

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 TO VOID ACTIONS TAKEN AT 10
APRIL 2012 MEETING

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20
21 COME NOW MICHAEL MARKING AND ELIZABETH FLEMING, in proper person, as Plaintiffs,
22 and hereby submit their MOTION TO VOID ACTIONS TAKEN AT 10 APRIL 2012 MEETING.

23
24 WHEREAS

25 Defendant Austin Roping Club (“Club”) is required to comply with Nevada’s Open
26 Meeting Law (“OML”) (MEMORANDUM OF POINTS & AUTHORITIES, pg. 4); and

27 The Club substantially and materially failed to comply with the OML at its meeting of
28 10 April 2012 (MEMORANDUM OF POINTS & AUTHORITIES, pg. 4); and

29 As a consequence of the Club's failure to comply with the OML, Plaintiffs were
30 denied rights conferred by the OML (MEMORANDUM OF POINTS & AUTHORITIES, pg. 9); and

31 Anyone, such as Plaintiffs, denied a right under the OML may ask a court to declare
32 actions taken at the meeting declared void (MEMORANDUM OF POINTS & AUTHORITIES, pg. 10);

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36 THEREFORE

37 Plaintiffs hereby pray to this Court for an order declaring as void all actions taken at
38 the Club's 10 April 2012 meeting.

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40
41 IN SUPPORT OF THIS MOTION TO VOID ACTIONS TAKEN AT 10 APRIL 2012 MEETING, Plaintiffs have
42 attached their MEMORANDUM OF POINTS & AUTHORITIES and their Exhibits.

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45 DATED this Monday, 11 June 2012.

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49 _____
50 Michael Marking, Plaintiff

51 e-mail *marking@tatanka.com*
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Elizabeth Fleming, Plaintiff
e-mail *ryuuz@tatanka.com*

both at General Delivery, Austin, Nevada 89310

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79
80 MEMORANDUM OF POINTS & AUTHORITIES
81

82 **1. The Club is required to comply with Nevada’s Open Meeting Law.** The Club is
83 required to comply with the OML for two separate reasons: (a) the Club’s By-Laws impose
84 this requirement; and (b) the Club is a policy-making agent of Lander County, and subject to
85 the OML by reason of NRS 241,

86 **2.** Article IV, Rule 4 of the Club’s By-Laws (Exhibit VA-1) requires that the Club
87 comply with the OML.

88 **3.** Furthermore, the Club is an agent of Lander County, establishing rules and
89 policies applicable to lessees of corrals (which are County property). The rules and policies
90 applicable to non-Club members must be ratified by the Commissioners. (Exhibit VA-2)
91 Therefore, the Club acts in an advisory capacity to Lander County, and is subject to the OML
92 by law. (NRS 241.015(3))
93

94 **4. The Club substantially and materially failed to comply with the OML at its**
95 **meeting of 10 April 2012.** In a number of significant respects, the Club failed to comply with
96 its obligations under the OML. (a) An improper closed session was held (see pg. 4, *infra*); (b)
97 Unlawful restrictions were placed on the public’s right to comment and on the public’s First
98 Amendment rights (pg. 7); (c) The Club failed to accommodate a member of the public who
99 had a disability (pg. 9); (d) Supporting materials were not distributed to the public (pg. 9);
100 and (e) The Club failed to provide a safe environment for the meeting (pg. 9).
101

102 **5. (a) An improper closed session was held.** The meeting included an
103 “executive/closed session”. (Exhibit VA-3) Such sessions are allowed by the OML only under
104 certain, specific circumstances and for certain, specific purposes. The meeting failed to meet

105 the requirements for an exemption in three ways: (i) The closed portion of the meeting
106 improperly excluded some members (pg. 5, *infra*); (ii) The closure was not for a purpose
107 permitted by the OML (pg. 5); and (iii) Deliberation and action were improperly made and
108 taken at the closed session (pg. 6).

109
110 **6. (i) The closed portion of the meeting improperly excluded some members.**

111 Two of the members, Lois Bispo and Chuck Bispo, were excluded from the closed session.
112 (Exhibit VA-4)

113 **7.** While the OML allows closed sessions for “a gathering or series of gatherings of
114 members [...] to receive information from the attorney employed or retained by the public
115 body [...]” (NRS 241.015.2(b), emphasis added), it does not recognize a gathering of other
116 than the members. It does not allow a closed gathering of “officers” or “board members”,
117 only a closed gathering of members. “A meeting that is closed pursuant to a specific statute
118 may only be closed to the extent specified in the statute allowing the meeting to be closed.”
119 (NRS 241.020)

120 **8.** The members which were not excluded constituted a majority of the voting
121 members, and as such the closed portion was in violation of the OML.

