CASE No. 09 PO 002/003

IN THE JUSTICE COURT OF AUSTIN TOWNSHIP

COUNTY OF LANDER, STATE OF NEVADA

VIRGINIA GALLEGOS, Applicant v. MICHAEL MARKING, ELIZABETH FLEMING, Adverse Parties	MOTION TO DISSOLVE TEMPORARY ORDER

COME NOW Michael Marking and Elizabeth Fleming, in proper person, as Adverse Parties in this matter, and petition this Court as follows:

WHEREAS

(1) Applicant Virginia "Sissie" Gallegos (hereinafter, "Sissie") on Monday, 10 August 2009, applied to this Court for a Protective Order as allowed by NRS 200.591), and the requested Order was granted the same day; and

(2) Adverse Parties Michael Marking ("Marking") and Elizabeth Fleming ("Fleming", a.k.a. Nancy Elizabeth Fleming) moved on 11 August for a hearing under the provisions of NRS 200.594 to argue for dissolution of the Protective Order, and the Court on 13

August scheduled the hearing; and

(3) A protective order such as the one issued in this case is an equitable remedy, and the discretion of the court in issuing such an order is limited by the rules of equity in addition to those of statutory law (*Points & Authorities*, pages 7-9); and

(4) The allegations contained in the Application are false, deceptive, incomplete, vague, and misleading (*P&A*, pages 10-13); and

(5) There has been no violation of the law by Adverse Parties; and

(6) The Application itself is an abuse of process, part of a pattern of activity by Applicant and her husband which includes slander, harassment, malicious mischief, assault, fraud, larceny, abuse of office, and threatened felonious destruction of property (*P&A*, pages 13-20); and

(7) The Protective Order, as a matter of equity, law and of fact, ought to be dissolved for the following reasons:

(a) The application fails to state a claim upon which relief can be granted (*P&A*, page 10ff)

(b) The allegations, to the extent that the alleged actions can be construed as improper, are false, misleading, incomplete, and inaccurate (*P&A*, page 12ff);

(c) Except for e-mails related to Roping Club business, which are manifestly not improper, no communication has been directed specifically to any of the protected parties by either Adverse Party since April (*P&A*, page 12ff); and

(d) Applicant has unclean hands, and is not entitled to relief (*P&A*, pages 13-20); and

(e) Applicant has adequate remedies at law (*P&A*, pages 20-21); and

(f) Applicant has not shown a "certain and immediate" threat of irreparable harm will come from failure to grant the injunction (P&A, page 20ff); and

(g) The Order itself is overly broad, in violation of the Constitution, and is in

violation of the provisions of NRS 200.575.6(e) and NRS 200.591 (*P&A*, pages 21-24); and

(h) The balance of equities favours Marking and Fleming (*P&A*, pages 24-26).

THEREFORE, the Adverse Parties petition this Court to dissolve the Protective Order for the foregoing reasons.

IN SUPPORT of their request, Adverse Parties attach their MEMORANDUM OF POINTS AND AUTHORITIES and their EXHIBITS, as follow.

DATED Monday, 25 August 2009.

_____

Michael Marking

_____

Nancy Elizabeth Fleming

both at: General Delivery, Austin,
Nevada 89310

Memorandum of Points and Authorities

Contents

A. Preliminaries

1. This Motion is submitted in written form. Although not required in this Court, this written motion may facilitate more expeditious disposition of this matter and, as well, will ensure completeness of the record in any appeal or derivative action.

2. In a proper brief, a declaration attesting to the facts would be attached as a separate exhibit. Given the informality of this Court, and that Adverse Parties are appearing in proper person, we have incorporated the facts into the Points and Authorities. The Court may regard assertions of fact as if they were submitted in separate declarations, subject to penalties of perjury.

3. This Motion is intended to supplement, not to replace, the proceedings of the hearing. Adverse Parties may seek to add to the arguments and exhibits herein at the time of the hearing.

4. Exhibit A.1 to this *Motion* is a compact disc (CD) which should be readable on almost any personal computer, and which contains this Motion and some of the exhibits. Some of the exhibits are audio recordings which cannot be included in paper form, and photographs, which do not reproduce well on copiers. The A exhibits are on the disc, the B exhibits are in paper form. File names on the disc should be self-explanatory.

B. Factual History

5. Marking and Fleming have known Ruben and Sissie since around 2005. When

Marking and Fleming came to Austin in late 2004, they knew no one here. Ruben and Sissie were one of the first people Marking and Fleming met, and it appeared they wanted to be friends.

6. Ruben and Sissie "warned" Marking and Fleming about all of the bad people in town. They told Marking and Fleming that Ray Williams, Jr., was an embezzler; that Jerry and Gail Utter were dishonest thieves; that Joe Ramos pocketed donations to the Roping Club; that Elizabeth Williams stole money from the Roping Club; that Mel (last name unknown) defrauded them in a restaurant deal; that Ray Williams, III, was a thief; that the Youngs sold bad hay and slandered us behind our backs; that Chuck Austin disliked us; and so on. The told of us various people who were child molesters and sex offenders. We emphasize that we have never seen proof that any of this was true, but it made us concerned for quite a while.

