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

IN RE: PETITION FOR ARBITRATION – RECALL DISPUTE

CLIFFORD SWINT, as
unit owner representative

Petitioner,

v.

FLAMINGO SOUTH BEACH I CONDOMINIUM ASSOCIATION, INC.,

Respondent.
_____/

Case No. 2021-03-1388

SUMMARY FINAL ORDER

Statement of the Issue

The issue in this case is whether the Association improperly failed to certify the written recall served on the Association on June 14, 2021? In order to decide this issue, two sub-issues need to be resolved. These sub-issues are:

a. Is Flamingo South Acquisitions, LLC ("FSA") a "Developer" or a "Bulk Buyer"?

b. Was the recall vote sufficient in numbers and facially valid?

Salient Procedural History

On July 9, 2021, Clifford Swint, unit owner representative, filed a Non-Binding Petition for Recall Arbitration against Flamingo South Beach I Condominium Association, Inc. (the "Association"). On August 9, 2021, the Association filed its Answer to the Petition. On August 23, 2021, Petitioner's Reply to Affirmative Defenses

was filed. On August 25, 2021, an Order Resetting Hearing for Case Management was issued.

On August 30, 2021, FSA filed a Motion to Intervene in this arbitration and served the parties. On September 3, 2021, a telephonic Hearing for Case Management was held with Counsel for the Petitioner, the Association and FSA, the potential Intervenor, participating. Petitioner and three unit owners were also present on the call. On September 3, 2021, an Order Following Hearing for Case Management was issued. On September 7, 2021, Petitioner filed an Expedited Motion for Order Setting Expedited Briefing Schedule, an Amended Notice of Filing Affidavit of Kenneth Rothly, and a Response in Opposition to Motion to Intervene. On September 8, 2021, an Order Denying Motion to Intervene and Setting Final Briefing Schedule was issued.

On September 16, 2021, an Order Extending Final Briefing Schedule was issued. On September 16, 2021, Non-Party FSA's Supplement Brief was filed. On September 16, 2021, Petitioner's Response in Opposition to Motion for Extension of Time was filed. On September 17, 2021, Petitioner's Motion to Strike FSA's Supplemental Brief was filed. On September 22, 2021, the Association's Final Brief was filed. On September 23, 2021, Petitioner's Brief in Support of Summary Disposition was filed. On September 29, 2021, Respondent's Response to Petitioner's Final Brief was filed.

Findings of Fact

1. Petitioner, Clifford Swint, the unit owner representative, is the owner of unit 140S within the Association.

2. The Association is the corporate entity responsible for the operation of the Condominium. The Board of Directors of the Association("Board") is comprised of three members.

3. The Declaration of Condominium was recorded on September 15, 2006 and does not contain *Kaufman* language automatically adopting future amendments to the Florida Condominium Act.[1]

4. The condominium consists of 562 units.

5. FSA at the time of the recall owned 222 units within the condominium.

6. FSA, over a period of nine years beginning in 2011 and ending in 2020 acquired its 222 units within the condominium.

7. FSA's managing member is Aimco/Bethesda Holding, Inc. ("Aimco"), a publicly traded real estate development corporation.

8. FSA leases or advertises for lease the 222 units it owns in the condominium in the ordinary course of business.

9. On June 14, 2021, a written recall agreement, consisting of one hundred eighty-two (182) ballots, was served on the Association.

10. The written recall agreement utilized the standard recall ballot form found on the Division's website, and on the face of the written agreement, the Directors sought to be recalled, and the corresponding number of votes for recall as to each, are:

Scott Shames	182
Stephen Fesik	182
Lee Hodges	182

[1] The referenced Kaufman language is that provisions of the Condominium Act are adopted "*as it may be amended from time to time.*"

11. On the face of the written agreement, the replacement candidates, and the corresponding number of votes to elect each are:

James La Greca	182
Robert Primavera	182
Amit Ratchkauskas	182

12. On June 21, 2021, the Board held a zoom meeting to consider the recall. The minutes of the June 21, 2021 meeting reflect that the meeting was called to order at 10.07 a.m., adjourned at 10:35 a.m., and state in pertinent part, as follows:

> **To consider and vote on whether to certify or not the recall initiated by the unit owners voting for recall.**
> Stephen Fesik motioned to not certify the recall initiated by the unit owners voting for recall, as per the list read allowed (sic) by Marc Halpern including the reasons for not certifying the recall for each given unit mentioned. The list is attached hereto as EXHIBIT A; motion seconded by Scott Shames. All in favor, motion unanimously passed.

