

1 Case Number 10197

2 Department 1

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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.

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16 AUSTIN ROPING CLUB  
17 Defendant

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26  
OPPOSITION TO MOTION FOR MORE  
DEFINITE STATEMENT

21 COME NOW MICHAEL MARKING AND ELIZABETH FLEMING, in proper person, as Plaintiffs,  
22 and hereby submit their OPPOSITION TO MOTION FOR MORE DEFINITE STATEMENT.

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24  
25 WHEREAS

26 Hy Forgeron filed and served his MOTION FOR MORE DEFINITE STATEMENT (hereinafter,

27 “MOTION”) in this matter on or about 13 March 2012; and

28 Hy Forgeron does not represent the Defendant, nor for any other party to this action  
29 (POINTS & AUTHORITIES, page 4); and

30 Notwithstanding whether or not Forgeron properly represents Defendant, his Motion is  
31 formally deficient and defective, and in violation of the rules of this Court (POINTS &  
32 AUTHORITIES, page 9); and

33 With exceptions set forth below, Forgeron’s arguments lack merit (POINTS &  
34 AUTHORITIES, page 10).

35  
36 NEVERTHELESS,

37 Despite the above, certain of Forgeron’s arguments are meritorious, and Plaintiffs will  
38 amend their complaint to correct the deficiencies as acknowledged herein. (POINTS &  
39 AUTHORITIES, page 14)

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41  
42 THEREFORE

43 Having Plaintiffs’ commitment to correct certain deficiencies as made in the previous  
44 paragraph and detailed in the accompanying MEMORANDUM OF POINTS & AUTHORITIES, Plaintiffs  
45 ask this Court to deny the Motion for the aforesaid reasons.

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48 IN SUPPORT OF THIS OPPOSITION TO MOTION FOR MORE DEFINITE STATEMENT, Plaintiffs have  
49 attached their MEMORANDUM OF POINTS & AUTHORITIES. and their EXHIBITS DS-1 to DS-6.

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DATED this Friday, 30 March 2012.

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both at General Delivery, Austin, Nevada 89310

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MEMORANDUM OF POINTS & AUTHORITIES

79  
80  
81 **1. Hy Forgeron does not represent the Defendant.** In general, a third party has no  
82 standing to challenge the internal affairs of a corporation, or to question whether a  
83 corporation has acted in accordance with its charter and by-laws. However, in this case,  
84 Plaintiffs are not third parties, but are, rather, parties to a contract, which is defined by the  
85 Club’s charter, by-laws, and applicable statutes regarding their force and interpretation. (See  
86 next section, **By-laws constitute terms of a contract**, pg. 5) Indeed, a major cause of action  
87 in this matter is claims for breach of said contract.

88 **2.** Plaintiffs have a right to enforce those contract terms, even during a dispute such as  
89 this one. This is generally true of all terms in a contract affecting dispute resolution: contract  
90 terms specifying forum selection, arbitration, attorneys’ fees, notice of breach, choice of law,  
91 or grievance procedure. Moreover, the various terms of a contract are not, in general,  
92 severable. Contracts are read as a whole, and not broken into pieces.

93 **3.** Relevant now to the legitimacy of Forgeron’s representation of the Club are two  
94 terms, specifically: the Club’s obligation to comply with the Open Meeting Law, and the  
95 limitations on the powers of the officers of the Club.

96 **4.** Notwithstanding the relevance of the By-Laws as a contract among the Club and its  
97 members to the conduct of this litigation, NRS 241.037.2 conveys a statutory right of action  
98 upon Plaintiffs, who as members of the public have been denied rights conveyed by the OML.  
99 (The specific right which has been denied is the right to attend the Club’s meetings, and to  
100 observe the actions of the Club.) By the same subsection (NRS 241.037.2), Plaintiffs are  
101 entitled to have this Court void any actions taken by the Club in violation of the OML, and to  
102 have this Court require compliance with the OML in all future meetings of the Club.

103 Consequently, since any purported retention of Forgeron by the Club was made in violation of  
104 the OML, Plaintiffs ask this Court to declare that act null and void in accordance with the

105 statute. Specifics of the violations are given in the next section of these POINTS & AUTHORITIES,  
106 immediately below.

107  
108 **5. By-laws constitute terms of a contract.** A diligent search has uncovered no  
109 Nevada opinion on this question, but other jurisdictions are consistent in holding that the by-  
110 laws and charters of both unincorporated and incorporated associations constitute the terms of  
111 contracts among the associations and their members.