122 **9.** Furthermore, the “board” has no legal status within the Club. Neither the statutes,
123 nor the by-laws, nor the charter of the Club recognize a body called a “board”. The idea of a
124 formal “board” is a mere fiction created by certain officers attempting to accrue power to
125 themselves in opposition to the legal organization and operation of the Club.

126
127 **10. (ii) The closure was not for a purpose permitted by the OML.** Although the
128 Agenda (Exhibit VA-3) indicates that the closed session was to be held after the retention of
129 the attorney, in fact the two agenda items were handled in opposite order: the closed session
130 was held before the retention of Hy Forgeron. (Exhibit VA-4) Mr Forgeron was explicit at the

131 meeting that, prior to his retention by the Club, he was not the representative of the Club, nor
132 was he the Club's attorney. (Exhibit VA-4)

133 **11.** Therefore, at the time the closed session was held, Hy Forgeron was not the
134 Club's attorney.

135 **12.** NRS 241.015.2 allows a closed session only "To receive information from the
136 attorney employed or retained by the public body [...]". Since, at the time of the closed
137 session, Hy Forgeron was neither employed or retained by the Club, the closed session was
138 not exempt from the requirement of the OML that the meeting be open to the public.

139
140 **13. (iii) Deliberation and action were improperly made and taken at the closed**
141 **session.** The agenda (Exhibit VA-3) specifies that the closed session was to be for "discussion
142 and action on lawsuit [...]" However, the exemption for closed meetings with retained or
143 employed attorneys does not allow for discussion or action; such closed sessions are allowed
144 only to "receive information" from the retained or employed attorney.

145 **14.** When the meeting was re-opened after the closed session, there was no
146 discussion. The so-called board members merely voted on a resolution already prepared,
147 presumably by Hy Forgeron.

148 **15.** Clearly there was discussion and action taken during the closed session, as
149 foreseen by the agenda, and it was obvious that a decision (approval of the resolution) had
150 already been made.

151 **16.** "[M]ere perfunctory approval at an open meeting of a decision made in an
152 illegally closed meeting does not cure any defect of the earlier meeting or relieve any person
153 from criminal prosecution for the same violation. *Scott v. Bloomfield*, 229 A.2d 667 (N.J.
154 Super. Ct. Law Div. 1967). The matter should be put on an agenda for an open meeting and
155 reheard or discussed." (Atty. General Catherine Cortez Masto, *Nevada Open Meeting Law*
156 *Manual*, Tenth Edition, December 2005, pg. 72, emphasis added)

157
158 **17. (b) Unlawful restrictions were placed on the public’s right to comment and**
159 **on the public’s First Amendment rights.** The Constitutionally protected rights of free
160 speech apply to meetings covered by the OML.

161 “In places which by long tradition or by government fiat have been devoted to
162 assembly and debate, the rights of the State to limit expressive activity are sharply
163 circumscribed. At one end of the spectrum are streets and parks [...]

164 “A second category consists of public property which the State has opened for
165 use by the public as a place for expressive activity. The Constitution forbids a State to
166 enforce certain exclusions from a forum generally open to the public even if it was not
167 required to create the forum in the first place. *Widmar v. Vincent*, 454 U.S. 263 (1981)
168 (university meeting facilities); *City of Madison Joint School District v. Wisconsin*
169 *Employment Relations Comm’n*, 429 U.S. 167 (1976) (school board meeting);
170 *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (municipal theater).
171 Although a State is not required to indefinitely retain the open character of the facility,
172 as long as it does so it is bound by the same standards as apply in a traditional public
173 forum. Reasonable time, place, and manner regulations are permissible, and a content-
174 based prohibition must be narrowly drawn to effectuate a compelling state interest.
175 *Widmar v. Vincent*, supra, at 269-270.”

176 (*Perry Education Association v. Perry Local Educators’ Association et al.*, 103
177 S. Ct. 948, 460 U.S. 37 (U.S. 02/23/1983))

178 **18.** The Nevada Attorney General, cites the U.S. Supreme Court’s decision in *Perry*
179 *Education Association* in support of the principle that free speech rights apply to gatherings
180 covered by the OML. “[W]hen the government intentionally creates a public forum, it is
181 bound by the same constitutional standards that apply in a traditional public forum.” (OMLO
182 99-12) Abridgement of First Amendment rights is thus a violation of the OML.

183 **19.** For years, Plaintiffs have been harassed, ridiculed, and criticized by the Club for
184 their refusal to recite the Pledge of Allegiance to the U.S. flag. (Exhibit VA-4) Plaintiffs have
185 over the years repeatedly explained their practices; however, in the Club, bigotry prevails and
186 Plaintiffs continue to be harassed, ridiculed, and criticized.

