MEMORANDUM

Date: February 28, 2012

TO: Town Commission

FROM: Dave Bullock, Town Manager

SUBJECT: Public Hearing for Status of The Colony Redevelopment Efforts per Resolution 2011-17

On May 2, 2011 the Town Commission passed Resolution 2011-17 granting an extension of time, until December 31, 2012, to redevelop or use the nonconforming uses and structures at the Colony without being deemed to have been abandoned in accordance with Section 158 (B)(8)(a). A copy of Resolution 2011-17 is attached.

A provision of the Resolution contained within Section 3, is to hold a public hearing at the Town Commission's March 5, 2012 Regular Meeting to examine and determine the status of the efforts to redevelop or reopen the Colony.

Additional attachments consist of copies of correspondence to the owners of lands within the Colony regarding the scheduled March 5, 2012 Public Hearing, as well as responses received from the parties. Responses from the parties are attached in the order in which they were received.

Please don't hesitate to contact me if you have any questions or require additional information.

RESOLUTION 2011-17

A RESOLUTION OF THE TOWN OF LONGBOAT KEY, FLORIDA, GRANTING THE COLONY BEACH AND TENNIS CLUB ASSOCIATION, INC., AN EXTENSION OF TIME TO COMPLY WITH THE REGULATIONS GOVERNING NONCONFORMING USES AND STRUCTURES FOR THE COLONY BEACH AND TENNIS CLUB, LOCATED AT 1620 GULF OF MEXICO DRIVE, ALLOWING THE ASSOCIATION ADDITIONAL TIME TO REOPEN THE TOURISM RESORT DEVELOPMENT IN ACCORDANCE WITH SECTION 158.138 (B)(8)(b) OF THE TOWN OF LONGBOAT KEY ZONING CODE; PROVIDING FOR SERVERABILITY; PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, on November 21, 1972, the Town of Longboat Key ("the Town") at a special meeting of the Town Commission approved the plot plan for the development of a 237 unit tourism resort hotel ("the Colony") on the land that consists of approximately 17.3 acres of land, located at 1620 Gulf of Mexico Drive; and,

WHEREAS, the zoning of the subject land at the time of the plot plan approval was H-2, which allowed for a maximum density of 14 units per acre of land; and,

WHEREAS, the Town issued a building permit for the construction of the tourism resort hotel on February 20, 1973; and,

WHEREAS, the Colony Beach and Tennis Club Association, Inc. ("Association") is a not-for-profit corporation formed in 1973; and,

WHEREAS, 232 of the 237 units were entered into and subject to a Certificate of Agreement of Limited Partnership dated December 27, 1973; and

WHEREAS, the Limited Partnership filed for Chapter 11 under Federal bankruptcy codes and was converted on August 9, 2010, to Chapter 7 liquidation; and,

WHEREAS, the Colony has been closed since August 15, 2010; and,

WHEREAS, the tourism units were deemed to be no longer physically suitable for occupancy; and,

WHEREAS, the Association Board and representatives from the Town met on October 7, 2010, to discuss the future of the tourism resort development; and,

WHEREAS, it was determined that Section 158.138 (B)(8)(a) of the Town's Zoning Code regarding the abandonment of a nonconforming use or structure applied to the Colony, with the period of one year ending on August 15, 2011; and,

WHEREAS, the Association Board of Directors has diligently worked with the Town in good faith for the past six months with the goal of reopening the Colony prior to August 15, 2011; and,

WHEREAS, the Association has received a number of professional proposals to redevelop the site or revive the existing development; and,

WHEREAS, the Association believes the tourism resort cannot be redeveloped or reopened in a manner fitting to the resort prior to August 15, 2011; and,

WHEREAS, on April 14, 2011, the Association submitted a request for an extension of time to comply with the regulations governing nonconforming uses and structures for the Colony Beach and Tennis Club, located at 1620 Gulf of Mexico Drive; and,

WHEREAS, all property owners within the Colony Beach and Tennis Resort have joined in this application; and

WHEREAS, the request for the extension is consistent with the provisions of the zoning code Section 158.138 (B)(8)(b), which allows the Town Commission to grant an extension of the period of time a nonconforming use or structure can remain unused or vacant if the nonuse or vacancy is caused by legal restraints upon the owner or lessee; and,

WHEREAS, the current underlying zoning of the subject property is Tourist Resort Commercial (T-6), which allows the development of a maximum of six (6) units per acre; and,

WHEREAS, under single control or ownership abandonment of the nonconforming use or structure would result in the loss of tourism units that could be redeveloped or reopened in the future to approximately 103 units, a loss of approximately 134 units, based on 17.3 acres of land; and,

WHEREAS, the Town Commission has determined that multiple legal constraints have prohibited the timely redevelopment or reopening of the Colony, and deems it in the public interest to extend the one year abandonment period to December 31, 2012, to provide the Association time to redevelop or reopen the Colony.

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COMMISSION OF THE TOWN OF LONGBOAT KEY, FLORIDA, THAT:

SECTION 1. The above Whereas clauses are true and correct and are hereby ratified and confirmed.

SECTION 2. The Town Commission pursuant to 158.138 (B)(8)(b) of the Town's Zoning Code hereby grants the extension of the time until December 31, 2012, to redevelop or use the nonconforming uses and structures at the Colony without being deemed to have been abandoned in accordance with Section 158 (B)(8)(a).

SECTION 3. In order to evaluate progress made and in recognition that an additional extension of time may be requested, a hearing shall be held at the regular meeting of the Town Commission in March 2012, or at a time mutually agreed upon to

examine and determine the status of the efforts to redevelop or reopen the Colony. Any additional extension must be acted upon prior to December 31, 2012.

SECTION 4. In accordance with the terms of this Resolution, the subject property may be redeveloped or maintained at the existing density of 237 tourism units as that term is defined by the zoning code, as may be amended.

SECTION 5. Effective Date. This Resolution shall become effective immediately upon adoption.

Passed by the Town Commission of the Town of Longboat Key on the 2nd day of May, 2011.

James L. Brown, Mayor

ATTEST:

Trish Granger, Town Clerk

Susan Phillips

From: Dave Bullock
Sent: Friday, February 24, 2012 11:27 AM
To: 'jyablon@nycap.rr.com'; 'dhemke@carltonfields.com'; 'murfklauber@gmail.com'; 'cbartlett@icardmerrill.com'; 'wrobertson@kirkpinkerton.com'; 'nsivyer@sbwlegal.com'; 'dsiegal@assafandsiegal.com'
Cc: Susan Phillips; David Persson; Dave Bullock
Subject: March 5, 2012 Regular Meeting - Presentation Regarding Update on The Colony Redevelopment

Good morning all,

On February 9, 2012 I sent the attached letter to the owners of lands within The Colony regarding the March 5 presentation to the Town Commission per Section 3 of Resolution 2011-17.

TM to Colony Owners re Present...

This e-mail is sent as a follow-up reminder that your presentation documentation needs to be submitted no later than Tuesday, February 28, 2012. I also reiterate that a coordinated presentation is highly recommended.

Thank you,
Dave Bullock
Town Manager

TOWN OF
LONGBOAT KEY
Incorporated November 14, 1955

Town Hall
501 Bay Isles Road
Longboat Key, Florida 34228-3196
(941) 316-1999
SUNCOM **516-2760**
Fax **(941) 316-1656**
www.longboatkey.org

February 9, 2012

Colony Beach & Tennis Club Association, Inc.
c/o Jay R. Yablon, Esquire
President
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jyablon@nycap.rr.com

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Carlton Fields, PA
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Tampa, Florida 33601-3239
Attorney for Colony Beach & Tennis Club Association, Inc.
dhemke@carltonfields.com

Dr. Murray J. Klauber
Registered Agent for Colony Beach and Tennis Club, Inc.
and Colony Beach, Inc.
1620 Gulf of Mexico Drive
Longboat Key, Florida 34228

Charles J. Bartlett, Esquire
Icard Merrill Cullis, et al.
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Attorney for Colony Beach and Tennis Club, Inc.
and Colony Beach, Inc.
cbartlett@icardmerrill.com

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davidsiegel@the-beach.net

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Breakpointe, LLC
c/o W. Andrew Adams, Manager
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Murfreesboro, TN 37128

Neal A. Sivyer, Esquire
Sivyer, Barlow, Watson, P.A.
401 E. Jackson Street, Suite 2225
Tampa, Florida 33602-5233
Attorney for Breakpointe, LLC
nsivyer@sbwlegal.com

Dear Owners,

Last Spring, the Colony Beach and Tennis Club Association, Inc., filed an application to prevent abandonment of the uses and structures at the Colony under the requirements of the Town's Zoning Code. The owners of lands within the Colony joined in the request which was granted by the Town Commission by passage of Resolution 2011-17 at the May 2, 2011 Regular Meeting. I have attached a copy of the Resolution for your convenience.

Section 3 of that Resolution provided for a public hearing to evaluate progress that had been made since passage of the resolution and in recognition that an additional extension may be requested prior to its expiration on December 31, 2012. This public hearing will take place on Monday, March 5, 2012, at the Town Commission Regular Meeting beginning at 7:00 PM.

It would be very helpful to have a coordinated presentation by the Colony property owners at this hearing. To that end I ask that you provide whatever documentation that you want to present to the Commission no later than Tuesday, February 28, 2012, so that it may be included within the Commission agenda materials. I also highly recommend a coordinated presentation at the hearing itself. Presentations are generally limited to 20 minutes. Please let me know if you collectively require more time.

Thank you for your efforts and I look forward to your presentation.

Sincerely,

Dave Bullock,
Town Manager

cc:

Morgan R. Bentley, Esquire
Bentley & Bruning, P.A.
783 S. Orange Avenue, Suite 220
Sarasota, Florida 34236-4702

Mr. William Maloney
200 – 2nd Avenue South #463
St. Petersburg, Florida 33701
(Bankruptcy Trustee for Colony Beach & Tennis Club)

Jordi Guso, Esquire
Berger Singerman, LLP
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Miami, Florida 33131-3453
(Bankruptcy attorney for Colony Beach & Tennis Club)

Roberta A. Colton, Esquire
Trenam Kemker, P.A.
Post Office Box 1102
Tampa, Florida 33601-1102
(Bankruptcy attorney for Colony Beach & Tennis Club)

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Passed by the Town Commission of the Town of Longboat Key on the 2nd day of May, 2011.

James L. Brown, Mayor

ATTEST:

Trish Granger, Town Clerk

End of Agenda Item 4a

ICARD MERRILL

ATTORNEYS & COUNSELORS

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February 27, 2012

(Via telecopy #316-1656)
Town of Longboat Key
Town Hall
501 Bay Isles Road
Longboat Key, Florida 34228-3196
Attn: Dave Bullock, Town Manager

Re: Colony Beach & Tennis Club

Dear Mr. Bullock:

This letter responds to yours of February 9, 2012 concerning The Colony Beach & Tennis Club property. I represent Dr. Murray J. Klauber and various entities with which he is affiliated including Colony Beach & Tennis Club, Inc. and Colony Beach, Inc. I plan to attend the Town meeting on March 5, 2012.

Pursuant to the request contained in your letter, I am enclosing herewith a copy of the Order entered by Judge Merryday on July 27, 2011 in the pending bankruptcy case involving the Association. I will make reference to various portions of the Order in my presentation to the Town Commission.

Very truly yours,

CHARLES J. BARTLETT, ESQ.
For the Firm

Dictated but not read.
Signed in his absence to
avoid delay in delivery.

