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	REPLY IN SUPPORT OF MOTION TO DISQUALIFY ATTORNEY

COME NOW MICHAEL MARKING AND ELIZABETH FLEMING, in proper person, as Plaintiffs, and hereby submit their REPLY IN SUPPORT OF MOTION TO DISQUALIFY ATTORNEY.

WHEREAS

Plaintiffs filed and served their MOTION TO DISQUALIFY ATTORNEY (2012.04.09); and

Hy Forgeron, purportedly attorney for Defendant (the Club), filed and served his

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION TO DISQUALIFY ATTORNEY (2012.04.18, hereinafter, "FORGERON'S OPPOSITION"); and

FORGERON'S OPPOSITION failed to address Plaintiff's arguments that Plaintiffs have standing to raise the question regarding Forgeron's qualification as Defendants' representative (MEMORANDUM OF POINTS & AUTHORITIES, pg. 4); and

The 10 April 2012 Club meeting at which Forgeron was supposedly retained was materially in violation of the OML (and hence of the Club's By-Laws), rendering the actions of the Club at that meeting void (MEMORANDUM OF POINTS & AUTHORITIES, pg. 7); and

The ratification by the Club of Forgeron's representation, even if effective, was not timely, and thus was ineffective, and the Club is technically in default (MEMORANDUM OF POINTS & AUTHORITIES, pg. 9);

THEREFORE

Plaintiffs hereby request that this Court grant the Motion, striking Mr Forgeron's filings, and grant him leave to re-submit them once he has been properly retained by the Club.

IN SUPPORT OF THIS REPLY IN SUPPORT OF MOTION TO DISQUALIFY ATTORNEY, Plaintiffs have attached their MEMORANDUM OF POINTS & AUTHORITIES.

DATED this Monday, 30 April 2012.

Michael Marking, Appellant

e-mail *marking@tatanka.com*

Elizabeth Fleming, Appellant

e-mail *ryuuza@tatanka.com*

both at General Delivery, Austin, Nevada 89310

Contents

Memorandum of Points & Authorities

1. Previous document incorporated. To avoid duplication of material, Plaintiffs'

previous Opposition to Motion for More Definite Statement (30 March 2012), along with its exhibits, is hereby incorporated into this Motion by reference, and is called the "30 March Opposition" in this Motion's text. The exhibits to the 30 March Opposition are designated DS-1 to DS-6.

2. Forgeron failed to address arguments regarding standing. Plaintiffs made these points regarding their standing to question Forgeron's qualifications as the Club's representative: (a) Plaintiffs have a right by contract to challenge Mr Forgeron's representation of the Club; and (b) Plaintiffs have a common-law right to challenge Mr Forgeron's representation of the Club. Forgeron's Opposition failed to challenge, let alone refute, either of Plaintiffs' arguments.

3. Forgeron cited a single opinion, in *Farmers Union Oil v. Maixner*, which agreed with Plaintiffs. Plaintiffs had already made the same point. (30 March Opposition, ¶1, lines 81-83, pg 4, referenced by the Motion to Disqualify Attorney , ¶6, lines 106-107, pg. 5)

4. *Farmers Union Oil v Maixner* dealt with the standing of a stranger to the corporation (Maixner) to challenge the authority of an officer (Kaufman) to institute suit. Digging deeper, however, other courts have distinguished the finding in *Farmers Union Oil* from other cases wherein there was a relationship between the corporation and the party challenging the authority of an officer to act.

5. For example, in *Advanced Optics Electronics, Inc. v. Robins* (No. CIV 07-0855 JB/DJS, 2008.DNM.0000797 (D.N.M. 09/29/2008)), applying Nevada law (the corporation was headquartered in New Mexico, but incorporated in Nevada), the Federal court concluded that the authority of the President (Pete) to initiate litigation could be challenged by an insider (Robins). Moreover, the court also distinguished Nevada law from that of most other states.

"The majority of states allow the president of a corporation, or a similar executive officer, to generally authorize litigation, unless the board has specifically acted to forbid or constrain the president from doing so. [...] Under Nevada law, for a corporation to commence litigation against an officer and director of the corporation, it must have its board of directors' authorization. The Plaintiffs argue that the president has authority under the bylaws to initiate the present litigation. This lawsuit, however -- against the Chairman and Chief Executive Officer ("CEO") of the plaintiff corporation -- cannot be pursued without the board of directors' affirmative permission. The Plaintiffs' approach circumvents the legal channels Nevada has set up to deal with such a situation. [...]

