STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA CONDOMINIUMS, TIMESHARES AND MOBILE HOMES

IN RE: PETITION FOR RECALL ARBITRATION

SHORES OF PANAMA RESORT COMMUNITY ASSOCIATION, INC.,

Petitioner,

v.

Case No. 2014-00-3018

UNIT OWNERS VOTING FOR RECALL,

Respondent.
_____/

SUMMARY FINAL ORDER AND DENIAL OF MOTION TO DISMISS

On January 21, 2014, Shores of Panama Resort Community Association, Inc., (the Association) filed a timely petition for recall arbitration. The Association is comprised of two condominiums, designated Shores of Panama I and Shores of Panama II (Shores I and Shores II). Respondent[1] was attempting to recall four of the seven members of the board of directors. The board did not certify the recall at a meeting called for that purpose on January 13, 2014. Respondent answered the petition on February 13, 2014.

Relevant Procedural History

The petition for recall arbitration was filed on January 21, 2014, and on January 28, 2014, Respondent filed a motion to dismiss. On February 17, 2014, the four subjects of the recall filed a motion to intervene individually which was denied on

[1] The unit owners voting for recall will be known collectively as Respondent.

February 19, 2014. The motion for reconsideration of the denial was denied on March 12, 2014. Respondent's motion to dismiss is still pending.

Order to Show Cause

On May 28, 2018 the undersigned issued an order to show cause to both parties to state why this recall petition should not be dismissed because the Division lacked authority to hear and decide a recall petition that involved a mixed-use condominium. The undersigned cited Rule 61B-45.013(8), Florida Administrative Code, and *United Grand Condo. Owners, Inc. v. The Grand Condo. Ass'n, Inc.* 929 So. 2d 24 (Fla. 3d DCA 2006), in support of the order to show cause.

The undersigned's premise that the Division did not take mixed-use condominium recall petitions was incorrect. In fact, the Division has indeed exercised jurisdiction over such condominiums and will do so here. *Home Tower condominium, Inc. v. Unit Owners Voting for Recall*, final Order Certifying Recall (September 2, 2010); *Brickell Key One Condominium Association, Inc. v. Mavic Corporation,* Arb. Case No. 2010-04-1646, Order of Dismissal for Lack of Jurisdiction (August 26, 2010).

This recall involves a community which according to the Declarations of Condominium recorded on June 28, 2007(Shores I) and November 9, 2007(Shores II), is comprised of 785 units of which 76 are non-residential/commercial units.[2] These non-residential units are described in the governing documents as men's and women's restrooms; several maintenance rooms/closets; cooling towers; cooling equipment areas; workout center; janitors' rooms; laundry chutes; commercial storage units;

[2] These non-residential units will be referred to interchangeably as commercial units or non-residential units.

commercial vending units; numerous crosswalks; elevators; the registration desk; linen closets; offices; and a media center unit. Each non-residential unit has been assigned a separate parcel number/folio number by the Bay County Property Appraiser's Office. As such, these units are titled in the names of separate owners. According to the governing documents, all the non-residential units described are included as voting interests within each condominium.

Findings of Facts

1. The Shores of Panama Resort Community Association, Inc., is the governing body of the Shores of Panama Resort Community. The Association is the entity which operates the condominium and maintains its common elements.

2. The Association is comprised of two condominiums, Shores of Panama I and II. According to the Declarations of Condominium Shores I is comprised of 479 residential units and 68 non-residential units. Shores II contains 298 residential units and 8 non-residential units. The total residential units in the Association is 709 and the total non-residential units are 76 for a total of 785 units.

3. Twelve of the non-residential units were conveyed to the Association on April 27, 2012.

4. The board of directors consists of seven directors serving two year terms: Stewart Berman, Jay Glatter, Solly Halberthal, Isere Halaberthal, Aaron Klein, Howard Konetz and Josh Ostreicher.