7. In retrospect, it was the beginning of a classic confidence game. "Don't trust them, but we will be your friends."

8. Ruben and Sissie helped Marking and Fleming by lending money and hay at times. Half of the money has been paid back, but hay is still owed. R&S let M&F use their phones for a while for the internet beginning mid-2008 and ending January 2009. During the same time, they let M&F use their washing machine to wash clothes.

9. At the same time, M&F helped R&S by lending a trailer, helping with their corrals and horses, building their web sites, giving advice on business and taxes, and other matters.

10. For some reason M&F do not understand, R&S started becoming hostile in late 2008 and early 2009. Perhaps it was Sissie's switch from narcotics to other psychotropic drugs. Perhaps it was the money that was owed. Maybe R&S had personal problems M&F were not aware of. At any rate, at that time, the relationship began to deteriorate.

11. R&S began to harass M&F. (See E. Unclean Hands, pages 13-20)

12. A large part of the problem seemed to center on the Roping Club. R&S felt that,

because M&F owed them money, M&F should support them in whatever they wanted with regard to the Roping Club. M&F could not in clear conscience agree to that.

13. M&F circulated open letters to the membership during the August meeting. The next week, Sissie applied for the Order. It was apparently the Roping Club dispute which triggered her Application, and M&F presume the goal is to prevent M&F from coming to the next (September) meeting so that R&S can push through by-laws changes to insulate them from M&F and allow them to continue their abuse of office.

C. Equitable Remedy.

14. Law and Equity are Distinguished. Law and equity are distinguished.

> **Equity.** Justice as administered according to fairness as contrasted with the strictly formulated rules of common law. [...] A system of jurisprudence collateral to, and in some respects independent of "law" [...] (*Black's Law Dictionary*, Fifth Edition)

15. (The distinction between "law" and "equity" is historical. Early on, there were courts to administer the "king's law". Although the history of equity dates back to the 13th century, it was around the 15th century that separate courts, the chancery courts, were established in part to deal with matters not covered by the law courts. The chancery courts were the courts of equity, sometimes called the "king's conscience", and had their own rules. However, the chancery court would not act if the law court had a remedy, hence the principle that equity could not be used where an adequate remedy at law was available. There is a complex history to equity and its relationship with law. In the United States, in all states such as Nevada which have adopted rules of civil procedure, separate law and equity courts have been eliminated, and the same courts administer both law and equity using a common procedure. However, the distinctions remain. For example, actions in equity typically do not employ juries; the Seventh Amendment to the constitution only guarantees juries at "common law", not at equity. As another contrast, where an injunction or

restraining order would issue in equity, a law court probably would issue an analogous but not identical thing, and would call it a "writ of prohibition". Law tends to be more formal than equity, although it is common to see both law and equity in a single case.)

16. Protective Order an Equitable Remedy. The Protective Order is, on its face, an injunction, albeit temporary, pending a hearing.

> **Injunction.** A prohibitive, equitable remedy issued or granted by a court at the suit of a party complainant directed to a party defendant [...] forbidding the latter to do some act [...] which he is threatening or attempting to commit, or restraining him in the continuance thereof, such act being unjust and inequitable, injurious to the plaintiff, and not such as can be adequately redressed by an action at law. [...] (*Black's Law Dictionary*, Fifth Edition.)

17. Equitable remedies are available only when the alleged wrong cannot be "adequately redressed by an action at law." (*Id.*)

> When a complete and adequate remedy can be had at law, it is settled that a court of equity will not interfere; but on the other hand, if the injury is likely to be irreparable, or if the defendant be insolvent, equity will always interpose its power to protect a person from a threatened injury. Further, it has been noted by the Supreme Court of Nevada that if the plaintiff has an adequate remedy at law, the harm is not "irreparable." (*Chamption v. Sessions*, 1 Nev. 478 (1865))

18. This has been the law in Nevada since statehood (as the above case shows), and remains the law to this day. See *1 Rent-A-Car v. Ramada Inns, Inc.*, 94 Nev. 779, 587 P.2d 1329 (1978).

