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

IN RE: PETITION FOR ARBITRATION

LÉO-PAUL MASSE

Petitioner,

Case No. 2012-03-9829

INVERRARY CONDOMINIUM ASSOCIATION, INC.,

Respondent.
____/

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION AND SUMMARY FINAL ORDER

This order is entered pursuant to Rule 61B-45.030, Florida Administrative Code, which permits the arbitrator to enter a summary final order where there are no disputed issues of material fact.

Pertinent Procedural History

1. On September 19, 2012, Petitioner, Léo-Paul Masse, filed a Petition for Mandatory Non-binding Arbitration naming the Inverrary Condominium Association, Inc. (Association) as Respondent. Petitioner alleges the Association failed to allow Petitioner to timely inspect certain official records of the Association.

2. On September 26, 2012, an Order Requiring Answer was entered.

3. On October 2, 2012, the Association filed a Motion for an Extension of Time to File an Answer.

4. On October 2, 2012, Petitioner filed a Motion to Dismiss the Association's Motion for Extension of Time to File an Answer.

5. On October 10, 2012, an Order Denying the Association's Motion was entered.

6. On October 10, 2012, Petitioner filed a Motion to Place an Ex Parte Communication on the Record and to Disqualify the Firm Cole, Scott & Kissane, P.A. as Legal Representative for the Respondent.

7. On October 15, 2012, the Association filed a Renewed Motion for an Extension of Time.

8. On October 22, 2012, a Notice of Communication and Order Granting an Extension of Time and Denying Petitioner's Motion to Disqualify the Association's Law Firm was entered.

9. On October 23, 2012, Petitioner filed Petitioner's Motion for Reconsideration of the arbitrator's Order which denied Petitioner's Motion to Disqualify the Association's Law Firm, Motion for Order of Default and Motion for Summary Final Order.

10. On November 2, 2012, the Association filed an Answer.

11. On November 5, 2012, Petitioner filed a Motion to Correct Respondent's Failure to Deliver to Petitioner a Copy of Correspondence to Arbitrator.

12. On November 6, 2012, Petitioner filed Petitioner's Motion for Order of Default and Final Order after Default.

13. On November 27, 2012, the Association filed a Memorandum of Law in Response to Petitioner's Motion for Order of Default.

14. On December 2, 2012, Petitioner filed a copy of Petitioner's letter to Attorney David Coleman, counsel for the Association.

15. On December 14, 2012, Petitioner filed a Rebuttal to Respondent's Answer to Petition and Motion for Summary Final Order.

<u>Petitioner's Motion for Reconsideration, Order of Default and Summary Final Order</u>

Petitioner requests that the arbitrator reconsider her Order dated October 22, 2012, which, in pertinent part, granted the Association additional time to file an Answer. As the Association filed an Answer on November 5, 2012, Petitioner's request for reconsideration of the Order granting the Association additional time to file an Answer need not be considered.

Petitioner also seeks an Order of Default pursuant to Rule 61B-45.02(1), Florida Administrative Code. The Rule states as follows:

> When a party fails to file or serve any responsive document in the action or has failed to follow these rules or a lawful order of the arbitrator, the arbitrator shall enter a default against the party where the failure is deemed willful, intentional, or a result of neglect. No service need be made on parties against whom a default has been entered, except that pleadings asserting new or additional claims against them shall be served in the manner provided for service of the original petition for arbitration.

Petitioner alleges that the Association failed to provide him a copy of the Answer by 5:00 p.m. on November 2, 2012, and is therefore in default. Petitioner is mistaken.

The arbitrator's October 22, 2012 Order required the Association to file an Answer by 5:00 p.m. on November 2, 2012. Rule 61B-45.010(4), Florida Administrative Code, states:

> "Filing" shall mean receipt by the Division during normal business hours or by the arbitrator during the course of a hearing. Pleadings including the initial petition or other communications may be filed by regular hard copy or facsimile, and if filed by facsimile, a hard copy of the pleading or other communication need not be filed with the arbitrator; however, the party using facsimile filing bears the burden of ensuring that the pleading or other correspondence has actually been filed with the arbitrator. If a

> document is filed via facsimile, the facsimile confirmation sheet shall be evidence of the date on which the Division received the document. A facsimile copy is filed within the meaning of this rule when the facsimile copy of the document is received by the Division. No pleadings shall be faxed that exceed 30 pages in length including attachments. When a party files a facsimile document with the arbitrator, the party shall also provide a facsimile copy to the other party if the fax number is available.