13. Exhibit A to the June 21, 2021 Board meeting minutes provides in pertinent part as follows:

> **Reasons For Not Certifying the Recall**
>
> **1. Received 182 ballots; Recall ballots from a majority of the voting interests of the Condominium were not submitted.**
> 562 total units in Condominium – 282 votes required for recall
> AIMCO owns 222 Units
> w/o AIMCO's voting interest- 340 total units in Condominium – 171 votes required for recall
> **2. If the Division determines that Flamingo South Acquisitions is a 'Developer" rather than "Bulk Buyer", all unit owner votes to recall Lee Hodges are invalid as he is a developer assigned Board member.**
> **3. 1 recall ballot was pre-marked in that digital checkmarks were included for the recalled and replacement board members.**
> Unit 1212
> **4. "Sample" ballot was provided to show owners how "it has to be filled" (SEE EMAIL DATED October 23, 2020 from Kenneth Rothly). Advising the owners of how the ballot MUST be completed, does not allow each owner the opportunity to consider the recall or retention of each Board member individually.** ....

5. Ballots for Units 1516, 1408, and 924 owned (sic) **are illegible**
6. 3 Unit Owner Petitions do not match the name of the record unit owners.

Unit 272
Unit 918
Unit 1006

(Bold Emphasis in original of 12 and 13).

14. On July 9, 2021, Mr. Swint, the Unit Owner Representative, filed a Petition for arbitration pursuant to Section 718.112(2)(j)4, Florida Statutes ("Fla. Stat."), challenging the Board's failure to certify the recall of Board Members.

15. Board members Scott Shames and Stephen Fesik, who were two of the three board members and subjects of this recall, resigned from the Board after the Petition was filed and no evidence has been produced that they have been replaced on the Board.

16. The Association maintains that if FSA is determined to be a "Developer", Lee Hodges, the third board member subject to recall, is a FSA appointed board member and therefore not subject to recall by the unit owners.

17. In his Affidavit dated September 5, 2021, Kenneth Rothly, an Association unit owner, states that he sent two identical emails with a sample ballot on October 23 and October 24, 2020 related to a recall managed by unit owner David Weissman. These e-mails were sent prior to Mr. Swint's recall Petition and were for the recall of a different set of board members.

Conclusions of Law

The arbitrator has jurisdiction over the parties and the subject matter of this dispute pursuant to Sections 718.112(2)(j)4 and 718.1255, Fla. Stat. A Summary Final

Order is appropriate in this case pursuant to Rule 61B-45.030(3), Florida Administrative Code ("F.A.C."), which provides:

> At any time after filing of the answer, and if no disputed issues of material fact exist, the arbitrator shall summarily enter a final order awarding relief if the arbitrator finds no meritorious defense exists, and that the petition is otherwise appropriate for relief.

Petitioner argues that based on the Association's Declaration, the 2010 "bulk buyer" amendment to Section 718.103(16), Fla. Stat., which substantially changes the definition of "developer", does not apply to the Association because the Association's Declaration does not contain *Kaufman* language. Petitioner asserts that FSA is a developer pursuant to Section 718.301, Fla. Stat., as it existed in 2006 and thus, FSA is not entitled to vote in a manner that would allow it to select a majority of the board members. Finally, Petitioner argues that the 222 units owned by FSA must be excluded from the Association's 562 total voting interests, leaving 340 units eligible to recall the board members, and thus, requiring 171 votes to support the recall of a Board member.