19. It is also the law of the United States. In *Weinberger v Romero-Barcelo*, 456 U.S. 305 (1982), the US Supreme Court held that the basis for injunctive relief in the federal courts is irreparable injury and the inadequacy of legal remedies. In considering whether to grant an injunction, the court "balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." (*Id.*)

20. When a court balances the hardships, it "must be concerned not only with possible

injury to a plaintiff but also with possible injury to the defendant." *Everett J. Prescott, Inc. v. Ross*, 383 F. Supp. 2d 180, 191 (D. Me. 2005)

21. Standards for Injunctions. In addition to the above stated standards requiring that there be no adequate remedy at law, and requiring that the interests of the parties be balanced against one another, Nevada (and other jurisdictions) also require that:

(a) the plaintiff (here, the applicant) will suffer irreparable harm if the request is not granted; and

(b) the plaintiff has a reasonable likelihood of prevailing on the merits (were a full trial to be held)

See *Dept. of Conservation and Natural Res., Div. of Water v. Foley*, 121 Nev. 77, 80 (2005); *Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens, Inc.*, 88 Nev 1 (1972); *Ottenheimer v. Real Estate Division*, 91 Nev. 338 (1975).

22. Furthermore, the interests of third parties and the public interest must be considered. (*Planned Parenthood Ass'n v. Cincinnati*, 822 F. 2d 1390, 1400 (6th Cir., 1987))

23. The irreparable harm alleged by the Applicant must be both certain and immediate; it must not be merely speculative or theoretical. (*Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150 (6th Cir., 1991)) The Applicant must show that a "credible threat" of irreparable harm exists, and that the future injury is not merely "conjectural". *Kolender v. Lawson*, 461 U.S. 352, 355 n.3 (1983)

24. An injunction may not issue absent the threat of future harm. It is not to be used as a remedy for past acts, nor is it to be used when the alleged acts have already ceased. (See *Russell v. Douvan*, A096261, Calif. Ct. App., 1st App. Dist., Div. 3 (2003), citing *Scripps Health v. Marin* (1999) 72 Cal.App.4th 324)

D. Analysis of Application

25. Failure to State a Claim. It is unclear from the Application whether the Application is based on Harassment (NRS 200.571) or on Stalking (NRS 200.575). Applicant alleges neither specifically; she only says "The people go after me to provoke my husband & nephew into confrontation so they look bad." Neither the elements of NRS 200.571, nor the elements of NRS 200.575, are alleged. She used the word, "harass", however she failed to describe any act which constituted a violation of NRS 200.571. Accordingly, the application should be denied, and the Protective Order dissolved for failure to state a cognizable claim under which relief can be granted. (NRCP 12(b)(5))

26. Under NRS 200.571, harassment requires at least a threat without lawful authority. Nowhere in the Application does Applicant describe a threat of any kind, lawful or not; indeed, no such threat took place. This Court has no evidence of harassment before it.

27. Presumably, then, Applicant may have been complaining about stalking as defined under NRS 200.575. Under that hypothesis, too, the Application is lacking. Stalking requires that the accused "willfully or maliciously engages in a course of conduct". A "course of conduct" must evidence "a continuity of purpose directed at a specific person".

28. The Applicant's rambling and desultory statement describes a series of events, some true, some not, but nowhere do those events show any continuity of purpose. In fact, nowhere does she specify what the alleged purpose might be except "to provoke" her husband and nephew. She also says "They wanted me to attack them so they could put charges on us." Apparently, she feels that all of these alleged acts were only to provoke them.

29. Further, NRS 200.575 requires that the course of conduct "would cause a reasonable person to feel terrorized, frightened, intimidated, or harassed." The salient word here is "reasonable". Applicant is not reasonable.

30. A reasonable person does not feel terrorized when buying a trailer. A reasonable person does not feel frightened when lending hay to someone. A reasonable person does not feel intimidated when someone says he or she cares about that person. A reasonable person does not feel harassed when someone accepts an invitation to come to their home.

31. We invite the court to ask how each of the alleged acts furthers the supposed goal of "provoking" the protected parties. There is no reasonable answer.

32. Even if the goal were to provoke the Ruben and Sissie into some act which would allow Marking and Fleming to "put charges" on them, no action on Marking's or Fleming's part would be necessary for that to happen. As is shown elsewhere (see E. Unclean Hands, herein at pages 13-20), Ruben and Sissie have committed acts already which allow Marking and Fleming to charge them with crimes or file tort actions against them, but neither Marking nor Fleming ever filed any charges or made any complaints to any court about them except for a violation of the Protective Order. Therefore, the accusation that Adverse Parties wanted to file any kind of charges against Ruben and Sissie rings hollow. If that were the goal, it could have been done months ago.

33. Simply because Sissie says she "cannot take their mental abuse anymore", does not show irreparable harm. What a world that would be if we could all cop out of this or that situation by claiming "we can't take it any more" and get an injunction against something we don't like! The most she has shown is discomfort.

34. There are several acts described which omit a critical point: Marking and Fleming were invited to perform them, or at least not asked to refrain. "Hugging in public" is not normally an illegal activity, and no one asked Marking or Fleming to refrain, in public or otherwise. Doing laundry is not inappropriate which the launderer has been given permission. Coming into a home is not trespassing when the visitor is invited.

35. Finally, there are no laws against "verbal abuse" or "mental abuse". There are laws against child abuse, sexual abuse, and elder abuse. There is no "verbal abuse", and there is

no "mental abuse" described in the law.

