STATE OF NORTH CAROLINA **COUNTY OF WAKE** **CROCKETT CAPITAL CORPORATION,** **Plaintiff,** **v.** **INLAND AMERICAN WINSTON HOTELS, INC. and WINN LIMITED PARTNERSHIP,** **Defendants.**	**IN THE GENERAL COURT OF JUSTICE** **SUPERIOR COURT DIVISION** **CIVIL ACTION NO. 08-CVS-000691**

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TREATISES

I. INTRODUCTION

Crockett Capital has asked this Court to enforce the contractual rights the parties to this action agreed to in July 2007, memorialized in the Agreement Regarding Development Projects ("the Master Agreement"). To avoid this result, Defendants have argued that the Master Agreement was only an "agreement to agree" and thus unenforceable. To make this argument, however, Defendants must disregard the provisions of the Master Agreement itself, as well as recent precedent from this Court.

In the Master Agreement, the parties declared that they were "set[ting] forth their agreements" concerning the evaluation, ownership and development of thirteen hotel properties they designated "Pipeline Properties." (Amended Complaint ¶ 11; Master Agreement at Recital C; Exhibit B). To assure a definitive outcome for the decision to develop any of these Properties, the parties also provided that, "for good and valuable consideration," they had reached agreements "regarding (i) the ownership of the Pipeline Properties which Inland determines to develop as hotel properties; (ii) Crockett Capital's rights and obligations with respect to those Pipeline Properties which Inland determines not to develop as hotel properties; and (iii) Crockett Capital's and Inland's rights and obligations with respect to properties other than Pipeline Properties which Crockett Capital and Inland may determine to develop as hotel properties, either alone or with a third-party investor." (Master Agreement; Recital C).

On August 27, 2007, in a closely analogous contract, this Court rejected the contention that an "agreement to agree" was at hand, observing:

> It is definite on its own terms, looks to the formation of an ultimate agreement, and serves to govern the parties' relationship during further negotiations.

Sony Ericsson Mobile Communs. USA, Inc. v. Agere Sys., Inc., 2007 NCBC 28, ¶ 21 (N.C. Super Ct. 2007) (Jolly, J).

Defendants ignore Judge Jolly's opinion in *Sony Ericsson*, just as they ignore several essential terms of the Master Agreement that separate this case from the precedent Defendants advance. Relying—indeed depending upon—their strident warnings against this Court's "forcing the parties to agree," Defendants recast the Master Agreement so that it will fit the precedent they have selected. A fair, straight-on construction, however, of the agreement these parties actually made displays its fundamental difference with the precedent defendants choose to present.

Accordingly, and as detailed below, Defendants have no genuine basis for this motion, much less can they carry the special burden this motion demands. In deciding such motions under Rule 12(b)(6), the Court must determine "whether the facts alleged in the complaint, when viewed in the light most favorable to the plaintiffs, give rise to a claim for relief on any theory." *Ford v. Peaches Entm't Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986). On this motion, this Court takes as true all factual allegations in the complaint. *Oberlin Capital, L.P. v. Slavin,* 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001) (citing *Hyde v. Abbott Labs., Inc.,* 123 N.C. App. 572, 575, 473 S.E.2d 680, 682 (1996)). Moreover, "[t]he complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Block v. County of Person,* 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000).[1]

---

[1] In addition to the allegations set forth in the complaint, "the Court may consider documents . . . which are the subject of the challenged pleading and specifically referred to in that pleading." *Wachovia Capital Partners, LLC v. Frank Harvey Investment Family L.P.*, 2007 WL 2570838, *3, 2007 NCBC 7, ¶ 20 (N.C. Super. March 5, 2007) (citing *Oberlin Capital*, 147 N.C. App. at 60, 554 S.E.2d at 847). Here, Crockett Capital relies in part upon the text of the Master Agreement attached to the Amended Complaint, with Exhibits A – F, as Exhibit A.

II. BACKGROUND OF THE MASTER AGREEMENT

Crockett Capital develops and manages hotel properties, and Defendants own and operate hotels and other hospitality properties. (Am. Compl. ¶¶ 4-5). In late July 2007, Defendants and Crockett Capital entered into the Master Agreement, an agreement they dated retroactively to July 1, 2007. (*Id.* ¶¶ 8-9).

The Master Agreement contains a series of agreements the parties reached with respect to their ongoing business relationship. First, it prescribes the process by which the parties agreed to evaluate each Pipeline Property submitted for development consideration. Crockett Capital agreed to prepare for Defendants development packages containing certain information about various Pipeline Properties identified in Paragraph 2 of the Master Agreement.[2] (*Id.* ¶ 11; Master Ag. ¶ 2). In turn, Defendants agreed to provide Crockett Capital written notice within specified time periods if they decided to pursue development of a particular property that Crockett Capital had identified as a development prospect. (Am. Compl. ¶ 12; Master Ag. ¶ 2).