The Association asserts that FSA is a "bulk buyer" or a party other than "the developer" and is not precluded from voting for a majority of the Board pursuant to Section 718.301, Fla. Stat. As such, the Association argues that all 562 units must be included in determining the number of units in the Association, which requires the vote of 282 members to support a recall. Further, the Association asserts that if FSA is found to be a Developer, then Director Lee Hodges is the developer appointed board member and cannot be recalled by the unit owner members. Finally, the Association asserts certain specific challenges to the validity of certain ballots.

I. FSA is a Developer

The Association argues that the provisions of the Distressed Condominium Relief Act ("DCRA"), Sections 718.701-708, Fla. Stat., which became law in 2010, control the question of FSA's status and FSA is a bulk buyer under the definition set in Section 718.703(2) of the DCRA, and the amendment in the same 2010 law of the definition of the term "developer" found in Section 718.103(16), Florida Statutes.[2] However, the initial inquiry is whether the DCRA applies in this case.

A. The Association's Declaration

In pertinent part, the Association's Declaration of Condominium ("Declaration"), recorded on September 15, 2006, provides as follows:

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[2] The DCRA statutes were first enacted and became law in 2010. s.7, Ch. 2010-174, Laws of Fla. The definition of "developer" in Section 718.103, Florida Statutes was amended by the same chapter law to add the following pertinent underlined language:

> 718.103 Definitions.—As used in this chapter, the term:
> (16) "Developer" means a person who creates a condominium or offers condominium parcels for sale or lease in the ordinary course of business, but does not include:
> (a) An owner or lessee of a condominium or cooperative unit who has acquired the unit for his or her own occupancy;
> (b) A cooperative association that which creates a condominium by conversion of an existing residential cooperative after control of the association has been transferred to the unit owners if, following the conversion, the unit owners are will be the same persons who were unit owners of the cooperative and no units are offered for sale or lease to the public as part of the plan of conversion;.
> (c) A bulk assignee or bulk buyer as defined in s. 718.703; or ....

DCRA Section 718.703(2), Florida Statutes defines "bulk buyer" as follows:

> "Bulk buyer" means a person who acquires more than seven condominium parcels in a single condominium as set forth in s. 718.707, but who does not receive an assignment of any developer rights, or receives only some or all of the following rights:
> (a) The right to conduct sales, leasing, and marketing activities within the condominium; ...

I. Introduction and Submission.

. . .

B. Submission Statement. Except as set forth in this Section I(B), the Developer hereby submits the Land and all improvements erected or to be erected thereon, and all other property, real, personal or mixed, now or hereafter situated on or within the Land . . . to the Condominium Form of Ownership and use in the manner provided for in the Florida Condominium Act as it exists on the date hereof and as it may be hereafter renumbered...

2. Definitions.
The following terms when used in this Declaration and in its Exhibits, and as it and they may hereafter be amended, shall have the respective meanings ascribed to them in this Section, except where the context clearly indicates a different meaning:

(A) "Act" means the Florida Condominium Act (Chapter 718 of the Florida Statutes) as it exists on the date hereof and as it may be hereafter renumbered. ....

(Emphasis Added).

It is clear from the provisions of the Association's Declaration, set out above, that it does not incorporate amendments to the Florida Condominium Act, Chapter 718, occurring after the date the Declaration was recorded in 2006 because, unlike *Kaufman*, the Declaration only allows changes as sections of the act *"may be hereafter renumbered"* and not *"as it may be amended from time to time."* Therefore, the statute as it existed at the time the Declaration was filed controls.

B. Florida Statutes

Section 718.103(16), Fla. Stat. (2006) which was in effect when the Association's Declaration was filed states:

"Developer" means a person who creates a condominium or offers condominium parcels for sale or lease in the ordinary course of business, but does not include an owner or lessee of a condominium or cooperative unit who has acquired the unit for his or her own occupancy, nor does it include a cooperative association which creates a condominium by

> conversion of an existing residential cooperative after control of the association has been transferred to the unit owners if, following the conversion, the unit owners will be the same persons who were unit owners of the cooperative and no units are offered for sale or lease to the public as part of the plan of conversion. A state, county, or municipal entity is not a developer for any purposes under this act when it is acting as a lessor and not otherwise named as a developer in the association.

