

DWYER SCHRAFF MEYER GRANT & GREEN

ATTORNEYS AT LAW ♦ A LAW CORPORATION

1800 PIONEER PLAZA ♦ 900 FORT STREET MALL ♦ HONOLULU, HAWAII 96813
TELEPHONE: (808) 524-8000 ♦ FACSIMILE: (808) 537-4667 ♦ HOME PAGE: www.dwyerlaw.com

JOHN R. DWYER, JR.
PAUL A. SCHRAFF
WILLIAM G. MEYER, III
RONALD V. GRANT
ADELBERT GREEN

JARED H. JOSSEM (1942-2003)

LAUREN B. LUIS
PATRICK K. SHEA

OF COUNSEL:
BEATRICE L. K. DAWSON

April 24, 2007

RONALD V. GRANT
(808) 534-4446
rgrant@dwyerlaw.com

VIA FACSIMILE AND MAIL (702) 385-2086

C. Drew Stagg, Esq.
Hutchinson & Steffen
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145

Re: Sands of Kahana: March 6, 2007 and March 12, 2007 Correspondence to Carol Nelson, et. al.

Dear Mr. Stagg:

This firm represents Carol Nelson, Jim Cahill, Charlie Johnson, John Oliver and Tom Podl, to whom you addressed letters dated March 6, 2007 and March 12, 2007. On behalf of these individuals, I respond to your letters.

In your March 6, 2007 letter, you indicate that you are in possession of communications that reveal Mrs. Nelson “engaged in illicit, illegal activity in relation to Mr. (Michael) Kaplan that includes, inter alia, libel, slander per se, and conspiracy to defame his reputation and character in his business capacity.” However, the referenced communications are not attached. If you are referring to a communication authored by George Perkinson addressed to “Lee” discussing the 2005 Annual Meeting and elections there in, your characterizations are not supported by the text of that communication. With respect to the Perkinson communication, if any attempt is made to hold Mrs. Nelson liable, I am confident that her freedom of speech rights under the First Amendment, as well as the defenses of truth and opinion, will completely exonerate her from any liability. If you are referring to other communications, please forward copies for my review. Your letter also indicates that you will seek recovery of all of your attorneys’ fees and costs. Under Hawaii law, attorneys’ fees are not recoverable in tort actions such as defamation, and I trust the law is the same for Nevada and Oregon. However, Rule 11 of the Hawaii Rules of Civil Procedure, does impose sanctions upon attorneys, law firms and/or

parties, including attorneys' fees and costs, for frivolous lawsuits, and Mrs. Nelson will invoke her rights under Rule 11, HRCF, if necessary.

Your March 12, 2007 letter, addressed to Mrs. Nelson and Sands of Kahana Owners Committee, demands that they "cease and desist operation of the Committee and its website under the Sands of Kahana name." The purported purpose of your demand is to "protect (the Club's) members and the general public from potentially misleading and/or deceptive information or solicitation concerning the Club, and to protect the Club's trademark and reputation." Notwithstanding any merit the stated goals may have, the asserted enforcement demands have none. They are based on erroneous premises and constitute direct interference with their ownership rights. Neither Mrs. Nelson nor the Committee is "violating the Club's governing documents by representing to the Club's members and the public at large that (they) represent, or are somehow affiliated with, the Club." Neither are they exercising or purporting "to exercise any of the powers or to perform any of the acts delegated to the Club or the Board." More importantly, under the controlling law, they are fully within their rights as Sands of Kahana owners to protect their interests, voice their concerns about management and operations and seek to replace current Board members.

As your clients know, Mrs. Nelson and the others are owners and members of the Sands of Kahana Vacation Club (the "Club") (as well as The Association Of Apartment Owners Of The Sands Of Kahana (the "AOAO")). Mrs. Nelson and her fellow owners and members have a constitutional right under the First Amendment to express their opinions and positions regarding their ownership and membership interests. The public interest in that constitutional right of free expression is not trumped by the Lanham Act's public interest in avoiding consumer confusion, particularly where the term "Sands of Kahana" is accurately and correctly used to describe their ownership and membership status.

Moreover, the Ninth Circuit has expressly upheld the right to use registered trademarks in a descriptive or "nominative" manner. In *Playboy Enterprises, Inc. v. Welles*, 279 F.3d 796 (9th Cir. 2002), Playboy sued former Playmate of the Month and Playmate of the Year Terri Welles for using those trademarks, as well as "Playboy", on her website, claiming infringement and dilution. The Ninth Circuit rejected those claims holding that "Welles' uses of PEI's trademarks are permissible, nominative uses." The Ninth Circuit agreed with the District Court's holding that there was no descriptive substitute for PEI's trademarks in this context.

