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 FOR ORDER VOIDING MEETINGS AND FOR PRELIMINARY INJUNCTION

COME NOW MICHAEL MARKING AND ELIZABETH FLEMING, in proper person, as Plaintiffs, and hereby submit their REPLY IN SUPPORT OF MOTION FOR ORDER VOIDING MEETINGS AND FOR PRELIMINARY INJUNCTION .

WHEREAS

Plaintiffs filed and served their MOTION FOR ORDER VOIDING MEETINGS AND FOR

27 PRELIMINARY INJUNCTION (2012.04.05); and

28 Defendant filed and served its DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR ORDER
29 VOIDING MEETINGS AND FOR PRELIMINARY INJUNCTION (2012.04.25, hereinafter, "OPPOSITION"); and

30 The OPPOSITION's points fail as follows:

31 Point 1 (OPPOSITION, pg. 2, line 19) fails because it is based on North Dakota
32 law, which is different from Nevada law (see MEMORANDUM OF POINTS &
33 AUTHORITIES, pg. 5);

34 Point 1 (OPPOSITION, pg. 2, line 19) also fails because it ignores the contractual
35 relationship between Plaintiffs and the Club (see MEMORANDUM OF POINTS &
36 AUTHORITIES, pg. 6);

37 Point 2 (OPPOSITION, pg. 3, line 18) fails because it misreads a statute, which
38 could result in ridiculous, ludicrous consequences (see MEMORANDUM OF
39 POINTS & AUTHORITIES, pg. 7);

40 Point 2 (OPPOSITION, pg. 3, line 18) also fails because it ignores other aspects of
41 the OML (see MEMORANDUM OF POINTS & AUTHORITIES, pg. 8);

42 Point 3 (OPPOSITION, pg. 4, line 4) fails because it disregards the relationship of
43 the Club to Lander County (see MEMORANDUM OF POINTS & AUTHORITIES, pg.
44 8);

45 Points 2 and 3, together, also fail because they fail to address the By-Laws as a
46 contract with Plaintiffs as intended beneficiaries (see MEMORANDUM OF
47 POINTS & AUTHORITIES, pg. 9);

48 Point 4 (OPPOSITION, pg. 6, line 22) fails because it is hearsay, without either
49 foundation or competence (see MEMORANDUM OF POINTS & AUTHORITIES, pg.
50 9);

51 Point 5 (OPPOSITION, pg. 7, line 6) fails because it ignores the Club's By-Laws,
52 and it is based on Point 3 (see MEMORANDUM OF POINTS & AUTHORITIES, pg.

53 10);

54 Point 6 (Opposition, pg. 7, line 23) fails because of faulty contract interpretation
55 (see Memorandum of Points & Authorities, pg. 10);

56 Point 7 (Opposition, pg. 8, line 16) fails because it ignores the law regarding
57 preliminary injunctions (see Memorandum of Points & Authorities, pg. 11);

58 Point 7 (Opposition, pg. 8, line 16) also fails because it ignores that the meetings
59 whose actions are to be voided are in the past (see Memorandum of Points
60 & Authorities, pg. 11);

61 Plaintiffs have demonstrated that they are entitled to have the actions from the subject
62 meetings to be declared void (Memorandum of Points & Authorities, pg. 12); and

63 Plaintiffs have demonstrated that all the requirements for a preliminary injunction are
64 met (Memorandum of Points & Authorities, pg. 12);

65

66

67 Therefore

68 Plaintiffs hereby request that this Court grant the Motion, for an order:

69 Voiding all actions taken at Defendants meetings since November 2011; and

70 Granting a preliminary injunction, effective until a final determination of the merits of
71 this case, prohibiting Defendant from conducting meetings in violation of the OML and the
72 Club's own By-Laws.

73

74

75 In support of this Reply in Support of Motion for Order Voiding Meetings and for
76 Preliminary Injunction, Plaintiffs have attached their Memorandum of Points & Authorities
77 and their Affidavit of Michael Marking and their Exhibit VM-1.

78

DATED this Monday, 7 May 2012.

Michael Marking, Appellant

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both at General Delivery, Austin, Nevada 89310

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123 ## Memorandum of Points & Authorities

124

125 **1. Point 1 fails because it is based on North Dakota law, which is different from**
126 **Nevada law.** The case (*Farmers Union Oil Co. v. Maixner*) upon which Defendant relies may
127 be good law in North Dakota, but it is bad law in Nevada. In Federal court, *Advanced Optics*
128 *Electronics, Inc. v. Robins* (No. CIV 07-0855 JB/DJS, 2008.DNM.0000797 (D.N.M.
129 09/29/2008)) cited *Farmers Union Oil*, but noted that the law does not apply to Nevada.

