

EIGHTH JUDICIAL DISTRICT
COUNTY OF COLFAX
STATE OF NEW MEXICO

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Cause No. D-809-CV-2020-00183

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

Plaintiff.

v.

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

Defendant.

**MOTION FOR PRELIMINARY INJUNCTION
TO ACCESS MEMBERSHIP DATABASE FOR ELECTION
AND REQUEST FOR EXPEDITED HEARING**

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 Motion for Preliminary
Injunction to Access Membership Database for Election and Request for Expedited Hearing, states
as follows:

I. Introduction.

In Count III of its First Amended Complaint, AAFPO has requested a Declaratory Judgment
that AAFPO is entitled to access to the membership database (the “Database”) that is currently in
the possession of the Resort, and to which the Resort continues to refuse AAFPO access. At this
time, it is necessary in order for AAFPO to conduct an election that complies with the law, is fair,
and does not have an appearance of impropriety, for AAFPO to have access to the Database.

II. History of the Database dispute.

This is a dispute between AAFPO and the Resort that goes back to the beginning of both entities. Attached hereto and incorporated herein by reference as **Exhibit 1** is a letter from Robert Dillon, a designated member of the original Board of Directors of AAFPO, dated July 26, 1997. On page 3, Mr. Dillon cites the Plan (Exhibit 1 to the Complaint), § 4.16(j)(ii):

The Purchaser agrees for itself and successors in interest 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, p. 3.) Mr. Dillon correctly points out that “this acknowledges that assessment collection is the responsibility of the Association.” (*Id.*) Then, Mr. Dillon sets forth reasons why AAFPO needs possession of the Database, including.

1. How is the AAFPO to establish means for evidencing membership in the Association? (See Art. VIII, Sec. 6 of the By-Laws.)
...
4. How can AAFPO determine who the owner of record is for each property? . . .

(*Id.*, p. 4.) Each of these questions must be answered for AAFPO to hold an election that complies with the law and By-Laws by giving every member in good standing notice of an election.

Mr. Dillon pointed out that despite the language in § 4.16(j)(ii) of the Plan, there was no contract between AAFPO and the Resort regarding collection of assessments. “[W]ithout a contract and some manner of verification, how can the AAFPO Board assure membership that what is reported to it by the Resort is in fact true?” (Ex. 1, pp. 4-5.) Mr. Dillon was quite prescient, as the same question remains today.

Attached hereto and incorporated herein by reference as **Exhibit 2** is a letter from AAFPO’s

attorney, Terrence R. Kamm to Daniel Rakes, Executive General Counsel for the Resort, dated May 13, 2004. Mr. Kamm expresses concern that the Resort had entered into an agreement with a third-party billing agent without AAFPO being a party to the contract, despite AAFPO being the principal and the Resort the agent regarding collection of assessments. Mr. Kamm further expressed concern that “the Resort is hedging in recognizing AAFPO’s ownership of the membership database. The database belongs to AAFPO.” Mr. Kamm goes on to insist that the Resort enter into a contract with AAFPO as required by the Plan. (Ex. 2, pp. 1-2.)

Attached hereto and incorporated herein by reference as **Exhibit 3** is a letter from Daniel Rakes to Terrence R. Kamm, dated May 18, 2004. Mr. Rakes states, in pertinent part:

I have informed you in my previous letters of the Resort’s position concerning the database. The Resort has never allowed the database to be used for any purpose without the consent of AAFPO. We will continue to honor any AAFPO request regarding the database.

(Ex. 3.) As of the date of this Motion, the Resort is not honoring AAFPO’s request for access to the Database for the purpose of ensuring notice to all members in good standing of the upcoming election.

A draft of an agreement by Mr. Kamm and a red-line of the agreement produced by the Resort in discovery are attached hereto and incorporated herein by reference as **Exhibits 4 and 5**, respectively. The proposed Agreements show that while Mr. Kamm believed that only AAFPO owned the Database, the Resort and Mr. Rakes believed that the Resort and AAFPO jointly owned the Database. Nevertheless, there clearly was agreement between the parties that AAFPO had a right to access the Database for AAFPO’s purposes. The Resort’s red-line version states in pertinent part:

10. Access to the Angel Fire Resort – AAFPO database will be governed by the following considerations:
 - (a) The Amended Joint Plan of Reorganization and the underlying documents are the controlling documents in the

relationship between the Resort and AAFPO.

(b) **AAFPO, as principal**, has the authority to approve of any third-party billing agent for the collection of the Annual Assessment.

(c) **AAFPO and the Resort are the owners of an electronic database** compiled for the billing and collection of the Annual Assessment (the “Database”), which contains data concerning the members of AAFPO’s. Both parties agree not to distribute, disburse, or dispose of the Database, or any portion thereof, without the other’s written approval.

(f) **AAFPO may access the Database for those purposes consistent with the terms and conditions of the governing documents**, provided, however, that the information on the Database may not be used for commercial or political mailings.

(Ex. 5)(emphasis added).

III. The Resort has become an adversary party in the 2021 AAFPO election.

Contrary to Mr. Rakes’ representations in Exhibits 3 and 5, the Resort is currently using the Database for purposes to which AAFPO has not consented. Contrary to Mr. Rakes’ representations in Exhibits 3 and 5, the Resort is currently not allowing AAFPO any access to the Database. Rather, the Resort insists that it will only provide a hard copy printout of what members are in good standing to the Chair of the Election Committee. AAFPO has requested and has been denied access to the Database.