36. False, Inaccurate, and Misleading Statements. Although most of the Applicant's incoherent statement consists of disjoint but irrelevant facts which are incomplete though mostly true, some of her assertions are false, inaccurate, or simply misleading.

37. At no time did either Marking or Fleming come into her room and wake her up, let alone "verbally abuse" her afterward. Sissie by her own admission previously took large quantities of various narcotics before switching around the time of her rehab to a course of selective serotonin re-uptake inhibitors (SSRIs), tranquilizers, and other psychotropic drugs. One does not always wake up quickly from a drug-induced stupor. Either Sissie is prevaricating in her statement, or she was hallucinating when she was waking up, or the incident did in fact occur with some other person at a time when she was insufficiently conscious to distinguish that person from Marking or Fleming.

38. Sissie and Ruben both invited Fleming and Marking into their home, even telling them to come on in when they were not present. (Exhibit B.1). Sissie had standing instructions to come in when she was there, even when she was asleep. At no time did either Marking or Fleming come uninvited.

39. Cessation of Activity. Sissie's dates are inaccurate. See Factual History, page 5ff for an accurate timeline.

40. The dates are significant because a large portion of what is alleged, however fanciful, imagined, or misinterpreted, happened months ago, and has not happened since that time. For example, Sissie says in her statement that the events at the Roping Grounds and at the Gallegos' house occurred February to May.

41. In fact, Fleming's last visit to the Gallegos house was in January, and Marking stopped coming on a regular basis in January, but made three visits by explicit invitation from Ruben during February, March, and April. Marking's last visit to the Gallegos house

was on Saturday, 11 April, at Ruben's invitation, to have Ruben make a debit card payment for the Gallegos' web sites.

42. The last time either Marking or Fleming ever went to the Gallegos corral was Friday, 1 May, to borrow hay. No hay was borrowed after 1 May. The only time after 1 May that Marking or Fleming spoke to Sissie or to Ruben at the Roping Grounds was at times when Sissie or Ruben came to the corral where Marking's horse is staying. In other words, all contact at the Roping Grounds after 1 May was initiated by Ruben or by Sissie.

43. In fact, except for e-mails related to Roping Club business, neither Marking nor Fleming have initiated any contact with Ruben, Sissie, or Marty since May. The Roping Club e-mails are manifestly not improper. Other Roping Club correspondence, also not improper, was not directed specifically toward Ruben, Sissie, or Marty, and thus is not probative of any allegation made under NRS 200.575.

44. In other words, except for the Roping Club correspondence, all of which is in evidence and which is manifestly not improper, all contact with Ruben, Sissie, or Marty, since May, was initiated by Ruben or Sissie. If Ruben or Sissie do not wish to hear from Marking or Fleming, they have a simple remedy: they need only stop coming to the Marking home and stop coming to the corral where Marking's horse is staying.

45. Even if the allegations were true, they would be in the past for almost four months. As explained above (see page 9ff), an injunction may not issue for activity in the past, and for which there is no indication of a likely recurrence in the future.

E. Unclean Hands

46. Relief Is Denied Because of Unclean Hands. "One who comes into equity must come with clean hands." Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or

dishonestly as to the controversy in issue. (*Olsen v. Olsen*, 657 N.W.2d 1, 265 Neb. 299, (2003)). A plaintiff must "act fairly in the matter for which he seeks a remedy. He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim." (*Kendall-Jackson Winery, Ltd. v. Superior Court of Stanislaus County*, 76 Cal. App. 4th 970, 978 (1999)). The equitable doctrine of unclean hands "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the [other party.]" (*Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1097 (9th Cir. 1985) (quoting *Precision Inst. Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945))

47. Sissie and Ruben have, during the previous several months, committed crimes and torts against Marking and Fleming. These include slander, harassment, malicious mischief, assault, fraud, larceny, abuse of office, and threatened felonious destruction of property. They have a nexus to the present allegation, as the points below show. Thus, regardless of the validity of any accusations made against the adverse parties, the equitable relief of an injunction is unavailable to them.

48. Threatening To Shoot Or To Kill Marking's Horse. On several occasions, Ruben and Sissie have threatened to kill Marking's horse.

49. In late May, Ruben told Marking he would shoot Marking's horse with a .357 Magnum if it were to get loose. Ruben and Sissie own a carbine which is chambered for .357 Magnum. Later, Ruben claimed it was only a joke. (Exhibit A.7) However, the law does not recognize a joke as an excuse when a threat is made: there is no element of sincerity required in the statutes.

50. Sissie has said she would kill the horse. (Exhibits A.8, B.2)

51. These are threats to destroy Marking's property, threats to commit a felony, and

constitute harassment under NRS 200.571.

