Case Number 10197

Department 1

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LANDER

MICHAEL MARKING and ELIZABETH FLEMING, Plaintiffs *vs.* AUSTIN ROPING CLUB Defendant	MOTION FOR ADDITIONAL FINDINGS OR TO VOID OR MODIFY ORDER

COME NOW MICHAEL MARKING AND ELIZABETH FLEMING, in proper person, as Plaintiffs, and hereby submit their MOTION FOR ADDITIONAL FINDINGS OR TO VOID OR MODIFY ORDER.

WHEREAS

The MOTION FOR MORE DEFINITE STATEMENT (2012.03.13) was filed on behalf of Defendant (the Club); and

27 Without waiting to receive Plaintiff's 2012.03.30 OPPOSITION TO MOTION FOR MORE
28 DEFINITE STATEMENT, Hy Forgeron filed and served his REQUEST FOR SUBMISSION on 2012.04.02;
29 and

30 This Court issued its ORDER GRANTING DEFENDANT'S MOTION FOR MORE DEFINITE
31 STATEMENT on 2012.04.05; and

32 Both the 2012.04.02 REQUEST FOR SUBMISSION, and (consequently) the 2012.04.05 ORDER
33 GRANDING DEFENDANT'S MOTION FOR MORE DEFINITE STATEMENT were premature (POINTS &
34 AUTHORITIES, page 5); and

35 A motion to vacate order is available for a premature, pre-trial order (POINTS &
36 AUTHORITIES, page 8); and

37 The 2012.03.13 MOTION also asked for attorneys fees, and the 2012.04.05 ORDER
38 granted that request; and

39 Attorneys fees may only be awarded by agreement, statute, or rule (POINTS &
40 AUTHORITIES, page 9); and

41 An order granting attorneys fees must be final, and therefore appealable (POINTS &
42 AUTHORITIES, page 10); and

43 No findings of fact or law are given to support the award of attorneys' fees.

44 While findings of fact and law may not be required in deciding a motion for more
45 definite statement, Plaintiffs are entitled to request them.

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47

48 THEREFORE

49 Plaintiffs hereby pray to this Court for the following:

50 Vacatur of this Court's 2012.04.05 Order as premature, and a hearing on the original
51 motion with consideration given to Plaintiffs' Opposition;

52 Or, in the alternative:

This Court's findings of fact and law supporting the award of attorney fees; and

To the extent that the award of fees must necessarily depend on a decision on the merits of the underlying case, a clear exposition of the decisions made on the issues considered, and this Court's certification under Rule 54(b) that a partial final decision is warranted.

An explanation of why Plaintiffs' detailed Complaint, hundreds of points in length, is insufficently detailed, when the rules allow very simple complaints as illustrated by the sample forms. (However, Plaintiffs concede the point about pleading fraud, and need no explanation.)

In any event, Plaintiffs request an ruling interpreting "time of filing" as discussed herein.

BECAUSE THE AWARD OF ATTORNEY FEES implies a final or partial final judgment, Plaintiffs take this as a tolling motion both for appeal purposes and for compliance with the Order.

IN SUPPORT OF THIS MOTION FOR ADDITIONAL FINDINGS OR TO VOID OR MODIFY ORDER, Plaintiffs have attached their MEMORANDUM OF POINTS & AUTHORITIES.

79 DATED this Monday, 23 April 2012.

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84 Michael Marking, Plaintiff

85 e-mail *marking@tatanka.com*

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89 Elizabeth Fleming, Plaintiff

90 e-mail *ryuuza@tatanka.com*

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92 both at General Delivery, Austin, Nevada 89310

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106 MEMORANDUM OF POINTS & AUTHORITIES
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108 **1. Previous document incorporated.** To avoid duplication of material, Plaintiffs'
109 previous OPPOSITION TO MOTION FOR MORE DEFINITE STATEMENT (30 March 2012), along with its
110 exhibits, is hereby incorporated into this MOTION by reference, and is called the "OPPOSITION" in
111 this MOTION's text. The exhibits to the OPPOSITION are designated DS-1 to DS-6.
112
113 **2. The 2012.04.02 Request and 2012.04.05 Order were premature.** Plaintiffs filed
114 their OPPOSITION (2012.03.30) by mail, but Mr Forgeron and this Court disregarded the
115 OPPOSITION. This was improper for three separate and distinct reasons: (a) filing by mail is
116 consistent with the rules (*infra,* pg. 5); (b) even if filing by mail were inconsistent with the
117 rules, those rules allow filing within a reasonable time after service (*infra*, pg. 7); and (c)
118 failure to allow filing by mail would be inequitable and would work a hardship on Plaintiffs
119 (*infra*, pg. 8).
120
121 **3. Filing by mail is consistent with the rules.** Plaintiff admits to being somewhat
122 amazed at not finding, despite a diligent search, an on-point Nevada opinion either supporting
123 or refuting this proposition.
124 (a) Nevada distinguishes between jurisdictional filings and filings supported by court rules.
125 (Notices of appeal are jurisdictional, and, since the rule is made by the legislature, and
126 Nevada feels it cannot override the statutes regarding jurisdiction, "filing" of a notice of
127 appeal consists of getting it into the hands of the clerk or judge by the due date.)
128 (b) Despite the above, all documents filed by prisoners, even notices of appeal, are considered
129 filed on the date the prisoner puts them into the prison mail system (following what the
130 United States Supreme Court calls the "prison mailbox rule").