As the Association's Answer was "filed" by facsimile with the Division on November 2, 2012, at 2:23 p.m., Petitioner's Motion for an Order of Default is without merit.

Finally, Petitioner requests the entry of a Summary Final Order. As the arbitrator has determined that there are no disputed issues of material fact remaining, a Summary Final Order is appropriately entered.

Statement of the Issue

Whether the Association failed to provide timely access of requested Association Official Records pursuant to requests made: on July 2, 3, 6, 11 and 18, 2012; on October 11, 2011; and on August 12, 24 and 29, 2012?

Finding of Facts

1. Petitioner, Léo-Paul Masse, is the owner of Unit # 406, 3776 Inverrary Boulevard, Lauderhill, Florida 33319, and by virtue of his ownership of the unit is a member of the condominium association.

2. Las Vistas in Inverrary Condominium Association, Inc. is the corporate entity responsible for the operation of Las Vistas in Inverrary Condominium.

Counts

3. Petitioner requested access to view the following records:

    a. Count 1: Letter dated July 2, 2012, and received by the Association on July 6, 2012:

List of all unit owners together with their unit identification, their mailing addresses and, if known, their telephone numbers and email addresses;

b. Count 2: Letter dated July 3, 2012, and received by the Association on July 6, 2012:

Consisted of over 50 requests relating to:

- Board resolutions;
- Board member motions;
- Member attendance sheets;
- Tally sheets;
- Meeting notices;
- Authorization for legal services;
- Estimates of projected legal costs (attorney fees and costs)
- Meeting notices;
- Unit owner notices;
- Any communications between the association and the association's law firm;
- All documents available to board members;
- Analysis of possibility of lack of quorum at meetings;
- Proxies;
- Agendas;
- All communications regarding arbitration disputes relating to Petitioner;
- All financial records of the Association from January 1, 2006 (including all banks, financial institutions) to date of inspection;
- Affidavits signed by person responsible for posting notices;
- Affidavits signed by person responsible for delivering notices;
- All motions made at meetings, identified by person making the motion, seconding the motion and identification of votes by members;
- All cancelled checks of the Association or its subsidiaries and satellite operations ever drawn on any bank or institution since January 1, 2006 to date of inspection;
- Document(s) authorizing representation of the Association by Glazer & Associates;
- Document(s) authorizing representation of the Association by Cole, Scott & Kissane, P.A. related to installation of fences around pool heaters in October 2010;

- Documents authorizing Cole, Scott & Kissane, P.A. to offer $500.00 in settlement with Petitioner;
- All documents relating to the Board's authorization for settlement with Petitioner including motion, estimated cost, list of members in attendance and how they voted;
- All communications by the Association or its board members with The Voice of Las Vistas since January 1, 2007 to date of inspection;
- All expenses relating to The Voice of Las Vistas between January 1, 2007 to the date of inspection;
- Board's resolution authorizing Rotor Rooter to clean stacks in early 2012, along with identification of who made the motion, who voted, how each person voted, estimates of costs and all competitive bids;
- Board's resolution relating to replacement of outdoor carpet on catwalks with Eurotile, including all competitive bids, all costs, contracts, invoices and checks;
- Resignation letter of James Smith;
- Letter from attorney Kristy Philips relating to Mr. Smith's resignation;
- All documents made available to the board relating to dismissal of employee Monica Rendon;
- All legal analysis and costs related to August 8, 2011, October 10, 2011, and November 2, 2011 meeting;
- All revised or corrected letters from Kristy Phillips referenced by Vice-President Stuttley and others;
- List of all computers and peripheral equipment owned by the Association as of January 1, 2006, with comparative list of all computers and peripheral equipment acquired by the Association by the date of inspection;
- List of all software acquired by the Association with identification of intended user since January 1, 2007 and date of inspection;
- Board's resolution relating to removal of pool tables and identification of designation of destination of tables in 2007;
- Board's resolution relating to and authorization of relocation of exercise room; and
- Board's resolution relating to, and authorization of, conversion of outdoor stairway leading to the Club House to a concrete ramp in 2009.

