

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 MICHAEL FOLEY,)
4)
5 Plaintiff,)
6 vs.)
7 JUAN CARLOS VALDES, *et al.*,)
8 Defendants.)
9

Case No.: 2:17-cv-02783-GMN-NJK

ORDER

10 Pending before the Court is the Motion to Dismiss, (ECF No. 47), filed by Defendants
11 AP Express Worldwide, LLC, AP Express, LLC, Jeffery Pont, and World Pack USA
12 (collectively “Defendants”).¹ Plaintiff Michael Foley (“Plaintiff”)² filed a Response, (ECF No.
13 52), and Defendants filed a Reply, (ECF No. 53). Also before the Court is the Report and
14 Recommendation (“R&R”), (ECF No. 49), of United States Magistrate Judge Nancy J. Koppe,
15 which recommends granting Defendants’ Motion to Declare Plaintiff a Vexatious Litigant,
16 (ECF No. 36). Plaintiff filed an Objection, (ECF No. 51), and Defendants filed a Response,
17 (ECF No. 54).³ For the reasons stated herein, the Court accepts and adopts Judge Koppe’s
18 R&R in full. Additionally, the Court grants Defendants’ Motion to Dismiss and Motion to
19 Declare Plaintiff a Vexatious Litigant.

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23 ¹ On October 1, 2018, Defendant Michelle Pont filed a Joinder to the Motion to Dismiss. (ECF No. 50).
Accordingly, any reference to “Defendants” as used in this Order shall include Defendant Michelle Pont.
24 ² In light of Plaintiff’s *pro se* status, the Court has liberally construed his filings, holding him to standards less
stringent than formal pleadings drafted by attorneys. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007).
25 ³ Also before the Court is Plaintiff’s Request for Judicial Notice and/or to Allow Plaintiff to Supplement
Response. (ECF No. 55). In the Motion, Plaintiff seeks to add to the record a state court opinion declining to
deem Plaintiff a vexatious litigant. (*Id.*). Defendants did not file an opposition to this request to supplement.
Accordingly, the Court grants Plaintiff’s Motion and considers the state court opinion. *See Local Rule 7-2.*

1 **I. BACKGROUND**

2 This case arises out of allegations of conspiracy to interfere with Plaintiff's custody over
3 his children. According to Plaintiff, Defendants engaged in a lengthy string of manipulative
4 tactics—including filing fake child abuse allegations against Plaintiff—to deprive Plaintiff of
5 his custodial rights. (*See* Compl., ECF No. 6). Based on these allegations, Plaintiff filed a
6 Complaint on January 17, 2018, asserting claims for: (1) Conspiracy to Conceal and Deprive
7 Custody of Children from a Parent; (2) Loss of Services; (3) Assault; and (4) Intentional
8 Infliction of Emotional Distress. (*Id.*).

9 In February 2018, Defendants filed Motions to Dismiss challenging, *inter alia*, the
10 Court's subject matter jurisdiction over this action. (Motions to Dismiss, ECF Nos. 11, 17). On
11 August 13, 2018, the Court issued an Order granting Defendants' Motions. (Order, ECF No.
12 35). In the Order, the Court found: (1) Plaintiff had failed to sufficiently allege Defendants'
13 citizenship for the purpose of establishing diversity jurisdiction; and (2) Plaintiff had failed to
14 establish the existence of federal question jurisdiction. Based on this finding, the Court granted
15 Plaintiff leave to file an amended complaint and directed Plaintiff to properly plead the
16 citizenship of Defendants.

17 On September 4, 2018, Plaintiff filed an Amended Complaint. (Am. Compl., ECF No.
18 44). Defendants now move to dismiss the Amended Complaint for lack of subject matter
19 jurisdiction.

20 **II. LEGAL STANDARD**

21 Rule 12(b)(1) of the Federal Rules of Civil Procedure permits motions to dismiss for
22 lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). When subject matter jurisdiction is
23 challenged, the burden of proof is placed on the party asserting that jurisdiction exists. *Scott v.*
24 *Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (holding that “[t]he party seeking to invoke the
25 court's jurisdiction bears the burden of establishing that jurisdiction exists”). Accordingly,

1 courts presume lack of subject matter jurisdiction until the plaintiff proves otherwise in
2 response to the motion to dismiss. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375,
3 377 (1994).