CJB/tkh
Enclosure

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re

COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC.,

_____/

COLONY BEACH & TENNIS CLUB, Ltd.,
RESORTS MANAGEMENT, INC., and
COLONY BEACH & TENNIS CLUB, INC.,

Appellants,

v. CASE NO.: 8:09-cv-2560-T-23

COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC.,

Appellee.
_____/

ORDER

Colony Beach & Tennis Club, Ltd., ("the Partnership") appeals (Doc. 16) a November 9, 2009, bankruptcy court judgment and order. (Docs. 1-4, 1-5) The Colony Beach & Tennis Club Association, Inc., ("the Association") responds, (Doc. 21) and the Partnership replies. (Doc. 24) The dominant issue on appeal is whether the documents governing the Colony Beach & Tennis Club ("the Colony") require the Association (through assessment of the Association's members) or the Partnership (through the revenue of the Colony Beach & Tennis Club's resort hotel ("the hotel")) to pay for repairs to the common elements of the Colony.

BACKGROUND

In 1973, Dr. Murray Klauber founded the Colony, a condominium complex and resort hotel in Sarasota, Florida. Each purchaser of a condominium unit (a "unit owner") at the Colony is both a member of the Association and a limited partner in the Partnership. Dr. Klauber is the general partner of the Partnership, the general partner controls the Partnership, and the general partner and the Partnership control and operate the hotel at the Colony. Katherine Moulton is the general manager of the hotel.

A Declaration of Condominium ("the Declaration") governs the Colony and the Association. The Declaration states that "[t]he maintenance and operation of the common elements [of the Colony] . . . shall be the responsibility of the Association as a common expense." (Ex. 13 Art. 6.5) In addition, Article 6 of the Association's By-Laws requires the Association to establish a reserve for deferred maintenance of the common elements and empowers the Association to assess each unit owner (as an Association member). A Limited Partnership Agreement ("the Partnership Agreement") governs the Partnership. The Partnership Agreement grants each unit owner (as a limited partner) thirty days of rent-free use of that owner's unit annually and authorizes the Partnership to operate each unit as a hotel accommodation during the balance of the year. (Ex. 22 Art. 10) The Partnership Agreement grants to each limited partner an aliquot portion of a "preferential amount" – the first $1.398 million – of the hotel's annual profit, plus half the profit above the preferential amount (with the other half granted to the general partner). (Ex. 22 Art. 11) The Partnership Agreement immunizes each limited partner

from liability for any loss from the hotel's operation. (Ex. 22 Art. 7.5) A 1984 Agreement, central to the parties' dispute, simplifies the exchange of money between the Association and the Partnership. The 1984 Agreement permits the Partnership to commit that portion of the hotel's profit that is owed to the limited partners to pay directly the Association's bill for repair to the common elements. (Ex. 27 ¶ 2)

In December, 2004, the Association's Board of Directors ("the Association Board" or "the Board") discussed the common elements' urgent need for extensive repair. (Sal Zizza, the President of the Association at the time, testified that the common elements' dilapidation was obvious long before this discussion). See generally (Ex. 100) The Board hired an engineering firm to estimate the cost of repair, and the firm estimated $10 million in repair and renovation. The Partnership urged the Association to pay for necessary repair, but in December, 2005, the unit owners voted to reject a $10.6 million "emergency assessment" for repair and improvement of the common elements. In December, 2006, the unit owners rejected a second proposed assessment and elected three new Board members. The new Board audited the Partnership and ceased re-paying the Partnership for many operational expenses that are the Association's responsibility under the Declaration.

In April, 2007, the Partnership sued the Association in state court. Asserting state law claims for the Association's breach of the governing documents, the Partnership sought (1) damages, (2) a determination that the governing documents compel the Association to assess the unit owners both for $2.1 million that the Partnership spent on the Association's behalf and for the money to repair the common elements, and (3) an

injunction compelling the Association to assess the unit owners. The Association alleged that the 1984 Agreement is ultra vires (and that the Partnership in any event breached the 1984 Agreement) and alleged both state law counter-claims against the Partnership and third-party claims against the general partner and Colony Beach & Tennis Club, Inc. The Association sought damages and an equitable accounting of the Partnership's operation of the hotel.

Eighteen months after the Partnership initiated the state court action and shortly before the state court trial, the Association claimed bankruptcy. The Partnership filed the state law claims in the bankruptcy proceeding but also moved for remand or for abstention on the ground that the state law claims are not a "core" proceeding within a bankruptcy court's mandatory jurisdiction.

The bankruptcy court denied remand and held a bench trial, which occurred in May and June, 2009. At a July 31, 2009, hearing and in a November 9, 2009, order the bankruptcy court disallowed the Partnership's claims, found the 1984 Agreement ultra vires, found the Partnership's damage calculation prohibitively speculative, denied the Partnership relief, and declared "moot" the Association's other counter-claims and third-party claims.

The Partnership argues in this appeal that each claim is a "non-core" proceeding, that the bankruptcy court incorrectly interpreted the governing documents, that the Association's obligation to pay for repair of the common elements persists despite the two votes to reject an assessment, that the 1984 Agreement is valid, that the

Partnership's damage calculation is sound, and that the Association's claims are not moot.

DISCUSSION

1. Core and Non-Core Proceedings

"[B]ankruptcy courts are not Article III courts and therefore may not exercise the judicial power of the United States." In re Parklane/Atlanta Joint Venture, 927 F.2d 532, 538 (11th Cir. 1991). Consequently, a bankruptcy court may not exercise jurisdiction over "all civil proceedings . . . related to cases under [the bankruptcy code]," because although "the restructuring of debtor-creditor relations . . . is at the core of the federal bankruptcy power, the adjudication of state-created private rights, such as the right to recover contract damages . . . . obviously is not." Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (plurality opinion).[1]

"In order to avoid the constitutional problems discussed by the Supreme Court in Northern Pipeline . . , Congress created [in 28 U.S.C. § 157] the distinction between core and non-core proceedings." Control Center, LLC v. Lauer, 288 B.R. 269, 274 (M.D. Fla. 2002) (Conway, J.). A bankruptcy court may issue a final order on a core

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[1] See also, Northern Pipeline, 458 U.S. at 86 n.39 (plurality opinion) ("Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level") and at 91 (Rehnquist, J., concurring) ("[under the unconstitutional portion of the Bankruptcy Reform Act of 1978, 28 U.S.C. § 1471,] [a]ll matters of fact and law . . . are to be resolved by the bankruptcy court in the first instance, with only traditional appellate review by Art. III courts apparently contemplated. Acting in this manner the bankruptcy court is not [merely] an "adjunct" of either the district court or the court of appeals."); Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 852-53 (1986) (distinguishing proper statutory empowerment of agency tribunal to adjudicate "a particularized area of law" (a common law counter-claim by customers in a CFTC reparation proceeding against a broker) from "the jurisdiction of the bankruptcy courts found unconstitutional in Northern Pipeline[, which] extended to broadly 'all civil proceedings arising under title 11 or arising in or *related* to cases under title 11.'") (emphasis in original) (quoting Northern Pipeline, 458 U.S. at 85).

proceeding, which a district court reviews *de novo* as to conclusions of law and for clear error as to findings of fact. 28 U.S.C. § 157(b); Fed.R.Bankr.P. 8013. A bankruptcy court may only propose findings of fact and conclusions of law on a non-core proceeding, with the district court entering a final order "after reviewing *de novo* those matters to which any party . . . object[s]." 28 U.S.C. § 157(c)(1); Fed.R.Bankr.P. 9033.

Ruling from the bench[2] that each Partnership claim is a core proceeding, the bankruptcy court stated, "Claims were asserted against the [Association] . . . in the state court action – claims were made against the Association by the very filing of the lawsuit . . . . and that is inherently a core matter, the adjudication of those claims." 8:08-ap-567-KRM, Doc. 14 at 83. Elaborating on behalf of the bankruptcy court, the Association asserts that each claim qualifies as a core proceeding because Section 157 states that a core proceeding includes "allowance or disallowance of claims against the estate," "counter[-]claims by the estate against persons filing claims against the estate," and "other proceedings affecting . . . the adjustment of the debtor-creditor . . . relationship." 28 U.S.C. § 157(b)(2).

The Partnership correctly asserts that the bankruptcy court erred. Section 157 "conform[s] the bankruptcy statutes to the dictates of [Northern Pipeline] . . , [which] was concerned about . . . the plenary adjudication by bankruptcy courts of proceedings related only peripherally to an adjudication of bankruptcy." In re Toledo, 170 F.3d 1340,

[2] The bankruptcy court issued a written order that states "for the reasons stated and recorded in open court, which shall constitute the decision of the Court , . . ." Case No: 8:08-ap-567-KRM (Doc. 12 at 2).

1349 (11th Cir. 1999) (quotations omitted). Conforming Section 157 to Northern Pipeline, the Eleventh Circuit concludes:

> If [a] proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding; it may be *related* to the bankruptcy because of its potential effect, but under section 157(c)(1) it is a . . . non-core proceeding.

170 F.3d at 1348 (emphasis in original) (quoting In re Wood, 825 F.2d 90, 97 (5th Cir. 1987)). The bankruptcy court acknowledged both that the Partnership initiated the claims in state court and that each claim "could exist outside of bankruptcy." Further, as in Northern Pipeline, each claim, including each Association counter-claim, presents a matter – the condominium form of real estate ownership and relations among the participants in that form of ownership – singularly and emphatically, preeminently and pervasively, governed by Florida law. To the governance of the condominium form of real estate ownership and those participating, the federal bankruptcy law is an awkward and unwelcome intruder. Each claim is a non-core proceeding. Accord In re Toledo, 170 F.3d at 1350 (finding a proceeding non-core that "sought to vindicate state-created common-law rights but did not utilize any process specially established by the Bankruptcy Code"); In re Happy Hocker Pawn Shop, Inc., 212 Fed.Appx. 811 (11th Cir. 2006) (holding that each state law claim was a non-core proceeding in part because no claim "invoke[d] a substantive right created by bankruptcy law" and each claim "could arise outside of bankruptcy law"); Lauer, 288 B.R. at 276-77 (finding the debtor's state law claim for money damages and for an injunction non-core proceedings because each was not "[a] matter[] concerning the administration of the estate" or a "proceeding[]

affecting . . . the adjustment of the debtor-creditor . . . relationship" under Section 157(b)(2)).

Article III confirms that each claim of the Partnership is a non-core proceeding, an affinity – however strong[3] – between a claim and a category of Section 157(b)(2) notwithstanding. If the Partnership's purely state law claims, asserted in state court, qualify as a core proceeding, "virtually any claim would entitle a bankruptcy court to enter final judgment," and "[Section] 157 would ignore the constitutional proscription limiting the jurisdiction of bankruptcy courts as set forth by the Supreme Court in Northern Pipeline." Lauer, 288 B.R. at 276 (quotation omitted). Because each claim is a non-core proceeding, the bankruptcy court's findings of fact and conclusions of law receive de novo review.

