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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED ON NOVEMBER 18, 2011 WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
COMMERCIAL DIVISION

Present: HON. ALAN D. SCHEINKMAN
Justice.

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SHERATON OPERATING CORPORATION,

Plaintiff, Index No.17443/09

-against-

POST-TRIAL DECISION

CASTILLO GRAND, LLC,

Defendant.
---X

Scheinkman, J.:

This action was commenced in this Court on August 5, 2009 by Plaintiff Sheraton Operating Corporation ("Sheraton" or "Plaintiff") against Defendant Castillo Grand, LLC ("Castillo" or "Defendant"). The caption of the action is the mirror image of a prior federal court action between the same parties which was dismissed for lack of subject matter jurisdiction virtually on the eve of trial.[1]

The underlying dispute arises out of efforts to construct and manage a luxury hotel (the "Hotel"), to be known as the St. Regis Hotel & Residences, in Fort Lauderdale, Florida. The Hotel was to be owned and constructed by Castillo subject to Sheraton's approval rights and Sheraton was to manage it. By all accounts, the construction of the Hotel was protracted; it is undisputed that the notice to proceed with construction was issued on July 23, 2003 and the Hotel was finally regarded as substantially completed on May 1, 2007 – nearly four years later. During that time, the Hotel project went through four principal interior design firms. The initial interior design firm was DiLeonardo International, Inc. ("DiLeonardo"), which was in place from roughly September 2000 to November 2003. DiLeonardo was succeeded by Vision Design, Inc. ("Vision"), which was on the scene through April 2005. Vision was replaced by internal Sheraton designers and then by Hirsch Bedner Associates ("HBA").

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[1] *See Castillo Grand LLC v Sheraton Operating Corp.*, 2009 WL 4667104 (SD NY 2009) (Patterson, J.).

In broad terms, Castillo blames Sheraton for the shifting interior designers and the resulting inability to develop a final approved interior design, with the absence of an interior design plan being, according to Castillo, the root cause of all of the delays. Sheraton claims, essentially, that: (a) the DiLeonardo and Vision interior designs were not of the quality to be expected in a St. Regis and Castillo went along willingly with the changes in interior designers because Castillo also realized that DiLeonardo and Vision had not produced appropriate designs; (b) Castillo's use of an improvident fast track construction technique, lack of project management, and attempts to use inferior furnishings caused delays; and (c) delays were caused by Castillo, by Castillo's general contractor and its subcontractors, by the City of Fort Lauderdale, and even by hurricanes.

After Sheraton and Castillo labored through an unquestionably painful hotel birthing process and produced what is unquestionably a first-rate facility, their relationship splintered utterly and completely. Shortly after the Hotel opened, Castillo engaged in a financing transaction which, to Sheraton's understanding, triggered Castillo's obligation to pay Sheraton a $3 million project license fee. When Castillo did not pay, Sheraton terminated the management contract for the Hotel.

The trial of this action took some nine weeks, starting on July 19, 2010 and ending on September 21, 2010. Over 20 witnesses testified in person; the deposition testimony of other witnesses was received into evidence. The trial transcript runs some 5300 pages. The exhibits are numerous, to say the least, with the physical documents being in binders which take up an entire bookcase. On December 16, 2010, the Court received post-trial submissions from each party, each submission consisting of a post-trial brief and proposed findings of fact. Counsel provided these materials in both traditional hard copy and electronic form, with the electronic versions containing hyperlinks to the cited trial and deposition testimony, exhibits, and legal authorities. The submission of the electronic versions has unquestionably facilitated the Court's review of the extensive transcript and voluminous exhibits.

Despite the extreme differences that exist between the parties, the attorneys have been most professional. The courtesy and cooperation that counsel displayed towards each other and towards the Court is commendable, particularly in an era in which too often zealous advocacy is diminished by petty bickering and lack of appropriate communication between counsel. The case presents interesting and involved issues of fact and law. The post-trial submissions of both sides are of high quality, most enlightening and of great assistance to the Court.

Sheraton's complaint presented eight causes of action. Following the Court's determination of Castillo's motion to dismiss at the close of Sheraton's direct case (Tr. at 830-836), Sheraton's affirmative case was distilled to: (a) the Fourth Cause of Action based upon Castillo's failure to defend and indemnify Sheraton from a claim presented in arbitration which involved the cancellation of an event being sponsored by former football player and present television sports commentator, Tony Siragusa; (b) the Fifth Cause of Action for breach of the Management Contract based upon Castillo's failure to pay the project license fee, seeking to recover both the project license fee and lost future management fees; and (c) a reply counterclaim seeking unpaid Condominium License Fees. Sheraton also seeks attorneys' fees based upon a contractual fee-shifting provision.

As limited by this Court's determination of Sheraton's motion to dismiss at the

close of Castillo's direct case (Tr. at 3530-3537), Castillo's affirmative case consists of: (a) the First and Second Counterclaims predicated upon unreasonable and untimely interior design changes made by Sheraton; (b) the Fifth Counterclaim for indemnification of amounts paid out by Castillo to third parties for increased costs of construction in excess of the approved budget; (c) the Sixth Counterclaim for attorneys' fees based upon contract; (d) the Seventh Counterclaim for wrongful termination of the management contract; (e) the Eighth Counterclaim for breach of fiduciary duty in relation to termination of the management contract; and (f) the Ninth Counterclaim based upon Sheraton's failure to defend and indemnify Sheraton from the arbitration claim. Castillo also seeks attorneys' fees based upon a contractual fee-shifting provision.

Sheraton's principal surviving claim is, in essence, that Castillo failed to pay the project licensing fee when due and payable and, therefore, Castillo owes it the amount of the fee, the profits that Sheraton lost when it terminated its management contract with Castillo upon Castillo's default, and the attorneys' fees for enforcing Sheraton's rights. Castillo denies that it breached the parties' contract by not paying the project license fee and asserts: (a) Sheraton caused substantial delays to the opening of the Hotel by repeatedly forcing major changes in interior design, thereby causing Castillo millions of dollars in damages; and (b) Sheraton improperly terminated the management contract, compelling Castillo to take the St. Regis "flag" off the building, leading Castillo to hastily turn the Hotel into a Ritz Carlton under disadvantageous terms and causing Castillo to sustain millions of dollars more in damages.

All of the issues were tried, as to both liability and damages, except that the claims of the parties for attorneys' fees were severed pending a determination as to which, if either, of the parties is to be considered the prevailing party (Tr. at 3401-3402).

Having deliberated upon the evidence adduced at trial, and having considered the parties' post-trial submissions, the Court now renders its findings of fact and conclusions of law:

FINDINGS OF FACT AS TO LIABILITY ON CONSTRUCTION/DELAY ISSUES

A. The Hotel Project

Castillo is a Florida limited liability company with its principal place of business in Clearwater, Florida. Castillo was formed to develop, on a site in Fort Lauderdale, Florida, a high-end hotel which would also feature condominiums. The property, which is located just to the west of the Atlantic Ocean, was acquired in 1999. Castillo intended to pay for the construction of the facility with a construction loan and thereafter sell condominiums and use the proceeds to pay off the construction loan. The principals of Castillo were John McDonald, Fred Bullard, and Van McNeel. McDonald handled the day-to-day management issues until his death in December 2004.[2]

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[2]It became quite evident during the trial that McDonald said and did things that Bullard later took issue with. However, to the extent that McDonald was the authorized spokesman for Castillo, McDonald's actions are binding on Castillo.

Sheraton is a Delaware corporation which has its principal place of business in White Plains, New York. Sheraton is a wholly-owned subsidiary of Starwood Hotels & Resorts ("Starwood"). Starwood owns and controls a number of prominent hotel brand names, including St. Regis, W, Westin, Sheraton and Four Points by Sheraton. The St. Regis brand is Starwood's premier brand, which competes for luxury business with such hotel brands as the Ritz Carlton, Four Seasons, and Mandarin.[3] As will be seen, Sheraton's relationship with Castillo was handled by a large and ever-shifting cast of characters and, as the corporate shifts occurred, each new wind blew in new views as to how the Hotel should be designed and constructed.

At the beginning, Castillo, in internal discussions, considered seeking affiliation with the Four Seasons and the Ritz Carlton. But Bullard insisted on St. Regis because, while St. Regis was an established high-end hotel in New York, the St. Regis brand was only beginning to expand outside of New York. Bullard was aware of only two St. Regis' expansion projects – one in California and one in Washington, D.C. Bullard wanted to be in on the ground floor of the extension of the St. Regis brand. There is higher economic value associated with a more exclusive, limited brand in the first-class hotel market, a point particularly relevant to the sales of condominium units as buyers for luxury properties would be expected to be more readily drawn in, and induced to pay more, for a unit in one of less than a handful of St. Regis facilities in the country.

This point was well described by one of Castillo's experts, Roger S. Cline:

> Luxury is a concept more than anything else. And it represents, in the branding business, a brand really is a set of associations. People view brands as a concept and a set of association they make with concepts of luxury.
>
> For example, I have a strong desire to one day own an Aston Martin which is something that I've wanted for a long time in British racing green. The reason I would like that is because it's a snazzy looking car and it's a rarity. If I was driving around in an Aston Martin I would feel pretty good about myself because I would probably be the only one in my community doing so.
>
> Similarly, if on the other hand everyone in my community in the world drove Aston Martins in British racing green, it wouldn't be really a big deal and people wouldn't view it as a luxury item (Tr. at 2594-2596).

As Cline explained, there are certain iconoclastic hotel names that convey a sense of luxury, such as the Ritz in Paris, the Savoy in London, the Waldorf-Astoria in New York and the St. Regis in New York. While these hotels occupy fixed locations, the branding concept is that by creating a hotel in another location under the same name, the consumer will be induced to perceive the new hotel as being of the same quality as, and

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[3]The corporate relationship between Sheraton, which is the Defendant here, and Starwood is not entirely clear. But since Sheraton is the named Defendant and Starwood is not a party and no one has suggested that Starwood should be a party, the Court, unless the particular context requires otherwise, will refer solely to Sheraton.

being connected to, the established one. However, exclusivity is important because if there were a St. Regis in every community in the United States, the St. Regis brand would be as ubiquitous as many other hotel brands, and the sense of novel luxury would be diminished.

Sheraton initially offered only the Luxury Collection to Castillo. Bullard held out for St. Regis and got it at a meeting held on June 6, 2000. However, it was made clear to Bullard – and Bullard understood and agreed – that Sheraton was going to control the interior design. Sheraton was going to recommend an interior designer to Castillo because, in Sheraton's experience, certain interior designers "get" the esthetic of a particular hotel brand while other designers do not.

A letter of intent entered into on June 28, 2000 envisioned that there would be a "high level" of coordination between Castillo and Sheraton's design and construction department. It also stipulated that the space plan, design and finish levels would all have to meet the strict requirements of a St. Regis.

In August 2000, Castillo entered into a contract with DiLeonardo to provide interior design services for the Hotel. Castillo claims that Sheraton directed it to select DiLeonardo; Sheraton claims that Castillo picked DiLeonardo because it was the cheapest. There is no competent direct evidence that Sheraton ordered or directed Castillo to pick DiLeonardo. For example, while Bullard testified that DiLeonardo was recommended to Castillo by Sheraton, neither he nor anyone else testified that Castillo was ordered or directed to accept this recommendation. While it is true that, in a memorandum authored several years after the fact, McDonald stated that Castillo had selected DiLeonardo because it was the cheapest, the evidence also reflects that DiLeonardo had done extensive work for Sheraton, including work on 4 and 5 star hotels. The evidence indicates that Castillo solicited Sheraton's recommendation as to an interior designer and none of Castillo's principals had any prior hotel design experience.

The Court has no difficulty in accepting that DiLeonardo was recommended by Sheraton, though the Court also finds that Sheraton did not force that selection on Castillo and that one, but hardly insignificant, reason why Castillo took DiLeonardo over other potentially available interior design firms was price. There is nothing inherently wrong or improper with selecting the lowest-priced firm, at least where, as here, there is no evidence that the lowest-priced firm was unable to perform the task. As noted, the evidence is that the Sheraton executives in charge of the project at the time were quite familiar with DiLeonardo and, in particular, with DiLeonardo's experience in five-star hotels and accepted DiLeonardo as a competent design firm for this project.

After the contract was signed, DiLeonardo began to work on the development of an interior design for the Hotel.

B. The Management Contract and its Amendments

On January 26, 2001, Castillo, as the Owner, and Sheraton, as the Operator, entered into a Management Contract (the "Management Contract") for the Hotel, pursuant to which Sheraton would manage the Hotel as a St. Regis. The Management Contract describes the Hotel as having: (i) at least 235 guest rooms; (ii) a restaurant and a lounge; (iii) at least 15,000 square feet of meeting space; (iv) a health club and spa; (v) a marina; (vi) guest access to a championship-quality golf course; and (vii) other supporting facilities

commensurate with a full-service luxury hotel. The Management Contract contemplated that the estimated opening date for the Hotel would be October 31, 2002, and that construction would commence by September 30, 2001.

Exhibit G to the Management Contract contains provisions for technical and pre-opening services to be provided by Sheraton. It also contains provisions regulating the construction of the Hotel. According to Paragraph 6 of Exhibit G, Castillo was to construct, furnish and equip the Hotel, "in accordance with final plans and specifications approved by [Sheraton] and in conformity with the Design Guide and with all Legal Requirements." Further, Castillo was engage "at its own expense, and subject to [Sheraton's] approval, such reputable and first-class architects, contractors, engineers, decorators and other specialists and consultants as may be necessary or desirable for the design, construction and furnishing of the Hotel. The plans and specifications for the building and facilities shall be prepared at Owner's sole expense in conformity with the Design Guide by a licensed architect, who shall be responsible for supervision of the construction of the Hotel." Further, Sheraton agreed to provide advice and assistance in the selection of an interior designer "and in defining the content and manner or presentation of the interior design submittals to be prepared by the designer." Sheraton reserved the right to approve the interior designer, with Castillo to provide at least three "consultant names."

Further, the technical services to be provided included, as set forth on Schedule 2 to Exhibit G: assisting Castillo in design guidance; reviewing Castillo's concept plans, recommending changes needed to obtain Sheraton's approval, and giving its approval; reviewing Castillo's preliminary architectural plans and specifications, recommending changes, and giving its approval; reviewing final plans, making recommendations, and giving its approval. Of particular moment in the context of this case, Sheraton was to provide advice and technical recommendations to the interior designer on the functional layout of guest rooms, public areas, food and beverage facilities, and ballroom and function spaces. Further, Sheraton was to review the preliminary design presentation, make recommendations and "[a]pprove the preliminary designation presentation, when acceptable." Likewise, Sheraton was to review the final design presentation, make recommendations, and, when acceptable, give final approval. For all of the technical services to be provided, Sheraton was to be paid a fee of $750,000.

Thus, the practical construct was that Castillo was directly responsible for the design of the Hotel, including the retention of design professionals, but virtually all aspects of the design process were subject to interaction with Sheraton, that is, Sheraton had the right to (1) review all preliminary and final designs, (2) make recommendations, (3) withhold its approval at each stage of the process until it was satisfied. In return, Sheraton was to be paid for its efforts.

Of no small significance are the provisions of Paragraph 5 of Exhibit G to the Management Contract. Significantly, Paragraph 5 identifies that the purposes of having Sheraton review plans for the Hotel are: (a) "for the purpose of determining that the plans and specifications incorporate the standards and guidelines set forth in the Design Guide defined in Schedule 6 and the Operating Standard contemplated by this Contract; (b) for improving the Hotel from a functional and aesthetic point of view; and (c) for making changes that may result in cost savings in respect of the construction and/or operation of the Hotel." Further, Paragraph 5 provides that approval by Sheraton of any documents or materials submitted for its approval "shall constitute a waiver of any right [Sheraton] might

otherwise have to require changes to such items on the grounds that they do not satisfy the standards of [Sheraton]."

The selection of DiLeonardo as interior designer had already been made by the time the Management Contract had been signed. The Management Contract contemplates that Castillo was to give Sheraton at least three names of interior designers and Sheraton had to approve at least one of them. While the evidence supports the conclusion that the process worked in reverse (that is, Sheraton came up with the names of interior designers and Castillo picked from among those names), it really does not matter how it happened since, however it happened, the parties agreed on DiLeonardo.

On March 27, 2002, the parties entered into a First Amendment to the Management Contract (the "First Amendment"). Among other things, the First Amendment: (i) memorialized a reduction in the number of guest rooms from 235 to 197; (ii) set the number of fractional units at 25; (iii) changed the effective date of the Management Contract to March 27, 2002; and (iv) stated that the parties "ratify and confirm the continued force and effect of the [Management Contract] as modified by the [First Amendment]."

In or around July 2003, Castillo and Sheraton executed a Second Amendment to the Management Contract (the "Second Amendment"). Among other things, the Second Amendment: (i) changed the "Effective Date" of the Management Contract to July 2003; (ii) reduced the number of guest rooms from 197 to 169; (iii) set the number of condominium units at 33; (iv) extended the deadline by which the Hotel was to open (without any Force Majeure Events) to July 1, 2006; (v) gave Sheraton the right to terminate the Management Contract and receive a $500,000 break-up fee if the conditions precedent to opening had not occurred by the opening deadline; and (vi) provided that Castillo and Sheraton "ratify and confirm the continued force and effect of the [Management Contract], as modified by the First Amendment and Second Amendment," and "agree that all terms and provisions of the [Management Contract] shall be and remain in full force and effect as therein written, except as otherwise expressly provided therein." As will be discussed further, *infra,* the Second Amendment reflected Sheraton's approval of the plans and specifications and project budget then in existence.

On or about March 1, 2006, Castillo and Sheraton executed the Third Amendment to the Management Contract (the "Third Amendment"). Among other things, the Third Amendment: (i) memorialized a reduction in the number of guest rooms from 169 to 166; (ii) confirmed the change from 25 fractional units to 34 fractional or condominium-hotel units; (iii) decreased the number of residential condominiums from 33 to 28; (iv) extended the deadline by which the Hotel was to open (without any Force Majeure Events) to December 31, 2006; and (v) "ratif[ied] and confirm[ed] the continued force and effect of the Management Contract."

C. *Design Guide*

As a springboard for its contention that Sheraton caused significant delays to the construction of the Hotel, Castillo argues that, notwithstanding the provision in the Management Contract obligating Castillo to construct the Hotel in conformity with the "Design Guide," Sheraton never actually provided Castillo with a Design Guide. Sheraton claims that it did provide a Design Guide.

According to the Management Contract, the term Design Guide was defined to mean:[4]

> **collectively**, (1) the multi-volume Design Guide, setting forth mandatory requirements for Managed Hotels, (2) the fire safety standards for Managed Hotels, the Fire Suppression Systems Handbook and the Guidelines for Fire Detection and Emergency Voice Alarm Communication and (3) the Fitness and Recreation Facilities Guidelines, each as then in effect on the date which is thirty (30) days prior to the awarding of a general contract for the construction of the Hotel (emphasis added).

The term Managed Hotels is used in the definition of Design Guide. Managed Hotels is defined[5] as follows:

> all hotels and resorts in the United States that are managed by [Sheraton] and/or its Affiliates under the name "St. Regis", including all such hotels and resorts that are owned by [Castillo].

Taken together, the Design Guide is defined to mean a multi-volume document, which contains mandatory requirements for St. Regis' brand hotels, as well as the fire safety and suppression standards, the emergency communication standards, and the fitness and recreational facilities standards.

Under the Management Contract, the Design Guide was to play an important role in the development of the design for the Hotel. Sheraton was to provide Castillo with the Design Guide for use in developing a conceptual plan and the architect was to bring to Sheraton's attention any inconsistencies between the conceptual plan, the Design Guide and other documents.

Castillo claims that it never received a Design Guide from Sheraton. Castillo cites the testimony of Ted Darnall, who started the management company for Starwood and who served as President of Starwood's North American division. According to Darnall, Starwood saw the St. Regis hotel in New York as a highly respectable luxury hotel that would be a launching pad for the establishment of a luxury brand. However, unlike competitor Ritz Carlton, and more like competitors Mandarin Oriental and Four Seasons, Starwood wanted to have individualized, rather than standardized, St. Regis hotels in the locations into which the brand was to be expanded. While each property was to be a luxury property, each hotel was to be unique and different and be adapted to its locale, rather than being a "cookie-cutter."

On cross-examination by Castillo's counsel, Darnall was asked if there was a design guide for interior design in connection with the Hotel. He responded that there were

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[4]Exhibit G to the Management Contract provides that capitalized terms not defined in Exhibit B are defined in Schedule 6 to Exhibit G. The definition of Design Guide is not set forth in Exhibit B, but is set forth in Schedule 6 to Exhibit G.

[5]This definition is found in Schedule B to Exhibit G.

"architectural construction" standards and disclaimed knowing "what you mean by design guide." He acknowledged testifying at his deposition, when asked if he had ever seen a design guide for interior design for the St. Regis, that he did not think that there was one but he allowed that he could be wrong. At trial, he reiterated: "I don't know what you're referring to as a design guide. There are architectural construction guides, but I am not aware of a design guide."

Castillo also cites the deposition testimony of Richard Martini, Starwood's Senior Vice President of architecture and construction. Martini testified that there were design or operating guidelines for the St. Regis brand, documents that he described as being just a few pages in length and dealing with basics like room sizes and number of restaurants. He could not recall providing any such documents to either Castillo or to DiLeonardo.

In addition, Castillo relies upon the deposition testimony of Anne Cotter, Vice President of Arquitectonica International Corporation ("ARQ"), the architectural firm that was the architect of record for the Hotel. Ms. Cotter testified that ARQ's design was based on a set of Ritz Carlton standards that had been provided by a consultant for Castillo. Ms. Cotter testified that this was all ARQ had even though ARQ had asked for design guidelines from Starwood. She further testified that it was not until the end of 2005 that ARQ received anything from Starwood and that what it received was a document in the nature of a summary, which offered only generic information. Anne Cotter testified that over the course of time, she asked a variety of people at Starwood for St. Regis hotel guidelines or a design guide, including Richard Martini and David Milus.

Ellen O'Neill, then the chief interior designer employed by Starwood, testified at her deposition that, as late as October 26, 2004, she had asked Mari Balestrazzi, Director of Design for St. Regis and Luxury Collection, to write to Steve Alden, then the Senior Vice President for St. Regis and Luxury Collection, about obtaining a concise list of St. Regis design standards, a writing prompted by requests for such standards.

The e-mail discussion is quite interesting. Balestrazzi wrote to Alden on October 26, 2004 at 1:00 p.m. to relay O'Neill's request for a concise list of St. Regis design standards. "These standards have become increasingly imperative to our effort to define, and hold others accountable to, the look and feel of a 'St. Regis' property." She explained further:

> As the number of projects increase, we are being queried by designers on a multitude of issues for which he have no clear directive. More importantly, we are seeing a disjuncture between the ... submissions of designers, loyal to the wishes of owners, that are divergent from our collective aims for the brand. Ft. Lauderdale is just one example in which our hands have been tied when presented with items such as plumbing fixtures which don't even meet Sheraton standards or my particular favorite – a lion themed table lamp.

Balestrazzi went on to provide Alden with a copy of Sheraton's architectural standards as a relevant guide post. She copied Robert Shinn, Ellen O'Neill and George Fong on this e-mail. Robert Shinn was the Senior Vice President of architecture,

construction and design. George Fong was a St. Regis Vice President for Project Management and Technical Services who was working on the St. Regis brand.

The next day, Shinn replied to all those who received the Balestrazzi e-mail that a "game plan" and a schedule were needed "for when we will have a St. Regis document like Sheraton attached." He asked who would take charge of the project and indicated that outside resources could be brought in for assistance. Alden responded with the suggestion that they identify an outside firm with expertise that would match "brand needs." Shinn then asked Balestrazzi to take the lead on finding a resource that "can do this under our direction and put together a budget." Fong did not submit a response to these e-mails.

Richard Cotter was in charge of the St. Regis brand until December 2000 and thereafter was the Vice-President for the mid-Atlantic region. He testified at a deposition that he did not know whether any St. Regis brand standards had been given to Castillo.

Dan Nelson, the principal of Vision, the interior design firm that succeeded DiLeonardo, testified at his deposition that there was no St. Regis hotel standard at the time of his involvement; he testified that he believed that one "was in the works." Robert DiLeonardo, principal of his own interior design firm, testified at his deposition that he did not receive any guides or standards before he started his work and that, as work went along, he received "sign offs" from Martini and Richard Cotter, but no one ever gave him design documentation. DiLeonardo testified that he had brought up the lack of documentation at a meeting, but ascertained that the brand was so new there was nothing in place.

Sheraton, in support of its claim that it did provide a Design Guide to Castillo relied on the testimony of David Milus who, in 2001, was Sheraton's Senior Vice President for New Builds and Transitions, which is the part of Sheraton having the responsibility for operational oversight of new hotels coming into the system. Milus testified that there were written St. Regis standards relating to physical facility design in place at the time of the design and construction of the Fort Lauderdale property. Milus claimed to have seen them and testified that they were prepared in 2002. Milus testified that the design standards he was describing had materials relating to logo compliance and type style, but did not have anything as to where the signs would go, what finishes the signs would have, and how the signs would tie into the building. This, he said, was because each building is different and St. Regis "is not a prototype cookie cutter brand, it is a luxury brand."

But Milus' testimony, given on re-direct, was in contravention of his earlier testimony on cross-examination – testimony elicited in response to an e-mail exchange on January 19, 2005. On that date, Brian Proctor of Sheraton's New Builds and Transitions Group reported, by e-mail, to George Fong (copies to Milus and Anne Cotter of ARQ, among others) that Ms. Cotter, from the architectural firm, had asked for direction on both exterior and interior signage requirements. In response, Fong stated that there "is no St Regis Brand standards for signage." Fong went on to say: "It's like interior design where everything starts from scratch and has to work with the architecture, the interior design, the location and type of hotel ...." Fong suggested that they follow the procedure used for the San Francisco project: "get a company [to] meet with architect and interior designer, visit the site and then come up with a concept with images, materials, samples and color boards that are presented to Barry [Sternlicht] [Starwood CEO] for his comments and

suggestions." Further, Fong told Anne Cotter that he was asking someone to send her a brochure, some company information and a proposal. Milus' response to this was to tell Fong that the others would need his help and that Fong should review and facilitate approvals.

Sheraton also relies on Fong's testimony. Fong identified a document entitled on the front cover "St. Regis Hotels & Resorts Sample Hotel" and bearing on the front cover "February 2002." This document proceeds to discuss the general criteria and equipment of various room types in a sample hotel and is self-described in the introduction as a Design Brief and Criteria. There is a similar document for information technology and for a fitness/spa facility. The title on the materials and the date seem designed to fit within the requirements of the Management Contract.

Fong testified that he, along with others, prepared these materials between the end of 2001 and early 2002 to serve as a design guide in order to provide the architect, the interior designer, the engineers, the development managers and the project mangers with a guide to be used in the development and building of a product that would align with the St. Regis brand.

Fong testified that, after the document was completed, he provided it to McDonald of Castillo. He could not recall however how he provided it to McDonald, *i.e.*, by letter or e-mail. Nor did he recall telling McDonald what he, McDonald, should do with the document. Fong acknowledged that he did not have a record of having given the design guide to McDonald. Thus, all we have is Fong's word that this occurred, with McDonald having died and being unavailable to testify.

The Court cannot – and does not – accept Milus' and Fong's testimony in this regard.

Milus' claim that there was in 2002 a design guide and it provided for signage, at least to the extent of logos and type styles, is contradicted by his failure to refer to such a document in his response to the January 19, 2005 e-mails. Fong's testimony that he gave the design brief to McDonald is not supported by any confirmatory document, a fact that takes on added significance given Fong's testimony as to the wide distribution that the design document was to have. According to Fong, the design brief was to be provided, not just to Castillo, but to the architect, the interior designer, the engineers, the development managers and the project managers. The Court observes that, during the development of the hotel, the large number of project participants (including the architects, the interior designers, the engineers, the general contractor, the subcontractors, Castillo's representatives and Sheraton's representatives) frequently exchanged documents of all types: letters, e-mails, memoranda, included. Fong did not claim that he gave the design brief to anyone other than McDonald. No one else (no architect, interior designer, engineer, project manager) testified that he or she had obtained such a document from Fong. No one else, not even anyone from Sheraton, testified that they had ever seen this document, much less that they had seen it back in 2002. Fong did not name any of the people he claimed were involved in working with him in the preparation of the document and no evidence of the development of this document (e-mails, memoranda, drafts) was offered.