c. Count 3: Letter dated July 6, 2012, and received by the Association on July 10, 2012:

- All invoices received since January 1, 2012, to date of inspection from any and all attorneys including details unless precluded by “attorney-client” privilege;
- Non-descriptive explanation of facts related to invoices related to attorney-client privilege;
- All cancelled checks or other devices in lieu of payment of any and all attorney’s fees and costs from January 1, 2012 to date of inspection; and
- All accounting records from January 1, 2012 to date of inspection.

d. Count 4: Letter dated July 11, 2012, and received by the Association on July 12, 2012:

- Record of all activities held by Las Vistas Social Club since January 1, 2006 to date of inspection;
- All accounting records and supporting documents related to Las Vistas Social Club since January 1, 2006 to date of inspection;
- Up to date statements of any and all accounts held by banks and/or financial institution since January 1, 2006 to date of inspection;
- Any and all documents relating to payments that that may have been made to individuals, merchants or vendors through petty cash;
- Accounting ledger with folio identification for activities of the social club from January 1, 2006 to date of inspection;
- List of all tangible acquisitions realized by or for the social club since January 1, 2006 to date of inspection; and
- List of all expenses incurred for the hosting of social gatherings of Barbara Weltish, JoAnn Moore and Sam Donato in 2011 or 2012.

e. Count 5: Letter dated July 18, 2012, and received by the Association on July 25, 2012:

- Current statement of account for each unit where amount is due, by unit owner name, due date, assessment amount, due date, amount paid and amount due;
- All documents relating to new arrangements for payment and/or unit occupancy related to unit R-203;
- List of any or all units where financial institution has succeeded in foreclosure, including assessments due, attorney’s fees at foreclosure, amount paid by each foreclosing entity since takeover;

- Updated list of all owners with unit identification, mailing addresses, telephone numbers and email; and
- All files relating to five pools and peripheral equipment including all documents relating to repair, replacement, addition or other, permits, Health Department reports since January 1, 2009 to date of inspection.

f. Count 6: Letter dated October 11, 2011, and received by the Association on October 24, 2011:

- All documents related to August 8 and October 10, 2001 owner meetings, including notices, affidavits, sign-in sheets, proxies, vote tallies and minutes;
- All contracts signed with Devcon;
- All invoices received from people who painted the buildings in 2010 with all checks paid to Got You Covered company;
- Up-to-date listing of all accounts receivable;
- All invoices from Glazer & Associates since January 1, 2011 until date of inspection; and
- Current Question and Answer sheet.

g. Count 7: Letter dated August 12, 2012, and received by the Association on August 24, 2012:

- All directives or ordinances that prohibit the Association from using carpet on condominium catwalks.

h. Count: 8: Letter dated August 24, 2012, and received by the Association on August 31, 2012:

- Checkbook used for all activities of the social club from January 1, 2012 to date of inspection;
- Any checkbook replacing previous checkbook used for all activities of the social club;
- Closing bank statement from any account closed related to social club;
- All canceled checks written for social club activities between January 1, 2012 to date of inspection;
- All accounting records of the association for 2007 up to the date of the inspection in 2012;
- Be physically shown all equipment purchased by social club including: 50” TV, surround sound system, 2 DVDs, and 2 pool tables – if no longer located on the association’s property – any documentation or board resolution related to its removal, with identification of final destination;

- All bids received from Smith Watson Parker relating to association insurance policies for last seven years;
- Most recent documentation regarding 2013 policies provided by broker to board at August 20, 2012 meeting;
- All accounting records, ledgers, reports and others of all transactions relating to insurance policies, financing of insurance policies and mitigation credits;
- All notices and other information received regarding mitigation credits for each year and at all times;
- All documents relating to where and how mitigation credits have been entered into the books of the association; and
- All documents relating to how the approximate $43,000.00 mitigation credit received in 2007 was applied to the 2008 insurance premium.

