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

IN RE: PETITION FOR ARBITRATION

OLGA PEREZ, JOHN LEMUS, AND CONCEPCION LUYANDO,

Petitioners,

v. **Case No. 2005-03-3823**

LAS PALMAS AT SAND LAKE CONDOMINIUM ASSOCIATION, INC., and UNIT OWNERS VOTING FOR RECALL,

Respondents.
/

SUMMARY FINAL ORDER

I. PRELIMINARY MATTERS

On June 22, 2005, the above-styled case was filed at the behest of Olga Perez, John Lemus, and Concepcion Luyando, three purportedly "recalled" board members, as a petition for recall arbitration brought by Las Palmas at Sand Lake Condominium Association, Inc. The petition asserted that it was being filed by the association in accordance with rule 61B-50.105(2), Fla. Admin. Code, which governs petitions for recall arbitration filed pursuant to section 718.112(2)(j)3., Florida Statutes.

The petition alleged that there was an attempted recall by written agreement; that the written recall agreement "was not received by the board;" that the board received a letter from Lydia Melendez, the president and registered agent of the association, stating that she had received 117 recall ballots; and that the board received from Russell Klemm, the association's attorney at the time, a list of unit owners who had

allegedly signed the recall agreement. The paragraph at the top of the list of unit owners, written in Spanish, states that on June 14, 2005, Mr. Omar Rodriguez, the owner representative, presented and provided "documents with 117 signatures" to the president of the board, Lydia Melendez. The list was of the unit owners who signed the documents.

A letter dated June 14, 2005, signed by the president, Ms. Melendez, was attached to the petition for arbitration. It informs the board of directors that on June 14, 2005, she received

> 117 signature (*sic)* of owners executing the removing of the following Director (*sic*) of the Board: John Lemus, Ms. Concepcion Luyando, and Ms. Olga Perez.
>
> For that reason for the past (*sic*) the meeting dated June 15, 2005 in the House Club at 7:00 pm will not have effect because Directors before mentioned had been removed by a "RECALL" realized by the owners of Las Palmas Condominium.
>
> The following owners hade (sic) been elected by our community to occupied (*sic*) the position of the Directors before mentioned in the "RECALL" that will be the following: Nelson Garcia, Juan Arvelo and Eudosia Taveras.

According to the petitioners, the only evidence that a recall agreement had been served on the board, through service on Ms. Melendez, was the above-quoted letter and the list of names purporting to be the names of the unit owners who signed the recall agreement.

The petition for arbitration also alleged that the three "recalled" board members met with attorney Russell Klemm, who informed them that he did not consider them

board members because of the recall; that the president locked the board[1] out of the association's office and refused to deliver any association documents to them; and that the board refused to certify the recall because the board had not seen the recall by written agreement.

The problem with the petition being filed as a petition for recall arbitration pursuant to section 718.112(2)(j)3., Florida Statutes, is that the majority of the board, i.e., the three board members informed that they had been recalled, apparently never saw or voted on the recall agreement. The petitioners apparently held a previously noticed meeting of the board on June 15, 2005, the day after the delivery of the alleged recall agreement to Ms. Melendez and Ms. Melendez's announcement that the three board members had been recalled; however, according to the minutes of the meeting, the recall was not discussed. Since the recall was not served until June 14, 2005, the recall obviously could not be discussed at that meeting, for lack of proper notice, and there were no allegations that any other meeting was ever held to discuss the written recall agreement that the president had allegedly received.

Because it appeared that the written recall agreement was never presented to the entire board to review, because there was never a board meeting held for the purpose of determining whether the recall agreement should be certified, and because the petitioners had been summarily removed from office by the president on the basis of a recall agreement to which they did not have access, it was determined that this case could not be brought as a traditional petition for recall arbitration filed pursuant to

[1] It is assumed that the "board" used in this context means the three petitioners, who constituted a the majority of the board when purportedly recalled.

section 718.112(2)(j)3., but could be considered a "reverse recall" case brought pursuant to section 718.1255, Florida Statutes, by the three purportedly recalled board members against the association.