"Nevada law vests 'full control over the affairs of the corporation' in the board of directors, subject to other statutory provisions and restrictions in the corporation's articles of incorporation. N.R.S. 78.120. Corporate officers have 'such powers and duties as the bylaws may prescribe or as the board of directors may determine.' Id. 78.130. The default position is that the board of directors must directly authorize litigation or else have delegated that power to someone else to exercise. [...]

"Although Nevada requires every corporation to have a president, it leaves it to the corporation's board of directors to define the president's power. See N.R.S. 78.130. The Plaintiffs urge the Court to construe Nevada's law to allow for the president to sue unless the board forbids it. In support of this position, they note that the majority of states follow this rule. See W. FLETCHER, supra, § 618, at 138-40. Similar to the bylaws situation, however, the Court believes that this rule applies to general litigation matters, and not to extraordinary actions like the lawsuit against Leslie Robins. Given the absence of any Nevada case law or statute addressing the issue, there is no compelling reason to extend this rule to Nevada corporations in such broad strokes.

"The emergency situation theory that the Plaintiffs advance also cannot succeed. The Plaintiffs argue that, when a board is deadlocked or otherwise prevented from acting, a corporate president has the inherent ability to authorize litigation to preserve the corporation's vital interests. [...] While this theory is a convincing one, it does not fit well with the facts of this case. [...] The existence of alternative ways that redress can be sought bolsters this conclusion. The Nevada statutes provide for several potential remedies to this impasse. Their existence not only means that the Court is not cutting off all possible relief, it implies that the ruling the Plaintiffs seek would be contrary to Nevada law. [...] Not all of these possibilities may be appropriate here, and presumably none are as desirable as direct action. They are, however, what Nevada law provides. They imply that Nevada sees these as the proper vehicles for resolving disputes similar to the one here. Allowing the suit to proceed would effectively circumvent the statutory framework Nevada has constructed and would amount to the creation of a new cause of action under Nevada law.

> "Finally, the Plaintiffs also argue that Leslie Robins 'lacks the authority to pronounce that ADOT's lawsuit against him is ultra vires.' [...] This argument misses the point. Leslie Robins is not exercising any corporate authority to have the lawsuit declared unauthorized. He is asking the Court to pronounce on whether ADOT has been authorized to commence litigation. The Supreme Court of Nevada has addressed a similar question and declared:
>
> 'As a general rule the authority of an officer or agent to do a particular act or make a particular contract may be questioned only by the corporation, its stock-holders or creditors, and where they do not raise an objection, another third person can not do so or question the validity of the particular act or contract, except such third persons who may be injured thereby." *Porter v. Tempa Min. & Mill. Co.*, 93 P.2d 741, 745 (Nev. 1939) (quotation marks and citation omitted).'
>
> "The general rule appears to be that third parties cannot challenge a corporation's authorization to sue. See, e.g., W. FLETCHER, supra, § 4216, at 15; *Farmers Union Oil Co. of New England v. Maixner*, 376 N.W.2d 43, 47 (N.D. 1985). Notably, most courts have stated that third parties lack the right to challenge a corporation's authority to sue, but have not said that only the corporation itself can bring the challenge. In contrast, albeit implicitly at times, courts have upheld the right of corporate insiders to challenge a corporation's authorization to sue. See, e.g., *Tidy-House Paper Corp. of N.Y. v. Adlman*, 168 N.Y.S.2d at 449, 451-52 [...]"
>
> (All of the above lengthy quotation from *Advanced Optics Electronics, Inc. v. Robins*, emphasis added.)

6. The above opinion was expressed with regard to a for-profit corporation. For a non-profit co-operative such as the Club, given the Club's By-Laws and the Nevada statutes, it is the members and not the directors who must authorize almost all acts of the corporation. (The Club has vested almost no special powers in the directors, and Nevada statutes reserve to the members all powers not specifically delegated to others.)

7. (Plaintiffs are grateful to Mr Forgeron's for bringing up *Farmers Union Oil* to their attention. By Shepardizing *Farmers Union Oil*, Plaintiffs have been led to *Porter v. Tempa Min. & Mill. Co.*, by way of *Advanced Optics Electronics, Inc. v. Robins*. From North Dakota to New Mexico, then on to Nevada.)