52. Attempting To Set Loose Marking's Horse. Ruben and Sissie habitually and repeatedly let their horses, including mares in heat, run loose on the Roping Grounds. This is in violation of the by-laws. Ruben asserts this violation is acceptable to some others, but it is not acceptable to everyone, and there is nothing in the by-laws which grants him an exception from the rules. Because of this, horses in corrals, including Marking's horse, a stallion, and William's horses, play and sometimes fight with the loose horses. This causes damage to the corrals and endangers the animals.

53. On Tuesday, 20 May, Fleming and Rhonda Williams made repairs and reinforcements to the corral where Marking's horse is kept, such repairs being necessary because of the loose horses.

54. The next day, Wednesday, 21 May, Marking came to the corral and found Sissie taking down the wire used to repair the fence. Sissie said she would take it down each time it was repaired. Sissie was committing malicious mischief under the statutes. The same day, Marking filed a report (Exhibit A). He told Dennis Lowe he did not want to make a complaint, only to have the problem explained to Sissie and to put the matter on the record.

55. On Monday, 25 May, Ruben told Marking that Sissie had admitted to taking down the fence.

56. Stealing Marking's and Fleming's Watering Tank. When Fly quit working and the bar in the International and moved to Oregon in the spring of 2007, he gave Marking and Fleming the horse which is now Marking's. He also gave them the watering tank, shown in Exhibit A.11. The tank is distinctive: it is a fiberglass tub, probably originally intended for use in a hot tub or jacuzzi. When Ruben told Marking in May 2008 to move the horse from its original corral to corral #2 (formerly the Utter corral), Marking moved the watering tank

as well.

57. Later that month, Ruben and Sissie let mares in heat loose again, and Marking's stallion jumped a five foot fence to get to them. Marking, Fleming, and a friend cornered the horse into the location where it now is staying. The horse is not broke.

58. When the horse was out of corral #2, Ruben took the watering tank and moved it to his own corral, where it remains today. (Exhibit A.14) Corral #2 was locked at the time, but Ruben had a key. Ruben never sought, nor was he granted, permission to take the watering tank. He simply stole it.

59. Falsely and Publicly Accusing Marking and Fleming of Stealing a Gate. In the August Roping Club meeting, Sissie falsely and publicly accused Marking and Fleming of stealing a gate. During the meeting, Marking said he did not know what had happened to the gate previously on corral #4, that someone had taken it. Sissie accused him and Fleming of taking the gate, and putting it on corral #2. (Exhibit A.9)

60. This is false. They are different gates. Exhibit A.12 is a photograph of corral #4, including the gate previously on it. Exhibit A.13 is a photograph of corral #2, including its gate. Obviously, the gates are of different construction.

61. Making a false accusation of an illegal act constitutes the actionable tort of slander per se.

62. Assaulting Marking at the Roping Grounds. Ruben has at least twice assaulted Marking on the Roping Grounds. Both times were near where Marking's horse is kept, and both times Ruben approached Marking when Marking was already taking care of his horse.

63. The first occasion was in August. Ruben came up and started shouting at Marking. Marking decided to drive away without replying to Ruben. After Marking got into his car, Ruben took the door handle and opened the door from the outside to prevent Marking from

leaving. Eventually, Ruben let go and Marking was able to drive away.

64. The second occasion was several weeks later. Again, Ruben was shouting at Marking. Ruben positioned himself so his face was within three inches of Marking's face, drew his fist back so he was ready to punch Marking in the face. He continued shouting belligerently, then suggested that Marking "take a poke" at him, and told Marking that he (Ruben) could "take you down".

65. Provoking assault is punishable under NRS 200.490.

66. Fraud. Sissie, as acting secretary of the Roping Club, has created false meeting minutes to avoid any references to matters she deems unpleasant to her. Typically, these things include any non-disparaging or non-negative references to Fleming or Marking, and any mention or details of rules which Sissie and Ruben want to ignore.

67. Furthermore, Sissie has published meeting agendas which avoid similar topics. She has repeatedly lied about the times the agendas were published. For example, the last meeting (August) was on Thursday, so the agenda should have been posted by Monday morning. Sissie claimed she posted it on Sunday. However, it was not posted until Tuesday sometime after 11am. Exhibits A.4, A.5, and A.6 are photographs taken between 9:05 and 9:20am Tuesday at the courthouse, the post office, and the Chevron: the agenda notices for August were not there.

68. The Nevada Open Meeting Law, and the By-Laws, require and permit Roping Club meetings to be recorded. Beginning with the June meeting, in response to Sissie's falsification of the meeting minutes, Marking and Fleming began recording the meetings. Exhibits A.7, A.8, and A.9 are audio recordings of the June, July, and August meetings.

69. In the January meeting, Fleming was elected treasurer. However, neither the records nor the checkbook have ever been turned over to Fleming by Sissie or by Ray Williams, Jr. Ruben admitted to this in the June meeting (Exh. A.7). Subsequently, Sissie put electing a

new treasurer onto the agenda, even though it had not been discussed or approved in any meeting. Sissie merely wished away Fleming's election. Sissie's account in her minutes of the March discussion omitting omitting Fleming from the new signature card was mere fanatasy, as were other matters.