131 (c) Filings with administrative agencies are considered to have their own rules, not necessarily
132 related to the court rules.
133 (d) Filings allowed or required by statute follow their own rules in determining what is timely
134 filing.
135 Once all of these distinctions are considered, Plaintiffs have been unable to find a single
136 Nevada Supreme Court opinion determining whether the response to an “ordinary”, non-
137 jurisdictional motion (or, for that matter, a reply thereto) is considered as timely filed if
138 mailed on the due date (or for that matter, according to NRCP 5(d), “within a reasonable time
139 thereafter”).
140 **4.** However, in the Nevada Supreme Court, “[...] a document is timely filed if, on or
141 before the last day for filing, it is: (i) mailed to the clerk by First-Class Mail, or other class of
142 mail that is at least as expeditious, postage prepaid; or (ii) dispatched to the clerk for delivery
143 within 3 calendar days by a third-party commercial carrier; or [...]” (NRAP 25.1(a)).
144 **5.** Furthermore, both in district courts and in the Nevada Supreme Court, an
145 electronically filed document is deemed to be filed when transmitted, not when it is received
146 by the clerk. (NEFR 8(a)) The principle is elsewhere enunciated as “transmission is effected
147 when the sender does the last act that must be performed by the sender. Service by other
148 agencies is complete on delivery to the designated agency.” (2001 Committee Amendment
149 Commentary on FRCP 5(b))
150 **6.** Thus, deeming timely mailing to be timely filing is consistent with the Nevada
151 Supreme Courts own rules, and with the rules for electronic filing both for district courts and
152 for the Nevada Supreme Court.
153 **7.** In any case, the clerk may review the document and consider it not properly filed
154 for good reason (such as failure to attach fee payments), so the clerk may retroactively decide
155 if the mailed or electronically filed document was filed properly. Furthermore, the clerk will
156 stamp a mailed document with the date received, and the stamped date is the date appearing

on the docket sheet in the Nevada Supreme Court: the rule for filing by mail is to determine whether a document was timely filed, and the date of mailing is not necessarily the same as the date used by the clerk.

8. Filing must be within a reasonable time after service. Two rules are most relevant to filing in district courts: "All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter [...]" (NRCP 5(d)); and DCR 13, which covers the procedure, and timing, for motions. The salient parts of DCR 13 are: "Within 10 days after the service of the motion, the opposing party shall serve and file his written opposition thereto [...]" (DCR 13.3) and "The moving party may serve and file reply points and authorities within 5 days after service of the answering points and authorities [...]" (DCR 13.4)

9. NRCP 6(e) adds three days when the party serving and filing is responding to a document received by mail. This is an implicit acknowledgement that mail takes around three days to be delivered. This is consistent with the actual time for mail from Austin to Battle Mountain, usually two or three days (but occasionally as much as a week).

10. DCR must be in harmony with NRCP. (NRCP 83; see also *Nevada Power v. Fluor Illinois*, 108 Nev. 638, 837 P.2d 1354 (Nev. 08/20/1992), which held that a local rule "cannot exceed the scope of" a NRCP rule.)

11. There are two ways to read DCR 13.4: a response (or reply) must be both served and filed within ten (or five) days, or it must be served within ten (or five) days and filed "within a reasonable time thereafter".

12. The first interpretation is implausible unless service is effective upon mailing, because a party who must rely on service by mail would have three days deducted from his time because he must allow those three days for delivery of the mail. This would give a movant <u>only two days</u> to come up with reply points, instead of five. In the NRCP, <u>almost</u>

nothing happens in two days. (The only thing that must take place on two days' notice is an objection to a TRO under NRCP 65(b), and those TROs are marked not only with the date but also with the time of day, as befitting something with so short a fuse.)

13. It also is unreasonable to require that a response or reply be in the clerk's hands three days before it reaches the other party, since the court is not involved with the motion at that point. There must be a rational basis for a rule or law. (See *State Farm Fire & Casualty Co. v. All Electric, Inc.*, 99 Nev. 222, 660 P.2d 995 (Nev. 1983))

14. This is not to imply that there is anything wrong with DCR 13. Rather, consistent with the usual principles of construction, when there are multiple interpretations, the court must choose the one that makes the most sense. In this instance, the only rational interpretations are that filing is effective on mailing, or that filing may occur at a reasonable time after service, or both.

15. Failure to allow filing by mail would be inequitable and would work a hardship on Plaintiffs. Plaintiffs have no registered vehicle, and no easy way to get to the clerk's office. By contrast, Hy Forgeron is only a few blocks away, and can easily walk. To ask Plaintiffs to drive a hundred miles to equalize the time is unfair and inequitable.

