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May 12, 2021

To: Charles K. Purcell

Re: AAFPO v. Angel Fire Resort

Dear Kip:

This is in response to your letter to me of May 11, 2021. I believe it is our duty as lawyers, and even as citizens, to tell the truth and not spread false information. I would very much appreciate if you would share the following facts with your client and encourage them to stop spreading false information.

In your letter, you state: “Members understandably regard the maneuver – in connection with the board’s concurrent attempt to amend a slew of by-laws at the eleventh hour, a matter about which Mr. Manley was also left in the dark – as a cynical effort by an unpopular board to cling to power it would otherwise be hard-pressed to retain.” First, when giving your opinion to me in the future, please don’t hide behind the ill-informed opinions of unidentified other people. This is a disinformation tactic commonly used to make false accusations as if they weren’t your own accusations. **In fact**, the Board only recently received a legal opinion from its counsel, that is set forth below. The Board is duty bound to follow the law, and the decision that three positions are up for election is mandated by New Mexico law.

In your letter, you state: “Over the weekend, it seems, AAFPO strategically assigned particular appointees to particular seats to maximize their staying power.” This statement is false. **In fact**, the Board only recently received a legal opinion from its counsel, that is set forth below. The Board is duty bound to follow the law, and the decision that three positions are up for election is mandated by New Mexico law. The terms for each vacancy were determined by the terms of the directors whose positions were filled.

In your letter, you state: “But AAFPO is apparently ignoring other sections of the Nonprofit Corporation Act that make the by-law [sic] controlling over the statute.” This statement is false. **In fact**, the statutory sections you cite to provide further support for my legal opinion:

The New Mexico Nonprofit Corporations Act, NMSA 1978, § 53-8-12 (1975) states as follows:

The bylaws may contain any provisions for the regulation and management of the affairs of a corporation not inconsistent with law or the articles of incorporation.

By default, the statute governs, to the extent there is any conflict with the bylaws.

Many provisions in the Act allow for the default rules of the Act to be altered by a corporation's articles of incorporation or its bylaws. For example, § 53-8-15(A) states that the right of members to vote may be enlarged **“to the extent specified in the articles of incorporation or the bylaws.”** § 53-8-95 states, “Whenever, with respect to any action to be taken by the members or directors of a corporation, the articles of incorporation or bylaws require the vote or concurrence of a greater proportion of the directors or members or any class of members than required by the Nonprofit Corporation Act, **the provisions of the articles of incorporation or bylaws shall control.**” Thus there are provisions of the Act that specifically allow the default rules of the Act to be altered and even superseded by a corporation's bylaws. But in the absence of the specific allowance for the Act's default rules to be altered or superseded, if there is any conflict between the Act and the bylaws, the Act governs.

NMSA 1978, § 53-8-19(B) states as follows:

A director elected or appointed to fill a vacancy shall be elected or appointed for the unexpired term of his predecessor in office.

New Mexico enacted the Nonprofit Corporations Act in 1975. At that time, the operative model act was from 1964. The model act was updated in 1987 and then again in 2008 by the ABA's Model Nonprofit Corporation Act Subcommittee. The current version of the Model Act (the Third Edition) provides as follows:

Except as provided in the articles of incorporation or bylaws, the term of a director elected to fill a vacancy expires at the end of the unexpired term that the director is filling.

(Emphasis added). The fact that this specific allowance for altering the term of an appointee for a vacancy has been added to the language of this section, further proves that the prior version, and what is New Mexico's § 53-8-19(B), cannot be altered by a corporation's bylaws.

In your letter you state: “I would also remind you of your statement to the court back in December when you were arguing that the appointment of directors to seats vacated by resignation was governed by the by-laws” If you are trying to accuse me of inconsistency, or even hypocrisy, you are well off the mark.

As you well know, you argued that AAFPO's Board needed a quorum of directors (at least 5) to appoint successor directors. This argument was contrary to the plain language of the Bylaws and

the Nonprofit Corporation Act, § 53-8-19(A). I argued successfully that the Bylaws are consistent with § 53-8-19(A). Judge Chavez ruled that, pursuant to AAFPO's Bylaws and § 53-8-19(A), successor directors could be appointed by less than a quorum of the remaining directors.

Although § **53-8-19(A)** is completely consistent with the Bylaws, Article VI, Section 5, it may be that Article VI, Section 5 is not entirely consistent with § **53-8-19(B)**. These are two separate issues and two separate statutory provisions. The **manner** of appointing successor directors is flexible and can be altered by a corporation's bylaws under § 53-8-19(A). However, the **term** a successor director shall serve is not flexible and cannot be altered by a corporation's bylaws under § 53-8-19(B). And, pursuant to § 53-8-19(B), a successor director shall serve the remaining term of the director who left the vacancy. This is a mandatory, statutory requirement.

Kip, the law cited above is very clear. I would respectfully ask you to educate your client so that your client is not involved any further in spreading false information.

Sincerely,

/s/

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