AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

CASE NO. 01-19-0001-7752

In the Matter of the Arbitration of

DAYTONA BEACH RESORT, L.L.C.,
a Florida limited liability company,

Claimant,

and

DAYTONA BEACH RESORT AND
CONFERENCE CENTER CONDOMINIUM
ASSOCIATION, INC., a Florida not-for-
profit corporation,

Respondent.
_____/

FINAL AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties and dated October 19, 2000, and having been duly sworn and having duly heard the proofs of the allegations during the Final Hearing conducted March 25 through March 28, 2020 during which Claimant Daytona Beach Resort, L.L.C. ("Developer") was represented by Brent D. Kimball, Esq. of Greenspoon Marder, LLP and Respondent Daytona Beach Resort and Conference Center Condominium Association, Inc. ("Association") was represented by David Neal Stern, Esq. of Frank, Weinberg & Black, P.L., and being further advised in the premises and the proofs, hereby issues this FINAL AWARD as follows:

I. Findings of Fact

This arbitration arises out of a mixed-use condominium and hotel project in Daytona Beach, Florida. The typical challenges faced by owners in a mixed-use development are

amplified in this case by the lack of trust between Claimant Developer and Respondent Association. As aptly put by one witness, the trust level between the parties is extremely low but a relationship is necessary. The facts of the case are straightforward.

Claimant is the developer of a mixed-used hotel and resort project located at 2700 North Atlantic Avenue, Daytona Beach, Florida ("Property"). Developer became the fee simple owner of the Property in December, 2000, at which time there was a hotel on the Property consisting of two buildings: a thirteen story building ("North Building") and a five story building ("South Building"). The Property had been a conventional hotel prior to Developer taking title.

Developer created a condominium on a portion of the Property named "Daytona Beach Resort and Conference Center," and consistent therewith, drafted and recorded a Declaration of Condominium Establishing Daytona Beach Resort and Conference Center, A Condominium Resort ("Declaration"). The Declaration is recorded at Official Records Book 4624, Page 342 of the Public Records of Volusia County, Florida. Developer also formed the Association at this time, which organization remained under Developer's exclusive control until turnover to the unit to the Condominium in December, 2007. The Developer sold condominium units but also retained some units. Both members of the Association (the private unit owners) and the Developer rent their units to the general public.

Developer contributed certain floors of the hotel towers and other parts of the Property to condominium ownership, which contributed property is known as the

"Condominium." Developer, however, retained fee simple ownership to all property not included in the Condominium including areas such as the swimming pools, the restaurant, front desk, exercise room, and media center ("Retained Property").

The Developer and Association also entered into an agreement to provide for use of certain portions of the Retained Property by members of the Association titled the Easement and Maintenance Agreement for Access, Ingress and Recreational Use ("Easement Agreement"). Pursuant to the Easement Agreement, the Developer granted certain non-exclusive easements (including the right of access, ingress, and egress) over portions of the Retained Property, and the use of certain recreational and other commonly used facilities contained within the Retained Property.

Developer also retained certain other rights. For example, Section 5 of the Easement Agreement states the Association gives the Developer "a right of first refusal with respect to the installation of cable television service, satellite, internet or other telecommunication services ("Telecommunication Services") in the Condominium." The Easement Agreement is silent as to whether payment (and how much) must be made for Telecommunication Services.

The easements granted to the Association and its members were subject to rules and regulations adopted by the Developer from time to time in its sole discretion. Further, Section 7 of the Easement Agreement states that the "foregoing easements...shall be further conditioned upon payment by the Association of its pro rata share of the costs and expenses incurred in the operation, maintenance and management of the Recreational

and Other Commonly Used Facilities as referenced herein pursuant to the terms and conditions hereinafter set forth."