i. Count 9: Letter dated August 29, 2012:

- Up-to-date statement of Petitioner's account
- Date of all postings of all monthly assessments to all accounts with explanations of any and all special assessment charges with supporting documents;
- Minutes of board meetings when special assessments were approved;
- Affidavit of delivery of meeting notices;
- Agenda of each meeting;
- Notice of meeting;
- Motion that lead to board's discussion regarding special assessments, including identification of board member voting and vote;
- Notice of special assessment to all owners after adoption;
- Dates of posting and explanation of any and all late fees;
- Articles of governing documents authorizing levy of late fees;
- Notice sent to Petitioner regarding late fees;
- Dates and posting of late fees with interest charges with explanation including article of governing document authorization for imposition;
- Delivery dates of notice to Petitioner regarding late fees with interest charges;
- Dates of posting with explanation of fines levied on Petitioner;
- Article in governing documents authorizing the levy of fines;
- Report given to board by Covenant Enforcement Committee (Fining Committee) recommending fine;

- Motion to fine Petitioner with identification of board members and their votes;
- Notice sent to Petitioner regarding imposition of fine;
- Becker & Poliakoff letter dated prior to June 21, 2010, regarding correction of fee that had been previously levied on Petitioner;
- Minutes of the June 21, 2010 board meeting;
- Date of posting of each and every payment made by Petitioner;
- Explanation of how assessment payments by Petitioner was applied; and
- Notice sent to Petitioner regarding any alleged payment which was insufficient to keep account up-to-date.

<u>Statutes</u>

4. Section 718.111(12)(b), Florida Statutes, provides, in pertinent part, as follows:

> The official records of the association must be maintained within the state for at least 7 years. The records of the association shall be made available to a unit owner within 45 miles of the condominium property or within the county in which the condominium property is located <u>within 5 working days after receipt of a written request by the board or its designee</u>.

(Emphasis supplied).

5. Section 718.111(12)(c), Florida Statutes, provides, in pertinent part, as follows:

> The official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times. The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the member. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying. <u>The failure of an association to provide the records within 10 working days after receipt of a written request creates a rebuttable presumption that the association willfully failed to comply with this paragraph.</u> A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association’s willful failure to comply. Minimum damages are $50 per calendar day for up to 10 days, beginning on the 11th working day after receipt of the written request. The failure to permit

> inspection entitles any person prevailing in an enforcement action to recover reasonable attorney's fees from the person in control of the records who, directly or indirectly, knowingly denied access to the records.

(Emphasis supplied).

6. Section 718.111(12)(c)1.-7., Florida Statutes, identifies the following records which are not accessible to unit owners pursuant to requests for access made under Section 718.111(12), Florida Statutes, as follows:

> 1. <u>Any record protected by the lawyer-client privilege</u> as described in s. 90.502 and any record protected by the work-product privilege, including a record prepared by an association attorney or prepared at the attorney's express direction, which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association, and which was prepared exclusively for civil or criminal litigation or <u>for adversarial administrative proceedings</u>, or which was prepared in anticipation of such litigation or proceedings until the conclusion of the litigation or proceedings.
> 2. <u>Information obtained by an association in connection with the approval of the lease, sale, or other transfer of a unit</u>.
> 3. <u>Personnel records of association or management company employees, including, but not limited to, disciplinary, payroll, health, and insurance records</u>. For purposes of this subparagraph, the term "personnel records" does not include written employment agreements with an association employee or management company, or budgetary or financial records that indicate the compensation paid to an association employee.
> 4. Medical records of unit owners.
> 5. Social security numbers, driver's license numbers, credit card numbers, <u>e-mail addresses, telephone numbers</u>, facsimile numbers, emergency contact information, addresses of a unit owner other than as provided to fulfill the association's notice requirements, and other personal identifying information of any person, excluding the person's name, unit designation, mailing address, property address, and any address, e-mail address, or facsimile number provided to the association to fulfill the association's notice requirements. However, an owner may consent in writing to the disclosure of protected information described in this subparagraph. The association is not liable for the inadvertent disclosure of information that is protected under this subparagraph if the information is included in an official record of the association and is voluntarily provided by an owner and not requested by the association.
> 6. Electronic security measures that are used by the association to safeguard data, including passwords.