There is no other way that Ms. Welles can identify or describe herself and her services without venturing into absurd descriptive phrases. To describe herself as the "nude model selected by Mr. Hefner's magazine as its number-one prototypical woman for the year 1981" would be impractical as well as ineffectual in identifying Terri Welles to the public.

Playboy Enterprises, Inc. v. Welles, 279 F.3d, at 802.¹

As in the *Welles* case, if denied the use of the name “Sands of Kahana,” there is no other way Mrs. Nelson or her fellow owners can describe themselves and their ownership and membership interests without venturing into similarly absurd, impractical and ineffectual descriptive phrases such as “owners and members of that certain vacation club in that certain condominium project located in the State of Hawaii on the Island of Maui and depicted in that certain Condominium Map No. 703 filed in the Bureau of Conveyances of the State of Hawaii as modified by later final plans submitted and filed in said Bureau of Conveyances of the State of Hawaii as Condominium Map No. 763.” They are Sands of Kahana owners and are entitled to use that term.

Having upheld the nominative use, the *Welles* court also rejected dilution claims, holding that the use of a trademark to truthfully and accurately describe an individual does not diminish or dilute a mark. Since Mrs. Nelson and the other are “Sands of Kahana” owners and members, their use of the term “Sands of Kahana” to describe themselves is simply not actionable.

With respect to claims of misrepresentation of authority, contrary to the allegations and implications in your letter, the www.sandsofkahanaowners.com web site does not purport to be the official web site of the Club or the Board. Neither does it purport to represent or to be affiliated with either of them. Rather, it clearly identifies those voicing their positions therein as fellow owners and members of the Club and describes their goal of having likeminded individuals elected to the Club Board. Nowhere on the web site does it even imply much less state that Mrs. Nelson or any of the other owners represents or speaks on behalf of the Club or its Board. To the contrary, these owners distance themselves from the current Board and urge their fellows to vote to replace the current directors and elect members “who are timeshare owners rather than representatives of Consolidated Resorts, the developer.” Similarly, inviting other owners to “consider a yearly contribution of \$25 per week owned to help us achieve our goal” cannot be reasonably construed as creating an obligatory assessment imposed by the Club or its Board which owners are required to pay. The language clearly suggests a *voluntary* contribution which owners and members can make or reject at their discretion. It does not violate the Hawaii timeshare or condominium statutes or the Club’s declaration or bylaws.

The Club’s reliance on the Anticybersquatting Consumer Protection Act of 1999 is likewise misplaced. Mrs. Nelson and the other owners have done nothing that prevents the Club from using the URL www.sandsofkahana.com with the claimed trademark. However, out of an abundance of caution, Mrs. Nelson and the other owners identified on the web site will shortly terminate use of the www.sandsofkahanaowners.com web site, and will include a disclaimer as suggested by the court in *Welles* on any future web site.

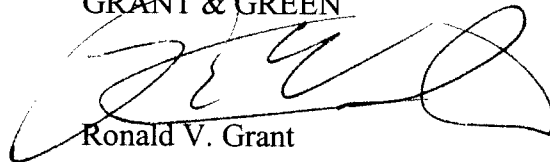
¹ The Ninth Circuit similarly recognized and upheld nominative fair use of trademarks in *New Kids On The Block v. News America Publishing, Inc.*, 971 F.2d 302 (9th Cir. 1991); *Brother Records, Inc. v. Jardine*, 318 F.3d 900 (9th Cir. 2002); and *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003).

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In summary, the claims and allegations in your letter have no factual or legal basis. By wrongfully and falsely accusing Mrs. Nelson and the others of "violating the Club's governing documents," of "illegal activities," of "clear violations," and of "illegal and illicit use of the Sands of Kahana name," the Club and the Board have defamed and damaged them. Given the clear state of the law on these matters, the Club and the Board knew or should have known the claims had no merit and would only serve to harm Mrs. Nelson and her fellow owners in their personal and business reputations, constituting willful and intentional misconduct entitling them to punitive damages. Mrs. Nelson and her fellow owners demand that the Board and the Club immediately cease and desist from their malicious and wrongful accusations and their interference with their rights as Club member and owners. If the Board and the Club persist in this conduct, they will be liable for all resulting damages. Please direct all further correspondence addressed to Mrs. Nelson or the other owners to whom your letters are addressed to the undersigned.

Very truly yours,

DWYER SCHRAFF MEYER
GRANT & GREEN



Ronald V. Grant

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