David Edwards, who worked on the Hotel project as a representative of Castillo, testified at his deposition, after reviewing an e-mail he had sent to McDonald in

June 2000, that he, Edwards, provided a copy of the Ritz-Carlton design standards to ARQ and its engineers because there were no St. Regis' standards, and that notice of this was provided to Sheraton, including Martini. Anne Cotter testified at her deposition that she got the Ritz-Carlton design standards from Edwards in October 1999. Mr. DiLeonardo testified that his company also worked off of the Ritz-Carlton standards.

Further, both Fong's and Milus' testimonies are undermined by the testimony and e-mails from, among others, (1) Sheraton's Darnall, to the effect that he was not aware of a design guide, (2) Anne Cotter, to the effect that ARQ (the architect) had been asking for design guides and got nothing until the end of 2005, and (3) Ellen O'Neill (Sheraton's chief interior designer) to the effect that she asked Balestrazzi to seek a concise list of design standards. The claims by Fong and Milus are also contradicted by Ballestrazzi's e-mail of October 26, 2004, in which she sought a list of St. Regis brand standards for interior design and was provided a set of Sheraton standards as a relevant guide post. Fong was copied on this e-mail. If, in fact, he had prepared, over several months between 2001 and 2002, a design brief, he surely would have brought it to Ballestrazzi's attention. Further, on October 27, 2004, Shinn notified all concerned (including Fong) that a "game plan" and a schedule were needed to develop a St. Regis document like the Sheraton one and then Shinn asked Ballestrazzi to find an outside source to help prepare such a document. Again, Fong remained silent.

Fong's testimony is also belied by his own words. The Sample Hotel guide brief that he claimed he gave to McDonald in 2002 contained about 15 pages of design brief and criteria relating to a Sample Spa Wellness Center. Yet, in an e-mail Fong sent to a number of people, including Balestrazzi, on October 9, 2005, Fong wrote: "There are no set standards for St Regis Health Club/Fitness Center" and proceeded to list 8 "guidelines," which were nothing more than a list of items to be supplied and who was to supply them, *e.g.*, "1. Cardio Equipment from Technogym – **Tanya has ordered**" (emphasis in original). It is inconceivable that if the Sample Spa Wellness Center brief in fact existed, Fong would not have provided it in 2005 to HBA. Again, he sat back and remained silent when Tanya Marks of Sheraton e-mailed HBA's Sandra Cortner, on October 17, 2005 (copy to Fong) that she wanted Cortner to have Fong's e-mail of October 9, 2005 so as to be "sure we are adhering to St. Regis Brand guidelines." This e-mail of October 17, 2005 also went to Steve Shalit and Brian Proctor of Sheraton. Surely, if a Sample Spa Wellness Center document existed, they would have corrected Fong's oversight – if that is what it was.

In short, the evidence cited by Sheraton that there was any sort of Design Guide came from Milus who never claimed to have seen it and from Fong, who testified that he created it and gave it to a person now deceased, but who consistently acted as if the document never existed.

The Court notes that in May 2006, Thomas Smith of Sheraton, in a letter to Bullard, asserted that "there was a book of standards when the Management Contract was executed" and that Sheraton provided "McDonald with a copy more than one year earlier." Smith did not testify during the trial and no evidence was offered as to a "book of standards" allegedly given to McDonald in 2000.

As noted above, the Management Contract, executed in January 2001, obligated Castillo to construct, furnish and equip the Hotel,"in accordance with final plans and specifications approved by [Sheraton] and in conformity with the Design Guide and

with all Legal Requirements." As also previously noted, the Design Guide was, as defined in the Management Contract, supposed to consist of (1) the multi-volume Design Guide, setting forth mandatory requirements for Managed Hotels, (2) the fire safety standards for Managed Hotels, the Fire Suppression Systems Handbook and the Guidelines for Fire Detection and Emergency Voice Alarm Communication, and (3) the Fitness and Recreation Facilities Guidelines, each as then in effect on the date which is thirty (30) days prior to the awarding of a general contract for the construction of the Hotel. Castillo entered into a contract with its general contractor, AMEC Construction, Inc. ("AMEC), for the construction of the hotel on March 18, 2002. Thus, the Design Guide specified by the Management Contract was supposed to be the Design Guide in existence as of mid-February 2002. The Court finds that Sheraton did not have such a Design Guide and necessarily could not, and did not provide it to Castillo, or to the architect ARQ, or to DiLeonardo, then the interior design firm. No such Design Guide was ever provided to Vision [6] and there is no evidence that indicates that it was sent to HBA.[7]

The Court also takes cognizance of the fact that Sternlicht was regarded as the chief design officer for Sheraton. It is inconceivable that a Design Guide would have been approved and circulated without Sternlicht's input and approval. There is no evidence that he was ever involved in the development and distribution of a Design Guide. Indeed, Sternlicht testified at his deposition that St. Regis had no standard operating procedures at the time because St. Regis was too new a brand. While Sternlicht was not speaking specifically of a Design Guide, his testimony that St. Regis was too new a brand to have developed standard operating procedures squares with the Court's view of the evidence and undermines the contention of Sheraton that there was a published Design Guide that was provided to Castillo.

Since there never was a Design Guide, as contemplated by the Management Contract, and such a document was not provided to Castillo, it was not possible for Castillo to design and construct the Hotel in conformity with the Design Guide. It is also readily apparent that the absence of a Design Guide played a role in causing the uncertainty, confusion, and disorganization that marked the progress of the interior design of the Hotel.

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[6]The Court observes that, even if it is assumed *arguendo* that Fong gave McDonald the documents Fong claims he did, those documents fall well short of constituting the Design Guide described in the Management Contract. For one thing, Fong's documents do not contain the Fire Suppression Systems Handbook or the Guidelines for Fire Detection and Emergency Voice Alarm Communication. While Fong's documents do touch on these subjects, the documents do not describe themselves to be such documents and the information provided in Fong's documents is incomplete. For example, while his design brief does mention sprinklers and alarms, it states only that the hotel should have them "as per local codes/Starwood specifications." Likewise, Fong's IT Information focused on the guest room amenities (entertainment center, bedside consoles, guest room safes) rather than fire detection and emergency communication equipment. This disparity becomes particularly glaring when the Fong documents (Exs. 5, 6) are compared to the Ritz-Carlton 1999 Standards and Guide.

[7]While Ballastrazzi testified that HBA asked for a design guide, and she said that she would send them the current standards, she did not testify that she actually sent them anything. Moreover, she explicitly told HBA that their own experience with five-star properties would guide them better than any design document Sheraton might have.

Further, the lack of a Design Guide made it impossible for Sheraton to "determine that the plans and specifications incorporate the standards and guidelines set forth in the Design Guide defined in Schedule 6 and the Operating Standard contemplated by this Contract."

The Court views the absence of a Design Guide as critical. As Castillo's expert, Roger S. Cline, testified, this Hotel, as built, ended up with a per room investment of about $800,000, which to be economical, would need a room rate of $800 per night. Cline testified that, while there might be a few premier locations in the world that might merit that level of investment or more (such as the Mandarin in Columbus Circle), Fort Lauderdale was not one of them. Outside of world-class cities like New York, London, Paris, Hong Kong, Tokyo, and San Francisco, the developers of luxury hotels need to modulate the development so as not to "end up with a total upside down economic situation which is what you basically have here."

D. DiLeonardo

DiLeonardo was retained in September 2000. At a meeting held on October 10, 2000, DiLeonardo presented schematics of the interior design for some major Hotel components, such as the guest rooms, ballroom, and some finishes. Thereafter, DiLeonardo continued to work on its concept plans, with Sheraton giving comments thereon. By June 28, 2001, the schematic designs were approved and DiLeonardo was cleared to start preparing detailed designs and prepared the designs by August 2001. While the evidence does not support Castillo's claim that Richard Martini and Richard Cotter had approved the DiLeonardo designs as of August 2001, the evidence does reflect that there were no fatal objections to what DiLeonardo had submitted and neither Richard Martini nor Richard Cotter had raised concerns about DiLeonardo's competence or its ability to continue on with its work.

In August 2001, Sheraton changed its corporate structure and responsibility for the St. Regis brand was transferred to a group in Dallas, Texas, headed by Atef Mankarios. Mankarios replaced Richard Cotter as brand president and George Fong replaced Richard Martini as the technical services point person. Neither Mankarios nor Fong spoke to Cotter and Martini to obtain a briefing about the Fort Lauderdale Hotel project. Notwithstanding this, and exercising their prerogative as the new parties in charge, Mankarios and Fong began to tear apart the layout, the budget and the design of the Hotel, all of which had been developed with input from Martini and Cotter. It is evident that the new team wanted to place their mark on the Hotel; it is also clear that this mark had some elements that were entirely reasonable and some that were entirely arbitrary.

By e-mail on September 13, 2001, Michael Matthews reported to Mankarios that McDonald had called and asked for help. McDonald was trying to obtain the construction loan and was in the final stages of obtaining the municipal approvals and permits. McDonald was asking Mankarios and Fong to review the changes made by Sheraton to assure that the Hotel was at the 5 star level and was asking that Fong, and if available Mankarios, come to the site and meet. About an hour later, Fong responded by asking for a set of drawings and reported having heard that McDonald had reduced the project budget. Fong wanted the drawings and the revised budget before going to the site. Matthews then suggested that Fong call him and Fong did speak to McDonald the next day. According to Fong's e-mail of Friday, September 14, 2001, McDonald had promised to send the drawings and budgets by Monday. Fong reported that these could be reviewed

during the week and that McDonald wanted to meet to discuss their comments. Then Fong wrote:

> DiLeonardo is doing the interior design!!!!!! I did not ask if they were under contract so as to not raise suspicion that we may want someone else.

This e-mail reflects that Fong had already had a negative reaction to DiLeonardo and was already contemplating having DiLeonardo replaced on the Hotel project, even though Fong had not yet seen any of DiLeonardo's work product.

Upon questioning from the Court at trial about this, Fong testified that he was surprised that DiLeonardo had been chosen for a five-star project because DiLeonardo was not on "our" list of five-star designers. When pressed further, Fong then claimed that his comment about wanting someone else was predicated upon McDonald's telling Fong that he, McDonald, was not happy with DiLeonardo. Again, the Court does not accept Fong's testimony and views it as contrived in light of McDonald's unavailability to rebut it. It makes no sense for Fong to have to, as he said, take care "so as not raise suspicion" that Sheraton may want a different designer if, in fact, McDonald was expressing such utter dissatisfaction with DiLeonardo. Moreover, Fong acknowledged that he reacted negatively to DiLeonardo without having even seen their work product; he also acknowledged that it would have been fairer to have at least looked at their work.

The Court accepts that Mankarios and Fong, as part of their effort to take control of the Hotel project, desired to have their own interior designer. If the project was starting from scratch, it would not have been unreasonable for the new Sheraton/St. Regis team to want to work with a five-star designer that the new team members were familiar with. However, the decision by Mankarios and Fong to reject the interior design firm already in place with Sheraton's approval, without any articulated objective basis for doing so, was unreasonable and arbitrary. Moreover, while the record reflects that, as of October 2001 and continuing into 2003, Mankarios and Fong offered good faith, reasonable comments and suggestions, they maintained an entirely closed mind to DiLeonardo's attempts to respond to the points they raised.

Following Fong's review of the plans, he advised McDonald that the guest rooms were too small for a luxury hotel and the budget for furnishings, fixtures and equipment ("FF&E") was not adequate to produce a five-star hotel. Bullard agreed that the room sizes could be changed; the project was at an early stage and there was time to implement this change. Likewise, there were changes to the room count, some relating to changes in whether certain floors would contain hotel rooms or fractional units. As a consequence of these changes, Castillo hired James Trunzo of JT Architect ("JT Architect") to prepare new interior layout plans. JT Architect was used for this purpose because there was a billing dispute at that time between Castillo and ARQ.

The revised layouts prepared by JT Architect had a significant impact on the mechanical, electrical and plumbing ("MEP") and required that significant revisions be made to the existing MEP and structural plans. As a result, the interior design work came to a halt pending the preparation of the JT Architect plans. The JT Architect or Trunzo plans, which were little more than "boxes" or just bare layouts, were completed in 2002 and made their way into Revision "B," which was submitted to the City of Fort Lauderdale in April 2004 and approved in June 2004.

By February 2002, there was agreement on the room layouts and the parties were narrowing in on a FF&E budget.

On March 18, 2002, Castillo entered into a general construction contract with AMEC with a Guaranteed Maximum Price of $68,379,326 (the "GMP Contract"). Under the GMP contract, AMEC was only permitted to charge Castillo for the actual cost of the work up to the guaranteed price unless there were changes to the scope of work that could not be anticipated by the parties at the time of contracting. The AMEC contract required that AMEC substantially complete construction of the Hotel within 670 days from the issuance of a notice to proceed by Castillo. However, there was a change order dated July 23, 2003, which reduced the time to complete construction to 630 days from the notice to proceed and reduced the GMP by $3.1 million.

It is clear that when the GMP Contract was made, the plans for the Hotel were not ready for construction to actually proceed. While a set of plans had been submitted to the municipal officials for permitting purposes back in July 2001, those plans did not contain any DiLeonardo plans for the interior. Moreover, it was understood that substantial revisions would be needed to the mechanical systems (*e.g.*, the relocation of cooling towers) to the hotel guest rooms, to the spa/fitness center, and to the time-share units. The public and common spaces (lobbies, meeting rooms, ballrooms, and kitchen areas) were not fully designed. But on April 25, 2002, the City of Fort Lauderdale issued a permit on the basis of the plans submitted.

Sheraton's expert, David Pattillo of Navigant Consulting, Inc., testified that it is not unusual in south Florida for construction projects to begin, even pursuant to a GMP construction contract, with 15% to 20% of the details still unfinished. There is typically enough planned work to do within the first months of construction so that the unfinished construction details can be completed in time.

Very little appears to have happened between March 2002, when the GMP Contract was let, and July 2003, a delay of about 15 months, which Sheraton's expert, Thomas Driscoll (of URS Corporation) attributes to difficulties that Castillo was having in obtaining financing. The Court sees no reason not to accept that view. While, as a practical matter, if Castillo did not have the funding, it could not pay for the all the required design work to go forward, the fact remains that, had the design work been done in this period, the construction process would likely have been much smoother than it was. Of equal importance, had Sheraton provided Castillo with an appropriate, complete Design Guide, as it was contractually obligated to do, the benchmarks for obtaining approval from Sheraton would have been clear for both Castillo and Sheraton.

In April 2002, McDonald, accompanied by his daughter and by Mankarios and Fong, interviewed four different design firms as possible replacements for DiLeonardo. Bullard testified, essentially, that McDonald and Castillo were doing thus just to humor the new powers-that-were at Sheraton. But McDonald's writings suggest something different. On June 4, 2002, Fong inquired by e-mail for an "update on the interior designer selection." McDonald responded by saying that Castillo was in the "final stages" of obtaining financing and that July would be "the month for designers." Thereafter, on July 31, 2002, McDonald sent Fong a draft of a letter that McDonald proposed to send to three of the design firms that had been interviewed back in April. In that draft letter, McDonald stated that "[w]e are now in position to move forward with construction of our project and **select an interior**

design firm" (emphasis added). While there is no evidence that this letter was ever actually sent to the design firm, the fact remains that McDonald did take the time to interview four possible replacement firms and did express, in writing, twice, an intention to select a new interior design firm contemporaneously with the availability of funding with which to do so.

The notice to proceed was issued on July 23, 2003, which was 23 days before Castillo closed on its construction loan with CIBC on August 15, 2003. With the notice to proceed having been given on July 23, 2003, the substantial completion date became May 6, 2005.

The planned start dates for major phases of the project were as follows:

Tower Concrete	December 9, 2003
Podium Concrete	March 19, 2004
Podium Rough-In	July 13, 2004
Tower Guestrooms Rough-In	April 27, 2004
Tower Guestrooms Finishes	May 7, 2004
Tower Timeshares Rough-In	July 6, 2004
Tower Timeshares Finishes	July 16, 2004
Tower Condos Rough-In	August 4, 2004
Tower Condos Finishes	August 13, 2004
Final Substantial Completion	May 6, 2005
Final Completion	August 5, 2005

Pattillo opines that this schedule was unrealistic from the outset. However, Pattillo does not provide any support for that conclusion, other than pointing to what he terms the "massive revision to the design documents" or "substantial redesign activity" that was to be forthcoming. Moreover, his opinion is inconsistent with his acknowledgment that it is not unusual in south Florida to start construction even though 15% to 20% of the construction details are not yet done. The Court observes that the time allowed for the Tower and Podium concrete work to get done would appear to be more than sufficient to allow any interior design issues to catch up in time for the Tower guest room rough-ins to start on April 27, 2004. Castillo's expert, Thomas Driscoll, testified, in essence that the schedule left sufficient time to complete the interior design work, especially since there was some built-in "float" in that the Tower rough-ins had a late start allowance for May 2004.

Pattillo did not provide any estimate as to the percentage of construction detail undone at the time the notice to proceed was given. Nor did Pattillo opine as to how long the "redesign" should have taken. Nor did he opine as to whether the redesign activities needed to be "massive" or "substantial" or why. Moreover, despite the voluminous records, no evidence was offered that indicated that Sheraton was ignorant of the proposed schedule or that Sheraton objected to it. Further, AMEC is a well regarded Florida construction company and, as was pointed out during Pattillo's cross-examination, to accept Pattillo's position would require the Court to conclude that AMEC, despite being an experienced builder, entered into a GMP contract that contained an impossible schedule and then agreed to further reduce the schedule.

For the construction loan, CIBC agreed to provide Castillo with $112 million of construction financing and Deutsche Bank agreed to provide a take-out loan at the

completion of construction based upon the pre-approved project budget, which was annexed to the construction loan agreement as Exhibit B. As a condition to closing, CIBC required Sheraton and Castillo to enter into the Second Amendment in which Sheraton "acknowledge[d] and agree[d] that the plans and specifications and project budget in existence as of the date of this Second Amendment delivered by Owner to Operator have been approved by Operator in accordance with Exhibit G of the Contract."

CIBC specifically required that representation from Sheraton because it wanted to ensure the "loan would be sufficient to complete the hotel in a way that would satisfy Starwood and if our borrower constructed the project in accordance with the plans and specifications, that Starwood [would] accept[...] [it] upon completion."

It is evident that, as of the Second Amendment, DiLeonardo was the interior designer of record for the Project and that DiLeonardo had completed design development drawings for the Hotel. While these were not final drawings, the fact remains that Sheraton approved these drawings as the basis for the interior design. While it turned out that later-arriving Sheraton executives decided that these drawings were not good enough and, in particular, DiLeonardo was not good enough, the fact remains that Sheraton specifically represented that the then existing plans and specifications, including the DiLeonardo plans, were approved by Sheraton. Sheraton cannot not now walk away from that solemn agreement. Indeed, pursuant to the Management Contract, the grant of the approval by Sheraton resulted in a waiver of approval rights as to the matters approved. Further, the absence of a Design Guide entitled Castillo and its consultants to put even more reliance on the plans approved as part of the Second Amendment as those plans evidence what Sheraton approved as meeting a St. Regis brand "standard".

As to the budget, Ted Darnall, Sheraton's Executive Vice President, executed the Second Amendment on behalf of Sheraton and as he explained at trial, Sheraton would not sign off on a project budget unless it was satisfied the project budget was sufficient to build the Hotel to Sheraton's standards. The approved project budget was $137,825,945. Although a proposed budget in a lower amount had previously been developed through Sheraton's prior project personnel, the approved budget was developed under Fong's guidance and Fong stated that the "budget reflects our [*i.e.,* Sheraton's] vision of a five star luxury resort that will be one of the best in the market and reflects the St. Regis quality and image."

Sheraton now argues that the original budget was inadequate for constructing and furnishing a five-star hotel. For this point, Sheraton cites an internal Castillo memorandum, dated August 6, 2003, wherein Bullard gave a reminder that Castillo had "skinnied" the budget in many areas and warned that Castillo would "likely have some line items inadequate for completion." However, this was said in the context of urging that Newsome, Morris, and McDonald work with him as a team to manage costs. Bullard explained that Castillo had worked with its bank to reduce its reserve for contingency and that some items had actually been renegotiated with the subcontractors, thus providing a basis for a "skinnied" budget in some areas. Other evidence cited by Sheraton includes testimony that the original budget: (a) did not include a line item for a lighting consultant; (b) did not include a stand or key cabinet for a parking valet; and (c) provided for guest rooms to have locks opened with keys, rather than for a Ving or card system.

The Court is of the view that Fong, on behalf of Sheraton, found that the

budget was sufficient to produce a "five star luxury resort." The Court rejects Sheraton's attempt to argue, in essence, that Fong was wrong and to put the blame for the error (if such there be) on Castillo. Sheraton was in the hotel business, had the expertise, had the approval authority, and had the opportunity to provide an all-encompassing Design Guide. Bullard's reduction of the contingency budget by some unstated amount and renegotiation of prices did not impact the sufficiency of the budget on the facts then known nor did it change or undermine Fong's approval. The budget was prepared on the basis of DiLeonardo's interior design, with Sheraton having approved DiLeonardo and the general design direction. While it was certainly understood that there would be some design changes, and that the interior design was not complete and had not received final Sheraton approval, it remains that Fong found the budget to be adequate and Sheraton has not provided any reason for the Court to allow it to evade its responsibility for having given that approval.

With the benefit of hindsight, it is clear that Bullard underestimated the amount and cost of changes that Sheraton would demand in terms of interior design. Castillo had notice that the DiLeonardo design was subject to further refinement, at least in some Hotel areas. It also had notice that the Mankarios/Fong team was looking to replace the interior designer. On the other hand, it is equally clear that Fong, who approved the budget, knew that he and Mankarios wanted to change the interior design team and, therefore, he should have insisted upon an allowance for that cost in the budget but did not. More important, the Court cannot fault Bullard and Castillo for assuming adherence to the basic interior design framework contemplated by the DiLeonardo plans which were approved by Sheraton in the Second Amendment. After all, Sheraton had approved them.

It is at this juncture that the root of the underlying problem is exposed. Castillo had the right to insist upon proceeding with the plans approved in the Second Amendment, subject to some revisions and refinements. In all of the correspondence, e-mails and communications between Sheraton and Castillo and within Sheraton, there was virtually no recognition that Sheraton had approved the DiLeonardo plans and, therefore, its rights going forward were limited to refining those plans. Thus, Castillo could not reasonably foresee what came to pass – Sheraton would insist upon re-visiting the design plans Sheraton had already approved.

To the extent that Sheraton now points out that there needed to be a lighting consultant, a key cabinet for the parking valet, and a Ving card system, these matters would have been addressed had Sheraton provided the Design Guide that it was supposed to have provided, but did not. Additionally, the Court notes that Sheraton has not provided any evidence as to the amount that it now believes should have been provided for in the budget. Moreover, since Sheraton had approved the budget and was the party with the practical experience on hotel operations, these oversights, if such they be, are at least just as much, if not more, Sheraton's fault than Castillo's.

In August 2003, after the loan closed, construction of the Hotel commenced. The plan was to start with the tower side of the Hotel, building the structure of the first six floors, and then continuing with the guest suites, timeshare and condominium levels. As the structure of the tower went up, the shoring would be removed, and the exterior envelope and masonry would be installed, followed by the interior rough-in and finishes of the guest room units, which would progress up the building behind the structural and envelope work. The podium was scheduled to be constructed after the tower portion was

built so that the space could be used as a staging area. The tower side was to be started on the rear of the lot and the podium was to be started on the front.

DiLeonardo resumed work, developing what it termed a redesign of the Hotel, and continued working through to November 2003. While this was going on, Bullard, McDonald and McNeel met in Dallas with Mankarios and Fong, with the Sheraton representatives suggesting that Castillo consider alternatives. According to Bullard, Mankarios and Fong made it plain that they did not care for the DiLeonardo design and did not care for DiLeonardo and, further, they expressed their belief that DiLeonardo could not deliver a five-star quality design. In the meeting, Mankarios and Fong expressed a preference for Dan Nelson and his company, Vision. Bullard pointed out to Mankarios and Fong that DiLeonardo had won awards for five-star designs and that DiLeonardo had been recommended to Castillo by Sheraton in the first place. Bullard testified, and the Court accepts, that Mankarios and Fong did not provide any objective statement as to their reasons for rejecting DiLeonardo and its design.

Mankarios and Fong were familiar with Nelson and Vision because they had all worked together for years at Rosewood Hotels, designing a number of five-star hotels. While Mankarios and Fong were promoting Nelson and Vision for this Hotel, they did not tell anyone at Sheraton's headquarters in New York that they were trying to replace DiLeonardo nor did they seek approval for the list of acceptable replacements they had given to Castillo. Significantly, they did not consider that Sheraton had approved the extant DiLeonardo plans as part of the Second Amendment in July 2003, just a few months earlier.

On November 4, 2003, Fong e-mailed McDonald to assert that the appointment of Vision needed to be resolved as soon as possible. He stated further:

> We cannot and should not proceed with any more new layouts or design for guestrooms and public areas until that decision is made or we may have to do it over [again]. We strongly recommend that DiLeonardo is advised that they should not develop any other floor plans for the public areas/restaurant/meeting rooms, etc.

Fong's e-mail was preceded by a few days by the submission of a proposal by Vision to Castillo.

The Court notes that there is no evidence that Mankarios and/or Fong ever saw any of the DiLeonardo work product developed between August and November 2003. It appears that they simply wanted nothing to do with DiLeonardo and its design for no reason other than they wanted their own person, Nelson of Vision, to step in. This decision was grounded purely in personal preference and in disregard of the prior approval by Sheraton of DiLeonardo. Further, the complete absence of a Design Guide made it impossible for there to be any objective way to determine whether DiLeonardo was or was not adhering to St. Regis brand standards for interior designs, as those standards consisted of nothing more than the subjective tastes and preferences of whatever Sheraton executive happened to be in charge at the time. Further, there is no evidence that Mankarios and/or Fong were critical of DiLeonardo's efforts to complete DiLeonardo's already-approved interior design plan, while there is substantial evidence to the effect that

they sought to junk DiLeonardo's plan entirely, notwithstanding Sheraton's prior approval of it.

At this juncture, the Court also notes that there is a difference between an individual forming his or her judgment as to whether an item (whether an automobile, jewelry, or a hotel room) is luxurious or elegant, on the one hand, and a businessperson forming his or her judgment as to whether such an item would be accepted as luxurious by customers in the marketplace.

Further, as previously noted, the purposes of Sheraton's review and approval were: (a) to determine if there was compliance with the Design Guide; (b) to allow for improvement to the Hotel from an functional and aesthetic point of view; and (c) to make changes that would result in cost savings. The Court concludes that Mankarios and Fong did nothing towards fulfilling any of these purposes. Indeed, the only purpose that they were arguably serving was improving the Hotel functionally and aesthetically, but there is no evidence that they ever explained to Castillo how and why the change in designer would bring about an improvement in those areas.

Castillo fired DiLeonardo and retained Vision. Sheraton argues that Castillo had the final say on this decision and made it because McDonald liked Nelson and his presentation. To the extent that this argument is predicated on Fong's testimony, the Court does not accept it. The Court does not view Fong as a credible witness insofar as his testimony purports to recount his interactions with McDonald. Rather, the Court accepts that the reasons why Castillo fired DiLeonardo and brought in Vision were because: (a) Mankarios and Fong made it clear that Sheraton would not approve any DiLeonardo designs (existing or future); and (b) Castillo expected that, given Vision's extensive experience designing five-star hotels with Mankarios' team, Vision's designs would be quickly approved, thus keeping any delay to a minimum. These considerations by Castillo have nothing to do with the quality (or lack thereof) of the work done by DiLeonardo.

It is questionable whether Sheraton had the contract right to require that Castillo terminate a designer that Sheraton had already approved. The express language of the Management Contract does not deal with termination of professionals; it deals only with retention of professionals. Castillo could have refused to replace DiLeonardo and asserted its contract rights. But the Court understands that had Castillo done so, litigation would have ensued and the Project would have died then and there.

Later on, McDonald apparently prepared a memorandum listing his achievements during the period August 15, 2003 to August 30, 2004. In that memorandum, he indicated that he viewed room redesign as an achievement. He stated that St. Regis "insisted (and correctly so) on a new interior designer (we had used DiLeonardo because he was the cheapest)."

McDonald's memorandum confirms that the interior designer was changed at Sheraton's insistence. It also indicates that McDonald viewed the change in designers as being correct, but does not provide any basis for that view and does not indicate whether this opinion was one he had at the time of the switch or was one that was formed in hindsight. As previously noted, the fact that DiLeonardo may have been the lowest priced firm must be viewed in context. There was no evidence that DiLeonardo was not a five-star designer; rather the evidence was that DiLeonardo was recommended to Castillo by

Sheraton and the management team then in place at Sheraton found it to be acceptable. While it may be some luxury designers charge less than others, a luxury designer is still a luxury designer. Moreover, while DiLeonardo was looked down upon by Fong, there was no evidence that DiLeonardo was regarded in the design industry generally as not being a five-star quality design firm or that the prior Sheraton management acted improperly in approving DiLeonardo as a five-star designer.

More compelling is an after-the-fact e-mail from Sheraton's Ted Darnall. On April 20, 2005, he gave Barry Sternlicht an "fyi" that the "Dallas office of Starwood had picked the designer [Vision] against the desire of the owner." From a corporate standpoint, Darnall observed that this was an example of how the experiment of operating the St. Regis brand from Dallas and beyond the reach of the New York office had failed.

No evidence was offered at trial to support a finding that the DiLeonardo work was substandard, inferior, not useable, or not suitable to a five-star standard. Indeed, the evidence is to the contrary to the extent that the DiLeonardo plans were part and parcel of the plans approved in the Second Amendment. No evidence was offered to support a finding that DiLeonardo could not have responded successfully to comments and suggestions from Sheraton; rather, the evidence on that score is to the contrary. Moreover, because there was no Design Guide from Sheraton, there is no objective basis upon which any one, including Mankarios and Fong, could decide that DiLeonardo had not, and was not capable, of developing an interior design that would meet Sheraton's published requirements.

The Court accepts that Castillo went along with the change in designers but also accepts that its reasons for doing so were: (1) the likelihood that Mankarios and Fong would not approve any designs emanating from DiLeonardo; and (2) the likelihood that Vision's work would be promptly approved because Mankarios and Fong were promoting Vision and had worked with Vision successfully in the past.

E. Mankarios Departs the Scene

While Castillo was accepting a change to Vision in the expectation that this would smooth the process of obtaining approvals from Mankarios and Fong, Sheraton was in the process of terminating Mankarios – a critical development which Fong kept from Castillo. Even more disturbing was that one of the prime reasons Barry Sternlicht, Sheraton's CEO, had for terminating Mankarios was disagreement over design. According to Sternlicht's deposition testimony, Sternlicht viewed Mankarios' design preferences as "too old world." Sheraton's corporate management also perceived the Dallas office as being too independent, particularly with respect to design issues. Ellen O'Neill, Sheraton's chief in-house designer, testified that the main headquarters had an issue with the process by which the Dallas office vetted design names without prior consultation with the White Plains office. O'Neill, for one, was concerned that "nobody felt this scheme [Vision's] was appropriate for the brand, that these names were being vetted as approved designers for Starwood St. Regis projects."

Despite the fact that Vision had only just come on board and it was not too late to either go back to DiLeonardo or find someone else, and despite the fact that the White Plains office disagreed with Mankarios' design concepts and with his choice of designers, Sheraton did not inform Castillo of these misgivings and simply allowed Castillo

to go forward with Vision. In short, Sheraton let Vision proceed with the interior design even though Sheraton's decision-makers, including Sternlicht who was the chief design officer, disagreed with the design concepts of the former Sheraton decision-maker who directed the retention of Vision. This set Vision up for failure, particularly when it is considered that there still was no Design Guide for St. Regis, rendering any judgment about the quality of proposed designs entirely subjective. Sheraton's conduct in this regard was entirely unreasonable.

F. Construction Activities

At this juncture, it is useful to review the status of conditions on the ground. The notice to proceed was given on July 23, 2003. Photographs of the site taken in late September 2003 reflect that the site was essentially barren, save for some pilings and some construction equipment. By late January 2004, there is clearly discernible a platform in the rear of the lot and more substantial pilings in the front portion of the lot. One month later, three floors are visible in the Tower (rear) portion of the lot. In late May 2004, the Tower portion of the building has been built to a height of about eight to nine floors and the curve for the pool area on the seventh floor is visible. The beginnings of a floor can be seen atop the pilings in the front podium area and about one half of the floor is in place by late June 2004.

Framing and rough-in work began in May 2004 and continued throughout the course of the summer and fall of 2004. However, the construction team was prevented from finishing that work and installing drywall because of the issues with respect to interior design. Drywall and interior finishes could be installed only after the interior design plans were finalized.

As will be developed *infra*, while Vision completed interior design for most areas of the Hotel by February 2004, Sheraton did not approve any interior design plans for the guest rooms until October 2005, and the lobby plans were not approved until June 2006.

According to Bullard's testimony, which the Court accepts, during 2004, Castillo was proceeding to construct empty floors on a regular basis. While the floors could not be finished without interior design, Castillo was proceeding to construct floors. As Bullard acknowledged, the absence of interior design did not cause any delay during 2004 because all that was going on at the site was the construction of the exterior shell. On the other hand, as Bullard also testified, had interior design plans been in place, then Castillo could have been running electrical lines, installing plumbing rough-ins, and doing all the things needed to get the rooms ready to accept furniture. This interior work could have proceeded simultaneously with the construction of additional floors.

The photographs show that, by October 2004, the Tower in the rear portion of the building is approaching full height and several half-floors are discernible in the front podium portion.

As of November 2004, the construction of the Tower structure was virtually complete, the podium structure was poured, the exterior skin and masonry were complete, and windows and sliding glass doors had been installed in through the timeshare floors. At the same time, the majority of the guest room floors had been framed, much of the

rough-ins had been completed and drywall was stocked, hung to a extent but certainly not completed. But, at the same time, as Newsome testified, the public spaces, such as the fourth floor ballroom and the third floor meeting room, were essentially raw spaces, awaiting interior design plans.

Pattillo criticizes Castillo for engaging in a "fast-track" construction process. In some portions of his testimony and report, it appears that he is asserting that a "fast-track" process was used from the beginning; the evidence does not support such a contention. Upon a closer view of Pattillo's report and testimony, it is appears that Pattillo agrees that Castillo, at the inception, intended to utilize a traditional, "design it, bid it and then build it" approach. But, as delays mounted, Castillo turned to what it called a "caveman" approach, which is somewhat different from what Pattillo calls a "fast-track" approach.

The evidence shows that Castillo and its contractors were aware of the risks in proceeding with construction without having approved plans, as well as the risks in proceeding with construction for which permits were issued though some work had not yet been permitted. As Pattillo acknowledged in his testimony, the starting of work without fully finished and approved plans is not unusual in south Florida. As Pattillo further acknowledged, in response to a question from the Court, the fact that an operator (Sheraton) had design approval did not bring about a higher level of complication. Moreover, the evidence shows that, as guest room designs were finally approved (something that did not happen until October 2005), Castillo embarked on a "caveman" approach to construction. Rather than await formal architectural renderings, Castillo had the guest rooms built by educating the subcontractors using sketches, notes and instructions from the interior designer. Of course, Castillo could not schedule inspections, close up the walls, and install interior finishes until the interior design was approved by the City Building Department.

G. The Premature Incorporation of the Vision Plans

By February 11, 2004, Vision had delivered interior layouts for most areas of the Hotel, layouts which McDonald characterized as complete and final. On February 19, 2004, Fong e-mailed McDonald (with copies to ARQ and Vision) to take issue with the characterization. Fong specifically pointed out that Sheraton had not signed off on the plans. Fong stated:

> As discussed when you met in Fort Lauderdale with Stephen Alden on February 6, we agreed that since there has been a change in the St. Regis leadership team, all these plans need to be reviewed again (they were not signed off by the previous St. Regis team) which we are in the process of doing.

McDonald responded on February 23, 2004 that he did not agree to start the Sheraton approval process all over again. He contended that Sheraton had been actively involved in all aspects of design for two years, construction was in "full swing" and warned that delays would "cost us a fortune."

On February 29, 2004, Fong e-mailed McDonald, telling him that he had reviewed the plans with Stephen Alden and then proceeding to list what Fong described as

"St. Regis' comments." Most of these comments were specific requests for adjustments, such as the replacement of certain doors or the provision of some banquettes. Other comments suggested that further work would be needed, such as a comment that Sheraton would be contacting the kitchen designer/equipment supplier "to discuss their proposed equipment list and layouts." There was no comment on the spa, other than to state that the plans were being reviewed by "Starwood VP Spa" and comments would come later.

Of significance, as to the guest rooms, while there were some specific comments, such as adding double bedrooms to room mix and replacing swing doors with larger sliding doors in "intra coast" rooms, Fong's primary comment was:

> We need to have a mock up room as soon as possible. A mock up room is very critical and instrumental to really see, feel and analyze the flow of the room as well as its overall functionability from a guest's view.

A reasonable person reading these words would conclude that Sheraton was not going to approve the guest room designs without seeing a mock up or model guest room. On the other hand, a reasonable person could also conclude that the comments provided by Fong were the totality of St. Regis' comments, *i.e.*, Fong's comments represented the authorized view of the entire Sheraton organization.

McDonald, on March 1, 2004, responded to Fong by stating that he had passed Fong's comments onto Vision and that McDonald was now "assuming that this means that St. Regis has accepted the final room layouts in all instances ...." McDonald said he would await Fong's comments on the spa and thanked Fong for his expeditious review.

This Court concludes that McDonald was totally in error in deciding that Sheraton had "accepted the final room layouts in all instances." While Fong did not explicitly request to see revised layouts incorporating his comments, Castillo should have understood, both from the nature of Fong's comments and from the Management Contract, that it would need to send revisions for Sheraton to review and, indeed, Castillo did so understand. Moreover, Castillo should have understood that the guest room layouts were not going to be approved until Sheraton had reviewed a model room.

Vision proceeded to revise its plans and, on March 30, 2004, sent them to Sheraton for its approval. The furnishing plans, which showed where case goods, lamps, beds, televisions and other items would be placed in the guest rooms, were critical because the placement of such items would control the location of the MEP rough-ins. By April 20, 2004, the Vision layout and finishing plans had been provided to ARQ, the architects. ARQ, in turn, prepared architectural drawings, known as Revision B, which were provided to AMEC, the contractor, and to the Fort Lauderdale Building Department.

Castillo claims, in its proposed Findings of Fact (¶ 82, *citing* Bullard Ex. O1), that Vision's layout and furnishing plans were sent to ARQ only "[u]pon receiving Sheraton's approval." However, the only support for this assertion is the Fong e-mail of February 28 and the McDonald e-mail of March 1, both of which obviously were sent before Sheraton had seen (or could have seen) the revisions made by Vision in response

to Fong's comments. Moreover, even if it were assumed that Fong's comments constituted the entire universe of comments from Sheraton and even if it were assumed that it would not be necessary to have Sheraton review the revised plans to assure itself that its comments had been incorporated, it remained that Castillo had been specifically warned that the guest room layouts were not going to be approved until a model room could be viewed.

Clearly, the purpose in having the Vision plans incorporated into a buildable set of plans was to enable AMEC to accomplish the concrete pours of the guest room levels, sleeving and rough-in work on time and to keep the Hotel on track to open by May 2005. However, in sending in the Vision plans, though there had not been approval of them by Sheraton, Castillo was taking the risk that further revisions would be necessary and, further, that the work that was proceeding would have to be re-done.

On March 31, 2004, Bullard, Fong, McDonald, Nelson and others attended a meeting at Vision's office in Dallas at which Vision presented its conceptions of the details for the guest rooms and spa. The meeting minutes reflect that the participants discussed the details, offered comments and opinions, some changes were agreed to, and various items were approved for purposes of preparing a mockup or model room.

At trial, Fong, on cross-examination, denied that he had approved any of the finishes for the model room, though he acknowledged that the minutes reflected that certain finishes had been approved and that he never attempted to correct the minutes. More importantly, Fong conceded that he did not view any of the elements he saw on March 31, 2004 as being inappropriate for the St. Regis brand and that he proceeded to ask White Plains to set up a presentation for Sternlicht, who was the chief design officer charged with the final approval authority, including final approval authority over the guest rooms. Again, the Court does not view Fong as being credible; the Court accepts that the minutes were accurate in indicating that certain finishes were approved and further accepts that Fong did not object to anything he saw on March 31, 2004 as being inappropriate for the St. Regis brand.

In an e-mail circulated within Sheraton on March 30, 2004, Bob Shinn reminded all concerned that Sternlicht was the chief design officer and had final approval authority.

H. The Vision Design is Rejected and Vision is Given a Second Chance

Barry Sternlicht and other Sheraton personnel viewed the Vision materials, by themselves, outside of the presence of Vision and Castillo, around April 20, 2004. By all accounts, Sternlicht and the other White Plains corporate leaders were horrified by the design. In an e-mail of April 20, 2004, Sternlicht called it the "worst" he'd ever seen. Bob Shinn referred to some of the material as looking like "driftwood" and "stuff that had washed up on the shore."

In the round of e-mails circulated on April 20-21, 2004, Sternlicht was informed by Darnall of the history of the designer selection:

> An FYI on this one we Starwood (Dallas) pick the designer here against the desire of the owner. This is another example of how

> our experiment failed. That said I think we will be better prepared for future deals however the growing question will be international and we are working on some thoughts there.

Sternlicht's response was terse: "U r kidding. Atef picked this guy?"

Darnall rejoined: "Yes and I think if we want to change designer we are going to have cover some of the expense." Sternlicht was informed that the cost was expected to be around $100,000 and expressed a willingness to "absorb it if we have to."

On April 21, 2004, at 9:00 a.m., George Fong wrote to Jim Alderman of Sheraton, pointing out that Vision had replaced DiLeonardo and had been working with McDonald to develop layouts and designs. He also noted that they had sent up proposed schemes for the model room (conveniently leaving out the fact that Fong himself had seen them and had not objected to them) and that Sternlicht had not liked them. Fong reported that he had cautioned Ellen O'Neill that Sheraton was going to have a hard time with McDonald who Fong expected was going to have a "fit". Fong specifically warned Alderman that changing designers was going to cause delays to the project and the Hotel would not open in the summer of 2005. The Court infers that Fong, having a prior successful relationship with Vision, was still interested in keeping Vision on the job and that Fong, having participated in inducing McDonald and Castillo to ditch DiLeonardo in favor of Vision, was reluctant to go back to McDonald and undo what Fong and Mankarios had orchestrated in the first place.

Alderman then e-mailed Darnall for directions. He reported that Fong "does not think that our approach has been very thoughtful" and that Alderman too saw "a storm brewing with" McDonald. Alderman reported that Fong was suggesting that Vision have a meeting with Stephen Alden to obtain direction, something that was happening on other projects.

Darnall then responded to Alderman that Sternlicht was more likely to "blow the deal up" than move forward with Vision, but Darnall was going to ask Sternlicht for money to put toward changing the designer.

In the meantime, by 10:37 a.m. on April 21, 2004, Fong was advising Ellen O'Neill by e-mail that he had called Vision and cancelled a White Plains presentation scheduled for April 26, 2004. "As expected they wanted to know why and what next? I told them that their design was not acceptable and that they will get their instructions from the developer after we speak to him." Fong urged that Sheraton make its "recommendations" to the owner/developer "as soon as possible so not to cause any delays in construction which is progressing."

Rather than simply going along with the replacement of Vision, on April 23, 2004, Darnall suggested to Sternlicht that Vision be given another chance:

> I am concerned that this thing could get ugly on us real quick....before [Mankarios] we recommended a designer the rumor has you chose ... Then [Mankarios] enters and does not like the design or the designer and gives ownership a list of three designers and that quote "St. Regis Approved".

> Ownership negotiates with all three and ends with Vision. [Mankarious] manages progress reviews through last year, post his departure there are no Starwood reviews. Ownership contacts George Fong requesting a design review[s], George set up meeting with Ellen and Bob as per the new process. This said the issue here is ownership is now claiming that they spent $350 K on the first designer and 800 K with vision. I think we have no choice but to give vision one more crack at it, have them come to WP to meet with Ellen and the Brand and see what we get. If they don't get it then we are in a better position to require they change. I do not think we have any other choice now.

Darnall reiterated on May 5, 2004 that it was his recommendation that Vision be given another opportunity.

While Sheraton contends that Castillo wanted to keep Vision and that it was to accommodate Castillo that Sheraton agreed to give Vision another chance, the Court rejects this contention. The internal Sheraton e-mails make it plain that it was Sheraton's concern with liability for additional design costs and project delays that caused Sheraton to retreat from the initial impulse to change designers. As Shinn stated in an e-mail of May 5, 2004: "there is a large financial exposure if Vision gets fired and developer has to start from scratch with a new designer. Starwood will have exposure since Vision and original designer were both our recommendations and somewhat following [Mankarios'] directions." Following up on this about 30 minutes later, Fong pointed out bringing in a new designer meant a total new design because "[a]s everyone know[s] each new designer always wants to produce their own design and not use any left over from the previous one."

Again, because there was no Design Guide it was not possible for Sheraton to have determined that the model room failed to meet the Design Guide criteria. While it is certainly arguable that Sheraton's rejection of the Vision model room was for the purpose of improving the aesthetic of the Hotel, and Sternlicht and the others certainly gave the room severe aesthetic criticism, there was, in this, no concrete information as to how to improve the guest room design.

On May 6, 2004, Bullard wrote to Sternlicht, Robert Cotter and Stephen Alden to complain about the interior design process and to place the blame on Sheraton. Bullard alleged that DiLeonardo's designs had been approved by Starwood (which was not entirely accurate because those designs were only conceptual in nature and by no means final design plans) and that Castillo had fired DiLeonardo at Sheraton's insistence (which was accurate). Of significance, Bullard stated that Castillo "support[s] and appreciate[s] the recent reviews of the interior design direction; however, the challenge and task of reaching an acceptable scheme may be difficult unless the current designer receives very clear direction immediately." From this, as well as from an e-mail of Ellen O'Neill of May 5, 2004, it is apparent that Castillo did not care for the Vision design either but, then, Castillo's dropping of DiLeonardo and retention of Vision was not voluntary.

Bullard's comment about giving clear direction was entirely appropriate, given that evidence shows that there was anything but clarity about Vision's role at the time. Bullard wrote that Vision had informed Castillo on May 4, 2004 that Vision had been

instructed to stop working on the restaurant and bar designs. At the same time, however, Vision kept working on guest room re-design because, on May 19, 2004, Sheraton held an internal meeting to review that re-design, a meeting attended by Sternlicht. Ellen O'Neill reported to Nelson that day that the new "boards were well received," though Sternlicht had lots of comments. The Sheraton meeting minutes indicate that Sternlicht wanted the rooms to have a more "British Colonial" feel, that Sternlicht felt the design was still "very conventional" but that the re-design "is looking more brand appropriate than the previous submission." Again, the absence of a Design Guide for St. Regis reduced the task of gaining approval to doing whatever was necessary to make the interior design appeal to Sternlicht's personal sense of taste or his personal sense of what the marketplace would accept. Vision's ability to meet Sternlicht's idea of brand standards was made even more difficult by the fact that Vision did not get to meet directly with Sternlicht; his views were filtered to Vision and Castillo by others. While clearly the task became how to get Sternlicht's approval, there was nothing objective to indicate how this was going to improve the aesthetic of the Hotel.

On May 27, 2004, Ellen O'Neill, Bob Shinn and George Fong discussed the situation with McDonald and Bullard. The Sheraton team stated that, going forward, O'Neill would be the point of contact for interior design and Fong the point of contact for technical services. O'Neill was to work with Castillo and its designers more closely than normal in order to minimize issues. The Sheraton team reported that Vision was now viewed as acceptable, but Vision's design was still not acceptable. Sheraton was "moving in the general direction of British colonial." O'Neill reported that she had met in New York the previous day with Nelson, which was for the purpose of helping Vision understand the St. Regis brand, and was confident that the design would be corrected. She also described some materials that she was sending to McDonald which were intended to convey the "design direction that Barry Sternicht [*sic*] has called out for the St. Regis, Fort Lauderdale Project." Bullard's reaction to this was generally accepting, given that he did not care for the Vision design, but Bullard was very concerned about paying for what he characterized as a third design. Again, the Court notes that O'Neill was specifying that Sternlicht was decreeing the design direction, there being no objective Design Guide. There is also no evidence that Sternlicht's sense of design was any better (or worse) than that of Mankarios or Fong. Moreover, there is also no evidence as to whether any of the interior design concepts were called out based on the reviewer's sense of what the marketplace would accept.

Despite the apparent vote of confidence by Sheraton in Vision, on June 7, 2004, just about ten days after the May 27, 2004 discussion, Ellen O'Neill recommended six other design firms to Bullard for the public spaces in the Hotel, including the restaurant. O'Neill advised that these six firms had "executive approval" and that one of these should be given the task rather than Vision. O'Neill reported that Sheraton believed that Vision "will have difficulty in interpreting the St. Regis brand standards and design direction." One of the recommended designers was HBA. Castillo did not accept this suggestion and decided to press forward with Vision.

Despite the coaching from O'Neill, Vision had not made progress towards a satisfactory interior design, at least in Sheraton's view. On July 8, 2004, Vision's most recent effort was reviewed by Sternlicht, Darnall, Shinn, and Balestrazzi, among others. Sternlicht indicated that Vision was not yet where "they needed to be" and that the quality of materials was not high enough for a St. Regis. Sternlicht and Darnall concluded that

Vision "is just not getting it" and another designer was needed, either Ellen O'Neill doing it in-house or else bringing in an outside firm.

I. Sheraton Takes the Design Lead

On July 16, 2004, Fong confirmed an earlier conversation with McDonald that Sheraton would "take the design lead with assistance from Vision Design" in order to complete the interior design of the guest rooms. Sheraton would provide Vision with pictures, sketches, and specifications. Vision would be responsible for implementing the design by filling in the details. This direction-taking by Sheraton was contrary to the Management Contract. Paragraph 5 of Schedule G stipulated that Sheraton's review and approval rights did not mean that Sheraton was "providing architectural, engineering or other professional services to" Castillo.

Sheraton proceeded to re-design the guest rooms, including the selection of all the furniture, fixtures and equipment. On August 5, 2004, O'Neill informed Shinn that she had "finished redesigning the Ft. Lauderdale guest room." Sternlicht approved the design and then it was sent to Castillo and Vision – the reverse of the expected process. Vision then prepared specifications to implement Sheraton's guest room interior design. A process of comments and reviews ensued, leading to a meeting on January 31, 2005, involving Castillo and Sheraton. The design for the entire Hotel was presented to Sternlicht, who approved it.

The next step was to construct a model room so that all parties could see what an actual room would look like and whether further changes would be required.

While all of this was going on, the design development of the public spaces appears to have been largely stalled, with no design development plans as of November, 2004.

J. Sternlicht Departs/The Model Room is Rejected

In early 2005, Steve Heyer replaced Sternlicht as the CEO and Chairman of Sheraton and as the executive responsible for approving interior design for the St. Regis brand. Castillo was not informed about this development and learned that Sternlicht was out and Heyer was in only on April 21, 2005, when the model room review was held.

Heyer, Darnall and others from Sheraton attended the model room review, as did Bullard and Nelson. Bullard was not entirely pleased with the model room. Nelson was not entirely pleased with the model room. The Sheraton team detested the model room. All the participants viewed the room, then the Sheraton group viewed the room in private, and then there was a brief interaction between Heyer and Bullard.

Bullard's version is that the Sheraton private meeting lasted only briefly and that Heyer emerged and said, in essence, Castillo had to "change this all out" or else Sheraton would turn the Hotel into a "Westin." The point here is not that the Westin Hotels are bad hotels, but that Westins are not the exclusive, elite property that St. Regis is. Heyer's version is similar, but different. Heyer's version is that the model room had a look and feel and a cost that was more evocative of a Westin and, therefore, to get the problem of the Fort Lauderdale project solved, it was suggested that the Hotel be developed as a

Westin. Heyer also noted, though, that "[i]t wouldn't have been the best Westin but it certainly wasn't a St. Regis in everyone's estimation ...." Whether viewed as a threat or as a helpful suggestion, the concept was not acceptable to Bullard or even to Heyer because the condominium units were being marketed on the assumption that the Hotel was going to be a St. Regis.

Castillo urges that Heyer's suggestion/threat to turn the property into a Westin was arbitrary and unreasonable, given the brief amount of time that Heyer devoted to the room review and the venomous rivalry that Heyer had with Sternlicht, Heyer would have not approved any design that Sternlicht had fostered. The Court does not accept this contention. Heyer's disfavor with the room was not isolated; the unacceptability of the model room was shared by the other Sheraton participants and even, *albeit* to a lesser extent, by Bullard and Nelson. Nor does a relative brief time for review make the review arbitrary. Doubtless, the average person who walks in a hotel room can rapidly discern whether the room's quality is closer to a five-star hotel than to a two or three-star hotel. For example, Darnall testified that the room was shocking and nowhere close to what a five-star room should be. He said that the television set in the room was not a branded model but was a "knock off something you would see at Walmart." The average consumer could certainly distinguish between a brand name television and an unbranded one. Heyer pointed out that some of the furniture was not the right scale for a St. Regis and not the right quality and that "some of the fixtures were shoddy and looked frankly cheap." These harsh comments were clearly hyperbole as, after all, Heyer was willing to accept the room as suitable for a Westin.

The evidence shows that the observations by Heyer and the other Sheraton personnel were comments and criticisms that were made in good faith, though the comments were exaggerated. The negative reaction was undoubtedly influenced, to some degree, by the fact that the contractor built the wrong size room and the construction was rushed; there were issues with the finish on the wood and problems with the marble; and either Castillo or its contractor had substituted lesser quality, inferior materials for some materials that were identified by the Sheraton/Vision specifications. Even Bullard acknowledged as much in writing to Heyer on May 3, 2005, that, while the furniture design and style were specific to what Sheraton had proposed, "the quality is not what it should be." However, Castillo reasonably offered to re-do the model room by swapping out the inferior items for better quality items.

Sheraton offered no evidence as to what were the applicable standards for a Westin and how they differed from what was expected at a St. Regis. While there is an implication that a Westin would be less prestigious or less luxurious than a St. Regis, Sheraton did nothing to try to explain what the differences would be. The Court is left to conclude that the difference between what was suitable for a Westin and what was suitable for a St. Regis was entirely in the subjective eye of the beholder, particularly since there was no objective basis for comparison via a Design Guide. Moreover, there was no evidence that anyone at Sheraton complained that the model room was not consistent with the drawings. As Bullard testified, Castillo would have swapped out the inferior goods and re-constructed the room. For one, it would not appear to involve any major effort to simply put higher quality television sets in the rooms, replacing the low quality one panned by Darnall. The problem was that Heyer and his team rejected the entire design, not just the manner in which it was implemented. This was contrary to the fact that Sheraton, *albeit* under Sternlicht, had approved the Vision design in concept.

K. HBA Enters and the Interior Design Is Completed

In the wake of the model room debacle, Sheraton again suggested a switch in designers. It did so rather than identify the elements of the model room that should be replaced. This time, Castillo balked at the demand for another change. In a May 3, 2005 letter to Heyer, Bullard stated, with much sense, that if the problem was the quality of the goods used to implement the room design, that should not cause a major design problem. On the other hand, as he noted, the problem would be bigger if the direction of the design was changed again. Bullard's real concern, which he expressed both orally and in writing, was that plumbing, electrical, interior walls, and other elements had been, or were in the process of being installed, and he wanted to minimize changes that would affect the installed elements. Bullard orally agreed to allow Sheraton to proceed with more interior design changes, but conditioned his agreement on Sheraton's commitment to minimize those changes and to finalize the design promptly. Castillo orally terminated its arrangement with Vision, who did no further work after the model room review.

Sheraton then proceeded to select and retain HBA.[8] As Shinn wrote to Bullard on May 11, 2005: "As confirmation, we have hired Hirsh Bedner Associates (HBA) and plan to have a guest room design presentation scheduled in Atlanta in about three weeks. Ellen has sent their design proposal to you."

In May 2005, representatives of HBA met with Fred Bullard at the Hotel to review the status of construction. Shortly thereafter, HBA's representatives met with Bullard at HBA's offices in Atlanta, and attended a "brand immersion" at Sheraton's offices in White Plains. During the Atlanta meeting, Newsome pointed out that a great deal of design work remained to be done and that the job site was essentially "shut down" pending interior design.

On June 2, 2005, HBA presented its initial interior design concepts to Sheraton and Castillo. On June 14 and 15, 2005, HBA presented plans for guest rooms and public areas to Sheraton and Castillo. The renderings contemplated substantial changes that would have added cost and delay. Following the June 2005 meeting, Sheraton agreed that HBA's redesign would not affect the pre-existing framing, drywall and MEP systems that already had been completed and that all items in the HBA presentation would be evaluated as to the impact on time and cost before being approved. Steve Shalit, in an e-mail of June 21, 2005, acknowledged the existence of "the understanding that the HBA design would use what is in the room." That e-mail, and an e-mail of the same date between Fong and Shinn, reflect tension between minimizing design changes on the one hand, and developing a design that would make the model room different from the version previously rejected.

On August 22, 2005, Sheraton and Castillo reviewed HBA's model room and both parties approved the design with only minor comments. HBA presented its public area design to Sheraton's representatives in White Plains on September 12, 2005, and the public area design was approved by Sheraton at a subsequent presentation on September

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[8]While Sheraton had asserted claims against Castillo to recover amounts paid by Sheraton to HBA, this Court dismissed those claims at the close of Sheraton's case on the ground that the Management Contract did not permit Sheraton to hire experts on Castillo's behalf; it required Castillo to hire experts subject to Sheraton's approval.

19, 2005. During a conference call on September 30, 2005, both Castillo and Sheraton confirmed that the public area plans were fixed and approved.

As of October 30, 2005, HBA had issued interior design drawings for most areas of the Hotel to Castillo, Sheraton, and ARQ for review.[9] While the pace of the process had certainly picked up (either because HBA was more in keeping with Sheraton's mind-set or because HBA was attempting to minimize changes, or both), the process was not entirely free from indecision.

While Sheraton approved the October 2005 plans within a few weeks, Castillo did not do so for two months. Consequently, HBA's final revised and supposedly complete drawings were not issued until early January 2006. The guest room design was finally approved by the City Building Department in February 2006. The timeshare level design was approved by the City on April 19, 2006.

HBA's lobby plans were not permitted until June 2006. The lobby presented more complicated issues than the guest rooms. The ceiling above the lobby contained ductwork, fire protection system, electric system, and live safety system components and there was potential for there to be conflicts above the ceiling. While the guest rooms could be done using "caveman" construction, the lobby and the space above its ceiling had to be engineered.

The HBA plans for the lobby were radically different from the Vision plans and presented complex construction issues, including the construction of curved coves that HBA insisted upon, over Castillo's objections. HBA made changes to other public spaces, such as the removal of a structural wall in the fourth floor ballroom so that a car could drive into the ballroom from the parking garage. In addition, HBA significantly changed the partitioning of the ballroom. The existing plans had a design for a single partition so that the ballroom could be divided into two: this involved a design for the steel beams and a steel subsystem to support the track. HBA eliminated the single partition and provided for two partitions in different places, so that the ballroom could be divided in three. As a result, the overhead utilities, such as fire sprinkler mains, had to be relocated and retrofitted. Another new element was chandeliers which were different from those originally contemplated and required additional overhead work.

The public space plans were finally approved in June 2006. Additional HBA drawings were released in October 2006. In the meantime, Castillo commenced litigation against Sheraton, complaining about delays, in federal court. The action was commenced on July 21, 2006 (*see Castillo Grand, LLC v Sheraton Operating Corp*, 2009 WL 2001441 [SD NY 2009] [Patterson, J.]),

The HBA-led design process proceeded more expeditiously, relatively seamlessly, due to the fact that the Sheraton team which brought in HBA remained in place throughout the process. The Court cannot help but observe that DiLeonardo was terminated when Sheraton replaced its management team; Vision was terminated when Sheraton replaced its management team. The Court concludes that it was essential, in

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[9]While Sheraton claims that these plans covered "all" areas of the Hotel, the Court, having reviewed the plans, could not identify any of the plans as covering the interior design of the spa/health facility.

order to gain approval from whomever was running Sheraton at the time, for Castillo to engage a design team that the Sheraton management favored. The change in designers had little to do with their own merits and more to do with the whims of the changing cast of characters, something that would have been prevented had a Design Guide been in place.

It is worth noting that the start of HBA's design activities was in May 2005 and those activities were completed in October 2006 – a period of roughly 17 months. However, the October 2006 date involved the spa which, as discussed *infra*, was itself delayed and, therefore, the use of that date as a measuring point for how long it took for HBA to do its work is unfair. The Court will use the June 2006 date, completion of public space design, such that the Court determines that it took HBA about one year to do its design work.

L.. Other Design/Construction Issues

Notice to proceed with construction was given on July 23, 2003. That notice was given notwithstanding that interior design had not been approved and was nowhere close to approval. Both Bullard and Newsome acknowledged that there were important design changes that were to be made, but had not yet been, as of the time construction started. In particular, in between March 2002 and August 2003, the room count was reduced from 233 rooms to 194 rooms, which was going to be accomplished by changing the direction of some rooms, making rooms bigger; further, some hotel suites were going to be changed into timeshare units. These changes required significant changes to the MEP and HVAC systems.

While the design of the guest rooms was in flux, one thing that had been approved by Sheraton was the guest room layouts prepared by JT Architect, which were approved with the Second Amendment to the Management Contract in July 2003. However, Bullard and McNeel, in September 2003, sought to change the guest room layouts. While McDonald and Fong attempted to discourage Bullard and McNeel from making broad changes, Bullard prevailed and, on November 19, 2003, Castillo instructed Vision to revise the layouts of the guest rooms to incorporate Bullard's and McNeel's changes. The changes affected the locations of the bathtub, shower, toilet, vanity, and closet in every guest room, leading to substantial MEP redesign.

Additionally, ARQ's original design failed to account for window curbs and operable windows, which were required by the City, and therefore the window systems need additional design work.

Separately, Castillo initiated design changes to the timeshare levels (which ultimately housed condominium-hotel units). Before construction commenced, the timeshare floors moved from Levels 16 and 17 to Levels 15 and 16. The shift in the timeshare floors created complications because the layouts, ceilings, and floor-to-floor heights of those floors (and the 14th floor ceiling) had to be redesigned. Then, in March 2004, Castillo redesigned the layouts of the timeshare floors again, increasing the number of timeshare units on the Levels 15 and 16 and converting Level 17 from condominium units to timeshare units. These changes impacted the architectural and MEP design of the timeshare units.

The hotel units were located on the floors directly underneath the timeshare

units. Thus, there were design issues, relating to Sheraton, that were impacting the on-going construction on the lower floors, as well as design issues, having nothing to do with Sheraton, that would have impacts on the higher floors.

There was another problem in that the timeshare units were to have washers and dryers but, for some reason, ARQ's permit drawings did not include them. Further, apart from whether the timeshare units were supposed to have whirlpool tubs to begin with, the original plans had them having whirlpool tubs. There had to be redesigning to account for the MEP for these items, bearing in mind that the plumbing lines ran the height of the building and piping had to be rerouted. This redesign was one of the tasks done by HBA.

M. The Spa

Castillo was to pay for the design and construction of the spa at the Hotel and Sheraton was to operate it, though the parties could elect, by mutual agreement, to engage a third party to operate the spa on behalf of Castillo. The costs of such a third party were to be an operating expense, paid out of the Hotel's receipts. Pursuant to the Management Contract, the Hotel could not open until 21 days after the completion of the spa.

In December 2003, Castillo retained Smith Club & Spa Specialists ("Smith Club") to act as the spa consultant for the Hotel. Smith worked with Vision to prepare the design of the spa and Vision presented the spa finishes to Sheraton on March 31, 2004. At that presentation, the general direction of design for the spa, including the layouts, interior design concept and finishes proposed by Vision and Smith were approved by Fong with only relatively minor comments.

However, by March 2004, Sheraton was proposing that one of its subsidiaries, Remedé Spa ("Remedé"), operate the spa. From Sheraton's point of view, Remedé was the top tier spa brand it owned and it made sense for the top tier spa to be situated at the top tier Hotel. From Castillo's point of view, having Remedé run the spa would be a better economic deal since Remedé would pay for the design and build out of the spa and would pay rent to Castillo in exchange for retaining the revenues received from the spa's operation.

On March 10, 2005, Remedé sent Castillo a term sheet setting forth the details of the proposed lease. In that communication, Remedé indicated that Nelson from Vision was going to be visiting with Remedé for a full design review and Remedé expected to have direction as to design and finishes after that session. As Sheraton points out, the term sheet indicated that neither party was to rely on the term sheet as a commitment to complete the transaction.

On March 28, 2005, Fong wrote in an e-mail that he had met with Vision, had spoken with Remedé, and that the spa was being redesigned to fit Remedé's needs. Fong told Castillo's construction manager that "construction of the spa should be put **on hold** until the revised layout and design was completed by Vision, something that Fong estimated would happen in about one week" (emphasis in original). According to Fong, Remedé was "aware of the fact that there is already lots of framing in place" and was "trying to keep as much as possible."

There was no evidence that Vision completed its revised layout and design in

April 2005 as Fong estimated. Rather, Vision left the scene and HBA entered and worked on the guest rooms and public areas into September and October, 2005. By October 2005, it became evident that Sheraton and Castillo had various disputes and that Sheraton viewed the use of the Remedé branding of the spa as a negotiating lever with Castillo. In particular, the Court notes that on August 26, 2005, counsel for Sheraton wrote to Castillo claiming that Castillo's refusal to pay HBA's fees constituted an event of default under the Management Contract. (This Court has determined, for reasons stated on the record at the close of Sheraton's case, that Castillo had no legal obligation to pay HBA, which was hired by Sheraton, not Castillo).

On October 17, 2005, Milus wrote to Darnall to recount the history, which was that Sheraton had "sold" Bullard on having Remedé run the spa. "Since then, I know he has taken the build out costs out of his numbers, since Remedé is handling as part of the deal." Milus cautioned that if Sheraton was going to take Remedé "off the table," Sheraton would be "adding fuel to the fire" with Castillo. Milus indicated that Sheraton might have a valid concern with putting the Remedé brand name into the "volatile" project, but this would create a "HUGE issue" for Castillo. Milus asked:"Are we sure we want to pull this off the table and tell [Bullard] ...."

Thereafter, on October 21, 2005, Steve Shalit sent Tom Smith a lengthy report on the status of things with Castillo. In that e-mail, he reported that, on October 17, 2005, Ken Siegel, apparently an attorney with Sheraton, directed that Remedé would be a part of a negotiated settlement with Castillo. While Shalit wanted Remedé as part of the project and had "major concerns" with Castillo's reaction, and knew that Remedé and Castillo had been discussing deal points and design, he had stopped all communication between Remedé and Castillo. He told Smith that the situation needed to be clarified immediately as otherwise Castillo would "know we are stalling ...."

In fact, two days earlier, on October 19, 2005, Greg Morris, on behalf of Castillo, sent an e-mail to several people, including Heyer, Darnall, Smith and Shalit, stating that he had spoken with Remedé's Vice President, Julia Petrini, and that she had told him that Remedé was "now officially committed" to the Hotel. He advised her who to contact on the architectural and construction issues. Morris observed that, while a lease had not yet been finalized, Petrini "advised me that they are reviewing my comments to the draft lease and will respond by Monday [October 24]. We would then look to finalize the lease by next Friday."

Notwithstanding the attempted shut-down of communications between Castillo and Remedé, the parties continued to exchange lease drafts and e-mails through November 2005. On December 12, 2005, Morris told Christina Mogan of Remedé that the lease changes looked fine to him and that the two legal departments should get together to tie up the loose ends. However, on January 12, 2006, Morris asked for a decision from Petrini because Castillo had been approached by another group and needed to either close the lease with Remedé or "take a different path." The next afternoon, January 13, 2006, Petrini e-mailed Morris, representing "We will sign the lease today and send it to you immediately," and explaining that Remedé "had a delay in the PAR approval process, that caused this. My apologies."

Yet the lease was still not signed. On January 18, 2006, Mogan e-mailed Morris to tell him that the lease was now with Remedé's new President, though he "is

planning to sign as soon as he returns from London (in office on Monday morning)."

The lease was not signed in January 2006 or, for that matter, ever. In March 2006, Smith of Sheraton sent contracts with HBA to Castillo and again asserted that it was Castillo's obligation to pay HBA. The Court perceives that Sheraton was using the Remedé issue as leverage to try to get Castillo to pay HBA's fees.

The matter lingered into the summer of 2006. During that summer, Castillo initiated a mediation process pursuant to the Management Contract and, in response, Sheraton's legal counsel pulled the plug on the Remedé Spa plan. According to Morris, Robin Zeidel, Senior Director and Assistant General Counsel to Starwood, told Morris that Sheraton was not very comfortable with the relationship with Castillo, "we are very concerned about where we are going in total." Morris took this to mean that Sheraton was concerned about getting stuck with a Remedé Spa on what was not going to be a Starwood property.

On July 12, 2006, Zeidel wrote Morris, stating that it was Castillo who caused the demise of the Remedé Spa by recently proposing "significant changes" which led Sheraton to reconsider the business deal. Notably, no evidence of any such changes was offered at trial. Rather, Zeidel's e-mail went on to explain that Sheraton was changing the business deal. Zeidel stated that Sheraton did not want to fund the millions needed for the build-out of the spa "given the current status of the Project." Sheraton offered to operate the spa directly, or have Remedé run it (for a nominal fee), or have a mutually agreed third party run it. She added that Sheraton had "no objection to the use of the plans" prepared for Remedé provided that the operator was Sheraton, Remedé, or an agreed third party.

Thus, it is readily apparent that Sheraton was looking to re-write the economic deal by putting the costs for the spa build-out on Sheraton. Sheraton does not deny that it deliberately stalled Castillo on Remedé for months. Nor does it deny that it reneged on the deal. Rather, its argument is that the term sheet made clear that the mere fact that the parties had compiled the material terms did not bind either party to finalize the deal and, therefore, Sheraton was within its rights to decline to finalize the deal. Castillo does not contend otherwise. Castillo's real point is that Sheraton engaged in a deliberate strategy to feign interest in offering Remedé (with Sheraton paying for the build-out), thus inducing Castillo not to proceed with the spa design/construction for many months.

When the Remedé deal collapsed, Castillo had the spa built out, at Castillo's expense, using primarily the Vision designs prepared in 2004. While Castillo claims that Sheraton required HBA to make further changes to the spa, and it appears that HBA issued a set of final spa design drawings in October 2006, Bullard testified, on direct, that HBA embellished the Vision design only "a little bit." He explained that the Remedé plans called for a spiral staircase leading from an exercise room to the spa. As a result, during the construction, a hole was left in the slab. After Remedé pulled out, at Sheraton's request, Castillo had the construction personnel go back, rebar the hole, re-pour it, and re-frame it.

The spa was eventually completed in June 2007, about one month after the Hotel opened for business. Sheraton did not require Castillo to refrain from opening the Hotel until the spa was done.

N. The Restaurant

Under the Management Contract, Sheraton was to assist Castillo in developing a list of the number and type of food and beverage facilities to be located at the Hotel. There is no definitive evidence as to whether any such list was ever prepared as a stand-alone document.[10] In any event, based on this list, Sheraton was supposed to prepare and submit to Castillo a program specifying the recommended size of all hotel facilities in square feet or meters and give Castillo the Design Guide for use in conceptual plan development. The evidence, again, shows that the parties did not proceed in such an organized fashion; instead, plans were simply prepared.

Castillo had hired Jeff Simon from General Kitchen to be its kitchen and restaurant consultant and Sheraton had Richard Faeh, its executive chef, who was in charge of food and beverages. Anne Cotter of ARQ testified that as of August 2003, there were items relating to the kitchen layout that were pending because the interior design from Sheraton and Castillo was needed. It is clear that, as of the giving of the notice to proceed with construction in July 2003, there was no approved bar and restaurant concept, let alone drawings.

At the project meeting on March 31, 2004, George Fong told all concerned that there would be more input from Sheraton coming on bar and restaurant concepts and suggested that "it would be best to put design in those areas on hold until that takes place." While meeting minutes suggest that this was stated as a request, it appears that the request was honored. It also appears that the demand to stop working on the restaurant and bar was repeated in early May, as on May 6, 2004, Bullard sent a letter to Sternlicht complaining about the instruction.

Dave Milus acknowledged in his testimony that as of the spring 2004, there were no plans for a restaurant in the Hotel. However, he was promoting the idea of a Café Lespinasse restaurant concept to Castillo, a concept that had originated with Steve Alden. On June 14, 2004, Alden reported that he had obtained full agreement from Castillo with the Café Lespinasse concept and that "we" (meaning Sheraton and Castillo) had selected Howard Pharr of HBA to do the interior design for the restaurant and the bar.

Notwithstanding the involvement of Simon and Faeh and the agreement to have HBA handle the interior design of the restaurant and bar, Alden arranged for Troy DuPuy to serve as a consultant on the development of the upscale café-style restaurant being planned for the premises. On October 20, 2004, Alden wrote a two-page letter to McDonald for the purpose of confirming that Castillo agreed to enter into a consulting agreement with DuPuy. While Sheraton points out that Castillo hired DuPuy, a position that is technically correct and consistent with the Management Contract, Sheraton does not dispute that Castillo hired DuPuy at Sheraton's direction.

At the time DuPuy was hired, the plans developed by Simon and Faeh called for the Hotel to have one full kitchen on the first floor that would service all areas of the

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[10] The list was also supposed to include a list of each type of guest room, a list of the banquet and facilities (with their seating capacities) and a list of the number and types of recreation, back of house and retail areas.

Hotel. In early November 2004, DuPuy, after meeting with Faeh, transmitted an extensive list of comments to Alden (Castillo was not shown as having received this from DuPuy; the fact that it was sent directly to Alden reflects DuPuy's practical understanding of who he was really working for). The DuPuy comments proposed significant changes: there would be two full kitchens, one on the first floor and one on the fourth floor, plus an additional kitchen on the seventh floor pool deck, which would require the installation of additional ventilation hoods and fire protection.

Newsome testified that, in September-October 2004, AMEC asked to be "turned loose" on the kitchen area. He authorized them to proceed, having been told by Fong that the kitchen design had been approved. The underground utilities and work required to prepare the kitchen area for a pour were readied, and the slab was ready to be poured. It was at that point, said Newsome, that he was approached by Milus and introduced to DuPuy. DuPuy and Milus said that DuPuy was to review the plans and Newsome told them that he could make small changes but asked them not to "do anything radical that affects what we got underground already roughed in." Milus specified that the slab for the kitchen was not to be poured until DuPuy had approved the kitchen plan. Newsome discussed Milus' request with Bullard and McDonald who told Newsome that he had been right, that Castillo would work with Sheraton to make minor modifications, but "it's ridiculous to think that we are going to completely redesign the whole entire ground kitchen much less discuss these other areas" and that Castillo was "not going to wait around for the next six, seven, eight months trying to figure out what's going on." Newsome was told "pour the slab and then we'll work with it from there."

Shalit testified that Bullard told him later that Bullard had ordered the pouring of the slab to "screw Starwood." The Court accepts this, though the Court finds that Bullard was not expressing that he intended to injure Starwood. Rather, the Court finds that Bullard was expressing an intent to proceed with the pour in order to try to avoid delays that would result from a design by DuPuy that was different from the design being implemented. The pour was in the nature of a preemptive strike against major kitchen design matters.

Dupuy's kitchen design led to the preparation of an entirely new set of architectural and engineering drawings, approved in February 2006, and a reworking of the MEP systems which had previously been installed on the first through fourth floors of the Hotel. The slab that had been installed at Bullard's direction was demolished and new rough-ins and a new slab board were installed. Newsome testified that the cost of the new slab work was relatively minimal compared to the costs of the other changes made by DuPuy. In addition, Castillo built the kitchens that DuPuy specified, including purchasing the equipment and materials.

In September 2005, Heyer fired DuPuy and terminated the plan for Café Lespinasse. Heyer told Steve Alden that Café Lespinasse was a "dead brand." At trial, Heyer put a nicer spin on this, explaining that Café Lespinasse had been closed at the New York St. Regis for "under performance" and that Heyer did not think that Café Lespinasse would fit with what Bullard was building and, therefore he did not want to Bullard "to make that investment because [he] didn't think it would pay out."

The Court does not accept Heyer's testimony. According to Alden, Heyer made the "dead brand" comment and Heyer admitted that he made it. Alden's e-mail, reporting on what Heyer told him, of September 13, 2005 is telling:

> Following yesterday's design review ... with Steve Heyer and Ted, it is now very apparent that we need to incorporate a new brand restaurant concept into this project versus Café Lespinasse as we had originally planned -- Where do we stand with St. Regis potential restaurant partnerships. Are we in a position to speak with someone that Steve has approved to incorporate a concept into this the Ft. Lauderdale project. **The kitchen plans are already committed to and it is being built and the anticipated opening is April 1st** .... (emphasis added).

There was no testimony as to why the Café Lespinasse in New York was unprofitable nor any testimony as to when it was determined to be unprofitable or when it was closed. There was no analysis offered, even by Heyer, as to the reasons why the Café Lespinasse in Fort Lauderdale would not succeed. The claim that Heyer did not want Bullard to "make that investment" because it would not succeed is belied by the fact that Sheraton knew full well that the investment had been and was being made – the plans were being implemented. While there was no testimony that Heyer himself knew what stage of development the Café Lespinasse's plans were in, the fact is that he should have known – certainly Alden (whose idea it was in the first place) knew. Moreover, the evidence is that Heyer did not care about what Castillo had invested. He simply decided without any analysis or study, and without even talking to Bullard, that the Café Lespinasse concept was over, because he, Heyer, could do so. The Court notes that, if Heyer was acting in good faith, he would have spoken to Bullard and discussed the matter; instead, the duty of telling Bullard that Sheraton was pulling the plug on Café Lespinasse went to Milus who did not claim to have given Bullard any explanation for the decision.

Sheraton offered no alternative concept to Castillo, instead opting to seek out an independent operator and, when that failed, Castillo was forced to open a general American-style restaurant with no concept. The kitchens installed at the insistence of Dupuy and Sheraton were built at great cost and were ultimately entirely unnecessary. While it is true, as Sheraton argues, that the change from Café Lespinasse did not require any further re-design, and while it is also true that the kitchen as built was not shown to be inappropriate for a five-star hotel, the fact remains that Sheraton had Castillo undertake a build out for a unique restaurant brand concept which, after it was built out, Sheraton dropped, on a whim from the executive in charge.

The Court rejects as simply incredible Steve Shalit's testimony that Bullard was actually "pleased" about the change in restaurant concept. Shalit testified that Bullard liked the idea of moving forward with a seafood concept. There was no testimony that Heyer terminated Café Lespinasse in favor of a seafood restaurant or that Heyer had proposed a seafood restaurant in lieu of Café Lespinasse. Indeed, Alden's e-mail makes clear that after Heyer rejected the Café Lespinasse brand, Alden was engaged in a search for a restaurant brand that Heyer had already approved. There was no evidence that any such brand existed.

Nor does the Court accept Milus' contention that Bullard "agreed" with the termination of Café Lespinasse. As Milus acknowledged, Bullard had little choice in the matter. More compelling is Milus' reference to the kitchen situation, in an e-mail of August 19, 2005 (before the Café Lespinasse project met its official end), as a "fiasco."

O. *The Completed Result*

Whatever the growing pains were, there is no dispute that the Hotel is spectacular. According to a 2008 appraisal report, the Hotel "is the only true luxury hotel among all of the existing hotels along Fort Lauderdale's beachfront." That same appraisal report indicates that the Hotel was awaiting a certificate of occupancy for an elevated pedestrian walkway that would provide guests direct access to the beach from the fourth floor. The report goes on to state:

> The building spans 23 tiered, glass-walled floors; designed in a curvilinear fashion to mimic the ocean waves. The design was created by Miami Beach-based Arquitectonica, and features one of the largest pool decks along Fort Lauderdale Beach Boulevard spanning 29,000 square feet, with a zero entry pool facing the Atlantic Ocean. The main intention of the design is to provide un-obstructed ocean views from all vantage points.

By 2008, there was a fine dining restaurant named CERO located on the lobby level, with both indoor and outdoor seating looking out onto the Atlantic Ocean and Fort Lauderdale beach. The lobby lounge is located directly across from the restaurant and also faces out into the Ocean.

P. *The Written Expert Reports*

In his written report, Castillo's expert, Driscoll, asserts that a total of 770 calendar days of delay (or about 26 months) are the responsibility of Sheraton due to changes of interior designers, design changes to the guest room and timeshare levels, and design changes to the public areas. Driscoll attributes 15 calendar days of delay to three hurricanes (Frances, Ivan, Jeanne), which occurred in September 2004.

Sheraton's expert, Pattillo, takes a very contrary view in his written report. He calculates the total number of calendar days of delay at 726. He contends that there were 9.4 months of "upfront" delay attributable to Castillo, 30 days of delay attributable to hurricanes (he says that there was a fourth hurricane, Katrina, in October 2004), 4 months of delay caused by Castillo's installation of fire-life safety systems, and 74 months of "independent" delay, delay which Pattillo says "would have existed in any event," such as delays in HBA's design activities relating primarily to public spaces, back-of-house and the timeshare units. Just as Driscoll blames virtually all of the delay on Sheraton and exonerates Castillo from any responsibility, Pattillo exonerates Sheraton entirely and puts virtually all of the blame on Castillo or others, such as City of Fort Lauderdale (for delays in reviewing permit applications and issuing approvals).

While the Court has respect for the expertise of both experts, the Court finds that each has taken a partisan position in their written reports which does not comport with either the established facts or even common sense. The Court cannot accept that Sheraton's insistence upon removing DiLeonardo, which was done without cause, and its later insistence upon removing Vision, had no impact upon the delays in the construction of the Hotel. Thus, Pattillo's assertion that the delays attributable to HBA's design activities for the public spaces, back-of-house and timeshare units, are "independent" delays ignores Sheraton's critical role in bringing in HBA late to begin with. Similarly, Pattillo's statement

that the original construction approach was changed from traditional to "fast-track" "[f]or whatever reason" conveniently glosses over the delays in the delivery of interior designs for the guest rooms, delays occasioned by Sheraton. Indeed, Pattillo acknowledged, in response to a question from the Court, that essentially, the delays were a function of interior design. On the other hand, the Court does note that some of the flaws in the Vision model room were provoked by Castillo's failure to have its contractor build it out properly and that Castillo initiated other design changes (particularly to the timeshare levels), and Castillo commenced working on interior design, based on the Vision plans, before Sheraton had approved them. Thus, Castillo is not an entirely innocent by-stander.

The Court now turns to an analysis of governing Florida law on the issue of construction delays.

FLORIDA LAW RELATING TO BREACH OF CONTRACT AND CONSTRUCTION DELAY

The Management Contract contains a choice-of-law provision stipulating that it, as well as any disputes relating to relating to its performance or interpretation, are to be construed under the laws of the State where the Hotel is located, which, here, means Florida. The parties do not dispute that Florida law governs their dispute.

A party may recover for breach of contract if it proves: (1) the existence of a valid contract; (2) a material breach; and (3) damages (*Cibran Enters., Inc. v BP Prods. N. Am., Inc.*, 365 F Supp 2d 1241, 1254 [SD Fla 2005]; *Abruzzo v Haller*, 603 So 2d 1338, 1340 [Fla Dist Ct App 1992]). A breach is material when an injured party has sustained a substantial injury due to the breach (*Salam Jeans Ltd. v Fortune Swimwear, LLC,* 2010 WL 1331226 at *1 [SD Fla 2010]).

Plaintiff must show that the damages claimed are a proximate result of the material breach (*Border Collie Rescue, Inc. v Ryan*, 418 F Supp 2d 1330, 1343 [MD Fla 2006]; *Cibran Enter., Inc., supra,* 365 F Supp 2d at 1254; *Chipman v Chonin*, 597 So 2d 363, 364 [Fla Dist Ct App 1992]). Under Florida law, "proximate cause" is synonymous with "legal cause," and "includes the notion of cause in fact" (*U.S. v Stevens*, 994 So 2d 1062, 1066 [Fla Sup Ct 2008]).

To recover damages for delay, the plaintiff must prove that a given delay extended the overall contract completion date (Williams & Koberg, Florida Construction Law and Practice, the Florida Bar, §11.17). However, in doing so, the plaintiff is required to show that defendant's conduct was a substantial factor in causing the delay; the plaintiff is not required to exclude the prospect that the acts of others contributed to the delay.

This point was made in *Tuttle/White Constr., Inc. v Montgomery El. Co.* (385 So 2d 98 [Fla Dist Ct App 1980]), where the court adopted as the governing law the following statement from 5 Corbin on Contracts § 999 (1964):

> In all cases involving problems of causation and responsibility for harm, a good many factors have united in producing the result; the plaintiff's total injury may have been the result of many factors in addition to the defendant's tort or breach of contract.

> Must the defendant pay damages equivalent to the total harm suffered? Generally the answer is Yes, even though there were contributing factors other than his own conduct. Must the plaintiff show the proportionate part played by the defendant's breach of contract among all the contributing factors causing the injury, and must his loss be segregated proportionately? To these questions the answer is generally No. In order to establish liability the plaintiff must show that the defendant's breach was a "substantial factor" in causing the injury (*Tuttle/White Constr., Inc.,* 385 So 2d at 100).

This same paragraph, and the principle it articulates, was accepted in *Cedar Hills Prop. Corp. v Eastern Fed. Corp.* (575 So 2d 673, 678 [Fla Dist Ct App 1991], *rev denied* 589 So 2d 290 [Fla Sup Ct 1991]).

If there are factors for which the defendant is responsible and factors for which it is not, the plaintiff must provide a reasonable basis for apportioning the damages. However, where the defendant is responsible for all of the several sources of delay, it would serve no purpose to require the plaintiff to apportion the amount of damages caused by each (*U.S. ex rel. Gray-Bar Elec. Co. v J. H. Copeland & Sons Constr., Inc.,* 568 F2d 1159 [5th Cir 1978], *cert denied* 436 US 957 [1978], *cited in Gesco, Inc. v Edward R. Nezelek, Inc.*, 414 So 2d 535, 538 [Fla Dist Ct App 1982], *rev denied* 426 So 2d 25 [Fla Sup Ct 1983]). Indeed, it appears that where defendant has been found liable for delay damages, the burden is on the defendant to establish a reasonable basis for apportioning the damages between defendant and others (*RDP Royal Palm Hotel, L.P. v Clark Constr. Group, Inc.*, 168 Fed Appx 348, 354 [11th Cir 2006] [where a party who caused delay to a construction project by, among other things, requiring multiple design changes and delays in design plan approval, fails to prove the presence of other causes of delay, apportionment was not required]).

One way, but not necessarily the exclusive way, to demonstrate that the defendant delayed the project is by use of "critical path" analysis. "The critical path is the longest series of work activities through the performance of a whole project. If an activity on the critical path exceeds its scheduled duration, the ... [completion] of the project will be delayed unless some other activity on the critical path is performed in less than its scheduled time. A work activity ... [which is] not the critical path may be ... delayed without affecting the [time of completion] of the project unless the non-critical activity exceeds its "float" and thereby becomes an activity on the critical path" (*U.S. Fid. & Guar. Co. v Orlando Util. Commn.*, 564 F Supp 962, 968 [MD Fla 1983]).

Thus, in assessing the issue of responsibility for delay in completion of an entire project, the focus is on delays along the critical path. There can be more than one opinion as to where the critical path was for a given project; indeed, while assessment of the critical path must be logical, logic may support the existence of more than one critical path through a given project. In performing a critical path analysis, it is important to know what the as-planned critical path was (Leiby, Construction Law Manual, West's Florida Practice Series, §13:9).

SHERATON'S ACTIONS IN RELATION TO INTERIOR DESIGN BREACHED THE MANAGEMENT CONTRACT

As previously discussed, the Management Contract obligated Sheraton to provide Castillo with a Design Guide for a St. Regis Hotel. The purpose of such a Design Guide was to identify Sheraton's requirements for the construction and interior design of a St. Regis Hotel. Sheraton, however, did not have such a Design Guide and did not provide it to Castillo or to the various interior designers who worked on the Hotel, including DiLeonardo, Vision, Sheraton's own in-house staff, and HBA. Even though the Management Contract was made in 2001, a Design Guide was never furnished throughout the several years that the Hotel was being designed and constructed.

The Management Contract did not specify a precise time by which the Design Guide was to be furnished, though it was supposed to be provided for use in developing a conceptual plan. Under Florida law, where a contract does not expressly fix the time for performance of its terms, the law will imply a reasonable time (*see Denson v Stack*, 997 F2d 1356, 1361 [11th Cir 1993], *citing Greenwood v Rotfort*, 158 Fla 197 [1946] and *Fleming v Burbach Radio, Inc.*, 377 So 2d 723 [Fla Dist Ct App 1979]). The Court believes that a reasonable time within which to provide the Design Guide lapsed, at the latest, in July 2003, at the time of the execution of the Second Amendment.

As a consequence of the absence of a Design Guide, Castillo had no established parameters from which to guide its preparation of interior designs. Further, the absence of established parameters resulted in Sheraton's review of Castillo's submissions being conducted solely on the basis of the subjective opinions of the reviewers, a circumstance which was compounded by the repeated changes in Sheraton personnel responsible for design review and approval and the differences of opinion among those Sheraton personnel (such as [1] Fong and Mankarios' rejection of DiLeondardo's interior design plans, notwithstanding the appoval of them as set forth in the Second Amendment; [2] Fong's acceptance of interior design elements which were later found unacceptable by Sternlicht; and [3] Heyer's complete rejection of guest room design elements found acceptable by Sternlicht).

The Management Contract gave Sheraton the right to approve the interior designers, the right to review all preliminary and final designs, the right to make recommendations, and the right to withhold its approval at each stage of the process until it was satisfied. Sheraton was paid for these services by Castillo. While Sheraton had these contract rights, the Management Contract did not explicitly give it sole and unfettered discretion. To the contrary, because the Management Contract gave Sheraton the right to use its discretion in regard to design without further defining the scope of that discretion, the Management Contract left it to Florida law to provide for the scope of its discretion.

Florida law imposes an obligation to act in good faith in all contracts (*County of Brevard v Miorelli Eng'g, Inc.*, 703 So 2d 1049, 1050 [Fla Sup Ct 1997]). Designed to protect the contracting parties' reasonable expectations, the implied covenant of good faith exists in every contract because "'[a] contract is an agreement whereby each party promises to perform their part of the bargain in good faith, and expects the other party to do the same'" (*Cox v CSX Intermodal, Inc.*, 732 So 2d 1092, 1097 [Fla Dist Ct App 1999], *rev denied* 744 So 2d 453 [Fla Sup Ct 1999], *quoting First Nationwide Bank v Florida Software Servs., Inc.*, 770 F Supp 1537, 1543 [MD Fla 1991]). The covenant is breached when one

party acts in a manner that deprives the other party of the right to receive its bargained for benefits under the agreement (*Speedway SuperAmerica, LLC v Tropic Enters., Inc.*, 966 So 2d 1, 3 [Fla Dist Ct App 2007]). "'[W]here the terms of the contract afford a party substantial discretion to promote that party's self-interest, the duty to act in good faith nevertheless limits that party's ability to act capriciously to contravene the reasonable contractual expectations of the other party'" (*id.* at 3, *quoting Cox*, *supra*, 732 So 2d at 1097-1098). In the *Cox* case, the Florida court cited to the Second Circuit's observation in *Travellers Intl. A.G. v Trans World Airlines, Inc.*, 41 F3d 1570, 1575 [2d Cir 1994]): "Even when a contract confers decision-making power on a single party, the resulting discretion is nevertheless subject to an obligation that it be exercised in good faith".[11]

In context here, the review and approval by Sheraton was, as stated in the Management Contract, for the purpose of: (a) assuring compliance with the Deign Guide; (b) improving the functionality and aesthetics of the Hotel; and (c) lowering construction and operation costs. Sheraton was obligated to use good faith in reviewing the designs and plans for these purposes.

Sheraton exceeded its contract rights by compelling, through Mankarios and Fong, Castillo to terminate DiLeonardo for no better reason other than that they wanted to bring in their own favored designer and without even bothering to evaluate any of DiLeonardo's work. The refusal of Fong and Mankarios to even consider any of DiLeonardo's work can only be characterized as arbitrary and capricious. To make matters worse, Sheraton allowed Castillo to proceed with hiring Vision, the preferred designer of Fong and Mankarios, even though (1) Sheraton knew that Mankarios was leaving and control over the project was being shifted from the Dallas office to the White Plains office and (2) Sheraton's decision-makers, at the very least, had misgivings about Vision. Furthermore, even though Mankarios had given Castillo design direction on behalf of Sheraton, Sheraton did not have the decency to tell Castillo that those remaining at Sheraton disagreed with Mankarios' design direction.

At trial, Darnall, in response to questions from the Court, made it clear that Sheraton was determined to exercise its prerogatives without regard to the interests of Castillo, such as its insisting upon whatever changes it wanted without regard to cost or time considerations. At the time of the events, Darnall acknowledged that Sheraton was engaged in an "experiment" which had failed.

Sheraton also failed in its review of the Vision plans. The review, ultimately by Sternlicht, was entirely subjective, there being no Design Guide by which to measure the quality of the submissions. Further, Sternlicht, who had the ultimate approval authority, did not met with Vision but, instead, communicated his reactions through others, an indirect form of communication that made the task of obtaining clarity as to Sternlicht's desires even

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[11]It is true that Judge Robert P. Patterson, Jr., when the case was in federal court, granted Sheraton's motion to dismiss Castillo's claim based on breach of the implied covenant of good faith and fair dealing (*see Castillo Grand LLC v Sheraton Operating Corp.*, 2009 WL 2001441 [SD NY 2009]). However, he did so on the ground that the breach of implied covenant claim was "redundant" of the breach of contract claim in that Castillo could not separately recover on both. This Court agrees that Castillo is entitled to only one recovery, but adds that whether the implied covenant of good faith was breached is a relevant consideration in determining whether there was a breach of contract.

more difficult. While Castillo's own conduct had some impact on the quality of the Vision model room presented to Heyer, Heyer, on behalf of Sheraton, rejected the Vision design, and Vision itself, entirely. His objection was not merely limited to how some elements of the Vision design were executed. By virtue of the Management Contract, Sheraton did not have the right to go back and revisit approvals already granted. By insisting upon discarding the original, approved DiLeonardo plans and then by insisting upon entirely discarding the approved Sternlicht guest room concepts, Sheraton improperly retreated on prior approvals.

Sheraton's conduct with respect to the spa and to the restaurant not only reflect Sheraton's arbitrariness in dealing with those areas, but also reflect more generally Sheraton's failure to use good faith in its execution of its contract responsibilities. As to the spa, while Sheraton is correct that it did not have an obligation to finalize the Remedé deal, the fact of the matter is that Sheraton deliberately strung Castillo along for months on this topic, feigning continuing interest while acknowledging internally that it was "stalling." With regard to the restaurant, Sheraton specifically had Castillo hold up on the restaurant so that it could put into place Troy DuPuy and the Café Lespinasse concept, only to junk DuPuy and that concept when Heyer decided that Café Lespinasse, which was an idea developed by prior Sheraton management, was a "dead brand."

Sheraton acted improperly in essentially instructing Castillo in November 2003 to put the design for the public spaces on indefinite hold. While this may have been intended as helpful advice in the sense that whatever DiLeonardo would have submitted would have been rejected, this only confirms that Sheraton was out to reject whatever DiLeonardo submitted. Sheraton had no contract right to tell Castillo not to submit design plans; it had the right to approve or disapprove, acting reasonably. As a result of this improper instruction by Fong, the design of the public rooms was essentially stalled until June of 2005.

SHERATON'S CONDUCT WITH RESPECT TO INTERIOR DESIGN WAS A SUBSTANTIAL FACTOR IN CAUSING CASTILLO DAMAGES

In his report, Castillo's expert, Driscoll, identified three separate paths of criticality: the guest rooms, podium and timeshares. In his rebuttal to Driscoll, Sheraton's expert, Pattillo, did not dispute the identification of these three paths, though he does vigorously dispute Driscoll's analysis of these paths. In his main report, Pattillo provides commentary and analysis as to why there were significant deviations between the as-planned schedule and the as-built schedule, but does not specifically identify one or more critical paths. While there is clearly some overlap between the guest room, podium and timeshare paths, the Court accepts Driscoll's identification of these as the principal critical paths.

The Court does not accept Pattillo's contention, most clearly expressed at trial, that the critical path was solely through the timeshare levels 15, 16 and 17 and that this path was burdened by delays not attributable to Sheraton.

Pattillo testified that these areas were critical because they are finished last and, therefore, any delay on the podium or the guest rooms would not matter if there were delays on the timeshare levels. Pattillo identified the driving delays at the timeshare levels as being attributable to two issues, one related to the bathtubs and one related to the

washer/dryers.

As to the first issue, while whirlpool tubs were supposed to be installed (and were in the design in early 2004), AMEC installed soaker tubs. On August 23, 2005, AMEC was stopped by Castillo and the 34 soaker tubs were thereafter removed, the related rough-ins were removed and whirlpool tubs were procured. Pattillo testified that this involved four months and pushed the reinstallation back and also involved changes to the plumbing and electrical components and prevented the ceiling on guest room level 14 from being finished. Pattillo testified that these changes were not finished out until April 2006.

Similarly, he testified that washers and dryers were shown in the drawings in early 2005, but it was not until August 28, 2006 that they were installed, with framing having to be torn out and core holes drilled.

However, Pattillo conceded on cross-examination that these issues were resolved within roughly 45 days of the approval of Revision G by the City, that is, floor 15 was inspected on June 26, 2006. Pattillo further conceded that none of the finish work in the Hotel could be completed until there were approved plans and inspections on each level and that this could not happen until there was a finished set of drawings. Thus, the real cause for delay was the absence of approved plans.

It seems blindingly obvious that construction of the Hotel's interior spaces (including the mechanical, electrical and plumbing components) could not proceed unless there were approved interior design plans. This is true with respect to the guest rooms, the public spaces, and the timeshares. It is not possible to construct something without knowing what was being constructed. Moreover, the credible, if not undisputed, evidence is that design and construction on upper floors and design and construction on lower floors are co-dependent since certain mechanical, electrical and plumbing lines rise (or descend) vertically through a multi-story building. Consequently, the Court cannot accept the contention from Sheraton that interior design delays had nothing to do with the delays in the construction of the Hotel, anymore than the Court can accept an argument from Sheraton that any interior design delays were all Castillo's fault. The Court agrees with Driscoll that the "heart attack" that injured this project was the delay in interior design.

Even Pattillo testified: "There were lots of different people directing Vision but there was never a focal point." The Court agrees with this observation and adds that, until HBA arrived on the scene, there was no focal point on interior design. The Court puts the responsibility for that on Sheraton – not on Castillo. Maria Ballestrazzi testified that interior design is a team effort, the ultimate objective being to arrive at a design through consensus. This approach led to many cooks being in the design kitchen. On the other hand, the consensus approach worked only within middle management. Sheraton's personnel made it clear, both at the time of the events and in testimony, that interior design was ultimately controlled by Sternlicht and, thereafter, Heyer, no matter what the consensus of the others was. The evidence also reflects that there were times when the middle management personnel at Sheraton did not know whether certain design features had been approved by Sternlicht and, in particular, Heyer. Because there was no Design Guide and because neither Sternlicht nor Heyer gave clear direction in advance to any interior design team, and because Sheraton insisted upon switching design teams, the lack of a focal point on interior design is attributable entirely to Sheraton.

The Court acknowledges that there were a number of other contributing

factors to delay in the construction and opening of the Hotel, such as the errors made by Castillo in the washer/dryers and bathtubs for the timeshare units, the mistakes by Castillo in preparing the Vision model room, the kitchen slab delay, the 15 days for hurricane-delays,[12] and delays in obtaining approvals from the City. But, as previously stated, Florida law requires only that Castillo prove that Sheraton's conduct was a substantial factor in causing the delay in construction and opening of the Hotel. The Court finds that Castillo has proven that Sheraton's breaches of the Management Contract were a substantial factor in delaying the construction and opening of the Hotel from the planned final completion date of August 5, 2005 to the actual final completion date of May 1, 2007.[13]

Accordingly, the Court will grant judgment in favor of, and award damages to, Castillo on its First and Second Counterclaims.

DAMAGES RELATED TO INTERIOR DESIGN ISSUES

Under Florida law, the injured party in a breach of contract action is entitled to recover monetary damages that will put it in the same position it would have been had the other party not breached the contract (*see e.g., Capitol Envtl. Servs., Inc. v Earth Tech, Inc.*, 25 So 3d 593, 596 [Fla Dist Ct App 2009]; *Florida E. Coast Ry. Co. v Beaver St. Fisheries, Inc.*, 537 So 2d 1065, 1068 [Fla Dist Ct App 1989]; *Hobbley v Sears, Roebuck & Co.*, 450 So 2d 332 [Fla Dist Ct App 1984]). The injured party is entitled to recover all damages that are causally related to the breach so long as the damages were reasonably foreseeable at the time the parties entered into the contract (*Florida E. Coast Ry. Co., supra*; *see also Mnemonics, Inc. v Max Davis Assocs., Inc.*, 808 So 2d 1278, 1280 [Fla Dist Ct App. 2002] ["Damages recoverable by a party injured by a breach of contract are those that naturally flow from the breach and can reasonably be said to have been contemplated by the parties at the time the contract was entered into"]).

Damages are foreseeable if they are the proximate and usual consequence of the breaching party's act (*Capitol Envtl. Servs., Inc., supra*, 25 So 3d at 596). It is not necessary that the parties have contemplated the exact injury which occurred as long as the actual consequences "could have reasonably expected to flow from the breach" (*Mnemonics, Inc., supra*, 808 So 2d at 1281).

The damages sought by Castillo fall essentially into two categories: (a) damages for delay; and (b) damages for increases in the scope of the project. The Court will deal with these issues separately.

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[12]The Court accepts the 15 day attribution to hurricanes by Driscoll, rather than the 30 days attributed by Pattillo.

[13]In this regard, the Court does not consider the later final substantial completion date of the spa of June 30, 2007 since, notwithstanding the provisions of the Management Contract, Sheraton did not insist that the opening of the Hotel await the completion of the spa and Castillo did not offer any evidence that the additional delay for the spa caused any significant economic loss to Castillo.

A. *Delay Damages*

Castillo has the burden of showing that Sheraton's delay in approving interior designs occasioned Castillo to make expenditures flowing naturally from the breach; Sheraton may then show that the expenditures claimed by Castillo resulted from waste, extravagance and lack of good faith (*Tuttle/White Constr., Inc., supra*).

Castillo was required to pay CIBC interest on the construction loan. As a result of the delays caused by Sheraton, the construction period was extended and Castillo had to pay CIBC $13,127,783 in interest payments that it would not have been required to pay but for Sheraton's breach during the period August 2, 2005 to June 1, 2007[14] (*see Lynch v Florida Min & Materials Corp.*, 384 So 2d 325 [Fla Dist Ct App 1980]). Therefore, Castillo should be awarded $13,127,783, together with interest thereon from June 1, 2007.

Prejudgment interest is allowed in breach of contract cases under both New York law (*see* CPLR 5001[a],[b]) and Florida law (*Capitol Envtl. Serv., Inc. v Earth Tech, Inc.*, 25 So 3d 593 [Fla Dist Ct App 2009]). While New York law provides for a fixed rate of interest (*see* CPLR 5004), the Florida Statutes Annotated, title 39, § 687.01 provides that in the absence of a specific agreement between parties to a contract, interest is set by Florida Statutes Annotated, title 6, § 55.03. Under that statute, the interest rate is determined each December by the Chief Financial Officer under a specified formula. The Chief Financial Officer informs the courts of the established rate, which takes effect January 1 of a given year and is posted at www.myfloridacfo.com/aadir/interest.htm.

The United States Court of Appeals for the Second Circuit has held that New York choice of law principles dictate that the allowance of prejudgment interest is controlled by the law of the state whose law determined liability on the main claim (*Schwartz v Liberty Mut. Ins. Co.*, 539 F3d 135, 147 [2d Cir 2008]; *Entron, Inc. v Affiliated FM Ins. Co.*, 749 F2d 127, 131 [2d Cir 1984]; *Patch v Stanley Works (Stanley Chem. Co. Div.)*, 448 F2d 483, 494 n. 18 [2d Cir 1971]). However, since the parties have not briefed this issue, the Court defers holding that Florida law definitely controls the award of prejudgment interest pending submissions from the parties on this question.

As a result of the delays, Castillo had to exercise two extension options of its construction loan, totaling $572,500. While the first extension occurred in June 2005, the evidence shows that the parties were well aware that the Hotel was not going to be completed on schedule and therefore, the cost of this extension is a proper item of damages. In this regard, the Court will award Castillo $572,500, with interest from September 15, 2005, the second of the two extensions.

In connection with a further extension, in March 2006, Castillo was also required to pay legal fees to its counsel, Carlton Fields, as well as to CIBC's counsel, Schulte Roth & Zabel, in the total amount of $205,106.35 and, at the closing, was also

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[14]While Castillo claims $13,978,365.41, the Court has eliminated three payments, those made June 1, 2005, July 1, 2005, and August 1, 2005, because these payments would have been due even if the Hotel had been finished on August 1, 2005. The Court has included the payments made on May 1, 2007 and June 1, 2007 because those payments would have been due anyway, notwithstanding the substantial completion of the Hotel.

required to pay a commitment fee to CIBC ($1,437,500), further legal fees to Schulte Roth & Zabel ($103,676.94), legal fees to Deutsche Bank's counsel, Kaye Scholer ($8,244.40), mortgage taxes ($16,500), title insurance premiums ($141,395.84) and the costs of a title search ($300), totaling $1,707,617.18. Castillo is awarded $1,912,723.53 for these loan extension costs, together with interest thereon from March 1, 2006.

Castillo had to extend its loan with CIBC in February 2008. In connection with that extension, Castillo had to pay for: commitment fees to CIBC ($625,000); an interest rate cap ($25,000); appraisal fees ($15,750); title company charges ($53,017); legal fees ($649,714.92); environmental reviews ($2,200); insurance reviews ($675); title and other searches ($807.54); zoning ($836.64); due diligence services ($3,593); copying charges ($3,618.96); and Legalink costs ($1,794.20), totaling $1,382,007.10. Accordingly, Castillo should be awarded $1,382,007.10 for these loan extension costs, with interest from February 12, 2008.

Pursuant to the terms of the Management Contract, Castillo was required to pay Sheraton $2.5 million to cover pre-opening expenses. As a result of the delays caused by Sheraton, the construction period was extended and Sheraton used that excuse to compel Castillo to pay $3,966,124 in additional pre-opening expenses. Despite the fact that Castillo repeatedly objected to the increase in pre-opening expenses, Castillo was repeatedly told by Milus that Sheraton would walk off the premises if Castillo refused. Hence, Castillo paid them. Since the Hotel's opening was delayed, there is no apparent reason, and Sheraton offered none at trial, for why the pre-opening costs should triple when most employees were not hired until just before opening. Milus' explanations were simply not convincing. For example, when asked by the Court for an explanation as what accounted for the difference between the original number and the final number, Milus could only offer that the roughly $4 million difference represented "the carry cost for the managers that were hired which are on longer lead times than hourly associates that work the service to the customer." The Court finds this explanation totally unworthy of belief.

Accordingly, the Court views the $3,966,124 as having been extracted by Sheraton during the delay period by reason of the delay but without justification. However, Sheraton has shown that it refunded $611,031.29 in November 2007 and, therefore, is entitled to a credit in this amount. Accordingly, the Court will award Castillo $3,355,092.71 with interest from February 28, 2008.

IVI was retained by CIBC and Deutsche Bank to monitor and report on the construction of the Hotel and was responsible for reviewing Castillo's draw requests on behalf of CIBC on a monthly basis, meeting with Sound Construction and the AMEC project executives, inspecting the status of construction onsite and issuing monthly reports to CIBC. IVI inspected the construction of the Hotel each month and Castillo was charged a monthly fee by both IVI and CIBC for the preparation and review of its reports. As a result of the delays caused by Sheraton, Castillo was obligated to pay IVI and CIBC inspection fees during the extended construction period, totaling $142,123.90.[15] Castillo should be awarded

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[15]Castillo claims a total of $161,055.91 but the Court has excluded the payments made on or before August 1, 2005, while including the payments made in June and August, 2007.

that sum, together with interest thereon from July 1, 2006.[16]

During the construction of the Hotel, Castillo maintained construction-related property insurance, including builder's risk insurance. As a result of the delays caused by Sheraton, the construction period was extended and Castillo was therefore obligated to extend its construction insurance for an additional two years, at a total cost of $2,469,167.05. Sheraton has shown that $277,251 was refunded to Castillo. Therefore, the Court awards $2,191,916.05, together with interest thereon from July 1, 2006.[17]

During the construction of the Hotel, Castillo was required to maintain OCIP insurance and paid Willis, its insurance broker, fees for managing that program. As a result of the delays caused by Sheraton, the construction period was extended by two years and Castillo was therefore required to extend its OCIP coverage for an additional two years and was obligated to pay $865,864.14 in Willis additional fees to continue to manage that program. The Court will award Castillo $630,058.14, deducting the two payments made on August 16, 2007, as Castillo failed to convince the Court that those two payments were for a prior, rather than prospective, period. The Court will award interest from the July 1, 2006 mid-point.

There are a number of damage claims that the Court rejects. Castillo seeks damages of $920,000 on account of a penalty it had to pay to Exclusive Resorts, which purchased 8 condo-hotel units, because the Hotel did not open by August 31, 2005. Castillo failed to show that Sheraton was aware of this penalty provision or should have been. While Sheraton could readily have contemplated that it would be liable for such items as real estate taxes, loan extension costs, and insurance expenses if it caused delays, there is no basis for concluding that a penalty provision to a condo-hotel purchaser was reasonably in the contemplation of the parties.

Castillo seeks $50,000 for the legal fees it paid to negotiate the Remedé Spa lease. While the Court sympathizes with Castillo for its victimization by the duplicitous conduct of Sheraton, the Court does not perceive that Castillo is entitled to recover for its legal fees for the unsuccessful negotiation. Sheraton/Remedé were not obligated to enter into a lease; because Sheraton/Remedé stalled Castillo, Castillo would be entitled to recover damages for delay. But legal fees are not, in this instance, connected to delay.

Castillo claims $984,968.60 for payments made to Sound Construction, its construction manager, over an extended construction period. However, the Court finds that Castillo failed to show that the services provided by Sound during the period in question were attributable to delay. Nor is there a basis upon which the Court could determine that these services would not have been incurred even absent delay.

Castillo also seeks $10,606,000 in lost profits. Under Florida law, if liability is established, delay damages do not have to be proven with mathematical certainty. The claimant must establish a reasonable basis for such damages; recovery will not be denied

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[16]Since these payments were made over a lengthy period, the Court is using a mid-point.

[17]Since these payments were made over a lengthy period, the Court is, again, using a mid-point.

simply because it is difficult or impossible to prove an exact dollar amount of damages (*Mori v Matsushita Elec. Corp. of Am.*, 380 So 2d 461 [Fla Dist Ct of App 1980], *cert denied* 389 So 2d 1112 [Fla Sup Ct 1980]; *Adams v Dreyfus Interstate Dev. Corp.*, 352 So 2d 76 [Fla Dist Ct of App 1977]; *Reitano v Peninsular Bldg. Supply Co.*, 262 So 2d 710 [Fla Dist Ct of App 1972]). The recovery of lost profits is permitted "regardless of whether [a business] is established or has any 'track record,' provided there is some standard by which the amount of damages can be determined ...." (*WW Gay Mech. Contr., Inc. v Wharfside Two, Ltd.*, 545 So 2d 1348, 1351 [Fla Sup Ct 1989]). Proof of lost profits must be certain; prospective profits that are too remote or speculative are not recoverable (*Douglas Fertilizers & Chem. Inc. v McClung Landscaping, Inc.*, 459 So 2d 335 [Fla Dist Ct App 1984]).

In support of its request for an award of lost profits, Castillo relies on the case of *Wharfside Two, Ltd., v W.W. Gay Mech., Contr., Inc.*, 523 So 2d 193 [Fla Dist Ct App 1988], *affd sub nom. W.W. Gay Mech., Contr., Inc. v Wharfside Two, Ltd.* 545 So 2d 1348 [Fla Sup Ct 1989]). In that case, a subcontractor charged with installing the water system in a Sheraton hotel constructed in Jacksonville, Florida, sued to foreclose on its mechanics' lien after the general contractor withheld its payment due to a petroleum odor and leaks occurring in the pipes installed. The hotel owner counterclaimed for damages sustained as a result of the petroleum odor– namely, its lost profits resulting from a reduction in the number of guests staying at the hotel. The owner tried to prove its lost profits through studies it had commissioned to obtain financing prior to the litigation. The studies were based on similar hotel operations in the vicinity. Although the trial court allowed the admission of the studies, it did not allow expert testimony to compare the projected occupancy rates with the actual rates realized to show lost profits.

The Florida District Court of Appeals reversed the trial court's refusal to allow such expert testimony as too speculative holding that although the general rule is that lost profits of a new business are too speculative and dependent on changing circumstances, "'the rule is not an inflexible one, and if profits can be established with reasonable certainty, they are allowed'" (*W.W. Gay Mech., Contr., Inc.*, 523 So 2d at 195, *quoting Twyman v Rowekk*, 123 Fla 2 [1936]). In this regard, the Florida District Court of Appeals found that the studies used to obtain financing were sufficiently reliable since they were used to justify the consummation of a multi-million dollar arrangement for the financing of a prospective hotel, such that they provided a sufficient standard for the admission of the expert testimony.

The Florida Supreme Court affirmed the District Court of Appeals' holding by stating

> A business can recover lost prospective profits regardless of whether it is established or has any "track record." the party must prove that 1) the defendant's action caused the damage and 2) there is some standard by which the amount of damages may be adequately determined. We reject the contention that the causal connection between foul-smelling water and lost revenues was too tenuous. There was competent and substantial evidence that the odor was a cause of reduced occupancy. This evidence was supported by studies prepared by reputable economic analysts and provided a sufficient standard to support the experts' testimony concerning lost profits. The expert testimony, when

combined with the economic studies, was clearly sufficient to raise a jury question. Accordingly, the trial court erred by excluding the testimony on lost profits (*W.W. Gay Mech. Contr., Inc.*, 545 So 2d at 1351).

By contrast, here, Castillo's claim of lost profits is predicated solely on an internal document generated by Sheraton in connection with its $7 million mezzanine loan approval. Castillo introduced the document as part of the testimony from its CFO, Morris. This document was prepared by Sheraton in 2002 and 2003 in connection with its decision to proceed with the Hotel project. Castillo offered no expert testimony in this regard. The document indicates that Sheraton was projecting that the Hotel would generate $4,731,000 in net operating income in the first year following the opening of the Hotel and $5,875,000 during the second year. However, Castillo did not offer any evidence as to basis for these projections and how these projections were still relevant given, *inter alia*, that during the period following 2003, the costs associated with the construction were ever-changing as evidenced by the changing number of guest rooms and condominium units to be constructed as well as the change orders, some of which were Castillo-induced.

Furthermore, Castillo's own expert, Cline, testified that as built, the Hotel ended up with a per room investment of about $800,000, which to be economical under an industry rule of thumb, would need a room rate of $800 per night. Although little evidence was presented as to the amount ultimately charged per room, Cline's testimony suggested that there was little ability for Castillo to make a profit with the amount invested. In this regard, Cline's ten year projection of estimated income for the Hotel "As Open" (2009-2018) used an average room rate of $385.00 in 2009 rising to an average room rate of $433.32 in 2013 and to $502.34 in 2018. Cline's ten year projection of estimated income for the Hotel "About-to-Open" (2009-2018) uses an average room rate of $327.25 in 2009, rising to $433.32 to 2013, and to $502.34 in 2018. In no instance did Cline use a room rate of $800 per night and Cline forthrightly acknowledged in his testimony that the current room rate was nowhere near $800 per night.

Since the claim for loss profits for the delay period is based only on unexplained Sheraton projections from a period several years prior to breach, and the economic underpinnings of the Hotel changed considerably, Castillo's evidence is insufficient to support its claim for lost profits *(see, e.g., Susan Fixel, Inc. v Rosenthal & Rosenthal, Inc.*, 921 So 2d 43, 46 [Fla Dist Ct App 2006], *rev denied* 939 So 2d 1061 [Fla Sup Ct 2006]; *North Dade Community Dev. Corp. v Dinner's Place*, 827 So 2d 352, 353 [Fla Dist Ct App 2002]).

Castillo seeks to recover the real estate taxes it paid on the Hotel property during the construction period. Castillo claims that as a result of the delays caused by Sheraton, the construction period was extended by two years and Castillo was obligated to use borrowed funds to pay additional real estate taxes, totaling $537,387.64. However, as the Court noted during trial, Castillo would have had to pay the real estate taxes even if the Hotel had been completed on time. While it is true that Castillo would have had income from which to pay the taxes, it remains that this is simply another tactic by which Castillo seeks to recover lost profits and the Court is not convinced that this is a legitimate item of delay damage.

B. *Scope Damages*

There are two major categories of damages that Castillo seeks that it categorizes as "scope" damages, that is damages resulting from Sheraton insisting upon excessive or unnecessary interior design changes that altered the scope of the undertaking. Castillo seeks recovery for: (a) $20,952,074 in change orders during the course of construction; and (b) $9,426,650, representing increases over the approved FF&E (furniture, fixtures, equipment) and OS&E (operating supplies and equipment) budgets. The Court denies both of these claims.

1. *Change Orders*

In essence, Castillo seeks to shift the economic responsibility for all of the change orders given to AMEC onto Sheraton. This effort, in the opinion of this Court, is seriously flawed.

First, as previously noted, at the time the AMEC contract was let, DiLeonardo had not completed all of the interior design plans. Castillo failed to show that there would have been no change orders of any sort had DiLeonardo been permitted to complete all of its work. Stated differently, Castillo failed to show what the total cost would have been had the DiLeonardo design been fully executed.

Second, it is quite obvious that a considerable number of the change orders had nothing to do with interior design or delays in interior design. The initial set of change orders, for example, involved significant monies and were occasioned by the change in room count brought about by the Second Amendment and not a change that can be attributed to Sheraton's changes in interior guest room designs.

Third, as previously noted, Castillo prematurely incorporated the Vision design scheme. At the time, the scheme had been approved by Fong but not by Sternlicht and, as it turned out, Sternlicht rejected it. While Sheraton was wrong in delaying giving approvals and changing what it would approve, Castillo acted prematurely in proceeding with the construction of a design that had not received final approval from Sheraton's chief design officer. Accordingly, to the extent that the change orders reflect increased expenses due to the necessity of having to change from a non-approved Vision design, Castillo, having proceeded at its own risk, must absorb that expense.

Fourth, the Court agrees with Sheraton that Newsome could not sufficiently identify the documents that he relied upon to try to show that particular change orders resulted from the changes in design from Vision to HBA. Again, Castillo did not show what it would have cost for it to build out the Vision design and, in fact, Castillo failed to show with clarity what elements of the Vision design were included in the Hotel and what elements were not. Thus, there is no baseline from which the Court can ascertain the incremental costs of the changes made by HBA to the Vision design.

Fifth, Castillo's contention assumes that the DiLeonardo plan, the Vision plan, and the HBA plan each separately qualified as meeting a reasonably objective standard for a five-star Hotel. In part, Castillo met this burden by showing that Sheraton had approved the DiLeonardo plans back in 2003. However, Castillo failed to show that the work necessary to complete those plans would have met a five-star standard. Nor did Castillo show that the Vision work, if implemented, would have met a reasonably objective five-star

standard.

Sixth, and perhaps most importantly, Castillo received the benefit and value of the construction changes and will continue to do so for many years to come. All agree that, however the flawed the design and construction process was, the Hotel is, in fact, a five-star luxury Hotel. Castillo has not shown that a hotel of the quality of this one could have been built and constructed for less money. It would be, as the Court noted repeatedly during the trial, fundamentally unfair for Castillo to retain the value and benefit of the construction at Sheraton's expense, especially where the Management Contract put the economic responsibility for construction of the Hotel on Castillo. While it may well be that some, or even most, of the change orders would not have been undertaken but for Sheraton's actions, the fact is that the changes benefitted Castillo and will continue to do so into the future. In this regard, the Court stresses that, while Castillo did not make a considerable number of changes for any reason other than to try to gain Sheraton's approval, it did make a considerable number of changes for the additional purpose of assuring that the Hotel would be a first class facility.[18]

While the Court is sensitive to the prospect that Castillo could have a legitimate argument that it was compelled by Sheraton to construct an overly luxurious hotel and that the costs of doing so were such that it would never be able to make a profit (a point suggested by Cline), Castillo did not establish what an appropriate baseline of luxury would be or what it would have cost to attain it.

2. *Budget Increases*

The Court also denies Castillo's effort to make Sheraton responsible for increases in the approved FF&E and OS&E budgets. This effort is doomed by the Management Contract which specifically provides that no review or approval of budgets by Sheraton would impose on Sheraton any responsibility for their content or for the cost of construction (Management Contract, §2.13.5). Indeed, Castillo specifically released Sheraton, in advance, from such a claim (*id.,* §2.13.6). Further, the over-the-budget theory suffers from the same defects identified above in connection with the change order theory and that discussion will not be repeated.

3. *Other Costs*

Castillo seeks $830,974.90 in payments made to Vision and to a lighting consultant. However, Castillo has failed to show what it would have paid to DiLeonardo to complete DiLeonardo's plans and, therefore, has failed to show what the change to Vision cost it. Similarly, the Court rejects the claim for $798,031.49 for payments made by Castillo to Doug Welles for managing changes brought about by HBA as well as the claims for $111,871.38 in payments made to Hauser Construction for expediting permits from the City and $1,065,154.18 in architectural and engineering fees.

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[18]The only two items of enhanced construction that Castillo addresses specifically is $144,548 for millwork for a wine bar and $38,478 for a wireless radio system. The Court denies these requests for the same reasons that it denies the more general request.

SHERATON'S EXCULPATORY CLAUSE AFFIRMATIVE DEFENSES

Sheraton contends that any liability on its part to Castillo for delays or other misconduct in its exercise of its design approval rights is barred by claimed exculpatory language in Section 2.13.5 of the Management Contract, Section 2.13.6 of the Management Contract, in Exhibit G to the Management Contract, Section 4.2 of the Third Amendment to the Management Contract, and Section 5.5(b) of the Developer License and Marketing Agreement ("DMLA").

The claimed exculpatory clauses and Sheraton's arguments in support of its affirmative defenses based on them were extensively discussed and analyzed by United States District Judge Robert P. Patterson, Jr. in connection with Sheraton's motion for summary judgment (*see Castillo Grand LLC v Sheraton Operating Corp.*, 2009 WL 2001441 [SD NY 2009]). Judge Patterson concluded, in essence, that Castillo's claims were not barred as a matter of Florida law by the cited contract clauses and that whether Castillo, in fact, consented to any delays or failures by its words or acts were matters of fact to be determined at trial. While Judge Patterson later found that there was no subject matter jurisdiction, this Court finds his analysis of the relevant contract provisions and Florida law persuasive.

Sheraton's arguments in its post-trial brief appear to be little more than a repetition of its prior arguments before Judge Patterson. While Sheraton gives a glancing citation to Judge Patterson's summary judgment decision (pointing out that Judge Patterson dismissed certain claims of Castillo's), Sheraton does not offer any argument at all as to why it would disagree with Judge Patterson's analysis of its exculpatory clause defenses.

Since Judge Patterson's analysis is persuasive and Sheraton has not offered any argument for why this Court should not follow Judge Patterson' lead, the Court will incorporate herein Judge Patterson's analysis of the exculpatory clause affirmative defenses and, based on that analysis, as well as this Court's findings of fact that Castillo had no choice but to consent to Sheraton's designer changes and design demands and, therefore, did not consent to the delays by its words or acts, deny Sheraton's defenses.

SHERATON'S OTHER AFFIRMATIVE DEFENSES

In its response to Castillo's claims, Sheraton has presented a plethora of affirmative defenses. Most of these do not merit discussion. One that does merit some mention is Sheraton's arguments based on Section 10.1.4 of the Management Contract. That Section provides:

> Any litigation or arbitration of a dispute ... must be initiated within one (1) year from the date on which either Party first gave written notice to the other of the existence of the dispute, and any Party who fails to commence litigation or arbitration within such one-year period shall be deemed to have waived any of its affirmative rights and claims in connection with the dispute and shall be barred from asserting such rights and claims at any time thereafter.

Sheraton points to various letters that Bullard wrote to Sheraton to complain

about Sheraton's conduct. Specifically, on May 6, 2004, Bullard wrote to Sternlicht and asserted that the interior design process had created additional expense which Castillo believed was Sheraton's responsibility. Sheraton contends that because the May 2004 letter gave notice of the existence of a dispute, Castillo's failure to sue within one year should result in a waiver of the delay damages claim. The Court disagrees. The May 2004 letter, in context, was not a demand for payment from Castillo. Rather, Bullard's recitation of the delay issue was simply a preliminary to his larger point — objecting to the instruction to stop design work on the restaurant and bar. Bullard explained that Castillo could not afford additional costs that might result from the decision to delay the design of the restaurant and bar.

The Court is very much aware that the parties exchanged much correspondence during the course of design and construction. While the parties did have disagreements about design and construction, the Court does not believe that they had ripened into "disputes" within the meaning of Section 10.1.4 as early as May 2004. While Bullard did assert that Sheraton's actions had cost Castillo economically, he was not demanding that Sheraton pay Castillo money or do anything other than undo its directive to stop work on the restaurant and bar.

Similarly, Bullard's letter of June 7, 2005 to Darnall did not give notice of a dispute. The letter pointed out that there was a slow down of work on the site and cautioned that delays and changes were costly. Bullard stated that if the parties could not come to a solution on the design problems, Castillo might have to review its options and "consider a change of course." In context, this communication was an effort to express Castillo's position on changes being requested by HBA. Bullard was seeking to minimize the adoption of HBA's design changes. The communication was part of the design/construction dialogue, not the giving of written notice of a dispute.

Further, as Castillo points out, by Florida statute, "[a]ny provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void" (Fla. Stat. § 95.03). Sheraton contends that Section 10.1.4 does not run afoul of the statute because it operates as a waiver of the claim as opposed to a statute of limitations bar. The Court does not agree. Section 10.1.4 actually provides for both a claim waiver and a time bar. The fact that Section 10.1.4 expressly provides that failure to sue within one year of the giving of written notice results in a bar from ever asserting the claim causes Section 10.1.4 to run afoul of the statute. But even if 10.1.4 was viewed simply as a waiver provision, this Court cannot accept that Florida's public policy against shortening the statute of limitations period can be so easily avoided by simply providing for a claim "waiver" as opposed to a time "bar".

FINDINGS OF FACT WITH RESPECT TO THE IMI ARBITRATION

Sheraton's Fourth Cause of Action and Castillo's Ninth Counterclaim relate to their respective indemnification claims arising out of an arbitration with Incentive Marketing, Inc. and BrandPro Services, LLC (jointly, "IMI ").

The documents indicate that, as of mid-2006, the parties were discussing a projected opening date for the Hotel of December 15, 2006 and it appears that such date was still being discussed as viable, notwithstanding that, for example, HBA's lobby plans were not approved until June 2006. In any event, Sheraton was booking business for the

Hotel for the first quarter of 2007. On August 31, 2006, Sheraton contracted with IMI to provide guest room accommodations and meeting space at the Hotel from February 1, 2007 until February 5, 2007. The IMI event was a Super Bowl event featuring former a NFL player and present sports commentator, Tony Siragusa.

Sheraton's contention is that, by November 22, 2006, it realized that the Hotel was not going to be open by December 15, 2006 and, therefore, Sheraton would proceed to "mitigate the harm to innocent third parties to whom we have pre-sold the project for January and February." Thomas M. Smith of Sheraton so informed Bullard in writing on that date. Seven days later, on November 29, 2006, Michael Hatzfeld, the General Manager of the Hotel, wrote to IMI to cancel the Siragusa Event.

On October 31, 2007, IMI filed a demand for arbitration against Castillo and Sheraton (the "IMI Arbitration"). Castillo and Sheraton each timely requested that the other provide defense and indemnity and these requests were rejected. The IMI Arbitration was resolved by settlement, effective as of September 9, 2009, with Sheraton paying $69,298.40 to IMI. Sheraton seeks to recover the $497,313.69 it paid to its attorneys in connection with the IMI Arbitration, an amount the parties have stipulated is reasonable.

Castillo claims that Sheraton knew the Hotel was not going to open in December 2006, cancelled other events, and deliberately waited until the eleventh hour to cancel the IMI event. Castillo seeks recovery of its attorneys' fees in connection with the IMI Arbitration, which amount to $156,751.09, an amount stipulated to be reasonable. The differential in the fees paid is attributable to the fact that Sheraton's counsel took the lead role in the arbitration. While the arbitration was settled, the Court accepts that the defense of the arbitration was very successful in that the arbitration was settled for an amount that was relatively nominal in relation to the sum demanded.

The problem with Sheraton's position is that it began canceling January 2007 events in July 2006. Specifically, on July 10, 2006, Katy Gettinger, Associate Director of Sales, wrote to the Commonwealth Fund to confirm an earlier conversation in which the Fund's January 9-14, 2007 event was moved to the Mandarin Oriental in Miami. It makes little sense that Sheraton would cancel a January 9 event in July, but not cancel the February 1, 2007 event until November 29, 2006. Indeed, the IMI event contract was not executed until August 31, 2006, when it was signed by Ms. Gettinger. Ms. Gettinger did not testify at trial.[19] But it makes little sense that Ms. Gettinger would cancel a January 2007 event in July 2006, yet schedule an event for February 1, 2007 roughly six weeks later. It also makes very little sense that Smith would write Bullard on November 22, 2006 to tell him that Sheraton was going to be canceling January and February 2007 events when, in fact, Sheraton had canceled at least one such event some six months earlier.

CONCLUSIONS OF LAW WITH RESPECT TO THE IMI ARBITRATION

Under Section 12.9.1 of the Management Contract, Castillo is to indemnify and defend Sheraton from all claims from third parties relating to the ownership or operation

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[19]There was no request for a missing witness inference to be drawn from the failure to call Ms. Gettinger.

of the Hotel, including claims arising from contracts made by Sheraton under the Management Contract, except for Sheraton's "Grossly Negligent or Willful Acts." Under Section 12.9.2, Sheraton is to indemnify and defend Castillo from claims arising from Sheraton's "Grossly Negligent or Willful Acts."

"Grossly Negligent or Willful Acts" are defined as being any "gross negligence, willful misconduct or fraud" committed by Sheraton in performing its duties under the Management Contract. Further, acts or omissions of Hotel Personnel (that is, all individuals performing services in the name of the Hotel at the Hotel), other than Senior Executive Personnel (*i.e.*, the general manager, director of marketing and controller), are not to be imputed to Sheraton or deemed Grossly Negligent or Willful Acts unless the acts or omissions resulted from gross negligence or willful misconduct by Sheraton's Corporate Personnel or the Senior Executive Personnel in supervising the Hotel Personnel. Pursuant to Section 12.9.3 of the Management Contract, errors in judgment made in good faith by Sheraton's employees are not to be deemed "Grossly Negligent or Willful Acts" unless: (1) the errors are material to the business of the Hotel; (2) are repeated after notice of them is given by Castillo; and (3) result in debts or liabilities that would not normally be incurred in the ordinary course of business of the Hotel.

Under the Management Contract, Sheraton is entitled to be indemnified except in the event of the carefully and narrowly defined exception for Grossly Negligent or Willful Acts. It appears to the Court that, under this construct, the burden is on Castillo to plead and prove the applicability of the Grossly Negligent or Willful Acts exception. In the view of this Court, Castillo failed to do so.

There is no evidence before the Court that supports the claim by Castillo that Sheraton willfully failed to notify IMI that the Hotel was not going to be ready. Nor does the evidence support a finding that Sheraton wilfully entered into the IMI agreement even though Sheraton knew the Hotel was not going to be ready. At best, the evidence might indicate that Ms. Gettinger was negligent in entering into the IMI contract after having just canceled the Commonwealth Fund event. But her acts are not to be imputed to Sheraton unless Sheraton's Corporate Personnel or Senior Executive Personnel acted in a grossly negligent fashion or willfully committed misconduct in supervising her. There is no evidence that they were.

For these reasons, the Court finds that Sheraton is entitled to recover $497,313.69 from Castillo. Because the attorneys' fees were incurred from October 31, 2007 to September 9, 2009, the Court will use a mid-point for interest of August 31, 2008. Accordingly, under its Fourth Cause of Action, Sheraton is entitled to recover $497,313.69, with interest thereon from August 31, 2008. Since Sheraton is liable in a far greater amount to Castillo, the judgment to be entered shall treat Sheraton's recovery in this regard as an offset, reducing the total amount owed to Castillo, such that the judgment will be for a net amount, inclusive of all offsets. Castillo's Ninth Counterclaim is denied.

SHERATON'S CLAIM FOR UNPAID CONDOMINIUM LICENSE FEES

Sheraton, by way of a reply counterclaim, seeks the recovery for a shortfall in the payment of Condominium License Fees.

Castillo agreed to pay Sheraton "Condominium License Fees" equal to 10%

of the amount by which the proceeds of the first *bona fide* sale of specified condominium-hotel and residential units exceeded, on an individual basis, $850 per useable square foot. Castillo paid Condominium License Fees to Sheraton for Unit 2004 and Unit 2101 based on incorrect sales prices of $3,963,500 and $6,880,000, respectively. The actual sales price for Unit 2004 was $4,113,500, with the closing taking place on July 11, 2007. The actual sales price for Unit 2101, which closed on May 5, 2008, was $7,307,415.

Castillo argues that it is not obligated to pay any more money with respect to Unit 2101 because the additional consideration of $447,415.37 was for "Unit Upgrades." Castillo asserts that units were generally sold in a "white box" condition. The Court does not read the agreement as limiting "proceeds" of sales to only those proceeds that are attributable to as-is sales.[20] While Castillo may have been entitled to an offset for the amount it cost Castillo to perform the upgrades, no evidence as to such cost was offered.

Castillo offers no explanation for the differential in the sales price for Unit 2004.

Based on the actual sales prices for the units, Castillo owes additional Condominium License Fees. Accordingly, the Court will grant judgment to Sheraton against Castillo as follows: (a) $15,000, with interest thereon from July 11, 2007; and (b) $42,741, with interest thereon from May 5, 2008. However, given Sheraton's greater liability to Castillo, these awards shall be used as an offset in the judgment to be entered herein.

FINDINGS OF FACT AS TO THE PROJECT LICENSE FEE

In its Fifth Cause of Action, Sheraton seeks to recover damages for Castillo's failure to pay a Project License Fee, claimed to be due under the Management Contract.

Pursuant to the Second Amendment, which was made in 2003, Castillo was to pay Sheraton the greater of 10% of the gross sales proceeds for all fractional units or $5,000,000. The Second Amendment also provided that if Castillo elected not to develop fractional units, Castillo would pay Sheraton a project license fee of $3,000,000 ("Project License Fee") which was recited to be "in consideration for all programs offered by Operator in conjunction with the operation of the Hotel during the Term." While the term "Term" is not defined,[21] it most logically means the scheduled duration of the Management Contract.

It is not disputed that in 2005 Castillo decided not to pursue fractional units. As a result, Sheraton's entitlement to the Project License Fee became fixed. What is disputed

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[20]The Court declines Castillo's invitation to construe the language providing for Condominium License Fees in light of the Condominium License Fee provision of the DLMA. As Castillo concedes, the DLMA does not apply. The Court does not find the applicable Condominium License Fee provision to be ambiguous and, therefore, will not consider any parol evidence offered for the purpose of trying to shed light on a non-existent ambiguity.

[21]The Second Amendment incorporates the definition of terms set forth in the Management Contract. The Management Contract does not specifically define Term, though it refers to Initial Operating Term and Extension Terms.

is when the payment was supposed to be made.

The relevant provisions of the Second Amendment, as modified by certain changes brought about in the Third Amendment, was entered into in 2006 (by which time the parties were aware that the trigger event for the Project License Fee entitlement had occurred) are as follows:

> If Owner elects not to develop the fractional units, Owner shall pay to Operator a project license fee in the amount of Three Million Dollars ($3,000,000.00) (the "Project License Fee") in consideration for all programs offered by Operator in conjunction with the operation of the Hotel during the Term. **The Project License Fee shall be due and payable upon the earliest to occur of (i) payment in full of the Approved Debt (whether by refinancing the Approved Debt or otherwise)**, (ii) the stated maturity date of the Construction Loan (as set forth in the Construction Loan Agreement), **or (iii) the date when the Hotel shall be subject to any mortgage lien securing debt that is in addition to, or in lieu of, the Construction Loan**. If funds are not immediately available, the Project License Fee shall accrue interest at the rate of 7.5% annually until paid in full, giving effect to monthly compounding. Owner shall use all proceeds from any sales activity at the Hotel including condominium sales, condominium hotel unit sales, club membership sales, or any other activity generating cash flow, including all Hotel cash flow over and above the Approved Debt, to pay the Project License Fee. Owner and Operator acknowledge that payment of the Project License Fee is subordinate to payment in full of the Approved Debt (emphasis added).

The definition of Approved Debt was changed by the Third Amendment. As so revised, the Approved Debt consisted of: (i) the construction loan provided by a syndicate lenders led by CIBC Inc. which was not to exceed an aggregate principal of $115,000,000 (the "Construction Loan"); and (ii) a deferred forward commitment fee in the amount of up to $3,500,000 payable to Deutsche Bank, AG (the "Deferred Forward Commitment Fee").[22] Deutsche Bank was to provide the permanent financing.

The maturity date of the Construction Loan was July 2005, predicated upon the original construction schedule. However, the relevant documents provided for two three month extensions that would both extend the maturity date of the construction loan to January 31, 2006 and extend the date by which Castillo had to exercise its right to the Deutsche Bank take-out loan.

As a result of the delay in construction caused by Sheraton, Castillo exercised both extension options and, as previously discussed, the Court has found Sheraton liable to Castillo for the costs involved. However, construction was still not complete and Deutsche Bank refused to extend its take-out commitment and provide any new permanent loan. As a result, Castillo obtained an further extension of the Construction

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[22]This fee was paid, apparently in 2006.

Loan, extending it from February 2006 to February 2009. Again, this Court has found Sheraton liable for the expenses involved. But the Court now emphasizes that the financing problems were well known to Castillo prior to the March 1, 2006 date of the Third Amendment.

Of some significance, as previously noted, Castillo commenced its federal action against Sheraton on July 21, 2006.

In January 2008, Castillo began searching for new permanent financing to replace the Construction Loan. By this time, the Hotel had been open for seven months and had lost $3.5 million; Castillo was effectively insolvent on a cash basis, having less cash on hand than bills to pay. However, Castillo could not find a permanent lender. The Hotel had been open for about seven months and had already lost $3.5 million; Castillo did not have enough cash on hand to meet its payables, having, on average, about $1 million less than needed.

Castillo again went to CIBC for an extension, doing so about a year in advance. CIBC agreed to extend the loan to February 2011. One purpose for this was to give Castillo additional time to have the hotel operations ramp up to a level that could qualify for a loan from another lender to repay CIBC's loan. Further, while CIBC was not willing to lend Castillo more money, it was willing to have the principal owed it paid down somewhat by freeing up some money from sales of condominiums and condo-hotel units, which had been encumbered as collateral by the existing Construction Loan. In addition, CIBC obtained personal guarantees and other additional security and Castillo actually paid money to CIBC at the loan closing.

On February 12, 2008, CIBC and Castillo closed the loan transaction (the "2008 Transaction"). In form, the transaction appeared as the giving of two new Notes: (a) one in the amount of the then outstanding principal balance of the Construction Loan of $61,528,311.72; and (b) one for $971,688.28. The economic reality of the deal was that, as described by Morris, Castillo's CEO, there was a roughly $62.5 million first mortgage, a roughly $1 million interest reserve, and a future paydown requirement of $4 million from sales of condominium units that were under contract, bringing the net loan to roughly $58.5 million. Economic reality notwithstanding, the documents reflect that the 2008 Transaction resulted in the pre-existing Construction Loan having been paid off and satisfied.

There is no dispute that Sheraton was advised by Castillo of at least the general nature of the 2008 Transaction (*i.e.*, that CIBC was prepared to loan Castillo $62.5 million but would not do so unless Castillo, Sheraton and CIBC entered into an Assignment of Management Agreement and Subordination of Management Fees [the "Assignment"]) and Sheraton consented (by entering into the Assignment).

On February 14, 2008, Sheraton's Thomas Smith, by facsimile and overnight delivery, wrote to Bullard and asserted that the 2008 Transaction represented a loan that was "in addition to, or in lieu of, the Construction Loan" and that, as a result, the Project License Fee was due and payable. Smith stated further:

> Sheraton hereby requests that Castillo immediately pay Sheraton the Project License Fee in full together with any and all accrued interest.

> The above is without prejudice to Sheraton's rights and remedies, including but not limited to all of its rights and available remedies under the Management Contract, the Developer License and Marketing Agreement, and the common law.

Castillo did not respond to Smith's letter. On March 11, 2008, Smith wrote to Bullard again, enclosing a copy of his previous letter. Smith repeated the request that Castillo pay the Project License Fee in full with interest. This time, however, Smith added that Castillo's failure to pay the $3 million fee and accrued interest was "a material default under the Management Contract." Smith pointed out that under Section 4.2 of the Management Contract, a failure of a party to pay money when due and payable which failure is not cured within ten (10) days following notice is an Event of Default. Smith also wrote that "Sheraton will hold Castillo responsible for all damages sustained by Sheraton as a result of Castillo's failure to comply with its contractual obligations." Smith repeated that his statements were without prejudice to Sheraton's rights and remedies, including its rights and available remedies under the Management Contract, the DLMA and the common law.

This time, Smith got an answer to his letter. On March 12, 2008, Bullard responded to both the February 14, 2008 and March 11, 2008 letters by asserting that by entering into the 2008 Transaction, Castillo "merely amended the original construction mortgage." According to Bullard, Castillo had not closed any loan which was "in addition to, or in lieu of the Construction Loan" and, therefore the Project License Fee was not yet due.

CONCLUSIONS OF LAW AS TO THE PROJECT LICENSE FEE

The Court agrees with Sheraton that the closing of the 2008 Transaction operated to make the Project License Fee "due and payable" pursuant to the terms of the Third Amendment. Fundamentally, as Sheraton points out, in the Assignment of Management Agreement and Subordination of Management Fees document executed by Castillo, CIBC and Sheraton as part of the 2008 Transaction, Sheraton, as Manager, certified, that "the Management Fees and all other sums (other than the Condominium License Fee and the Project License Fee) due and payable to the Manager under the Management Agreement as of the date hereof have been paid in full." Clearly, the Project License Fee being excepted from the representation that all monies due and payable to Sheraton makes sense only if the parties perceived that the Project License Fee was then due and payable. While it is true that this certification was given by Sheraton, not Castillo, it is also true that Sheraton gave the certification as part of a transaction desired by Castillo and there is no indication that Castillo objected to the terms of the certification. The Court views the certification by Sheraton, in a document signed by Castillo, as the functional equivalent of an admission by Castillo that the Project License Fee became "due and payable" by reason of the 2008 Transaction.[23]

There was ample reason for the parties to agree that the Project License Fee

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[23]This paragraph of the document recites that terms were for the benefit of the Lender and could not be relied upon by the Owner. It further recites the Owner would not use this section as evidence in any lawsuit. These terms do not prevent Sheraton, as the Manager, from using the section as evidence of an admission by Castillo.

was due and payable. The Court concludes, independently of the parties' statement, that the Project License Fee had become due and payable.

By its terms, the Third Amendment made the Project License Fee due and payable upon payment in full of the Approved Debt, whether the Approved Debt was paid by refinancing or otherwise. The components of the Approved Debt were: (a) the Construction Loan; and (b) the Deferred Forward Commitment Fee. Since the parties do not dispute that the latter was paid sometime in 2006, the question devolves to whether the Construction Loan was paid off by the 2008 Transaction, whether the 2008 Transaction involved a refinancing or not.

The Court concludes, and indeed it is obvious, that the 2008 Transaction paid off the Construction Loan. The day prior to closing, Morris was given specific instructions to remit payment totaling $63,090,597.50 to the Bank of New York for credit to the New York branch of Canadian Imperial Bank of Commerce (CIBC). Included within this payment were charges for an "Exit Fee" for one of the notes being paid. On the day of the closing, counsel for CIBC wrote to counsel for Castillo: "You are to send the funds to Canadian Imperial Bank of Commerce. They are the bank being paid off." Counsel for Castillo responded: "Will do."

The purpose of the 2008 Transaction was, essentially, to refinance the existing Construction Loan. The Third Amendment makes clear that payoff of the existing Construction Loan through a refinancing would make the Project License Fee "due and payable."

Separately, the Third Amendment provides that the Project License Fee would become due and payable "when the Hotel shall be subject to any mortgage lien securing debt that is in addition to, or in lieu of, the Construction Loan." The 2008 Transaction subjected the Hotel to mortgage liens that secured debt that were both "in addition to" and "lieu of" the Construction Loan.

The Amended, Restated and Consolidated Promissory Note, dated February 12, 2008, in the sum of $62,500,000 specifically recites that it was "given in substitution for" the existing note. The Court agrees with Sheraton that the phrase "in lieu of" means "[i]nstead of or in place of; in exchange or return for" (Black's Law Dictionary [9th ed 2009]). The 2008 Transaction, involving the payoff and termination of the prior Construction Loan, clearly meets this test.

The 2008 Transaction also involved secured debt that was "in addition to" the Construction Loan. At the time Castillo closed on the 2008 Transaction, the outstanding balance owed on the Construction Loan was $61,528,311.72 – exactly $971,688.28 less than the amount of the 2008 Loan. As a result, Castillo structured the transaction as two separate promissory notes – one in the amount of the final pre-payoff balance of the prior Construction Loan and a "new" Future Advance Note in the amount of $971,688.28. Castillo also paid Florida Documentary Stamp Taxes and Intangible Property Taxes on the "new money" advanced pursuant to the 2008 Transaction. Thus, the 2008 Transaction involved secured debt that was "in addition to" the prior Construction Loan.

Castillo's contention that the 2008 Transaction was not "in lieu of" or "in addition to" the existing Construction Loan because Castillo actually paid money at closing and did not receive any cash as the result of the closing misses the mark. The pertinent

language of the Third Amendment triggers the Project License Fee becoming due and payable when the Hotel becomes subject to a mortgage lien securing debt that is in addition to, or in lieu of, the Construction Loan. Thus, the inquiry is not whether Castillo received any money in addition to, or in lieu of, the Construction Loan; the question is whether Castillo caused the Hotel to become subject to debt that was "in addition to, or in lieu of, the Construction Loan."

This inquiry is resolved, in addition to all discussed above, by reference to the Amended and Restated Mortgage, Assignment of Leases and Rents and Security Agreement ("Security Instrument") executed as part of the 2008 Transaction. Therein, after acknowledging the existence of the existing note and mortgage (actually two notes, totaling together the original principal amount of $115 million), it is recited that the Security Instrument was for the purpose of securing: (a) an Amended, Restated and Consolidated Promissory Note which "amends, restates and consolidates the Existing Note"; and (b) "that certain Future Advance Note of even date herewith in the original principal amount of $971,688.28."

Castillo argues that Sheraton should be prevented from enforcing its rights to the Project License Fee because it was Sheraton's breaches of the Management Contract which caused delay which, in return, led to Castillo losing its permanent financing and, eventually, to its entering into the 2008 Transaction. This argument is unavailing. As of the time of the Third Amendment, March 1, 2006, the fact is that the parties were already well past the original final completion date of August 2005. Further, Castillo had just obtained an additional extension of the Construction Loan because Deutsche Bank had walked away from providing permanent financing. In the Third Amendment, the parties pushed the estimated opening date of the Hotel back to November 1, 2006. Thus, Castillo knew all about Sheraton's activities and had the ability to protect itself by negotiating a different or alternative payment obligation with respect to the Project License Fee. Instead, as of March 1, 2006, Castillo agreed to the relevant change so that it provided that the Fee would be "due and payable" upon the earlier of the payoff of the Construction Loan or upon the securing of the Hotel for debt in addition to, or in lieu of, the Construction Loan.

This conclusion is consistent with the intention of the parties as reflected in the Third Amendment. It is readily apparent that the parties intended that the Project License Fee would be come "due and payable" when the Construction Loan was paid off, replaced, or supplemented. Castillo, at least, was aware in March 2006 that its original permanent lender, Deutsche Bank, had left the scene. It was also well aware that the Construction Loan would have to be dealt with by February 2009 at the latest since that was when the Construction Loan would have expired. In the normal course of events then, by February 2009, Castillo would have to had to have either found permanent financing or would have had to have obtained an extension. If permanent financing had been found, the Project License Fee would have become due and payable; if the Construction Loan had simply been extended, the Fee would not have become due and payable. In the normal course of events, whether the Construction Loan was paid off or extended would depend upon whether the Hotel had opened.

Rather than wait until February 2009 and take the risk that the Construction Loan might not be extended, Castillo decided to buy time into 2011 by entering into the 2008 Transaction. But the Hotel had opened in 2007 and it seems beyond the reasonable expectations of the parties that the date that the Project License Fee would be "due and payable" could be pushed by Castillo into 2011 or even later. By February 2008, when

Sheraton demanded payment of the Project License Fee, the Hotel had been open for some seven months.

While the Court agrees with Sheraton that the Project License Fee became "due and payable" as of February 12, 2008, this does not mean that Sheraton was entitled to immediate payment of the full amount of $3 million.

The terms "due and payable" in light of the other relevant provisions of the paragraph governing the Project License Fee indicate that whether Sheraton was entitled to immediate payment of the entire payment was dependent entirely upon whether Castillo had "funds ... immediately available" to pay it.

No Florida case defining "due and payable" has been found or cited. "Due" can mean either immediately enforceable or it could mean owing or payable (*see* Blacks Law Dictionary [9th ed 2009]). Conjoining the term "due" with the term "payable" leads to the latter construction as "payable" means an amount to be paid (*id.*). Thus, by use of the phrase, "due and payable" the parties were indicating that the Project License Fee was, upon the occurrence of the stated events, something that was to be paid. But the parties did not end there; they went on to specify how it was to be paid:

> **If funds are not immediately available, the Project License Fee shall accrue interest at the rate of 7.5% annually until paid in full, giving effect to monthly compounding. Owner shall use all proceeds from any sales activity at the Hotel including condominium sales, condominium hotel unit sales, club membership sales, or any other activity generating cash flow, including all Hotel cash flow over and above the Approved Debt, to pay the Project License Fee.** Owner and Operator acknowledge that payment of the Project License Fee is subordinate to payment in full of the Approved Debt (emphasis added).

By this language, the parties agreed that the Project License Fee was to be paid in full when it became "due and payable" only to the extent the funds were "immediately available" to pay it. Immediate availability of funds necessarily refers to Castillo's cash condition as it was Castillo who was to pay the money. Availability means accessible or at hand (see Webster's II, New College Dictionary). The modifier immediate reflects that the funds had to be presently accessible or instantly at hand.

Castillo was given a very distinct incentive to pay the Fee promptly – a significant interest rate made more significant by monthly compounding. Sheraton was given a very distinct benefit in exchange for having to wait an indefinite time for payment in full – a significant interest rate made more significant by monthly compounding.

The obligation on Castillo's part to use proceeds from condominium sales and other sales to pay the Project License Fee further confirms that the parties intended that the entire Project License Fee did not have to be immediately paid if funds were not "immediately available" to Castillo to pay the entire Fee immediately. If immediate payment of the entire amount was required in all events, there would have been no need to require Castillo to use proceeds from sales activity to pay it. Indeed, funds from sales activities

would not be immediately at hand unless the transaction had closed. The only way the sentence makes sense is as indicating that Castillo was to use the proceeds from pending or future sales activities at the Hotel to pay down the Fee if it lacked sufficient funds to pay the entire amount when it first became "due and payable."

The Court also notes that Castillo was required to use all Hotel "cash flow over and above the Approved Debt, to pay the Project License Fee." The Management Contract had Sheraton maintaining an Operating Account out of which it was pay certain expenses, including its management fees, and then funds in excess of a minimum balance would be disbursed to Castillo. The language giving priority to payment of Approved Debt would not apply where the Project Licence Fee became due and payable because the Approved Debt had been paid off. However, it would have significant meaning and application if the Project License Fee became due and payable because the Approved Debt had come to maturity (and not been refinanced) or was substituted for or supplemented. But again, this means that Castillo had time to pay the Project License Fee, *albeit* while running up a significant interest tab, if Castillo did not have enough funds "immediately available" to pay the entire Fee.

The Court likewise reads the last sentence – that "payment of the Project License Fee is subordinate to payment in full of the Approved Debt " – as indicating that the Project License Fee would not necessarily be paid in full immediately. The Court agrees with Sheraton that the last sentence represents an inchoate subordination agreement which would govern the relative priorities among creditors upon a liquidation of a debtor's assets and, further, that until such a liquidation, the debtor is obligated to make regular payments to the subordinated creditor (*see Standard Brands, Inc. v Straile*, 23 AD2d 363, 366 [1st Dept 1965]).[24] The Court does not agree that the last sentence was intended to, or did, postpone *any* payment on the Project License Fee, or defer the running of significant interest on the unpaid Project License Fee, until after the Approved Debt was paid. But even if the Court adopted this construction, it would not matter as the Approved Debt (*i.e.,* the Construction Loan and the Deferred Forward Commitment Fee) was paid by February 14, 2008.

Furthermore, the Project License Fee was "in consideration for all programs offered by Operator in conjunction with the operation of the Hotel during the Term." Since the Fee was payment for services being provided throughout the term of the Management Contract, it is logical that the payment could be extended through the term of the Management Contract.

All this being said, after the Third Amendment was entered into in 2006, and as part of the very 2008 Transaction that triggered the payment obligation of the Project License Fee, Sheraton consented in writing to the granting of security interests by Castillo to CIBC which covered virtually every aspect of the Hotel and its property. Thus, while Sheraton would have otherwise had reason to anticipate that the payment of the Approved Debt would eliminate the collateral given for the Construction Loan, Sheraton, in effect, agreed to the collateralization of Castillo's interests in the Hotel property and income for a period through 2011.

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[24]While the cited decision is from a New York court, the proposition discussed is a general one and the parties have not cited any relevant Florida authority that would suggest that Florida law is different.

The Management Contract, in Section 6.1, specifically gave Castillo the right to "encumber all of the assets that comprise the Hotel, any part thereof, or any interest therein, including the real estate on which the Hotel is located, the Hotel building and all improvements thereto and all FF&E and hotel equipment and operating supplies ...." Castillo could not, however, mortgage the operating account for the Hotel or the payroll account.

As Morris testified, as part of the 2008 Transaction, Sheraton agreed to certain security arrangements with CIBC. In particular, Sheraton, Castillo and CIBC entered into a Manager Cash Management Agreement dated February 12, 2008. Under that Agreement, all of the Hotel's income was to be deposited into accounts controlled by Sheraton and used to pay hotel operating expenses and any other funds would remain in a cash management account entitled "CIBC INC, as security party of Castillo Grand LLC, Deposit Account" and that account would be controlled by CIBC.

The Assignment of Management Agreement and Subordination of Management Fees instrument, between Castillo, Sheraton, and CIBC, reflects, in its recitals, that CIBC was willing to lend $62,500,000 to Castillo secured by an Amended and Restated Mortgage, Assignment of Leases and Security Instrument encumbering the property. This Security Instrument, and the Manager Cash Management Agreement, reflect that Sheraton was well aware that CIBC was taking a security interest in virtually of Castillo's interest in the Hotel.

Morris testified that CIBC had "everything" as collateral: "they had the land, building, furniture, fixtures, the pledge of the member's interest, partnership's interest, any cash flow, sweep of everything." The Court accepts this testimony and finds, further, that Sheraton consented to this arrangement, perhaps because it was required to do so by the Management Contract.

For these reasons, the Court concludes that Castillo's obligation to immediately pay the Project License Fee was dependent upon whether it had immediately available funds with which to pay and, further, that Castillo did not have any immediately available funds, as all of its funds were controlled by CIBC, and that Sheraton consented to this arrangement. While CIBC was copied on the demand letters sent by Smith, there is no evidence that Sheraton requested that CIBC agree to release any of its collateral so that the Project License Fee could be paid.

The practical import of this construction of the Project License Fee provisions is that, while the 2008 Transaction rendered the Project License Fee "due and payable", if Castillo did not have immediately available funds to pay it, Castillo nonetheless would begin to incur interest at the contract rate from the date that the Fee became "due and payable".

SHERATON FAILED TO PROVE THAT CASTILLO'S REFUSAL TO PAY ANYTHING ON ACCOUNT OF THE PROJECT LICENSE FEE WAS A BREACH OF THE MANAGEMENT CONTRACT

At the time of the events, Sheraton and Castillo each took extreme positions: Sheraton claimed it was entitled to the entire $3 million with interest; Castillo claimed it did not have to pay anything. Now, at trial, Sheraton contends that Castillo did have funds immediately available to pay the entire $3 million with interest; Castillo claims it did not.

Sheraton points to an unaudited Castillo financial statement for the two months ending February 29, 2008 which shows that, some 15 days after the demand from Sheraton, Castillo had $4,869,015.51 in cash on hand. But the very same financial statement shows accounts payable of $5,502,539.49. Thus, the financial statement shows that Castillo currently owed roughly $600,000 more than it could pay, without taking into consideration the Project License Fee.

At trial, Morris testified, in essence, that the financial statement reflected a snapshot at that particular moment in time and that the $4.87 million was quickly gone (the cash was present only "[m]omentarily") as it was spent immediately. Morris testified that after the closing, Castillo paid some $2.3 million to construction contractors in order to clear liens that CIBC wanted off the property and another $350,000 to settle a litigation that CIBC wanted settled. Certain other expenses, including payments for furniture, fixtures and equipment for the Hotel, were paid as well. Also paid were legal fees for certain pending litigations. According to Morris, CIBC approved all of these various payments. According to Morris, the $4.87 million on hand on February 29, 2008 was an aberrational amount; more typically, there was about $1 million on hand each day with $2 million in payables.

The Court accepts Morris' testimony that the $4.87 million was an aberrational amount and that it was totally expended. More important, based upon Morris' testimony and upon the 2008 Transaction documents, the Court accepts that any money that ordinarily would have been paid, or was paid, to Castillo was under the control and direction of CIBC and that Castillo was not free to expend it as it chose, as Sheraton well knew.

Sheraton also points to the fact that, on May 5, 2008, Castillo closed the sale of Unit 2101 of the Hotel for over $7.3 million, suggesting that this freed up money that could have been used to pay the Project Management Fee. However, Morris testified that any money that would have been made would have been deposited into escrow with the closing agent. The Hotel was subject to a mortgage; as previously noted, a main purpose of the 2008 Transaction was to free some condominiums from mortgage liens so that the money could be used to pay for expenses, an action that required CIBC's consent.

The Project License Fee was to be paid by Castillo from any sales activity or other cash flow generating activity at the Hotel. However, as Sheraton knew, and consented to, all of that activity was subject to prior liens of CIBC. While there was some testimony to the effect that the members of Castillo made capital contributions at various times, the provisions with respect to the Management Agreement did not require Castillo to raise capital from members to pay the Project License Fee. Sheraton could have sought such a provision or a provision requiring CIBC to release its liens in order to pay the Fee, either at the time of the Third Amendment, or at the time of the 2008 Transaction, but no such provision was made.

The Court therefore concludes that Sheraton has failed to prove that Castillo had any funds available from which the Project License Fee could be paid, either at the time of the February 14, 2008 original demand for payment or at the time of the March 11, 2008 letter. While the Court, as also noted above, concludes that Castillo was obligated to make payment on the Project License Fee from Hotel sales activities or other cash flow producing sources, Sheraton failed to prove that Castillo had access to any funds from any such

activities or sources.[25]

As discussed in greater detail, *infra,* Sheraton terminated the Management Contract based on Castillo's non-payment of the Project License Fee. This was an anticipatory breach by Sheraton which had the effect of relieving Castillo of all payment obligations and entitling Castillo to sue for the damages it sustained as a result of Sheraton's breach. Accordingly, the Court will deny recovery to Sheraton under its Fifth Cause of Action. Discussion of the termination issues follows.

FINDINGS OF FACT WITH RESPECT TO SHERATON'S TERMINATION OF THE MANAGEMENT CONTRACT

As previously discussed, on March 12, 2008, Castillo wrote to Sheraton that, in Castillo's view, the Project License Fee, was not due or payable. There was no immediate response to this from Sheraton. Instead, Sheraton continued to operate the Hotel and pay itself management fees from the Hotel's operating account for April and May. Castillo perceived that Sheraton had decided that the matter was closed.

As of this time, Castillo and Sheraton had been in litigation for some 20 months. Sheraton knew that Bullard was looking to sell the property and Sheraton was looking to facilitate a sale, but for its own purposes. Michael Hatzfeld, the General Manager of the Hotel, on May 21, 2008 transmitted an e-mail seeking "feedback" on a tour of the Hotel and information as to a potential sale. He was informed that there had been a quick tour from a group from United Assurance and that it was anticipated that a letter of interest would be received from this group. Hatzfeld forwarded this information to Graeme Davis, Vice President of Operations for the South Florida and Caribbean areas for Starwood, and Davis responded on May 22, 2008 as follows:

> Thanks Michael ... hopefully a real buyer who is willing to pay the price Fred is looking for as this will definitely help in leveraging Fred to pay up and keep the brand ... if we go and more litigation begins ... it will never get sold any time soon ... appreciate the update

From this, it is readily apparent that Sheraton was looking to use the prospect of a pending sale to "leverage" Bullard to get him to pay Sheraton the $3 million. It seems apparent that no sale could occur if Sheraton walked off the property and the lawsuits intensified, as no buyer would walk into a situation where the hotel manager was vacating the property ("if we go and more litigation begins ... it will never get sold any time soon").

On May 27, 2008, Smith sent Bullard and CIBC a letter in which Sheraton gave notice of its intention to terminate the Management Contract. Smith contended that the Castillo's failure to pay the Project License Fee was a material breach and that Castillo had

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[25]Sheraton points out that, during the trial, the Court commented that lack of funds was not a proper defense to a contract claim. While the Court did make that comment, Castillo's counsel properly and promptly pointed out to the Court that the Third Amendment had the clause that keyed payment to the availability of funds and the Court acknowledged that counsel was correct in her argument.

failed to pay it, notwithstanding the March 11, 2008 notice that Sheraton regarded non-payment of the Project License Fee as a material breach. After reciting at some length Sheraton's arguments as to why the Project License Fee was due and owing, Smith asserted that Sheraton had elected to terminate the Management Contract effective just five days later – June 2, 2008. Further, Smith stated that Sheraton was going to vacate the Hotel and cease all operational activities not later than June 7, 2008, though Sheraton did offer to agree to stay for up to 60 days. Smith advised that Sheraton was going to begin notifying guests of Sheraton's intent to depart on June 2, 2008.

Bullard did not immediately respond. On May 28, 2008, Hatzfeld informed Davis and Milus that Bullard was in the hospital for a heart problem and Hatzfeld was contemplating "follow-up to see if the letter was received." Davis' response was rather cold:

> Thanks very much for the heads up Michael. good thing he's getting heart surgery as he needs his heart and arteries working well when he gets the notice ... Dave is there any way we can reach out from attorney to attorney to make sure he has received and it's not just sitting on a desk somewhere ... Thanks.

There is no indication that Sheraton had advance notice of Bullard's illness or that it timed its notice of termination in order to take advantage of his medical condition.

Milus acknowledged in his testimony that five days to transition a hotel to new management is very tight. He also testified that he was not involved in making the decision to terminate Castillo; he was told about the decision by Keith Grossman, a Sheraton attorney.

Denise Coll, who became President of Starwood's North America Division in January 2008, testified that she recommended to senior leadership – the chief financial officer and the chief legal officer – that Castillo be terminated. Neither of these individuals testified.[26] Coll testified that the "primary driver" behind her recommendation was the $3 million payment that Sheraton was seeking. She testified that she expected that Castillo's response to the termination letter was that it would pay the $3 million and Sheraton would continue to operate the Hotel. She did not indicate the source or sources from which she expected Castillo to make the payment.

Coll's testimony was significantly undermined by her admission on cross-examination that she did not look at the 2008 Transaction documents, but simply relied upon what Tom Smith and in-house counsel, Grossman, told her in an overview. Her testimony led to the following exchange with the Court:

> THE COURT: With all due respect, please don't take this the wrong way. If Mr. Smith was giving you the information and pointing out the relevant facts to you, what did they need you for?
>
> THE WITNESS: I have a direct responsibility to insure that I continue to grow the North America division and a decision to

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[26]Dave Milus testified that he was not involved in making the decision either.

terminate a property is a significant decision as relates to the business.

Coll proceeded to explain that Smith was lower on the corporate ladder than she and it was up to Coll to give the information he was giving her to even more senior management.

THE COURT: He was looking to you to be the formal recommendation conveyor?

THE WITNESS: Correct.

Coll testified that she gave the information to her superior, Mr. Ouimet, verbally and it was Ouimet who communicated the recommendation to senior management.

That Sheraton relied on Coll, who had only recently arrived on the scene, to give the recommendation to senior management to terminate Castillo, is yet another instance where Sheraton's corporate structure hindered effective practical decision-making.

Coll's testimony was that she relied on the information she received from Smith and in-house counsel. But, in a pre-trial deposition, she admitted that she relied strictly on the advice of counsel in deciding that the Project License Fee was due and payable. In fact, she acknowledged that in her deposition she did not mention that Smith was even in on the meeting. The Court concludes that her deposition testimony, which was given closer to the events, was accurate in this regard and that her trial testimony was not.

Coll testified that she did not consider the provision in the Third Amendment for the Project License Fee to bear interest at 7.5% annually, compounded monthly, in forming her recommendation for termination. More important, Coll testified that it was part of Sheraton's strategy to have a number other Sheraton properties located in close proximity to the Fort Lauderdale beach front. These other properties included a Sheraton Yankee that became a Westin and a W Fort Lauderdale. Sheraton wanted a significant share of the "beach front" across all segments of the market. Coll testified that she was aware of the risk that a competitor might pick up the Castillo property. But nevertheless she claimed that the nonpayment of the Project License Fee was more important to her. Indeed, she testified that even though she knew that Sheraton might well lose millions of dollars of management fees in the years ahead, the nonpayment of the Project License Fee loomed more important.