5. The written recall agreement was served on the board on January 6, 2014, and the parties agree that it contained 404 ballots in favor of the recall of a majority of the board: Stewart Berman, Aaron Klein, Solly Halberthal and Isere Halberthal.

6. The minutes of the meeting held on January 13, 2014, to consider the recall, include a transcript of the full meeting, a 12-page committee report from persons chosen to review and count the ballots, and a 3 page excel spread sheet which reflects the number and reason for the disqualification of ballots. These documents however, conflict on how many ballots were rejected.[3]

7. The board noticed the meeting to consider the recall for January 13, 2014, at 12:00 p.m. However the vice-president of the board, Stewart Berman, could not secure a quorum in order to begin the meeting on time.[4] He decided to postpone the meeting until 3:00 p.m. the same day.

8. Neither Mr. Berman nor any other members of the board ever appeared in the meeting room to advise any unit owners present that they did not have a quorum for the meeting and that the meeting was going to be postponed until 3:00 p.m.

9. Section 718.112.2(j)(2), Florida Statutes, provides:

> If the recall is by an agreement in writing by a majority of all voting interests, the agreement in writing or a copy thereof shall be served on the association by certified mail or by personal service in the manner authorized by chapter 48 and the Florida Rules of Civil Procedure. The board of administration *shall duly notice and hold a meeting of the board within 5 full business days after receipt of the agreement in writing.* At the meeting, the board shall either certify the written recall a member or members of the board, in which case such member or members shall be recalled effective immediately . . .

(Emphasis added).

10. Section 718. 112(2)(j)4, Florida Statutes states:

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[3] The Committee's Report appended to the minutes of the meeting states that 167 ballots were rejected; the transcript of the meeting on page 31 states that 136 ballots were rejected; and on page 32 of the transcript of the meeting it reflects that 'maybe' 224 ballots were rejected.

[4] Affidavit of Stewart Berman vice president of the board of directors. However, Mr. Berman did not state how he reached the conclusion that a quorum would not be available at noon. The reason for the lack of a quorum is that the other board members were attending a wedding.

> If the board fails to duly notice and hold a board meeting within 5 full business days after service of an agreement in writing . . . the recall shall be deemed effective.

11. At 3:00 p.m. the meeting was held and the recall was not certified by the board. According to Mr. Berman, a number of unit owners did attend the meeting and a court reporter was present to transcribe the meeting.

Conclusions of Law

The arbitrator has jurisdiction over the subject matter of and the parties to this arbitration pursuant to Sections 718.112(2)(j)(3), and 718.1255, Florida Statutes.

Motion to Dismiss

Respondent filed a motion to dismiss alleging the unit owners were not duly notified of the postponement of the 12:00 p.m. meeting to consider the recall as required by the Association's bylaws, section 718.112(2)(j)2, Florida Statutes and Rule 61B-23.0028(3), Florida Administrative Code. Respondent's request for relief is that the recall be certified, that the recalled board members be removed and the elected replacement candidates be seated in their place.

Section 718.112(2)(c), Florida Statutes, requires:

> Meetings of the board of administration at which a quorum of the members is present are open to all unit owners.
>
> (c)(1). Adequate notice of all board meetings, which must specifically identify all agenda items, must be posted conspicuously on the condominium property at least 48 continuous hours before the meeting except in an emergency.

Rule 61B-23.0028(3), Florida Administrative restricts the definition of an emergency as follows:

> The board shall hold a duly noticed meeting of the board to determine whether to certify (to validate or accept) the recall by written agreement within five full business days after service of the written recall upon the board. It shall be presumed that service of a written agreement to recall one or more board members shall not, in and of itself, constitute grounds for an emergency meeting of the board to determine whether to certify the recall.

The failure to duly notify the membership of a board meeting to consider a written recall agreement is a violation, as will be explained below, to which certain penalties attach. The word "duly" is defined as "in a due manner of time"; "in the proper or expected way". "duly" Merriam-Webster.com.2014. The most convincing evidence presented has persuaded the undersigned that the Association did not hold a duly noticed meeting of the board to consider the recall as required by its governing documents and the law.