70. The By-Laws require an inventory of Club assets every April. None has been conducted since Ruben was president in 2008. Some new panels and railroad ties were purchased for the arena in 2007: what happened to old panels and old railroad ties? An honest, open club leadership would welcome sunshine. The need for secrecy in the records, the bank account, and the assets looks suspicious.

71. At the beginning of the August meeting, Marking and Fleming passed out open letters to the members expressing some of their concerns. (Exhibits A.2 and A.3) Presumably, this is what set Sissie off, since she attached one of the letters to her Application.

72. We emphasize that we are not so concerned with the rules per se. We are concerned with playing fairly. When Ruben and Sissie haven't played fairly, we have invoked the rules. That is what they are for: to encourage fair play. Sissie mentions "quoting the law" in her application. When people play fairly, there is little discussion of rules. The only reason we are quoting the law is because Ruben and Sissie haven't played fairly in the first place. The only reason we are recording the meetings is that Sissie has been dishonest. We suspect that the main reason for this Order is to keep us out of the next meeting.

73. Abuse of Office. One of the purposes of the fraudulent minutes and agendas has been to avoid even application of the Club rules where they are inconvenient to Ruben and Sissie. For example, Ruben and Sissie do not pay their fair share of corral rents; they keep too many horses in each corral; they let their horses, including mares in heat, run loose and unattended on the grounds; they use their corral area for general storage unrelated to horses;

and so on.

74. At the same time, Ruben and Sissie have vigorously sought to collect previously past-due corral rents from Marking and Fleming. (The rents are now paid.) Marking and Fleming were unable to pay annually in advance until recently, and were paying a few months at a time. The Club has sufficient money that the difference did not cause the Club to fail to pay any bills.

75. Ruben and Sissie did not similarly go after Ray Williams III and Rhonda for past rents (which are now also paid). They wanted to take the lock off the Marking/Fleming corral, but never wanted to take the lock of the Williams corral.

76. This is selective application of the rules used to harass Marking and Fleming, to draw attention away from Ruben's and Sissie's own infractions. It constitutes abuse of office. It is sufficient to deny relief to Applicant on the basis of unclean hands.

77. *Wedgewood Community Ass'n, Inc. v. Nash* (Ind. Ct. App. No. 02A03-0204-CV-112 (2004)) provides an example. In *Wedgewood*, the homeowners' association selectively enforced a rule about outbuildings against Nash but not against other members including one of the directors of the association. When the association tried to get an injunction, it was denied on the basis of unclean hands, because the rule was not evenly enforced.

78. (On appeal, Wedgewood was reversed on the technical grounds that the association, not the directors, had brought the action. That situation does not apply here, and would be defeated anyway since (1) Ruben's and Sissie's abuse of office was *ultra vires*, and not a legal activity by the Club, and (2) it is anyway Sissie personally who brings this action, not the Club. We note that since the Club has not had legal meetings, it cannot, under operation of Nevada law, take any action. Furthermore, some jurisdictions would ignore the corporate entity in a complaint for equitable relief, and not have reversed on appeal; see, for example, *Oklahoma Retail Grocers Association v. Wal-Mart Stores Inc.*, 605 F.2d 1155, CA 79-3158, Ct App 10th Circuit (1979). We do not have any Nevada cases, one way or the other, on that

question.)

F. Adequate Remedies at Law

79. No Immediacy or Urgency. Injunctions are available for immediate, imminent, and certain danger or threat of harm; the harm must be irreparable. (See Standards for Injunctions, herein, page 9ff) Applicant seeks an injunction for activities which, by her own allegation, have been occurring for at least eight months. Further, many of them stopped months ago. Now she would have the Court believe that she is in immediate danger of irreparable harm. Why has she not acted before?

80. Applicant has never previously filed any kind of complaint. She has never charged Marking or Fleming with trespassing, harassment, stalking, or any other crime. She has never filed a tort action for slander or libel against Marking or Fleming.

81. The actions alleged admittedly took place over time. Whence comes now the urgency or immediacy?

82. Furthermore, she admits to health problems. Presumably, the concern is mental health, because physical health is not threatened by "verbal abuse", "bad mouthing", or buying a trailer. In fact, she describes, in her application, the actions as "mental abuse".

83. Sissie has not *suddenly* developed mental health problems. She has had them for years. Her chronic paranoid personality disorder did not arise overnight. She has told Marking and Fleming that she has never undergone any kind of counselling or psychological therapy for her disorders. If there were an immediate problem, she would have sought psychological counselling long ago.

84. If there were immediacy, and if the other elements of the charge were met, an injunction might be appropriate. No physical harm or threat of physical harm is alleged, however. There has been no description of any mental injury. Where is the injury?