The Master Agreement also provides a no-impasse mechanism should Defendants elect not to develop a Pipeline Property by the terms Crockett Capital proposes in the pre-development submission process. In this instance, the Agreement requires the Defendants to "transfer, convey and assign any rights [they] ha[ve] in any such Pipeline Property to Crockett Capital or its assignee," and Crockett Capital has the right, either alone or with one or more third-party investors, to develop that Property. (Am. Compl. ¶ 23; Master Ag. ¶ 5). In return for this transfer of rights, Crockett Capital agrees to reimburse Defendants for costs they have incurred in acquiring those rights. (Master Ag. ¶ 5). As the Amended Complaint sets out, Defendants have declined to develop and thereafter refused—in contravention of ¶ 5—to "transfer, convey,

---

[2] As Defendants are well aware, development of six of the thirteen Pipeline Properties proved to be unfeasible. Accordingly, the parties agreed that submission of development packages for these Properties was not required. Defendants' contention otherwise holds no merit. Defs. Brief at n. 4.

and assign" their rights to Crockett Capital in three of the four Pipeline Properties this suit concerns. (Am. Compl. ¶¶ 34-35).

If, on the other hand, upon completing the evaluation process, Defendants determine to develop a Pipeline Property, the Master Agreement provides that an affiliate of Defendants and an affiliate of Crockett Capital would form a limited liability company to operate as a joint venture and own the Pipeline Property (a "Joint Venture"). (*Id.* ¶ 14). The parties negotiated and attached as Exhibit E to the Master Agreement a 35-page form Limited Liability Company Agreement to serve as the governing document for any resulting Joint Venture. (*Id.*). Exhibit E lays out in significant detail the parties' agreement how each Joint Venture would operate, including the rights and duties of members and managers, the allocation of profits and losses, and mechanisms for admitting new members or transferring membership interests. (Master Ag. at Exh. E). As the Amended Complaint explains, Defendants gave notice of their intent to proceed with development of a fourth Pipeline Property. (Am. Compl. ¶ 37). Yet later, in violation of their obligations under the Master Agreement, Defendants refused to cooperate in the development of that Property, causing Crockett Capital significant financial loss. (*Id.* ¶¶ 44, 46–50).

The Master Agreement also grants Crockett Capital the right to provide hotel management and development services for any Pipeline Property that the parties decide to develop. Defendants and Crockett Capital negotiated detailed form agreements to govern each of these relationships, attaching them to the Master Agreement as Exhibits D and F respectively. (*Id.* ¶¶ 18-19). Exhibits D and F contain formulas for calculating the fees and other compensation Crockett Capital is to receive for providing these services. (*Id.* ¶ 20; Exhibit D at Section 10.02; Exhibit F at Article 11). Contracts similar to the Master Agreement are standard within the real estate development industry, and for good reason. (Am. Compl. ¶ 7).

Parties evaluating opportunities for future development often enter into a master contract setting forth the terms and conditions of their ongoing relationship and agree on the forms of operative documents for the transactions they need to continue to evaluate. This arrangement allows the parties to monitor market conditions and costs of financing for those transactions. Nothing in the future monitoring process, however, diminishes the fact of the parties' contractual commitment that is "definite on its own terms." *See Sony Ericsson*, 2007 NCBC 28, at ¶ 21.

Since July 2007, Crockett Capital and Defendants have proceeded as if the Master Agreement is binding on all concerned. Crockett Capital has performed its obligations under the Master Agreement, and Defendants have performed their obligations—with the exception of Defendants' various breaches identified in the Amended Complaint. Specifically, with respect to one Pipeline Property, an Aloft hotel in Birmingham, Alabama, the parties evaluated the opportunity in accordance with the Master Agreement, and within days of Defendants' giving notice they wished to proceed, the parties executed the required documents in substantially the forms of Exhibits D, E and F. (Am. Compl. ¶¶ 36-41, detailing the parties' compliance with the Master Agreement in making final the Birmingham Aloft development agreement and related documents). Throughout their argument to dismiss, Defendants fail to mention these undisputed facts, all displaying the parties' adherence to the Master Agreement.

III. DEFENDANTS' BREACHES OF CONTRACT

Crockett Capital has asked the Court to redress Defendants' contractual breaches with respect to four Pipeline Properties: a Westin Hotel in Durham, North Carolina ("RTP Westin"), a Hampton Inn & Suites/Aloft Hotel in Raleigh, North Carolina ("Raleigh Hampton/Aloft"), an Aloft Hotel in Chapel Hill, North Carolina ("Chapel Hill Aloft"), and an Aloft Hotel in Cary, North Carolina ("RDU Aloft"). (Am. Compl. ¶¶ 45-59). Defendants declined to develop the first three of these properties with Crockett Capital during the evaluation stage set out in

paragraph 2 of the Master Agreement. As a result, Defendants are contractually obligated to transfer to Crockett Capital all of their rights in these properties. (*Id.* ¶¶ 51-57). In accordance with paragraph 5 of the Master Agreement, Crockett Capital has offered to pay Defendants their acquisition costs incurred to date with respect to each of these three properties, but Defendants have ignored these offers, refusing Crockett Capital's several requests that Defendants transfer their rights. (*Id.* ¶¶ 52-54).

By contrast, with respect to a fourth property (RDU Aloft), Crockett Capital submitted complete pre-development information, and the parties agreed upon all material terms of the Joint Venture arrangement in accordance with the Master Agreement. (*Id.* ¶¶ 36-39). Again as the Master Agreement calls for, Defendants gave notice to Crockett Capital of their intention to proceed with development. (*Id.* ¶ 37). Despite the parties' agreement, including approval by Defendants' counsel of the Limited Liability Company Agreement for RDU Aloft, Defendants have refused to comply with their express obligations under the Master Agreement to enter into a Limited Liability Company Agreement, a Hotel Management Services Agreement, and a Development Agreement substantially similar to Exhibits D, E and F. (*Id.* ¶¶ 42-44).

As a result of Defendants' breaches, Crockett Capital has incurred substantial financial losses, including without limitation lost profits, development fees and hotel management fees. (*Id.* ¶¶ 45-50, 58-59).

Contrary to Defendants' assertions, Crockett Capital has not asked this Court to order Crockett Capital and Defendants to enter into a Joint Venture for development of any of the Pipeline Properties. (Defs. Brief at 3). Rather, Crockett Capital seeks relief consistent with and contemplated by the Master Agreement. First, Crockett Capital seeks to recover its financial losses arising from Defendants' breach of its obligations under the Master Agreement by refusing to proceed with development of the RDU Aloft property. (*Id.* ¶¶ 45-50). Likewise,

Crockett Capital asks this Court to order Defendants to transfer, convey and assign to Crockett Capital their rights in the RTP Westin, Raleigh Hampton/Aloft and Chapel Hill Aloft properties, exactly as Paragraph 5 of the Master Agreement requires, or in the alternative, for recovery of its financial losses resulting from Defendants' refusal to transfer. (Am. Compl. ¶¶ 51-59).

IV. THE MASTER AGREEMENT IS ENFORCEABLE ON ITS FACE.

Defendants' motion must fail because the Master Agreement is not an "agreement to agree." Defendants rely on three North Carolina cases—*Boyce v. McMahan*, 285 N.C. 730, 208 S.E.2d 692 (1974), *Housing, Inc. v. Weaver*, 305 N.C. 428, 290 S.E.2d 642 (1982) and *Durham Coca-Cola Bottling Co. v. Coca-Cola Bottling Consol.*, 2003 NCBC 3 (N.C. Super. Ct. 2003)—that illustrate just how strained is Defendants' characterization of the Master Agreement. *Boyce, Weaver* and *Durham Coca-Cola* turned on two features of the challenged writings that are absent from the Master Agreement: (1) the very terms of the writings declared their preliminary nature, and (2) the writings contained no method for resolving disputes or eliminating impasses that might arise between the parties so as to guide a court in granting relief. Because the Master Agreement is a self-contained contract that delineates the parties' rights and obligations under all circumstances, the policy considerations central to *Boyce*, *Weaver* and *Durham Coca-Cola* do not obtain here. Defendants conjure only phantom fears that this Court will subject the parties to an agreement they did not and would not have reached themselves.

A. The Master Agreement is neither "preliminary" nor subject to the signing of a "more definitive" agreement.

Defendants depend upon their attempt to equate the Master Agreement with the facially deficient writings struck down in *Boyce*, *Weaver* and *Durham Coca-Cola*. In fact, the Master Agreement differs fundamentally from those writings, because in each of those cases, the parties affirmatively acknowledged the preliminary nature of their writing and expressed their intention

to enter into a subsequent contract finalizing or fleshing out terms necessary for a contractual commitment to arise. Specifically, in *Boyce*, 285 N.C. at 734, 208 S.E.2d at 695, the writing recited the "desire of the parties to enter into a preliminary agreement . . . and to execute a more detailed agreement at a later date" and stated that "the parties hereto agree to supplement this preliminary agreement by executing a more detailed agreement at some specific and subsequent date." Likewise, in *Weaver*, 305 N.C. at 431, 290 S.E.2d at 644, the writing recited that it "constitute[d] a memoranda [*sic*] of our understanding" and that the parties "inten[d] to supplement this letter of understanding by a more definitive agreement as this matter develops." Also, in *Durham Coca-Cola*, 2003 NCBC 3, at ¶ 40, the proposal for purchase of the business "refer[red] to itself internally as a 'letter of intent' at least five times" and "expressly state[d] that it [was] subject to a future, more complete acquisition agreement."

Though they could easily have done so had it been their intent, Defendants and Crockett Capital did not provide that the Master Agreement was "subject to a more definitive agreement," or one to be negotiated at a later time. *See Sony Ericsson,* 2007 NCBC 28, at ¶ 22 ("If the intent of Sony AB and Agere was to not be bound by the MDLA, 'surely no problem of draftsmanship would have stood in the way of its being spelled out.'") (citation omitted). Likewise, the parties declined to name their agreement either a "letter of intent," a "memorandum of understanding" or, as Defendants now prefer, a "development memorandum." Nowhere does the Master Agreement state that it is preliminary or that the parties do not intend to be bound by its terms. Rather, the Master Agreement's recitals, like its body, demonstrate the contrary, namely that "for good and valuable consideration," the parties "set forth their agreements" regarding evaluation, ownership and development of the Pipeline Properties. Although the Master Agreement contemplates that the parties may well enter into other agreements at a later time (*i.e.*, those governing a particular Joint Venture), it does not provide or even imply that the parties have any

need to enter into some further iteration of the Master Agreement. In contrast to the writings in *Boyce, Weaver* and *Durham Coca-Cola*, the Master Agreement is the parties' final word on the agreement it memorializes.

A more instructive analogy to the Master Agreement than the failed writings in *Boyce*, *Weaver* and *Durham Coca-Cola* is the Master Development and License Agreement ("MDLA") this Court upheld in *Sony Ericsson.* Sony Ericsson sought assistance from Agere to develop a chip platform for its wireless products, and the parties entered into the MDLA. *Sony Ericsson*, 2007 NCBA 28, at ¶¶ 1, 7. Sony Ericsson sued Agere for fraud in connection with the development efforts. When Agere moved to dismiss Sony Ericsson's complaint and enforce the MDLA's forum selection clause, Sony Ericsson argued the MDLA was an unenforceable agreement to agree. *Id.* at ¶ 14. Judge Jolly rejected Sony Ericsson's argument, holding that although the MDLA contemplated future contracts between the parties in the form of "Statements of Work," the MDLA itself was complete and enforceable. Noting that such an arrangement "represents a not-uncommon contract structure in commercial agreements," Judge Jolly wrote as follows:

> Though the MDLA may not contain many of the substantive terms of the contemplated ultimate relationship of the parties itself—which appears to be the provision of technological deliverables—none of its own terms remain to be negotiated. In this regard, the main purpose of the MDLA is to provide "the general terms and conditions under which" the parties would explore a further relationship. Concordantly, the MDLA does not require that a Statement of Work ever be executed. (citations omitted) . . . .
>
> *[T]he MDLA is unlike an agreement to negotiate because none of its terms remain to be negotiated and it indicates the parties' intent to be bound to its substantive provisions.* In this regard, the MDLA is more of an "agreement governing negotiations" than an agreement to negotiate. Accordingly, the MDLA is distinguishable from those cases cited by Sony USA [which include *Boyce* and *Durham Coca-Cola*]. (footnote omitted)

Id. at ¶¶ 19, 20, 23 (emphasis added).

Likewise, in this case, the Master Agreement contemplates that the parties will identify Pipeline Properties they wish to develop, resulting in their executing Joint Venture documentation in substantially the forms attached as Exhibits D, E and F. But the Master Agreement neither requires nor depends upon the formation of a Joint Venture for any of the Pipeline Properties. Its scope is much broader and encompasses the full range of the parties' dealings—whether they develop a Pipeline Property together or not. Like the MDLA in *Sony Ericsson*, the Master Agreement establishes substantive rights and obligations of the parties—independent of their negotiations of additional agreements in the future. *Id.* at ¶ 21. The MDLA left some terms of Sony Ericsson's and Agere's Statements of Work for later determination. *Id.* Similarly, the Master Agreement recognizes that the parties can complete certain features of the Joint Venture documentation only when they have further evaluated a particular Pipeline Property. But like the MDLA, nothing about the Master Agreement itself remains to be negotiated.

As a result of this internal completeness, Judge Jolly distinguished the MDLA from the deficient contract this Court struck down in *Durham Coca-Cola*. Although specific enforcement of the *Durham Coca-Cola* purchase proposal would have required that the Court "force the parties to negotiate" open terms or supply those terms itself, the MDLA in *Sony Ericsson* raised no corresponding concerns. *Id.* at n. 10, n. 12. The same reasoning applies to the Master Agreement in this case.

B. The Master Agreement delineates the parties' rights and responsibilities for development of each submitted Pipeline Property, regardless of whether the parties enter into a Joint Venture.

Defendants miss the mark to characterize the Master Agreement as having no "mode of settlement for any unresolved terms that were subject to future negotiations." (Defs. Br. at 13). First, as shown above, the Master Agreement itself contains no open terms. Despite their

characterizations, Defendants decline to show otherwise. Second, the Master Agreement specifies the parties' respective rights and obligations as to each Pipeline Property—whether or not they ever agree on all material terms of a particular Joint Venture. Unlike the writings in *Boyce*, *Weaver* and *Durham Coca-Cola*, the Master Agreement ensures that the parties will not remain at impasse—either they, as joint venturers, or Crockett Capital on its own, will have a full opportunity to develop each Pipeline Property that Crockett Capital identifies. *See, e.g.*, *166 Mamaroneck Ave. Corp. v. 151 East Post Road Corp.,* 78 N.Y.2d 88, 91-92, 575 N.E.2d 104, 106, 571 N.Y.S.2d 686, 688 (N.Y. 1991) (denying motion to dismiss on grounds that lease renewal option was "agreement to agree" where contract provided a mechanism for fixing open rent term and bound the parties to the result); *Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp.*, 74 N.Y.2d 475, 483, 548 N.E.2d 203, 206, 548 N.Y.S.2d 920, 923 (N.Y. 1989) (reversing finding that purchase option contract with open price term was unenforceable where contract contained "a method for reducing uncertainty to certainty"). Such an approach serves well the policy that neither party to this transaction can stop the wheels of commerce for any Pipeline Property submitted for development.

On its face, the Master Agreement fixes nearly every material term of the parties' relationship should they enter into a Joint Venture to develop a Pipeline Property. The form Hotel Management Services Agreement, Limited Liability Company Agreement and Development Agreement that comprise Exhibits D, E and F to the Master Agreement reveal that the parties have already negotiated and reached agreement as to almost all details, both major and minor. Indeed, the rapid execution of these documents with only minor alterations promptly after Inland elected to proceed with the Birmingham Aloft property demonstrates their completeness, and Defendants' recognition of such completeness. (Am. Compl. ¶¶ 36–41).

Moreover, in every instance where the Master Agreement does not expressly fix a material term relating to a Joint Venture, the Master Agreement prescribes a process by which the parties will either reach an agreement fixing that term or will take specific actions to permit Crockett Capital to develop the Pipeline Property on its own. Paragraph 2 of the Master Agreement provides that Crockett Capital will submit pre-development packages to Defendants for individual Pipeline Properties proposing certain terms the Master Agreement has left open. For example, Exhibit E, the form Limited Liability Company Agreement, does not set the parties' respective equity percentages in each Joint Venture. Crockett Capital agreed to propose equity percentages to Defendants, with Crockett Capital to propose its percentage in the range of 5-20%, in the pre-development package submitted in accordance with Paragraph 2. The Master Agreement then provides that Defendants may accept or reject Crockett Capital's proposed terms within specified time periods. (Am. Compl. ¶ 12, Master Ag. ¶ 2).

If the Defendants accept Crockett Capital's terms, as tendered or through negotiations, the parties will have fixed all material terms of the Joint Venture by agreement. The Master Agreement requires that the parties then memorialize their agreement in documents substantially in the form of Exhibits D, E and F. (Am. Compl. ¶¶ 14, 18, 19, Master Ag. ¶¶ 3, 4). This process went the contractual distance in Birmingham. (Am. Compl. ¶¶ 36-41).

If, on the other hand, Defendants choose not to accept Crockett Capital's proposal, and the parties fail to reach agreement about any open term, Defendants are free to reject the project and thereby decline to proceed with development of the submitted Pipeline Property. The Master Agreement is crystal clear about the parties' rights and obligations in such circumstances: under Paragraph 5, if Defendants choose not to develop a Pipeline Property, Defendants "agree[ ] to transfer, convey and assign, any rights [they] ha[ve] in any such Pipeline Property to [Crockett

Capital]," in exchange for reimbursement from Crockett Capital for any costs Defendants might have incurred in acquiring those rights.

In either instance, Paragraphs 2 and 5 of the Master Agreement assure that the parties need never ask a Court to supply terms of a Joint Venture for them. The parties will have reached agreement on their own as to all material terms, or Defendants, having declined to accept Crockett Capital's proposed terms, will have transferred their rights in the subject property to Crockett Capital. *See 166 Mamaroneck Ave.,* 78 N.Y.2d at 91-92, 575 N.E.2d at 106, 571 N.Y.S.2d at 688; *Cobble Hill*, 74 N.Y.2d at 483, 548 N.E.2d at 206, 548 N.Y.S.2d at 923.

Notably, Defendants ignore these bargained-for features of the Master Agreement, both in their business dealings with Crockett Capital and in their brief. Plaintiff submits that Paragraphs 2 and 5 are dispositive both of Defendants' motion, and also of Defendants' liability. As Defendants are bound to concede, they rejected three of the four Pipeline Properties at issue in this suit at early stages of the evaluation process by repeatedly failing to respond to Crockett Capital's proposals. (Am. Compl. ¶¶ 31, 33, 34). Yet Defendants have refused to comply with their obligations under Paragraph 5 to transfer their rights in those properties to Crockett Capital. (*Id.* ¶ 35). Defendants have refused to do so, despite Crockett Capital's offer to reimburse Defendants' acquisition costs for each of the three properties. (*Id.* ¶ 53).

For the fourth property, RDU Aloft, Crockett Capital made its proposal to Defendants about how to resolve terms the Master Agreement did not fix, including its submission that Defendants hold a 95% interest in the Joint Venture. Defendants had the right, under Paragraph 2, to reject Crockett Capital's proposed terms and to invoke Paragraph 5 to recover any acquisition costs they might have incurred. But Defendants chose instead to accept Crockett Capital's proposal and to agree to Crockett Capital's terms. (*Id.* ¶ 38). On September 26, 2007, Defendants even instructed the parties' shared outside counsel [Andrew Tapscott, Hunton &

Williams] to prepare a Limited Liability Company Agreement for RDU Aloft in accordance with the Master Agreement. (*Id.* ¶ 42, see Defendants' September 24-26, 2007 emails (attached at Tab A)).[3]

Defendants' generalized insistence that material terms remained to be negotiated at that point contradicts the straightforward language of the Master Agreement—and Defendants' conduct. In order for Defendants to give Crockett Capital final notice that they intended to proceed with RDU Aloft—and there is no question Defendants gave this notice (*id.* ¶ 37)—the parties had to have reached agreement as to all material terms of the Joint Venture arrangement through the steps outlined in Paragraph 2. Defendants' refusal to memorialize the agreement the parties had reached and to proceed with development violates their obligations under the Master Agreement.

C. Defendants' attacks on the Master Agreement ignore its text and hold no merit.

Defendants attempt to distract the Court from the Master Agreement's clear mechanism for fixing open Joint Venture terms or, where they cannot be fixed, allocating rights to develop the Pipeline Properties. They do so in part by exaggerating the number and significance of the issues the Master Agreement has left open for negotiation as to each Pipeline Property. For instance, Defendants make the remarkable and repeated claim that Exhibits D, E and F are "not binding in any way upon the parties" and that the parties "expected" but "were not required" to

---

[3] The emails attached at Tab A establish the following:

On September 24, 2007, Inland's Michael Broadfoot set in motion the "JV process for the Aloft RDU." Later that day, Mr. Tapscott answered Mr. Broadfoot, including in his answer Kenneth Crockett of Crockett Capital. Tapscott asked for consent to represent both parties and noted: "I understand that the [joint venture] documentation will be based on the agreed-upon documents from the Birmingham/Homewood deal."

Defendants' Broadfoot answered on September 26, 2007, recommending that Tapscott be approved to represent both parties, adding "we need to get this done in a timely manner."

adhere to their terms in forming a Joint Venture. (Defs. Brief at 2, 6, 11). Not only does this assertion find no basis in the text of the Master Agreement, the text dictates to the contrary. Defendants decline to evaluate the direction from Paragraphs 3 and 4 that the documents executed for a particular Joint Venture "shall be . . . in substantially the form" of the relevant Exhibit. Moreover, Defendants' position defies common sense. Why would the parties negotiate over 100 pages of ancillary agreements if they intended them as no more than suggestions? Further, the level of detail the template documents set out belies Defendants' insistence that the parties were depending on extensive future negotiation, as does the parties' close adherence to these forms for the Birmingham Aloft project. *See Durham Coca-Cola,* 2003 NCBC 3, at ¶ 33 ("In addition to the language chosen by the parties, a court may examine the subsequent behavior of the parties to determine whether a contract was made.") (citations omitted); *Corbin on Contracts* § 4.3, p. 577 (1993).

Defendants' brief identifies only three specific terms they claim to be both material and unresolved: (1) the compensation Crockett Capital is to receive for providing hotel management and development services to the Joint Venture; (2) the amount of rent due to the Joint Venture from an operating entity the parties would form for REIT purposes; and (3) each party's ownership percentage in the Joint Venture. (Defs. Brief at 2, 5, 6, 10, 11, 14). The first two items are red herrings. The Master Agreement fixes Crockett Capital's compensation for services rendered to any Joint Venture by means of formulas contained in Exhibits D and F. *See Corbin on Contracts* § 4.3, p. 576-77 (1993) ("If compensation is expressed in a workable formula, it is certainly expressed with sufficient definitiveness."). Furthermore, as explained in Paragraphs 15 and 16 of the Amended Complaint, the rent amount is immaterial because the parties would own equal percentages of both the landlord and the tenant in this lease arrangement. Because the rent amount would have no economic impact on Crockett Capital, the

parties' agreement reflects their understanding that Defendants would set the rent amount at their discretion in accordance with REIT guidelines and Paragraph 3 of the Master Agreement. A term that is irrelevant to one party and not subject to negotiation cannot carry the weight Defendants suggest.

The third item Defendants advance as fatal to the Master Agreement is the parties' respective ownership percentages. To make their contention, however, Defendants again must ignore the parties' agreement in Paragraph 2 that Crockett Capital would propose equity percentages for Defendants' acceptance or rejection. The Master Agreement specifies that either the parties will agree upon equity percentages during the Paragraph 2 evaluation process or Defendants will transfer their rights in the property to Crockett Capital in accordance with Paragraph 5. In sum, although the Master Agreement does not specify a numeric ratio of ownership percentages, it provides a fail-safe method for determining the parties' ownership rights and obligations. Defendants neither answer nor mention the Master Agreement's built-in tool for fixing equity ratio rights.

Instead, Defendants turn this process on its head when they claim that the Master Agreement "anticipated that the parties first would form a joint venture company . . . with the specific ownership percentages of each partner to be determined by future negotiation." (Defs. Brief at 5). By its terms, the Master Agreement resolves the issue of equity percentages prior to the formation of a Joint Venture: either the parties agree upon equity percentages during the evaluation phase, or Defendants reject development of that property with Crockett Capital.

Likewise, Defendants ignore that the parties did in fact agree upon equity percentages with respect to the RDU Aloft property in accordance with the Paragraph 2 procedure—Defendants would hold a 95% share and Crockett Capital would hold 5%. (Am. Compl. ¶ 38). Equity percentages are irrelevant to Crockett Capital's claims regarding Raleigh Hampton/Aloft

and RTP Westin because Defendants rejected those properties after Crockett Capital's opening submissions. (*Id.* ¶ 34). They are similarly irrelevant to Chapel Hill Aloft, which Defendants rejected after Crockett Capital's second submission, as described below. (*Id.* ¶ 31).

Defendants make a further attempt to divert the Court's attention from their breaches of the Master Agreement. They do so by mischaracterizing Crockett Capital's prayer for relief and the consequences of this Court's enforcing the Master Agreement. They claim that Crockett Capital asks the Court to hold that the Master Agreement "contractually mandate[s] the parties to negotiate, reach final agreement, and execute literally dozens of contracts" establishing Joint Ventures for each and every Pipeline Property. (Defs. Brief at 3). This depiction then allows Defendants to adopt as their mantra the policy concerns central to *Boyce*, *Weaver* and *Durham Coca-Cola*: "the potential tyranny of the courts in forcing contracts upon the parties [that] they were not willing to make for themselves" *Durham Coca-Cola,* 2003 NCBC 3, at ¶ 39.

Crockett Capital asks that the Court enforce the parties' bargain—nothing more nor less. Contrary to Defendants' stated fears, a review of the Amended Complaint will not yield the conclusion that the Master Agreement requires the parties to enter into any Joint Venture—unless and until they have agreed upon all material terms using the procedure their agreement provides. (*See* discussion at 11-13, *supra*). Nor is Crockett Capital asking this Court to require Defendants to enter into any Joint Venture or to develop any Pipeline Property with Crockett Capital. Defendants, by contract right, can "just say no" to any Crockett Capital submission for any Pipeline Property, and upon transfer of its rights to Crockett, not be bothered further.

D. Defendants' conduct belies their insistence that the Master Agreement is unenforceable.

In addition to mischaracterizing the text and spirit of the Master Agreement, Defendants ignore the fact that they have proceeded all along as though the Master Agreement is binding upon all parties to it. The paradigmatic example is Birmingham Aloft, a project the parties have

evaluated and begun to develop just as the Master Agreement provides. Crockett Capital submitted to Defendants the required pre-development information, and Defendants gave notice that they wished to proceed with the proposed Joint Venture. The parties then memorialized their agreement regarding Birmingham Aloft by executing a Hotel Management Agreement, a Limited Liability Company Agreement, and a Development Agreement in substantially the forms of Exhibits D, E and F respectively. The Amended Complaint sets out this history of the parties' conduct. (Am. Compl. ¶¶ 36-44).

Moreover, with respect to Chapel Hill Aloft, one of the properties at issue in this suit, Defendants undertook their evaluation of the project pursuant to the procedure set out in Paragraph 2. Crockett Capital prepared and submitted to Defendants an initial development package on July 12, 2007, and Defendants responded in accordance with the Master Agreement by providing written notice to Crockett Capital, within 10 business days, that they wished to continue the evaluation process (Am. Compl. ¶ 29, see Defendant's July 25, 2007 email (attached at Tab B)). Crockett Capital then submitted a second-round development package to Defendants on or about September 28, 2007. When Defendants declined to give notice that they desired to proceed further with Chapel Hill Aloft, Crockett Capital requested that Defendants comply with their obligation under Paragraph 5 to transfer their rights in the project. Crockett Capital offered to tender Defendants' acquisition costs.[4] At this point, however, by refusing to

[4] Defendants cite yet another instance of the parties' partial performance under the Master Agreement: their execution of four Construction Management Services Agreements as required by Paragraph 1 of the Master Agreement. (Defs. Brief at p. 4, n. 3). Contrary to Defendants' characterization of these agreements as "subsequently negotiated," Paragraph 1 specifies that the agreements were to take substantially the form of Exhibit C to the Master Agreement. In fact, the Construction Management Services Agreements the parties signed were virtually identical to Exhibit C. Crockett Capital submits that the execution of these agreements further demonstrates that Defendants intended to be and are in fact bound by the terms of the Master Agreement. Because the Amended Complaint does not address the Construction Management Services Agreements, however, Crockett Capital asks that the Court not consider this issue when deciding Defendants' motion.

make the required transfer, Defendants breached the Master Agreement. (Am. Compl. ¶¶ 28-31, 35).

Though Defendants denounce the Master Agreement as an "agreement to agree," they have been invoking rights and performing obligations under the Master Agreement for the past ten months. If the definitive nature of the Master Agreement was not clear from its plain language, the parties' dealings under the Master Agreement confirm their intent to be bound by its terms. *See Durham Coca-Cola,* 2003 NCBC 3, at ¶ 33 ("In addition to the language chosen by the parties, a court may examine the subsequent behavior of the parties to determine whether a contract was made.") (citations omitted); *North Carolina Nat'l Bank v. Wallens*, 26 N.C. App. 580, 584, 216 S.E.2d 12, 15 (1975) (trial court's error in granting motion to dismiss because court could not determine whether challenged writing was preliminary without considering the parties' "subsequent conduct and interpretation") (citation omitted).

V. CONCLUSION

Even if the legal standard for a Rule 12(b)(6) motion required Plaintiff's strong forecast of success on the merits, Crockett Capital should prevail on this motion. Defendants have chosen to attack at length their conception of an agreement that is most distinct from the one these parties signed. A fair review of the Master Agreement demonstrates its full compliance with the requirements for a binding contract.

Judge Jolly's opinion in *Sony Ericsson* recognizes agreements that bind the parties to a foundational position, anticipating how their relations might develop, and giving each the freedom to evaluate market forces to come. Nothing Defendants have advanced can detract from the wisdom of encouraging—and thereafter enforcing—such agreements.

Crockett Capital asks this Court to deny Defendants' motion to dismiss.

CERTIFICATE OF COMPLIANCE WITH BCR 15.8

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT contains 6257 words, excluding the parts of the brief exempted by BCR 15.8, and therefore complies with the word-count limitation of BCR 15.8.

This 2nd day of May, 2008.

/s/ John R. Wester
John R. Wester
N.C. State Bar No. 4660
jwester@rbh.com
Louis A. Bledsoe, III
N.C. State Bar. No. 12730
lbledsoe@rbh.com
Jennifer F. Revelle
N.C. State Bar No. 32896
jrevelle@rbh.com

ROBINSON, BRADSHAW & HINSON, P.A.
101 North Tryon Street, Suite 1900
Charlotte, North Carolina 28246
(704) 377-2536 (telephone)
(704) 378-4000 (fax)

Attorneys for Plaintiff
Crockett Capital Corporation