> 7. The software and operating system used by the association which allow the manipulation of data, even if the owner owns a copy of the same software used by the association. The data is part of the official records of the association.

(Emphasis supplied).

Waiver – Counts 1, 2 and 3

7. By letter dated July 3, 2012, Petitioner waived the timing requirements of Section 718.111(12), Florida Statutes, relating to his July 2 and 3, 2012 letters stating, in pertinent part, as follows:

> As I will be in transit from Canada to Florida when you receive this request, I would humbly ask you to communicate with me…within the prescribed delay, to inform me of the date when I can inspect the said records, either on July 18 or on the very following days.

8. By letter dated July 6, 2012, Petitioner waived the timing requirements of Section 718.111(12), Florida Statutes, stating, in pertinent part, as follows:

> As I will be in transit from Canada to Florida when you receive this request, I would humbly ask you to communicate with me at … to inform me of the date when I can inspect the said records, either on July 23 or on the very following days.

Counts 4 and 5

9. By letter dated July 18, 2012, counsel for the Association responded to Petitioner's letters dated July 11 and July 18, 2012, by letter dated July 18, 2012, stating, summarized as follows:

- Requested clarification of Petitioner's records request;
- Informed Petitioner that the Association maintains official records for seven (7) years, therefore records prior to that time were not maintained by the Association[1];
- Explained that separate accounting records were not kept for social club activities, and that a "folio" did not exist for the social club;

[1] Section 718.111(12)(a) and (b), Florida Statutes.

- Explained that a “list of tangible acquisitions” or “hosting social events” did not exist; and
- Requested Petitioner’s dates of availability prior to July 23, 2012, in order that a member of the Association or law firm could be present to assist.

10. By letter dated July 19, 2012, Petitioner stated that he refused to inform the Association of the dates he would be available to review the requested records stating, in pertinent part, as follows:

> Finally, I know that pursuant to S. 718.111(12) you must make the requested records available to me within ten (10) working days of the association’s receipt of my request, which was on July 12, 2012, but I also know that neither this article nor any other gives you the right to force me to let you know of my availability so that it can suit your purpose. All you need to do is to ensure that you make the records available to me in due time, and all I need to do, is to be available to proceed with my inspection.

On July 26, 2012, Petitioner was provided access to certain Association records.

11. By letter dated August 29, 2012, the Association informed Petitioner that relating to his written requests relating to the replacement of the outdoor carpeting on the catwalks, they had copied all the requested information and had attached it to the letter for his review.

<u>Count 6</u>

12. Petitioner’s letter dated October 11, 2011, to the Association was sent by U.S. Certified Mail, return receipt requested. The U.S. Postal Service attempted to deliver the letter on October 14, 2011. Delivery was either refused or not received by the Association and the letter was returned to Petitioner.[2]

[2] By email dated July 21, 2011, Petitioner was informed that minutes of Association meetings were available for review in the office and that all he needed to do was to “come in and sign a paper and view them.” Additionally, Petitioner was informed that the Association was unable to release unit owner [email] addresses and telephone numbers without first obtaining the unit owner’s permission. Section 718.111(12)(c)5., Florida Statutes.

13. The Association provided Petitioner access to Association records pursuant to DBPR Compliance Case No. 2011-05-2714, on or about January 4, 2012.

Count 7

14. Petitioner's letter dated August 12, 2012 was received by the Association on August 31, 2012.

15. By letter dated August 31, 2012, the Association provided Petitioner "all of the documents it has in its possession as it relates to the catwalk carpet issue." The "documents" consisted of a letter dated April 24, 2012, from Nutek Engineering, LLC. addressed to Barbara Weltfisch, President of the Association.

16. By letter dated September 11, 2012, counsel for the Association confirmed that it has provided Petitioner all the information they possessed regarding his August 12, 2012 request.

