fraud claim. Therefore, the Court will dismiss that
14 claim without prejudice.

15 Accordingly,

16 **IT IS HEREBY ORDERED** that Plaintiffs' Fourth Amendment and Defamation claims
17 may proceed.

18 **IT IS FURTHER ORDERED** that Plaintiff's Fraud claim is dismissed without prejudice.

19 **IT IS FURTHER ORDERED** that the Clerk of the Court shall file the Second Amended
20 Complaint (ECF No. 10).

21 **IT IS FURTHER ORDERED** that the Clerk of the Court shall issue summons to
22 Defendants named in the complaint and deliver the summons to the U.S. Marshal for service. The
23 Clerk of the Court shall send the required USM-285 forms to Plaintiffs. Plaintiffs shall have twenty
24 (20) days to furnish the required USM-285 forms to the U.S. Marshal at 333 Las Vegas Blvd.
25 South, Suite 2058, Las Vegas, Nevada 89101. After Plaintiffs receive copies of the completed
26 USM-285 forms from the U.S. Marshal, they have twenty (20) days to file a notice with the court
27 identifying if Defendants were served. If Plaintiffs wish to have the U.S. Marshal attempt service
28 again on any unserved defendant, then a motion must be filed with the court identifying the
unserved defendant, specifying a more detailed name and address and indicating whether some

1 other manner of service should be used. Pursuant to Rule 4(m) of the Federal Rules of Civil
2 Procedure, service must be accomplished within ninety (90) days from the date that the complaint
3 was filed.

4 **IT IS FURTHER ORDERED** that henceforth, Plaintiffs shall serve upon Defendants, or
5 their attorney if they have retained one, a copy of every pleading, motion, or other document
6 submitted for consideration by the court. Plaintiffs shall include with the original paper submitted
7 for filing a certificate stating the date that a true and correct copy of the document was mailed to
8 Defendants or their counsel. The Court may disregard any paper received by a district judge,
9 magistrate judge, or the Clerk which fails to include a certificate of service.


10 **RECOMMENDATION**

11 **IT IS HEREBY RECOMMENDED** that Plaintiffs' Fifth Amendment Due Process claim
12 be dismissed with prejudice for failure to state a claim upon which relief may be granted.

13 **NOTICE**

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

22 DATED this 6th day of March, 2018.

23
24 
25 GEORGE FOLEY, JR.
26 United States Magistrate Judge
27
28