85. The delay in acting bars Applicant from relief. “Injunctive relief is an equitable remedy, and the complaining party must come into court with clean hands and must have acted promptly to enforce its right. *Landry's Seafood Inn & Oyster Bar-Kemah, Inc. v. Wiggins* , 919 S.W.2d 924, 927 (Tex. App.--Houston [14th Dist.] 1996, no writ); *Foxwood Homeowners Ass'n v. Ricles* , 673 S.W.2d 376, 379 (Tex. App.--Houston [1st Dist.] 1984, writ ref’d n.r.e.)” (*Twyman v. Twyman*, Ct. App. 1st Dist. Tex. (2009)) In this case, Applicant did not act promptly. In fact she dallied for months, which belies any assertion of immediacy.

86. Remedies at Law. Sissie has always been free to file complaints or actions for assault, trespass, libel, slander, harassment, stalking, or any other of the alleged activities. These things are already illegal, so no injunction is necessary. (In fact, no injunction can be used simply to enforce the law. See *Nasif v. U.S.*, 165 F.2d 119, 121 (5th Cir. 1947))

87. Suppose that Marking or Fleming were to enter the Gallegos house when they were knowingly unwanted. Then Sissie could dial 911. Would it make any difference if there were an injunction? No, the result would be the same: the deputy would come and ask or force the trespasser to leave. The law is adequate. Sissie has not described any irreparable harm which might come from such a violation. Even if there were, she has not explained how an injunction would provide any protection not already provided by the law.

88. Suppose that Marking or Fleming were to say untrue things about Sissie, and she were able to show she were damaged. She could file a tort action for slander, and collect money damages. When money damages are available, then there is, by definition, an adequate remedy at law. Therefore, no injunction should issue.

G. Excessive Scope of Order

89. Order Unnecessarily Covers Ruben and Marty. Sissie asserts that her health is not good; we take this to mean her mental health, since no physical threat is alleged. Then she goes on ask that Ruben and Marty be included as protected parties. Is she thereby alleging that Ruben and Marty suffer the same mental disorders as Sissie? If so, then she is saying her entire family has some mental illness. If not, then why are they included in the Order? There is no evidence that Ruben or Marty are in any immediate danger of irreparable harm from being close to Marking or Fleming, so the Order is overbroad.

90. Furthermore, Ruben apparently feels no threat. See Exhibit A.10.

91. Order Not Crafted to Enjoin Allegedly Threatening Activity. The Application speaks of so-called "verbal abuse", "bad mouthing", and other things. How does keeping 100 yards from Applicant prevent "bad mouthing"? If the real danger is verbal, or if there is a serious and imminent danger of irreparable harm from public hugging, then the Order should enjoin those activities, not merely being in Applicant's sight.

92. Order Covers Activity Beyond What Is Unlawful. NRS 200.575 forbids activities "without lawful authority". It goes on to say

> (e) "Without lawful authority" includes acts which are initiated or continued without the victim's consent. The term does not include acts which are otherwise protected or authorized by constitutional or statutory law, regulation or order of a court of competent jurisdiction, including, but not limited to:
>
> (1) Picketing which occurs during a strike, work stoppage or any other labor dispute.
>
> (2) The activities of a reporter, photographer, cameraman or other person while gathering information for communication to the public if that person is employed or engaged by or has contracted with a newspaper, periodical, press association or radio or television station and is acting solely within that professional capacity.
>
> (3) The activities of a person that are carried out in the normal course of his lawful employment.
>
> (4) Any activities carried out in the exercise of the constitutionally protected rights of freedom of speech and assembly.
>
> (NRS 200.575)

93. These excluded activities, including others not specifically listed, do not constitute a violation of the statute, and cannot properly be viewed as activities to enjoin. However, the order effectively prohibits them anyway. Thus the Order is overly broad.

94. For example, when Marking was in Jay's hardware and Ruben entered, Marking was buying parts for a job he was doing in the normal course of his lawful employment. Had Ruben been there first, then Marking would have been hindered in earning his living, and third parties who needed the work done would have been seriously inconvenienced if not injured.

95. Indeed, if the place is public, then Sissie should feel reassured that someone is more likely to come to her aid, or to be a witness in case of an alleged violation.

96. The Order, if necessary at all, should have been crafted to exclude lawful behaviour in public places.

97. Order Violates First Amendment Rights. The Order violates the protections afforded to Marking and Fleming by the First Amendment to the U.S. Constitution. It does this because it deprives Marking and Fleming of their right to free speech and assembly when one of the protected parties is at a public meeting.

98. A violation of First Amendment rights, even for a short time, causes irreparable harm. (*Baker v. Adams Courty/Ohio Valley Sch. Bd.*, 310 F.3d 927, (6th Cir., 2002). See also *Planned Parenthood Ass'n v. Cincinnati*, 822 F. 2d 1390, 1400 (6th Cir., 1987) "We agree with the district court, however, that there is potential irreparable injury in the form of a violation of constitutional rights.")

