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

IN RE: PETITION FOR RECALL ARBITRATION (CO-OP)

KEY LARGO OCEAN RESORT CO-OP, INC.,

Petitioner,

v.

Case No. 2009-04-3146

UNIT OWNERS VOTING FOR RECALL,

Respondent.
_____/

FINAL ORDER

Statement of the Issue

The issue in this case is whether Petitioner properly determined not to certify the recall.

Procedural History

On August 6, 2009, Petitioner, Key Largo Ocean Resort Co-Op, Inc. (the Association), filed an amended petition for recall arbitration with the Division of Florida Condominiums, Timeshares and Mobile Homes. On September 1, 2009, Respondent filed an answer to the petition. A final hearing was held in this matter on November 17, 2009, during which the parties presented the testimony of witnesses, tendered documents into evidence and cross-examined witnesses. The parties have filed recommended orders. This order is entered after consideration of the complete record in this matter. Only the facts and law that are dispositive of this case will be treated in this Final Order.

Appearances

For Petitioner: Franklin D. Greenman, Esq.
Greenman & Manz
5800 Overseas Highway, Suite 40
Marathon, FL 33050

For Respondent: Kent Harrison Robbins, Esq.
1224 Washington Avenue
Miami Beach, FL 33139

Findings of Fact

1. Key Largo Ocean Resort Co-Op, Inc. is the legal entity responsible for the operation of Key Largo Ocean Resort Co-Op.

2. Respondent seeks the recall of five members of the board of directors, Andres Arcia, Eugenio J. Collazo, Omar Hernandez, Pedro Salva, and Maria Tellez. The Association's board of directors is comprised of five (5) members.

2. The Association consists of 284 voting interests. Therefore, 143 votes are necessary to recall a director.

3. On July 25, 2009, the Association was served with 165 recall ballots.

4. The board held a meeting on July 29, 2009, at which time it decided not to certify the recall. The minutes of the recall meeting state in pertinent part as follows:

> Mr. Greenman: Commenced meeting to order and stated purpose of meeting was that the Board of Directors, we were served on Saturday with a Written Recall Agreement Petition, under Florida Statute 719.106. When a Board of Directors is served with a Written Recall Petition and served [sic] we have to have a meeting within 5 days, which we are having today, and make a decision. The decision that is given you, under the law, is to accept the recall and turn over the Co-Op, over to the members who are under the recall petition, to be the new Board. The other choice is to Petition the Division of Condominium for arbitration regarding the recall written agreement. In the short time that we have had

> to review the Written Recall Agreement, based on what I have been able to do in short time, it is my recommendation that you do not certify the recall and request arbitration from the Division of Condominium. The reason for that is that it appears from that [sic] the ballots, written recall ballots received, that the ballots do not comply with the cooperative documents of KLOR, at least one of the ballots was blank, many of the ballots were not witnessed and many of the ballots appeared to be procedurely [sic] incorrect either in violation of the Florida Administrative Code, the cooperative law or the by-laws of KLOR. It is not for you or me to make that decision but I do not believe that it not be decided [sic], it is my recommendation not to certify the recall and submit the recall for arbitration to the Division of Condominiums.
>
> Mr. Arcia: I make a motion not to certify the Written Recall Agreement and submit to the division for arbitration. Mrs. Tellez seconded the motion.
>
> Mr. Salva: all those in favor say I, all board members unanimously agreed and approved the motion not to certify the Written Recall Agreement, and submit petition for arbitration to the Division of Condominiums.
>
> Greenman: Meeting adjourned.

5. The minutes of the board meeting to consider the recall petition are insufficient on their face because the board failed to identify the unit number and the specific defect for each ballot it challenged. Therefore, on August 25, 2009, the arbitrator issued an order to the Association requiring it to show cause why the arbitrator should not certify the recall due to the deficient recall meeting minutes.

6. On September 9, 2009, the Association filed a response to the Order to Show Cause indicating that, pursuant to a search warrant issued by a Monroe County judge on July 16, 2009, all of the Association's business records, files, and computers, including shareholder records and proprietary leases, were seized by the Monroe County Sheriff's office. The Association stated that, at the time the board of directors

met to consider the recall, the Sheriff's office still had possession of all of its records. Thus, the Association contended that without access to its records, it was unable to specifically identify the errors on the recall ballots in the minutes of the recall meeting.

7. On September 24, 2009, a telephonic case management conference was held in this matter.

8. On September 25, 2009, the arbitrator issued an Order After Case Management Conference determining that, as a result of the unusual circumstances in this case (the document seizure), equity required that the Association be allowed to challenge specific ballots in this recall arbitration case even though the minutes of the board meeting did not contain each specific basis upon which the board based its determination not to certify the recall, including the unit number and the specific defect to which each challenge applied.

9. The arbitrator further ruled in the Order After Case Management Conference that, in the event that this matter proceeded to a final hearing, the Respondent would be permitted to introduce evidence to controvert the Association's claim that it was unable to access its records at the time the recall was considered.