Counts 8 and 9

17. Petitioner's August 24, 2012 records request was received by the Association on August 31, 2012.

18. The Association received Petitioner's August 29 and September 5, 2012.

19. By email dated September 13, 2013, Petitioner informed the Association that "unless you inform me no later than September 14, I shall file a petition for arbitration…"

Conclusions of Law

The Division has jurisdiction over a dispute that involves the failure of the Association to allow inspection of books and records pursuant to section 718.1255, Florida Statutes.

Rule 61B-45.030(2), Florida Administrative Code, provides that an arbitrator shall enter a summary final order denying relief if no disputed issues of material fact exist and no preliminary basis for relief has been demonstrated.

Official Records

The general rule is that a unit owner has access to the official records of the association within five (5) working days from the board's receipt of the owner's request under section 718.111(12)(b), Florida Statutes, subject to reasonable rules adopted by the association under section 718.111(12)(c), Florida Statutes. There is nothing in section 718.111(12), Florida Statutes, that prohibits a unit owner or his authorized representative from making repeated requests for access to records. Although section 718.111(12)(c), Florida Statutes, authorizes the association to adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying of official records, such restrictions cannot unreasonably deny access to such records. Whether a particular rule is reasonable or unreasonable depends on the facts and circumstances of each individual case. *Wanda Dipaola Stephen Rinko General Partnership v. Beach Terrace Association, Inc.,* Arb. Case No. 2007-02-2785, Final Order (February 20, 2008). In the case at hand, the Association has not adopted a rule or regulation regarding the frequency, time, location notice and manner of record inspections an copying of official records.

Written Inquiries

By letters dated July 2, 6, 11, and 18, 2012, Petitioner requested access to numerous Association official records. Additionally, included in Petitioner's letters were numerous requests to: 1) review documents which the Association was not required to maintain; 2) review documents belonging to unit owners, information the Association is prohibited by law from releasing; and 3) requests for analysis, summary, comparisons of records.

Section 718.111(12), Florida Statutes, requires that a condominium association make official records available to its members. The requirement applies only to records that are in existence and does not require the association to create records desired by unit owners. *Gladys Villa v. Trianon Park Condo. Ass'n, Inc.,* Arb. Case No. 99-0571, Order Dismissing Claim and Striking Request for Relief (March 15, 1999)(Section 718.111(12), Florida Statutes, does not require the association to create or generate a document or report for an owner that it does not maintain in the form requested, or that it is not required by Chap. 718 or the documents to maintain).

Counts 1, 2 and 3

In the letters dated July 2, 3 and 6, 2012, Petitioner requested, in pertinent part, access to certain Association records. However, in these letter Petitioner waived the requirement that the Association provide him access to the records within the ten (10) working day statutory timeframe by specifically informing the Association that he would not be available to review Association records until after he "returned" to Florida on July 18 or 23, 2012. Accordingly, by Petitioner's statement that he would not be available to review the files in the ten-day period, Petitioner waived the Association's duty to provide him access within that time, as he was out of the country at that time.[3] Accordingly, the

[3] Additionally, by email dated July 21, 2011 [Petitioner's exhibit 1-A], Petitioner had previously been informed that some of the documents he was requesting (minutes of Association meetings) were on-site and available for review by unit owners and that all he needed to do was to "come in and sign a paper and view them."

Association's failure to provide Petitioner access to the Associations records was not a violation of statute.

Counts 4 and 5

By letters dated July 11 and 18, 2012, Petitioner requested access to records relating to the social club, various accounting and supporting documents, banking statements, and payments to vendors.[4] The Association received the letters on July 12 and 25, 2012, respectively. As summarized below, by letter dated July 18, 2012, counsel for the Association, explained to Petitioner that:

- Certain specific information he had requested was not permitted to be released by the Association without permission of the affected unit owner;
- Social club financial records were not "separate" records but were part of the Association's financial records which he could review;
- All Association financial records for the past 7 years were available for his review;
- Certain of his requests were not documents required to be maintained by the Association and were not maintained by the Association and so could not be provide; and
- Requested Petitioner to inform the counsel for the Association dates of Petitioner's availability.