8. Indeed, it appears that *Porter v. Tempa Min. & Mill. Co.* is the controlling authority in Nevada. It seems not to have been contradicted or overturned, and it is compatible with

State of Nevada v. California Mining Co. (13 Nev. 203, (Nev. 12/31/1878)), cited in ¶7 of Plaintiffs' MOTION TO DISQUALIFY ATTORNEY.

9. In summary, in Nevada, even disregarding the contractual relationship created by the Club's By-Laws, Plaintiffs have a right to question the authority of officers or agents, if by those acts they might be injured. Specifically, Plaintiffs have the right to question the authority of Ruben Gallegos and Sissie Gallegos, as Plaintiffs have made it clear in the Complaint that such unauthorized actions have already brought them injury.

10. The Club's 10 April 2012 meeting was materially in violation of the OML and the By-Laws. Said meeting was conducted materially in violation of the OML in several respects: (a) the closed portion of the meeting improperly excluded some members (*infra*, pg 7); (b) the closed portion of the meeting was conducted with Hy Forgeron, before the resolution was made to retain Mr Forgeron, so he was not then their attorney (pg. 9); and (c) supplemental materials were not provided to all attendees (pg. 9).

11. "The action of any public body taken in violation of any provision of this chapter is void." (NRS 241.036) Therefore, the retention of Mr Forgeron by the Club was void. Mr Forgeron was never retained by the Club, and is not their authorized representative.

12. Plaintiffs are not attempting to be punitive or petty. They are not seeking default, they have asked for this Court to grant a reasonable time for the Club to find and to retain properly an attorney. Plaintiffs have asked this Court to grant leave to the attorney, once retained, to re-submit his motions.

13. One of the main claims in this action is that the Club refuses to abide by the rules. If the Club cannot do this now, how can they be expected to do so after the action is complete?

14. The closed portion of the meeting improperly excluded some members. There

was a closed portion of the meeting to discuss this legal action. It is called an "Executive/Closed Session" on the agenda.

15. The Club is organized almost as a pure democracy. Although there are officers and directors (only one director currently holding office), according to the By-Laws they have almost no special powers. (Most notably, they officiate at meetings and roping events.) Otherwise, they have only the minimal powers and authority granted to them by statute.

16. Although in lay terms there is a "board", it has no legal status in the Club. It is not recognized by the By-Laws, and it is not defined by the statutes. It has about as much legal standing as blue automobiles. Yes, there are blue automobiles: you can talk about them as a group, you can recognize that they exist, but they have no meaning outside what various individuals think about them. The Club's board is the same way: it has certain members, but no special significance or powers. It has no authority to make any decisions, to put items on the agenda, to make rules or recommendations, or to do any other thing. The power belongs to the members (subject to some control by the County).

17. Central to the Complaint is a power-grab by certain core members calling themselves "the board". The corporation recognizes all members as equals, but the greedy core members would have us believe, to paraphrase Napoleon the Pig (from George Orwell's *Animal Farm*), that "some members are more equal than others".

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

19. The closed session in the 10 April meeting was closed to non-board members,

thus violating NRS 241.020.

20. The closed session was not exempt from the OML. The agenda cites NRS 241.015.2 as an exemption allowing the closed session. The agenda item reads, "Executive/Closed Session. Discussion and action on a lawsuit brought against us by Michael Marking and Elizabeth Fleming [...]" The Club's assertion is unjustified, for two reasons.

21. First, the agenda reads, "Discussion and action [...]". However, NRS 241.015.2 allows a closed session only "To receive information from the attorney employed or retained by the public body [...]". Receiving information is not the same as "discussion and action". Thus, the closed session should not have been closed, or the agenda was improper, or both.

22. Second, as implied by Forgeron's Opposition, pg 5., lines 10-22, the two agenda items "Retention of Attorney" and "Executive/Closed Session" were switched at the time of the meeting. Switching agenda items is OK, but under the circumstances as a consequence of the switch, Hy Forgeron was not "retained or employed" by the Club at the time of the closed session. Therefore, the exemption allowed by the statute does not apply.

23. Supplemental materials were not provided to all attendees. The OML requires that supporting material be provided to all attendees at a meeting. (NRS 241.020.5(c)). While the secretary provided copies of the agenda, there were no copies of the treasurer's report (distributed only to members) or the County Contract (the latter passed out only to members at the discussion regarding amendment of the By-Laws, agenda page 2). Thus, the public was kept in the dark about these items, failing the requirement of NRS 241.020.5(c).

24. Ratification of Forgeron's representation was not timely, and therefore was ineffective. Regardless of whether or not the ratification of Mr Forgeron's representation by the Club was effective, it was not timely and therefore is ineffective.

25. "The question is at least presumptively governed by principles of agency law, and in particular the doctrine of ratification. 'If an act to be effective in creating a right against another or to deprive him of a right must be performed before a specific time, an affirmance is not effective against the other unless made before such time.' *Restatement (Second) of Agency* § 90 (1958); see also id., Comment a ('The bringing of an action, or of an appeal, by a purported agent can not be ratified after the cause of action or right to appeal has been terminated by lapse of time'). Though in a different context, we have recognized the rationale behind this rule: 'The intervening rights of third persons cannot be defeated by the ratification. In other words, it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made.' *Cook v. Tullis*, 85 U.S. 332, 18 Wall. 332, 338 (1874) (emphasis added). Here, the Solicitor General attempted to ratify the FEC's filing on May 26, 1994, but he could not himself have filed a petition for certiorari on that date because the 90-day time period for filing a petition had expired on January 20, 1994. His authorization simply came too late in the day to be effective. See, e.g., *Nasewaupee v. Sturgeon Bay*, 77 Wis. 2d 110, 116-119, 251 N.W.2d 845, 848-849 (1977) (refusing to uphold town board's ratification of private attorney's unauthorized commencement of lawsuit where ratification came after the statute of limitations had run); *Wagner v. Globe*, 150 Ariz. 82, 87, 722 P.2d 250, 255 (1986) (holding invalid city council's attempt to ratify police chief's dismissal of police officer after police officer commenced a wrongful discharge action). But see *Trenton v. FowlerThorne Co.*, 57 N.J. Super. 196, 154 A.2d 369 (1959) (upholding city's ratification of unauthorized lawsuit filed on its behalf even though ratification occurred after limitations period had expired)." (*Federal Election Commission v. NRA Political Victory Fund*, 115 S. Ct. 537, 130 L. Ed. 2d 439, 63 U.S.L.W. 4027 (U.S. 1994), emphasis added)

26. "Despite well established agency principles allowing for retroactive dating of a subsequent authorization of an unauthorized act, ratifications are deemed ineffective in the

face of an intervening deadline. The Bankruptcy Court applied this principle in disallowing and expunging Appellants' claims. [...] See also *Fed. Elect. Com'n v. NRA Political Victory Fund*, 513 U.S. 88, 115 S.Ct. 537 (1994)) (concluding that the Solicitor General's subsequent authorization of the Federal Election Commission's (FEC) unauthorized timely filing of a writ of certiorari did not relate back to the date of FEC's unauthorized filing because the 90-day statutory period for filing certiorari petitions had expired.); *Town of Nasewaupee v. City of Sturgeon Bay*, 251 N.W.2d 845, 948 (Wis. 1977) ("Ordinarily, a subsequent ratification relates back to the time of the original transaction. However, that rule is not applicable when the rights of others have intervened by the passage of time.").” (*Mission Towers v. W.R. Grace*, No. 07-287 (D.Del. 12/06/2007), emphasis added)

27. The Club’s ratification of Mr Forgeron’s action, even if effective, was too late. They had 20 days to answer the Complaint. They held a regular meeting during that time, and have the power to call special meetings when necessary, but they did not hire an attorney or answer during that time. They did not petition this Court for an extension. The Club missed the 20-day deadline to respond to the complaint, and the Club is technically in default.

28. When Ruben and Sissie Gallegos spoke to Forgeron, two days remained to answer the complaint, and two days remained to ratify Mr Forgeron’s representation. Mr Forgeron did not seek an extension, either.

29. Plaintiffs do not seek the harsh remedy of a default judgment against the Club. They were ill-served by their attorney, and perhaps Mr Forgeron had good intentions but was merely ignorant of the law. Plaintiffs seek only what we originally asked: strike his pleadings, and allow them to be resubmitted once he has been properly retained as the Club’s representative.

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, 30 April 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, 30 April 2012.

_____

Michael Marking

(Plaintiffs' electronic document name: *mfvarc_reply_disqualify_attorney_20120430a)*