Since the petition for arbitration was treated as a "reverse recall" brought by petitioners pursuant to section 718.1255, Florida Statutes, the style of the case was changed to "Olga Perez, John Lemus, and Concepcion Luyando v. Las Palmas at Sand Lake Condominium Association, Inc. and Unit Owners Voting for Recall." The Unit Owners Voting for Recall remained as a party respondent because its substantial interests could be affected by the arbitration action.

II. FACTS

1. The respondent, Las Palmas at Sand Lake Condominium Association, Inc., is a condominium association with 224 voting interests; thus, 113 votes for recall are necessary to recall a board member.

2. On June 14, 2005, the president of the board of directors was served by hand with a written recall agreement consisting of 117 separate ballots.[2] On every ballot there was a computer generated, pre-marked "x" in the recall box or space next to the names Olga Perez, Concepcion Luyando, and John Lemus, and a pre-marked "x" in the retain space next to the names Lydia Melendez and Aixa Lopez. The computer generated x's were also in the spaces next to the names of Nelson Garcia, Juan Arvelo, and Eudosia Taveras for election as replacement board members.

[2] The date of service of the recall agreement is accepted to be June 14, 2005, when it was served by hand on the president. According to respondents, after consultation with the association's attorneys, the recall agreement was to be served again by certified mail on June 17, 2005, with the meeting to be held on June 27, 2005. The recall agreement sent by certified mail was received on June 18, 2005. There is no indication that a board meeting to discuss the recall was ever noticed or held. It is not clear that the petitioners were ever aware of the second service by certified mail.

3. Not surprisingly, Olga Perez, Concepcion Luyando, and John Lemus each received 117 votes to be recalled; Lydia Melendez and Aixa Lopez received 117 votes to be retained, and Nelson Garcia and Juan Arvelo were unanimously elected with 117 votes to be the replacement board candidates. Eudosia Taveras was not listed on some of the ballots. However, she received a pre-marked vote on all the ballots on which she was included.

4. From the exhibits to the petition, which were not disputed by the respondents, it is apparent that the association failed to follow the procedures set forth in section 718.112(2)(j), Florida Statutes, and rule 61B-23.0028, Fla. Admin. Code. Upon receipt of the written agreement, the president of the association, Lydia Melendez, announced to the board and the membership that Olga Perez, Concepcion Luyando, and John Lemus had been recalled and that Nelson Garcia, Juan Arvelo, and Eudosia Taveras were now on the board.

5. That the recall was announced by the president on the same day she received the written recall agreement is clear. The letter dated June 14, 2005, signed by the president, Ms. Melendez, informs the board of directors that on June 14, 2005, she received

> 117 signature (*sic)* of owners executing the removing of the following Director (*sic*) of the Board: John Lemus, Ms. Concepcion Luyando, and Ms. Olga Perez. For that reason for the past (*sic*) the meeting dated June 15, 2005 in the House Club at 7:00 pm will not have effect because **Directors before mentioned had been removed by a "RECALL**" realized by the owners of Las Palmas Condominium.
>
> The **following owners hade (sic) been elected by our community to occupied (*sic*) the position of the Directors before mentioned** in the "RECALL" that will be the following: Nelson Garcia, Juan Arvelo and Eudosia Taveras. (e.s.)

6. Rule 61B-23.0028(3), Fla. Admin. Code, provides in pertinent part as follows:

> (3) Board Meeting Concerning a Recall by Written Agreement: Filling Vacancies. **The board shall hold a duly noticed meeting of the board to determine whether to certify** (to validate or accept) the recall by written agreement within five full business days after service of the written agreement upon the board. It shall be presumed that service of a written recall agreement to one or more board members shall not, in and of itself, constitute grounds for an emergency meeting…
>
> (a) Certified Recall. **If the board votes to certify the written agreement to recall, the recall shall be effective upon certification,** and the following provisions apply:
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> …
>
> 3. If a majority or more of the board is recalled in a certified recall, those **replacement board members** elected by the written agreement … **shall take office upon adjournment of the board meeting** at which it was determined to certify the recall. (e.s.)