4 A motion to dismiss under Rule 12(b)(1) may be construed in one of two ways.
5 *Thornhill Publ'g Co., Inc. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). It
6 may be described as 'facial,' meaning that it attacks the sufficiency of the allegations to support
7 subject matter jurisdiction. *Id.* Alternatively, it may be described as 'factual,' meaning that it
8 "attack[s] the existence of subject matter jurisdiction in fact." *Id.* When, as here, a defendant
9 asserts a factual attack, "[t]he plaintiff bears the burden of proving by a preponderance of the
10 evidence that each of the requirements for subject-matter jurisdiction has been met." *Leite v.*
11 *Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

12 "Ordinarily, a case dismissed for lack of subject matter jurisdiction should be dismissed
13 without prejudice so that a plaintiff may reassert his claims in a competent court." *Frigard v.*
14 *United States*, 862 F.2d 201, 204 (9th Cir. 1988) (per curiam). However, where there is no way
15 to cure the jurisdictional defect, dismissal with prejudice is proper. *See id.*

16 **III. DISCUSSION**

17 **1. Motion to Dismiss**

18 In the Amended Complaint, Plaintiff alleges that the Court has subject matter
19 jurisdiction pursuant to 28 U.S.C. § 1332. (Am. Compl. ¶¶ 1–8, ECF No. 44). In order to
20 establish federal jurisdiction under Section 1332, a plaintiff must demonstrate that each
21 defendant is a citizen of a different state than the plaintiff. 28 U.S.C. § 1332(a)(1). With
22 respect to limited liability companies, a plaintiff must allege the citizenship of each member to
23 properly plead diversity. *See Johnson v. Colombia Props. Anchorage, LP*, 437 F.3d 894, 899
24 (9th Cir. 2006). The party asserting diversity jurisdiction bears the burden of proof. *Lew v.*
25 *Moss*, 797 F.2d 747, 749 (9th Cir. 1986).

1 Here, the Court previously dismissed Plaintiff's Complaint for failure to allege the
2 citizenship of both Patricia Foley and World Pack USA. (Order 3:8–18, ECF No. 35). In the
3 Amended Complaint, Plaintiff alleges that Patricia Foley is a citizen of Mexico and Defendant
4 World Pack USA is owned and operated by Jeffrey Pont and Shantal Smith, who are citizens of
5 California. Absent from these allegations, however, is the citizenship of “Augusto Soriano Jr.,”
6 who the Nevada Secretary of State lists as a managing member of World Pack USA residing in
7 Las Vegas, Nevada. (*See* Ex. 1 to First MTD Reply, ECF No. 26). Per the Court's prior Order,
8 any amendment to the Complaint had to allege the citizenship of each member of World Pack
9 USA to satisfy the diversity requirements. *See Johnson*, 437 F.3d at 899. As Plaintiff has failed
10 to meet this requirement, the Court finds dismissal appropriate on this basis.

11 Even to the extent Plaintiff had alleged World Pack USA's citizenship, the Court finds a
12 legitimate question as to whether Plaintiff has accurately stated the citizenship of Defendant
13 Patricia Foley. In particular, the Court notes that Plaintiff has previously asserted in other
14 lawsuits that Patricia Foley—who was at one point married to Plaintiff in the United States—is
15 a citizen of Nevada. (*See* Reply 3:4–15, ECF No. 53); (*see, e.g.*, Clark County Compl. at
16 APE000132, Ex. 3 to Appx. I, ECF No. 37-3). In his Response, Plaintiff does not address this
17 issue or any of the other jurisdictional issues raised by Defendants or the Court. (*See* Resp.,
18 ECF No. 52). The Court therefore finds that Plaintiff has consented to the granting of
19 Defendants' Motion as stated in the local rules. *See* Local Rule 7-2(d). Moreover, by failing to
20 address these issues, the Court finds that Plaintiff has not met his burden of establishing the
21 Court's subject matter jurisdiction over his claims. *See Lew*, 797 F.2d at 749. Accordingly, the
22 Court dismisses Plaintiff's claims without prejudice.

