

EIGHTH JUDICIAL DISTRICT  
COUNTY OF COLFAX  
STATE OF NEW MEXICO

FILED  
8TH JUDICIAL DISTRICT COURT  
COLFAX COUNTY NM  
FILED IN MY OFFICE  
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LAUREN M. FELTS-SALAZAR  
DISTRICT COURT CLERK  
Evanna Maldonado

**BOARD OF DIRECTORS OF  
ASSOCIATION OF ANGEL FIRE  
PROPERTY OWNERS, INC.**, a  
New Mexico non-profit corporation,

Plaintiff.

v.

D-809-CV-2020-00183

**ANGEL FIRE RESORT OPERATIONS, LLC**,  
a New Mexico limited liability company.

Defendant.

**COMPLAINT FOR DECLARATORY JUDGMENT,  
BREACH OF FIDUCIARY DUTY AND INJUNCTIVE RELIEF**

Plaintiff Board of Directors of Association of Angel Fire Property Owners, Inc. (“AAFPO”),  
by and through its attorneys, Walcott, Henry & Winston, P.C., for its Complaint for Declaratory  
Judgment, Breach of Fiduciary Duty and Injunctive Relief, states as follows:

**General Allegations**

1. AAFPO is a New Mexico non-profit corporation with its principal place of business in Colfax County, New Mexico.
2. Defendant Angel Fire Resort Operations, LLC (the “Resort”) is a New Mexico limited liability company with its principal place of business in Colfax County, New Mexico.
3. On April 20, 1995, the United States Bankruptcy Court for the District of New Mexico entered an Amended Joint Plan of Reorganization (the “Plan”) that governs rights and duties between AAFPO and the Resort. The Plan is attached hereto and incorporated herein by reference as **Exhibit 1**.

4. Section 4.16(j)(ii) of the Plan was amended by Order dated February 21, 1996. (Ex. 1.)

5. AAFPO was incorporated on July 11, 1995. AAFPO's Articles of Incorporation (the "Articles") are attached hereto and incorporated herein by reference as **Exhibit 2**.

6. On February 15, 1996, AAFPO filed its By-Laws with the State of New Mexico, which are attached hereto and incorporated herein by reference as **Exhibit 3**.

7. On September 27, 1995, AAFPO filed a Supplemental Declaration of Restrictive Covenants and Easements ("Supplemental Declaration") in the Taos County Clerk's Office. The Supplemental Declaration is attached hereto and incorporated herein by reference as **Exhibit 4**.

8. Disputes between AAFPO and the Resort are governed by the provisions of Exhibits 1-4 hereto.

9. The Court has jurisdiction and venue to determine the disputes between the parties.

### **Count I**

#### **Declaratory Judgment Regarding the Lawful Constitution of AAFPO's Board of Directors**

10. AAFPO incorporates herein by reference the General Allegations as if fully set forth herein.

11. On June 27, 2020, a regular AAFPO Board meeting was held to elect new officers for 2020. As of that date, the Board consisted of nine members.

12. On July 9, 2020, an Executive Session was called, during which four Directors resigned. As of that date, the Board consisted of five members.

13. On August 7, 2020, another Board member resigned, leaving the Board with four members.

14. On August 13, 2020, the remaining four Directors met and nominated four new

Directors to fill positions left vacant by resignations. As of August 13, 2020, the Board had eight Directors.

15. Since August 13, 2020, the Resort has repeatedly taken the position that the Board is not legally constituted because it did not have a quorum necessary to elect new Directors.

16. AAFPO's By-Laws, Article VI, Section 1 state that "the Association shall be managed by a Board of nine (9) Directors . . . ." (Ex. 3.)

17. NMSA 1978, § 53-8-20 states:

A. A majority of the number of directors fixed by the bylaws, or in the absence of a bylaw fixing the number of directors, then of the number stated in the articles of incorporation, shall constitute a quorum for the transaction of business, unless otherwise provided in the articles of incorporation or the bylaws; but in no event shall a quorum consist of less than one-third of the number of directors so fixed or stated. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by the Nonprofit Corporation Act, the articles of incorporation or the bylaws.

