

PAHIO at the Kauai Beach Villas Interval Owners Association
c/o Grand Pacific Resorts, Plan Manager
4330 Kauai Beach Drive
Lihue, HI 96766

Re: Demand For Action/PAHIO at the Kauai Beach Villas Interval Owners Association (KBVIOA)

To Whom It May Concern:

The undersigned are interval owners at Kauai Beach Villas, and thus Members of the KBVIOA non-profit corporation. This letter is intended to serve as a demand for action within the meaning of HRS 414D-90.

BACKGROUND

The Developer of the Association is PAHIO Vacation Ownership, Inc. (“PVO”). In 2006, Wyndham Vacation Ownership, Inc. (“WVO”) acquired PVO, along with the Plan Manager at the time, PAHIO Vacation Resorts, Inc. (“PVR”). The Hawaii Department of Commerce and Consumer Affairs records identify PVO and PVR as separate Hawaii corporations, and WVO as a Delaware corporation. According to filings made with the Securities and Exchange Commission by WVO’s parent company (Wyndham Destinations Inc.), PVO and PVR are wholly-owned subsidiaries of WVO (meaning WVO owns 100% of the stock in those corporations).

After its acquisition by WVO and continuing through 2016, PVR continued to act as the Plan Manager for KBVIOA. Nonetheless, WVO made continual and confusing representations to the public that it was in charge of the resort, many WVO employees served on the KBVIOA Board of Directors, and Board minutes and agenda were prepared on WVO letterhead and stationary. WVO has never owned any KBVIOA intervals. However, at the time of WVO’s acquisition of PVO, PVO still had some unsold intervals in its inventory. PVO never attempted to sell these intervals after it was acquired by WVO.

Instead, at some point in time, the KBVIOA Board entered into a “foreclosure agreement” with Wyndham Vacation Resorts, Inc. (“WVR”), which is a Delaware corporation and another wholly-owned subsidiary of WVO. Under this agreement, WVR apparently had the right, among other things, to acquire ownership rights in intervals that had gone to foreclosure for non-payment of maintenance fees. Apparently, the “fine print” of this agreement allowed WVR to title those intervals in the name of any “designee,” and that designee wound up being PVO. Through this agreement with WVR, PVO was able to increase dramatically the number of intervals it owned (it currently owns 672 intervals according to the KBVIOA membership list), thereby giving it (and its parent company, WVO) substantial control over Member voting and Board decision-making.

WVR also holds the registered trademark for “Club Wyndham.” After PVR’s acquisition by WVO in 2006, and while PVR acted as Plan Manager, Club Wyndham was marketed aggressively to Members. KBV continues to be advertised as a Club Wyndham property on the Club Wyndham website, further confusing Members and the public at large. While many Members have apparently opted to participate in “Club Wyndham,” it is not an exchange program that has been authorized or approved by KBVIOA; according to the current House Rules, RCI is the authorized exchange company for the KBVIOA.

On July 30, 2015, the Board voted in a special meeting to terminate the foreclosure agreement with WVR, and on February 23, 2016, the Board (in executive session) voted to terminate the KBVIOA management agreement with PVR. Grand Pacific Resorts was retained as the Plan Manager, effective January 1, 2017.

MEMBER CONCERNS

We are extremely concerned with the continued lack of transparency by the KBVIOA Board of Directors, and what appears to be Board collusion with efforts by WVO to retake control of the KBVIOA through PVO, and reinstate a WVO-affiliate as Plan Manager. Documents such as the infamous “smoking gun” memo, which is archived and available for review on the SaveKBV.org website, make clear WVO’s intention to take control of the AOA and the entire Kauai Beach Villas complex, and not just KBVIOA. On May 16, 2019, the Board voted 3-2 not to renew the Association’s management contract with Grand Pacific Resorts, without alleging any performance issues or contract breach by the Plan Manager. This was done without the Member vote required by the Declaration, and contrary to the advice of the Association’s general counsel. Not surprisingly, a WVO-affiliated Director cast the deciding vote. We have reason to believe that this agenda is being orchestrated and manipulated by WVO through tortious and fraudulent, if not illegal, conduct.

