IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

MARRIOTT HOTEL SERVICES, INC.	:	
Plaintiff,	:	
v.	:	Case No. 483406-V
WARDMAN HOTEL OWNER, L.L.C.	:	
and	:	
PACIFIC LIFE INSURANCE COMPANY	:	
Defendants.	:	

Attorneys and Law Firms:

John M. Quinn, Esq., Ethridge, Quinn, Kemp, Rowan & Hartinger, Rockville, MD, counsel for the plaintiff.

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J. Stephen McAuliffe III, Esq., Rosalyn Tang, Esq., Miles & Stockbridge, Rockville, MD, counsel for defendant Wardman Hotel Owner, L.L.C.

Todd E. Soloway, Esq., Bryan T. Mohler, Esq., Pryor Cashman, LLP, New York, NY, counsel for defendant Wardman Hotel Owner, L.L.C.

Brian D. Frey, Esq., Grant Stein, Esq., David Wender, Esq., Alston & Bird LLP, Atlanta, GA, counsel for defendant Pacific Life Insurance Company.

MEMORANDUM AND ORDER
GRANTING A PRELIMINARY INJUNCTION

On December 1, 2020, and December 2, 2020, the parties appeared, through counsel, beginning at 9:30 a.m., for a hearing on the plaintiffs' motion for a preliminary injunction. The parties were given the opportunity to call witnesses and present exhibits. Counsel for the parties listed above presented argument. The court concludes that the motion should be granted for the reasons set out below.

Findings of Fact

Plaintiff Marriott Hotel Services, Inc. ("Marriott") is the manager of the Washington Marriott Wardman Park Hotel located at 2660 Woodley Rd. NW, Washington, D.C. 20008 (the "Hotel"). The Hotel is located in the heart of Washington D.C.'s Woodley Park neighborhood adjacent to the Woodley Park-Zoo Metro (Red Line). The Hotel sits on approximately twelve (12) acres and consists of 1,152 guest rooms, approximately 200,000 square feet of meeting space, and parking for more than 550 vehicles in a total building area of approximately 1,551,928 square feet. [1]

Defendant Wardman Hotel Owner, L.L.C. ("Wardman") is a Delaware limited liability company and owns the Hotel.

Defendant Pacific Life Insurance Company ("PacLife") is a Nebraska corporation with its principal place of busines in Newport Beach, California. PL Wardman Member, LLC is a Delaware limited liability company with its principal place of business in Newport Beach, California and is owned by PacLife. JBGS/CIM Wardman Owner Member, L.L.C. is a Delaware limited liability company with its principal place of business in Bethesda, Maryland and is owned by JBG Smith Properties, a Maryland Real Estate Investment Fund. Until recently, PL

[1] Plaintiff's Exhibit 1s at p. 4.

Wardman Member, LLC owned an 80% equity interest in Wardman and JBGS/CIM Wardman Owner Member, L.L.C. owned a 20% equity interest in Wardman. PL Wardman Member, LLC now owns a 100% equity interest in Wardman. As noted, PacLife owns PL Wardman Member, LLC.

Marriot began managing the Hotel in 1998. After Wardman purchased the Hotel, Marriott and Wardman executed the Second Amended and Restated Management Agreement (the "Management Agreement") dated July 1, 2005.[2] The Management Agreement expires on December 28, 2029, but automatically extends for three ten-year periods unless Marriott gives notice of its intent not to renew the Management Agreement a year before each of the ten-year periods expires.[3]

Section 1.02 of the Management Agreement describes the details of the management arrangement between Marriott and Wardman. Section 1.02 states, in pertinent part:

> 1.02 Management Responsibilities[4]
>
> B. The operation of the Hotel shall be under the exclusive supervision and control of Manager which, except as otherwise specifically provided in this Agreement, shall be responsible for the proper and efficient operation of the Hotel. In fulfilling its obligations under this Agreement, Manager shall act as a reasonable and prudent operator of the Hotel, having regard for the status of the Hotel and maintaining the System Standards. Manager shall have discretion and control, free from interference, interruption or disturbance by Owner or by any other party claiming under, through or by right of Owner, in all matters relating to the management and operation of the Hotel, including, without limitation, the following: charges for Guest rooms, commercial space, and services provided by the Hotel; food and beverage services; employment policies; credit policies; granting of leases, subleases, licenses and concessions for shops and businesses within the Hotel, provided that the term of any such lease, sublease, license or concession shall not exceed the Term of this Agreement; receipt, holding and

[2] Plaintiff's Exhibit 1b.