7. The president's announcement that Olga Perez, Concepcion Luyando, and John Lemus had been recalled and that Nelson Garcia, Juan Arvelo, and Eudosia Taveras were now on the board was not in accordance with the statute and rule, and it caused the recall to resemble a coup more than an orderly democratic process. The president's failure to allow the other members of the board to see the recall agreement and determine whether to certify it, as required by the recall rules, created a situation where two competing boards were apparently claiming legitimacy. Although the respondents deny that the president locked "the board" out of the association office, the respondents do not state whether the petitioners were locked out of the association office. Further, the association denied that "legitimate board members have been

refused association documents," but does not deny specifically that the petitioners were denied access to the documents.[3]

8. In their answer, the association contends that regardless of the ruling on the recall, Olga Perez cannot resume her position on the board because she resigned from the board on May 5, 2005. However, her resignation letter, which was attached to the answer, states that she "would like to present my resignation as secretary of the board."[4] The letter only states that she is resigning as secretary, not that she is resigning from the board.

III. **DISCUSSION**

Regardless of the propriety of the recall procedures initiated by the president of the association, the determining factor in this case is that the recall agreement itself is invalid. Although the ballots followed the form approved by the Division, the agreement is facially invalid because the ballots were all pre-marked. The computer generated x's in the petitioners' "recall" spaces did not allow the unit owners an opportunity to mark their own ballot and decide for themselves who should be recalled and who should be retained.

Although each ballot of the written recall agreement contains separate recall and retain boxes for each board member sought to be recalled, each of the ballots contains a perfect, computer generated "x" that fills the recall box next to each of the three petitioners' name. The pre-printed "x" is also placed in the boxes next to each of the

[3] All unit owners have a right to inspect the association records; not just board members. *See* §718.111(12)(b), Florida Statutes. A recall agreement becomes an official record of the association upon service of the agreement.
[4] The original letter is written in Spanish; the translation is apparently respondents'.

three replacement candidates listed to replace the three board members sought to be recalled. [5]

Rule 61B-23.0028(1), Fla. Admin. Code, provides as follows:

> (1) Form of Written Agreement. All written agreements used for the purpose of recalling one or more members of the board of administration shall:
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> * * *
>
> (b) Provide spaces by the name of each board member sought to be recalled so that the person executing the agreement may indicate whether that individual board member should be recalled or retained.

There are scores of cases that discuss the necessity for recall and retain spaces on the written recall agreement ballots when more than one director is sought to be recalled and the reasons for requiring them. Indeed, the vital importance of recall and retain spaces is reflected in recent cases as well as older ones. *See,* e.g. *Greye v. Alpine Woods Ass'n, Inc.* Arb. Case No. 2004-04-6686, Order on Respondent's Motions (November 8, 2004)(where recall agreement ballots did not have recall and retain spaces they were declared to be void *ab initio); Gateland Village Condominium Association, Inc. v. Unit Owners Voting for Recall* , Arb. Case No. 98-5144, Summary Final Order (January 11, 1999)(written agreement is "fatally flawed" where there are no recall and retain spaces for each director); *Lake Howell Arms Condominium Ass'n, Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 98-3766, Summary Final Order (May 22, 1998)(lack of recall and retain lines for each director is fatal and agreement is void *ab initio*).

[5] Although all five board members were listed on the recall ballots, two of the board members, Lydia Melendez and Aixa Lopez, were pre-marked with an "x" in the retain box. Since all the ballots were pre-marked, only three replacement candidates needed to be listed.

The rule requires recall and retain "spaces" on the ballot next to each name so that the unit owner who is voting may indicate whether that individual board member should be recalled or retained. Obviously, when a ballot is pre-marked, the ballot no longer provides the spaces next to the board member's name where the unit owner may choose to mark the recall box or the retain box.

