

1 Case Number 10197

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6 IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF LANDER

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10 MICHAEL MARKING  
11 and  
12 ELIZABETH FLEMING,  
13 Plaintiffs

14 vs.

15  
16 AUSTIN ROPING CLUB  
17 Defendant

MOTION FOR LEAVE TO AMEND COMPLAINT  
AND FOR JOINDER OF LANDER COUNTY

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20  
21 COME NOW MICHAEL MARKING AND ELIZABETH FLEMING, in proper person, as Plaintiffs,  
22 and hereby submit their MOTION FOR LEAVE TO AMEND COMPLAINT AND FOR JOINDER OF LANDER  
23 COUNTY.

24  
25 WHEREAS

26 The COMPLAINT (2012.01.26) in this matter named a single defendant, the Austin

27 Roping Club; and

28 No answer or other responsive pleading has yet been filed; and

29 Based on information received since the Complaint was filed, Plaintiffs desire to  
30 amend their Complaint to add Lander County as a defendant (MEMORANDUM OF POINTS &  
31 AUTHORITIES, pg. 4); and

32 Based on information received since the Complaint was filed, Plaintiffs desire to add  
33 additional rights of action, accruing from and related to transactions and events already  
34 pleaded (MEMORANDUM OF POINTS & AUTHORITIES, pg. 5); and

35 Plaintiffs' claims against the Club as set forth in the Complaint, and Plaintiffs' claims  
36 of negligence against Lander County arise from a common set of facts and circumstances (to  
37 wit, the County Contract and relevant actions and omissions of the Club);

38 Even if Lander County were to have no liability, Lander County has an interest in the  
39 interpretation of the County Contract, since such interpretation obviously affects the County's  
40 rights; as such, the County is an interested party and ought to be joined to protect the  
41 County's rights (MEMORANDUM OF POINTS & AUTHORITIES, pg. 6); and

42 Plaintiffs desire to supplement their Complaint to include occurrences which have  
43 happened since the date of the original Complaint (MEMORANDUM OF POINTS & AUTHORITIES, pg.  
44 6); and

45 Plaintiffs desire to amend their complaint to plead more specifically the elements of  
46 fraud required by NRCP 9(b), improperly omitted from the original Complaint;

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48  
49 THEREFORE

50 Plaintiffs hereby pray to this Court for an order allowing the joinder of Lander County  
51 to this action; giving leave to Plaintiffs to amend the Complaint to incorporate claims against  
52 Lander County, and to incorporate additional claims against the Club relating to the County

53 Contract; and to supplement the Complaint with occurrences which have happened since the  
54 date of the original Complaint; and to allowing the amendment of the Complaint to more  
55 specifically plead the elements of fraud as already alleged.

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57  
58 IN SUPPORT OF THIS MOTION FOR LEAVE TO AMEND COMPLAINT AND FOR JOINDER OF LANDER COUNTY,  
59 Plaintiffs have attached their MEMORANDUM OF POINTS & AUTHORITIES.

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61  
62 DATED this Monday, 7 May 2012.

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65  
66 \_\_\_\_\_  
67 Michael Marking, Plaintiff  
68 e-mail *marking@tatanka.com*

69  
70  
71 \_\_\_\_\_  
72 Elizabeth Fleming, Plaintiff  
73 e-mail *ryuuz@tatanka.com*

74  
75 both at General Delivery, Austin, Nevada 89310  
76  
77  
78

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85 MEMORANDUM OF POINTS & AUTHORITIES

86  
87 **1. Bases for complaint against Lander County.** In summary, Plaintiffs’ complaint  
88 against Lander County is as follows:

89 (a) The contract between Lander County and the Club anticipates and provides for  
90 leasing corral space, which is County property, to the public; and the County retains some  
91 control over the terms of those leases; therefore, Plaintiffs’ corral lease was a lease from the  
92 County to Plaintiffs’, with the Club as agent and the County as principal; the County  
93 (principal) has liability for certain acts of the Club (agent); it remains for discovery to  
94 determine, based on communications between the Club and the County, to what extent the  
95 Club’s actions and omissions were within the scope of the County Agreement; and

96 (b) The above points notwithstanding, Lander County was negligent in failing to  
97 enforce the terms of the County Agreement; and

98 (c) Lander County was negligent in failing to ensure that Club activities conducted on  
99 County property were safe and orderly; and

100 (d) To the extent that Lander County is liable in the above, it is contractually liable and  
101 also liable as a joint tortfeasor for the relief requested in the Complaint.

102 **2.** The above is given without citations to authority, as there is no requirement to  
103 identify a correct legal theory when making a complaint. (see *Liston v. Las Vegas Metro*  
104 *Police Dep’t*, 111 Nev. 1575, 908 P.2d 720 (Nev. 12/29/1995))

105           **3.** The additional point made here is that the complaint against Lander County shares  
106 common set of facts and circumstances with the complaint against the Club, and the two  
107 ought to be tried together. Not least among this common background is interpretation of the  
108 County Contract itself.