The Association produced an affidavit from Mr. Berman, the vice president of the board which states in pertinent part:

> On Monday, January 13, 2014, a duly noticed meeting of the Board of Directors of the Association will [sic] scheduled for 12 o'clock noon. More than 48 hours notice had been provided. The purpose of the meeting was to consider the written recall petitions served upon the Board of Directors on January 6, 2014.
>
> Shortly before noon it became apparent that there would not be a quorum present at 12 o'clock. I went to the meeting room to set up the telephone for the conference call and to announce that the meeting would be delayed. I set up the telephone on the conference table but no owners were present to advise of the delay.
>
> I returned to the front desk to continue to arrange a quorum with the intention to return to the meeting room at 12 o'clock to advise of the delay of the meeting. At approximately noon, I was still on the telephone trying to arrange the meeting when I saw Billy, a member of the management company, walking through the lobby. Because I was still on the telephone I instructed Billy to notify the owners who were present and planned to attend the meeting, that the meeting would be continued until three o'clock. This exchange was caught on a lobby video camera, a copy of the video is attached hereto.

> From 12:00 o'clock noon to 3:00 p.m. I was present in the lobby and no one came to me to question why the meeting was not going forward or whether the meeting would be held later therefore, I assumed Billy had advised the owners as I had instructed. At 3:00 p.m. I went to the club room where the meeting was scheduled to be held. There were numerous owners in attendance along with a court reporter retained by the recall committee to transcribe the meeting.

Respondent produced two opposing affidavits from unit owners, Lionel Furst and Bill Bowling, which stated they arrived at the meeting room at 11:45 a.m. and remained until 1:20 p.m. and they never saw Mr. Berman enter the room where the meeting was to be held.[5] Respondent produced a third affidavit from owner, Jeannie Smith, who said she arrived at 11:45 a.m. in the meeting room and remained until 6:00 p.m. and did not see Mr. Berman in the meeting room between 11:45 a.m. and noon. Mr. Bowling's affidavit also stated:

> I can state of my own personal knowledge that no member of the Association's Board of Directors, or any other person on behalf of the Association's Board of Directors, appeared or was present in the meeting room of Shores of Panama at 12:00 noon on January 13, 2014, and that no one convened a meeting of the Association's Board of Directors at that time.

Mr. Furst's affidavit and Ms. Smith's affidavit mirrored Mr. Bowling's with respect to the absence of any board members. In accordance with Mr. Berman's affidavit, Furst, Smith and Bowling agree that Mr. Berman opened the meeting at 3:05 p.m.

Section 26 of the Association's bylaws states:

> Adjourned Meetings. If at any meeting of the Board of Directors there is less than a quorum present, the majority of those present may adjourn the meeting from time to time until a quorum is present and after notice has been provided. At any adjourned meeting any business that might have

[5] Mr. Furst and Mr. Bowling both executed their affidavits on March 4, 2014.

been transacted at the meeting as originally called may be transacted without further notice.

The Association provided no evidence rebutting Respondent's motion to dismiss. It produced an affidavit from Clair Pease, the Community Association Manager (CAM), that simply states that she received a call from one of her employees that the meeting was being moved to 3:00 p.m. Ms. Pease said she was the employee who told those who had gathered in the meeting room, specifically mentioning Ms. Denise Hindes and the court reporter, that the meeting would reconvene at the later hour.

No member of the board made the announcement of the new meeting time, the CAM did so. Ms. Pease apparently received her instructions from Mr. Billy Kimensky, her employee, who received his instructions from Mr. Berman who remained on the telephone in his office attempting to secure a quorum. The Association's bylaws only authorize board members present, to adjourn a meeting when a quorum cannot be met.

The Association suggests that because one or two owners were in the meeting room when Ms. Pease made the announcement mitigates the severity of the notice violation. The issue is not whether any owners did in fact find out that the meeting had been postponed but whether the change in the time had been duly noticed by the Association. The Association did not duly notice the meeting called to consider the recall.

Remedy for Failing to Duly Notice the Board Meeting

Respondent in its motion to dismiss argues that, "in view of the fact that the matter of the defective notice of the recall board meeting and the matter of the illegally held/improper meeting of Petitioner's board of directors are set forth on the face of the

petition for arbitration, a ruling on this motion to dismiss requires no consideration of any documentation or information outside the four corners of the petition for arbitration and its accompanying exhibits". Respondent is incorrect.

The failure to duly notice the meeting to consider the recall does not confine the arbitrator to a resolution of the dispute referring only to the four corners of the petition and its exhibits. What it does is confine the arbitrator to review and determine the outcome of the recall using only the facial validity of the 404 ballots cast and the governing documents. *Ringler v. Tower Forty One Association, Inc.,* Arb. Case No. 2005-04-1867, Summary Final Order (December 12, 2005)(because the recall ballots were facially valid the recall was certified despite the failure of the Association to duly notice and hold board meeting to consider the recall as required by the law); *Monaco Garden Condominium Apartments, Inc. v. Unit Owners Voting for Recall,* Arb. Case No. 2010-01-9408, Summary Final Order (May 14, 2010)(When the rule requires certification of a recall for violation of section 718.112(2)(j), Florida Statutes, the arbitrator may only reject an individual ballot for obvious defects within the document itself which render the individual ballot facially invalid); see also, *Barry Saxton v. Laurel Terrace Inc.*, Arb. Case No. 2013-03-0288, Summary Final Order (September 6, 2013).

No matter the Association's conduct with regard to the process immediately following the service of a recall agreement, nothing will validate recall ballots which are otherwise void on their face. *The Decoplage Condominium Association, Inc. v Unit Owners Voting for Recall*, Arb. Case No. 2002-5830, Summary Final Order (January 15, 2003). The test of the validity of the ballots involves determining whether the recall was: a) handled substantially in compliance with Rule 61B-50.105, Florida

Administrative Code; and b) whether there are defects in the ballots which render them unenforceable. *Id.* If after the review, the arbitrator finds the vote for recall short of a majority, the non-certification of the recall will be upheld despite the Association's failure to duly notice the meeting after service of the recall agreement. The recall ballot forms conformed to the requirements of the statute because Respondent utilized the recommended forms which are available on the Division's website. The arbitrator has already found that the board failed to comply substantially with the requirements of the law by failing to duly notice the meeting to consider the recall. The remaining issue is reviewing the recall ballots for facial validity.

Are the Ballots Facially Valid?

Only seven of the ballots are facially, fatally defective and are therefore, eliminated from the count of voting units. Five are invalid because the date the ballot was signed and the signature of the voter are cut-off from the bottom of the ballots - Jaime Keeling, units 423 and 901; Bradley D. Davey unit 712; Bobbie McCann unit 1511; and Benny French unit 1604.

On the ballot cast by Cheryl Deanna North Hughes who owns unit 613-c, Ms. Hughes' signature was an electronic signature. It was simply the owners' full name in a cursive font. This is not a signature and the ballot is also invalidated. Lastly, one ballot was so poorly copied it cannot be deciphered in any respects. This leaves the number of ballots cast for recall at 397 (404 – 7 = 397).

Voting Interests

Respondent contends the 76 commercial unit owners should not be counted as part of the voting interests of the Association and ballots cast by these commercial unit

owners should not be counted toward the number of valid ballots cast for recall. The Association's count of 785 voting interests without dispute includes 12 non-residential units owned by the Association. These units were improperly included in the count. Section 718.112(2)(b)(2), Florida Statutes (no voting interest or consent right allocated to a unit owned by the association shall be exercised or considered for any purpose, whether for a quorum, an election or otherwise). This leaves 773 voting interests of which a majority is 387.

Section 718.104(4)(j), Florida Statutes, requires the declaration to contain or provide for the unit owners' membership and voting rights in the association. The Declarations of Condominium provide the following with respect to the distribution of voting rights in both Shores I and Shores II condominiums:

> Definitions. Section 2R, Voting Interests means the voting rights distributed to the association members pursuant to s. 718.104(4)(j). In a multicondominium association, the voting interests of the association are the voting rights distributed to the unit owners in all condominiums operated by the association. On matters related to a specific condominium in a multicondominium association, the voting interests of the condominiuim are the voting rights distributed to the unit owners in that condominium.
>
> Section 4.C 5 The Vote. provides, each unit shall be entitled to one (1) vote, said vote to be cast by the unit owner in the manner prescribed by the By-Laws of the Association.[6]
>
> Section 6D. Approval or Disapproval of Matters. Directs that whenever the decision of a unit owner is required upon any matter, whether or not the subject of an Association meeting, such decision may be expressed by written agreement as well as by duly recorded vote and shall, in either event, be expressed by the same person who would cast

[6] Section 9 of Shores II's By-Laws states: "at any meeting of the members, the voting interest of each unit shall be entitled to cast one (1) vote for each unit he owns which shall not be cumulative."

the vote of the unit if in an Association meeting, unless the joinder of record unit owners is specifically required by the Declaration.

The governing documents for the condominiums make no distinction between residential or commercial unit owners and their right to vote on Association business. Both types of units are considered voting interests and unless "otherwise" limited by law, were properly counted as such.[7] The votes in favor of recall totaled 397 which is a majority of the voting interests in the condominiums. The recall effort was successful. This determination is case dispositive and none of the remaining issues raised by Respondent will be addressed.[8] Accordingly,

1. The recall is CERTIFIED and Stewart Berman, Aaron Klein, Solly Halberthal and Isere Halberthal are removed from the board effective the date of the issuance of this order.

2. Within five (5) full business days from the effective date of this recall, Stewart Berman, Aaron Klein, Solly Halberthal and Isere Halberthal shall deliver any and all records of the Association in their possession to the board of directors.

3. As four of the seven members of the board have been recalled, replacement candidates Dean Lautzenheiser, Denise Hindes, Jerry Dow and Enoch Hartman will

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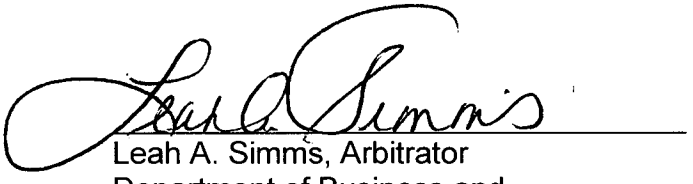
[7] Respondent's second argument that the commercial units should not be counted because they are prohibited by Section 718.404(2), Florida Statutes, from voting for a majority of the board of directors will not be addressed. The recall is certified without an analysis of whether this statute applies to recalls.

[8] Respondent also alleges that 21 unit owners' voting rights were suspended due to a delinquency of more than 90 days in their monetary obligations to the Association. These facts cannot be determined without resort to a review of extrinsic evidence, that is, the Association's accounts receivable records, which is prohibited. *Sun Isle Condominium Ass'n. of Merritt Island, Inc v. Unit Owners Voting for Recall*, Arb. Case No. 2008-05-2748, Summary Final Order (October 31, 2008)(After failing to comply with filing requirements, a recall must be certified despite claims that certain ballots were signed by non-owners or forged, because those facts could not be established without looking beyond the four corners of the document.)

take their seats on the board shall take seats on the board effective immediately for the remainder of the term of the seats they fill.

4. Respondent's motion to dismiss is **DENIED**.

DONE AND ORDERED this 25th day of June, 2014, at Tallahassee, Leon County, Florida.



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