130 **2.** The authority in Nevada is *Porter v. Tempa Mining & Milling Co.* (59 Nev. 332,

131 93 P.2d 741 (Nev. 09/05/1939)), which held, " 'As a general rule the authority of an officer or
132 agent to do a particular act or make a particular contract may be questioned only by the
133 corporation, its stockholders or creditors, and where they do not raise an objection, another
134 third person can not do so or question the validity of the particular act or contract, except such
135 third persons who may be injured thereby.' 14a C. J. 2260." Thus, Nevada makes an exception
136 for third parties such as Plaintiffs who may have sustained, or might sustain, injuries as a
137 result of the Club's actions.

138

139 **3. Point 1 also fails because it ignores the contractual relationship between**
140 **Plaintiffs and the Club.** As former members, Plaintiffs are parties to a contract with the
141 Club, and terms relevant to dispute resolution survive the termination of the contract.

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

153 **5.** See also: *Straub v. American Bowling Congress*, 353 N.W.2d 11, 218 Neb. 241
154 (Neb. 1984); *Pollock v. Crestview Country Club Association*, No. 99, 205 P.3d 1283, 41
155 Kan.App.2d 904 (Kan.App. 05/01/2009); *Regency Homes Association v. Schrier*, 759 N.W.2d
156 484, 277 Neb. 5 (Neb. 01/23/2009); *Reliable Credit Association v. Credithrift of America Inc.*,

157 280 Or. 233, 570 P.2d 379 (Or. 10/25/1977); *Monasco v. Gilmer Boating and Fishing Club*,
158 No. 06-10-00047-CV (Tex.App. Dist.6 04/27/2011); *Diamond v. United Food and*
159 *Commercial Workers Union Local 881*, 329 Ill.App.3d 519, 768 N.E.2d 865, 263 Ill.Dec. 784
160 (Ill.App. 05/03/2002); and *Executive Board of the Missouri Baptist Convention v. Carnahan*,
161 170 S.W.3d 437 (Mo.App. W.D. 05/31/2005).

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

167

168 **7. Point 2 fails because it misreads a statute, which could result in ridiculous,**
169 **ludicrous consequences.** According to Defendant, if all of the attendees at a meeting
170 participate, they waive the right to protest inadequate notice. So far, so good. However,
171 Defendant would have us believe that this is adequate to show that no one has a right to
172 protest inadequate notice of the Club's meetings. This leap takes us into absurdity, because it
173 ignores the rights of the members who do not attend.

174 **8.** The statute reads, "Whenever all persons entitled to vote at any meeting [...]". This
175 must include all voting members, whether or not they actually attend the meeting. If
176 Defendant's interpretation were correct, any few members constituting a quorum could get
177 together without notice, conduct business, and the members not attending would have no
178 recourse.

179 **9.** For example, if there were ten thousand members in a body, and a quorum were to
180 consist of six, then six people could get together without notice and decide matters for the
181 other 9994 members. Obviously, this is a ridiculous interpretation of the statute.

182 **10.** In the instant case, for example, Dessie Skeath is a member (see AFFIDAVIT), yet he

183 did not attend the meetings. He was entitled to vote. Did he even know about them? It would
184 be absurd to infer that he consented to waive right to notice.

185 **11.** Defendant's claim that a few members waived the rights for the rest doesn't hold
186 water.

187

188 **12. Point 2 also fails because it ignores other aspects of the OML.** There are other
189 aspects of the OML which are completely ignored by Defendant. For example, the OML
190 requires notice not only to members but also to the public. The OML requires that meetings
191 be recorded or transcribed, and that the recordings or transcriptions be made available. The
192 OML requires time for public comment. The OML allows non-members to attend.

193 **13.** Defendant's Point 2 talks about notice to members, but disregards the implications
194 of the OML for other persons.

195

196 **14. Point 3 fails because it disregards the relationship of the Club to Lander**
197 **County.** Defendant cites irrelevant opinions and cases in support of its contention that the
198 Club is not a public body. However, Defendant ignores the implications of the County
199 Contract when making its argument.

200 **15.** Under the Club's contract with Lander County, the Club leases the Roping
201 Grounds for nominal cost from Lander County. It then acts as a lessor (sublessor) of corral
202 space. Corral lessees need not be members. (see attached AFFIDAVIT) The Club acts as a leasing
203 agent of the County. It sets rules and policies regarding the corrals, and enforces (badly, we
204 would argue) those rules and policies.

205 **16.** Since corral lessees may be members of the public (not necessarily Club
206 members), the club is performing executive and administrative functions for Lander County.

207 **17.** Thus, based on the County Contract, <u>the Club sets rules which affect members of</u>
208 <u>the public, based on authority delegated by the County Commissioners</u> (who retain some right

of review). At least some officers are aware of this. (See attached AFFIDAVIT.)