The Resort’s use of the Database without the consent of AAFPO includes:

1. Sending e-blasts to AAFPO’s members criticizing the current Board.
2. Sending e-blasts to AAFPO’s members, or allowing the Database to be used to send these e-blasts from Lovell Upton and BJ Lindsey, who are attempting to convince members to provide their proxies in the name of Kim May, a candidate for the Board who is also suing the Board in a separate lawsuit, in an effort to remove the current Board.
3. Sending e-blasts to AAFPO’s members, promoting the

candidacy of only the seven candidates for the Board who are currently suing the Board in a separate lawsuit.

Attached hereto and incorporated herein by reference as **Exhibit 6** is an example of an e-blast sent by the Resort that criticizes the current Board members. Attached hereto and incorporated herein by reference as **Exhibit 7** are the e-blasts from BJ Lindsey and Lovell Upton. Attached hereto and incorporated herein by reference as **Exhibit 8** are the Resort's e-blasts for the candidates the Resort is supporting in the upcoming election because these candidates have promised to abandon or stay this lawsuit against the Resort.

Attached hereto and incorporated herein by reference as **Exhibit 9** are Facebook posts from Mark Manley, General Counsel of the Resort and the Resort's designated *ex officio* member of AAFPO's Board of Directors, and Christy Germscheid, Vice President of the Resort. Mr. Manley and Ms. Germscheid proudly acknowledge that they personally helped fund the *Clark, et al.* lawsuit against AAFPO.

The Resort has also hosted at least one event for the candidates the Resort is supporting in the upcoming election because they have promised to abandon or stay this lawsuit against the Resort. Attached hereto and incorporated herein by reference as **Exhibit 10** is an advertisement on the Resort's web page for an event for the Resort candidates..

To this very day, the Resort has a link on its web site entitled "Meet Your 2021 AAFPO Candidates." This can be found at the following link:

<https://www.angelfireresort.com/member-community/>

The only candidates listed are those who have promised to cooperate with the Resort in dismissing this litigation, including all seven candidates who are separately suing AAFPO. The Resort appears to be attempting to mislead AAFPO members into believing that these eight Resort candidates are

the only candidates up for election.

The Resort has become an adversary party in the AAFPO 2021 election. As such, the Resort cannot be entrusted with its self-anointed role of determining who may and who may not vote in this election.

IV. Argument and Authorities.

A. Standard of Review.

In determining whether to grant a preliminary injunction, the Court must balance equities and hardships, including the following factors: “(1) the character of the interest to be protected; (2) the relative adequacy to the plaintiff of an injunction, when compared to other remedies; (3) the interests of third parties; (4) the practicability of granting and enforcing the order; and (5) the relative hardship likely to result to the defendant if granted and to the plaintiff if denied. *Insure New Mexico, LLC v. McGonigle*, 2000-NMCA-18, ¶ 6. To obtain a preliminary injunction, AAFPO must show: “(1) the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the public’s interest; and (4) there is a substantial likelihood plaintiff will prevail on the merits.” *LaBalbo v. Hymes*, 1993-NMCA-010, ¶ 11.

B. A balancing of the equities and hardships favors granting the relief sought by AAFPO.

AAFPO seeks a preliminary injunction for access to the Database in order to identify all members in good standing who should receive notice of the upcoming election. If necessary, this can be done in compliance with the Protective Order that has already been entered in this case.

The character of the interest being protected is the fairness and integrity of an election for board positions in a homeowner association of at least five thousand members. Absent a preliminary

injunction, AAFPO will be forced to rely on the Resort to identify and disclose to AAFPO's Election Committee Chair what members are in good standing to vote in the election. The delegation of this duty to a party who is actively participating in the election by funding and promoting certain candidates is improper.

There is no other remedy that can ensure that all members who are in good standing will be given notice of the election. The preliminary injunction sought by AAFPO will not cause any damage to the Resort, and it is in the best interest of the thousands of members of AAFPO that AAFPO have information necessary to determine what members are in good standing and are entitled to notice of the election and to vote.

AAFPO is also likely to prevail on the merits of this claim. As set forth in the Plan, the Resort is AAFPO's agent for performing AAFPO's duty to collect assessments from its members. Even the red line version of the "Membership Database Sharing and Collection" Agreement produced by the Resort in this case states that AAFPO is the "principal." (Ex. 5, § 10(b).) The Resort's version of this Agreement also states that AAFPO is part owner of the Database. (Ex. 5, § 10(c).) And the Resort's version of the Agreement acknowledges that AAFPO has the right to access the Database. (Ex. 5, § 10(f).) And these agreements are consistent with the statements of Daniel Rakes, Executive General Counsel to the Resort. (Ex. 3.)

Even without the express admissions by the Resort and its Executive General Counsel, as agent for AAFPO, the Resort has a duty to disclose information to AAFPO. *See, e.g., Robertson v. Carmel Builders Real Estate*, 2004-NMCA-056, ¶ 32. All of the information in the Database is information the Resort has a duty to disclose to AAFPO.

V. Request for Expedited Hearing.

AAFPO expects to be sending out notice of the 2021 election within the next week or two.

Access to the Database as soon as possible is necessary for AAFPO to ensure the election is not tainted by the actual or perceived bias of the Resort and the Resort's control over who may and who may not receive notice of the election and who may or who may not vote in the election.

VI. Conclusion.

For the reasons set forth above, AAFPO requests a preliminary injunction to allow AAFPO full access to all of the information on the Database for the purpose of determining what members are in good standing so AAFPO can provide those members notice of the 2021 election.

Respectfully submitted,
WALCOTT, HENRY & WINSTON, P.C.

By: /s/ Donald A. Walcott
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CERTIFICATE OF SERVICE

I certify that on this 19th day of July, 2021, I caused the foregoing pleading to be served on all counsel of record through the Court's electronic filing system.

 /s/ Donald A. Walcott
Donald A. Walcott