18. AAFPO's By-Laws, Article VI, Section 5, states:

Vacancies. In the event of death, resignation or removal of an elected director, his successor **shall be selected by the remaining elected directors** and shall serve until the next election of directors. (Emphasis added).

19. N.M.S.A. 1978, § 53-8-19 (1975), states in pertinent part:

A. Any vacancy occurring in the board of directors and any directorship to be filled by reason of an increase in the number of directors may be filled **by the affirmative vote of a majority of the remaining directors, though less than a quorum of the board of directors**, unless the articles of incorporation or the bylaws provide that a vacancy or directorship so created shall be filled in some other manner, in which case such provision shall control. (Emphasis added).

20. Pursuant to the By-Laws, Article VI, Section 5, and NMSA 1978, §§ 53-8-19 and 53-

8-20, the Board had the authority, **and indeed the duty**, to appoint four new Directors so that the Board would have a quorum necessary to conduct the business of AAFPO on behalf of its members.

21. Consistent with the Declaratory Judgment Act, §§ 44-6-1, *et seq.* (1975), there is an actual controversy between the parties regarding interpretation of the By-Laws and provisions of the New Mexico Nonprofit Corporation Act, §§ 53-8-19 and 53-8-20, for which a decree from this Court may terminate any uncertainty or controversy.

22. AAFPO respectfully requests the Court enter a Declaratory Judgment that decrees that the current constitution of the Board of AAFPO is legal and that the Board has the authority to conduct business on behalf of AAFPO's members.

## **Count II**

### **Declaratory Judgment Regarding AAFPO's Right to Information**

23. AAFPO incorporates herein by reference the General Allegations and Count I as if fully set forth herein.

24. Pursuant to the Plan (Ex. 1.), the claims of the Property Owners, who are now members of AAFPO, were resolved in Section 4.16, by mutual agreements between the predecessor to the Resort and AAFPO and its members, in pertinent part to this dispute, as follows:

- a. AAFPO and its members would have rights to a Negative Easement for use of the Resort's Amenities (Ex. 1, § 4.16(a));
- b. AAFPO's members would pay an Annual Assessment, or would not have the right to use the Amenities (Ex. 1, § 4.16(b));
- c. The Resort would spend amounts received from the Annual Assessment for upkeep, maintenance, operation and improvement of the Amenities (Ex. 1, § 4.16(c));
- d. The Resort will provide an "annual amenities budget from the [Resort] prior to the

Annual Assessment being spent showing [AAFPO] how the [Resort] will break out the Annual Assessment proportionally by amenity . . .” (Ex. 1, § 4.16(c));

- e. The Resort “shall prepare an annual report of the Annual Assessment collected for the prior year showing how the Annual Assessment was spent.” (Ex. 1, § 4.16(c));
- f. The Resort “must place the Annual Assessment funds in a separate segregated account to be held in trust for the Property Owners . . .” (Ex. 1, § 4.16(f));
- g. AAFPO’s Board “will have veto power over the annual budget or any portion of the Annual Assessment contemplated by the [Resort] to be used for other than the Amenities, prior to those sums being spent.” (Ex. 1, § 4.16(f));
- h. AAFPO “will take responsibility for collection of the annual assessment in order to comply with requirements of New Mexico law wherein the [AAFPO] board must be responsible for annual assessment collection.” (Ex. 1, § 4.16(f));
- i. “A collection process will be worked out wherein [AAFPO] will subcontract the annual assessment collection to another party which could be the [Resort]. The process will be worked out with the [Resort] whereby the [AAFPO] board cannot unreasonably withhold the Annual Assessment funds from the [Resort].” (Ex. 1, § 4.16(f));
- j. “The [Resort] will not increase Annual Assessment for ‘commercial’ facilities, e.g., a new restaurant. The [Resort] understands that the Committee does not expect the Property Owners to use such facilities for free. Property Owners will be able to use, and will be charged the same rates as the public for use of these ‘commercial’ facilities.” (Ex. 1, § 4.16(i)(i));
- k. “The annual amenities budget provided to [AAFPO] each year shall include

