STATE OF NEW MEXICO
COUNTY OF COLFAX
EIGHTH JUDICIAL DISTRICT

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

Plaintiff,

v.

No. D-809-CV-2020-00183

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

Defendant.

STIPULATED ORDER ADJUDICATING THE ISSUES BETWEEN THE PARTIES AND DISMISSING THE LAWSUIT

Plaintiff Board of Directors of Association of Angel Fire Property Owners, Inc. ("AAFPO") filed this lawsuit ("Lawsuit") against Defendant Angel Fire Resort Operations, LLC ("the Resort") on October 20, 2020. As amended on July 19, 2021, AAFPO's Lawsuit sought relief as detailed in six different legal counts:

(1) Declaratory judgment that AAFPO's board of directors was legally constituted and fully vested with authority to transact business on behalf of its members;

(2) Declaratory judgment that AAFPO is a "homeowner association" as the New Mexico Homeowner Association Act ("HOA Act") defines that term, see NMSA 1978, § 47-16-2(N) (2019);

(3) Declaratory judgment that AAFPO is entitled to receive certain categories of information from the Resort – including information about payments of annual assessments by, and collections of assessments from, individual AAFPO members, information about the 4% portion of the annual assessments earmarked for projects designated by AAFPO, information about the ways in which the Resort spends its share of the assessments, and information about the Resort's budget for spending assessments – as well as access to databases from which such information might be gleaned, including the Resort's membership database;

(4) Declaratory judgment that AAFPO is entitled to replace the Resort as the party responsible for collecting the assessments;

(5) Money damages for the Resort's alleged breach of fiduciary duties owed to AAFPO; and

(6) Injunction requiring the Resort to pay directly to AAFPO the 4% of assessments earmarked for projects designated by AAFPO.

Of the six counts pled by AAFPO, only the first count has been resolved by court order. Namely, by order dated April 22, 2021, the Court ruled that AAFPO was legally constituted and had authority to transact business on behalf of its members. While the parties agree that the Court's April 22, 2021 ruling has definitively adjudicated the first count, none of the other issues described above have previously been resolved by court order or otherwise. The purpose of this order is to resolve those remaining issues, and to conclude the Lawsuit on a basis mutually agreeable to the Parties and deemed factually supported and legally sufficient by the Court. The parties therefore stipulate and agree as set forth herein, and after review, consideration, and amendment where deemed necessary, the Court adopts the discussion and findings of this order as they pertain to the remaining counts:

Count II: Declaratory Judgment Regarding Whether AAFPO is a Homeowner's Association

1. Although AAFPO shares certain features with traditional homeowner associations as such associations are defined in the HOA Act, the language of the statute demonstrates that AAFPO is not such an entity in crucial respects. The statute defines "homeowner association" as "an incorporated or unincorporated entity upon which maintenance and operational responsibilities are imposed and to which authority is granted in the declaration." § 47-16-2(N). But under the Amended Joint Plan of Reorganization [in Bankruptcy], In re Angel Fire Corp., No. 11-93-12176 RA (Bankr. D.N.M. Apr. 20, 1995) ("Amended Joint Plan") that governs the

relationship between AAFPO and the Resort – and specifically under the Supplemental Declaration of Restrictive Covenants and Easements ("Supplemental Declaration") incorporated in the Amended Joint Plan by reference (and vice versa), see Amended Joint Plan § 4.16(a); Supplemental Declaration ¶ 4(B) – it is the Resort, not AAFPO, that owns the "amenities" as that term is defined in the Amended Joint Plan and the Supplemental Declaration. The term "amenities" carries the same practical and legal meaning as the term "common area" as defined in the HOA Act. See § 47-16-2(E). It is the Resort that has the responsibility of maintaining and operating the amenities (i.e., the "common areas"), and it is the Resort that therefore enjoys the authority to impose an annual assessment on lot owners. See, e.g., Amended Joint Plan §§ 1.8, 4.16(c); Supplemental Declaration ¶¶ 1(A), 3(A). For this reason, AAFPO is not a "homeowner association" as the HOA Act defines that term.

2. Notwithstanding the parties' agreement that AAFPO is not a traditional "homeowner association" within the meaning of the HOA Act, the parties also agree that prudence dictates, and the Court therefore finds, that AAFPO should continue to comply with the obligations that the statute imposes on "homeowner associations" within the statute's ambit, as long as compliance with those obligations does not conflict in any way with the provisions of the Amended Joint Plan and the Supplemental Declaration.

3. In particular, among other things, AAFPO should continue to make its own financial and other records available to its members under NMSA 1978, § 47-16-5; should be deemed empowered to foreclose on the lien created by § 47-16-6(B) (with the ability to assign that right to the Resort), and thus should be obligated to furnish the recordable statement described by § 47-16-6(D); should require the members of its board of directors to fulfill the requirements set forth in § 47-16-7; should undergo a financial audit at least once every three

years pursuant to § 47-16-10; should furnish the disclosure certificates described by § 47-16-12, under the circumstances described by that section; and should hold meetings in accordance with § 47-16-17. The Parties agree, and the Court therefore finds, that the parties should continue to treat AAFPO as if it were a statutorily defined homeowner association insofar as governmental entities not bound by this stipulated order may require them to do so.