Fiduciary Duty Breaches

Directors of nonprofit corporations are fiduciaries, meaning they hold positions that require trust, confidence, and the exercise of good faith and candor. They also have a duty to act for the benefit of the Members in connection with their undertakings for the Association. Specifically, Directors can be held personally liable based on three fiduciary duties: the duty of care, the duty of loyalty, and the duty of obedience. Unfortunately, our Board seems to ignore their fiduciary responsibilities to the Association and Members. Directors, past and present, who are in breach of their fiduciary duty to the Association are liable for any damages caused by the breach. Additionally, any person who aids or abets, or conspires in, the breach is equally liable. Equitable remedies also exist to compel compliance with fiduciary duties, or enjoin on-going breaches.

The duty of care requires a Director to exercise the same care that an ordinary, prudent person would exercise under similar circumstances. Generally, this duty is also understood to include informed decision-making and attentiveness. Informed decision-making means knowing the law and the corresponding requirements for the Association, keeping tabs on its daily activities, and then, basing decisions on that knowledge. Devoting the necessary attention to the Association requires the Directors to act in a competent manner and spend the time required to care for the Association as needed. The Board has ignored at least one recent written legal opinion of the Association's general counsel, and appears to be unaware of such basic legal concepts as fixing a record date for elections or what a membership list is. That duty of care also has been violated by the Board's failure to keep all of the Association's governing documents updated and current. The Board must ensure that it is regularly reviewing the Association's governing documents and updating them as necessary to keep up with the current workings of the Association and applicable law. No updates have been done to the Declaration since 1998, or Bylaws since 1996, despite the fact that "KBV Interval Owners Newsletter Number 1" states:

"Vice President Warner started a project to rewrite the Bylaws in November 2017. There were multiple reasons to do so. Removal of references to the "Developer," codify use of electronic communications, incorporate Amendment 1 to the Bylaws, remove the requirement that one board member be a Hawaii resident and correct references to repealed Hawaii Statutes. The rewritten Bylaws were passed to Grand Pacific after the Annual Meeting for their legal staff review. After that they will go to the KBV Legal Counsel for another legal review before being submitted to the owners for a vote."

A reasonable conclusion to be drawn is that, for whatever reason, someone on the Board or affiliated with WVO does not want to see the Bylaws amended or restated. Certainly, the Board has knowledge that the Bylaws are in serious need of updating, but there seems to be no urgency given to this issue.

The duty of loyalty requires Directors to act in good faith and pursue the Association's best interests. This includes full disclosure of any issues that could cause, or be perceived to cause, a conflict of interest and recusing oneself from all discussions, both formal and informal, related to such conflict. It also requires Directors not to take opportunities away from the nonprofit for their own personal gain and to protect the organization's confidential information. The continued presence of WVO-affiliated persons on the Board creates obvious, continual, and irreconcilable conflicts of interest, and gives those persons direct access to confidential information, including confidential information concerning WVO's competitors. The Board lacks the requisite transparency in dealing with conflicts of interest, and appears more concerned with WVO's best interests than the Association's. Board records (agenda packets, minutes, resolutions, policies, etc.) dating back to 2006 are woefully incomplete, and provide virtually no evidence that any real effort was made to address the conflicts of interest posed by the continued presence of WVO-affiliated persons serving on the Board.

The duty of obedience requires the Board to operate within the scope of the Association's rules, policies, Declaration, articles of incorporation, and Bylaws. In addition, the Board must comply with state and federal laws. Directors are supposed to follow the rules of the Association as laid out in the various governing documents, as well as applicable state and federal laws (such as IRS non-profit record-keeping and meeting minutes requirements). Not only has the Board failed and refused to familiarize themselves adequately with the Association's governing documents and applicable law, they have willfully ignored and violated them and the advice of the Association's general counsel, putting the Association as a whole at risk of, among other things, insurance coverage denial for being out of compliance with applicable law and governing documents, and having the legal validity of its actions and agreements challenged. Furthermore, Directors' recent actions with respect to the non-renewal of the plan management agreement expose them to tortious interference with contract claims, and expose the Association to liability on a substantial breach of contract claim by Grand Pacific Resorts.

