STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CIVIL ACTION NO: 08-CVS-000691

CROCKETT CAPITAL CORPORATION

Plaintiff,

v.

INLAND AMERICAN WINSTON HOTELS, INC. AND WINN LIMITED PARTNERSHIP,

Defendants.

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

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I. INTRODUCTION

Plaintiff Crockett Capital Corporation ("Crockett Capital") has brought suit to enforce what it claims is a legally binding contract between it, Inland American Winston Hotels, Inc. ("Inland American"), and Winn Limited Partnership ("Winn LP") (collectively, "Inland") to negotiate and enter into a series of joint venture agreements to develop potential hotel properties. On its face, this development memorandum is nothing more than a preliminary reflection of the parties' "desire" to subsequently enter into these prospective joint venture agreements and various ancillary contracts. Memorializing the intent of the parties to further negotiate and enter into prospective contracts, what Crockett Capital claims to be a contract is a classic agreement to agree, unenforceable as a matter of law.

Pursuant to a merger between Inland and Winston Hotels, Inc. ("Winston Hotels"), Inland acquired ownership or options to purchase numerous "properties that *may be suitable for development* as hotel projects." (Am. Compl. Ex. A at A (emphasis added).) Given Crockett Capital's "expertise in the development, construction and management of hotel properties," Inland "desire[d] to engage" Crockett Capital to assess the "feasibility" of developing thirteen different properties in seven different states that Inland acquired in the merger. (*Id.* at B.) If any of those thirteen projects appeared viable, the parties then contemplated forming individual joint venture corporations and entering into a series of related contracts "with respect to those properties which Inland determines to develop as hotel properties." (*Id.*)

The groundwork necessary to get to that point, however, was significant. The development memorandum served as a loose framework for the parties as they began to assess

the development prospects for each of the properties. To aid Inland in this process, Crockett Capital first was to prepare a "preliminary development package[]" for each of the thirteen properties. (*Id.* at C.2.) It was expected that each proposal would provide Inland with the basic outlines of any proposed deal, including information such as the proposed site, a "preliminary cost budget," "proposed franchisors," "preliminary proposed equity percentages," and anticipated costs. (*Id.*) If, after several stages of further review and assessment, Inland gave its final approval to a particular deal, the expectation was that Inland and Crockett Capital at that point would form a joint venture company to develop the particular property.

Should the parties reach agreement as to the viability of an individual project, however, significant negotiation still remained to be done, as is explicit on the face of the development memorandum. The parties contemplated that they would enter into joint venture agreements, which, in turn, required a host of contractual documents (such as a limited liability operating company agreement, an operating lease, a construction agreement, a development agreement, and a management agreement) to be agreed upon and executed by the parties and their to-be-formed joint venture. (*Id.* at C(3)-(4).) Although the parties provided templates to guide them in these negotiations, these templates were not binding; the parties expected only that any executed documents would be "substantially similar" to these templates. (*Id.*; Am. Compl. at ¶ 21.) In any event, critical components – such as the equity percentages of each joint venture partner – remained to be decided. (*See* Am. Compl. ¶ 38.) The development memorandum contains no guidance as to how the parties were to resolve any disputes that arose in the process of negotiating individual joint ventures (as somewhat unsurprisingly has occurred).

The entirety of this case hinges on the legal ramifications, if any, of this development memorandum and whether Inland and Crockett Capital were legally bound to enter into

prospective joint ventures. Crockett Capital has brought suit against Inland with respect to four of the potential development sites, claiming the development memorandum was a binding contract that was breached by Inland after the parties were unable to reach resolution on the host of issues left undecided by this development memorandum. Were Crockett Capital correct in its interpretation, the development memorandum would contractually mandate the parties to negotiate, reach final agreement, and execute literally dozens of contracts to form individual joint ventures on thirteen different potential hotel developments, each of which poses unique characteristics and complexities and none of which had even been preliminarily assessed.

As a matter of law, Crockett Capital's claims do not pass muster because the development memorandum on its face is nothing more than an agreement to agree, replete with references to the fact that it was expressing the "desires" and "intentions" of the parties to enter into future agreements. Rather than irrevocably binding the parties to specific contractual obligations, it broadly outlined the steps they would take *in the future* to form individual limited liability companies for any development proposals approved by Inland. Before getting to that point, the parties had to jump through a number of hoops and reach further agreement on a wide range of issues. It is a fundamental precept of North Carolina law that an agreement to enter into future transactions such as this is void and unenforceable. Crockett Capital's claims, based entirely on breach of contract, therefore should be dismissed with prejudice.

II. FACTUAL BACKGROUND

The crux of this case is a July 1, 2007 document (Am. Compl. Ex. A) regarding development projects (the "development memorandum") entered into between Inland American, Winn LP and Crockett Capital. Inland recently had merged with Winston Hotels and, as of July 1, 2007, either became the owner or acquired option interests "in certain other properties that may be

suitable for development as hotel projects ..." (Am. Compl. Ex. A.)[1] These thirteen potential development sites located in seven different states collectively were referred to as the "Pipeline Properties." (*Id.*)

Crockett Capital,[2] on the other hand, had "expertise in the development, construction, and management of hotel properties." (*Id.* at B.) Inland accordingly "desire[d] to engage" Crockett Capital to provide it with an assessment of the feasibility and investment prospects for developing the various Pipeline Properties. (*Id.* at B.) Crockett Capital was to prepare initial development proposals for each of these thirteen sites, with the idea that, if Inland eventually chose to proceed with any of those development proposals, the parties at that point would enter into a joint venture agreement for the particular property. (*Id.*)[3]

The development memorandum provides the basic framework by which the parties expected this evaluation process to proceed. As of the effective date of the development memorandum, however, Crockett Capital had not yet presented Inland with any specific development proposals. Any reference to potential joint developments thus was only at a conceptual level.

