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	OPPOSITION TO MOTION TO STRIKE COMPLAINT

COME NOW MICHAEL MARKING AND ELIZABETH FLEMING, in proper person, as Plaintiffs, and hereby submit their OPPOSITION TO MOTION TO STRIKE COMPLAINT.

WHEREAS

There have been repeated instances of filings crossing in the mail, possible misunderstandings of the rules, and resulting premature motions and submissions for decision

in this matter. These are leading to unjust results and making extra work for this Court and for the parties (see MEMORANDUM OF POINTS & AUTHORITIES, pg. 4); and

These results appear to be based on an incorrect interpretation of the rules (see MEMORANDUM OF POINTS & AUTHORITIES, pg. 4); and,

The MOTION TO STRIKE COMPLAINT arose from an abuse of the rules, and should be denied for that reason (see MEMORANDUM OF POINTS & AUTHORITIES, pg. 8); and

Defendant is technically in default, and must cure the default before taking any other action (see MEMORANDUM OF POINTS & AUTHORITIES, pg. 8); and

As a result of the foregoing errors, this Court failed to consider Plaintiffs' OPPOSITION TO MOTION FOR MORE DEFINITE STATEMENT of 30th March, and justice, equity, and due process require that Plaintiffs be heard on this issue; and

There are now multiple, outstanding motions in this action, one submitted for decision and others not yet submitted, most of which have interrelated issues, and ought not to be decided separately.

THEREFORE

Plaintiffs hereby request that the MOTION TO STRIKE COMPLAINT be denied, for reasons explained herein; and

Plaintiffs further request that this Court consider the interrelated arguments made in other outstanding motions, oppositions, and replies, which are related to this issue, but which have been omitted here to avoid excessive repetition.

IN SUPPORT OF THIS OPPOSITION TO MOTION TO STRIKE COMPLAINT, Plaintiffs have attached their MEMORANDUM OF POINTS & AUTHORITIES.

DATED this Monday, 14 May 2012.

Michael Marking, Plaintiff

e-mail *marking@tatanka.com*

Elizabeth Fleming, Plaintiff

e-mail *ryuuza@tatanka.com*

both at General Delivery, Austin, Nevada 89310

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Memorandum of Points & Authorities

1. Motions crossing in the mail. Hy Forgeron filed and served his Motion for More Definite Statement in this matter on or about 13th March 2012. Plaintiffs filed and served their Opposition to Motion for More Definite Statement on 30th March 2012.

2. Without waiting for Plaintiff's service or filing to arrive by mail, Hy Forgeron filed and served his Request for Submission on 2nd April 2012. This Court, believing the Motion for More Definite Statement to be unopposed, granted said Motion in its Order Granting Defendant's Motion for More Definite Statement on 5th April 2012.

3. Plaintiffs, believing the Order to require additional findings, and also believing the Order to be in error due to this Court's failure to consider their Opposition to Motion for More Definite Statement, served and filed their Motion for Additional Findings or to Void or Modify Order (2012.04.23); that motion is a tolling motion.

4. Again not waiting for service of the Motion for Additional Findings [...], and apparently believing the time to comply with the order was not tolled, Defendant served and filed its Motion to Strike Complaint on 2012.04.25.

5. Incorrect interpretation of the rules. No doubt, Hy Forgeron would argue that DCR 13.3 and 13.4 require that responses and replies be in the clerk's hands ten and five days, respectively, after the triggering events. Otherwise, his actions in filing the 2nd April Request for Submission and the 25th April Request for Submission would have been premature.

6. However, there are significant reasons to believe such an interpretation to be incorrect:

(a) the rules may be read otherwise;

(b) the foregoing interpretation is both improbable and inequitable, and can create a situation where compliance with the rules is actually impossible; and

(c) Mr Forgeron's own actions do not follow the foregoing interpretation.

7. The rules admit of several interpretations. Amazingly, there seems to be no on-point case which deals with the interpretation of DCR 13 when responses and replies are filed by U.S.P.S. mail. However, there are two different ways to read DCR 13 in the context of NRCP 5(d) which might have avoided the current situation.

8. The first way is to read DCR 13.3 as if it were written more unambiguously: "Within 10 days after the service of the motion, the opposing party shall serve and [thereafter] file [...]", and to make a similar interpretation of DCR 13.4, "The moving party may serve and [thereafter] file reply points and authorities within 5 days [..]". The filing "thereafter" is consistent with NRCP 5(d), which says, "All papers [...] shall be filed with the court either before service or within a reasonable time thereafter [...]". In other words, the five and ten day deadlines apply to service, not to filing.

9. The second way is to interpret "time of filing" the same way as "time of service" is interpreted: effective at time of mailing. There are a number of reasons to believe this to be the correct interpretation:

(a) It is consistent with the rules for electronic filing, which explicitly say (NEFR 8(a)) that time of filing is time of transmission, not time of receipt by the clerk.

(b) It is consistent with the rules for the Nevada Supreme Court, which say (NRAP 25.1(a)) that filing is effective upon mailing, not when received by the court.

(c) It is consistent with the philosophy behind Rule 5: "transmission is effected when the sender does the last act that must be performed by the sender." (2001 Committee Amendment Commentary on FRCP 5(b)) When sending by U.S.P.S., the sender's last act is to deposit the document into the mail system.

(d) It is consistent with service to the other party, which is effective upon depositing the document into the mail system. (NRCP 5(B)(2)(b)).

