

1 Case Number CV 002

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6 IN THE JUSTICE COURT OF AUSTIN TOWNSHIP
7 COUNTY OF LANDER, STATE OF NEVADA
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9
10 RUBEN GALLEGOS
11 and
12 VIRGINIA (SISSIE) GALLEGOS,
13 Plaintiffs

MOTION TO DISQUALIFY MASTER

14 v.

15
16 MICHAEL MARKING
17 and
18 ELIZABETH FLEMING,
19 Defendants
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23 COME NOW Michael Marking and Elizabeth Fleming, in proper person, as Defendants, and
24 hereby make their MOTION TO DISQUALIFY MASTER.
25
26

27 **WHEREAS**

- 28 (1) In the third hearing, this Court suggested that the District Attorney, Hy Forgeron,
29 might be asked to assist this Court, presumably in the capacity of a master under
30 JCRCP 53, in the execution of this Court's Judgment; and
- 31 (2) Hy Forgeron is disqualified from acting as a master in this matter by reason of having
32 previously formed and expressed an unqualified opinion regarding the merits of this
33 action (see MEMORANDUM OF POINTS & AUTHORITIES, page 3); and
- 34 (3) Hy Forgeron is also disqualified because he has acted as de facto attorney for one of
35 the parties in the case (see MEMORANDUM OF POINTS & AUTHORITIES, page 3); and
- 36 (4) Hy Forgeron is further disqualified due to a conflict of interest regarding a separate,
37 indirectly related case (see MEMORANDUM OF POINTS & AUTHORITIES, page 4); and
- 38 (5) Aside from the above, no master, neither Hy Forgeron nor anyone else, should be
39 appointed at this time in this case (see MEMORANDUM OF POINTS & AUTHORITIES, page 4);
40 and
- 41 (6) This Court has recognized, available alternatives for resolving questions of law,
42 without recourse to the appointment of a master (see MEMORANDUM OF POINTS &
43 AUTHORITIES, page 6);

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45 **THEREFORE**

46 Defendants pray to this Court that no master, especially including but not limited to
47 Hy Forgeron, be appointed in this case.

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50 **IN SUPPORT** of this request, Defendants their MEMORANDUM OF POINTS AND AUTHORITIES.

53 DATED this Monday, 25 October 2010.

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56 _____
57 Michael Marking, Defendant

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60 _____
61 Elizabeth Fleming, Defendant

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63 both at General Delivery, Austin, Nevada 89310
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66 MEMORANDUM OF POINTS AND AUTHORITIES
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68 **1. Hy Forgeron is disqualified under JCRCP 53(a)(2)6.** Plaintiff Ruben Gallegos said
69 in the first hearing that he had discussed this case for an hour and a half with Hy Forgeron,
70 who examined evidence in this case and concluded that Plaintiff should be able to recover the
71 debt. Such a conclusion is an unqualified opinion regarding the merits of the case.

72 **2.** “Any party may object to the appointment of any person as a master on one or more of
73 the following grounds: [...] Having formed or expressed an unqualified opinion or belief as to
74 the merits of the actions.” (JCRCP 53(a)(2)6)

75 **3.** Accordingly, Hy Forgeron is disqualified under the JCRCP.
76

77 **4. Hy Forgeron has acted as attorney for one of the parties.** Forgeron's actions
78 involving this case constitute the practice of law, which includes the application of statutes

79 and court rules to specific facts. (SCR 44.3(a)) While it is not necessarily unlawful for
80 Forgeron to engage in the practice of law outside of his job as District Attorney unless he is
81 paid for such activities, such activities may create conflicts of interest. Such a conflict would
82 arise in this case should Forgeron be appointed master, since he has given legal advice to one
83 of the parties.

84 **5.** Nevada's Code of Judicial Conduct applies to masters as well as to judges. (CJC,
85 “Application”, A) If Forgeron were to be appointed master, his examination of Plaintiff's
86 documents, and interpretation of the statutes and rules to Plaintiff's, would create a violation.
87 “A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality
88 might reasonably be questioned, including but not limited to instances where: [...] the judge
89 served as a lawyer in the matter in controversy” (CJC, Canon 2D, E(1)(b))

90 **6.** Even if Forgeron might not, technically, have acted as a lawyer to Plaintiffs, he is
91 disqualified because his actions certainly give an appearance of impropriety, which is
92 prohibited by CJC, Commentary to Canon 1A, A.

93
94 **7. The District Attorney is further disqualified by an additional, potential conflict.**
95 Defendants in this matter are making the first of several complaints to the Lander County
96 Sheriff's office. These complaints involve Plaintiffs, and the District Attorney may be required
97 to prosecute. Although these complaints involve separate, criminal activities, and there is no
98 direct conflict with this case, we contemplate it would be unseemly to create a situation where
99 where the District Attorney may act both as prosecutor and as judge in matters involving the
100 same parties.