1. Information not permitted to be released

Section 718.111(12)(c)1.-7., Florida Statutes, identifies records which are not accessible to unit owners. At various times, Petitioner has requested access to documents which are not accessible to unit owners' pursuant official records requests. In pertinent part, these documents include: unit owner email addresses and telephone numbers, documents protected by attorney-client privilege; information obtained by the Association in connection with approval, lease, sale or other transfer of a unit; and

[4] Petitioner also made written inquiries to create records and requests for information not permitted to be released by the Association.

personnel records. Accordingly, the Association's denial of access of these documents to Petitioner was not a violation of the statute.

2. Social Club Records

By email dated July 27, 2012, Petitioner alleges that at the Association failed to provide him access to all of the records of the social club during his July 26, 2012 review. Included in Petitioner's demands are requests for unit owners records of Barbara Weltfish, JoAn Moore and Sam Donato relating to social club activities and forums.[5] Petitioner's email identified the missing documents as:

- Activity reports for 2006, 2007, 2008, 2009 and 2010 (income and expenses);
- Social Club checkbook for 2007;
- Deposit books from January 7, 2006 to 2009; and
- Bank statements for 2006 (January, February, March, April, May, August, September and November), 2007 (July), 2008 (April, August and October), 2009 (May and June), 2010 (November and December), 2011 (May) and 2012 (March).

The Association maintains that it has provided Petitioner access to all the documents the Association possesses relating to the social club. Although failure to have and maintain certain of these records (i.e., bank statements, cancelled checks, deposit records, and ledgers) may be a violation of section 718.111(12), Florida Statutes, that violation is not an issue within the jurisdiction of the arbitrator. Failure to maintain a record does not give rise to a claim for money damages for failure to produce the non-existent record. *Brown v.-Wellington L Condominium Ass'n., Inc.,* Arb. Case No. 94-0363, Final Order (February 20, 1995). Accordingly, the Association's alleged failure to maintain complete records is not a dispute within the jurisdiction of the arbitrator.

[5] Petitioner also objected to the lack of information regarding the disposition of Association equipment. However, as previously stated, Petitioner's "objections" to the lack of a report relating to the disposition of the Association's equipment is a "written inquiry" and not within the jurisdiction of the arbitrator.

3. Records possessed by unit owner.

Additionally, Petitioner has demanded access to social club records of unit owners, including a director currently serving on the board, who have hosted events in the social club. These are not official records of the condominium association subject to access pursuant to Section 718.111(12), Florida Statutes. *Humphrey et al. v. Carriage Park Condo. Ass'n., Inc.*, Arb. Case No. 2008-04-0230, Final Order (March 30, 2009)(The property of an individual director does not become the property of the association because of his office on the board). Accordingly, the Association's failure to provide Petitioner access to such records is not a violation of the statute.

4. Petitioner's refusal to provide the Association dates and times for access

In pertinent part, the Association's response to Petitioner's letters dated July 11 and 18, 2012, was to request Petitioner provide to it dates and times he would be available to access the Association records. By letter dated July 18, 2012, the Association timely agreed to provide Petitioner his requested access to its records.

In this case, it was not the Association that improperly denied Petitioner access to the records, but Petitioner who refused to inform the Association what day and what time he would be reviewing the records. Therefore, Petitioner's refusal to agree to a time and place for review of the records will not be construed as a willful failure by the Association to provide him timely access to the records.

Count 6

Petitioner's letter dated October 11, 2011, requested access to certain Association official records. It is undisputed that the Association provided Petitioner access to these records on January 4, 2012. The Association improperly delayed

Petitioner timely access to these records for a period that exceeded 10 days, pursuant to Section 718.111(12), Florida Statutes. Accordingly, the Association's failure to provide Petitioner timely access to official records of the Association is a violation of the statute.

Count 7

Petitioner's letter dated August 12, 2012, requested access to "all directives or ordinances that prohibit the Association from using carpet on the catwalks." The Association received Petitioner's letter on August 24, 2012. In response, the Association, by letter dated August 29, 2012, attached a copy of the letter from the engineering company regarding the catwalks and asserted that the enclosed was "all the documents they have in regards to your request." By email dated September 11, 2012, Petitioner objected to the Association's statement and reiterated his demands.