\$100,000.00 or 5% of the collected annual assessments every year . . . whichever is greater.” (Ex. 1, § 4.16(j)(ii));

- l. As part of the 5% due to AAFPO, the Resort is to pay AAFPO “\$20,000.00 or 1% of the collected annual assessments every year, whichever is greater” as a “discretionary account” to cover “AAFPO’s ordinary and reasonable operating expenses.” (Ex. 1, § 4.16(j)(ii));
  - m. “The [Resort] agrees . . . that the [AAFPO] responsibilities for collection of assessments will be contracted to the Purchaser or its successors in interest and that they will be performed for consideration of no more than \$1 chargeable to the [AAFPO] discretionary account as an expense of [AAFPO].” (Ex. 1, § 4.16(j)(ii));
  - n. “The [AAFPO] Board will have an advisory role on issues such as operating programs, annual budgets and capital improvements which fit within the limitation described herein. The [Resort] agrees to review the amenities operating and capital budget with the [AAFPO] Board prior to the fiscal year in which Annual Assessment monies are contemplated to be spent.” (Ex. 1, § 4.16(n)(vii)).
25. Pursuant to the Supplemental Declaration:
- a. “Declarant shall assess and the Property Owner of each Homesite shall pay to Declarant a nonrefundable annual assessment . . . to be used only for improvement, maintenance, upkeep, repair and operation of and additions to the Amenities.” (Ex. 4, § 3.A.)
  - b. “Declarant or the Association, as may be agreed between them, may enforce the provisions of this Paragraph 3.” (Ex. 4, § 3.C.)
  - c. “[T]he Property Owners irrevocably appoint the Association, and the Association

hereby accepts such Appointment, as their sole and exclusive agent for purpose of enforcing the provisions of Paragraphs 1 and 5 hereof and no Property Owner shall have an individual right to enforce the provisions of said paragraphs.” (Ex. 4, § 10.)

26. The Articles state, in pertinent part, that AAFPO shall have the power to:
  - a. Enforce the Protective Covenants and Restrictions (Ex. 2, Art. II(d));
  - b. Levy assessments and enforce payment thereof (Ex. 2, Art. II(e));
  - c. Review and approve the annual operating budget to be submitted by the Resort (Ex. 2, Art. II(f));
  - d. File or record liens and foreclose upon such liens for non-payment of assessments (Ex. 2, Art. II(h)).
  
27. The By-Laws set forth the Duties and Powers of the Board, including:
  - a. “To, in accordance with the Supplemental Declaration, establish the method for calculating the amount of yearly assessment dues to be paid by the members of the Association and to levy and collect those assessments, and to establish and collect reasonable annual assessments for the use of any or all of the Common Facilities and maintenance of the integrity of the Supplemental Declaration as the Board may deem necessary or desirable from time to time for the purpose of equitably allocating amount property owners and the public the cost of operation thereof.” (Ex. 3, Art. VIII, § 14.)
  
  - b. “The method for calculating the amount of the assessments will be based upon the percentage of use of the Amenities by the members compared to that of the general public. These figures will be kept by the [Resort] along with the information on the income generated from the use of all Amenities, which will be annually audited and

submitted to the Board.” (Ex. 3, Art. VIII, § 14.)