109  
110           **4. Additional rights of action against the Club.** As intended beneficiaries of the  
111 County Contract, Plaintiffs have standing to enforce the County Contract. (See *infra*, pg 5)

112           **5.** Many of the actions and omissions of the Club alleged in the Complaint are  
113 breaches of the County Contract. Therefore, some of the acts and omissions of the Club are  
114 breaches of two contracts simultaneously, and Plaintiffs plan to add claims of breach of the  
115 County Contract to the acts and omissions already pleaded.

116           **6.** Additional actions and omissions of the Club, not alleged in the Complaint, are  
117 also breaches of the County Contract, while not necessarily breaches of the members'  
118 contract. Plaintiffs plan to add these breaches by the Club to the Complaint, along with  
119 appropriate prayers for relief.

120  
121           **7. Plaintiffs are intended beneficiaries of the County Contract.** Although a  
122 complaint need not specify the legal theory upon which it is based (*Liston*, cited above.), it  
123 would be proper, and might forestall objection, to outline the basis for Plaintiffs' standing to  
124 enforce the terms of the contract between Lander County and the Club.

125           **8.** Whether as members of the general public, as persons with an interest in horse-  
126 related activities, as residents of Lander County, as members of the Roping Club, and as  
127 lessees of a corral, Plaintiffs are clearly intended beneficiaries of the County Contract. "[T]he  
128 law has long recognized that an individual, although unnamed in a contract or a stranger to  
129 both parties thereto, may bring suit where a breach of the contract has caused him injury.  
130 *Anderson v. Rexroad*, 266 P.2d 320 (Kan. 1954); *Hemphill v. Hanson*, 77 Nev. 432, 366 P.2d

131 92 (1961). Even where, as here, the contract is between a municipality and another party for  
132 the benefit of the general public the courts have not hesitated to permit a member of the  
133 public to bring suit for breach thereof. *Bush v. Upper Valley Telecable Co.*, 524 P.2d 1055  
134 (Idaho 1973); *People ex rel. Jackson v. Suburban R. Co.*, 53 N.E. 349 (Ill. 1899); *Phinney v.*  
135 *Boston Elevated Ry. Co.*, 87 N.E. 490 (Mass. 1909). It safely can be said that [appellants] were  
136 intended beneficiaries of the City of North Las Vegas-Nevada Power franchise agreement.”  
137 (*Williams v. City of North Las Vegas*, 91 Nev. 622, 541 P.2d 652 (Nev. 10/23/1975), emphasis  
138 added)

139  
140 **9. Plaintiffs may supplement their complaint.** “Upon motion of a party the court  
141 may, upon reasonable notice and upon such terms as are just, permit the party to serve a  
142 supplemental pleading setting forth transactions or occurrences or events which have  
143 happened since the date of the pleading sought to be supplemented. Permission may be  
144 granted even though the original pleading is defective in its statement of a claim for relief or  
145 defense. If the court deems it advisable that the adverse party plead to the supplemental  
146 pleading, it shall so order, specifying the time therefor.” (NRCP 15(d))

147 **10.** “NRCP 15(d) is intended to promote as complete an adjudication as possible by  
148 allowing the addition of claims that arise after the initial pleadings have been filed. *William*  
149 *Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1057 (9th Cir.), cert.  
150 denied, 103 S.Ct. 57 (1982).” (*Szilagyi v. Testa*, 99 Nev. 834, 673 P.2d 495 (Nev. 12/20/1983))

151  
152 **11. Lander County becomes a party in interest.** Although Plaintiffs have a right as  
153 intended beneficiaries to enforce the County Contract, Lander County becomes a party in  
154 interest in this litigation, and must be joined under NRCP 19(a)(2). “A ‘real party in interest’  
155 under NRCP 17(a) 1 is one who possess the right to enforce the claim and has a significant  
156 interest in the litigation. *Painter v. Anderson*, 96 Nev. 941, 620 P.2d 1254 (1980).” (*Szilagyi v.*

157 *Testa*, 99 Nev. 834, 673 P.2d 495 (Nev. 12/20/1983)) Certainly, the County also has a right to  
158 enforce those portions of the claim arising from breaches of the County Contract, and the  
159 County has an interest in the interpretation of that contract.

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161  
162 CERTIFICATE OF SERVICE

163  
164 I hereby certify under penalties of perjury that on this date I served true and correct copies of  
165 the foregoing document by depositing them for mailing, in sealed envelopes, U.S. postage  
166 prepaid, at Austin, Nevada, addressed as follows:

167 Hy Forgeron; 168 South Reese Street; Post Office Box 1179; Battle Mountain, Nevada  
168 89820

169 Dated Monday, 7 May 2012.

170  
171 \_\_\_\_\_  
172 Michael Marking

173  
174 Affirmation (Pursuant to NRS 239B.030)

175 I hereby affirm that the preceding document filed in the above-described manner does  
176 not contain the social security number of any person.

177 Dated Monday, 7 May 2012.

178  
179 \_\_\_\_\_  
180 Michael Marking

181  
182 (Plaintiffs' electronic document name: *mfvarc\_motion\_amend\_complaint\_20120426a*)