(Emphasis added). Under the 2006 definition of "Developer", FSA is a developer as it offers condominium parcels for lease in the ordinary course of business.

In pertinent part, Section 718.301, Fla. Stat. (2006) provides:

> (1) . . . Unit owners other than the developer are entitled to elect at least a majority of the members of the board of administration of an association:
> . . .
> (e) Seven years after recordation of the declaration of condominium; or, in the case of an association which may ultimately operate more than one condominium, 7 years after recordation of the declaration for the first condominium it operates; or, in the case of an association operating a phase condominium created pursuant to s. 718.403, 7 years after recordation of the declaration creating the initial phase, whichever occurs first. The developer is entitled to elect at least one member of the board of administration of an association **as long as the developer holds for sale in the ordinary course of business** at least 5 percent, in condominiums with fewer than 500 units, and 2 percent, in condominiums with more than 500 units, of the units in a condominium operated by the association. Following the time the developer relinquishes control of the association, the developer may exercise the right to vote any developer-owned units in the same manner as any other unit owner except for purposes of reacquiring control of the association or selecting the majority members of the board of administration.

(Emphasis added). The By-Laws of the Association at Article 4.15 provide in pertinent part as follows:

> Unit Owners other than the Developer are entitled to elect not less than a majority of the members of the Board of Directors: ... or (e) seven (7) years after recordation of the declaration, whichever occurs first. The Developer is entitled (but not obligated) to elect at least one(1) member of the Board of Directors as long as the Developer holds for sale in the ordinary course of business five percent (5%) of the Units that will be operated ultimately by the Association.

(Emphasis added). Under Section 718.301(1)(e), Fla. Stat. (2006), and Article 4.15 of the Association's By-Laws, FSA as a "Developer" is entitled to elect at least one member of the board as long as it "holds for sale in the ordinary course of business" 2% of the condominiums operated by the Association. While there is no claim that FSA is holding units for sale, FSA has the right, under Section 718.301(1)(e), Fla. Stat. (2006), to vote its developer-owned units in the same manner as any other unit owner except to reacquire control of the Association or to select a majority of the board of administration.

FSA offers condominium units for lease in the ordinary course of business, and therefore, is a developer under the 2006 version of Chapter 718, Fla. Stat. As a developer, FSA is not entitled to reacquire control of the Association or select the majority of the board pursuant to the 2006 version of Chapter 718, Fla. Stat. *Polo Glen Condominium Ass'n, Inc. v. Unit Owners Voting for Recall,* Arb. Case No. 2015-01-1970, Summary Final Order (April 10, 2015). *See, Beck v. Mallard's Cove Condominium Ass'n, Inc.*, Arb. Case No. 2014-04-9162, Summary Final Order (May 4, 2015). FSA already controls one seat on the board and with a three member board may not gain control over or select a majority of the board members.

C. Florida Case Law

In *Cohn v. The Grand Condominium Association, Inc.*, 62 So. 3d 1120 (Fla 2011), the Florida Supreme Court found that the retroactive application of a statute governing voting in mixed use condominiums was unconstitutional as applied. In *Cohn* the declaration established that the retail and commercial unit owners, collectively, had majority vote control over the board of directors and did not contain "as amended from

time to time" language subjecting it to future statutory changes to the Condominium Act. The Court found that under the provision of the Florida Constitution that prohibited enactment of any law impairing the obligation of contracts; changing the distribution of voting power to the residential unit owners would have altered the rights of retail and commercial unit owners in contravention of their contractual agreement.