10. At the final hearing, Gregory Larochelle, a Deputy Sheriff for the Monroe County Sheriff's Department, gave testimony concerning the seizure of the Association's records pursuant to the search warrant. Deputy Sheriff Larochelle testified that he was present at the time the warrant was served. He further testified that, at the time of the records seizure, he informed Maria Hernandez, the office manager for the Association,[1] that the Sheriff's Department did not intend to shut down

[1] Ms. Hernandez was the Association's main witness at the final hearing and has worked for the Association for 17 years.

the operations of the Association. Deputy Sheriff Larochelle unequivocally testified that he specifically told Ms. Hernandez that she could obtain any Association records that she needed to carry out the Association's business, and that she could access the records at any time. In fact, Deputy Sheriff Larochelle testified that the first time Ms. Hernandez asked for any Association records was on or about August 1, 2009,[2] and she was given those records.

11. The arbitrator finds the testimony of Deputy Sheriff Larochelle to be credible and dispositive. The minutes of the recall meeting are insufficient on their face because the board failed to identify the unit number and the specific defect for each ballot it challenged. The Association argued that it should be excused from the deficiency in its minutes as it claimed that it was unable to access its records, and therefore, it was impossible to provide the requisite specificity in the minutes. In an abundance of caution, the arbitrator allowed Petitioner to challenge specific ballots in this recall arbitration case. However, the arbitrator also ruled that Respondent could introduce evidence to controvert the Association's claim that it was unable to access its records at the time the recall was considered. At the final hearing, Respondent demonstrated, through the testimony of Deputy Sheriff Larochelle, that the Association could have accessed its records in order to review them to make specific ballot challenges. In fact, there was no evidence presented that the Association even asked to obtain its records prior to the recall meeting.[3] Accordingly, the arbitrator finds that

[2] As indicated above, the board meeting at which it decided not to certify the recall was held on July 29, 2009.

[3] In this context, it is important to note that the Association actually held its recall meeting early, on the third business day after it was served with the recall agreement. The Association had two more days to meet under applicable law. If the Association had been actively trying to obtain its records, presumably it would have utilized all of the time legally available to meet, rather than holding its meeting early.

Respondent met its burden of showing that the Association could have accessed its records prior to the recall meeting and therefore should not be excused from the deficiency in its recall meeting minutes.

12. The arbitrator finds that the written recall agreement served on the Association, viewed on its face, contained 159 ballots voting in favor of the recall of directors Eugenio J. Collazo, Omar Hernandez, Pedro Salva, and Maria Tellez and 158 ballots voting in favor of the recall of director Andres Arcia. Furthermore, the written recall agreement contained 158 ballots voting for replacement directors Juan Alvarez, Felix Perez, and Gicela Pino and 157 ballots voting for replacement directors Scott Barret and Oreste Lopez Recio.

Conclusions of Law

The arbitrator has jurisdiction of the parties and the subject matter of this dispute. §§ 719.106(1)(f) and 719.1255, Fla. Stat. Section 719.106(1)(f), Fla. Stat., provides that any member of the board of administration (board) may be recalled and removed from office with or without cause by vote or agreement in writing by a majority of all voting interests. In pertinent part, the relevant statute, § 719.106(1)(f), Fla. Stat., provides as follows:

> 2. . . . . 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 agreement to recall members of the board, . . . or proceed as described in subparagraph 3.
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> 3. If the board determines not to certify the written agreement to recall members of the board . . . the board shall, within 5 full business days after the board meeting, file with the division a petition for binding arbitration pursuant to the procedures of s. 719.1255.

Furthermore, Fla. Admin. Code R. 61B-75.008(4) requires that the board meeting minutes must include the following:

> The minutes of the board meeting at which the board determines whether to certify the recall are an official record of the association and shall record:
>
> (a) The time the board meeting is called to order and adjourned;
> (b) Whether the recall is certified by the board;
> (c) The manner in which any vacancy on the board occurring as a result of recall will be filled, if the recall is certified; and,
> (d) If the recall was not certified, the specific reasons it was not certified.

Fla. Admin. Code R. 61B-50.105(5)(h) requires that, when a board meets to consider a recall petition, the minutes of such board meeting contain "[e]ach specific basis upon which the board based its determination not to certify the recall, including the unit number and the specific defect to which each challenge applies." The rule further provides that: "Any specific reason upon which the board bases its decision not to certify the recall that is stated in the petition for recall arbitration, but absent from the board meeting minutes or attachments thereto, shall be ineffective and shall not be considered by the arbitrator."