- c. “[T]he [Resort] shall, no less than three (3) months prior to the beginning of the amenity year, submit a proposed operating budget, including the proposed yearly assessment amounts that individual property owners shall pay, and a list of the total amount of dues assessed. The Board shall have the right to review and approve said budget.” (Ex. 3, Art. VIII, § 14.)
- d. “The reasonableness of the annual assessment in the budget will be based on: 1) the pro rata share of the Members’ versus the general public’s use of the Amenities (broken down by amenity), compared to the income generated by each; and 2) the estimated operating expenses (by amenity), using the consumer price index as the basis for raising dues if necessary. This information will assist the Board in determining whether or not the Members’ assessments should be increased or decreased for the following fiscal year. (Ex. 3, Art. VIII, § 14.)
- e. “To perform all acts required of it under the Covenants and Restrictions, including but not limited to the enforcement of collection of the assessments, the hiring and designation of a collection agent, and enforcement of the Land Use Easement granted the Association and the Members in the Supplemental Declaration.”  
(Ex. 3, Art. VIII, § 15.)
- f. “[T]he Board shall have the right to review the [Resort’s] amenities operating and capital budgets prior to the amenity year in which annual assessment monies are contemplated to be spent.” (Ex. 3, Art. VIII, § 17.)

28. The provisions of the Plan, Supplemental Declaration, Articles and By-Laws should all be considered when determining the rights, duties and obligations between AAFPO and the Resort.



29. AAFPO also has statutory duties as a Homeowners' Association:
  - a. Pursuant to NMSA 1978, § 47-16-6(B), AAFPO has the power to lien and foreclose liens on lots for unpaid assessments.
  - b. Pursuant to NMSA 1978, § 47-16-6(D), AAFPO has the duty to provide a recordable statement setting forth the amount of unpaid assessments against a lot owner's lot within ten business days after receipt of a request for such statement.
  - c. Pursuant to NMSA 1978, § 47-16-7(E), AAFPO shall adopt a budget annually and provide a copy of the budget to all lot owners.
  - d. Pursuant to NMSA 1978, § 47-16-7(F), AAFPO shall provide all lot owners a copy of the annual budget listing all fees and fines that may be charged to a lot owner by AAFPO or any management company retained by AAFPO.
  - e. AAFPO has an obligation to disclose the terms of any contract negotiated between AAFPO and any management company.
30. AAFPO has statutory and contractual duties to its members to provide information regarding what is being done with their annual assessments.
  31. Currently, in order to discharge its statutory and contractual duties, AAFPO must rely on information to be provided by the Resort.
  32. Currently, the Resort collects assessments from members of AAFPO.
  33. The Resort maintains a database tracking compliance of AAFPO's members in paying assessments.
  34. Pursuant to the Plan, the Resort is to pay AAFPO \$100,000 or 5% of assessments collected, whichever amount is greater, annually for AAFPO's amenities budget. (Ex. 1, § 4.16(j)(ii)).

35. Pursuant to the Plan, as part of the 5% due to AAFPO, the Resort is to pay AAFPO \$20,000 or 1% of assessments collected, whichever amount is greater, annually for AAFPO's discretionary account. (Ex. 1, § 4.16(j)(ii)).

36. Currently, the Resort pays 1% of assessments to AAFPO, less gross receipts taxes, on a monthly basis.

37. AAFPO is not receiving accounting from the Resort to show what the Resort is doing with the remaining collected assessments that should be paid to AAFPO.

38. Pursuant to the Plan, the Resort is to provide an annual report for AAFPO showing how it has spent the 95% of assessments that are not to be paid to AAFPO. (Ex. 1, § 4.16(c)).

39. AAFPO is currently not receiving a report from the Resort regarding its annual expenditures of collected assessments.

40. Pursuant to the Plan, the Resort is to provide a budget for AAFPO's approval regarding how future assessments will be spent. (Ex. 1, §§ 4.16 (c)& (f)).

41. AAFPO is not receiving information from the Resort required by the Plan prior to the Resort using the money it collects.

42. Currently, there is no written agreement between AAFPO and the Resort regarding the Resort's collection of and payment of monies due to AAFPO from AAFPO's members.