(e) It is consistent with some opinions holding that, when used in lieu of electronic filing where electronic filing is ordinarily used, time of postal mailing is time of filing (to prevent the unfairness to postal mail filers which would otherwise accrue). (See, for example, *St. John v. CBE Group*, Civil Action No.10-40091-FDS, D. Mass. (2011))

10. Of course, the clerk's "filed" date will differ from the effective filing date. That is what happens routinely in the Nevada Supreme Court, so it is not an insurmountable problem.

11. Even if this Court deems Plaintiff's interpretations of the rules to be incorrect, "[A] district court has discretion to 'depart from the strictures of its own procedural rules where (1) it has a sound rationale for doing so, and (2) doing so does not unfairly prejudice' a party who has relied on the rule. *United States v. Eleven Vehicles, Their Equipment & Accessories*, 200 F.3d 203, 215 (3d Cir. 2000); see also *Prof'l Programs Group v. Dept. of Commerce*, 29 F.3d 1349, 1353 (9th Cir. 1994) [...]" (*United States v. Rivas*, No. 05-3380 (3rd Cir. 06/26/2007))

12. Mr Forgeron's interpretation is inequitable, unjust, and can make compliance with the rules literally impossible in this case. Mr Forgeron rushed to file his 2nd April REQUEST FOR SUBMISSION at 8:01AM at the Clerk's office, not waiting for service of a responsive opposition by mail. Surely, after decades of practice in rural Nevada, he knows that such a reading of the rules is inappropriate.

13. To see why, consider the some of the most recent correspondence between Plaintiffs and the Clerk of this Court. On 30th April, a Monday, Plaintiffs mailed two documents to the Clerk for filing, with a self-addressed postage paid envelope for return copies. The Clerk marked them "filed" on Friday, 4th May, four days later. Presumably, the return copies were mailed the same day, but they weren't postmarked until Monday, the 7th, probably because many if not most mail drops don't operate on weekends. The copies stamped by the Clerk were received by Plaintiffs on Friday, 11th May, twelve days after they

were first mailed for filing. This is not an unusual delay in rural Nevada: mail between Battle Mountain and Austin usually goes by way of Reno. Sometimes it can take only two days, but three or four days each way is more common. It can be worse: mail from Austin to Eureka often goes through Las Vegas. The Pony Express was faster.

14. In Mr Forgeron's interpretation, where "filing" consists of putting the documents into the hands of the Clerk, the twelve-day round trip by mail between Austin and Battle Mountain makes it impossible for Plaintiffs to comply with the five-day reply time required by DCR 13.4. Even after adding two days for a weekend and three days for service by mail (NRCP 6), the interval is two days too short. To comply with the rules, Plaintiffs must make the 200 mile round trip between Austin and Battle Mountain. However, Plaintiffs do not have an automobile, so this is not ordinarily an option for them.

15. Even if Plaintiffs were to have an automobile, the 200 mile trip is unreasonable and puts them at a serious disadvantage, especially considering that Mr Forgeron's office is but a short walk from this Court. Furthermore, allowing a four day time for mail one way, Plaintiffs might have only a weekend to craft a reply to an opposition mailed on a Friday, if it were to sit all weekend in the Battle Mountain mail drop, even if Plaintiffs were able to drive it to Battle Mountain the Monday following receipt on Friday.

16. Surely, the designers of DCR 13.4 did not mean for litigants to have only two days – a weekend at that – to come up with replies to oppositions. Thus the other interpretations of DCR 13.3 and 13.4, with filing effective upon mailing, or with filing made reasonably soon after service, make more sense.

17. Mr Forgeron's own actions are inconsistent with his premature filings. Plaintiffs served Defendant with their MOTION FOR ORDER VOIDING MEETINGS AND FOR PRELIMINARY INJUNCTION, by mailing said motion on 5 April. By the rules, an opposition was due 18 days later, on 23 April. However, Mr Forgeron did not file or serve his opposition until 25 April,

two days late. Thus, when it suits him, he fails to follow the same rules he wants interpreted strictly for Plaintiffs.

18. Plaintiffs do not complain about Mr Forgeron's actions. Maybe he was busy. They might want the same lenience themselves someday. Furthermore, we hope that this Court would prefer to decide issues on their merits, not in a race against the clock to file motions on a rigid, inflexible schedule.

19. The MOTION TO STRIKE COMPLAINT arose from abuse of the rules, and should be denied for that reason. Were it not for the premature filing of the 2 April REQUEST FOR SUBMISSION, Plaintiffs 30 March OPPOSITION would have been considered, and Defendant's MOTION ought never to have been granted. Were it not for the premature filing of the MOTION TO STRIKE COMPLAINT, in the face of a tolling motion by Plaintiffs, this OPPOSITION would not be necessary.

20. Mr Forgeron is gaming the system, and the MOTION TO STRIKE COMPLAINT should be denied because it is based on serial abuse of the rules.

21. Defendant is technically in default. Defendant was served with the Complaint 22nd February 2012, and had twenty days, until 13th March, to answer. On the final day of that period, Mr Forgeron filed his MOTION FOR MORE DEFINITE STATEMENT. However, Mr Forgeron had not yet been retained as attorney by the Club.

22. Mr Forgeron argues that he was engaged by the Club on 10th April, and that the Club ratified his previous actions in this matter. However, it is well settled that retroactive ratification of an attorney's actions in a litigation cannot serve to circumvent a filing deadline. (see *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); see also *Mission Towers v. W.R. Grace*, No. 07-287 (D.Del. 12/06/2007))

23. Thus, the Club did not timely answer the Complaint, and is in default. The default must be cured before the Club may appear before this Court with motions unrelated to its defaulted status.

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, 14 May 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, 14 May 2012.

_____

Michael Marking

(Plaintiffs' electronic document name: *mfvarc_oppos_strike_complaint_20120514a)*