23 **2. Vexatious Status**

24 In the R&R, Judge Koppe recommends declaring Plaintiff a vexatious litigant and
25 subjecting his future complaints against Defendants to pre-screening. (R&R 10:13–16, ECF

1 No. 49). A party may file specific written objections to the findings and recommendations of a
2 United States Magistrate Judge made pursuant to Local Rule IB 1–4. 28 U.S.C. § 636(b)(1)(B);
3 D. Nev. Local R. IB 3-2. Upon the filing of such objections, the Court must make a *de novo*
4 determination of those portions of the Report to which objections are made. *Id.* The Court may
5 accept, reject, or modify, in whole or in part, the findings or recommendations made by the
6 Magistrate Judge. 28 U.S.C. § 636(b)(1); D. Nev. Local R. IB 3-2(b).

7 Here, Plaintiff largely objects to Judge Koppe’s R&R based on his own subjective
8 beliefs regarding both the merits of his underlying conspiracy allegations and the biased nature
9 of his other legal proceedings. In raising these objections, Plaintiff utilizes much of the crude
10 or slanderous language that has become commonplace in his filings. In particular, the Court
11 notes Plaintiff’s liberal use of language like “sexual inadequacy,” “gambling addiction,”
12 “enslavement,” and “evil” behavior when referencing Defendants. Additionally, the Court
13 notes Plaintiff’s repeated allegations of corruption, bias, and mental incapacity against other
14 courts and judges. This type of combative language only serves to highlight the vexatious
15 nature of Plaintiff’s numerous actions. Nonetheless, amidst Plaintiff’s accusations, Plaintiff
16 raises three broad objections to Judge Koppe’s R&R: (1) Judge Koppe relied upon incorrect
17 facts in reaching her conclusion; (2) the Court declaring Plaintiff vexatious violates his First
18 Amendment rights; and (3) Plaintiff has not filed enough cases against Defendants to warrant
19 being declared vexatious. (Objection 7:25–9:25, ECF No. 51). The Court addresses each
20 objection in turn.

21 *a) Incorrect Facts*

22 Plaintiff argues that Judge Koppe’s R&R incorrectly states the number of cases Plaintiff
23 has filed against Defendants. (*Id.* 8:1–4). Plaintiff further argues that some of the closed cases
24 cited by Judge Koppe “are still alive and pending further action” or else ripe for appeal. (*Id.*
25 8:14–16). Contrary to Plaintiff’s assertion, however, Judge Koppe explicitly acknowledges that

1 not all of the cases cited in the R&R involve the Defendants in this case. (*See* R&R n.1 at 2).
2 Judge Koppe included these additional cases to illustrate “Plaintiff’s use of judicial time, to
3 establish a record of the relevant actions, and to elucidate the common themes and strategies in
4 Plaintiff’s litigation.” (*Id.*). To the extent Plaintiff objects to the precise number of purported
5 cases he has filed against Defendants, the Court finds this argument immaterial to its vexatious
6 determination. *See Ringgold-Lockhart v. Cty. of Los Angeles*, 761 F.3d 1057, 1062 (9th Cir.
7 2014) (omitting a precise case quota amongst vexatious litigant factors). Here, Judge Koppe
8 detailed over a dozen of Plaintiff’s other cases in making her vexatious litigant
9 recommendation. The R&R therefore complies with the procedural requirement that the Court
10 “compile an adequate record for appellate review.” *Id.*

11 *b) First Amendment Rights*

12 Plaintiff next objects to the R&R on the basis that it disparages his “First Amendment
13 Right to petition the government for redress of his grievances.” (Objection 9:1–2). According
14 to Plaintiff, “[i]f this court forecloses this case, or the plaintiff’s right to sue these malicious and
15 menacing defendants . . . the Ponts will continue in their constant meddling and tortious
16 interference with *impunity*.” (*Id.* 9:7–10).