43. Although the Plan indicates that the Resort agrees to collect assessments on behalf of AAFPO, the Plan does not obligate AAFPO to contract with the Resort for the collection of assessments.

44. The Resort manages a database of AAFPO members. Although the Resort has maintained possession and control of the database, it is AAFPO's responsibility to be able to assess its members using accurate and updated membership information.

45. Currently, there is no written agreement between AAFPO and the Resort regarding the ownership and maintenance of the membership database.

46. AAFPO has made requests for access to information in the membership database from the Resort, and the Resort has refused to provide much of the information AAFPO has requested.

47. Consistent with the Declaratory Judgment Act, §§ 44-6-1, *et seq.* (1975), there is an actual controversy between the parties regarding interpretation of the Plan, Declaration, Articles, By-Laws and applicable statutes, regarding what information AAFPO is entitled to receive from the Resort, for which a decree from this Court may terminate any uncertainty or controversy.

### **Count III**

#### **Declaratory Judgment AAFPO's Right to Collect Assessments**

48. AAFPO incorporates herein by reference the General Allegations and Counts I and II as if fully set forth herein.

49. Currently, the Resort is collecting assessments from members of the Association on behalf of AAFPO.

50. There is no formal agreement between AAFPO and the Resort regarding the rights, duties and responsibilities of the parties in the Resort's collection of assessments on behalf of AAFPO.

51. AAFPO has duties to its members to be responsible and account for the assessments paid by its members.

52. The Resort's control over the collection of and accounting for assessments is an impediment to the AAFPO's fulfillment of its duties and responsibilities to its members.

53. Pursuant to the Plan, AAFPO "will take responsibility for collection of the annual assessment in order to comply with requirements of New Mexico law wherein the [AAFPO] board

must be responsible for annual assessment collection.” (Ex. 1, § 4.16(f)).

54. The Plan, Section 4.16(j)(ii), also makes clear that to the extent the Resort has agreed to take on the responsibility of collections, it is as the agent for AAFPO. As principal, AAFPO may choose to use the Resort for collections, or choose to collect assessments in some other way.

55. In order to fulfill its statutory and contractual duties and responsibilities to its members, AAFPO’s Board has determined that AAFPO must take responsibility for collection of the annual assessment by contracting with a third party who is not the Resort.

56. The Resort, upon information and belief, will oppose turning over the collection of assessments from AAFPO’s members to AAFPO’s Board.

57. Consistent with the Declaratory Judgment Act, §§ 44-6-1, *et seq.* (1975), there is an actual controversy between the parties regarding interpretation of the Plan, Declaration, Articles, By-Laws and applicable statutes, regarding whether AAFPO is entitled to take responsibility for collection of assessments over from the Resort, which a decree from this Court may terminate any uncertainty or controversy.

#### **Count IV**

##### **Breach of Fiduciary Duty**

58. AAFPO incorporates herein by reference the General Allegations and Counts I, II and III as if fully set forth herein.

59. For many years, the Resort has been collecting monies from members of AAFPO on behalf of AAFPO, of which some monies belong to AAFPO.

60. For many years, the Resort has had the contractual obligation, pursuant to the Plan and the Supplemental Declaration to provide information to AAFPO regarding what monies have been collected, and how those monies have been and will be spent.

61. The Resort has a fiduciary duty to AAFPO in handling AAFPO monies and in providing AAFPO information.

62. The Resort has a contractual and fiduciary duty to AAFPO to pay AAFPO \$100,000 or 5% of assessments collected, whichever amount is greater, annually for AAFPO's Amenities budget. (Ex. 1, § 4.16(j)(ii)). The Resort has not paid AAFPO its contractual share of assessments.

63. As part of the 5% of assessments due to AAFPO, the Resort has a contractual and fiduciary duty to AAFPO to pay AAFPO \$20,000 or 1% of assessments collected, whichever amount is greater, annually for AAFPO's discretionary account. (Ex. 1, § 4.16(j)(ii)). The Resort has not paid AAFPO its contractual share of assessments.