The Developer's original intent, as reflected in the Master Plan and marketing of intervals to original interval purchasers, was for the Developer to relinquish control of the Association to the Members as it sold intervals. The current Developer (PVO) has made no effort to market or sell any intervals since it was acquired by WVO in 2006; instead WVO is using PVO to feed its Club Wyndham program by acquiring more and more intervals through the WVR foreclosure agreement.

Many Declaration amendments were made by the Developer to provide Members with transparency and rights, but since WVO's acquisition of PVO, these have been largely ignored by the Board. For example:

- Article II, Section 5(e) requires an annual vote by Members regarding Plan Manager rentals;

- Under Article V, Section 2, and Article VIII, Section 1, any transfer of an interval by a Member requires that it be authorized by, and done through, the Association, but no House Rule or published Board policy exists for this to happen;

- Article V, Section 7 requires a Member vote to change a Plan Manager or enter into contracts for longer than 1 year;

- Article V, Section 8 requires the Board to give Members notice and an opportunity to vote on matters before the Master Association (i.e., the AOA);

- Article VI, Section 5 requires the Board to send to all Members not only the budget 45-60 days prior to the beginning of the fiscal year, but the annual report within 120 days

after the close of the fiscal year, minutes of all Board meetings within 60 days of the meeting, and enforcement policies and practices regarding maintenance fees at least 60 days prior to the beginning of the fiscal year;

-Article VI, Section 5 also requires the Board to give or make available all financial and other information to all Members.

Election Problems

Only Members (i.e., “Owners” as defined in the Declaration) are entitled to vote or serve on the Board. The Association is required by law (HRS 414D-301(c)) to “maintain a record of its members in a form that permits preparation of a list of the name and address of all members, in alphabetical order by class, showing the number of votes each member is entitled to cast,” and the Plan Manager is supposed to “keep an accurate and current membership list that includes the names and addresses of association members” (Hawaii DCCA Administrative Rule 16-106-12(g)). Under Hawaii law (HRS 414D-302) and the Association’s Bylaws (Section 5.04), Members have the right to inspect and copy the membership list, and the list is supposed to be used to, among other things, verify a Member’s voting and Board candidacy eligibility before voting/election information is transmitted to Members. Knowingly causing false or misleading voting/election information to be provided to Members via the US Postal Service or internet can constitute the federal crimes of mail or wire fraud.

The membership list being made available to Members by the Association does not list any WVO-affiliated entity other than PVO. For elections, however, the Board is using a different “Owner Roster” that was provided to Grand Pacific upon its appointment as Plan Manager, which is not being made available to Members and shows “Wyndham” having a 22.3% total voting/ownership interest under the following 4 entities:

- 1) First American Trust, fsb;
- 2) Pahio Development, Inc.;
- 3) Pahio Vacation Ownership, Inc.; and
- 4) Wvo-Wyndham Developer.

Of these entities, only PVO appears on the membership list being made available to Members, First American Trust, fsb is a financial institution and not a “Wyndham” entity, PAHIO Development, Inc. is not in good standing with the State of Hawaii and appears to have been dormant for several years, and no entity called “WVO-Wyndham Developer” exists.

Furthermore, the membership list distributed to Members upon request references only the Owner name and address as provided to Grand Pacific upon transition and recorded in the property management system. This list does not indicate if the interval is annual or biannual, or the number of intervals which may be owned by each individual or entity. Curiously, this

“secret” list apparently was prepared while PVR was Plan Manager and WVO-affiliated persons controlled the Board.

Simply stated, the Association is either providing Members with an inaccurate membership list or using a different “secret,” unverifiable list for election purposes. Neither list comports with Hawaii law. There is no system in place to verify the accuracy of the membership list being used by the Association for election purposes or verify the validity of Board candidate qualifications or any votes cast, or verify a *bona fide* quorum for election purposes. The inability of the Association to provide Members with a current and accurate membership list invalidates any special or Annual election.