18. Furthermore, it is not merely occasional grants of money from Lander County which constitute support: it is also the nominal cost lease of County property. Use of County property is considered financial support. (see *Op. Nev. Att'y Gen. No. 2002-19*, 14 (May 2, 2002), citing *Stevens v. Geduldig*, 719 P.2d 1001, 1009-10 (Cal. 1986)).

19. Thus, the Club meets the requirements of the statute: " 'public body' means any administrative, advisory, executive or legislative body of the State or a local government which expends or disburses or is supported in whole or in part by tax revenue [...]" (NRS 241.015.3), not because of its organization but because of its function based on the County Contract.

20. Points 2 and 3, together, also fail because they fail to address the By-Laws as a contract with Plaintiffs as intended beneficiaries. As shown above, the Club's By-Laws constitute a contract between the Club and its members. These include the rule obligating the Club to comply with the Open Meeting Law. Clearly, the public is the intended beneficiary of the OML compliance rule. As members of the public, Plaintiffs are intended beneficiaries of the contract. Hence, Plaintiffs have standing on those grounds to enforce the OML.

21. Point 4 fails because it is hearsay, without either foundation or competence. The substance of Mr Forgeron's conversation with Mr Taylor is inadmissible under NRS 51.065. There is no sworn affidavit, as required by the rules. (DCR 13.5; NRCP 56(e); NRCP 43(c)) Was this a quick, off-the-cuff opinion? Was Mr Taylor apprised of all the facts? Was he aware that the Club was not only a lessee, but also a lessor which established rules and policies for leasing County property to the public and not merely to Club members? Did he even read the County Contract? Did he know that the lease was for nominal cost? Did Mr Forgeron tell him that the Commissioners retained some control over the Club as part of the

235 bargain? Was he told that the Club was delegated through the contract to make rules for the
236 public on behalf of the County?

237 **22.** In short, even if there were a proper affidavit, there isn't enough to go on to give
238 any weight to Mr Forgeron's interpretation of Mr Taylor's opinion.

239

240 **23. Point 5 fails because it ignores the Club's By-Laws, and it is based on Point**
241 **3.** Regardless of what the law says is a "public body", the Club has elected in its By-Laws to
242 follow the OML. There is no reasonable interpretation of the OML in the context of the By-
243 Law election that does not take "public body" to mean "Austin Roping Club".

244 **24.** The only way to make sense of NRS 241 in this context is to take "public body" to
245 mean the Club.

246 **25.** Merely because a statute by its own language applies to some group, does not
247 prohibit some other group from voluntarily complying. The Club has a right to act as a public
248 body, even if not required to do so.

249

250 **26. Point 6 fails because of faulty contract interpretation.** Article 4, Rule 4 of the
251 By-Laws obligate the Club to follow the OML, effectively incorporating NRS 241 into the By-
252 Laws. The By-Laws are a contract.

253 **27.** The principles of contract interpretation require that every word in the agreement
254 be given meaning; no part is to be disregarded. The meaning, of course, must be read in
255 context.

256 **28.** In the context of the By-Laws, the right to seek remedies "conferred by this
257 chapter" is a right under the terms of the language of the OML. Such rights belong to the
258 parties (the members and the club) and, by common law, to intended beneficiaries, which can
259 hardly be taken to mean anyone other than the public.

260

29. Point 7 fails because it ignores the law regarding preliminary injunctions. "A preliminary injunction to preserve the status quo is normally available upon a showing that the party seeking it enjoys a reasonable probability of success on the merits and that the defendant's conduct, if allowed to continue, will result in irreparable harm for which compensatory damage is an inadequate remedy. *Number One Rent-A-Car v. Ramada Inns*, 94 Nev. 779, 780, 587 P.2d 1329, 1330 (1978)." (*Dixon v. Thatcher*, 103 Nev. 414, 742 P.2d 1029 (Nev. 9/30/1987))

30. "The controlling reason for the existence of the right to issue a preliminary injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated." (*Rhodes Co. v. Belleville Co.*, 32 Nev. 230, (Nev. 12/31/1910))

31. The Legislature has simplified the requirements in cases involving the OML. First, no showing of irreparable harm is required. (NRS 241.037.1(a)) Second, the Legislature has declared that open meetings are in the public interest. (NRS 241.010).

32. The status quo is interpreted as when the action was filed. ("The status quo when NL industries commenced its action [...]", *All Minerals Corp. v. Kunkle*, 105 Nev. 835, 784 P.2d 2 (Nev. 12/20/1989))

33. At the time the action was initiated, the obligation to follow the OML was the status quo. Accordingly, Plaintiffs are entitled to a preliminary injunction preserving the use of the OML in meetings, as it has been at least since the mid-1990s.

34. Point 7 also fails because it ignores that the meetings whose actions are to be voided are in the past. The first request in the Motion was for an order voiding the actions taken at meetings in January, February, and March 2012. Those meetings are in the past, when the OML election in the By-Laws was in effect. (We also would argue that the OML election

287 is secondary, since the statute requires compliance anyway.)