Count III – Declaratory Judgment Regarding AAFPO's Right to Information

4. This Order incorporates the foregoing as if fully restated herein, as the factual and legal context of certain counts applies to other counts as well.

5. As set forth in the Amended Joint Plan, the Resort shall provide AAFPO an "annual amenities budget... prior to the Annual Assessment being spent showing the [AAFPO] Board how the [Resort] will break out the annual Assessment proportionally by amenity." See Amended Joint Plan § 4.16(f). The Amended Joint Plan also requires that the Resort "shall prepare an annual report of the Annual Assessment collected for the prior year showing how the Annual Assessment was spent," often referred to informally by the Parties as the "95% Report." See Amended Joint Plan § 4.16(c). The purpose of both the budget and the 95% Report is to assure AAFPO that the Resort meets the requirement that it "may only spend the Annual Assessment on the upkeep, maintenance, operation and improvement of the Amenities." Id. § 4.16(c). The Court therefore finds, and the Parties agree, that AAFPO has a legitimate need for transparency as to how the annual budget is derived and also as to the underlying information that supports the 95% Report. The Resort shall provide such information to the Board annually as it becomes available, in accordance with the provisions of the Amended Joint Plan and pursuant to a confidentiality agreement of the sort that AAFPO Board members have signed in

the past, executed by the AAFPO Board and by committee members of the Board who have a demonstrated need for such information.

6. Notwithstanding this litigation, the parties have traditionally collaborated on matters of common concern and have maintained an excellent working relationship since the filing of the Amended Joint Plan in 1995. Nevertheless, while the Resort has generally attempted to provide AAFPO's directors with the financial information the directors need in order to fulfill the duties assigned to them by the Amended Joint Plan and the Supplemental Declaration, AAFPO has from time to time expressed a desire for greater transparency from the Resort. The parties stipulate and agree that they will continue to work together to strengthen their relationship and to ensure that AAFPO's directors receive the information necessary for the performance of AAFPO's duties under the Amended Joint Plan and the Supplemental Declaration, consistently with the provisions of those documents and as set forth above.

7. The Parties believe, stipulate, and agree, however, that even if AAFPO were a statutorily defined "homeowner association," it would have neither the right nor the duty to disclose to its members the *Resort's* independent financial statements, which the Resort has agreed to provide to AAFPO board members who sign nondisclosure agreements in order to examine them. The HOA Act requires a homeowner association to make available to its members "[a]ll financial and other records of the association," § 47-16-5(A) (emphasis added) – including, among other things, the association's operating budget, financial statements and accounts, and financial audits, see id. § 47-16-5(C)(6), (8) to (9). These materials do not include the private and proprietary financial data of other entities such as the Resort, even if AAFPO obtains access to necessary components of the Resort's information pursuant to nondisclosure agreements. The Resort maintains such documents in confidence to avoid affording unfair

advantages to competitors, and also to respect the privacy interests of individual members whose confidential account information might otherwise become public.

8. The Court finds, and the parties stipulate and agree, that neither the Uniform Trust Code nor any other statute imposes on AAFPO a duty to disseminate the Resort's confidential financial information to AAFPO's members. The members have "irrevocably appoint[ed] [AAFPO] ... as their sole and exclusive agent for the purpose of enforcing Paragraphs 1 and 5" of the Supplemental Declaration. Supplemental Declaration § 10. AAFPO's Board therefore has the sole authority to examine the documents that the Resort provides pursuant to nondisclosure agreements, and to take any action that the Amended Joint Plan and the Supplemental Declaration may permit or require on the basis of that review. The Uniform Trust Code, to the extent that it applies at all, leads to the same conclusion – because AAFPO's members have effectively and irrevocably "waive[d]" the right to receive the information personally. NMSA 1978, § 46A-8-813(D) (2007).

9. At the same time, to assure AAFPO's members that the Resort has honored its commitments and that AAFPO's directors have fulfilled their oversight obligations under the Amended Joint Plan and the Supplemental Declaration, the directors have traditionally certified that they have checked the annual amenities budget and the 95% Report and found them "satisfactory." The parties agree that AAFPO should continue to provide its members with certifications of that sort.

10. To enhance the reliability of these certifications, however, the Resort and AAFPO agree to explore the feasibility of procedures designed to confirm the accuracy of the annual amenities budget and the 95% Report, consistently with the provisions of the Amended Joint Plan and the Supplemental Declaration. The intent of such exploration shall be to derive

mutually agreeable and standardized procedures as well as a reporting format for the 95% Report that the Parties deem reliable, accurate, and in conformance with the spending limitations set forth in § 4.16 of the Amended Joint Plan – namely that any spending or aggregation of spending shown therein was for the "upkeep, maintenance, operation and improvement of the Amenities." By pledging their cooperation to explore ways of improving current procedures, however, the parties do not mean to suggest – and nothing in this order should be construed to imply – that current or past practices or procedures have failed to yield reports and results that are reliable, accurate, and in conformance with the spending limitations set forth in the Amended Joint Plan.