In the case at hand, the Association provided Petitioner a photocopy of the April 24, 2012 letter of Paul Orr, PE which addressed the issues relating to the replacement of the carpet on the outdoor catwalks. According to the Association, the April 24, 2012 letter is the only record they possess relating to any prohibition on the Association to reinstall outdoor carpeting on the outdoor catwalks. Additionally, pursuant to Section 718.111(12)(a), Florida Statutes, the Association is not required to maintain a copy of ordinances as part of its official records. Accordingly, the Association timely complied with Petitioner's August 12, 2012 request for access to the Association's official records.

Counts 8 and 9

By letter dated August 24, 2012, Petitioner demanded, in pertinent part, access to certain Association official records. On August 30, 2012, the Association received

Petitioner's letter. By letter dated August 29, 2012, Petitioner demanded, in pertinent part, access to certain additional Association official records. On August 31, 2012, the Association received Petitioner's letter. By email dated September 11, 2012, counsel for the Association responded to Petitioner's requests stating, in pertinent part, as follows,

> Please be advised that the Association has advised that this is all the information they have in regards to your request.

The Association's response was untimely and creates a rebuttable presumption that the Association willfully failed to comply with the requirements of paragraph 718.111(12)c, Florida Statutes.

As previously discussed, if the Association provides to the unit owner access to all the records they have in their possession related to a unit owner's request, then any demands to the Association to provide access to records that do not exist is an alleged failure of the Association to maintain records rather than a failure to provide access and is not a dispute within the jurisdiction of the Association. A review of Petitioner's August 24 and 28, 2012 letters indicates that Petitioner was requesting access to records that: 1) he had previously reviewed; 2) he had been informed the Association did not possess and 3) additional documents not previously requested.

It is well established arbitration case law that timely access to the Association's official records cannot be denied merely due to mere repetitiveness. *Kilgore et al. v. Ciega Verde Unit Owners Ass'n, Inc.*, Arb. Case No. 00-0747, Summary Final Order (July 3, 2000)(an association cannot refuse access to official records on the ground that access was previously provided). Furthermore, the Association's response to Petitioner's August 12 and 29, 2012 letters was untimely, as it was issued on

September 11, 2012. Accordingly, based on the foregoing, even though the Association had previously provided Petitioner with access to the documents it had in its possession, the Association failed to provide Petitioner timely access to the requested documents in its possession.

Damages

It is concluded that the Association did not timely comply with Petitioner's request for access to official records of the Association on three occasions and the failure to comply was willful. Because actual damages were neither pled nor established, Petitioner is entitling only to the statutory minimum damages, which are capped at $500.00 per incident. Section 718.111(12)(c), Florida Statutes.

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

1. Petitioner's Motion for Reconsideration and Order of Default is **DENIED.**

2. Petitioner's request for relief for counts 1, 2, 3, 4, 5 and 7 is **DENIED.**

3. Petitioner's request for relief for counts 6, 8 and 9 is **GRANTED.** The Association shall, within ten (10) working days from the date of this order, provide access to all of the Association's official records requested by Petitioner in letters dated July 6, August 24 and 29, 2012.

4. By 5:00 p.m. on January 18, 2013, the Association shall pay to Petitioner damages in the sum of $1,500.00.

5. The Association shall, in the future, comply with Section 718.111(12), Florida Statutes.

DONE AND ORDERED this 18th day of December, 2012, at Tallahassee, Leon County, Florida.

Tonya S. Chavis, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
1940 North Monroe Street
Tallahassee, Florida 32399-1029
Telephone: (850) 414-6867
Facsimile: (850) 487-0870

Trial *de novo* and Attorney's Fees

This decision shall be binding on the parties unless a complaint for trial *de novo* is filed 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 Fla. Admin. Code R. 61B-45.048.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order has been sent by U.S. Mail to the following persons on this 18th day of December, 2012:

Leo Paul Masse
3776 Inverrary Blvd.
Suite 406
Lauderhills, Florida 33319

David S. Colman, Esquire
Cole, Scott & Kissane, P.A.
1645 Palm Beach Lakes Florida Blvd.
2nd Floor
West Palm Beach, Florida 33401
FAX: 561-683-8977

____
Tonya Chavis, Arbitrator