Here, the Association's argument that FSA is bulk buyer, as defined in the 2010 Amendment of Section 718.104(16), Florida Statutes, must fail; as FSA is subject to the definition of that term as it existed in 2006. *See, Three Eighty Nine Corp. v. Cohn*, No. 9:14-CV-81573, 2015 WL 1526219 (S.D. Fla. April 2, 2015)(citing *Kaufman v. Shere*, 347 So. 2d 627, *cert. denied* 355 So. 2d 517 (Fla. 1978)); *see also Polo Glen, supra* (citing *Cohn, supra).* The reasoning in *Cohn* confirms that the Association's unit owners are entitled to elect and thus recall a majority of the Board and FSA is entitled to elect and recall one developer controlled board member pursuant to Section 718.301(1)(e), Fla. Stat. (2006). *See, Allen v. Harbourtowne at Country Woods Condo. Ass'n, Inc.*, Arb. Case No. 2008-02-8189 (Feb. 23, 2009); Rule 61B-23.003(9), F.A.C.

II. The Recall

While FSA, as a developer, is not entitled with its 222 votes to select a majority of the Board pursuant to the 2006 version of Section 718.301, Fla. Stat., it is entitled to elect and retain the seat held by Mr. Lee Hodges as a developer elected Board Member. Rule 61B-23.0026(1), F.A.C.,[3] provides that only the 222 units owned by FSA

[3] **61B-23.0026 Right to Recall and Replace a Board Member; Developers; Other Unit Owners; Class Voting.**

(1) Developer Representatives. When both a developer and other unit owners are entitled to representation on a board of administration pursuant to Section 718.301, Florida Statutes, or Rule 61B-

shall be counted to recall a board member who was elected or appointed by the developer. Thus, Mr. Lee Hodges cannot be the subject of this recall by the members, and retains his seat on the board until the next election. Pursuant to Rule 61B-23.0026(2)(a), F.A.C., only 340 votes are to be counted to replace board members elected by the unit owners other than the Developer. Therefore 171, votes were required to recall Board Members Fesik and Shames.

In pertinent part, Section 718.112(2)(j)4, Florida Statutes, provides:

> 4. If the board fails to duly notice and hold the required meeting or at the conclusion of the meeting determines that the recall is not facially valid, the unit owner representative may file a petition pursuant to s. 718.1255 challenging the board's failure to act or challenging the board's determination on facial validity. The petition must be filed within 60 days after the expiration of the applicable 5-full-business-day period. The review of a petition under this subparagraph is limited to the sufficiency of

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23.003, F.A.C., the following provisions apply to recall and replacement of board members elected or appointed by a developer:

(a) Only units owned by the developer shall be counted to establish a quorum for a meeting to recall and replace a board member who was elected or appointed by that developer.

(b) The percentage of voting interests required to recall a board member who was elected or appointed by a developer is a majority of the total units owned by that developer.

(c) A board member who is elected or appointed by a developer may be recalled only by that developer.

(d) Only the developer may vote, in person or by limited proxy, to fill a vacancy on the board previously occupied by a board member elected or appointed by that developer.

(2) Unit Owner Representatives. When both a developer and other unit owners are entitled to representation on a board of administration pursuant to Section 718.301, Florida Statutes, or Rule 61B-23.003, F.A.C., the following provisions apply to recall and replacement of board members elected or appointed by unit owners other than a developer:

(a) Only units owned by unit owners other than a developer shall be counted to establish a quorum at a meeting to recall and replace a board member elected by unit owners other than a developer.

(b) The percentage of voting interests required to recall a board member elected by unit owners other than a developer, is a majority of the total units owned by unit owners other than a developer.

(c) A board member who is elected by unit owners other than a developer may be recalled only by unit owners other than a developer.

(d) Only unit owners other than a developer may vote, in person or by limited proxy, to fill a vacancy on the board previously occupied by a board member elected by unit owners other than a developer.

service on the board and the facial validity of the written agreement or ballots filed.

(Emphasis added). As noted, the recall ballots were served on the Association on June 14, 2021. The Board was required to hold a Board meeting to address the recall no later than June 21, 2021, the expiration date of the 5-full-business-day period. On June 21, 2021, the Board held a meeting and voted to not certify the recall. The petition was timely filed on July 9, 2021.

The Association challenges all ballots submitted based on an e-mail dated October 23, 2020 from unit owner Kenneth Rothly that advised unit owners how to complete their ballots. This Rothly e-mail is related to a prior and different recall effort directed at the Association's board in place at that time, and the Association has submitted no evidence substantiating that it influenced the current June 14, 2021 recall.