64. Currently, because AAFPO has not received full accounting from the Resort regarding how it has used assessments it has collected, AAFPO has no idea how much of past assessments should have been, but were not, paid to AAFPO by the Resort.

65. Assessments due to AAFPO are to be kept by the Resort in a segregated account, and held in trust for the benefit of AAFPO. (Ex. 1, § 4.16(f)). The Resort has a contractual and fiduciary duty to hold monies in trust for the benefit of AAFPO and account for those monies.

66. Upon information and belief, the Resort has been failing and refusing to provide information regarding its use of collected assessments for many years.

67. Currently, the Resort is withholding information from AAFPO regarding the monies it has collected from AAFPO members, the monies it has spent on amenities pursuant to the terms of the Plan and Supplemental Declaration, and the monies that should have been paid to AAFPO.

68. The Resort withholding information is a breach of its fiduciary duty.

69. The Resort failing to pay AAFPO amounts due to AAFPO is a breach of fiduciary duty.

70. AAFPO should be entitled to any damages suffered as a result of the Resort's breach of fiduciary duties, including the cost of having to seek information from the Resort in this lawsuit.

### **Count V**

#### **Injunctive Relief**

71. AAFPO incorporates herein by reference the General Allegations and Counts I, II, III and IV as if fully set forth herein.

72. Currently, the Resort is paying AAFPO 1% of collected assessments, less gross receipts taxes, on a monthly basis.

73. Pursuant to the Plan, AAFPO should be receiving 5% of collected assessments.

74. If AAFPO does not receive monies it is due pursuant to the Plan, AAFPO may suffer irreparable harm as a result of the Resort using said monies without AAFPO oversight or approval.

75. AAFPO has a duty to its members to account for the 5% of collected assessments it is entitled to receive from the Resort under the Plan, and has been and will continue to be unable to perform its fiduciary duties if the Resort does not begin making these payments to AAFPO.

76. The Resort will not suffer harm as a result of being compelled to perform its agreed upon contractual duties under the Plan to pay 5% of assessments to AAFPO.

77. There is a public interest in the thousands of members of AAFPO to having monies due to AAFPO, which are to be used for the benefit of the members, paid to AAFPO by the Resort, pursuant to the terms of the Plan.

78. AAFPO is entitled to a preliminary and permanent injunction ordering the Resort to pay AAFPO 5% of assessments it collects until such time as AAFPO takes over the collection of assessments from the Resort.

**Wherefore**, AAFPO respectfully requests the following relief:

1. A Declaratory Judgment that AAFPO has a legally constituted Board, pursuant to statute and its By-Laws;
2. A Declaratory Judgment that AAFPO has the right to information from the Resort regarding the monies it has collected from AAFPO members, access to the database maintained on AAFPO members, information on the monies the Resort has spent on amenities pursuant to the terms of the Plan and Supplemental Declaration, and an accounting of the monies that should have been paid to AAFPO;
3. A Declaratory Judgment that AAFPO has the authority to take over collection of assessments from its members from the Resort;
4. A judgment for any and all damages arising from the Resort's Breach of Fiduciary Duty;
5. A preliminary and permanent injunction requiring the Resort to pay 5% of assessments it collects until such time as AAFPO takes over the collection of assessments from the Resort;
6. Costs of suit and reasonable attorneys' fees, pursuant to § 4.16(e) of the Plan; and
7. Such further and additional relief as the Court deems just and proper.

Respectfully submitted,

WALCOTT, HENRY & WINSTON, P.C.

By:     /s/ Donald A. Walcott      
Donald A. Walcott  
150 Washington Ave., Suite #207  
Santa Fe, New Mexico 87501  
(505) 982-9559/982-1199 fax  
Attorneys for Plaintiff AAFPO