112 **6.** “ ‘It is well established precedent that the by-laws of a corporation, together with  
113 the articles of incorporation, the statute under which it was incorporated, and the member's  
114 application, constitute a contract between the member and the corporation.’ *Appeal of Two*  
115 *Crow Ranch, Inc.*, 159 Mont. 16, 494 P.2d 915, 919 (1972); see also *Rowland v. Union Hills*  
116 *Country Club*, 157 Ariz. 301, 757 P.2d 105, 108 (Ct.App. 1988) (an organization's articles of  
117 incorporation and by-laws constitute a contract between the organization and its members);  
118 *Jorgensen Realty, Inc. v. Box*, 701 P.2d 1256, 1257 (Colo.Ct.App. 1985) (‘The relationship  
119 between a voluntary association and its members is a contractual one. . . .’); *First Fed. Sav. &*  
120 *Loan v. East End Mut. Elec. Co.*, 112 Idaho 762, 735 P.2d 1073, 1075 (Ct.App. 1987) (by-laws  
121 are binding as a contract among members of cooperative).” (*Turner v. Hi-Country*  
122 *Homeowners Ass’n*, 910 P.2d 1223, 1996.UT.0042212 (Utah 01/26/1996))

123 **7.** See also: *Straub v. American Bowling Congress*, 353 N.W.2d 11, 218 Neb. 241  
124 (Neb. 1984); *Pollock v. Crestview Country Club Association*, No. 99, 205 P.3d 1283, 41  
125 Kan.App.2d 904 (Kan.App. 05/01/2009); *Regency Homes Association v. Schrier*, 759 N.W.2d  
126 484, 277 Neb. 5 (Neb. 01/23/2009); *Reliable Credit Association v. Credithrift of America Inc.*,  
127 280 Or. 233, 570 P.2d 379 (Or. 10/25/1977); *Monasco v. Gilmer Boating and Fishing Club*,  
128 No. 06-10-00047-CV (Tex.App. Dist.6 04/27/2011); *Diamond v. United Food and*  
129 *Commercial Workers Union Local 881*, 329 Ill.App.3d 519, 768 N.E.2d 865, 263 Ill.Dec. 784  
130 (Ill.App. 05/03/2002); and *Executive Board of the Missouri Baptist Convention v. Carnahan*,

131 170 S.W.3d 437 (Mo.App. W.D. 05/31/2005).

132 **8.** (Note that, when an employer-employee relationship also exists between a member  
133 and an organization, as for instance when the organization is a hospital and a member is also  
134 an employed physician, the application of this principle is not so straightforward in all cases.  
135 That does not apply here, but incautious reading of some opinions may be misleading as a  
136 result.)

137  
138 **9. Fogeron was not retained by the Club.** The Club's By-Laws obligate the Club to  
139 comply with Nevada's Open Meeting Law (OML, or NRS 241; Exhibit DS-5, Article IV, Rule  
140 4). Under the OML, all actions by the Club must be taken in open meetings, as defined by the  
141 OML.

142 **10.** The Complaint in this action was submitted to this Court 26 January 2012. It was  
143 served on the Club 23 February 2012. Since those dates, the Club held two meetings, on 13  
144 February 2012 and on 6 March 2012.

145 **11.** No mention was made of this action on the agenda for the 13 February meeting,  
146 and no mention was made during the meeting itself.

147 **12.** Except for the public comment period at the beginning of the 6 March meeting,  
148 the entire meeting was closed. (EXHIBITS DS-2 and DS-3) No action may be taken during a  
149 closed meeting. There is an exception in the OML (NRS 241.015.2(b)(2)) allowing  
150 deliberation, but not action, when discussing litigation involving the Club. However, the  
151 closed portion of the meeting cannot involve any action: the meeting must be re-opened in  
152 order to take any action. (*Chanos v. Nevada Tax Commission*, Nev.Adv.Op. 22 (2008), 181  
153 P.3d 675 (Nev. 04/24/2008)) Action includes decisions, such as a decision to engage an  
154 attorney or to defend the action. (*Dewey v. Redevelopment Agency of the City of Reno*,  
155 Nev.Adv.Op. 9 (2003), (Nev. 03/14/2003)) Action taken in violation of the OML is void.  
156 Therefore, any action, such as retaining Mr Forgeron, which might have been taken during the

157 6 March meeting was void.

158 **13.** Thus the Club as a whole never retained Mr Forgeron, nor did it take any action,  
159 which includes making any decisions, regarding the instant case.