The Association reviewed the ballots, and the minutes of its June 21, 2021 Board meeting reflect that of the 182 ballots submitted, one was pre-marked, three were illegible and three were signed by individuals who are not record owners of these units and are not listed on the Voting Certificate. This resulted in the Board rejecting a total of 7 ballots. This rejection of ballots by the Board reduced the number of valid ballots to 175 ballots, which is more than the required 171 ballots, thus rendering the number of required ballots for recall of unit owner elected Directors sufficient to recall Directors Shames and Fesik if the 171 ballots are facially valid. *See*, Findings of Fact No. 13. In accordance with Section 718.112(j)(4), Fla. Stat., the recall will be certified if service was sufficient, the recall ballots are facially valid, and a majority of the voting interests have been obtained.

A. Recall Agreement was Properly Served

The Association admits that the written recall agreement was served on the Association on June 14, 2021 and contained 182 ballots purporting to recall the three Directors and install James La Greca, Robert Primavera, Amit Ratchkauskas as replacement Directors. Thus, service was sufficient.

B. Facial Validity of the Ballots

The Arbitrator is limited to a review of the facial validity of the ballots filed. This arbitrator may only reject an individual ballot for obvious defects within the document itself which render the individual ballot facially invalid and is limited to looking within the four corners of the ballots. *Thomas Shorrock v. Knollwood Homeowners' Association, Inc.*, Arb. Case No. 2019-02-8857, Summary Final Order (July 24, 2019) (citing *Westbrook Estates Homeowners Ass'n, Inc. v. Homeowners Voting for Recall*, Arb. Case 2010-03-2663, Summary Final Order (July 22, 2010)); *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). Addressing the reasons for rejection of the ballots asserted by the Association requires the Arbitrator to look outside of the four corners of the ballots and cannot be considered. *See*, *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), and *Nicastro v. Nomi Condo. Ass'n, Inc.* Arb. Case No. 2019-03-8572, Summary Final Order (February 26, 2020).

Arbitration decisions have narrowly construed what makes a ballot facially invalid. For such determination, the arbitrator's review is limited to a defect within the four corners of the ballot itself and must not consider extrinsic evidence. *See, e.g.,*

Rivera v. Bayshore Yacht and Tennis Club Condominium Ass'n, Inc., Arb. Case No. 2019-03-0374, Summary Final Order (Sept. 25, 2019). Examples of facial invalidity include where (1) the votes on the recall ballots were pre-marked; (2) the recall ballot did not provide an opportunity for the voter to cast a vote individually to recall or retain, each board member targeted for recall, (3) the ballot did not contain a signature; and (4) there are no markings on a ballot indicating that the unit owner voted to recall or retain a board member, *i.e.*, where no check is in the box next to the board member's name.[4] In each of these instances, an arbitrator can conclude that a ballot is facially invalid without resorting to extrinsic evidence.

C. Majority of the Voting Interests Obtained

The Arbitrator has reviewed the four corners of the 182 ballots served on the Association for facial validity and found that all 182 ballots are in substantial compliance with the form approved by the Division, with one ballot (Petitioner 221) not being complete as submitted. There are 181 facially valid ballots voting for the recall of Board Members Shames and Fesik. There are 181 facially valid ballots voting for replacement candidates La Greca and Primavera and 180 ballots voting for replacement candidate

[4] *Rivera v. Bayshore Yacht and Tennis Club, supra*; *Riverview South of Deerfield Beach Condominium Ass'n, Inc., supra*; *Brookside Mobile Manner, Inc. v. Members Voting For Recall,* Arb. Case No. 2006-02-0053, Summary Final Order On Petition For Recall Arbitration (May 7, 2006); *Shores of Panama Resort Community Association, Inc., v. Unit Owners Voting For Recall, Arb.* Case No. 2014-00-3018, Summary Final Order and Denial of Motion To Dismiss (June 25, 2014); *Silver Gardens Condominium Ass'n, Inc. v. Unit Owners Voting For Recall*, Summary Final Order (July 5, 2016); *View West Condominium Ass'n, Inc. v. Unit Owners Voting For Recall,* Arb. Case No. 2012-02-7479 (August 28, 2012); *Adios Villas Homeowners' Ass'n, Inc., v. Homeowners Voting For Recall*, Arb. Case No. 2012-01-1552, Summary Final Order (April 6, 2012).