[3] Plaintiff's Exhibit 1b at p. 5 (Section 2.01).

[4] Plaintiff's Exhibit 1b at p. 4.

disbursement of funds; maintenance of bank accounts; procurement of Inventories, supplies and services; payment of costs and expenses specifically provided for in this Agreement or otherwise reasonably necessary for the proper and efficient operation of the Hotel; and, generally, all activities necessary for operation of the Hotel.

Section 4.03 of the Management Agreement describes the accounts Marriott is to use to make payments related to managing the Hotel and establishes that Marriott is not to advance payments or incur liabilities to manage the Hotel. Section 4.03 states, in pertinent part:

> 4.03 Accounts, Expenditures[5]
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> B. All payments made by Manager hereunder shall be made from the Operating Accounts, petty cash funds, or from Working Capital. Manager shall not be required to make any advance or payment with respect to the Hotel except out of such funds, and Manager shall not be obligated to incur any liability or obligation with respect to the Hotel. In any event, if any such liability or obligation is incurred by Manager with respect to the Hotel, Manager shall have the option to deduct such amounts from Owner's share of Operating Profit if Owner has not fully reimbursed Manager for said amounts within ten (10) days after Owner's receipt of notice from Manager that said amounts are due.
>
> C. Debts and liabilities incurred by Manager as a result of its operation and management of the Hotel pursuant to the terms hereof, whether asserted before or after Termination, will be paid by Owner to the extent funds are not available for that purpose from Gross Revenues. The provisions of this Section 4.03C shall survive Termination.

Section 4.05 of the Management Agreement discusses Wardman's obligation to fund Working Capital. Section 4.05 states:

> 4.05 Working Capital[6]
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> As of the Closing Date, Owner shall provide to Manager Working Capital in the amount of Two Million Dollars ($2,000,000). Thereafter, Owner shall, from time to time during the Term, promptly, but no later than ten (10) days after written request by Manager, advance any additional funds necessary to maintain Working Capital at levels determined by Manager to be reasonably consistent with the approved Annual Operating Projection or as a result of "unforeseen

[5] Plaintiff's Exhibit 1b at p. 9-10.

[6] Plaintiff's Exhibit 1b at p. 11.

circumstances" (as more fully set forth in Section 4.04.B). If Owner does not so fund additional Working Capital within the said ten (10) day period, Manager shall have the right (without affecting Manager's other remedies under this Agreement) to withdraw an amount equal to the funds requested by Manager for additional Working Capital from future distributions of funds otherwise due to Owner. All funds so advanced for Working Capital shall be utilized by Manager for the purposes of this Agreement pursuant to cash management policies established for the Marriott System. Upon Termination, Manager shall, except as otherwise provided in this Agreement, return the outstanding balance of the Working Capital to Owner.

The definitions section of the Management Agreement defines Working Capital.

The Management Agreement states that:

> "Working Capital"[7] shall mean funds that are used in the day-to-day operation of the business of the Hotel, including, without limitation, amounts sufficient for the maintenance of change and petty cash funds, amounts deposited in operating bank accounts, receivables, amounts deposited in payroll accounts, prepaid expenses and funds required to maintain Inventories, less accounts payable and accrued current liabilities.

Section 4.04.B further discusses Wardman's obligation to maintain Working Capital under "unforeseen circumstances." Section 4.04.B states:

> 4.04 Annual Operating Projection[8]
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> B. Manager shall diligently pursue feasible measures to operate the Hotel in accordance with the Annual Operating Projection. It is understood, however, that the Annual Operating Projection is an estimate only and that unforeseen circumstances such as, but not limited to, the costs of labor, material, services and supplies, casualty, operation of law, or economic and market conditions may make adherence to the Annual Operating Projection impracticable, and Manager shall be entitled to depart therefrom due to causes of the foregoing nature. However, Manager shall notify Owner of any significant variations from the Annual Operating Projection promptly after Manager learns of the same, and shall notify Owner of the nature and extent and reasons for such variation. For the purposes of this Section 4.04.B, any major Deduction category (major line item such as general and administrative) that varies by more than ten percent from the Annual Operating Projection or if total Deductions vary by more than seven and one-half percent (7.5%) shall be deemed to be significant. If such significant

[7] Plaintiff's Exhibit 1b at p. 50.

[8] Plaintiff's Exhibit 1b at p. 11.

variation is due to reasons other than Force Majeure, such variation shall be subject to Owner's approval (although it is understood that Owner shall have no greater approval rights for any such variation than those set forth for the Annual Operating Projection in Section 4.04.A).

The definitions section of the Management Agreement defines Force Majeure. Included in the definition of Force Majeure are "acts of nature without the interference of any human agency" including "epidemics." The Management Agreement states that:

> "Force Majeure"[9] shall mean any of the following events beyond the control of the party claiming that a Force Majeure event has occurred, regardless of where it occurs or its duration that have a material adverse impact on the Hotel: acts of nature without the interference of any human agency (including hurricanes, typhoons, tornadoes, cyclones, other severe storms, wins, lightning, floods, earthquakes, volcanic eruptions, fires, explosions, disease, or epidemics); fires and explosions caused wholly or in party by human agency; acts of war, attack, invasion or other acts of hostility by foreign enemies; civil war, rebellion, revolution, insurrection or usurpation of sovereign power; riots or other civil commotion; terrorism (including hijacking, sabotage, chemical or biological events, nuclear events, disease-related events, bombings, murder, assault, and kidnapping); strikes or similar labor disturbances; shortage of critical materials or supplies; action or inaction of governmental authorities having jurisdiction over the Hotel (including the revocation or refusal to grant licenses or permits, where such revocation or refusal is not due to the fault of the party whose performance is to be excused for reasons of Force Majeure); and any other events beyond the reasonable control of the parties (excluding, however, (i) lack of financing, or (ii) general economic and/or market factors which are not caused by one of the foregoing events).

The Management Agreement also discusses what happens in the event that a party fails to make a required payment. Section 9.01 states, in pertinent part, that:

> 9.01 Default[10]
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> D. The failure of either party to make any payment required to be made in accordance with the terms of this Agreement, as of the due date as specified in this Agreement. Upon the occurrence of any Default by either party as described under this Section 9.01.D, said Default shall be deemed an "Event of Default" under this Agreement if the defaulting party fails to cure such Default within ten

[9] Plaintiff's Exhibit 1b at p. 43.

[10] Plaintiff's Exhibit 1b at p. 25-26.

(10) days after receipt of written notice from the non-defaulting party demanding such cure.

The Management Agreement also provides for remedies for a non-defaulting party under an Event of Default. Sections 9.02 and 9.03 state, in pertinent part:

> 9.02 Remedies[11]
> Upon the occurrence of an Event of Default, the non-defaulting party shall have the right to pursue any one or more of the following courses of action: (1) if the Event of Default has a material adverse impact on the non-defaulting party, to terminate this Agreement by written notice to the defaulting party, which termination shall be effective as of the effective date which is set forth in said notice, provided that said effective date shall be at least thirty (30) days after the date of said notice and further provided that, if the defaulting party in Manager, the foregoing period of thirty (30) days shall be extended to seventy-five (75) days (or such longer period of time as may be necessary under applicable laws pertaining to termination of employment); (2) to institute forthwith any and all proceedings permitted by law or equity including, without limitation, actions for specific performance and/or damages; and/or (3) to avail itself of the remedies described in Section 9.03.
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> 9.03 Additional Remedies[12]
> E. The remedies granted under Sections 9.02 and 9.03 shall not be in substitution for, but shall be in addition to any and all rights and remedies available to the non-defaulting party (including, without limitation, injunctive relief and damages) by reason of applicable provisions of law or equity and shall survive Termination.

In mid-March of 2020, following the outbreak of the COVID-19 global pandemic, Marriott's cash flow projections showed that the Hotel would not have sufficient funds to meet its obligations under the Management Agreement. [13] Consequently, Marriott determined that $10 million would be reasonably necessary to operate the Hotel in the upcoming months.[14] On March 16, 2020, Marriott sent Wardman a Funds Request asking it to "fund $10,000,000.00 into the

[11] Plaintiff's Exhibit 1b at p. 26.

[12] Plaintiff's Exhibit 1b at p. 26-27.

[13] Plaintiff's Exhibit 1c.

[14] Plaintiff's Exhibit 1c.

Hotel's Operating Account within ten (10) days to cover the forecasted shortfalls."[15] On March 19, 2020, Wardman rejected Marriott's Funds Request.[16] Wardman argued that the Funds Request violated Section 4.05 of the Management Agreement because Marriott was seeking funds that were not "reasonably necessary to satisfy the needs of the Hotel."[17] It also argued that it was "patently unreasonable" of Marriott to ask for $10 million within ten (10) days when, according to its discussions with the on-site management team, the Hotel only needed $2.5 million to get through the end of April.[18]

On March 25, 2020, Marriott agreed to temporarily close the Hotel to guests.[19] On March 27, 2020, Hotel operations were suspended.[20] Despite the temporary closure of the Hotel to guests, Marriott still needed funds to pay for costs related to managing the property, including "payroll and benefits for those employees who must be retained to maintain the property while it is closed, benefits for furloughed employees who otherwise would be owed severance," and "bills that accrued but were not yet paid before the Hotel closed, utilities, taxes, license and permit fees, repairs, maintenance, security, and costs to maintain the systems used to operate the Hotel and to prepare for its reopening."[21]

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[15] Plaintiff's Exhibit 1c.

[16] Plaintiff's Exhibit 1d.

[17] Plaintiff's Exhibit 1d.

[18] Plaintiff's Exhibit 1d.

[19] Plaintiff's Exhibit 1, Declaration of Julie Bowen in Support of Plaintiff Marriott Hotel Services, Inc.'s Motion for a Preliminary Injunction ("Declaration of Julie Bowen"), at p. 4.

[20] Plaintiff's Exhibit 1, Declaration of Julie Bowen, at p. 4.

[21] Plaintiff's Exhibit 1, Declaration of Julie Bowen, at p. 4.

On March 28, 2020, Wardman authorized Marriott to withdraw $5 million from the FF&E Reserve for Working Capital.[22] Wardman also agreed that it would fund into the FF&E Reserve any amounts Marriott took from the FF&E Reserve to pay for Working Capital within 20 days of Marriott's request.[23] Wardman also acknowledged and agreed that 1) nothing in the agreement waived or otherwise modified Marriott's right to request additional Working Capital and that 2) it would fund the requested amounts into the Operating Account within 10 days or exercise its rights herein.[24]

Marriott expended the initial $5 million from the FF&E Reserve by the end of April.[25] On May 15, 2020, Marriott requested Wardman to fund an additional $1 million to cover projected cash shortfalls for the month of May.[26] Wardman rejected the request.[27] Instead, Wardman offered to fund $1 million from the FF&E Reserve to the Hotel if, among other conditions, Marriott agreed to permanently close the Hotel and if Marriott used all of those funds to facilitate the closure of the Hotel.[28] On May 20, Marriott restated its requests, thereby rejecting Wardman's conditional offer.[29]

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[22] Plaintiff's Exhibit 1f.

[23] Plaintiff's Exhibit 1f.

[24] Plaintiff's Exhibit 1f.

[25] Plaintiff's Exhibit 1, Declaration of Julie Bowen, at p. 4-5.

[26] Plaintiff's Exhibit 1g.

[27] Plaintiff's Exhibit 1h.

[28] Plaintiff's Exhibit 1h.

[29] Plaintiff's Exhibit 1i.

On May 22, 2020, Marriott requested Wardman to fund an additional $1.5 million to cover projected cash shortfalls for the month of June.[30] Once again, Wardman rejected this request, contesting that it violated Section 4.05 of the Management Agreement.[31] Wardman also stated that if Marriot made "a further Funds Request that complies with Section 4.05 of the HMA, including by explaining in detail (with all appropriate and reliable backup) why the requested funds are reasonably necessary to satisfy the needs of the Hotel," it would evaluate it at that time.[32]

On June 25, 2020, Marriot requested Wardman to fund an additional $1.3 million to cover projected cash shortfalls for the month of July.[33] Once again, Wardman rejected the request on the grounds that it violated Section 4.05 of the Management Agreement and stated that it would consider a Funds Request that complied with Section 4.05.[34]

On July 24, 2020, Marriott requested Wardman to fund an additional $2.7 million to cover projected cash shortfalls anticipated through September.[35] Once again, Wardman rejected the request on the grounds that it violated Section 4.05 of the Management Agreement and stated that it would consider a Funds Request that complied with Section 4.05.[36]

On September 3, 2020, PL Wardman Member, LLC, the former owner of an 80% equity interest in Wardman and the current owner of a 100% equity interest in Wardman, petitioned the

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[30] Plaintiff's Exhibit 1j.

[31] Plaintiff's Exhibit 1k.

[32] Plaintiff's Exhibit 1k.

[33] Plaintiff's Exhibit 1m.

[34] Plaintiff's Exhibit 1n.

[35] Plaintiff's Exhibit 1o.

[36] Plaintiff's Exhibit 1q.

Delaware Chancery Court to dissolve Wardman and appoint a trustee to wind up its affairs.[37] In its petition, PL Wardman Member, LLC stated that the Hotel "is in financial distress, with liabilities that exceed its value, a near-total loss of revenues, and a need for material capital contributions."[38] JBGS/Company Manager, L.L.C., the former owner of a 20% equity interest in Wardman, responded to PL Wardman Member, LLC's petition with a letter to Vice Chancellor Slights in which it stated that Wardman "still has approximately $850,000 of cash in its operating account as well as an additional approximately $7,000,000 of cash in a furniture, fixtures, and equipment reserve (the "FF&E Reserve") that could be used to fund operating shortfalls."[39]

On September 4, 2020, Marriott requested Wardman to fund an additional $2.2 million to cover additional shortfalls through October.[40] Wardman has not provided these requested funds.[41]

According to Wardman, it rejected each of Marriott's claims for working capital listed above because "they were sent expressly in furtherance of Marriott's baseless March 16 demand for $10 million, they were procedurally improper under the HMA, and because Marriott failed to demonstrate that these vast sums were reasonably necessary each month for the operation of Owner's shuttered, inoperative Hotel."[42]

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[37] Plaintiff's Exhibit 1s.

[38] Plaintiff's Exhibit 1s.

[39] Plaintiff's Exhibit 1u.

[40] Plaintiff's Exhibit 1r.

[41] Plaintiff's Exhibit 1, Declaration of Julie Bowen, at p. 7.

[42] Defendant Wardman Hotel Owner, L.L.C.'s Opposition to Plaintiff's Motion for a Preliminary Injunction and Other Relief ("Defendant's Opposition), at p. 3-4.

On September 23, 2020, Marriott filed this motion seeking, by way of a preliminary injunction, specific performance of Wardman's obligation to provide Working Capital funds during the pendency of this litigation.[43] Wardman claims that, in its motion, Marriott seeks "to upend the status quo by forcing Owner to make working capital payments now, even though Marriott seeks precisely this remedy as the ultimate relief in its Complaint."[44]

Discussion

Marriott seeks a preliminary injunction against Wardman requiring it, as the owner of the Hotel, to fulfill its promise set out in Section 4.05 of the Management Agreement to "no later than ten (10) days after a written request by [Marriott], advance any additional funds necessary to maintain Working Capital at levels determined by [Marriott] to be reasonably necessary to satisfy the needs oi the Hotel as its operation may from time to time require….."[45] Marriott characterizes its request for relief at this juncture as a request for specific performance, as expressly allowed under Section 9.02 of the Management Agreement. That section provides, upon the event of a default, for the right of the non-defaulting party to seek, among other remedies, specific performance. That section also refers to the remedies referenced in Section 9.03(E) of the Management Agreement, which include injunctive relief.

Wardman counters that Marriott is simply seeking an injunction for the payment of money, and is doing so well in advance of a determination of the merits of its claims for relief. The court disagrees.

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[43] Motion by Plaintiff Marriott Hotel Services, Inc. for a Preliminary Injunction and Other Appropriate Relief and Memorandum in Support, p. 1.

[44] Defendant's Opposition, at p. 9.

[45] Plaintiff's Exhibit 1b at p. 11.

In Maryland, a party seeking a preliminary injunction must satisfy a common law, four-factor test. *Fuller v. Republican Central Committee*, 444 Md. 613, 635-36 (2015). Those four common law factors are:

1. The likelihood that the plaintiff will succeed on the merits;

2. The "balance of convenience" of the parties, which is whether greater injury would result from the issuance of the injunction than from its denial;

3. Whether plaintiff will suffer irreparable injury if the injunction is denied; and

4. The public interest.

Dep't of Transportation v. Armacost, 299 Md. 392, 404-05 (1984). The burden of proof and persuasion at all times is on the party seeking the injunction. *Eastside Vend Distributors, Inc. v. Pepsi Bottling Group, Inc.*, 396 Md. 219, 241 (2006). The party opposing the injunction has no burden. Although the law in Maryland was once to the contrary, an injunction will not be denied merely because the party seeking it has an adequate remedy at law. Md. R. 15-502(c); *see Anne Arundel Co. v. Whitehall Ven.*, 39 Md. App. 197, 200 n. 2 (1978).

In its opinion in Winter v. Natural Resources Defense Council, Inc., 129 S. Ct. 365, 374-76 (2008), the Supreme Court articulated what must be shown in federal court under Rule 65 to obtain a preliminary injunction, stating that the plaintiff must establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter,* 129 S. Ct. at 374. All four requirements must be satisfied. Indeed, the Supreme Court in *Winter* rejected a more flexible standard that allowed the plaintiff to demonstrate only a "possibility" of irreparable harm because that standard was "inconsistent with

our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 375–76.

The Court of Appeals has not yet decided whether to follow the federal courts' recent departure from the "flexible" approach it adopted in *Lerner v. Lerner*, 306 Md. 771, 784 (1986), which was derived from earlier federal cases such as *Hamilton Watch Co., v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953). *See also American Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 965 (9th Cir. 1983)(discussing then prevailing federal alternative approaches). For present purposes, this court will use the stricter federal standard currently employed under Federal Rule 65. *See Real Truth about Obama, Inc. v. FEC*, 575 F.3d 342, 345-47 (4th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2371 (2010), *reissued in relevant part*, 607 F.3d 355 (4th Cir. 2010).

In any event, the test for a preliminary injunction is not formulaic. There is no specific order in which a trial court is to consider the factors or the weight each factor will have in a particular case, especially absent an injunction's effect on a governmental party. *See Fogle v. H & G Restaurant, Inc.*, 337 Md. 441, 456 (1995). The four-factor test is not akin to proving the elements of a tort. "The four factors are simply that, *factors*, designed to guide trial judges in deciding whether a preliminary injunction should be issued." *DMF Leasing, Inc. v. Budget Rent-A-Car of Maryland, Inc.*, 161 Md. App. 640, 648 (2005) (emphasis in original). The Court of Appeals recently has noted, however, that ordinarily the first and the third factors "are generally considered to be the most significant." *Ademiluyi v. Egbuonu*, 466 Md. 80, 114-15 (2019). Nonetheless, the party seeking a preliminary injunction must satisfy its burden of proof as to all four factors. *Winter*, 129 S. Ct. at 374-76.

The parties chose the law of the District of Columbia as part of their agreement. Section 11.04 provides: "This Agreement shall be construed under and shall be governed by the laws of

the District of Columbia." Marriott contends that in using this language the parties elected only the substantive law of the District of Columbia, whereas the procedural law of any forum where suit was brought would govern the applicable remedies. For this reason, among others, Marriott chose to bring this action in Maryland, which in 2004 enacted a statute specifically addressing the remedy of specific performance and hotel management agreements. Wardman contends that only remedies available under the law of the District of Columbia apply to the Management Agreement at issue.

In enacting Section 23-102(b) of the Commercial Law Article in 2004, the General Assembly of Maryland vested trial courts with express statutory authority to enforce hotel management agreements by specific performance. That statute recites: "A court may order the remedy of specific performance for anticipatory or actual breach or attempted or actual termination of an operating agreement notwithstanding the existence of an agency relationship between the parties to the operating agreement." The bill file[46] makes plain that this provision was added to allow enforcement of hotel management agreements by specific performance despite their being considered personal service or agency contracts. At common law in many jurisdictions these types of agreements could not be enforced by specific performance or injunctive relief for a variety of reasons. *See Marriott International, Inc. v. Eden Roc, LLLP*, 962 N.Y.S.2d 111 (N.Y. App. Div. 2013)(holding that a hotel management agreement is a personal services contract that may not be enforced by injunction).

In this court's view, Section 23-102(b) of the Commercial Law Article is both remedial and procedural. As a procedural remedy authorized by statute, Maryland law, not the law of the District of Columbia, governs the availability of remedies potentially available in the event of a

[46] Letter of November 4, 2003 from Assistant Attorney General Kathryn M. Rowe to Delegate Anne Marie Doory, at p. 2.

contractual breach. Even were that to turn out not to be the case, the law of the District of Columbia nonetheless appears to allow specific performance in breach of contract actions. *Stanford Hotels Corp. v. Potomac Creek Assocs.*, 18 A.3d 725, 734-35 (D.C. 2011); *see also IHG Management (Maryland) LLC v. West 44th Street Hotel LLC*, 81 N.Y.S.3d 401 (N.Y. App. Div. 2018) (applying Maryland law and affirming issuance of a preliminary injunction prohibiting the defendant from terminating a management agreement). Further, regardless of which state's law applies, the Management Agreement itself authorizes either party to seek specific performance from a court as a remedy in the event of a breach. Thus, it ultimately makes no difference if Section 23-102(b) is held not to be procedural or to be inapplicable.

LIKELIHOOD OF SUCCESS

Likelihood of success on the merits is measured by whether the plaintiff's claims in the instant litigation have a realistic chance of being resolved in its favor. *Ehrlich v. Perez*, 394 Md. 691, 708 (2006). Here, Section 4.05 of the Management Agreement expressly requires Wardman to advance additional working capital within ten days of receiving a written request from Marriott. The court finds that Wardman repeatedly has failed to comply with this promise. Contrary to Wardman's contention, these funds, Working Capital, are not money damages due to or claimed by Marriott on account of Wardman's breach of the contract. To the contrary, they are funds defined under the parties' contract to be used by Marriott "for the purposes of this Agreement pursuant to cash management policies established for the Marriott System"[47] to run the hotel. Viewed in that light, Marriott in this case is simply "seeking specific performance of an express contractual undertaking and not merely the securing of an otherwise general

[47] Plaintiff's Ex. 1b at p. 11.

unsecured claim. Injunctive relief may be granted for that purpose, as the functional equivalent of specific performance." *SECI, Inc. v. Chafitz, Inc.*, 63 Md. App. 719, 726 (1985).

Ordinarily, "specific performance is an 'extraordinary equitable remedy which may be granted, in the discretion of the chancellor, where more traditional remedies, such as damages, are either unavailable or inadequate.'" *Yaffe v. Scarlett Place Residential Condo.*, 205 Md. App. 429, 454 (2012)(quoting *Archway Motors, Inc. v. Herman*, 37 Md. App. 674, 681 (1977)). Yet, as the Court of Special Appeals explained in *SECI, Inc. v. Chafitz, Inc.*, *supra*, it is a remedy that may be available in certain cases of breach of an express promise.

"While a prohibitory injunction requires no action by the person enjoined because it directs the person refrain from specified action, a mandatory injunction directs the person to take action." P. Niemeyer & L. Schuett, MARYLAND RULES COMMENTARY at 1008 (5th Ed. 2019). A mandatory injunction "should be issued with caution, and is ordinarily restricted to cases where adequate redress at law is not afforded, or where the injury is not compensable in damages." *Maryland Trust Co. v. Tulip Realty Co.*, 220 Md. 399, 412-413 (1959). "[I]n weighing the propriety of issuing it, a court should consider the relative convenience and inconvenience which will result to the parties from granting or refusing this form of injunctive relief." *Id.* (citing *Baltimore & P.S.B. Co. v. Ministers & Trustees of Starr Methodist Protestant Church*, 149 Md. 163, 180 (1925)). Where, "in addition to the inadequacy of the remedy at law for damages for the ends of justice, the injury is of so serious or material a character that the restoring of things to their former condition is the only remedy which will meet the requirements of the case, a mandatory injunction will be awarded." *Baltimore & P.S.B. Co.*, 149 Md. at 180.

Read together, Section 9.01(D), Section 9.02, and Section 9.03(E) of the Management Agreement expressly provide that Marriott may seek specific performance of Wardman's

promises, and do so by way of an injunction. The parties' agreement to remedy a breach through specific performance is "definite" and "certain," and thus is an agreement enforceable by this court. *Scholtz v. Philbin*, 157 Md. 196, 199 (1929).

IRREPARABLE HARM

In addition to monetary harm to the tune of over $ 5 million it has advanced because of Wardman's breach of promise, Marriott, the court finds, also has shown non-monetary injury proximately resulting from Wardman's conduct. Irreparable injury exists when damage to a party includes harm to reputation, goodwill, and customer relationships. *In re Shawe & Etling LLC*, 2015 WL 4874733, at *28 (Del. Ch. August 13, 2015), *aff'd*, 157 A.3d 152 (Del. 2017). For that reason, "the danger of losing valuable revenue-generating relationships is a harm that may not be compensable in any manner other than injunctive relief." *CRii, LLC v. Wellness Acq. Gp., Inc.*, 2009 WL 2998169, at * 13 (Del. Ch. Sept. 21, 2009). Marriott has shown such harm in this case; harm to its employee relationships, harm to its vendor relationships, and harm to its relationships with hotel customers.

BALANCE OF EQUITIES

Even were Marriott's chances on the merits somewhat less than described above, the equities still favor court intervention. The court finds that irreparable harm has resulted and will continue to result if Marriott is forced to wait to receive an award of money damages and to suffer successive breaches of promise by Wardman. Further, the court finds that money damages in this case are, to be sure, under-compensatory. Although an eventual money judgment would suffice in many cases, it would not be adequate here. Moreover, the parties in this case, pursuant to Sections 9.02 and 9.03(E) of the Management Agreement, specifically bargained for specific performance of the contract and injunctive relief, in addition to any other available remedies,

should intervention by a court be needed. Manifestly, these sophisticated parties knew what they bargained for when they signed the Management Agreement.

As noted, "injunctions are designed to maintain the status quo between parties during the course of litigation." *Eastside Vend*, 396 Md. at 241. The status quo means the preservation or maintenance of the last actual, uncontested status of affairs that preceded the pending controversy. *Maloof v. State Dept. of Env't*, 136 Md. App. 682, 693 (2001); *Maryland Comm'n on Human Relations v. Downey*, 110 Md. App. 493, 516 (1996). The status quo in this case is that Marriott requests Working Capital funds from Wardman as the need arises and that Wardman, pursuant to its express promise, provides it. Allowing Wardman to dishonor the bargained-for Working Capital requests destroys that status quo and, in the absence of an injunction, constitutes "irreparable injury in the context of preliminary injunctions." *Lerner*, 306 Md. at 791.

Marriott has spent over $5 million of its own funds to cover Wardman's contractual obligations under the Management Agreement. Marriott, the court finds, also has suffered, and, absent injunctive relief, will continue to suffer, reputational harm among its employees, vendors, and customers. The court finds this to be irreparable harm sufficient to warrant preliminary injunctive relief to maintain the status quo and to prevent further harm.

PUBLIC INTEREST

The court also finds that the public interest in this case militates in favor of granting a preliminary injunction. The public policy of both Maryland and the District of Columbia, with respect to contracting, is freedom of contract. *Whiting v. Wells Fargo Bank*, N.A., 230 A.3d 916, 923 & n. 10 (D.C. 2020)(citing *Maryland-Nat'l Capital Park & Planning Comm'n v. Washington Nat'l Arena*, 282 Md. 588, 606-607 (1978). This freedom to organize one's

financial affairs is particularly compelling when all parties to a contract are sophisticated parties, as is the case here. Absent fraud, or other unusual circumstances, a contract among sophisticated parties will be enforced, as written, even if it turns out to be a bad business deal for one side or the other. It is neither the court's job, nor part of the court's function, to fix a deal which, in hindsight, or due to unforeseen conditions, is less than optimal.

For the reasons outlined above, it is this 3rd day of December, 2020, at 4:45 p.m.,

ORDERED, that the plaintiff's motion for a preliminary injunction is granted. Wardman shall, within ten (10) days after receiving a written request from Marriott, advance the requested funds determined by Marriott to be reasonably necessary to maintain the Working Capital needs of the Hotel; and it is further

ORDERED, pursuant to Md. Rule 15-503(c), that Marriott shall sign and file with the Clerk of the Court a promissory commitment that it will answer for damages sustained and costs incurred by Wardman in the event that this preliminary injunction is determined to have been wrongly entered,[48] and it is further

ORDERED, that no monetary bond is required to be posted by Marriott until Wardman has provided, pursuant to this preliminary injunction, Working Capital in excess of $ 5 million.

Ronald B. Rubin, Judge

[48] P. Niemeyer & L. Schuett, MARYLAND RULES COMMENTARY at 1025 (5th Ed. 2019).