In *Courts of Inverrary Condominium Association, Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 02-5480, Final Order (September 19, 2002), the arbitrator found that "the form of the ballots did not allow a separate vote for each individual sought to be recalled. … Rather, the voter was forced or constrained to vote for or against the entire slate of board members sought to be recalled**. The cases are legion holding that in the interests of fair play, each board member sought to be recalled must be given separate consideration and accommodation in the ballot form used**." (e.s.)

In *Maya Marca Condominium Apartments, Inc. v. Unit Owners Voting For Recall*, Arb. Case No. 2004-05-5661, Summary Final Order on Petition for Recall Arbitration (January 7, 2005), the arbitrator found that pre-marked ballots were not valid ballots, stating:

> Clearly, in almost all circumstances, a pre-marked ballot will not satisfy the requirements of rule 61B-23.0028(1)(b), Fla. Admin. Code. …
>
> The administrative rules must be substantially followed for the recall ballot to be valid regardless of the intent of the individual voter. Although rules are to be liberally construed in favor of the right to vote, even when a right is a constitutional right it is subject to reasonable rules and regulations, as the Supreme Court recognized in Krivanek v. The Take Back Tampa Political Committee, 625 So. 2d 840 (Fla. 1993), stating:
>
> > Given its constitutional underpinnings, the right to petition is inherent and absolute. This does not mean, however, that

> such a right is not subject to reasonable regulation. Quite the contrary, reasonable regulations on the right to vote and on the petition process are necessary to ensure ballot integrity and a valid election process.
>
> Pursuant to statutory authority, the division has established rules regulating the procedures to be followed in recalls by written agreement. For the recall to be successful, unit owners seeking to recall board members must substantially follow those procedures. **Both the division's rule and its sample ballot form clearly indicate that the unit owner, not the person or group initiating the recall, is to vote by marking one of the spaces provided next to each board member's name** indicating whether that board member should be recalled or retained. The failure to comply with rule 61B-23.0028(1)(b), Fla. Admin. Code, in this regard is a fatal flaw in the recall agreement. (e.s.)

As was the case in *Maya Marca*, the written recall agreement in this case, consisting of ballots containing computer generated, pre-marked recall and retain spaces, is fatally flawed and void *ab initio*.

Therefore, based on the foregoing, it is

ORDERED:

Since the recall agreement was void *ab initio*, the recall of Olga Perez, John Lemus, and Concepcion Luyando was not effective. The recall is not certified. Olga Perez, John Lemus, and Concepcion Luyando shall remain on the board of directors. Nelson Garcia, Juan Arvelo, and Eudosia Taveras are not on the board of directors and shall immediately return to the board any and all association records and property in their possession.

DONE AND ORDERED this 24th day of August, 2005, at Tallahassee, Leon County, Florida.

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Diane A. Grubbs, Arbitrator
Dep't of Business and Professional Regulation
Arbitration Section
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1029

Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order has been sent by U.S. Mail and facsimile copy to the following persons on this 24th day of August, 2005:

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Diane A. Grubbs, Arbitrator

Right to Appeal

As provided by section 718.1255, F.S., a party who is adversely affected by this final order may, within 30 days of the entry and mailing of this final order, file a complaint for a trial de novo in a court of competent jurisdiction in the circuit in which the condominium is located. This order does not constitute final agency action and cannot be appealed to a district court of appeal.

Attorney's Fees and Costs

As provided by section 718.1255, F.S., the prevailing party in this proceeding is entitled to have the other party pay its reasonable costs and attorney's fees. Rule 61B-45.048, F.A.C., requires that a party seeking an award of costs and attorney's fees must file a motion seeking the award not later than 45 days after rendition of this final order. The motion must be *actually received* by the Division within this 45-day period and must conform to the requirements of rule 61B-45.048, F.A.C.