288 **35.** Subsequent repeal of the OML election in the By-Laws, even if done properly and 289 even if NRS 241 were not to apply on its own face, would not change the problem: There was 290 an obligation to follow the OML at those meetings, the OML was not followed, and therefore 291 the actions taken at those meetings are void.

292

293 **36. Plaintiffs have demonstrated that they are entitled to have the actions from** 294 **the subject meetings to be declared void.** The argument was made in the MOTION, at ¶¶2-7. 295 In its OPPOSITION, Defendant attacked, in part, ¶2, but did not attack the other paragraphs. 296 However, as shown above, the attack was insufficient. Therefore, Plaintiffs are entitled to have 297 actions taken at those meetings declared void.

298

299 **37. Plaintiffs have demonstrated that all the requirements for a preliminary** 300 **injunction are met.** The argument was made in the Motion at ¶¶11-16. The requirements are 301 again summarized above, starting at page 11. Defendant's only response was to change the 302 rule, ignoring abundant authority that a preliminary injunction is available to preserve the 303 status quo, in effect at the time the action commenced.

304 **38.** Further, Defendant did not even attempt to show that it would be harmed by a 305 preliminary injunction.

306 **39.** On the other hand, the land rush and power consolidation at the Club continue 307 unabated. Since this action was filed, a corral was improperly taken from one of the members, 308 and now over 95% of the fenced corral space and all but two or three of the corrals are now 309 controlled by only two couples. This last action was done without putting the eviction on the 310 agenda, and an injunction against violations of the OML might have prevented this. (see 311 AFFIDAVIT, attached.)

312 **40.** Thus the balance of interests is firmly with Plaintiffs.

313
314 AFFIDAVIT OF MICHAEL MARKING
315
316 State of Nevada
317 County of Lander } ss.
318
319 I, Michael Marking, being first duly sworn, depose and say that
320 **1.** This affidavit is given in support of our REPLY IN SUPPORT OF MOTION FOR ORDER VOIDING
321 MEETINGS AND FOR PRELIMINARY INJUNCTION .
322 **2.** I was present at all noticed Club meetings this year from January to April.
323 **3.** During a meeting this year, the treasurer's report included dues payment by Dessie
324 Skeath. However, Dessie Skeath has not attended any meetings this year.
325 **4.** At the 10 April 2012, Ray Williams Jr expressed his disappointment at the way his
326 corral was taken from him. On the same day that Rhonda Williams moved out, the
327 corral was taken over by Dennis Ashby.
328 **5.** Now, at least 95% of the fenced corral space, and all but two or three corrals are
329 controlled by two couples, Ruben Gallegos-Sissie Gallegos, and Lois Bispo-Dennis
330 Ashby.
331 **6.** At least one officer understands that the Club must rent corrals to the public, and not
332 only to non-members. At the 10 April 2012 meeting, Ruben Gallegos (the Club's
333 president) said, "The contract says between the roping club and the county that you
334 don't have to be a paid member of the roping club to lease property down there."
335 **7.** A former officer, Ray Williams, Jr, also understands this. At the same meeting, he
336 said,
337 "There was a meeting with the district attorney Zane Miles and Tim Echeverria back
338 in 1993 [...] The terms of the corral laws and lease of roping facilities said:

no exclusive use,

open to all, may not require joining the club

[...]

any rules which apply to non-club members must be ratified and approved by the county commissioners

evictions or discipline must have the right of appeal”

8. Mr Williams distributed a memo from Mr Echeverria, dated 16 November 1993. That memo is attached to this Reply as Exhibit VM-1.
9. He also said there was another memo regarding the determination that the club was qualified to lease county real property, from around October 1993, but he did not distribute that other memo.
10. Hy Forgeron attended the 10 April 2012 meeting, and would be aware of these statements.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Dated Monday, 7 May 2012.

____

Michael Marking

365
366 ## Certificate of Service
367
368 I hereby certify under penalties of perjury that on this date I served true and correct copies of
369 the foregoing document by depositing them for mailing, in sealed envelopes, U.S. postage
370 prepaid, at Austin, Nevada, addressed as follows:
371 Hy Forgeron; 168 South Reese Street; Post Office Box 1179; Battle Mountain, Nevada
372 89820
373 Dated Monday, 7 May 2012.
374
375 ______________________________
376 Michael Marking
377
378 Affirmation (Pursuant to NRS 239B.030)
379 I hereby affirm that the preceding document filed in the above-described manner does
380 not contain the social security number of any person.
381 Dated Monday, 7 May 2012.
382
383 ______________________________
384 Michael Marking
385
386
387
388
389
390 (Plaintiffs' electronic document name: *mfvarc_reply_void_meetings_preliminary_injunction_20120507a)*