11. The parties stipulate and agree that the Resort – having acquired a membership database from Angel Fire Corporation's bankruptcy trustee for valuable consideration, and having further developed the database "over many years and at considerable expense," Rapid Temps, Inc. v. Lamon, 2008-NMCA-122, ¶ 23, 144 N.M. 804, 192 P.3d 799 – is the sole owner of the database. Under these circumstances, AAFPO is not entitled to obtain its own access to the database. The parties further agree, however, that AAFPO has a legitimate and important interest in securing an accurate list of members in good standing – along with the members' contact information – to ensure that only those members vote in AAFPO's annual board elections. To that end, and in exchange for the promises and other consideration that form the basis of the Parties' resolution of this dispute, the Resort shall continue to furnish AAFPO with such a list each year at AAFPO's request.

Count IV – Declaratory Judgment Regarding AAFPO's Right to Collect Assessments

12. This Order incorporates the foregoing as if fully restated herein, as the factual and legal context of certain counts applies to other counts as well.

13. The parties stipulate and agree that in accordance with the Amended Joint Plan, the 4% of annual assessments reserved for projects designated by AAFPO (along with the 1% of the annual assessments reserved for AAFPO's operating expenses, see Amended Joint Plan § 4.16(j)(ii) (as clarified)) should continue to be deposited in a "separate segregated account held in trust for [AAFPO] by the [Resort]" (see Amended Joint Plan § 4.16(f)) from which funds will be disbursed to third-party contractors – or to the Resort, if the Resort undertakes a project in-house – at AAFPO's direction. The parties further agree that AAFPO is entitled to be fully informed about the account balance, the amounts deposited to the account, and the amounts withdrawn from it, and receive monthly statements for said account.

14. The parties stipulate and agree that as the party entitled to 95% of the annual assessments, the Resort has the sole right and responsibility to collect the annual assessments from AAFPO's members. See Amended Joint Plan § 1.8 ("'**Annual Assessment**' shall mean the required annual dues payable to the [Resort] by the Property Owners."); id. ¶ 4.16(c) ("The required Annual Assessment shall be paid by the Property Owners to the [Resort] ...."); id. ¶ 4.16(i)(iii) ("The [Resort] or an agent designated jointly by [AAFPO] and [the Resort] will collect the annual assessment as an agent of [AAFPO] under a contract for so doing."); id. ¶ 4.16(j)(ii) (as clarified) ("The [Resort] agrees ... that the AAFPO responsibilities for collection of assessments will be contracted to the [Resort] ...."); Supplemental Declaration ¶ 3(A) ("[The Resort] shall assess and the Property Owner of each Homesite shall pay to [the Resort] a nonrefundable annual assessment ....").

15. The Parties agree and stipulate to maintain the *status quo* as it pertains to collection of assessment, namely, that the Resort will continue to administer such collections pursuant to § 4.16(j)(ii) (as clarified), subject to the Resort's right to agree to the designation of a

third-party successor in the future pursuant to § 4.16(i)(iii) if the parties jointly determine that such a change is necessary.

Count V – Breach of Fiduciary Duty

16. This Order incorporates the foregoing as if fully restated herein, as the factual and legal context of certain counts applies to other counts as well.

17. The parties, after conducting discovery and having negotiated the voluntary resolution articulated herein as part of same, stipulate and agree that the Resort has not violated any fiduciary duties it may have owed to AAFPO, and therefore that the Resort is not liable to AAFPO for damages.

Count VI – Injunctive Relief

18. This Order incorporates the foregoing as if fully restated herein, as the factual and legal context of certain counts applies to other counts as well.

19. Count VI is addressed in the discussion above under Count III, among others.

Miscellaneous – Generally Applicable to All Counts

20. Nothing provided herein shall be construed as inconsistent with the Amended Joint Plan or the Supplemental Declaration. In the event of any conflict between the provisions of this order and the provisions of the Amended Joint Plan and Supplemental Declaration, the Amended Joint Plan and Supplemental Declaration shall control.

21. With these understandings and agreements, the parties stipulate and agree that the Lawsuit should be, and hereby is, dismissed, with each side to bear its own litigation costs, including but not limited to attorney's fees.

HON. EMILIO J. CHAVEZ
CHIEF DISTRICT JUDGE 6/21/22

Submitted by:

MARRS GRIEBEL LAW, LTD.

By /s/ Clinton W. Marrs
Clinton W. Marrs
Patrick J. Griebel
Attorneys for Plaintiff Board of Directors
of Association of Angel Fire Property Owners, Inc.
Post Office Box 27746
Albuquerque, New Mexico 87125
Telephone: 505-433-3926
clinton@marrslegal.com

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By /s/ Charles K. Purcell
Charles K. Purcell
Attorneys for Defendant
Angel Fire Resort Operations, LLC
Post Office Box 1888
Albuquerque, New Mexico 87103
Telephone: 505-765-5900
kpurcell@rodey.com

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