101 **8.** To avoid a potential conflict, Hy Forgeron should also be disqualified as a precaution
102 for this reason.

103
104 **9. Appointing a master is inappropriate at this time.** “A reference to a master shall be

105 the exception and not the rule.” (JCRCP 53(b)) Reference to special master should be made
106 exception and not rule; calendar congestion, complex issues of fact and law, and prospectively
107 lengthy trials do not provide exceptional conditions for reference, nor does the fact that an
108 accounting may be required in itself offer basis for reference. (*Russell v. Thompson*, 96 Nev.
109 830, 619 P.2d 537 (1980)).

110 **10.** Only two reasons have been put forth to justify this Court's reference to a master: the
111 question of the alleged collateral (which Defendants have already argued is inapplicable), and
112 the complexity of the execution process as described in NRS 21. As *Russell v. Thompson* held,
113 such questions are insufficient to justify reference to a master.

114 **11.** Both issues relate to the rights of the parties, and the determination of such rights is
115 not to be delegated to a master: the court must determine those rights. As a specific example,
116 the trial court, and not a master, is responsible for determining the rights of the parties and the
117 validity of liens. (*Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court of State ex rel.*
118 *County of Clark*, 118 Nev. 124, 41 P.3d 327 (2002))

119 **12.** The statutes regarding enforcement of judgments, primarily in NRS 21, are lengthy
120 and detailed, but clear. No questions of law have even been raised in that regard.

121 **13.** Corporation law, likewise, is relatively simple. The laws relating to security for debts,
122 especially involving real estate, are more complex; however, there is ample case law
123 explaining and interpreting the statutes. Regardless of the complexity however, it is clearly the
124 duty of the Court, and not anyone else, to resolve the questions.

125 **14.** Both parties have expressed confidence in this Court's Judge, and have elected to
126 proceed despite technical grounds for disqualification. Furthermore, the voters have elected
127 the Judge. The Judge has a duty to sit, despite the difficulty of the matter. (*Ham v. District*
128 *Court*, 93 Nev. 409, 415, 566 P.2d 420, 424 (1977)) It is not the Court's prerogative to assign
129 its duty to a master or other person.

131 **15. Alternative mechanisms exist to assist this Court.** Should intractable questions of
132 law arise in this matter, there are alternative mechanisms to assist this Court in arriving at a
133 decision.

134 **16.** The Code of Judicial Conduct acknowledges that a judge may, from time to time,
135 require assistance from a disinterested expert. However, a judge is prohibited from
136 communication with outside parties regarding a case, except where explicitly allowed by law.
137 This prohibition includes communications with lawyers, law teachers, and other persons who
138 are not participants in the case. Where communication is allowed, all parties should be
139 included in the communication. (CJC, Commentary to Canon 3B, 7) It is suggested that an
140 outside, disinterested party might be invited to submit a brief as amicus curiae, which allows
141 the parties an opportunity to respond, thus preserving their rights to be heard. (Ibid.)
142

143 **17. Response to protest at hearing.** At the third hearing, 28 September 2010, Ruben
144 Gallegos protested some unspecified mention of Sissie Gallegos' drug habits. At the time,
145 Defendants' could not recall of what mention Gallegos was speaking. After the hearing, we
146 were able to determine the reference, and respond here for the record.

147 **18.** It was Plaintiffs, not Defendants, who referred to the drug habits in their AMENDED
148 COMPLAINT. (see AMENDED COMPLAINT, "Amendment for a More Definite Statement", page 1, ¶4,
149 attached to AFFIDAVIT OF COMPLAINT AND ORDER.) Under JCRCP 8(b), Defendants were required
150 to reply to each of the claims in the AMENDED COMPLAINT. Defendants did so in their ANSWER,
151 characterizing the drug habits as irrelevant.

152 **19.** If Ruben Gallegos did not wish the drug habits to be discussed, they should not have
153 been mentioned in the AMENDED COMPLAINT.

154 **20.** We observe *pari passu* that the main difference among prescription drugs, OTC
155 drugs, and illicit drugs is how many bureaucrats and politicians have been rented or purchased
156 for the purpose of classification.

157
158 CERTIFICATE OF SERVICE
159

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

163 Ruben Gallegos and Virginia (Sissie) Gallegos; Post Office Box 221; Austin,
164 Nevada 89310

165 Dated Monday, 25 October 2010.

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167 _____
168 Michael Marking
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170
171 AFFIRMATION

172 (Pursuant to NRS 239B.030)
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174 I hereby affirm that the preceding document filed in the above-described manner does
175 not contain the social security number of any person.

176 Dated Monday, 25 October 2010.
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178 _____
179 Michael Marking
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181
182 (Defendants' electronic document name: *ggvmf_motion_to_disqualify_20101025b*)