Coll testified that after receipt of Bullard's letter claiming that the Project License Fee was not due, Sheraton kept operating the Hotel because Coll was hoping that the fee would be paid and Sheraton would be there long term. Yet, there was no communication between Sheraton and Castillo on this subject. The following testimony is relevant:

Q. So, no one was actually trying to speak with Mr. Bullard to try and see whether resolution could be had regarding the project license fee; is that right?

A. That's correct.

Q. On what basis, Ms. Coll, did you think that this issue was somehow going to be resolved if no one from Starwood had even responded to my client's March 12th letter disputing the fee?

A. At this point once we had initiated the default notification, the communication I think was clear that we expected the fee to be paid.

THE COURT: You are telling me that no matter what Mr. Bullard came back with in terms of a reason why it wasn't due, you weren't going to listen?

THE WITNESS: He disagreed with the fact that the fee was due and payable, that is correct.

THE COURT: Right. But, once you just told me I want to make sure I understand, that you sent out a letter saying, demanding that the fee was, that your view the fee was due, so no matter what Mr. Bullard said, you were committed to that position, no matter how reasonable or logical or well stated his response would have been?

THE WITNESS: Yes, I was committed to the position that we had relative to the fact that it was due and payable. That's not to say that had there be an opening for us to negotiate their fee or the payment of the fee, that we wouldn't have entertained those conversations.

THE COURT: You were in litigation at the time, not you personally, but Sheraton was in litigation [with] Castillo at the time; right?

THE WITNESS: Yes.

THE COURT: Did you consider saying let's take this to the Judge, see what the Judge thinks about who's right?

THE WITNESS: I did not.

THE COURT: That would have been an option, wouldn't have been, you could have still managed the property, get the management fee and not compromised your position and kept somebody else from coming in to the hotel?

THE WITNESS: Yes.

THE COURT: That was never discussed in your presence?

THE WITNESS: No, it was not.

Coll acknowledged in her testimony that, after two and one half months of silence from Sheraton, it might well have been a surprise to Castillo to receive a termination notice indicating that Sheraton was going to walk off the property in five days.

The Court perceives Coll as a middle-person, who was simply tasked with taking a strategy developed by Grossman, the attorney, and telling senior management about it and obtaining approval to execute it. The termination letter was intended as a high-pressure tactic: after all the hard work and effort by both Castillo and Sheraton to design and build a multi-million luxury hotel, Sheraton was going to try to extract $3 million that it did not have any immediate right to be paid, by threatening to walk away from the Hotel on five days notice. The Court accepts that the abrupt out-of-the-blue nature of the notice, and the abrupt five day time frame for vacating, were carefully designed by Sheraton's in-house counsel to try to compel Castillo, CIBC and a potential buyer that Sheraton perceived to be in the wings to pay Sheraton the $3 million. Even Sheraton's expert, Berman, testified that the property was for sale and "close to a transaction."

According to Morris, whose testimony the Court accepts, Bullard and he viewed the Sheraton threat to pull the St. Regis flag as not really being serious and as simply a way to coerce payment of the $3 million. Castillo perceived that Sheraton was not going to jeopardize its future revenue stream from the Hotel or take the risk that Castillo would bring in a competitor to take over management of the Hotel. Accordingly, instead of capitulating to Sheraton's demand, Castillo, with CIBC's support, decided to accept Sheraton's departure as manager, gambling that calling Sheraton's bluff would lead Sheraton to back down.

In the end, neither side blinked. On June 2, 2008, Sheraton, CIBC and Castillo entered into a Transition and Interim Management Agreement pursuant to which Sheraton stayed on to manage the Hotel until August 10, 2008. Section 12.26 of this Agreement provides that nothing therein is to be deemed a waiver of any claims or defenses that Sheraton, Castillo or CIBC has asserted or may assert against the other.

Castillo retained Ritz-Carlton to take over management of Hotel. Castillo entered into an Operating Agreement with The Ritz-Carlton Hotel Company L.L.C. dated as of July 21, 2008.

CONCLUSIONS OF LAW WITH RESPECT TO SHERATON'S TERMINATION OF THE MANAGEMENT CONTRACT

In its Seventh Counterclaim, Castillo seeks recovery for millions of dollars in damages based upon the contention that Sheraton's termination of the Management Contract was wrongful. While Sheraton had asserted a Seventh Cause of Action seeking a declaration that its termination of the Management Contract was proper, Sheraton withdrew that claim, without prejudice to its position on its merits, since the propriety of the termination would necessarily be decided in conjunction with Castillo's action at law.

Pursuant to Section 4.2. of the Management Contract, either party had the right to terminate the Contract on at least five days' notice if an Event of Default occurred. An Event of Default is defined, by Section 4.2.1, to include a failure by either party to "pay any sum of money" to the other party "when due and payable under this Contract that is not

cured within ten (10) days following notice thereof to the defaulting Party."

While it is technically accurate that the Project Management Fee became "due and payable" on February 12, 2008, as previously discussed, Castillo was not obligated to "pay any sum of money" to Sheraton on account of the Project License Fee unless funds with which to pay it were immediately available to it. Reading the provisions regarding the payment of the Project License Fee together with Sections 4.2 and 4.2.1, the Court holds that it was not an Event of Default for Castillo not to make any payment of the Project License Fee to Sheraton when Castillo did not have immediately available funds with which to do so. Accordingly, the termination of the Management Contract by Sheraton was a breach of the Management Contract[27] relieving Castillo of any obligation to perform under the Management Contract and allowing it to sue for damages resulting from the breach (*see Southeastern Integrated Med., P.L. v North Florida Women's Physicians, P.A.*, 50 So 3d 21 [Fla Dist Ct of Appeal 2010]; *Aberdeen Golf & Country Club v Bliss Constr., Inc.*, 932 So 2d 235 [Fla Dist Ct of Appeal 2005]; *Southern Crane Rentals, Inc. v City of Gainesville*, 429 So 2d 771 [Fla Dist Ct of Appeal 1983]).

The Florida Supreme Court has adopted the law of repudiation as set forth in the Restatement (Second) of Contracts § 253 (1979), which provides:

> (1) Where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach.
>
> (2) Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance (*id., quoted in Hospital Mtge. Group v First Prudential Dev. Corp.,* 411 So 2d 181 [Fla Sup Ct 1982]).

"Therefore, the nonbreaching party is relieved of its duty to tender performance and has an immediate cause of action against the breaching party" (*Hospital Mtge. Group, supra*, 411 So 2d at 182).

The Court notes that, earlier in this Decision, the Court found for Castillo on the delay claim and for Sheraton on the IMI arbitration and Condominium License Fee

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[27]While it is not necessary to deal in depth with Sheraton's claim for the recovery of what its expert, Berman, claims is the amount of $9.242 million in lost management fees, the Court notes that, as Berman conceded, Sheraton did not have to terminate the Management Contract as a consequence of its claim of default in non-payment of the Project License Fee. Sheraton could have simply sued on its claim; the Court would have decided whether Sheraton was entitled to the Fee; and there would have been no loss of any management fees. Thus, the Court would review any loss of management fees by Sheraton as entirely self-inflicted. Indeed, Coll acknowledged that she was willing, in order to try to compel the payment of the $3 million, to risk the loss of the future revenue stream.

claims. The issue of who breached first did not matter because, as Sheraton's counsel properly stated during the trial, both parties continued to perform. In contrast, with respect to the Project License Fee, Sheraton gambled that it was right and repudiated the Management Contract. In this Court's view, Sheraton was in error and, because Sheraton wrongfully refused to perform, Castillo was relieved of its obligation to pay the Project License Fee and the interest thereon and became entitled to damages for wrongful termination.

The Court also concludes that, even if Sheraton's claim of default was correct, the manner in which Sheraton went about notifying Castillo of the event and of its intent to terminate was a violation of Sheraton's obligation to exercise good faith and fair dealing toward Castillo.

When Sheraton sent the first demand for the Project License Fee on February 14, 2008, it did not give Castillo advance warning that failure to pay would be an event of default. This defect was remedied by Sheraton's second demand, sent on March 11, 2008, which did give Castillo notice that failure to pay would be regarded as a default and cited Section 4.2 of the Management Contract, which is the termination provision, though Sheraton did not specifically warn Castillo that Sheraton would terminate.

The Court does not view the failure of Sheraton in the March 11, 2008 to specifically alert Castillo to the possibility of termination as material given that Castillo clearly understood that termination was an option. Moreover, Castillo and its principal, Bullard, are sophisticated parties and had access to counsel and either did, or could have, readily ascertained that Sheraton's citation to Section 4.2 was a reference to termination. However, Castillo responded on March 12, 2008, with a denial that the Project License Fee was due and Sheraton did not do anything further until May 27, 2008, a period of two and one-half months and a period of sufficient duration that it was reasonable for Castillo to view the matter as having been closed. Moreover, the parties had been in litigation for nearly two years by then and if Sheraton considered Castillo's response unsatisfactory, it knew how to either contact Castillo's attorneys or the federal court in which the action was pending.

Castillo had been spent years and substantial monies in an effort to design and construct the Hotel in accordance with Sheraton's ever-changing, ever-demanding specifications. The Hotel had just opened. The Court views it as a violation of Sheraton's obligation to use good faith in the performance of its contractual obligations for Sheraton to have waited nearly three months and then abruptly transmit a notice of termination, in particular on just five days' notice.

It is manifestly clear to the Court that Sheraton was using a high-pressure tactic in order to induce Castillo (and CIBC) to pay the $3 million that Sheraton, as the Court has found, was not then entitled to. Good faith and fair dealing required at a minimum that: (a) Sheraton have sent another ten (10) day notice to cure in May 2008 before sending a termination notice; or (b) Sheraton have contacted Castillo's counsel to see if the matter could be discussed or negotiated; or (c) Sheraton to have contacted the court in an effort to have the court determine whether Sheraton's position on the Project License Fee was correct.

The Court also agrees with Castillo's argument that, through its inaction after Bullard's March 12, 2008 letter, its continued management of the Hotel and its continued

collection of management fees, Sheraton waived its rights to rely upon its March 11, 2008 letter as having complied with the notice of default provision of Section 4.2.1.

Under Florida law a party can waive or modify its rights under a written instrument by its conduct (*CJ Rest. Enters., Inc. v FMS Mgmt. Sys., Inc.*, 699 So 2d 252 [Fla Dist Ct App 1997]). Where a party acts in such a manner as to lead a counterparty to a contract to believe that its conduct is proper, that party waives its right to later declare a contract in default based on the conduct previously condoned as acceptable (*id.* at 254). This proposition has been enforced by Florida courts in a variety of situations (*see Smith v Landy*, 402 So 2d 441 [Fla Dist Ct App 1981] [holding a mortgagee's right to acceleration and foreclosure was estopped where late payments were previously accepted without dispute]) and applies to situations involving a contractual agreement *(CJ Rest. Enters., Inc. v FMS Management Systems, supra,* 699 So 2d at 255).

Here, Sheraton waited almost three months after sending its March 11, 2008 letter to Castillo before issuing the notice of termination. The evidence is undisputed that Sheraton failed to respond to Castillo's March 12th letter, continued to pay itself management fees from the Hotel's operating account, thereby intentionally lulling Castillo into a false sense of security and timing its notice of termination for the purpose of trying to take advantage of a possible sale of the Hotel in order to unfairly leverage its demand.

The Court does not agree with Castillo that Sheraton's termination of the Management Contract constituted a breach of fiduciary duty. In dealing with Castillo in a dispute over whether payments were due under the Management Contract, Sheraton was not acting, and was not required to act, as a fiduciary for Sheraton. Since the Court does not agree with Castillo's contention that Sheraton breached fiduciary duties, the Court also cannot accept Castillo's claim that the Court should impose punitive damages. Castillo has not provided any case law to the effect that Florida law permits the imposition of punitive damages in cases of breach of contract.

DAMAGES FOR WRONGFUL TERMINATION

Even though Castillo had already paid Sheraton significant amounts in working capital and pre-opening expenses in connection with the opening of the Hotel as a St. Regis, Castillo was forced to pay to Ritz Carlton $4,661,225 in pre-opening expenses, property improvements and working capital, costs that Castillo would not have incurred but for Sheraton's breach of the Management Contract by improper termination. Sheraton does not dispute that these costs were incurred by Castillo; rather, as will be discussed below, it contends that these costs are offset by $5 million in "key money" that Ritz-Carton paid Castillo.

Castillo's expert, Cline, opines that Castillo was also damaged as a result of Sheraton's termination of the Management Contract by having to sustain a $9,164,000 loss in market value of the Hotel as a result of being effectively compelled, under the duress of the abrupt departure of Sheraton, to enter into an operating agreement with Ritz-Carlton that has a duration thirty years longer than the Management Contract with Sheraton Contract and higher incentive fees. As was pointed out by Cline, the Sheraton Management Contract had an initial term of 20 years with two five year options that were available at the option of Castillo. In contrast, the Ritz-Carlton agreement has a basic 30

year term with two ten year extensions at the option of Ritz-Carlton. The Court perceives, from the evidence, little, if any, difference between the qualities of Ritz-Carlton as the operator of luxury hotels and Sheraton as the operator of luxury hotels. Cline opined that the additional 30 years on the Ritz Carlton Management contract cost Castillo $9,164,000 (present value) in damages in terms of the amount Castillo could have sold the Hotel for at the end of the original St. Regis term in 2027.

Sheraton's expert, Berman, opines that Cline's calculations are based on unrealistic assumptions and that in Berman's opinion, most prospective buyers would seek to divest themselves of hotels within a five to ten year period, which would be within the term of the original Management Contract. The Court disagrees. The Court was not convinced that any particular assumption by Cline was unrealistic; Berman's written rebuttal report was conclusory in this regard and Berman's testimony at trial was not persuasive in this respect. Further, Berman's argument that most "buyers" would seek to divest themselves of hotels within a 5 to 10 year period is not based on anything other than his own "experience" and, in any event, misses the mark. It makes economic sense that a hotel buyer would pay less for a hotel that was burdened with a longer, more costly management contract than a hotel had either had a shorter contract or a less costly one. Even if a seller were to sell within a 5 to 10 year period, the seller would still encounter the drag on value coming from a longer term, more costly, management contract. In this sense, the valuation issue is not different than if a property owner was seeking to sell a property that was burdened with a long term lease with a below-market rent.

The Court accepts Cline's opinion concerning the encumbrance value of the Ritz Carlton Management Contract as compared to the St. Regis Management Contract and that this encumbrance translated into a net present value $9,164,000 in damages. Mr. Cline's damage calculation is premised on his projection that in 2027, the Hotel would have sold for $178 million whereas as a Ritz Carlton still encumbered by a Management Contract in 2027, the Hotel would have only sold for $137 million. The Court views the appraisal methods used by Cline to be sound and further finds the 30% reduction in price based on the Ritz Carlton Management Contract encumbrance to be conservative.

The Court acknowledges that during Cline's testimony, the Court was somewhat troubled by Cline[28] having not reviewed, as part of his analysis, an appraisal that had been done in September 2008 after the Hotel was a Ritz Carlton, indicating the Hotel was worth $116 million and would be worth $129 million once it was stabilized, which was predicated as occurring in September 2011. Cline did use an earlier, August 2007 appraisal which put the value of the Hotel at $88.6 million and Cline opined that if the authors of the August 2007 appraisal had updated it in 2008 they would have come up with a value of approximately $85 million. This is completely out of sync with the September 2008 appraisal for $116 million, which appraisal Cline never saw.

It was further established that, on July 5, 2008, Thayer Hotel Investors IV L.P. ("Thayer") offered to purchase the Hotel for $121 million, unencumbered by the St. Regis Management Contract and with no other management contract having yet been made.

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[28]The Court notes that, as part of his "going concern" approach to damages (discussed *infra*), Cline opined that the Hotel had a value of $102,384,000 as a St. Regis as of June 2, 2008.

However, this deal did not close and the reasons for that are not indicated on this record.

This Court has considered whether the cost of the Ritz Carlton Management Contract is reflected in the difference in price between the September 2008 appraisal ($116 million) and the Thayer offer ($121 million). However, that would require the Court to assume that the Thayer offer was reflective of the price that could have been fetched for the Hotel, unencumbered by a management contract, under fair market conditions. Not only did the Thayer deal not close, but given the difficult situation that Castillo was in at the time of the offer, is not fair for the Court to presume that the Thayer offer is reflective of the fair market price of the Hotel unencumbered by a management contract. It is apparent that Castillo had to find someone to manage the Hotel in a short time frame, factors which adversely impacted its bargaining position with Ritz-Carlton. Addressing Castillo's mitigation efforts, it is apparent that a buyer would prefer to make its own deal with a manager; it is also apparent that Castillo had to find another manager to run the Hotel. There is no persuasive evidence that Castillo could have gotten a better deal within the time allowed from another luxury manager. In addition, in order to obtain the higher, stabilized value, Castillo would have to had suffered through three years of losses.

Accordingly, the Court finds that there was the encumberance effect of the Ritz-Carlton deal which caused $9,164,000 in damages to Castillo.

Since it is undisputed that Castillo received $5,000,000 from Ritz-Carlton in "key" money, which should be offset against the found damages, the Court concludes that Castillo is entitled to recover in this regard $8,825,225 ($4,164,000 + $4,661,225), together with interest from May 27, 2008.

There are several aspects of claimed damages that the Court does not accept.

Cline opined that, on June 2, 2008, the Hotel lost 80% of $20,204,000 – or $16,163,000 – of what Cline called its "going concern value," which consisted of the Hotel's customers, group meeting and banqueting business, employees, vendor relationships, operating policies and business operating systems.

In particular, Cline asserted that the Hotel's prior customers (both of the Hotel's guest room and its meeting space/banquet rooms) are at the heart of the Hotel's going concern value and that Starwood's removal of all of the guest history records upon its termination of the Management Contract "eliminated a critical Going Concern asset of the Owner" and left Castillo without any ability to reach out to these customers to explain what was going on at the Hotel. Another going concern asset that Cline asserts was depleted was the employee base. Under the Management Contract, Castillo was not permitted to solicit Senior Executive Personnel during the term of the agreement and for 12 months following its expiration. According to Cline, only 6 managers of the 36 managers at the Hotel today were holdovers from the St. Regis regime and while 231 employees moved over to the new management team, Cline asserts that "they did so without their personnel files" because Sheraton removed all of them. Cline testified that "you can't run a business without knowing who your employees are" and while Sheraton left their list of names and pay rates, Castillo did not have their application forms, training records. On the issue of vendors, Cline reported that Sheraton only left behind information concerning the vendors that had existing contracts – some 50 of the 300 vendor relationships. He contends that these vendors were

a critical part of the Going Concern Value. Cline further points out that all technology infrastructure (*i.e.*, the reservation system, the property management system, the point of sale system, sales management system and human resource system) and its operating manuals were removed from the Hotel leaving the Hotel leaderless and "flying blind." However, at the trial Cline testified that Sheraton removed its proprietary software which they had every right to do. Cline further admitted on cross-examination that Ritz Carlton had its own customers, employees, vendors and operating systems so the extent of damages suffered by Castillo as a result of these bad acts of taking the customer and vendor information, operating systems and employee files was never established.

Nonetheless, the loss of going concern value claimed by Cline is predicated upon his assumption that the loss of the exclusive St. Regis brand to the Ritz Carlton brand will cause losses to Castillo in both reduced room occupancy and pricing. However, other than some figures from a Star Report, Mr. Cline did not provide any historical figures concerning how the Hotel performed over the period August 2008 to August 2010. The failure to provide any historical performance data suggests to the Court that the projections for the Hotel as a St. Regis were not far off of the Hotel's actual performance as a Ritz Carlton.

Furthermore, the limited evidence submitted suggests that the Hotel operating under the Ritz Carlton flag was meeting the occupancy rates and room rates of the Hotel under a St. Regis flag, which were relied upon by Cline in his report.

Specifically, in his report (pp. 23-24), Cline sets forth the projections with regard to room occupancy and room rates as a St. Regis as having an occupancy rate steadily rising over a ten year period from 65% to 72% with an average room rate rising from $365 to $502.34. The Court however, was not provided with meaningful data from the actual operations of the Hotel over the period August 2008 to August 2010. Instead, Cline provided data from the Smith Travel Research's Monthly STAR for the period May 2008 to April 2009. Based on this data, the Hotel had an average occupancy rate of 64.9% and an average room rate of $369, which comports with the St. Regis projections on which Cline relies upon in his report where the room rate for 2009 was listed at $385 and the occupancy rate was listed at 65% (Cline Report at 23). Despite this neutral evidence, Cline opines that "the data indicate that for the first four months of 2009, the Hotel is 3.7 occupancy points behind its competitive set and that the rate premium it had been enjoying over the 12 month period to April 2009 eroded this year (down to $37 from $54). The net effect of the occupancy and ADR spreads on a RevPAR (Revenue per Available Room) basis, is that the premium that had been building under the St. Regis brand is eroding – $12 down on a YTD basis from $15 for the past 12 months" (Cline Report at 44). Cline then opines that there was an overall 3% loss on occupancy and room rates for years 2009 to 2013 and a 4% loss on the food and beverage revenue resulting in an overall loss of $16.6 based on the loss in the exclusivity of the St. Regis affiliation (Cline Report at 46). However, Cline, somewhat inconsistently, testified at other points during the trial that given the costs of construction, the Hotel would have had to have charged $800 a night to realize a profit and no testimony was provided that the room rates ever neared a figure of $800 a night. Moreover, based on data from 2009, Cline testified that as a Ritz Carlton, the Hotel was realizing a 64% occupancy rate (Tr. at 2758), which is practically the same occupancy rate projected for the Hotel in 2009 as a St. Regis (Cline Report at 23). These facts, coupled with the evidence presented concerning the effects of the recession on the hotel industry as a whole, as well as the evidence introduced concerning the intrinsic value of the Ritz Carlton name, has left

this Court with no basis from which to calculate the damages sustained, if any, as a result of the loss of going concern of the Hotel as a St. Regis rather than a Ritz Carlton. Indeed, another gap in Cline's opinion on the losses attributable to the going concern of the Hotel was that his opinion did not take into account the value of the Ritz Carlton brand.

Further, the Hotel never quite ceased to be a "going concern." While Castillo claims that Sheraton had not been operating the Hotel quite as effectively in anticipation of termination as it had been at the opening, the Hotel never did stop operations altogether. Moreover, Cline opined that the Ritz-Carlton take-over did not mitigate this loss, even though Ritz-Carlton is a comparable luxury operator with its own expertise, proprietary policies, procedures, and programs. Further, some of the management team and some of the employees stayed on after the change-over. Cline's opinions failed to account for the adverse market conditions that were already evident in mid-2008, resulting in overly optimistic revenue estimates for the ten-year holding period used in his model. Further, as above noted, his opinion as to the value at time of termination seems to be unduly low, given the Thayer letter of intent and the September 2008 appraisal.

Cline asserts that Castillo incurred $1,590,000 in interest and closing costs for a loan obtained to finance the pre-opening, working capital and property improvement requirements associated with the Hotel's conversion to Ritz-Carlton. However, Ritz-Carlton provided $5 million key money and, in any event, the loan was taken out by CGN Two, LLC and CG Managing Member, Inc. Neither of these entities are parties to this action. While it is reasonably inferable that these entities have some relationship with Castillo, Castillo has not shown what it is.

Castillo's expert, Cline, also opined that the Hotel's condo-hotel units generated a 28% premium over unbranded condo-hotel units and that, as a result of the loss of the St. Regis brand, the value of 21 "unsold" condo-hotel units declined in value by approximately $6,772,000. However, he did not account for the value of the condo-hotel units with the Ritz-Carlton brand. Castillo failed to offer any actual sales data to prove that the change from St. Regis to Ritz-Carlton had any detrimental effect on the value or marketability of the units that it claims were impacted.

ATTORNEYS' FEES

Each party has claimed for attorneys' fees against the other based on a fee-shifting provision in the Management Contract. The Court severed those claims, pending a determination of the merits of the underlying claims. The Court therefore schedules a conference to discuss scheduling of the fee claims to be held on December 8, 2011. The Court expects that, prior to such date, any party claiming attorneys' fees will provide to the opposing party copies of their billing records, reflecting the work done, the hours involved, the persons performing the work, and the hourly rates, to opposing counsel. The supplying party or parties may redact statements that would reveal attorney-client privileged communications.

CONCLUSION

Based upon the foregoing, and for the reasons set forth above, it is hereby

ORDERED that judgment for Plaintiff will be granted on the Fourth Cause of Action set forth in Plaintiff's Complaint and Plaintiff is entitled to recover the sum of $497,313.69 together with interest from August 31, 2008, which sum shall be used as an offset to the final sum awarded to Defendant on its counterclaims; and it is further

ORDERED that judgment for Plaintiff will be granted on the Fourth Reply Counterclaim and Plaintiff is entitled to recover the sums of: (1) $15,000 together with interest from July 11, 2007; and (2) $42,741 together with interest from May 5, 2008; and it is further

ORDERED that judgment for Defendant will be granted on the Fifth Cause of Action set forth in Plaintiff's Complaint and the said Fifth Cause of Action is hereby dismissed; and it is further

ORDERED that judgment for Defendant will be granted on the First and Second Counterclaims and Defendant shall be awarded the sums of (1) $13,127,783 together with interest from June 7, 2007; (2) $572,500 together with interest from September 15, 2005; (3) $1,912,723.53 together with interest from March 1, 2006; (4) $1,382,007.10 together with interest from February 12, 2008; (5) $3,355,092.71 together with interest from February 28, 2008; (6) $142,123.90 together with interest from July 1, 2006; (7) $2,191,916.05 together with interest from July 1, 2006; (8) $630,058.14 together with interest from July 1, 2006;

ORDERED that judgment for Defendant will be granted on the Seventh Counterclaim and Defendant shall be awarded the sum of $8,825,225, together with interest from May 27, 2008;

ORDERED that counsel for Plaintiff and for Defendant shall, provisions of 22 N.Y.C.R.R §202.48, submit proposed judgments to the Court with a settlement date of December 8, 2011), with the amount to be awarded for interest to be left blank; and it is further

ORDERED that with regard to the amount to be awarded for interest (1) if counsel agree on the state's law to be applied, counsel may submit a stipulation entered between counsel to this effect and, to the extent counsel agree that Florida's law applies, a proposal setting forth the amount of interest to be awarded on each cause of action, or (2) if counsel cannot so agree, counsel shall each submit a memorandum of law supporting on the issue of the applicable state's law to be applied to the award of interest, such submissions to be served and filed with the Court by no later than December 8, 2011, together with a calculation of the interest to be awarded on each cause of action; and it is further

ORDERED that counsel shall appear for a conference on December 8, 2011 the purposes of which is to discuss the severed claims for attorneys' fees and the scheduling of further proceedings with regard to these severed claims, which conference shall not be adjourned without the prior written consent of this Court.

The foregoing constitutes the Decision and Order of this Court and the Court's Findings of Fact and Conclusions of Law for purposes of CPLR 4213.

Dated: White Plains, New York
November 18, 2011

ENTER:

Alan D. Scheinkman
Justice of the Supreme Court

APPEARANCES:

BICKEL & BREWER
Attorneys for Plaintiff Sheraton Operating Corp.
By: William A. Brewer III, Esq.
James S. Renard, Esq.
Alexander D. Widell, Esq.
Eric P. Haas, Esq.
767 Fifth Avenue, 50th Floor
New York, New York 10153

PRYOR CASHMAN LLP
Attorneys for Defendant Castillo Grand, LLC
By: Todd E. Soloway, Esq.
Lisa M. Buckley, Esq.
James S. O'Brien, Jr., Esq.
Joshua D. Bernstein, Eq.
Bryan T. Mohler, Esq.
7 Times Square
New York, New York 10036