Allocation of costs is also set forth in the Easement Agreement. Pursuant to Section 8, the Association and its members are responsible for the payment of:

a. all costs and expenses directly or indirectly related to the maintenance of the elevators and elevator shafts, including all designated freight and/or service elevators;

b. all costs and expenses incidental to maintenance and servicing of all water lines and equipment; gas lines and equipment; electricity systems and equipment; sewage lines; plumbing lines; fixtures and equipment; air conditioning systems and equipment; heating systems and equipment; garbage disposal and the delivery of telecommunication services; and

c. all expenses incurred for the maintenance, repair, or replacement of the roof and all structural components and systems comprising the Condominium.

Pursuant to Section 9 of the Easement Agreement and in consideration for the right to use recreational and other commonly used facilities, the Association is required to pay the Developer the following expenses:

a. Ninety (90%) percent of the total charges for water and sewer service supplied to the Property;

b. Thirty-five (35%) percent of all real property and personal property taxes assessed against the Property, exclusive of taxes assessed directly with respect to the Condominium;

c. Thirty-five (35%) percent of all electricity and gas charges incurred with respect to the Property, exclusive of the charges for electricity and gas incurred directly with respect to the Condominium; and

d. Ninety (90%) percent of all expenses incurred in the maintenance, management, repair and operation of the main lobby, pool deck area, front entrance and driveway area, and front entrance building façade, which expenses include the furniture and furnishings therein, the floor, ceiling and equipment associated therewith, including all glass fixtures and including labor expenses, including Federal and State employee and employer taxes associated therewith, and all other expenses related to the use, maintenance and upkeep of such areas including reasonable reserves for replacement; but

e. Notwithstanding the foregoing, the Developer remained responsible for the remainder of the expenses not borne by the Association and remained responsible, directly or indirectly, for all expenses for management, upkeep, repair and replacement of the Retained Property not included within the Recreational Other Commonly Used Facilities designated for use by owner.

The Retained Area includes all of the Property except the condominium units and some of the corridors. A small portion of the Retained Area was retained exclusively for use by the hotel operation including the meeting spaces, the kitchen, the restaurant, the bars, and the offices. These items are included in the $3.5 million budget for the hotel's operations and not included in the Association's budget. The rest of the Retained Area under the Easement Agreement includes the three outdoor pools, pool deck area, beach access ramp, indoor pool and hot tubs, front lobby, common area bathrooms, fitness center, sauna, front desk, exterior entry and parking garage that owners have access to. These areas are used both by owners in the Condominium as well as guests of the Developer who rent rooms from the Developer through the Developer's rental program for those units it did not sell.

In 2009 and after turnover of the condominium association to the unit owners, the Association sued the Developer in Volusia Circuit Court (Consolidated Case Number 2009-32734-CICI) ("Lawsuit") challenging the validity of the Easement Agreement and asking for a declaratory judgment that the Easement Agreement was unenforceable and "that the [Developer] Retained Property are in fact common elements." In October 2012, the Developer and Association entered into a Settlement Agreement and Release of All Claims ("Settlement Agreement") thereby settling the claims raised in the Lawsuit. The Settlement Agreement includes a release which provides in pertinent part:

> ...[the Developer] and the Association each on behalf of themselves and their respective agents, members, affiliated entities, successors, and assigns mutually and completely releases (sic) and forever discharges (sic)

> one another and all of [the Developer]'s and Association's related or affiliated individuals and entities, and their respective agents, members, successors and assigns, for, from and against any and all claims, demands, actions, causes of actions, obligations, costs or liabilities arising from the Litigation, or otherwise, whether known or unknown, suspected or unsuspected, foreseen or unforeseen, matured or un-matured, and whether at law or in equity, or otherwise, which either ever had, now has or may hereafter claim to have had, against one another arising on or before the date of this Agreement. This general release includes, but is not limited to, any such claims of the Association against the Developer Retained [Property] Area, the validity and enforceability of the Easement and Maintenance Agreement . . . .

But this agreement did not being an end to the disputes. The Developer subsequently brought an arbitration proceeding against the Association in 2016, American Arbitration Association, Case No.: 01-16-0000-0168 ("2016 Arbitration"). This arbitration concerned, among other things, whether or not Developer was empowered to create new rules for the Property and whether or not Developer could charge new fees to rental guests of unit owners.

The Final Award issued in the 2016 Arbitration determined that while the Developer could not impose fees not specified in the Easement Agreement on guests, it could set reasonable rules. Specifically, a portion of the Final Award determined it was permissible for the Developer to require guests to use a key card to access areas of the Property set forth in the Easement Agreement. The Final Award confirmed the Developer was permitted to voluntarily create rules for the guest check-in process but did not require the Developer to provide guest check-in services for members of the Association who were not participants in the Developer's rental program.

Sections 7, 8, and 9 of the Easement Agreement set forth the procedure by which the Developer and Association produce an annual budget for the Property. Section 9 provides:

> . . . within thirty (30) days following the end of any fiscal year, an estimated operating budget for Recreational and Other Commonly Used Facilities, as set forth herein, for the expenses described above for the ensuing year of the Association, together with a statement of expenditures for all such expenses incurred by the Developer in the maintenance of such areas for the proceeding (sic) fiscal year of the Association. The Association shall have thirty (30) days from the delivery of said notice by the Developer in which to approve or reject the budget provided by the Developer, or in the alternative, to suggest an alternative budget.

Section 7 states that the "foregoing easements…shall be further conditioned upon payment by the Association of its pro rata share of the costs and expenses incurred in the operation, maintenance and management of the Recreational and Other Commonly Used Facilities as referenced herein pursuant to the terms and conditions hereinafter set forth."

Finally, Section 9 goes on to explain that:

> Failure of the Association to respond in writing within said thirty (30) days period shall be deemed to be an approval by the Association of the assessment. In the event the budget, as proposed by the Developer, is not approved by the Association as set forth herein, the Association shall continue to pay the assessments applicable for the previous year. The Developer shall, in its sole discretion, be entitled to increase the total assessment by a sum not to exceed fifteen (15%) percent of the previous year's assessments until such budget has been approved by the Association in order to cover any projected deficits.

The dollar amount budgeted for the Property did not increase from 2014 until the 2019 budget, but this may be because the Property was closed in 2016, 2017, and 2018

due to balcony restoration, hurricane damage, and resulting repairs. Notwithstanding that the Property was closed for the better part of three years, the evidence disclosed the budgeted expenses did not go down either. The Property was set to re-open for the full year in January 2019.

The Developer submitted a proposed 2019 budget to the Association, together with some invoices of past expenditures, in November of 2018. This proposed budget contained a significant monetary increase and new categories of expenses. The Developer did not receive a written response from the Association to the 2019 budget proposal until February 7, 2019, when it received an email from Association president Alan Rommes stating, "[y]es we did receive the information regarding a potential budget a few months ago but no action was taken." Mr. Rommes further stated that "[t]he information provided is in a different format than normally provided. The information is more detailed, which is good. . . We are going to need to have a discussion once we gather all the questions and concerns."

The evidence and testimony shows the Developer received a response from the Association on the proposed budget with a list of questions and comments from the board on March 13, 2019. This communication did not include an approval, but neither was it clearly marked a rejection. The Developer responded the following day to the Association's March 13, 2019 inquiries with a six-page letter to the Association. An email introduced into evidence from Mr. Rommes to the board dated March 30, 2019 asked the board to review the budget and noted the Developer's efforts to answer Mr. Rommes's

questions. As a result, the Developer contends the time period for the Association to act came and went without approval or rejection of the Developer's 2019 proposed budget.

Notwithstanding this status, the parties continued talking and after several conversations determined there remained three disputed categories of charges: management company, front desk, and website expenses. With this in mind, the parties agreed to have the Association pay in full the non-disputed items and defer the other payments until a either payment plan was agreed upon or resolution was reached as to the disputed items. However, Association Treasurer Noel Thomas sent the developer a personal email on May 10th stating:

> As for increasing dues to cover the budget submitted it will be almost impossible for the board to get approved. (sic) As you know there is a group of owners who have not had use of their units for two years. The Developer was closed for five months and again had limited use of their units. Therefore, they are extremely reluctant to approve any increase in the budget. Because of the refusal of the members to approve an increase the board's only option may be mediation. If the mediation comes out in your favor the members will have to pay the increase.

At some point during 2019, the Developer threatened to cut off access to the areas set forth in the Easement Agreement unless progress (and payments) were made. Suspension of access did not occur, however, as the Developer and the Association entered into a Forbearance Agreement where the Developer agreed to not terminate access and the Association agreed to pay a monthly amount. Not all payments due under the Forbearance Agreement were made Developer contends those payments that were made were made late. The Developer's records show that the Association failed to pay

$361,580.00 out of $824,210.00 due under the Forbearance Agreement. Based on the foregoing, the Arbitrator makes the following

II. Conclusions of Law

A good deal of the disagreement between the parties deals with interpretation of contracts and documents between the parties, and several rules of construction are typically used to interpret contracts. Foremost among these is that an unambiguous and clear contract must be interpreted according to its plain meaning. *Washington Nat'l Ins. v. Ruderman*, 117 So. 3d 943, 948 (Fla. 2013).

Questions of waiver and modification of contract also appear in the proceedings. "'Waiver is the intentional or voluntary relinquishment of a known right or conduct which warrants an inference of the relinquishment of a known right.'" *Aberdeen Golf & Country Club v. Bliss Constr., Inc.*, 932 So.2d 235, 244 (Fla. 4th DCA 2005) (citation omitted). Likewise, parties to a contract can modify the terms of the contract by their subsequent conduct, and such subsequent conduct may be considered a means of interpreting the contract. *St. Joe Corp. v. McIver*, 875 So. 2d 375, 382 (Fla. 2004).

Easements granted by contract are also governed by contract principles. *American Quick Sign, Inc. v. Reinhardt*, 899 So. 2d 461, 465 (Fla. 5th DCA 2005). So it follows that resort to other rules of construction is not necessary when the language of an easement is clear, concise, and unambiguous. *Id.* If the scope of the easement cannot be determined from the plain language of the easement, then "the legal extent of the right must be ascertained from the intention of the parties, in light of the surrounding

circumstances, at the time the easement right was created." *Walters v. McCall*, 450 So. 2d 1139, 1142 (Fla. 1st DCA 1984). And under general law, an easement holder may do whatever is reasonably necessary in order to fully enjoy the easement. *Florida Power Corp. v. Silver Lake Homeowners Ass'n*, 727 So. 2d 1149, 1150 (Fla. 5th DCA 1999).

Both parties have requested equitable relief in addition to legal relief. Florida law is clear that an equitable theory of relief cannot be pursued if an express contract exists. *Ocean Communications v. Bubeck*, 956 So. 2d 1222, 1225 (Fla. 4th DCA 2007). Florida law is also clear that implied duties of good faith and fair dealing only exist with regard to express contractual conditions and cannot be used to override the express terms of contracts. *Insurance Concepts and Design, Inc. v. Healthplan Services, Inc.*, 785 So. 2d 1232, 1234-35 (Fla. 4th DCA 2001).

A final concept to discuss is that of reasonableness in contract interpretation and performance. All provisions of a contract must be construed in conjunction with one another so as to give reasonable meaning and effect to all provisions. *Aucilla Area Solid Waste Admin. v. Madison Cty.*, 890 So. 2d 415, 416-17 (Fla. 1st DCA 2004) (citation omitted).

III. Final Award

While the parties disagree on a good many issues, there is one issue on which there is no disagreement and on which the substantial, competent evidence is uncontroverted: the failure to pay monies due under the Forbearance Agreement. Simply put, the Association agreed to make certain payments under the Forbearance Agreement

and failed to make those payments without justification for the failed payments. Accordingly, an award is being entered for the amounts due.

A good amount of dispute, however, exists between the parties on what constitutes the "main lobby" of the Property as set forth in Section 9 of the Easement Agreement. Webster's defines a "lobby" as "a corridor or hall connected with a larger room or series of rooms and used as a passageway or waiting room such as . . . a large hall serving as a foyer (as of a hotel or theater)."

The evidence at the Final Hearing indicated there is one large hall when one enters the Property which contains a waiting area and a check-in desk, joined by a corridor that leads to various other rooms and areas of the Property. In other words, this area serves as a foyer for the Property and operates as a "main lobby." Under the clear dictates of the Easement Agreement, only expenses for the "maintenance, management, repair and operation of the main lobby" can be charged to the Association. Developer failed to prove how many of the charges attributed to the "main lobby" could be considered reasonable charges for maintenance, management, and repair. For example, a website does not fall into these categories. And while expenses for a maintaining a front desk or for the Developer's management company might fall into this category, no clear evidence was adduced that Developer properly apportioned a reasonable cost of front desk services of management to the main lobby as opposed to the portions of running a large, complex hotel and mixed-use resort.

A good deal of the Final Hearing was also spent on the issue of the approval – or more appropriately - the non-approval of the budget. As recounted above, the Developer contends it delivered the proposed budget in accordance with the Easement and Maintenance Agreement and the Settlement Agreement and that the Association failed to approve or reject the delivered budget within thirty days.

As a result, contends the Developer, the budget was approved without objection. For its part, the Association contends what was delivered was an incomplete budget that required further details and explanation, which further details and explanation were not timely provided nor fully explained.

The evidence was uncontroverted, however, that the thirty-day deadline had been waived in the past by both parties and that both parties had acted in accordance with this past waiver. Admittedly, the Easement and Maintenance Agreement contains a non-waiver provision at paragraph 20, but Florida law is clear that subsequent conduct by parties can modify the terms of a contract. Since the evidence was clear that the thirty-day deadline requirement had been waived in the past by the parties, the past conduct of the parties created a modification of and waived the thirty-day deadline for the proposed 2019 budget. That is to say, this waiver is based on the facts and circumstances in this case for this particular budget only and does not mean the 30-day deadline is removed for future budgets. The Arbitrator makes no decision as to what would constitute a waiver in the future.

Nor does waiver of the budget process for 2019 excuse the Association from payment for past, present, and future expenses under Section 9(d) of the Easement Agreement, i.e., those expenses that are reasonably attributable to management, repair and operation of the areas covered by the Easement Agreement. The evidence at Final Hearing demonstrated that the website, management, and front desk expenses in the 2019 budget did not meet this standard. The Arbitrator renders no decision whether what level of better, more direct attribution to this standard for future expenses might.

Exercise of the easement rights themselves has also been problematic in this case. The Developer contends it can restrict use of the Retained Areas through key cards and the implementation of rules. On this point, it is correct but it may restrict only so long as the restrictions are reasonable. For example, Developer can require members of the Association and their guests to use key cards to access and enjoy certain non-public areas of the Retained Areas such as the pools. And while the Developer cannot impose a charge for providing one set of key cards to a member of the Association, it is correct that it can impose an administrative charge for providing multiple sets of key cards. And while the Developer is correct that a substantial failure to pay assessments can create a loss of the rights to use the non-public common elements, such substantial failure to pay assessments did not occur in this case.

A dispute also arose over the reserves belonging to the Association. Specifically, the Association contends it – and not the Developer – should be able to control its own reserves. While the Association is generally correct that a condominium association is

entitled to control its own reserves, the inescapable conclusion from documents in this case (e.g., the Settlement Agreement speaks of the Developer holding the reserves) and the prior course of conduct of the parties is that the Association has agreed to allow the Developer to hold and control the reserves. But the Association is correct that the Developer, by arguing for the right to and actually holding the reserves, holds those funds in trust for the Association and that the party or persons holding those funds holds those funds in a fiduciary capacity for the Association and its members.

IV. Conclusion

Based on the foregoing, the following is ordered and adjudged on the following counts pled by the Developer.

Developer's Count I: Breach of Easement Agreement

Due to the past modification of the thirty-day requirement under the Easement Agreement, there has been no waiver of the right to object to the proposed budget. However, those sums due under the Forbearance Agreement totaling $361,580.00, together with prejudgment interest from the date of demand for those funds, are hereby awarded to Developer. Developer has not proven, however, approval of the 2019 budget proposal it delivered and thus and pursuant to the instruments, the parties are ordered to operate under the last operative budget. And again pursuant to the instruments between the parties, the Developer may increase the proposed budget by fifteen percent if it chooses to do so.

Developer's Count II: Breach of Easement Agreement (Alternative)

No relief is granted under this count as the claim was pled in the alternative to Count I and relief was granted under Count I.

Developer's Count III: Unjust Enrichment

Developer has proven the existence of express contracts between the parties, including the Easement Agreement and the Forbearance Agreement, and has received benefits under same. Accordingly, no award may be made under unjust enrichment as express contracts exist for the same claims sought through the claim pled for unjust enrichment.

Developer's Count IV: Declaratory Relief

Developer seeks declaratory relief in its Count IV that the Association has control over the key card system, that the Developer has no obligation to provide services for the key card system, and that the Developer is not obligated to provide telecommunications systems to the Association. The Developer is correct on some points but not others.

With regard to the key card system, the Developer has instituted a system to control access to some areas covered by the by the Easement Agreement by means of a key card system. In accordance with Florida law, Developer must give members of the Association, their guests, and their business invitees a method to access those areas without cost and without significant inconvenience. This access must be provided in a reasonable fashion.

But reasonability travels both ways, and the Developer is correct that it does not have to serve as a clearinghouse for multiple copies of the key cards. Having delivered one set (two key cards per year is presumably a reasonable number of cards to provide each unit owner), the Developer does not have to provide multiple sets of key cards without cost to members of the Association, their guests or business invitees. No evidence was adduced as to what is a reasonable cost for replacing lost or damaged key cards, and accordingly, the Arbitrator can make no finding on this point. Likewise and barring a contractual agreement between the parties to do so, the Developer does not have to provide front desk services in order to deliver key cards at a moment's notice to owners and guests who enjoy the Property outside of Developer's rental program

The Developer also contends that it does not have to provide telecommunications services (including internet and cable television) to the Association under the applicable agreements. The Developer is correct it is under no obligation to do so, but it cannot prohibit the Association from entering into its own telecommunications contracts. Section 5 of the Easement Agreement provides that the Developer only maintains a right of first refusal to install any telecommunications services upon the same terms and conditions as the Association wishes to enter into. If the Developer chooses to not install or maintain an existing telecommunications system, then the Association may enter into its own contract and the Developer's only right will be a right of first refusal. And having failed to install its own system exercised or its right of first refusal, the Developer may not impose restrictions on the ability of the Association to install its own telecommunications system.

The Association likewise raised certain claims in its Amended Counterclaims. Based on the forgoing, the following is ordered and adjudged on the following counts pled by the Association.

Respondent's Count I: Declaratory Relief

The Association is correct that, generally speaking, it is not responsible for payment of maintenance, repair, management, or operation expenses other than those set forth in Sections 8 and 9(d) of the Easement Agreement. For example and barring the parties coming to agreement on payment of certain services, the Association is not responsible for expenses for front desk staff, on-site or off-site manager, hotel consultant, and marketing or advertising efforts at the Property.

Likewise and barring the parties coming to agreement on payment for certain services, the Developer is not responsible for staffing the front desk for the benefit of the Association (including its members' guests and business invitees), checking in guests, or assisting members of the Association, their guests, or their business invitees. And barring the parties coming to agreement on payment for on-site services such as replacing lost or damaged key cards, the Developer has no obligation to assist members of the Association with lost or damaged key cards. Likewise, the Developer has no obligation to provide on-site office space so that the Association may implement and operate the key card system itself. Finally with regard to Count I, the Association has not proven the Developer breached any fiduciary duties.

Respondent's Count II – Timing of Association's Payment Obligations

As reflected above and due to past custom and practices, there was no approval of the Developer's proposed budget by failure to object within thirty days.

Respondent's Count III – Breach of Fiduciary Duty

Other than the constructive trust and fiduciary relationship that has been created as the result of the Developer holding reserves belonging to the Association, the Association failed to prove the breach of a fiduciary duty under Count III.

Respondent's Count IV – Interference with Easement Rights

As set forth above, the Association has an adequate legal remedy and is not entitled to the equitable relief claimed in this count, including without limitation, the claimed requirement for the Developer to provide on-site office or other space for the Association to perform its duties.

Respondent's Count V – Breach of the Easement Agreement

To the extent the Association claims relief arising from an implied duty of cooperation as part of the implied duty of good faith and fair dealing, the Association has failed to prove a general "duty of cooperation" exists with regard to the agreements between the parties. The parties are bound to the express terms of the agreements between them. However and with regard to insurance issues, the Developer is ordered to designate an insurance trustee pursuant to Section 13(d) of the Easement Agreement, and to follow the dictates of Section 13(d) in implementing its provisions.

Respondent's Count VI – Equitable Accounting

A good deal of the financial information sought by the Association in Count VI was produced and delivered during the proceedings, thus the Association's claim for an equitable accounting is moot.

Respondent's Count VII – Reformation

To the extent not encompassed in the Settlement Agreement and Release of All Claims dated October 11, 2012, the Association failed to prove its claim for reformation.

Respondent's Count VIII – Breach of the 2012 Settlement Disclosure Obligations

The Association is awarded an accounting with regard to the claimed financial benefits arising from the hurricane-related insurance claim deductible and determination of the restaurant's "net profits." With regard to determination of the net profits of the restaurant, the parties are instructed that the term "net profits" necessarily requires the application of E.B.I.T.D.A. analysis to reach a final determination whether the restaurant enjoyed a net profit or net loss.

Otherwise, a good deal of the financial information sought by the Association in Count VI was produced and delivered during the proceedings and thus the Association's other claims for Breach of the 2012 Settlement Disclosure Obligations are moot.

Respondent's Count IX – Breach of 2018 Settlement Disclosure Obligations

With regard to the Association's claim for financial information under Count IX, the Developer shall provide sufficient financial information so that the Association may audit

the income and expenses of the restaurant, the health spa, special events, rents from vendors and all food and beverage operations.

Based on the foregoing, the Arbitrator makes the following

Determination of Prevailing Party for Attorney's Fees Purposes and AAA Fees

The significant issues in this case concerned how expenses were to be allocated between the Developer and the Association, and upon review, Claimant and Respondent each won some issues and lost some issues such that neither party was the prevailing party. Accordingly, neither party is the substantially prevailing party on the significant issues in the case and attorney's fees are not awardable to either party. *See Miller v. Jacobs & Goodman, P.A.*, 820 So. 2d 438 (Fla. 5th DCA 2002) (attorney's fees are not awardable when neither contractual party prevailed).

Likewise, the administrative fees of the American Arbitration Association totaling $28,500.00 and the Arbitrator's compensation and expenses totaling $61,481.93 shall be borne equally. Therefore, Claimant shall reimburse Respondent an amount of $1,924.99, representing those fees previously incurred by Respondent.

IV. Conclusion

This award is in full settlement of all claims and counterclaims submitted to this arbitration. All claims not expressly granted or otherwise expressly addressed herein are denied.

I, Manuel Farach, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this Final Award.

Dated: July 9, 2020

MANUEL FARACH, ARBITRATOR

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