17 Plaintiff is correct that restricting access to the courts is a serious matter which
18 implicates constitutional rights. *See De Long v. Hennessey*, 912 F.2d 1144, 1147 (9th Cir.
19 1990). Nonetheless, the Ninth Circuit has explicitly acknowledged that “[f]ederal courts can
20 ‘regulate the activities of abusive litigants by imposing carefully tailored restrictions under ...
21 appropriate circumstances.’” *Ringgold-Lockhart*, 761 F.3d at 1061 (citing *De Long*, 912 F.2d at
22 1147).

23 Here, the R&R only recommends subjecting Plaintiff to pre-screening of future
24 complaints against Defendants. (R&R 10:14–16). Plaintiff would otherwise retain full access
25

1 to the courts. The Court therefore finds Plaintiff's assertion that a pre-filing restriction would
2 disparage his First Amendment rights unavailing.

3 *c) Number of Cases Against Defendants*

4 Lastly, Plaintiff argues that he should not be deemed vexatious because he has only filed
5 "a total of two lawsuits against the Ponts." (Objection 9:16–17). Plaintiff does not detail the
6 specific lawsuits he is referencing, but the Court understands Plaintiff to mean the federal cases
7 *Foley v. Pont, et al.*, 11–cv–1769–JCM–VCF and the instant action.⁴ With respect to the
8 former, Plaintiff's claims were dismissed both on the merits and for failure to prosecute.
9 Plaintiff subsequently filed an appeal, which the District Court certified as frivolous and the
10 Ninth Circuit ultimately dismissed.⁵ As for the instant action, although the Court does not
11 reach the merits due to lack of jurisdiction, a cursory glance at the pleadings reveals Plaintiff's
12 allegations to be duplicative of the claims already adjudicated in the prior lawsuit. The Court
13 therefore finds this action consistent with the type of frivolous cases discussed in Judge
14 Koppe's R&R.

15 Regardless, Plaintiff's argument ignores that the R&R is based on a multitude of filings
16 against a variety of defendants and not just Jeffery Pont and Michelle Pont. Additionally, the
17 R&R encompasses not only the volume of Plaintiff's cases but also the harassing nature of his
18 filings. (*See* R&R 9:19–22) ("The Court finds [] that the volume, pattern of harassment in the
19 allegations, continual verbal abuse, lack of merit, and rancorous motivation in [Plaintiff's]
20 filings sufficiently demonstrate Plaintiff's intent to harass the defendants."). As noted in the
21 R&R, virtually all of Plaintiff's lawsuits arise out of a common nucleus of conspiratorial and
22 unfounded allegations directed against Defendants. Plaintiff fails to address the harassing
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24
25 ⁴ Plaintiff has filed additional lawsuits against Jeffery Pont and Michelle Pont in state court.

⁵ In a pattern consistent with numerous of Plaintiff's other filings, the Ninth Circuit dismissed the appeal for failure to prosecute.

1 nature of his filings in his Objection. The Court therefore finds no basis to depart from Judge
2 Koppe's recommendation.

3 **IV. CONCLUSION**

4 **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss, (ECF No. 47), is
5 **GRANTED**. The Court dismisses this action without prejudice.

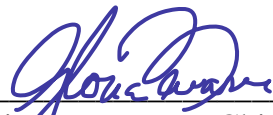
6 **IT IS FURTHER ORDERED** that the Court **ACCEPTS and ADOPTS** the Report &
7 Recommendation, (ECF No. 49), **in full**. Plaintiff shall be subject to pre-screening of future
8 complaints that he seeks to file in this District against Michelle Pont, Jeffrey Pont, A.P.
9 Express, World Pack USA, and Patricia Foley.

10 **IT IS FURTHER ORDERED** that Defendants' Motion to Declare Plaintiff a Vexatious
11 Litigant, (ECF No. 36), is **GRANTED** consistent with the foregoing.

12 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Judicial Notice, (ECF No.
13 55), is **GRANTED**.

14 The Clerk of Court is instructed to close the case.

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16 **DATED** this 8 day of March, 2019.

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19 _____
20 Gloria M. Navarro, Chief Judge
21 United States District Judge
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