2. The Governing Documents

Under the documents governing the Association and the Partnership, the Association bears ultimate responsibility to pay for repair and maintenance of the Colony's common elements. The Declaration states, "the maintenance and operation of the common elements [of the Colony] shall be the responsibility of the Association as a common expense." (Ex. 13 Art. 6.5) The "common elements" includes "the condominium property not included in the units." (Ex. 13 Art. 3.12) Further, Article Six

[3] The Supreme Court recently acknowledged, in a manner that fully supports the result in this appeal, the tension between the categories of core proceeding in Section 157(b) and the requirements of Article III. Stern v. Marshall holds that the debtor's state law counter-claim for tortious interference is a core proceeding "under the plain text of Section 157(b)(2)(C)" (the same provision under which the Association asserts its counter-claims are core proceedings), but that Article III prohibits a bankruptcy court's entering final judgment on the counter-claim. 131 S.Ct. 2594 (2011) (Roberts, C.J.). In short, "[t]he Bankruptcy Court . . . lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." 131 S.Ct. at 2620.

requires the Association to "maintain, repair and replace at the Association's expense: . . . [a]ll portions of a Unit, except interior surfaces, contributing to the support of the Unit . . . ." (Ex. 13 Art. 6.2) Article Three of the Declaration delegates other "common expenses" to the Association in detail:

> 3.13 *Common Expenses.* The common expenses include:
>
> (a) Expenses of administration; expenses of maintenance, operation, repair or replacement of the common elements, and of the portions, if any, of Units to be maintained by the Association, including but not limited to:
>
> (i) Fire and other casualty and liability insurance . . . .
>
> . . . .
>
> (iii) Costs of water, operation and maintenance of sewage facilities, electricity and other utilities which are not metered to the individual Condominium Units.
>
> (iv) Labor, materials and supplies used in conjunction with the common elements.
>
> . . . .
>
> (vi) Damages to the Condominium property in excess of insurance coverage.
>
> (vii) Salary of a resident manager, his assistants and agents, and expenses only incurred in the management of the Condominium property.
>
> (viii) All other costs and expenses that may be duly incurred by the Association through its Board of Directors from time to time in operating, protecting, managing and conserving the Condominium property and in carrying out its duties and responsibilities as provided by the Condominium Act, this Declaration, the Articles of Incorporation or the Bylaws of the Association.
>
> . . . .
>
> (c) Expenses declared common expenses by provisions of this Declaration or the Bylaws.
>
> (d) Any valid charge against the Condominium as a whole.

(Ex. 13 Art. 3.13) (emphasis in original); see also (Ex. 13 Art. 9.2, 9.4) (declaring insurance premiums a common expense of the Association); (Ex. 13 Art. 10.3, 10.5) (declaring payment for repair after casualty the responsibility of the unit owners and the Association). The Declaration empowers the Association, pursuant to Florida's Condominium Act and the By-Laws of the Association, to assess a unit owner "for common expenses" and to impose a lien for a unit owner's unpaid assessment. (Ex. 13 Art. 7.1, 7.4)

Erroneously interpreting Article 7.2, the bankruptcy court concluded that "[Article] 7.2 of the Declaration relieves Unit Owners who have made their units available to the Partnership [for use by the hotel] from paying assessments." (Doc. 1-5 at 6) This formulation startles because Article 7.2 plainly relieves a unit owner from assessment "only to the extent that the Partnership makes such payments and assumes all other responsibilities of a unit owner in that regard."[4]

The bankruptcy court quoted also Article 6.3(a), which requires a unit owner to maintain "portions of his Unit" that are not the responsibility of the Association. Article 6.3 states that a unit owner need not maintain the unit "so long as . . . the Partnership is maintaining and repairing such unit." Article 6.3 is not germane both because the Partnership seeks money to repair only the common elements, which Article 6.3 does not address, and because Article 6.3, like Article 7.2, requires the unit owners to pay maintenance and repair not paid by the Partnership.

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[4] When ruling from the bench the bankruptcy judge stated that the "starting point of [the Partnership's] argument is rather appealing, [that the] Declaration of Condominium [] says that the Association is responsible for the maintenance, repair and replacement of the common elements." Case No. 8:08-ap-567-KRM (Doc. 101 at 12) The written order ignores the "only to the extent" clause without explaining the abrupt change from the statement at the hearing.

The Articles of Incorporation of the Association empower the Association to assess the unit owners for the financial responsibilities of the Association in the Declaration. (Ex. 14 Art. 3.2) The By-Laws of the Association require the Association Board to:

> adopt a budget for each calendar year that . . . include[s] the estimated funds required to defray the common expenses and to provide and maintain funds for . . . reserves [for maintenance that occurs "less frequently than annually," see Art. 6.1,] according to good accounting practices.

(Ex. 15 Art. 6.2) The bankruptcy court noted that "[l]ike the Declaration and the Articles, the By[-]laws contain an express provision that Unit Owners who have made their units available to the Partnership are expressly relieved from paying assessments." (Doc. 1-5 at 11) Again the bankruptcy court erroneously failed to enforce the limiting clause that relieves the unit owners only "to the extent" that the Partnership pays. (Ex. 15 Art. 6.5)

The Partnership Agreement grants the Partnership control of the hotel at the Colony and allows the Partnership to rent each unit eleven months a year. (Ex. 22 Art. 7, Art. 10) The bankruptcy court emphasized that the Partnership Agreement "makes clear that the Limited Partners are not subject to assessment and have no personal liability for the Partnership's debts." (Doc. 1-5 at 12, 33); see (Ex. 22 Art 8.1) However, only in the role of limited partner is a unit owner not subject to assessment. Each unit owner is both a limited partner and a member of the Association, (Ex. 22 Art. 6.1(d)), and the Association may assess a member. The Partnership concurs that a unit owner is not responsible, either as a limited partner or as a member of the

Association, for retirement of the Partnership's debt. In this action the Partnership seeks money, not for retirement of the Partnership's debt but for maintenance of the common elements of the Colony, a solemn, fundamental, and unalterable statutory duty of the Association and its members, the unit owners.

Ruling that the Association is not subject to the 1984 Agreement, the bankruptcy court nevertheless applied the 1984 Agreement in some instances, albeit inconsistently. Compare (Doc. 1-5 at 29) ("The Association's Governing Documents were not amended to incorporate the assessment mechanisms or any other terms or provisions of the 1984 Agreement") with (Doc. 1-5 at 36) (concluding that the 1984 Agreement requires a vote of the unit owners to assess for the cost of repair). The Partnership correctly asserts that the 1984 Agreement alters only the process by which the Association pays for repair of the common elements but preserves the Association's obligation to pay for repair to the common elements.

The preamble of the 1984 Agreement states in part:

> WHEREAS, the Association is responsible for payment of certain obligations pertaining to [the Colony], including the establishment of reserves therefore, all of which are described in the Declaration . . . (hereinafter together the "Obligations") including, without limitation, [] expenditures for repairs, maintenance and insurance of the Common Areas as described in the Declaration [and] expenditures for capital improvements . . . .

Before the 1984 Agreement, the Partnership distributed money from the hotel's profitable operation to each unit owner in the unit owner's capacity as a limited partner and, in turn, the Partnership sought money for repair of the common elements from each unit owner in the unit owner's capacity as a member of the Association. The 1984

Agreement – and a "Tenth Amendment," which merely implements the 1984 Agreement in the Partnership Agreement – removes the unnecessary payment from the Partnership to the Association of money that the Partnership will reclaim to satisfy the Association's obligation to pay for common element repair. (Trial transcript ("Tr.") 5/26/09 at 57-58). The parties agree that the 1984 Agreement relieves the Association from paying for repair of the common elements at least "to the extent cash is available to the Partnership" for the repair. (Ex. 27 ¶ 2); see also (Ex. 27, preamble). However, the bankruptcy court erroneously (and inexplicably) declared that, with the 1984 Agreement and the Tenth Amendment, "[t]he Partnership became directly responsible for payment of all . . . expenses relating to the common elements." (Doc. 1-5 at 32) The Association and the bankruptcy judge overlook the conspicuous and inescapable "solely to the extent cash is available" qualification that dramatically controls the meaning of the 1984 Agreement. Because of the qualification, the Partnership is free to pay for repair of the common elements solely with money otherwise payable to the unit owners in their capacity as limited partners. The 1984 Agreement and Tenth Amendment transfer initial, but not final, responsibility to the Partnership for such expenses.

The bankruptcy court erroneously concluded that the 1984 Agreement defines "obligations" "broadly . . . to include everything . . . that the Partnership would have had to pay in order to operate and maintain the Hotel." (Doc. 1-5 at 14) On the contrary, nothing in the 1984 Agreement extends "obligations" beyond the Declaration's definition of the Association's common expenses. Compare (Ex. 13 Art. 6.2) and (Ex. 13 Art.

10.3, 10.5) (Requiring the Association to pay for repair of the common elements and for casualty damage to the common elements) with (1984 Agree. ¶ 2) (defining the "obligations" of the Association to include paying for repair of the common elements and for casualty damage to the common elements). Further, the 1984 Agreement repeatedly confirms that "the Obligations" are the responsibility of the Association (Ex. 27 preamble, ¶¶ 2, 5); the day-to-day operating expenses of the hotel, payable by the Partnership, are therefore not an "obligation" under the 1984 Agreement. Yet the bankruptcy court stated that the 1984 Agreement allows the Association to determine whether to "fund cash flow shortfalls . . . that the Partnership [can]not pay." (Doc. 1-5 at 17); see also (Doc. 1-5 at 41). The bankruptcy court again conflated the hotel's operating cost (for which the Association bears no responsibility) and the common element repair cost (for which the Association bears full responsibility).

Paragraph two of the 1984 Agreement directs the Partnership to establish "such reserves as are deemed necessary and appropriate for the continued operation of the [Colony] as a first class resort hotel." (Ex. 27 ¶ 2) The bankruptcy court concluded that the 1984 Agreement and the Tenth Amendment require the Partnership to establish reserves for "necessary capital repairs," "replacement costs," and "the preservation of the Colony," and the bankruptcy court found that the Partnership's reserves "were woefully inadequate" and insufficient "to operate the Hotel as . . . a first class resort hotel." (Doc. 1-5 at 18, 20)

The bankruptcy court erred by conflating reserves for repair of the common elements with reserves for operation of the hotel. Because the hotel cannot operate

without the common elements of the Colony, the bankruptcy court assumed that the Partnership must establish reserves sufficient to repair the common elements. However, the 1984 Agreement states in the preamble that "the Association is responsible for payment of certain obligations pertaining to the [Colony], including the establishment of reserves[. These obligations] are described in the Declaration . . . ." (Ex. 27 preamble). The By-Laws (which the Declaration requires the Association to follow, see (Ex. 13 Art 8.1, 8.5)) direct the Association to establish reserves for deferred maintenance and for "replacement required because of damage, depreciation or obsolescence." (Ex. 15 Art.6.1-2) The accord established throughout the governing documents assigns payment for operation of the hotel to the Partnership and assigns payment for maintenance of the common elements of the Colony to the Association. The 1984 Agreement upsets this scheme once only, in paragraph ten, which requires the Partnership annually to pay forty-five thousand dollars into a "capital reserve account" on behalf of the Association.[5] (Ex. 27 ¶ 10). The bankruptcy court nevertheless concluded erroneously that paragraph two of the 1984 Agreement implicitly shifts to the Partnership full responsibility to pay for repair of the common elements. Given the structure of the balance of the governing documents, paragraph two, construed disinterestedly and reasonably, directs the Partnership to establish reserves for the operation of the hotel. Cf. (Tr. 5/26/09 at 97) Requiring the Partnership to establish the full reserves necessary to pay for repair of the common elements would

[5] The Partnership never paid a full forty-five thousand dollars into this capital reserve account, but only because, as testimony at trial and the minutes of Association Board meetings show, the Association voluntarily waived the establishment of additional reserves. (Ex. 273 at 7-8; Ex. 279 at 1; Ex. 283 at 4; Tr. 5/26/09 at 92)

nullify paragraph ten, which requires the Partnership to pay only forty-five thousand dollars annually for common element maintenance. The bankruptcy court's interpretation of the 1984 Agreement is therefore fundamentally flawed and untenable.

3. Other Bankruptcy Court Holdings

The Declaration manifestly commands that "maintenance and operation of the common elements . . . shall be the responsibility of the Association as a common expense."[6] (Ex. 13 Art. 6.5) Nothing presented to the bankruptcy court overcomes this plain and obvious mandate.

The bankruptcy court stated that "[t]he Declaration provides no specific or affirmative obligations and sets no standard that the Association must achieve in the maintenance and repair of The Colony." (Doc. 1-5 at 31) The standard, however, is explicit in the Declaration's mandate by operation of the plain language employed. "Maintenance" is "the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep," Webster's Third New International Dictionary ("Webster's"), 1362 (1976), and "upkeep" is "the act of maintaining in good condition." Webster's at 2517. Additionally, the Declaration requires the Association to pay for "repair" and "replacement" of the common elements. (Ex. 13 Art. 3.13(a)) To "repair" is to "restor[e] to a state of soundness." Webster's at 1923. To "replace" is to "place again: restore to a former place, position, or condition" or to "supply an equivalent for." Webster's at 1925. The Partnership argues – persuasively, given the ordinary and plain

[6] The declaration of a condominium "is the condominium's 'constitution.'" 5 Boyer, Florida Real Estate Transactions § 190.10[1] (2010). "An association's authority is derived from the declaration and the bylaws provided the bylaws are not inconsistent with the declaration." Boyer, supra, § 190.10[1]. "[The] declaration . . . is more than a simple contract spelling out mutual rights and obligations of the parties to it. It assumes some of the attributes of a covenant running with the land." Boyer, supra, § 190.10[1].

meaning of "maintain," "replace," and "repair" – that the Declaration obligates the Association to keep the common elements in a condition similar to the condition of the Colony in 1973. Certainly, this standard leaves some opportunity for reasoned disagreement. For example, some materials used in 1973 are no longer sold, which leaves the parties to debate what current product best approaches "replacement." New government regulations prohibit certain rebuilding (Tr. 5/27/09 at 40-45, 79), which prohibition leaves the parties to debate whether a required change in the structure of a building qualifies as a "replacement" (or as near a replacement as reasonably feasible). In any event, an adequate standard exists by which to ensure that the Association maintains the Colony. If intractable dispute occurs, the parties may repair to the state court for a speedy determination of what is reasonable (thereby conforming with Florida's condominium laws and avoiding the disastrous implosion of an attractive, established, beachfront development).

The bankruptcy court suggested that the 1984 Agreement and the Tenth Amendment grant the Partnership so much control over the budget of the Association that the Association was relieved from paying for repair of the common elements. (Doc. 1-5 at 14-15) How an increase in the Partnership's control over the Association's budget nullifies the unambiguous language of the Declaration ("maintenance and operation of the common elements . . . shall be the responsibility of the Association"), the bankruptcy court does not cogently explain. In practice, the Association remained involved with, and informed about, the budget. The minutes of the Association Board

meetings in the record show that the Board approved each proposed budget. (Ex. 279 at 2; Ex. 282 at 1; Ex. 285 at 1; Ex. 289 at 1)

Noting that an "emergency" assessment requires unit owner approval (Ex. 15 Art. 6.6) and that the 2005 and 2006 proposed assessments were an "emergency" assessment, the bankruptcy court concluded that "the Partnership [cannot] force the Association to make an assessment [that] the Unit Owners twice voted [] down." (Doc. 1-5 at 35) This formulation is oversimple and erroneous. The 2005 and 2006 proposed assessments required the Association to pay for alteration of the common elements and were an "emergency" assessment. The Partnership concurs that an emergency assessment requires a vote of the unit owners. See (Ex. 13 Art. 6.6) (requiring unit owner approval of "alteration" or "improvement" of the common elements). The Partnership correctly submits, on the other hand, that the rejected 2005 and 2006 proposed assessments differ from the assessment the Partnership seeks in this action. The assessment the Partnership seeks would address only the cost of maintenance and repair of the common elements. The Association could have implemented the assessment without an "emergency" assessment. Nothing in the Declaration or By-Laws impedes the Association's including the cost of repair to the common elements in an annual assessment.[7]

The bankruptcy court concluded erroneously that the Association cannot assess the unit owners even for repair of the common elements unless a majority of the unit

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[7] Again, resort to Florida's mature and persuasive statutory arrangement benefits everyone. Section 718.112, Florida Statutes, mandates the contents of the by-laws of every condominium association in Florida. Section 718.112(2)(e)(2.a) requires that the by-laws empower the unit owners to vote down an annual assessment that exceeds 115% of the assessment for the preceding year. However, Section 718.112(2)(e)(2.b) explicitly excludes from the percent-increase calculation "reasonable reserves for repair or replacement of the condominium property [and] anticipated expenses of the association which the board does not expect to be incurred on a regular or annual basis."

owners vote to approve the assessment. The bankruptcy court's conclusion is utterly foreign to Florida's statutory regime, which is calculated to ensure the maintenance and repair of the common elements enjoyed by each of Florida's 1.3 million condominium residents. The bankruptcy court reasoned that the 1984 Agreement, which provides that the Association shall pay for "major capital improvements" through "special assessment" (Ex. 27 ¶ 2), "distinguishes between an assessment needed to make capital repairs and improvements and an assessment to fund the Association's annual budget. By this distinction," the bankruptcy court continued, "it is manifest that an assessment for repairs . . . must be put to a vote of the Unit Owners." (Doc. 1-5 at 36) This conclusion is wholly erroneous and unsupportable. No mention of "special" assessment occurs in the Declaration or By-Laws. The bankruptcy court asserted that Section 718.103, Florida Statutes, requires that a "special" assessment "be accompanied by a notice which sets forth the specific purpose or purposes of [the] special assessment." (Doc. 1-5 at 36) (quotation omitted). Manifestly, a notice requirement is not a vote requirement. In fact, condominium boards often pay for maintenance and repair by passing a "special" assessment without a unit owner vote. See, e.g., George v. Beach Club Villas Condo. Assoc., 833 So.2d 816 (Fla. 3d DCA 2002); Farrington v. Casa Solana Condo. Ass'n, Inc., 517 So. 2d 70 (Fla. 3d DCA 1987); Cottrell v. Thornton, 449 So.2d 1291 (Fla. 2d DCA 1984).[8]

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[8] Cottrell includes an especially informative passage:

> We are often faced with appeals which are similar in nature to this appeal. One area of misunderstanding seems to derive from the fact that a necessary repair . . . may involve a major expenditure of funds. The fact that a major expenditure is involved in making a substantial, necessary repair does not convert the repair into a material or substantial addition or alteration . . , which would trigger a required vote of the unit owners. That is not to say, however, that condominium owners are not without a solution to this frequent

(continued...)

Even were a vote required, the bankruptcy court failed to explain on what ground the unit owners may casually "vote away" the obligation of the Association to pay for repairs to the common elements. The governing statute, the governing documents, and common sense reject this notion. In fact, "Maintenance and operation of the common elements . . . shall be the responsibility of the Association as a common expense." (Ex. 13 Art. 6.5) With a sufficiently large super-majority the unit owners may amend the Declaration (Ex. 13 Art. 15.3), but a simple majority of the unit owners may not vote in effect to nullify the Declaration. In all instances, the declaration must conform to Florida's statutory requirement.

The bankruptcy court held that the Board's refusal to implement assessments for repairs without a vote was a proper exercise of the Board's business judgment. In the words of the bankruptcy court, "the Board . . . determined in good faith that the Association would not benefit from assessing the members to rebuild The Colony," and "[t]he Partnership's attempts to supplant the Board's decision with that of this Court . . , or the Partnership's opinion of what is best for the Association[,] ignore the business judgement [sic] rule." (Doc. 1-5 at 38, 40)

Without support in law or logic, the bankruptcy court imports and applies "the business judgment rule" to free the Association from the fundamental obligations

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[8](...continued)
problem. We strongly urge that before conflicts arise that require resort to the courts, the owners should consider whether it is desirable to amend the condominium documents to place a restriction on the amounts that could be expended to make necessary repairs without a prior vote of the owners.

449 So.2d at 1292 (emphasis removed). As in Cottrell, the governing documents of the Colony include no limit on the repair expenditures the Association Board may assess without a unit owner vote.

required by statute and memorialized in the Declaration. But the business judgment rule is no license for a condominium association to break with impunity from an obligation that in the moment displeases the association. If the Association can exploit the business judgment rule to escape paying for repair of the common elements, the Association may use the business judgment rule to escape honoring any purportedly binding document or contract, and each agreement the Association enters is entirely illusory because only in effect so long as the Association benefits. This reasoning, like the conclusion that the unit owners may vote to rescind a binding obligation, is untenable. Cf. Frank H. Easterbrook and Daniel R. Fischel, The Corporate Contract, 89 Colum. L. Rev. 1416, 1429 (Nov. 1989).

An erroneous assumption underlying the bankruptcy court's result is that the business judgment rule protects an Association's board not only from a member suit, but also from a third-party suit to enforce the lawful obligation of the Association to a third-party. The bankruptcy court apparently believes that the business judgment rule empowers the Association to repudiate a contract or other obligation merely because the Association in the moment concludes that the contract does not favor the Association. The business judgment rule has no such meaning and no such effect. Of course, a board member must use business judgment to further the interests of the association, and the business judgment rule (as the rule applies to a condominium association) "protects the [a]ssociation's decisions so long as the [a]ssociation acts in a reasonable manner." Garcia v. Crescent Plaza Condo. Ass'n, Inc., 813 So.2d 975, 978 (Fla. 2d DCA 2002) (citing Farrington v. Casa Solana Condo. Ass'n, Inc., 517 So.2d 70,

72 (Fla. 3d DCA 1987)). But the business judgment rule is not a weapon permitting the Association to renege on statutory, contractual, and other obligations on a whim (or even after solemn deliberation). The business judgment rule applies to a corporate governance dispute instigated by a member and protects an individual board member from personal liability. The business judgment rule does not empower a corporation to escape the consequences of the corporation's actions toward the outside world. If the Association Board flouts the statutes, violates the Declaration, lets the Colony crumble, and drives the Partnership to ruin, the Association as a whole may not escape the consequences merely because the Board intentionally inflicted the harm to further the perceived self-interest of the Association.

The bankruptcy court concluded that "the 1984 Agreement is ultra vires to the extent it may be interpreted to require the Association to assess the Unit Owners to fund operation shortfalls of the Partnership." (Doc. 1-5 41-44) As discussed earlier, see sec. 2, supra, the 1984 Agreement never obligates the Association to pay for the operation of the Partnership or the hotel. The bankruptcy court noted that "[a] condominium association may exercise only those powers enumerated in the Condominium Act," (Doc. 1-5 at 43) (quoting Towerhouse Condo. v. Millman, 475 So. 2d 674, 676 (Fla. 1985)), but, as the bankruptcy court acknowledged, Florida's Condominium Act empowers the Association to maintain and repair the common elements. Fla. Stat. § 718.111 (authorizing a condominium association to enter into contracts and collect assessments to maintain and repair common elements); see also sec. 4, infra. Even if the 1984 Agreement were ultra vires as applied to the

Association and even if the Partnership must follow the 1984 Agreement but the Association need not, the Association's obligation under the Declaration to pay for the repair of the common elements remains. See sec. 2, supra.

An undercurrent in the bankruptcy court's decision is that putative mismanagement by the Partnership excuses the Association's ignoring the obligation to pay for repair of the common elements. However, the bankruptcy court vaguely but unmistakably attributes to the Partnership impropriety, but explicitly declines to adjudge the existence or effect of the supposed impropriety:

> [this Court makes no] finding of impropriety or malfeasance in the operations of the Partnership. However , . . it is important to the analysis of this case that [] accounting issues and questions were discovered by the Association at a time when the Partnership was saying it did not have money and was requesting that assessments be made . . . .

(Doc. 1-5 at 22) In the ruling from the bench, the bankruptcy judge stated:

> some, if not all [the alleged accounting improprieties] were disclosed and rectified . . . . But the fact that they occurred at all I think is enough to justify what the Association did [i.e., refuse to pay for repairs in 2007].

8:08-ap-567-KRM, (Doc. 101 at 19-20). Without finding that the Partnership violated the governing documents, the bankruptcy court admonishes the Partnership. The bankruptcy court finds that the Partnership deserves no redress even if the Association violated the governing documents. The bankruptcy court left the allegations to linger as a spectral yet perceptible suggestion that the Partnership is in a general sense an unworthy claimant.

If the bankruptcy court believed that the Partnership's accounting or other practices relieved the Association of the obligation to honor the governing documents, the bankruptcy court needed to say so explicitly and attempt to explain why. The bankruptcy court certainly presented no reason that an accounting impropriety, if

proven, justifies entirely dissolving the Association's obligation to pay for repair of the common elements. Even if the Partnership's accounting or operation of the hotel harmed the Association, the proper course is not wholesale annulment of the governing documents but rather an orderly claim under the applicable law of Florida, including especially Chapter 718.

Another assumption floating ominously yet indeterminately in the background of the bankruptcy court's decision is that the Association deserves release from the obligation to pay for repairs because the governing documents are unfair. The bankruptcy court noted that the general partner prepared the Association's budget, that "[t]he larger the amount of expenses that the General Partner allocated to the Association's 'Obligations,' the greater the amount of distribution the General Partner [] receive[d]" (Doc. 1-5 at 15-16), and that the general partner received a distribution even when the Partnership sustained a loss. (Doc. 1-5 at 21) The bankruptcy court mentioned also that "[t]he Preferential Amount was set in 1973, but there [i]s no formula for any change [to that amount] over time." (Doc. 1-5 at 16)

The portrayal of the unit owners as trapped in an onerous agreement is unfounded. The Partnership estimates that the average rent value of a unit owner's yearly, thirty-day use of a unit was $12,750. (Ex. 38) The interior of a unit was maintained by the Partnership with hotel revenue (revenue generated, of course, entirely through the efforts of the Partnership), and unrebutted evidence shows that between 1987 and 2008 the Partnership contributed over $27 million of hotel revenue toward repair of the common elements and nearly $5 million toward the real estate

taxes of the units. (Ex. 38) Overall, from 1987 to 2008 the unit owners received $33.76 million in distributions. Over the same period, the general partner received $4.59 million. (Ex. 38) For decades, a unit owner effectively received a free thirty-day stay at a beachfront condominium each year plus the appreciation in value of the initial investment in the Colony. See (Ex. 153) and (Tr. 5/26/09 at 118-23) (estimating the average appreciation in value of a unit as of 2006). About this component of the arrangement – the value of the Colony to the unit owners throughout past decades – the bankruptcy court said not a word.

Given the historical value figures and the fact that the revenue for maintaining the Colony for decades came entirely from the effort of the Partnership, where is the unfairness? To the extent the Partnership exercised control over the Association's budget, until 2005 the Partnership exercised control over money generated by the Partnership, and the Association Board approved the budget the Partnership proposed. (Tr. 5/21/09 at 67, Tr. 5/29/06 at 110) Although the general partner indeed received a larger distribution if the cost of maintenance of the common elements rose above the preferential amount, the general partner was authorized to pay only for repair or restoration of the common elements and was therefore unable to deliberately generate excessive maintenance costs. The Partnership could not spend money on an improvement or alteration of the common elements and unilaterally charge the cost to the Association; an improvement or alteration required unit owner approval.[9] Although

[9] To repeat, if the Partnership attempted to charge the Association for an improvement to the common elements or for a hotel operating expense, the Association's recourse is to prove damages. The Association failed to prove any damages before the bankruptcy court. (Doc. 1-5 at 4 n.1) ("the [Association] did not present any evidence as to any damages it suffered").

the general partner received distributions after the hotel began to lose money, those distributions were matched dollar-for-dollar (on top of the $1.398 million preferential amount) with distributions that paid the obligation of the unit owners; the unit owners therefore continued each year to enjoy thirty days use of a unit at the Colony (plus the appertinent benefits) for dramatically less than cost. For example, when the hotel operated at a loss in 2006 and 2007, the general partner managed the hotel and received a few hundred thousand dollars while each unit owner contributed nothing and received heavily subsidized use of a beachfront condominium and the associated amenities.

The bankruptcy court is correct that the Colony's governing documents "must be strictly construed to assure those investing in [the] condominium property that 'what the buyer sees the buyer gets.'" (Doc. 1-5 at 29) (quoting Sterling Village Condo., Inc. v. Breitenbach, 251 So.2d 685, 688 (Fla. 4th DCA 1971)). The distributions to the general partner were in accord with the governing documents (this, too, is "fairness"). That the preferential amount is constant over time is in accord with the governing documents. Someone interested in becoming a unit owner in the Colony enjoyed full disclosure – guaranteed by Florida's condominium laws – of the governing documents. A buyer saw exactly what a buyer would get.

Above all, a buyer could see that "maintenance and operation of the common elements . . . shall be the responsibility of the Association as a common expense." (Ex. 13 Art. 6.5)

4. Florida Law

The plain language of the Declaration and the other governing documents resolves this appeal, but, more fundamentally, the Condominium Act, Chapter 718, Florida Statutes, resolves this appeal. Florida law intricately and pervasively regulates the creation, form, operation, and governance (and, when necessary, the dissolution) of the condominium form of ownership, including the condominium unit owners' association. The parties' dispute is entirely familiar to this statutory scheme (and entirely alien to bankruptcy law).

"The Condominium Act expressly provides that the Association is responsible for the maintenance and repair of the common elements." 5 Boyer, Florida Real Estate Transactions, § 190.20[2][c] (2010); see Fla. Stat. § 718.113(1). Under the Condominium Act, an association board has both the authority and the duty to maintain the common elements. See Ralph v. Envoy Point Condo. Ass'n, Inc., 455 So.2d 454, 455 (Fla. 2d DCA 1984); Boyer, supra, § 190.11[6]. In fulfilling the duty to maintain the common elements, the board may assess the members for common expenses without a vote of the unit members. Section 718.115(1)(a), Florida Statutes, states that, "Common expenses include the expenses of the operation, maintenance, repair, replacement, or protection of the common elements and association property." Section 718.115(2) states that, "Except as otherwise provided in [the Condominium Act], funds for payment of the common expenses . . . shall be collected by assessments against the units." Boyer adds that:

> Unless provided otherwise in the condominium documents, a vote of unit owners generally is not required to levy a special assessment for

> condominium repair work, where the work is not a material alteration of the condominium property . . . .

Boyer, supra, § 190.44[2]; see also Cottrell v. Thornton, 449 So.2d 1291 (Fla. 2d DCA 1984). A board may assess the members even for an alteration if the alteration is also a necessary repair to the common elements. "Simply because necessary work for maintenance may also constitute alterations or improvements does not nullify a condominium board's authority and duty to maintain the condominium common elements." Ralph, 455 So.2d at 455 (holding that an association board could assess the members, without a member vote, to pay for a vertical sea-wall to protect the common elements from storm damage because "if work was necessary, board authority was sufficient").

"A condominium association may be liable for damages that result from negligent maintenance of the common elements." Boyer, supra, § 190.20[2][e]; see, e.g., Coronado Condo. Ass'n v. Scher, 533 So.2d 295 (Fla. 3d DCA 1988) ("[the] unit owners . . . sued the . . . association for negligent maintenance of a sanitary sewer in the common elements [and] won an order requiring the association to conform with its duties under the Condominium Act"). In other words, the Condominium Act requires the association to prevent deterioration of the common elements. Rather than allow the common elements to deteriorate, the Condominium Act states:

> In circumstances that may create economic waste, areas of disrepair, or obsolescence of a condominium property for its intended use and thereby lower property tax values, the Legislature . . . finds that it is the public policy of this state . . . to preserve the value of the property interests and the rights of alienation thereof that owners have in the condominium property . . . .

Fla Stat. § 718.117(1). The method to preserve the value of the condominium is "termination [of the condominium] because of economic waste or impossibility." Fla. Stat. § 718.117(2). Termination, however, requires the approval of a super-majority of the members. Fla. Stat. § 718.117(2); (Ex. 13 Art. 16). In this action, rather than comply with the statutory command to "terminate" in the statutorily prescribed manner, the Association stopped paying for maintenance of the common elements.

The Condominium Act plainly states not only that an association must maintain the common elements but states also that "[t]he liability for assessments may not be avoided by waiver of the use or enjoyment of any common elements or by abandonment of the unit for which the assessments are made." Fla. Stat. § 718.116(2). In this action, a majority of the members effectively attempted to avoid liability for assessment by waiving en masse the "enjoyment of any common elements" (which eventually deteriorated beyond use). This attempt violated en masse Section 718.116(2).

Further, by allowing the Colony to deteriorate, the Board and the majority of the members impermissibly altered the common elements to the detriment of a minority of the members. (Ex. 13 Art. 15.3); cf. Boyer, supra, § 190[7][e][iii]. The Condominium Act requires that "no material alteration . . . to the common elements [occur] except in a manner provided in the declaration . . . ." Fla. Stat. § 718.113(2)(a). "The purpose of [this] provision[is] to protect the [unit] purchaser against unanticipated changes in the common elements which could dramatically affect the cost and enjoyment associated with owning a condominium." Wellington Prop. Mgmt. v. Parc Corniche Condo. Ass'n, Inc., 755 So.2d 824, 826 (Fla. 5th DCA 2000). Deterioration of the common elements is

an "alteration" and a "change" against which the Condominium Act protects the members who favor repairing the common elements.

In addition, Florida law requires an association to honor agreements with third-parties such as the Partnership. "The law simply does not," for example, "allow an association to borrow money and then absolve itself from repayment through its declaration or by-laws." Carmelitas Holding Company v. Paradise Beach Resort St. Augustine, 675 So.2d 660, 661 (Fla. 5th DCA 1996); see Boyer, supra, § 190.20[2][c] (citing Carmelitas Holding Company). Carmelitas Holding Company holds that a homeowners association:

> cannot assert that repayment of a debt is ultra vires in an attempt to invalidate what was otherwise a permissible corporate action – borrowing money . . . to meet the expenses of operating the association and maintaining the association's property.

675 So.2d at 661. Similarly, the Association cannot escape the obligation to maintain the common elements for use by the Partnership by declaring the obligation ultra vires.

In sum, each matter the bankruptcy court found important was a mischievous distraction because Florida law requires the Association to pay for maintenance of the common elements.

5. Damages and Mootness

The bankruptcy court rejected the Partnership's claim for damages on many grounds, each of which is flawed. Several of the reasons for rejecting damages rely on the bankruptcy court's faulty interpretation of the 1984 Agreement and the Tenth Amendment. Under a proper reading of the governing documents, the Partnership's pre-petition and post-petition damages arise from the Association's failure to pay for

repair and maintenance of the common elements. The pre-petition damages arise directly from the Association's refusal to pay the obligations before the Partnership sued the Association. The Partnership's expert, Dr. Henry Fishkind, demonstrated the post-petition damages with a conventional damages calculation, which shows that if the Association had repaired the common elements promptly, the revenue of the hotel (and thus the Partnership) would have dramatically recovered from the late-2000's decline. See (Ex. 121)

Although the bankruptcy court ruled that the Association is not responsible for damages because the Colony had needed repair for years and the Partnership under-reported the cost of the needed repair (Doc. 1-5 at 45-46), the Colony's needing repair long before the Partnership demanded repair excuses the Association from nothing. The bankruptcy court noted that the poor condition of the Colony impaired the hotel's profits "for at least the past fifteen years" (Doc. 1-5 at 45), but the Partnership seeks no damages for the decline in hotel revenue that occurred before the Partnership asked the Association to pay for repair. (Ex. 121 at 10-11, 16-17) The Partnership has no obligation promptly to alert the Association to each incipient need for repair. In any case, no evidence shows that delaying repair increased the cost of repair. If delay increased the cost, the Partnership bears no blame. The Partnership must pay for the repair to the common elements only to the extent cash is available from hotel revenue to do so. (Ex. 27 ¶ 2) The statutory responsibility of the Association includes ensuring the common elements remain in good repair and establishing an adequate financial reserve for major and exigent repair. (Ex. 13 Art. 6.5; Ex. 15 Art.6.1-2) Nor is the "under-reporting" cited by the bankruptcy court a problem for the Partnership. In 2005,

the Association hired an engineering firm to undertake a professional estimate of the cost of repair of the Colony. Before the Association hired the firm, Katherine Moulton prepared a yearly estimate, which almost inevitably was an amount far less than the estimate of the professional firm. The 1984 Agreement requires only that the Partnership each year prepare for the Association's review a budget that details the "obligations" paid by the Partnership. Nothing in the governing documents entitles the Association to rely on a Partnership-produced estimate of needed repair or needed reserves for future repair. Regardless, Moulton testified that she kept the Association Board's members aware that major repair to the common elements would cost more than the Association's reserves (Tr. 5/27/09 at 11-12), yet the Association Board and the Association consistently voted to waive reserves anyway. E.g. (Ex. 273 at 7-8; Ex. 279 at 1; Ex. 283 at 4) The Association Board knew both that Moulton's estimates were low and that the Colony, built in 1973, would eventually need extensive repair.

Finding that "the Hotel [at the Colony] operated at a loss for six of the last eight years," the bankruptcy court rejected the Partnership's damage claim in part because of the Partnership's losses. (Doc. 1-5 at 46-47) At an Association Board meeting in December, 2004, the Board discussed the common elements' dilapidated condition and decided to hire the engineering firm to assess the cost of repair. (Ex. 51) Annual hotel profit at the time of the meeting was over a half-million dollars. (Ex. 38) In a July, 2005, letter, the Partnership's attorney informed the Association's attorney of the urgent need for repair of the common elements. (Ex. 149) The letter concludes by asking the Board:

> as [the Board] is required to do under the various Colony documents, [to] commence the process to preserve and protect the Colony by implementing . . . the repairs that are necessary and the assessments associated therewith.

(Ex. 149) The hotel's profit in 2005 was $360 thousand. At that time, the hotel had earned a profit in sixteen of the preceding nineteen years. (Ex. 38) In December, 2006, when the Partnership implored the Association Board to approve a budget including several million dollars for repair of the common elements (Ex. 54), the hotel had begun to lose money. (Ex. 38) Four of the six losing years the bankruptcy court cited occurred after the Association first breached the Declaration by refusing to pay for repair of the common elements, and the Partnership was profitable when the breach began. The bankruptcy court's rejection of damages due to "the Hotel's history of being unprofitable" was clear error.

The Partnership presented four damage scenarios, each of which the bankruptcy court rejected because "[t]he occupancy rate and average daily rate that the Partnership used to calculate damages [in each scenario] ha[s] never been attained." (Doc. 1-5 at 46) "Difficulty in proving damages or uncertainty as to amount," however, is not fatal to a plaintiff's claim for recovery. Forest's Mens Shop v. Schmidt, 536 So.2d 334, 336 (Fla. 4th DCA 1988). Rather, a plaintiff need show a reasonable basis for computing an approximate amount of damages. Sampley Enterprises, Inc. v. Laurilla, 404 So.2d 841, 842 (Fla. 5th DCA 1981); Devon Medical, Inc. v. Ryvmed Medical, Inc., 60 So.3d 1125, 1128 (Fla. 4th DCA 2011). The Partnership's expert reasoned that after renovation the hotel would out-perform the average hotel occupancy rate in Sarasota because the hotel, on the beach and renovated, would "be newer than [the] average [hotel] and []

would have a superior location to the average hotel." (Tr. 5/22/09 at 29) In this light, the expert's five percent increase in hotel occupancy above the market average (Ex. 121 at 6), was modest and reasonable. The average daily rate the expert adopted, $280, was "attained" by the hotel in the past and is consistent with the hotel's performance before the Colony's facilities degraded. (Tr. 5/22/09 at 30) (Of course, a fact-finder might find $260 or $220 or another rent established by the facts; finding a fault in $280 fails to justify collapsing to zero rent or declaring the rent unknowable.)

The bankruptcy court concluded that "[t]he Partnership's damage model is based on a number of contingencies and assumptions," specifically that the Partnership, despite defaulting on a loan in 2006 (Ex. 177), could obtain the capital necessary to renovate the interior of each unit and that the Association could obtain a loan for the repair of the common elements. (Doc. 1-5 at 48) The Partnership tried, but failed, to show that a bank offered a loan to the Partnership for interior renovation contingent upon the Association paying for repair to the common elements. See (Tr. 6/1/09 at 75-78) However, if the Partnership failed to obtain a loan, the failure occurred as, and likely because, the Association failed to honor the obligation to pay for repairing the common elements. Cf. Whitney v. Citibank, N.A., 782 F.2d 1106, 1118 (2d Cir 1986) ("When a difficulty faced in calculating damages is attributable to the defendant's misconduct, some uncertainty may be tolerated") (citing Bigelow v. RKO Radio Pictures, 317 U.S. 251, 264-65 (1946)).[10] By the time the Partnership defaulted, the Association

[10] "[A] stricter standard of proof is necessary for [the] fact of damage than for [the] amount of damage." Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347, 1371 n.24 (5th Cir. 1976). Failure to obtain a loan for interior renovation might reduce the Partnership's lost profits. However, because of the superior location and past profitability of the Colony, the Partnership's regaining profitability after repair to the common elements alone is hard to doubt. See (Ex. 121)

was already breaching the Declaration. The Partnership was likely far more credit-worthy earlier, when the hotel was still profitable. As for the assumption that the Association could obtain a loan, the bankruptcy court's faulting the Partnership for assuming the Association could pay for repair of the common elements is slightly bizarre. A damage calculation estimates the plaintiff's position "but for" the defendant's wrongful conduct. The damage calculation presented by the Partnership necessarily treats the Association's paying for repair of the common elements – whether by a loan or by assessment of the unit owners – as a benchmark.

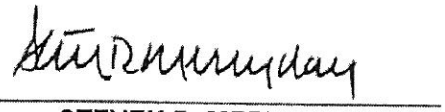
Finally, the Partnership objects that the bankruptcy court erred in finding the Association's counter-claims moot. However, the bankruptcy court added the condition that each counter-claim and third-party claim will receive reconsideration if any of the rulings in favor of the Association are reversed. (Doc. 1-5 at 49 n.5) The contemplated reversals occur, and the reconsideration must occur also. The Partnership's objection to the finding of mootness is moot.

CONCLUSION

The challenged orders of the bankruptcy court and each order of the bankruptcy court in this action that is inconsistent with this order are **REVERSED**. The district court (1) **STAYS** this order pending further order of the district court, retains jurisdiction of the proceeding, and withholds the issuance of instructions to the bankruptcy court; (2) directs that the parties submit by **August 5, 2011**, a paper (one paper for each side and only one paper for both this appeal and the companion appeal in Case No. 8:10-cv-913-T-23) of seven or fewer pages that

discusses the precise form of the remedy that the respective party recommends as a consequence of the district court's reversal of the bankruptcy court, and (3) sets a hearing for **August 11, 2011, at 1:30 p.m.** to hear argument on the form of the remedy. Counsel for each party shall appear at the hearing prepared and authorized to address the prospect of court-ordered mediation (including the issues of when, where, and by whom the mediation will be conducted)..

ORDERED in Tampa, Florida, on July 27, 2011.



STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

End of Agenda Item 4b

February 29, 2012

Mr. David Bullock
Town Manager
Town of Longboat Key
501 Bay Isles Road
Longboat Key, FL 34228

Dear David,

I would like to keep a foot in the door – primarily I want to hear the presentation(s) at the March 5th Hearing and if the door is open, I ***might*** like to give some suggestions regarding the Colony after my 44 years of living on beautiful Longboat Key.

If I have something to contribute, it would be my preference to be the last to be heard after listening to the others on this subject.

Thank you for this consideration.

Sincerely,

Murf Klauber

THE COLONY BEACH & TENNIS RESORT
1620 GULF OF MEXICO DRIVE, LONGBOAT KEY, FLORIDA 34228-3499 • 941.383.6464 • 800.4.COLONY • FAX: 941.383.7549
EMAIL: info@colonyfl.com • colonybeachresort.com

End of Agenda Item 4c

THE COLONY BEACH AND TENNIS CLUB ASSOCIATION, INC.

A Florida Condominium Association
1620 Gulf of Mexico Drive
Longboat Key, Florida 34228

BOARD OF DIRECTORS
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Bruce V. Pinsky, Vice President
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Ruth Kreindler
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Barry Spiegel

February 28, 2012

Mr. Dave Bullock, Town Manager
Town of Longboat Key
501 Bay Isles Road
Longboat Key, Florida 34228-3196

Dear Mr. Bullock:

In response to your letter of February 9, on behalf of our Association, I am transmitting herewith some materials for the Commission in advance of our report on March 5, specifically:

- A letter which was distributed to the Colony unit owners earlier today, reporting on the current status of our redevelopment efforts with Club Holdings Ventures, LLC (CHV), which will serve to report the same subject matter to the Commission

- A document from CHV, titled "The Proposed Development Plan for the Revitalization of the Colony Beach and Tennis Resort"

I will attend the March 5 meeting on behalf of the Association, and will be accompanied by our expert hospitality consultant Joel Rosen, our legal counsels Don Hemke and Jeff Warren, and the CHV redevelopment and management team represented by Scott Anderson, Glenn Miller, and Stacy Miller, as well as Tim Baker, the Principal of Baker Barrios Architects. Several other members of our Association Board will also attend, as will a number of Colony unit owners.

Our presentation will have three main parts. First, I will make some brief remarks about why we selected Club Holdings, and why we believe they are the right partner to redevelop The Colony, for both the unit owners and the Town of Longboat Key. Next, Glenn Miller will remark specifically about the redevelopment effort between now and when the resort reopens for business. Finally, Scott Anderson will discuss the newly-built world class Colony-inspired resort that we envision will serve the town and its guests and residents for generations to come. Given the great importance of The Colony redevelopment to the Town and the complexity of the issues involved, we anticipate needing about 30 minutes for all of this, and of course, all of the aforementioned people will all be available to answer any questions from the Commission.

We are also reaching out to the other interest holders at The Colony, with the hope that we can coordinate our presentations as you have suggested.

Sincerely,

Jay R. Yablon
President

THE COLONY BEACH AND TENNIS CLUB ASSOCIATION, INC.

A Florida Condominium Association
1620 Gulf of Mexico Drive
Longboat Key, Florida 34228

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Barry Spiegel

February 28, 2012

Dear Fellow Colony Owners:

This letter begins the process of providing to you the details of the proposal from Club Holdings Ventures, LLC ("CHV") for the rehabilitation and reopening of The Colony Beach and Tennis Club Resort (the "Proposal") that you will be receiving in the very near future.

In this communication, I will advise you about the various events and plans that have been made to provide opportunities for you to learn about the Proposal over the next five weeks, leading up to and including the annual and special meetings of the Association that are set for April 2 and 3, 2012. I will also preview the conceptual framework of the Proposal. Finally, I will ask for your serious and thoughtful consideration of the Proposal once you do receive it.

I. Club Holdings Ventures negotiations.

As you know, the Association Board of Directors selected Club Holdings Ventures as our recommended redevelopment partner at the end of September 2011. Since that time, with the assistance of our expert hospitality advisor, Joel Rosen, we have been negotiating and working very hard to resolve all of the many details associated with the comprehensive and very specific proposal that will be presented to the owners. This project is extremely complex and difficult and we expect to continue working diligently on certain details until the time when owners are asked to actually vote to approve the final legal documents and the reconstituted condominium documents. The Board and CHV believe that the work on this Proposal has advanced far enough and is sufficiently crystallized to the point where we are ready to share this information with the owners, as will be further detailed below.

II. Status report to the Longboat Key Town Commission on March 5.

In the resolution that was passed by the Town of Longboat Key Commission last May extending the possible abandonment of use related to alleged non-conforming uses and structures at The Colony to December of 2012, there was a provision for a hearing at the March, 2012, regular meeting of the Commission to "evaluate progress made." The Commission has scheduled this progress report for Monday, March 5 at 7 p.m. The Commission asked us to provide presentation materials to them in advance, by today, February 28. Because it is the Board's policy that we will not release anything into the public domain without first sharing that release with the owners, transmitted with this email is a copy of the materials that we will be providing to the Commission later today, which includes this letter to owners. If you happen to be in Longboat Key on March 5, we very much urge you to come to Town Hall at 7 p.m. to show your support for our efforts to revitalize The Colony. I will be there along with several other Board members, as will Joel Rosen, Don Hemke, Jeff Warren, and members of our Club

Holdings Ventures team. We will look forward to catching up with those of you who are able to make this meeting.

III. Release of the detailed Proposal.

The complete Club Holdings Ventures Proposal will be ready for release within the next week over a special website for The Colony redevelopment that we are targeting to activate on March 2. *The link and login information will be sent to you by me via separate email on the day that the site becomes active.* To protect CHV and you, we will ask you to sign a confidentiality agreement regarding the contents of the Proposal before you receive the Proposal. Once the protective confidentiality agreement is provided, you will be able to download a PDF of the Proposal and related documents as soon as they are posted, and a hardcopy will be sent to your mailing address. Should you have any trouble with the website, you can contact Gary Glass at Lighthouse Property Management (garyglass@mgmt.tv, or (941) 312-5414) and he will arrange to make the confidentiality agreement and materials available to you.

IV. March 15 and 16 planned "meet and greet" events.

We are planning a series of "meet and greet" events as opportunities for owners to discuss the Proposal and have their questions answered in advance of the owner meetings in April. These events are being planned, subject to confirmation of owner attendance, for March 15 and 16th. ***On the 15th, we plan to have a breakfast meeting in the New York City area, and a dinner meeting in the Buffalo, Niagara Falls or Toronto area. On the 16th, we plan to have a lunch meeting in the Chicago area and a dinner meeting in the Detroit area.*** Before we confirm the exact times and locations of these events for owners, we need for you to let us know if you plan on attending the event at one of the locations and which event you would attend. ***If you want to attend one of these events, please email Gary Glass at garyglass@mgmt.tv, or call him at (941) 312-5414 on or before March 6. Once we have confirmed that there is sufficient owner interest in an event, we will provide the exact times and locations.***

V. Annual and Special Meetings are April 2 and 3.

The agenda for the annual meeting will be distributed in a separate mailing. On the morning of April 2, we will conduct the regular annual business of the Association, which we will attempt to complete as expeditiously as possible. We will then adjourn the annual meeting and convene a special meeting of the unit owners to review and discuss the Club Holdings Ventures Proposal at length. It is our hope to have as much time as possible on April 2, and the entire day on the April 3, to go through the CHV Proposal.

VI. Key structural features of the Proposal.

An existing Colony owner will be able to choose from one of three options. It is our belief, which we have worked very hard to assure, that the Proposal contains at least one option that is reasonably acceptable for every unit owner's personal situation. The three options, outlined below, will be detailed with numbers and specifics in the forthcoming formal Proposal that you will be able to receive after accepting the confidentiality agreement.

Option #1 – Whole Ownership: The existing owner remains as the 100% owner of a new Colony unit by paying only the actual cost (referred to as "founder pricing") of rebuilding a new unit comparable to their present unit. Upgraded units will also be available on preferred terms for existing owners.

Option #2 – Fractional Ownership: The existing owner remains as a fractional Colony owner by deeding 7/8 of their unit to Club Holdings Ventures and retaining a 1/8 fractional ownership in the new unit, whereby the new unit will be built at no cost to that owner.

Option # 3 – Sale: The existing unit owner will sell their unit to Club Holdings Ventures, or to a private party seeking to gain the advantage of the at-cost founder pricing.

CHV is not interested, nor have they ever been interested, in owning the new units at The Colony. They prefer that all of us continue to own the new units. For the owners who wish to exit, they prefer that those units be transferred to other private individuals who would then own those units. CHV simply plans to use our privately-owned units to operate The Colony under terms of a management agreement we have negotiated with them and which terms will be included as part of the Proposal.

The central economic structural underpinning of the Proposal will be the existence of two tiers of pricing: (a) "founder pricing" meaning pricing available only to existing owners of a unit at The Colony for the purchase of a new unit at the actual construction cost to build the unit, and (b) "retail pricing," meaning pricing for the purchase of a new unit once the resort has been reopened, based on what the "natural market" would be expected to bear, based on comparisons to similarly situated properties. Please appreciate that all of this will be properly described in the Proposal with all of the usual caveats and disclaimers that are required by law when discussing investments of this type. ***This summary is not an offer to sell or a solicitation of an offer to buy securities. No legally binding obligations will be created until definitive agreements are executed and delivered by all parties.***

CHV has worked on the engineering and planning of a new site plan – which retains the campus flavor and "casual elegance" of the original Colony – with cost numbers designed to create a very substantial spread between the founder pricing and the expected post-reopening retail pricing. The goal is to make The Colony attractive universally, whether to existing owners wishing to remain, or to new individuals coming in to buy out owners who decide to leave.

There is, of course, a lot more to the Proposal than just the spread between founder and expected retail pricing. But because this is the centerpiece in terms of the economics, we think it is important that everybody understand this conceptual structure right at the outset.

VII. Your review of the forthcoming Proposal.

We have worked very hard to arrive at the very best deal for the owners that we possibly could with Club Holdings Ventures. Having carefully studied and reviewed all of the different proposals from various parties over the past eighteen months, I can tell you that we have not seen anything close to being better than their Proposal.

As in politics, making this deal is not about wishful thinking or unreality. It is about the art of the possible. The economics has to work for all parties. The CHV Proposal presents the opportunity for a very successful outcome after a very unfortunate recent history at The Colony. No business deals are ever perfect; they are the product of negotiation and compromise. We believe that after you review and understand what we have put together with CHV and weigh all aspects, pro and con, of this proposed arrangement, you will appreciate what a good solution this is to the current conundrum at The Colony.

We know that The Colony owners want a resolution that either enables them to again enjoy vacations on beautiful Longboat Key on fair and reasonable terms or enables them to dispose of their unit for a fair and reasonable price. The Proposal is designed to accomplish these goals. We expect that each owner will carefully look at each of the three options and make a decision based on their own rational self-interest.

While we know that the vast majority of owners will be evaluating the Proposal forthrightly as unit owners looking to return to a new Colony or exit on the best terms possible, you should not be surprised if, in the coming days and weeks, you receive communications from individuals trying to undermine the Proposal or mislead you about the actual, current situation, for their own reasons. If there is one thing I have learned over the last six years, it is that the owners at The Colony are smart and savvy and not easily taken in. I have every confidence that as the discussion of the Proposal proceeds, you will be able to discern who is genuinely evaluating the Proposal as a Colony owner, and who may have other motives besides the owners' best interests at heart.

VIII. Conclusion.

We are now entering a critical time in our long quest to bring a good and fair outcome to a bad situation at The Colony. Whenever one undertakes to build something substantial, there is a tremendous amount of groundwork that goes into planning and building the foundation. Solid, durable, underground foundations may not be seen or appreciated very much, but they are critical to the strength, viability and longevity of the visible edifices they support, which is what people do see and experience and appreciate at the end of the day.

The Board's work of many months to lay the foundation for a revitalized Colony, much of which has taken place quietly and patiently, has now been completed. Beginning in the next few weeks we will start to erect the aboveground structure designed to last and bring great joy to many future generations of owners and guests. We are all very excited about this, and we expect that you will be too.

For the Board,

Jay R. Yablon
President

CLUB HOLDINGS VENTURES, LLC

The Proposed Development Plan for the Revitalization of The Colony Beach & Tennis Resort

It is with great excitement that we unveil to the Town of Longboat Key and the public our general plan for the revitalization of The Colony Beach & Tennis Resort. A detailed proposal that discusses terms of specific interest to Colony unit Owners will be distributed to those Owners in the next several days. ***Club Holdings Ventures, LLC (the "Developer")*** was selected by The Colony Beach & Tennis Club Association, Inc. Board of Directors on September 25, 2011. With the assistance of the dedicated Colony Board, along with hospitality expert Joel Rosen, we have developed an exciting strategy to transform this beloved beachside vacation destination in Longboat Key. As the Developer, Club Holdings Ventures, LLC (CHV) will be responsible for executing all facets of the redevelopment project including financing, construction and resort marketing, sales and operations. Club Holdings Ventures has assembled an all-star team of talent to execute the restoration of this treasured resort and re-establish The Colony as a world class beach and tennis club. ***Club Holdings, LLC (the "Manager")*** will be the manager of the project. Club Holdings is the owner of multiple destination, vacation and recreation clubs, including the second largest destination club in the world, which has over 600 Members, a real estate portfolio currently valued at $220 million and tremendous depth in hotel and resort management and operations.

Anticipation. Transformation. Reality.

The Colony has often been referred to as "the Ellis Island of Longboat Key" – a comfortable gateway that has transformed virtually every Longboat Key newcomer into a long-time Key resident. Quite profound, and all the more reason we intend to restore this property to its former glory. Our revitalization plan is not only important to Colony Owners and their families, it's also important to Longboat Key's community, to the tens of thousands of guests who have shared unforgettable memories here and to future visitors who have yet to experience the charm of these beloved grounds. Our viable plan provides for restoring this community anchor and reinvigorating visitor activity and revenues on the Island. Based on preliminary analysis of our conceptual site plan and resort operations model, we are projecting approximately $10 million in revenues to the town from occupational sales tax generated directly from guests and owners over the next five years.

PO Box 2097
Windermere, FL 34786

CLUB HOLDINGS VENTURES, LLC

Project Vision

A successful transformation of The Colony will require more than a restoration of the existing structures. Today's discerning owners and travelers demand much different criteria than those of forty years past. Views, living areas, technology and resort amenities all serve as key drivers in the current market. With these factors in mind, we have created a plan that aims to make the best possible use of this celebrated piece of land.

Our governing design principles include:

- Four-star quality, world-class service and an unrivalled amenity package
- Spacious, comfortable and impeccably-appointed residences
- Architectural and landscape design that embraces nostalgic "old Florida" charm

PO Box 2097
Windermere, FL 34786

Our proposed master plan offers a combination of two-story vacation bungalows sprinkled throughout the resort core and a five-story residential tower situated at the resort entrance near Gulf of Mexico Drive. Both the bungalows and the tower will be adorned with wrapping outside balconies, expansive windows and improved views. Units located on the fourth and fifth floors of the tower will feature dual balconies with prime ocean and bay views. Vehicular traffic will be limited to the perimeter of the site, preserving peaceful pedestrian walkways and tranquil gardens within the resort. Parking will be provided directly beneath the units. Our plan seeks to preserve the unique Colony campus while enhancing it with today's high quality, sustainable building materials and elegant finishes.

The plan includes a multimillion-dollar restoration and rebuild of the residential units, amenities and resort. Our improvements and operating standards will be at four-star quality and offer a choice between whole ownership, fractional ownership and traditional hotel use. More specifically, our proposal is designed to deliver:

- **Restoration of Existing Beachfront Units** – With the assistance of the Town and upon approval from Colony Owners, we would promptly embark on the restoration of existing beachfront units (twelve in total). This will allow The Colony to begin accommodating Owners and attracting guests and will serve as a valuable marketing tool for future Owners and guests. We will work diligently with Town leadership to make certain the site meets all standards related to public health, safety, comfort, order, appearance, convenience, morals and general welfare.
- **New Residences** – We intend to build beautiful new residences that are code and flood complaint and also outfitted with elegant bungalow-style finishes. They will be designed with ease, function and casual living in mind, providing exceptional comfort and luxury, whether guests are staying for a day, a week or a month. Buildings will be oriented to capture ocean views, bay views or central gardens. Practical gourmet kitchenettes and open living spaces will accommodate informal family gatherings, while secluded sleeping quarters provide a peaceful sanctuary. Larger floor plans will provide flexible rental options for Owners.
- **Beach Club and Restaurant** – To enhance the value of your majestic beachfront, we will expand the former Monkey Bar, restaurant and beach pool. We will also enlarge the pool, deck, outside bar and poolside service areas as well as constructing a second adult pool, private beach cabanas and play areas for volleyball, croquet, putt-putt and family gatherings.
- **Tennis and Fitness Club** – The state-of-the-art tennis and fitness centre located on the southeast portion of the property will house approximately nine tennis courts, a stadium court, a tennis retail shop and a celebrity tennis program. With the very latest in technology, world-class instruction and an unparalleled fitness

PO Box 2097
Windermere, FL 34786

and training facility, The Colony will once again be positioned as a premier destination for tennis fans and fitness-lovers around the globe.

- **Full-Service Spa** – After a day at the beach or a morning perfecting their backhand, Owners and guests will relish a few hours of tranquillity at The Colony's serene spa. The spa will boast a comprehensive menu of signature treatments and a highly qualified staff to cater to every client's unique needs. The spa's multiple treatment rooms and soothing indoor and outdoor relaxation areas will ensure that Owners and guests alike depart feeling pampered and refreshed.
- **Landscaping, Vistas and Relaxation Areas** – Throughout the redesigned grounds we will cultivate lush gardens with native tropical landscaping, playful water features and soft lighting, all integrated with tasteful hardscapes, event spaces and relaxation areas. Guests will find plenty of quiet nooks strategically placed along meandering cobblestone walkways and quiet green spaces – perfect for curling up with the newspaper or simply watching the world go by. Central garden areas located between residences will provide just the place for outdoor grilling or enjoying your morning coffee.
- **Entrance and Welcome Center** – From the moment they arrive at The Colony, guests will begin an unmistakable transition into paradise. From the inspiring Welcome Center to the elegant port-cochere, we will create an unforgettable arrival experience. Banquet, conference and meeting space will be located above the welcome area. Conference and event space, including outdoor facilities perfect for open-air cocktail events and wedding receptions, will augment resort business during lower-demand seasons. This complex may also accommodate a second signature restaurant and additional residences.

PO Box 2097
Windermere, FL 34786

CLUB HOLDINGS VENTURES, LLC

Proposed Conceptual Site Plan

Preparation for Redevelopment of The Colony

A prerequisite for any application activity related to this project is the approval of the current Colony Owners. We are currently preparing detailed development proposals for each Colony Owner to be followed by Owner meetings scheduled for the second week in March and the annual Owner meeting scheduled for April 2nd and 3rd in Longboat Key. Once Owner approval is obtained, we will prepare our application for the Town's review.

With the assistance of the Town staff, the Planning Commission and the Town Commissioners, we are confident our collaborative efforts will result in an approval of the restored Colony.

PO Box 2097
Windermere, FL 34786

CLUB HOLDINGS VENTURES, LLC

Development Team

Club Holdings Ventures, LLC is a Delaware limited liability company established as a joint venture by Miller Group Colony, LLC and Club Holdings, LLC for the purpose of acquiring and developing unique resort properties. Club Holdings Ventures (CHV) combines the talents and expertise of Miller Group's Orlando-based real estate and development firm with Club Holdings' renowned collection of private destination and recreation clubs. Club Holdings Ventures has assembled an all-star team to execute the restoration of this treasured resort and re-establish The Colony as a world class beach and tennis club.

Glenn Miller **(Manager, CHV)** brings over thirty-five years of expertise in development, finance and execution of sustainable, revenue-generating real estate assets. As a self-made entrepreneur with experience in all areas of the development cycle, Glenn has assembled and managed a diverse portfolio across his career, including more than twenty grocery-anchored shopping centers, a mall and six tractor supply stores. One of Glenn's greatest individual assets is the network of investors, lenders, and equity partners he has built through the years. As an original investor in Club Holdings, Glenn has worked closely with Pete Estler on a variety of strategic initiatives. Glenn will provide leadership through all aspects of deal structure, finance and development throughout The Colony restoration process.

Pete Estler **(Manager, CHV)** is the Chief Executive Officer of Club Holdings and a founder of its flagship club, The Quintess Collection. Pete will lead efforts to obtain project financing. Pete is a successful serial entrepreneur with world-renowned expertise in integrated technologies, database marketing, business development, new media and finance. Pete launched Quintess over seven years ago, and has since led Quintess to expand the portfolio to include an international network of vacation homes in highly desirable resorts. Pete and his team will manage and operate the new Colony resort and will be instrumental in the design, marketing and sales efforts necessary to revitalize The Colony.

Club Holdings, LLC (the "Manager") owns destination and recreation clubs, including the second largest destination club in the world, which has over 600 Members and a real estate portfolio currently valued at $220 million. As manager, Club Holdings will lead resort marketing, sales and operations. Club Holdings has tremendous depth in hotel and resort management and operations, with top talent having prior professional experience within some of the industry's most recognized brands including RCI, Cendant, Wyndham, Four Seasons and The Ritz-Carlton, among others. The Club Holdings-owned Quintess Collection includes three separate clubs that together currently provide to their respective Members and clients:

- More than 40 destinations around the world.

PO Box 2097
Windermere, FL 34786

- More than 100 luxury homes and experiences.
- A full spectrum of services to ensure carefree vacations worldwide.
- Unparalleled access to the finest in golf through a strategic PGA TOUR licensing alliance, access to over 30 private clubs and resort courses and extraordinary events including the Masters and the Ryder Cup.

Scott Anderson is a hospitality industry veteran with over 30 years of experience as a senior hospitality executive. Scott will lead The Colony's marketing, sales and operations efforts. Since 1980, Scott has held positions as President of the Hotel Del Coronado, President and CEO of Callaway Gardens, Managing Director of Games Services, which included, lodging, tickets, food and beverage, merchandise, spectator services, games and marketing for the 1996 Olympic Games, Executive Vice President and Chief Marketing Officer of Cendant Corporation, President and CEO of Swan and Richfield Hospitality, President and CEO of High Country Hospitality, President and CEO of Dream Catcher, a destination club, and most recently Group President of Kohler Company's Hospitality and Real Estate Division. The Kohler Group consisted of three hotels, including the American Club and Inn on Woodlake in Kohler, Wisconsin and the Old Course Hotel in St. Andrews, Scotland. Those diverse properties included five golf courses, three spas, three real estate developments, four private clubs, seven retail outlets, a 120,000-square-foot shopping center and a 25,000-square-foot grocery store. Total revenues exceeded $100 million annually.

Stacy Miller brings over 15 years of experience in executing project development including design, permit, construction, financing, and delivery of all project approvals. Stacy's professional experience includes executive level positions at two Fortune 400 companies, Vice President of a Florida based commercial development firm and Development Director with a top 10 Design-Build Firm. Stacy will serve as project executive in charge of securing all approvals, contracts and managing day-to-day project execution.

Chris Tivey brings over 35 years of marketing and sales experience and he has focused solely on destination, second home and fractionally owned real estate since 1994. He was a co-founder of the Vancouver based marketing firm, E&S (Envisioning & Storytelling), working almost exclusively for five years with Intrawest, one of the leading resort operators and real estate developers in North America. He served as VP, Marketing and then President of Star Resort Group, developing, marketing and selling properties at the most sought after resort destinations, including Northstar Club, Lake Tahoe, CA, The Snowmass Club, Aspen/Snowmass, CO, The Cottages, Pinehurst, NC, Front Four at Stowe Mountain Lodge, Stowe, VT, and many others. Chris will create and execute the marketing and sales strategy for the new Colony.

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Windermere, FL 34786

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Don Kerchof has more than 24 years of experience in the luxury hotel business, bringing extensive experience to the development, sales, marketing and services within The Quintess Collection. A graduate of the University of Denver's School of Hotel, Restaurant and Tourism Management, Don began his career with Westin Hotels and Resorts in 1981 at the St. Francis Hotel in San Francisco, Calif. where he held key management positions over a period of 10 years. He held Director of Sales and Marketing positions with The Ritz-Carlton Hotel Company in Rancho Mirage and in Pasadena, CA; as well as at the Four Season Hotel Company in Austin, TX. Don was instrumental in helping the Four Seasons Hotel Austin and Ritz-Carlton, Huntington Hotel & Spa to achieve the prestigious AAA Five Diamond award.

The foregoing is a summary description and update of the Developer's plans and does not form a contract or binding terms on the Developer.

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End of Agenda Item 4d