In the case under consideration, the minutes indicate that the board failed to identify the unit number and the specific defect for each ballot it challenged. Accordingly, unless a defect can be determined from the face of the ballot itself, Fla. Admin. Code R. 61B-50.105(5)(h) requires that the arbitrator not consider the board's ballot challenges. However, where the recall effort is void *ab initio* due to a fatal flaw in the form of the agreement or where it is clear it has not been approved by the majority of the voting interests, the recall agreement will not be certified. *See Unit Owners Voting For Recall v. Sunrise Towne Preferred Condo. Assoc., Inc.*, Arb. Case No. 01-

2364, Summary Final Order (May 15, 2001); *see also Gateland Village Condo. Assn. v. Unit Owners Voting for the Recall*, Arb. Case No. 98-5247, Amended Summary Final Order (January 25, 1999); *Villa Biscaya Jardines Condo. Phase II, Inc. v. Castillo*, Arb. Case No. 98-3936, Summary Final Order (May 14, 1998); *Laguna Club Condominium Assn., Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 99-1335, Summary Final Order (July 30, 1999).

As indicated herein, viewed on its face, the written recall agreement served on the Association contained 159 valid ballots voting in favor of the recall of directors Eugenio J. Collazo, Omar Hernandez, Pedro Salva, and Maria Tellez and 158 valid ballots voting in favor of the recall of director Andres Arcia. Thus, as only 143 votes are necessary to obtain a majority vote to recall a director from this Association, a sufficient number of recall votes were cast to recall each of the five directors.

On the issue of what percentage of the Association's shareholders must vote in favor of a recall for the recall to be valid, the Association argues that its Bylaws require a two-thirds affirmative vote in favor of recall. However, this is contrary to the mandatory provisions of § 719.106, Fla. Stat. which state:

> 1) MANDATORY PROVISIONS.--The bylaws or other cooperative documents shall provide for the following, and if they do not, they shall be deemed to include the following:
>
> . . .
>
> (f) Recall of board members.--Subject to the provisions of s. 719.301, any member of the board of administration may be recalled and removed from office with or without cause by the vote or agreement in writing by a majority of all the voting interests. A special meeting of the voting interests to recall any member of the board of administration may be called by 10 percent of the unit owners giving notice of the meeting as required for a meeting of unit owners, and the notice shall

> state the purpose of the meeting. Electronic transmission may not be used as a method of giving notice of a meeting called in whole or in part for this purpose.

Emphasis supplied.

Accordingly, notwithstanding any provision of the Association's Bylaws to the contrary, a simple majority of the Association's voting interests is all that is required in order to effectively recall a member of the board. *See Pier Point South Condo. Assn., Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 2003-04-7161, Summary Final Order (May 15, 2003)(Association's argument that its bylaws, which require 2/3 of the unit owners to approve the recall of a member at a budget meeting, is unenforceable as it conflicts with the simple majority provision of Section 718.112(2)(j), F.S.); *Spanish Main Assn., Inc. v. Unit Owners Voting for Recall,* Arb. Case No. 2003-06-3718, Summary Final Order (June 17, 2003)(Association's 80% majority requirement to recall a director contained in its bylaws is unenforceable as it conflicts with the simple majority provision of Section 718.112(2)(j)).

Finally, the arbitrator notes that Andres Arcia testified during the final hearing that he had resigned from his position as director. This resignation took place subsequent to the meeting at which the board considered whether to certify the recall. Since the resignation occurred after the service of the written recall agreement on the board, pursuant to Fla. Admin. Code R. 61B-75.008(5)(b), any person who was appointed to replace Andres Arcia was only temporarily appointed pending the arbitration decision.

Based on the foregoing, it is ORDERED:

1. The recall of board members Eugenio J. Collazo, Omar Hernandez, Pedro Salva, and Maria Tellez is hereby CERTIFIED and they are REMOVED as directors

effective as of the date of the mailing of this order. Within five (5) full business days from the effective date of this recall, Eugenio J. Collazo, Omar Hernandez, Pedro Salva, and Maria Tellez shall deliver any and all records of the Association in their possession to the new board of directors.

2. Any person who was appointed to replace Andres Arcia was appointed only temporarily pending this arbitration decision. Therefore, any replacement director for Andres Arcia is REMOVED as director. Within five (5) full business days from the effective date of this recall, the replacement director for Andres Arcia shall deliver any and all records of the Association in his or her possession to the new board of directors.

3. Juan Alvarez, Scott Barret, Oreste Lopez Recio, Felix Perez, and Gicela Pino shall take seats on the board effective immediately.

DONE AND ORDERED this 21st day of December, 2009, at Tallahassee, Leon County, Florida.

David R. Slaton, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
1940 North Monroe Street
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Telephone (850) 414-6867
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order has been sent by fax and U.S. Mail to the following persons on this 21st day of December, 2009:

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FACSIMILE COVER SHEET

DATE: 12/21/09

TO: Kent Harrison Robbins, ESQ.

FROM: Kim Peterson

RE: Key Largo Resorts
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CONTACT PERSON:

PAGES: You should receive (12) pages, including this one. If you do not receive all pages, please call the contact person at 850.488.1631.

MESSAGE: