

Fax

To: Glenn Lang, Senior Attorney
DBPR
Arbitration Section

Fax: 850-487-0870

From: Jennifer Grimmer

Date: December 7, 2016

Re: Villages of Rio Pinar
vs. Homeowners Voting for Recall
Fee Case No.: 2016-04-8524
Rel Case No.: 2016-03-1948

Pages: 12, including cover

Cc:

☐ **Urgent** ☒ **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

Mr. Lang,

Please find the attached Response to Motion for Attorney's Fees and Costs to Prevailing Party to be filed in the above referenced case.

Thank you for your assistance. If you have any questions, please feel free to contact me.

Sincerely,

Jennifer Grimmer
Legal Assistant

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

IN RE: PETITION FOR BINDING ARBITRATION - HOA RECALL

Villages of Rio Pinar
Community Association, Inc.,

Petitioner,

v.

Fee Case No. 2016-04-8524
Rel. Case No. 2016-03-1948

Homeowners Voting for Recall,

Respondent,

James V. Rowell,

Petitioner,

v.

Fee Case No. 2016-04-8524
Rel. Case No. 2016-03-2689

Villages of Rio Pinar
Community Association, Inc.,

Respondent.

RESPONSE TO MOTION FOR
ATTORNEY'S FEES AND COSTS TO PREVAILING PARTY

The Villages of Rio Pinar Community Association, Inc. (the "Association"), by and through the undersigned Counsel, responds to the Motion for Attorney's Fees and Costs to Prevailing Party (the "Motion") as follows:

1. The Association does not dispute the reasonableness or the amounts claimed in the Motion. However, the Association disputes that is liable for the fees and costs.
2. Despite the case caption, the arbitration was not an effort by the Association to have the decision not to certify the recall upheld. It was two board members asserting their individual

challenges to the recall pursuant to §720.303(k), Fla. Stat. Moreover, the board members did not have authority to act on behalf of the association.

3. Thus, any award of fees and costs should be rendered against Ephraim Martin and Thomas Dougherty.

**THE AWARD OF FEES AND COSTS SHOULD BE
ENTERED AGAINST EPHRAIM MARTIN AND THOMAS DOUGHERTY**

4. The Arbitrator noted in the Corrected Summary Final Order (the “Order”), the crux of this matter was the composition of the board at the time of June 24, 2016. This is because at the meeting 4 directors voted to accept the recall and only 2 voted to reject it. (Order, p. 4). The two votes to reject the recall were cast by Ephraim Martin (“Martin”) and Thomas Dougherty (“Dougherty”).

5. The Order concludes that the Association had seven board members, and after the Association’s November 30, 2015 annual meeting, all seven of the board members became holdover board members for a one year term. (Order, p. 6). Accordingly, on June 24, 2016 and all material time prior to June 24, 2016, the board consisted of seven members.

6. After the November 30, 2015 annual meeting, Martin and Dougherty took the position that they were the only board members and appointed themselves to the offices of President, Vice President, Secretary, and Treasurer. With the assistance of counsel and the management company, Martin and Dougherty exercised exclusive control over the Association

7. In order to preserve the Association’s assets, the other five board members removed Martin and Dougherty from all offices of the Association. Effective June 23, 2016, Martin and Dougherty were replaced by Jason Alday as President; Phil Hampton as Vice President; Walt Lee as Secretary; and David Mau as Treasurer. A true and correct copy of the written action is attached hereto as **Exhibit A**.

8. Thus, as of June 24, 2016 and all times thereafter, Martin and Dougherty had zero authority to act on behalf of the Association. They were merely entitled to vote on board decisions. They did not have authority to retain an attorney or file a petition on behalf of the Association. The action they took was solely on their own and for the purpose of contesting their own recall.

9. On July 8, 2016, the undersigned sent a letter to Barbara Stage, Esq. and Soundview Management explaining why Martin and Dougherty were not the only two board members and informing them that Martin and Dougherty had been removed from all offices. A true and correct copy of the July 8, 2016 letter is attached hereto as **Exhibit B**.

10. Nonetheless, Martin and Dougherty improperly used Association funds as their personal piggy bank to fund their own personal challenges to the recall.

WHEREFORE, the Villages of Rio Pinar Community Association, Inc., request that if attorney's fees and costs are assessed in this case, that they are assessed against Ephraim Martin and Thomas Dougherty.

/s/Neil A. Saydah
Neil A. Saydah, Esquire
Fla. Bar No. 0011415
Saydah Law Firm
2572 West S.R. 426, Suite 3024
Oviedo, FL 32765
Phone: 407-956-1080
Fax: 407-956-1081
nas@saydahlawfirm.com
Attorneys for the Association

ACTION OF THE BOARD OF DIRECTORS
FOR
VILLAGES OF RIO PINAR COMMUNITY ASSOCIATION, INC.

WHEREAS, the affairs of the Association are managed by a board of seven (7) directors (the "Board") consisting of the following: Tom Dougherty, Ephraim Martin, Phil Hampton, David Mau, Jason Alday, Walt Lee, and Tom Allen;

WHEREAS, Tom Dougherty and Ephraim Martin have asserted they were validly appointed or elected to the offices of President, Secretary and Treasurer; and the Board disputes the validity of Tom Dougherty's and Ephraim Martin's appointment or election to the offices of President, Secretary and Treasurer;

WHEREAS, the Board believes it is in the Association's best interest to remove Tom Dougherty and Ephraim Martin from all offices;

WHEREAS, sections 8.5 and 8.6 of the Bylaws permit the Board to remove any officer, with or without cause and fill vacancies, and section 4.5 of the Bylaws, permits the Board to take any action permitted by law without a meeting by obtaining the written approval of the required number of directors; and

WHEREAS, the Board believes Jason Alday possesses the requisite credentials and qualifications to serve as President, Phil Hampton possesses the requisite credentials and qualifications to serve as Vice President, David Mau possesses the requisite credentials and qualifications to serve as the Treasurer, Walt Lee possesses the requisite credentials and qualifications to serve as the Secretary.

NOW, THEREFORE BE IT RESOLVED, that Tom Dougherty and Ephraim Martin are removed as officers of the Association.

IT IS FURTHER RESOLVED, that the vacancies in the offices shall be filled as follows:

President: Jason Alday
Vice President: Phil Hampton
Secretary: Walt Lee
Treasurer: David Mau

IT IS FURTHER RESOLVED, that the above changes are effective as of June 23, 2016.

(00027976.2)

EXHIBIT A

AGREED AND APPROVED BY THE UNDERSIGNED MEMBERS OF THE
ASSOCIATION'S BOARD OF DIRECTORS:

Signature: <u>Jason Alday</u> Print: <u>Jason Alday</u>	Signature: <u>Thomas Allen</u> Print: <u>Thomas Allen</u>
Signature: <u>David Mau</u> Print: <u>David Mau</u>	Signature: <u>[Signature]</u> Print: <u>Wanda Lee</u>
Signature: <u>Phil Hampton</u> Print: <u>PHIL HAMPTON</u>	Signature: _____ Print: _____

Text



2572 West S.R. 426
Suite 3024
Oviedo, Florida 32765
Phone: (407) 956-1080
Fax: (407) 956-1081
www.SaydahLawFirm.com

July 8, 2016

Via Electronic Mail and

Certified Mail to:

Certified No: 7015 1520 0002 8881 5454

Paul Palestrini

Soundview Property Management, Inc.

333 17th Street

Suite A

Vero Beach, FL 32960

**RE: Villages of Rio Pinar Community Association, Inc. (the "Association")
Notice of Change of Officers and Recall of Directors**

Mr. Palestrini:

If Soundview Property Management, Inc. ("Soundview") is represented by counsel, please forward this correspondence to Soundview's lawyer. If Soundview does not have a lawyer, I suggest it consult with a lawyer regarding the matters set forth below.

I have the pleasure of representing the Association by virtue of being retained by a majority of the Association's directors: Philip Hampton, Jason Alday, David Mau, Tom Allen, and Walt Lee (the "Board Majority"). As you know, Ms. Stage sent letters to each member of the Board Majority that asserted they lost their directorships because they failed to submit their "intent to be a candidate." Ms. Stage's letters are based on an inaccurate analysis of the Association's governing documents and the applicable laws. The Association cannot prohibit nominations from the floor and all votes must be in person or by proxy. Mail away or absentee balloting is not permitted by the governing documents.

The DBPR arbitration decision in *Laura Turner v. Butler Farms Homeowner's Association, Inc.* (the "Butler Farms Decision") does not support Ms. Stage's erroneous contention that the Board Majority lost its seats. The Butler Farms Decision was based on a set of facts that differs greatly from the facts at issue here. The Butler Farms bylaws required nominations to be made in advance of the election. Specifically, Article V of the Butler Farms Bylaws required nominations for director positions to be made in advance of the election for the purpose of mailing ballots to the membership at least 14 days prior to the election date. Unlike the facts and bylaws in the Butler Farms Decision, the Association's Articles of Incorporation provide that the directors shall be elected as provided in the Bylaws. Section 3.7 of the Association's Bylaws mandates:

(00028683.2)

EXHIBIT B

3.7. Action of Members. Decisions that require a vote of the Members must be made by a concurrence of a majority of the Voting Interests present in person or by proxy, represented at a meeting at which a quorum has been obtained unless provided otherwise in the Declaration, the Articles, or these By-Laws. (emphasis supplied).

Similarly, Section 3.8 of the Bylaws provides:

3.8. Proxies. At all meetings, Members may vote their Voting Interests in person or by proxy. (emphasis supplied)

Thus, the votes must be cast at the meeting of the members by the members and those present at the meeting holding proxies for members.

Section 4.7 of the Association's Bylaws specifically addresses the election of directors, and it provides that election to the Board shall be by secret written ballot, unless unanimously waived by all Members present at the meeting. Additionally, §720.306(9)(a), Fla. Stat. provides that the election of directors "must be conducted in accordance with the procedures set forth in the governing documents of the association...and a member may nominate himself or herself as a candidate for the board at a meeting where the election is to be held..." The Association cannot prohibit nominations from the floor unless the election procedure allows for nominations in advance of the meeting. See §720.306(9), Fla. Stat. The Association's election procedures clearly do not permit nominations in advance. Therefore, the Association must accept nominations from the floor, and it cannot require Members to submit "intent to be a candidate" forms prior to the meeting. Accordingly, the Butler Farms Decision is not applicable to the Association at all, and Ms. Stage's legal opinion is incorrect.

Since a quorum was not obtained at the last annual meeting, an election was not possible. Therefore, the existing Members of the board continue to serve as directors. Under the circumstances, the Board Majority constitutes a valid majority of the Board of Directors of the Association, and it has the authority to manage the affairs of the Association. This includes exercising the right to remove officers and appoint new officers, which the Board Majority has elected to do.

Enclosed please find a copy of the Action of the Board of Directors For Villages of Rio Pinar Community Association, Inc. (the "Written Action") removing Ephraim Martin and Thomas Dougherty as officers and appointing Jason Alday as President, Phil Hampton as Vice President, Walt Lee as Secretary, and David Mau as Treasurer. In addition to removing Martin and Dougherty as officers of the Association, a majority of the membership voted in writing to remove Ephraim Martin and Thomas Dougherty as directors. You clearly know about the recall because Soundview inexplicably refused to sign for the recall packet. In any event, the meeting was held at 10:30 on Friday, June 24, 2016. Not surprisingly, the only votes cast against certifying the recall were from Martin and Dougherty.

(00028683.2)

Irrespective of the recall, paragraph K of the Soundview Property Management, Inc. Management Services Agreement (the "Management Agreement"), makes the Association's President, Jason Alday, the only person authorized by the Association to direct Soundview. Therefore, upon receipt of this letter, Soundview is obligated to take direction from no one other than Jason Alday. Any failure to do so will be deemed a breach of the Management Agreement. Soundview is also on notice that attorney Barbara Billoit Stage has no authority to act on behalf of the Association and Soundview should cease communicating with her on all Association business.

Soundview is further directed to freeze the Association's accounts, and the authority to pay any of the Association's accounts payable, including amounts due to Soundview, is revoked. No payments shall be made until and unless Jason Alday approves the payments in writing. If Soundview fails to comply with this demand, the Association will look to Soundview for reimbursement of any improperly disbursed funds.

Soundview is also directed to immediately serve notices to the membership informing them that the "Annual Membership Meeting" scheduled for July 18, 2016 is canceled. There are numerous reasons why this meeting cannot be conducted, including but not limited to, the following: the meeting is not being held at a date, time and place determined by the board, as required by Section 3.2 of the Bylaws; the meeting appears to have been improperly called by only two of the seven board members or a person that is no longer officer of the Association; and the attempt to hold an election is not being done in accordance with the Association's governing documents. As noted above, there are 7 director positions in the Association and the election documents mailed by Soundview only provide for the election of 3 directors. The election documents require voting by secret ballot, and do not provide for nominations from the floor or a waiver of the use of secret ballots as provided in Section 4.7 of the Bylaws. Lastly, Sections 3.7 and 3.8 of the Bylaws require members to vote in person or by proxy. There is simply nothing in the Association's governing documents that provides for the election procedure contemplated in Soundview's recent mailing. If Soundview refuses to service notices of the cancelation of the July 18, 2016 meeting, the Association will look to Soundview to be indemnified for all legal fees and other costs that may be incurred to undo actions taken at the meeting.

Nothing in this letter should be construed as a waiver by the Association of any of its rights or claims against Soundview. The instant action is being taken to mitigate the Association's damages, and it is being done with a complete reservation of the Association's rights to pursue claims against Soundview for aiding or abetting board member breaches of fiduciary duties, if applicable, and breaches of the Management Agreement that may have occurred while the Board Majority was excluded from the management of the Association's affairs.

(00028683.2)

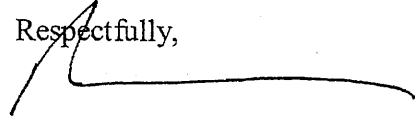


Main Office 2572 West S.R. 426 Suite 3024 Oviedo, Florida 32765	By Appointment Only 121 S. Orange Ave Suite 1500 Orlando, Florida 32801	Phone: (407) 956-1080 Fax: (407) 956-1081 www.SaydahLawFirm.com
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July 8, 2016
Paul Palestrini

Upon your receipt of this letter, please immediately contact Mr. Alday at 321-274-2305. Otherwise, I trust you will govern Soundview accordingly.

Respectfully,


Neil A. Saydah

Enclosures

cc: Phil Hampton
Jason Alday
David Mau
Tom Allen
Walt Lee
Barbara Billiot Stage

(00028683.2)

 **SAYDAH** LAW FIRM.com

Main Office
2572 West S.R. 426
Suite 3024
Oviedo, Florida 32765

By Appointment Only
121 S. Orange Ave
Suite 1500
Orlando, Florida 32801

Phone: (407) 956-1080
Fax: (407) 956-1081
www.SaydahLawFirm.com

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FOR
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IT IS FURTHER RESOLVED, that the above changes are effective as of June 23, 2016.

AGREED AND APPROVED BY THE UNDERSIGNED MEMBERS OF THE
ASSOCIATION'S BOARD OF DIRECTORS:

Signature: <u>Jason Alday</u> Print: <u>Jason Alday</u>	Signature: <u>Thomas Allen</u> Print: <u>Thomas Allen</u>
Signature: <u>David Mau</u> Print: <u>David Mau</u>	Signature: <u>[Signature]</u> Print: <u>WILLIAMS</u>
Signature: <u>Phil Hampton</u> Print: <u>PHIL HAMPTON</u>	Signature: _____ Print: _____