Finally, we are concerned about other issues regarding the election process that raise serious questions regarding its validity. Among other things:

- Bylaw 2.03 requires all meetings of the Association to be held at a place “within or without the State of Hawaii that is readily accessible at reasonable cost to the largest possible number of members.” Given that the vast majority of Members live on the mainland, holding the Annual meeting in Hawaii works to the advantage of merely a select few Members and WVO, and is in violation of the Bylaws.

- Bylaw 3.01 states that “there must be at least one Director on the Board who has been elected by members excluding the Developer.” The term "Developer" is defined in the Declaration at Article I, Section 2(m) to mean PVO. The Bylaws at Section 1.03 state: "Capitalized terms shall have the same meaning ascribed to them in the Declaration." Therefore, the term "Developer" as used in the Bylaws means PVO. No such vote has been held since 2006, when WVO acquired PVR and WVO-affiliated persons began serving on the Board.

- No Board policy seems to be in place for vetting candidates to ensure they meet the qualifications required in our governing documents;

- The past-President, who is a WVO employee, refused to allow a qualified Member candidate to appear on the 2017 ballot for no legitimate reason;

- It is unclear whether corporations which claim voting rights actually provide the Association with an appropriate resolution authorizing anyone to vote by proxy on their behalf at the meeting;

- No record date is fixed by the Board for establishing voting or candidate qualifications; and

-Nobody seems to be able to produce a current, verifiable membership list for election purposes to verify voting rights or candidate qualifications (i.e., whether a candidate is an “Owner” as defined in the Declaration).

With respect to the most recent Annual meeting:

-One successful candidate was not actually a Member according to the title transfer provisions of the Declaration(e.g., Article V, Section 2), and another was a WVO employee, and she offered no evidence that she was an officer of a corporate Member (as required by the Bylaws) and authorized to offer her candidacy on the corporation’s behalf (such as a corporate resolution);

-Many Members have voiced that they were unable to vote using the on-line system because it was not functioning properly;

-While the Bylaws specify the President is to be Chair of the Annual Meeting, a Director hired a “parliamentarian” to act as Chair, as well as a new Association attorney for unidentified “special projects,” without prior Board knowledge or approval;

-The election ballot failed to separately identify any Hawaii resident candidate or vote, but the Annual meeting “Chair” proceeded to make this a requirement anyhow, despite the written opinion of the Association’s general counsel, a recommendation raised from the meeting floor by the Plan Manager’s counsel to adjourn the meeting, and the Board’s newsletter statement to owners that the provision was being removed; and

-The election “Chair” failed to take a member appeal to vote, as required by Roberts Rules of Order, regarding the record date for candidate qualifications, and otherwise failed and refused to consider several concerns raised at the Annual meeting.

DEMAND FOR ACTION

We, the undersigned Members, hereby demand that the Board immediately bring itself into compliance with the governing documents and applicable law, and

-Withdraw any Board resolution regarding any change in Plan Manager and refrain from taking or authorizing any further action on behalf of KBVIOA other than that which is absolutely necessary to preserve the status quo until a new election is conducted;

- Declare the election results of May 16, 2019, invalid, and call a special meeting of the Association for the purpose of holding a new election utilizing a reconciled, accurate and transparent membership list; and

- Pass a resolution authorizing Grand Pacific Resorts to retain independent legal counsel(s) on behalf of the Association to investigate and make recommendations to all Members about:

1. Any possible civil claims or criminal conduct regarding Wyndham Vacation Ownership, Inc. (including any of its subsidiaries, affiliates, agents and employees), and any past or present officer, director, attorney, accountant, employee or agent of KBVIOA;
2. Applicable law and documents governing the formation, administration, operation and management of the Association; and
3. Systems, policies, procedures and best practices for the KBVIOA Board of Directors.

This demand and the Association's response thereto should be published on the "Owners Community" webpage of the KBV website maintained by Grand Pacific. In the event compliance with this demand is not completed within thirty (30) days of its receipt, the undersigned will have no choice but to bring a derivative class action on behalf of the Association against all persons and entities specified herein.

Signed By All Owners/Members Listed on Attachment A hereto