16. Without filing by mail, either through interpretation of the rules as "filing is effective upon mailing", or as "filing may occur after the deadline when the mail reaches the clerk's office", or both, would work a hardship on Plaintiffs, as it would allow them three fewer days to respond to documents received, which under some circumstances would be a very short time indeed.

17. A motion to vacate order is available for a premature, pre-trial order. Placing a time limit on responses to motions is not to determine whether a motion is meritorious. Rather, it is a convenience to the court and a balancing tool.

18. "In *Ouellette v. Heckler*, 102 F.R.D. 940 (D.Me. 1984), [...] When the district court granted plaintiff's motion, defendant moved to vacate the order, arguing that it was in substance a default and thus violated Fed. R. Civ. P. 55(e). Id. at 943. Relying on a local court rule which provided that a party who does not respond to a motion within ten days 'shall be deemed to have waived objection,' the court rejected this argument. The court stated: Local Rule 19(c) in this District, however, is not a rule of default. Instead, it is a rule by which the court determines what motions are contested. [...] Local Rule 19(c) merely provides a standard by which the court can assume that inaction amounts to waiver of any objection to a motion. Id. at 943 (emphasis added). Such a rule provides a balance between the interest of litigants and the needs of the court to have reasonably prompt notice that matters are contested. Id. [...] We agree with the reasoning in Ouellette [...]" (*Nye County v. Washoe Medical Center*, 108 Nev. 896, 839 P.2d 1312 (Nev. 10/22/1992), emphasis added) The Nevada court then went on to explain that, even with a default, the defaulting party has a reasonable amount of time to move to set aside a judgment.

19. Although this Court ruled prematurely on the MOTION FOR MORE DEFINITE STATEMENT, a motion to vacate is available for premature pre-trial orders. (see, for example, *In re Fishing Company of Alaska*, No. C08-945RSL (W.D.Wash. 08/29/2008))

20. Attorney fees may only be awarded by agreement, statute, or rule. "It is well established in Nevada that attorneys' fees cannot be recovered unless authorized by agreement or by statute or rule." (*Young v. Nevada Title Co.*, 103 Nev. 436, 744 P.2d 902 (Nev. 10/29/1987), citing *Sun Realty v. District Court*, 91 Nev. 774, 776, 542 P.2d 1072, 1074 (1975))

21. In this case, there is no agreement for attorneys' fees, and no statute or rule applies. Even NRS 18.010 does not apply, since there have been no money damages. "[U]nder NRS 18.010(2)(a), it is well settled that a money judgment is a prerequisite to recovery of attorney fees. (*Thomas v. City of North Las Vegas*, 127 P.3d 1057, 122 Nev. 82 (Nev.

235 02/09/2006))

236

237 **22. An order granting attorneys fees must be final, and therefore appealable.**
238 The logic is simple: in order to award fees, there must be a prevailing party, which means
239 there has been a final decision (even a partial final decision), which makes the order
240 appealable.

241 **23.** In order to have status as a prevailing party, and hence to trigger the recovery of
242 costs and fees, all of the causes of action must be decided. "[...] the trial court must offset all
243 awards of monetary damages to determine which side is the prevailing party" (*Parodi v.*
244 *Budetti*, 984 P.2d 172, 115 Nev. 236 (Nev.1999)). However, this Court's 2012.04.05 Order does
245 not specify that any cause of action has been determined.

246 **24.** Plaintiffs have considered it possible that this Court might have rendered a
247 determination of less than all causes, as allowed by Rule 54(b). However, the Complaint has
248 multiple, interrelated contract and tort claims. There seems no way to separate them. To
249 separate claims requires that the claims be properly separable, and also an express
250 determination that "there is no just reason for delay" in hearing one of the claims. In related
251 contract and tort claims, even if the "claims are separate, and require proof of separate
252 elements, [and] the factual underpinnings and many of the issues related to damages to be
253 awarded are the same", a decision on part of the claims could not be certified as final. If the
254 outcome of some issues depends on another issue, then "there can be no finding that there is
255 not just reason for delay, and certification of an order deciding some but not all of those
256 claims as final is an abuse of the court's discretion." (*Hallicrafters Co. v. Moore*, 728 P. 2d
257 441, 102 Nev. 526 (Nev. 1986))

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262 ## Certificate of Service
263
264 I hereby certify under penalties of perjury that on this date I served true and correct copies of
265 the foregoing document by depositing them for mailing, in sealed envelopes, U.S. postage
266 prepaid, at Austin, Nevada, addressed as follows:
267 Hy Forgeron; 168 South Reese Street; Post Office Box 1179; Battle Mountain, Nevada
268 89820
269 Dated Monday, 23 April 2012.
270
271 ______________________________
272 Michael Marking
273
274 Affirmation (Pursuant to NRS 239B.030)
275 I hereby affirm that the preceding document filed in the above-described manner does
276 not contain the social security number of any person.
277 Dated Monday, 23 April 2012.
278
279 ______________________________
280 Michael Marking
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282
283
284
285
286 (Plaintiffs' electronic document name: *mfvarc_motion_additional_findings_et_al_20120423a)*