Ratchkauskas.[5] These numbers exceed the majority of 171 votes required to remove and replace board members in this dispute.

D. Resignations

On June 14, 2021, the recall ballots were served on the Association. On June 21, 2021, the Board consisting of Mr. Hodges, Mr. Shames, and Mr. Fesik met and voted unanimously to not certify the recall. *See*, Finding of Fact #12. Subsequent to this meeting Mr. Shames and Mr. Fesik resigned from the Board.

Rule 61B-81.003(5)(b), F.A.C., which controls recalls in Homeowners' Associations provides that when a director resigns after service of a recall, any appointment to fill that director's seat is temporary pending the arbitration decision. While there is no such provision in Rule 61B-23, F.A.C, governing recalls in condominiums, the argument for application of the reasoning found in this rule to condominium recalls is persuasive. Here, there were no replacement board members appointed to take the place of the two resigning board members. *See, e.g., Rio Poco Homeowners Ass'n, Inc. v. Homeowners Voting for Recall*, Arb. Case No. 2018-02-7444, Summary Final Order (July 24, 2018). Once the recall is served any subsequent resignation by a Board Member must be controlled by law and rules governing recall. *See, Fairview Grande Condominium Ass'n, Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 2015-05-2685, Summary Final Order (January 8, 2016).

Furthermore, to take a different position would subvert the recall process by allowing challenged Board Members to resign and have the remaining board members appoint their replacements, or set a new election in the future, thus, thwarting the

[5] *See*, Petitioner's Exhibit B, Petitioner 132.

majority of the unit owners who have clearly expressed their intent by voting for recall. *See, Blau v. Martinique 2 Owners' Ass'n, Inc.*, Arb. Case No. 99-1880, Summary Final Order (January 6, 2000) and *Isabel Quintana v. Sea Air Towers Condo. Ass'n, Inc.*, Arb. Case No. 2020-01-8213, Summary Final Order, (May 22, 2020). Here, Board Members Scott Shames and Stephen Fesik were properly recalled, resigned while the recall was pending, and replacement candidates James La Greca and Robert Primavera were properly elected by a majority of the Association's voting interests.

Based upon the foregoing, it is **ORDERED:**

1. The recall of board member Lee Hodges is **NOT CERTIFIED**.

2. The recall of board members Scott Shames and Stephen Fesik is hereby **CERTIFIED,** and they are **REMOVED** as Directors, effective as of the date of the entry of this Order.

3. Replacement candidates James La Greca and Robert Primavera shall take seats on the board effective immediately for the unexpired term of the seat filled.

4. Within five (5) full business days from the date of this order, Scott Shames and Stephen Fesik, if they have not already done so, shall deliver any and all records of the Association in their possession to the new board of directors.

5. All pending motions are DENIED.

6. Petitioner is the prevailing party in this dispute.

DONE AND ORDERED this 19th day of November 2021, at Tallahassee, Leon County, Florida.

Mahlon C. Rhaney, Jr., Chief Arbitrator
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Condominium Arbitration and
Mediation Program
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Professional Regulation
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Trial *de novo* and Attorney's Fees

This decision shall be binding on the parties unless a complaint for trial *de novo* is filed within 30 days in accordance with Section 718.1255, Florida Statutes. As provided by section 718.1255, Florida Statutes, the prevailing party in this proceeding is entitled to have the other party pay reasonable costs and attorney's fees. Any such request must be filed in accordance with Rule 61B-45.048, Florida Administrative Code.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order has been sent by U.S. Mail, postage prepaid, and by E-mail to the following persons on this 19th day of November 2021:

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