160 **14.** The March meeting was closed improperly, not only because any purported  
161 engagement of Mr Forgeron was decided in closed session, but also because unrelated agenda  
162 items were closed as well. Only the exempt portions must be closed, and no action may be  
163 taken during the closed portions. (*Chanos v. Nevada Tax Commission*) For example, the  
164 reading of the minutes from the February meeting was closed. The February meeting was a  
165 *fait accompli*, attended in its entirety by one of Plaintiffs, and the only conceivable reasons to  
166 close a reading of the minutes are sinister: to revise those minutes for some illegitimate  
167 purpose, to seek some sort of revenge against Plaintiffs for filing this action, or to deprive  
168 Plaintiffs of knowledge which by law ought to be public and which some members of the  
169 Club conclude might be damaging in this litigation.

170 **15.** In addition to having improperly closed the 6 March meeting, there were other  
171 violations of the OML at both meetings: the proceedings were neither recorded nor  
172 transcribed as required by NRS 241.035.4; there was insufficient notice of the meetings and of  
173 their agendas (NRS 241.020.2); the agendas were not given in sufficient detail (“for action” is  
174 insufficient, a list of specific, possible actions should be given; see Nev. Att’y Gen’l OMLO  
175 2000-14); the February meeting was not held on the date required by the By-Laws (it was held  
176 on the second, not the first, Tuesday of the month; see Exhibit DS-5, Article IV, Rule 1); and  
177 (extrapolating from previous meetings), inadequate minutes were kept.

178 **16.** Each of these violations of the OML rendered the actions (including decisions)  
179 taken during the February and March meetings void.

180 **17.** These violations are wilful and intentional. Plaintiffs have repeatedly notified the  
181 Club of the OML violations at meetings and in letters. (Exhibit DS-6) As Exhibit DS-5  
182 shows, Defendant’s officers are aware of the Attorney General’s *Nevada Open Meeting Law*

183 *Manual*; it is freely available on the internet at <http://ag.state.nv.us/opengovt/oml/oml.html>,  
184 and contains plain-language, non-legalese explanations of the rules, opinions,  
185 recommendations, and how to apply them to various situations. Also at the same location is a  
186 convenient checklist of the provisions of the OML. Complying with the OML is not difficult.

187 **18.** How can one misinterpret words such as, “The public body must make its best  
188 efforts to record a public meeting” (*Nev. OML Manual*, Tenth Ed., 2005, pg. 6), or “[...] a  
189 Tuesday meeting must be noticed no later than 9 a.m. Thursday of the preceding week [...]”  
190 (*ibidem*, pg. 43)? There is no excuse for failing even to attempt to record the meetings (Exhibit  
191 DS-6), or for posting an agenda only one working day in advance (Exhibit DS-2).

192  
193 **19.** **No officer, director, or other Club member has the authority to defend this**  
194 **suit, or to engage the services of an attorney.** Authority for an officer, director, or other  
195 employee or member of a corporation to act on behalf of that corporation is conveyed only by  
196 the charter, by-laws or statutes. Nothing in the Club’s governing documents gives any power  
197 to anyone to make decisions regarding litigation, nor are there any provisions allowing any  
198 individual to engage an attorney. Only the Club as a whole, acting in accordance with its own  
199 By-Laws and other relevant rules and organic documents, has the authority to respond to the  
200 Complaint.

201 **20.** If Plaintiffs had wanted to sue Ruben Gallegos, or any other natural person, or any  
202 group of such natural persons collectively, they would have done so. This action is against the  
203 Austin Roping Club, and the answer to the Complaint and to any other motions or pleadings  
204 must come from the Austin Roping Club, not from its officers, directors, or members. By  
205 naming the Club and serving the resident agent, Plaintiffs have brought the Corporation  
206 which is the Club before the jurisdiction of this Court. Let the Club answer the Complaint, or  
207 make necessary motions. Such an answer or motion must be done according to the Club’s  
208 rules, which are a contract between the Club and Plaintiffs, or the answer or motion have no



209 effect.

210 **21.** As things stand now, the MOTION is apparently by Ruben Gallegos, not by the  
211 Defendant, but this Court cannot be sure.

212  
213 **22. The MOTION is formally deficient and defective.** Although the MOTION requires  
214 few supporting facts, it does need some, and the factual basis for a motion must be supported  
215 by evidence. In this instance, that evidence consists of two affidavits: one by Ruben Gallegos,  
216 and the other by Mr Forgeron. Although the facts are few, they are material, especially the  
217 assertion by Forgeron that he represents the Club. There is no supporting evidence for such  
218 facts as there are.

219 **23.** DCR 13.5 specifies general requirements for affidavits in motions, saying that  
220 they must comply with NRCP 56(e). “[...] Affidavits shall contain only factual, evidentiary  
221 matter, shall conform with the requirements of NRCP 56(e), and shall avoid mere general  
222 conclusions or argument. [...]” (DCR 13.5)

223 **24.** The only statement in the Gallegos affidavit which meets these qualifications is  
224 the first numbered paragraph. However, by itself, that doesn’t mean much. Even his office as  
225 “president” does not by itself imply personal knowledge. (See *Daugherty v. Wabash Life Ins.*  
226 *Co.*, 87 Nev. 32, 482 P.2d 814 (Nev. 1/28/1971)) Thus the only fact he gives is relatively  
227 useless.

228 **25.** NRCP 56(e) requires that affidavits shall be made “on personal knowledge”.  
229 However, the Gallegos affidavit claims only information and belief on some items.  
230 Furthermore, it lists no specific facts (other than in its paragraph number 1), and gives only a  
231 conclusion that the affiant believes the facts in the MOTION are true. Mere conclusions are to  
232 be avoided. (DCR 13.5) Furthermore, there is not even a foundation for the conclusion, let  
233 alone a foundation for the facts themselves, and Gallegos’ competence is never established.  
234 (See *Gunlord Corp. v. Bozzano*, 95 Nev. 243, 591 P.2d 1149 (Nev. 3/16/1979), and *Catrone v.*

235 *105 Casino Corp.*, 82 Nev. 166, 414 P.2d 106 (Nev. 5/13/1966))

236  
237 **26. Forgeron’s arguments, with one exception, lack merit.** With the sole exception  
238 of his point regarding necessary details when pleading fraud, Forgeron’s arguments lack  
239 merit. The reasons are: there is no need to provide the legal basis for the claims (the next  
240 section, beginning on page 11); there is no need to provide details for the claims (page 12);  
241 many of the details Mr Forgeron seeks are already in the Complaint; and he wrongly conflates  
242 “fraud” with “misfeasance”, “malfeasance”, and “nonfeasance”. Finally, he requests fess and  
243 costs, but the Contract contains no provision for attorney’s fees or costs, which are not  
244 allowed otherwise.

245 **27.** As background, Nevada is a notice pleading jurisdiction. The NRCP were adopted  
246 in 1953. They are based on the FRCP, adopted in 1938. (*Schmidt v. Sadri*, 95 Nev. 702, 601  
247 P.2d 713 (Nev. 10/29/1979)) Nevada often cites Federal court interpretation of FRCP when  
248 interpreting NRCP. Most rules, especially NRCP 8 and FRCP 8, specify notice pleading. Both  
249 NRCP 9 and FRCP 9, however, reflect certain aspects of code pleading.

250 **28.** The United States Supreme Court explained: “These requirements are exemplified  
251 by the Federal Rules of Civil Procedure Forms, which ‘are sufficient under the rules and are  
252 intended to indicate the simplicity and brevity of statement which the rules contemplate.’ Fed.  
253 Rule Civ. Proc. 84. For example, Form 9 sets forth a complaint for negligence in which  
254 plaintiff simply states in relevant part: ‘On June 1, 1936, in a public highway called Boylston  
255 Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff  
256 who was then crossing said highway.’ ” (*Swierkiewicz v. Sorema N.A.*, 122 S.Ct. 992, 534 U.S.  
257 506, 152 L.Ed.2d 1 (U.S. 02/26/2002)) Nevada’s Form 9 is substantially the same, even  
258 showing the same Boylston Street location.

259 **29.** Under the Rules, Plaintiffs in this action might have filed a very simple complaint:  
260 “From 2009 to present, at the Roping Club meetings and arena, the Club repeatedly violated

261 its By-Laws and Charter, and the statutes, and committed the torts of harassment, assault,  
262 trespass, theft, and so on...” But this is not enough for Mr Forgeron. Even 231 paragraphs is  
263 not enough for Mr Forgeron.

264 **30.** If asked, Forgeron would no doubt find fault with the Supreme Court’s Form 9  
265 itself. He would expand it to include a description of road conditions, the weather, details  
266 regarding the vehicle involved, how the pedestrian was dressed, names of witnesses, specific  
267 provisions of the traffic code which were violated, exact and precise time of day, street  
268 address, GPS coordinates, *et caetera*.

269 **31.** Maybe Forgeron is paid by the word. Maybe he is enamoured of legal prose.  
270 Maybe he is just fishing to see how much Plaintiffs have by way of detail. Any way, however,  
271 his request is not justified by the rules.

272  
273 **32. No legal basis need be given for claims.** Mr Forgeron repeatedly complains that  
274 the Complaint does not cite specific statutes, sections, or subsections for its various causes of  
275 action. This is intentional. The specification of specific laws is not required. “ ‘Notice  
276 pleading’ requires plaintiffs to set forth the facts which support a legal theory, but does not  
277 require the legal theory relied upon to be correctly identified.” (*Liston v. Las Vegas Metro*  
278 *Police Dep’t*, 111 Nev. 1575, 908 P.2d 720 (Nev. 12/29/1995)) “NRC 8(a) requires a pleading  
279 to contain: ‘(1) a short and plain statement of the claim showing that the pleader is entitled to  
280 relief, and (2) a demand for judgment for the relief to which he deems himself entitled.’ It  
281 does not require the legal theory relied upon to be correctly identified.” (*Swartz v. Adams*, 93  
282 Nev. 240, 563 P.2d 74 (Nev. 4/21/1977))

283 **33.** “One pleads a ‘claim for relief’ by briefly describing the events. At this stage the  
284 plaintiff receives the benefit of imagination, so long as the hypotheses are consistent with the  
285 complaint. *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).  
286 Matching facts against legal elements comes later.” (*Sanjuan v. American Board of Psychiatry*

287 *and Neurology Inc.*, 40 F.3d 247 (7th Cir. 11/21/1994)) (The U.S. Supreme Court later  
288 clarified this requirement in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) to add that  
289 the claim must be “plausible”.)

290 **34.** Thus Forgeron’s allegations are unjustified in this respect.

291  
292 **35. Details are not required.** FRCP 8 and NRCP 8 are the same, except that Nevada  
293 deletes the requirement to plead jurisdiction and places a non-binding limit on the amount of  
294 damages requested. Nevada hasn’t elaborated much on this, so we turn to the Federal courts  
295 for guidance.

296 **36.** “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain  
297 statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the  
298 defendant fair notice of what the ... claim is and the grounds upon which it rests,’ *Conley v.*  
299 *Gibson*, 355 U. S. 41, 47. While a complaint attacked by a Rule 12(b)(6) motion to dismiss  
300 does not need detailed factual allegations, *ibid.*, a plaintiff’s obligation to provide the  
301 ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a  
302 formulaic recitation of a cause of action’s elements will not do. Factual allegations must be  
303 enough to raise a right to relief above the speculative level on the assumption that all of the  
304 complaint’s allegations are true.” (*Bell Atlantic Corporation v. Twombly*, 127 S.Ct. 1955, 550  
305 U.S. 544, 167 L.Ed.2d 929 (U.S. 05/21/2007))

306 **37.** “Such simplified ‘notice pleading’ is made possible by the liberal opportunity for  
307 discovery and the other pretrial procedures established by the Rules to disclose more precisely  
308 the basis of both claim and defense and to define more narrowly the disputed facts and  
309 issues.” ( *Conley v. Gibson*, 78 S. Ct. 99, 355 U.S. 41 (U.S. 11/18/1957))

310 **38.** “The framers of the new rules went to great pains to circumscribe this practice of  
311 paper inundation and have adopted a compact and uncomplicated form of pleading which  
312 requires a plaintiff merely to make a clear and concise statement in order to put the defendant

313 on notice that plaintiff has a justiciable claim and is entitled to relief under some legal theory.  
314 Trial Rule 8(A); *Farm Bureau Insurance Co. v. Clinton* (1971), 149 Ind. App. 36, 269 N.E.2d  
315 780, 782. No more is required to withstand a motion to dismiss under Trial Rule 12 (B) (6). In  
316 the *Farm Bureau* case, supra, this court in a unanimous decision voiced its approval of the  
317 precepts of ‘notice’ pleading stated above: ‘The purpose of this liberalization is to avoid, the  
318 denial of a trial to an alleged injured party due to technicalities or human error in the drafting  
319 of a complaint. It is this court's opinion that the only feasible way of accomplishing this goal  
320 is to adhere to the defendants in a clear and concise statement that the plaintiffs have a claim  
321 for relief. (Emphasis supplied) Pursuant to this notification, the attorneys for both parties will  
322 have ample opportunity in discovery and pre-trial conference to learn of any and all facts  
323 necessary to fully represent the interests of their clients and at the same time avoid the denial  
324 of plaintiff's day in court due to a faulty pleading of a complaint based upon a technical error.  
325 Thus, the elements required to state a 'cause of action' are no longer required and the plaintiff  
326 is heavily favored so far as getting into court.’ (*McCarthy v. McCarthy*, 276 N.E.2d 891; 150  
327 Ind. App. 640 (1971))

328 **39.** In Nevada, it isn’t even necessary to plead all of the elements directly: oblique and  
329 tangential references may be sufficient. “[W]e believe that appellant has set forth sufficient  
330 allegations to give respondent adequate notice of the nature of the claim and relief sought,  
331 ‘the purpose of a complaint under notice pleading statutes.’ [citations omitted] [...] causation  
332 is at least obliquely referred to, [...]” (*Branda v. Sanford*, 97 Nev. 643, 637 P.2d 1223 (Nev.  
333 12/31/1981), emphasis added)

334 **40.** Thus Forgeron’s request for details is unsupported by the rules.  
335

336 **41. Many requested details are already in the COMPLAINT.** If Mr Forgeron were to  
337 read the COMPLAINT more carefully, he might see that many of his questions are already  
338 answered.

339           **42.** Example: he asks (MOTION, pg. 3, line 1) which “Contract”, what terms, and what  
340 manner are referenced by ¶36. The Contract is defined at ¶23, in sufficient detail for him to  
341 know the terms. The manners of the violations are defined in other paragraphs.

342           **43.** Example: he asks (MOTION, pg. 3, line 4) what violations, misrepresentations,  
343 harassment and assault referenced in ¶37 occurred. The nature of these is to be found  
344 throughout the COMPLAINT, if only he were to read it. For example, he can find a violation at  
345 ¶39, an assault at ¶50, a misrepresentation at ¶63, and an instance of harassment at ¶129.

346           **44.** Forgeron didn’t look very hard before complaining.

347  
348           **45. Forgeron conflates “fraud”, “misfeasance”, “malfeasance”, and**  
349 **“nonfeasance”.** There are, indeed, special requirements for pleading fraud. Plaintiffs concede  
350 that their COMPLAINT is inadequate in that respect, and will amend to correct it regardless of  
351 this Court’s ruling on this MOTION.

352           **46.** Forgeron correctly points out the deficiency with regard to fraud, but then lumps  
353 in collusion, misfeasance, malfeasance, and nonfeasance, as if these other allegations were the  
354 same thing. Any handy dictionary will allow differentiation of these terms. Rule 9(b) applies  
355 to fraud. It does not apply to these other actions, and Forgeron has cited no authority in  
356 support of his vague and implicit assertion (MOTION, pg. 5, line 22 *et sequentia*) that it does.

357  
358           **47. Plaintiffs will amend their Complaint to comply with NRCP 9(b).** Plaintiffs  
359 concede the correctness of Forgeron’s objection regarding the COMPLAINT’S inadequacy with  
360 respect to the claims of fraud. (However, as explained above, Plaintiffs cannot see that Rule  
361 9(b) also applies to misfeasance, malfeasance, collusion, or nonfeasance.) Desirous of  
362 prevailing on said claims, Plaintiffs intend to amend, voluntarily, their COMPLAINT accordingly.

363           **48.** Plaintiffs note that they have a right under NRCP 15(a) to amend their COMPLAINT  
364 prior to service of an answer by Defendant. However, given the possibility that this Court

365 might request other modifications, Plaintiffs will wait until this Court's decision on this  
366 MOTION before amendment of their pleading.

367  
368  
369  
370 CERTIFICATE OF SERVICE

371  
372 I hereby certify under penalties of perjury that on this date I served true and correct copies of  
373 the foregoing document by depositing them for mailing, in sealed envelopes, U.S. postage  
374 prepaid, at Austin, Nevada, addressed as follows:

375 Hy Forgeron; 168 South Reese Street; Post Office Box 1179; Battle Mountain, Nevada  
376 89820

377 Dated Friday, 30 March 2012.

378  
379 \_\_\_\_\_  
380 Michael Marking

381  
382 Affirmation (Pursuant to NRS 239B.030)

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

385 Dated Friday, 30 March 2012.

386  
387 \_\_\_\_\_  
388 Michael Marking

389  
390 (Plaintiffs' electronic document name: *mfvarc\_oppos\_more\_definite\_statement\_20120328b*)