99. "The loss of first amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (*Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion of Brennan, J.))

100. This is why, when, for example, a merchant complains about picketers or protesters

harassing his or her customers, that courts cannot simply make the picketers or protesters go away. An injunction can include reasonable conditions, such as requiring picketers or protesters to stay five feet from customers, or to stay on a public sidewalk. However, an injunction may not prohibit free speech and assembly.

101. The First Amendment is given high priority by the courts. The court, especially, cannot enjoin any speech in advance. (Such an injunction is called a "prior restraint".) Indeed, the Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial." (*Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226-227 (6th Cir. 1996); cf. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 563 (1976) (the Sixth Amendment right of a criminal defendant to a fair trial does not outrank the First Amendment right of the press to publish information); *New York Times Co. v. United States* (1971) 403 U.S. 713, 718-726 ("national security" interest in suppressing classified information in the Pentagon Papers did not outrank First Amendment right of press to publish classified information). "[I]t is clear that few things, save grave national security concerns, are sufficient to override First Amendment interests." *United States v. Progressive, Inc.* 467 F. Supp. 990, 992 (DC Wisc. 1979)

102. Accordingly, since a threat to Sissie's mental condition is not a grave national security risk, the Order is unconstitutional to the extent that it prohibits Marking and Fleming from attendance at public meetings, such as the Roping Club meetings, when one of the protected parties is there.

H. Balance of Equities

103. As explained above (Protective Order an Equitable Remedy, page 8ff), in considering whether to grant an injunction, the court must balance "the conveniences of the

parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction."

104. The balance of equities in this matter tilts decisively in favour of Marking and Fleming.

105. It has been shown that a deprivation of Marking's or Fleming's First Amendment rights is manifestly irreparable harm. In addition, the Order interferes with Marking's and Fleming's ability to earn a living, which sometimes requires them be in public or publicly accessible places as needed and when needed. It is certainly an inconvenience and an expense for Marking and Fleming, as well.

106. Sissie, by contrast, has not shown irreparable harm. The most she has shown is discomfort.

107. Sissie, in failing to seek treatment for longstanding mental disorders, is culpably negligent and self-abusive. While her moves to shake narcotics addiction are admirable, she has not undergone counselling or psychological therapy for her mental conditions. Her condition and mental health is not an excuse. The word "negligence" is defined with reference to what a "reasonable" person would do or not do. Sissie has not been reasonable. Her inability or unwillingness to be reasonable should not impose a burden on others.

108. Moreover, the balance of equities must include the injuries and inconveniences of third parties. This Order has cost the taxpayers hundreds of dollars in deputy time providing civil standby, and may well be a serious hazard in the event that such a civil standby causes a deputy to respond less quickly to a more serious matter.

109. In addition, the public itself is injured when anyone is deprived of First Amendment rights. "The public interest carries considerable weight in these matters. … The court must weigh any hindrance or furtherance of the public interest likely to result from interim injunctive relief." *Sheck v. Baileyville School Committee*, 530 F. Supp. 679, 693 (D. Me. 1982) (citing *Yakus v. United States*, 321 U.S. 414, 440-41 (1944)). "Protecting rights to

free speech is ipso facto in the interest of the general public." *Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 128 (D. Mass. 2003) (citing *Machesky v. Bizzell*, 414 F.2d 283, 289 (5th Cir. 1969) ("First Amendment rights are not private rights ... so much as they are rights of the general public.")).

110. Accordingly, the balance of equities tips sharply in favour of Marking and Fleming, and the Order should be dissolved.

CERTIFICATE OF SERVICE

I hereby certify under penalties of perjury that on this date I served a true and correct copy of the foregoing document by handing a copy to the clerk of the Court, on her word that she would serve it on Applicant by some appropriate means.

Dated Tuesday, 25 August 2009

_____

Michael Marking

AFFIRMATION

(Pursuant to NRS 239B.030)

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

Dated Tuesday, 25 August 2009

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Michael Marking

LIST OF EXHIBITS

A.1	CD-ROM
A.2	Letter to Roping Club Members (Marking), 2009.08.06
A.3	Letter to Roping Club Members (Fleming), 2009.08.06
A.4	photo of courthouse bulletin board, 2009.08.04
A.5	photo of post office bulletin board, 2009.08.04
A.6	photo of Chevron bulletin board, 2009.08.04
A.7	audio recording of June Roping Club meeting, 2009.06.04
A.8	audio recording of July Roping Club meeting, 2009.07.02
A.9	audio recording of August Roping Club meeting, 2009.08.06
A.10	complaint for violation of order, 2009.08.14
A.11	photo of horse and watering tank in corral #4, spring 2008
A.12	photo of horse and gate on corral #4, spring 2008
A.13	photo of corral #2 gate, 2009
A.14	photo of watering tank in Ruben's corral, august 2009

B.1	invitation from Sissie, late 2008
B.2	statement by Kelsey Williams, 2009.08