187 **20.** At the 10 April 2012 meeting, one of Plaintiffs (Marking) was assaulted and
188 battered by Chuck Bispo, primarily (in Bispo’s words) for Marking’s refusal to recite the

183 Pledge. (Exhibits VA-4 and VA-5) Bispo was drunk and smelled of liquor; he can be heard
184 slurring his words in Exhibit VA-5. (It is his voice beginning about 14 seconds into the
185 recording, beginning with, “hey, you don’t belong here...”) Bispo used force to prevent
186 Marking from exercising his right to remain seated during the Club’s religious opening.

187 **21.** In Nevada, harassment, assault, and battery as committed that night are
188 misdemeanors (NRS 200.571, NRS 200.471, NRS 200.481), and the use of force to prevent
189 Marking from exercising his right to remain seated is a felony (NRS 207.190).

190 **22.** Deputy Rangel concluded that Bispo had committed assault and battery. (Exhibit
191 VA-4)

192 **23.** Hy Forgeron, who was an eyewitness to these events, also declared that what
193 happened was battery.

194 **24.** Joe Ramos was complicit in the attack by twice unplugging the phone when
195 Marking was calling 911 to summon assistance. That was a misdemeanor under NRS 707.900.

196 **25.** In a remarkable instance of Orwellian doublethink, Joe Ramos declared that it
197 was Marking who was being disruptive, not Bispo.

198 **26.** *Herr Doktor* Joseph Goebbels, Adolph Hitler’s *Reichsministerium für*
199 *Volksaufklärung und Propaganda*, would have been proud.

200 **27.** Ramos has repeatedly declared that there is a by-law preventing Marking from
201 sitting at the main table, even though the table is almost never full. (It was only half occupied
202 during the 10 April 2012 meeting.) This fanciful invention of Joe Ramos is not invoked for
203 other guests, only for Plaintiffs. There is, of course, no such by-law. (Exhibit VA-1) Ramos’s
204 selective memory and imagination is shared by other Club members, as is alleged in the
205 Complaint.

206 **28.** Thus, criminal intimidation was used to prevent Marking from exercising his First
207 Amendment rights. This was a violation of the OML.

209 **29. (c) The Club failed to accommodate a member of the public who had a**
210 **disability.** NRS 241.020.1 requires that the Club make reasonable efforts to accommodate
211 those with disabilities. One of Plaintiffs (Marking) has numerous times explained that he has
212 difficulty hearing, and that he needs to sit at the table to hear. (Exhibit VA-4) Rather than
213 speak up, the Club asks (and sometimes forces) Marking to sit away from the table, and
214 speaks more quietly so that Marking cannot hear. This is a further violation of the OML.

215
216 **30. (d) Supporting materials were not distributed to the public.** NRS 241.020.5
217 requires that copies of supporting materials be provided at meetings. Although some materials
218 were made available to members, they were not available to non-members. These include
219 Mondayproposed minutes from a previous meeting, the treasurer's report, and the current
220 contract with Lander County. (Exhibit VA-4)

221 **31.** This failure to provide or make available supporting materials was an additional
222 violation of the OML.

223
224 **32. (e) The Club failed to provide a safe environment for the meeting.** As shown
225 above (pg. 8), four misdemeanors and a felony threatening the safety of Plaintiffs were
226 committed at the 10 April 2012 meeting. The Club is responsible for and liable for the safety
227 of attendees at its meetings. (*Cronk v. Chevrolet Local 659*, 189 N.W.2d 16, 32 Mich. App.
228 394 (Mich. 1971); *Miazga v. International Union of Operating Engineers*, 2 Ohio App.2d 153,
229 (Ohio App. 8th Dist. 02/14/1964))

230 **33.** By failing to provide a safe environment for attendees, the Club was in violation
231 of Nevada law, and consequently of the OML which imposes no obligation on guests to risk
232 their own safety to attend meetings.

233
234 **34. Plaintiffs were denied rights conferred by the OML.** As a consequence of the

235 foregoing, Plaintiffs were denied right conferred by the OML: the right to attend the meeting
236 in safety, the right to observe and comment on meetings which ought not to have been closed,
237 the rights of free speech, the right to examine supporting material, and so on, as explained in
238 the previous sections.

239

240 **35. Plaintiffs may ask a court to declare actions taken at the meeting declared**
241 **void.** Under the OML, actions taken at a meeting in violation of the OML are void. (NRS
242 241.036)

243 **36.** Plaintiffs, having been denied the aforesaid rights, may ask this Court to declare
244 such actions void. (NRS 241.037.2)

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CERTIFICATE OF SERVICE

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

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

Dated Monday, 11 June 2012.

Michael Marking

Affirmation (Pursuant to NRS 239B.030)

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

Dated Monday, 11 June 2012.

Michael Marking

(Plaintiffs' electronic document name: *mfvarc_motion_void_actions_taken_10_april_2012_meeting_20120604b*)