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[1] This merger was the result of an unsolicited "topping bid," through which Inland merged with Winston Hotels and as a result acquired an interest in Winn LP. (*Cf.* Am. Compl. Ex. A at A.)

[2] Crockett Capital was formed by Kenneth Crockett and Robert Winston on July 11, 2007. Prior to the July 1, 2007 merger, Kenneth Crockett was the Executive Vice President and Chief Development Officer for Winston Hotels. Afterwards, he and Robert Winston, the former Chief Executive Officer of Winston Hotels, formed Crockett Capital to focus exclusively on hotel development and management. The development memorandum was signed by Mr. Crockett, on behalf of Crockett Capital, and Brent West, on behalf of Inland. Mr. West also is a former employee of Winston Hotels. He was retained by Inland after the merger and promoted to Chief Financial Officer. Shortly after signing the development memorandum on behalf of Inland, Mr. West resigned to work for Crockett Capital.

[3] The development memorandum also stated that Inland desired to retain Crockett Capital to provide it with construction management services on a handful of properties nearing the end of construction. (Am. Compl. Ex. A at B.) The development memorandum contemplated that Inland and Crockett Capital subsequently would enter into one or more construction management agreements pertaining to those properties and that they also might enter into one or more property management agreements. (*Id.* at C(1).) Inland American and Crockett Capital later did enter into negotiations resulting in executed contracts for these hotels, none of which are at issue in this litigation. The fact that the parties subsequently negotiated and executed stand-alone contracts for these projects only highlights the fact that the development memorandum merely served as a framework for future contract negotiation and execution.

The first step in the process accordingly was for Inland to assess the viability of each of the Pipeline Properties it recently had acquired. Crockett Capital was to aid in this process by providing Inland with a "preliminary development package" for each of thirteen proposed projects. (*Id.* at C(2).) As the name suggests, these packages were to contain basic information outlining the nature of the proposed deal, including a one-page "investment description," "proposed franchisors," a "preliminary cost budget," "projected net operating income," and "preliminary proposed equity percentages" in which Crockett Capital's equity interest could range anywhere from five to twenty percent. (*Id.*)

The development memorandum then set forth a multi-stage approval process in which Crockett Capital would provide increasingly more detail as the proposal progressed. (*Id.*) If Inland ultimately accepted a final proposed development plan for a particular deal, the parties intended to pursue the project further by forming a joint venture. The development memorandum provides that – at that future point – the parties would enter into a succession of contractual agreements to develop the property. It was anticipated that the parties first would form a joint venture company that would be the owner of the particular property, with the specific ownership percentages of each partner to be determined by future negotiation. (*Id.* at C(3).) The parties also would need to execute "a limited liability company operating agreement" to govern the joint venture. (*Id.*) Similarly, it was anticipated that the to-be-formed joint venture in turn would enter into individual lease agreements with respect to the particular property, with rent in "an amount to be determined." (*Id.*) Those lease agreements would be between the joint venture and "an entity (the 'Lessee') to be formed between [Crockett Capital] and an affiliate of Inland...." (*Id.*)

It was anticipated that the joint venture then would enter into various development, construction, and management contracts with Crockett Capital and Inland, all to be negotiated and

executed in the future, including the issue of compensation, which similarly was left "to be determined." (*Id.* at C(4).) The development memorandum also contemplated that, if Inland later decided not to develop a particular Pipeline Property, it then would execute documentation to assign its rights to any such properties to Crockett Capital. (*Id.* at C(5).)

The development memorandum provided for a series of template documents that would guide the parties in their later negotiations on specific projects, both for the existing hotels and the Pipeline Properties, however, the parties were *not* bound to those templates. Those anticipated future agreements between to-be-formed entities were expected, but not required, only to be "substantially similar" to the templates provided, which themselves left open material issues such as ownership percentages, rent, and compensation. (*Id.* at C(3)-(4); Am. Compl. ¶¶ 21, 38.)

The development memorandum contains no guidance as to how the parties are to resolve any disputes that may arise in the process of negotiating individual joint ventures. It also does not provide for the situation in which both parties may wish to proceed with a given project, but cannot come to agreement over the specific terms of a joint venture (as since has occurred).

Crockett Capital has brought suit based solely on what it claims are breaches of contract by Inland for failure to adhere to the development memorandum with respect to four Pipeline Properties. Crockett Capital claims that Inland did not formally approve proposals for three of the Pipeline Properties (proposed RDU Westin, Raleigh Hampton Inn, and Chapel Hill Aloft projects) and that Crockett Capital thereby is entitled to obtain all rights Inland has in those underlying properties. Am. Compl., Counts II and III. Crockett Capital also claims that Inland is in breach of the development memorandum because the parties have been unable to agree to a joint venture agreement with respect to the fourth property (RDU Aloft). (Am. Compl., Count I.)[4]

[4] Tellingly, this lawsuit pertains only to four out of the thirteen Pipeline Properties. Although the development memorandum contemplated that Crockett Capital would submit development proposals for each of the thirteen

III. STANDARD OF REVIEW

When ruling on a motion to dismiss under Rule 12(b)(6), the court must determine "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted." *Harris v. NCNB*, 85 N.C. App. 669, 670 (1987). The court must treat the allegations in the complaint as true. *See Hyde v. Abbott Lab., Inc.*, 123 N.C. App. 572, 575 (1996). The court is not, however, required to accept as true any conclusions of law or unwarranted deductions of fact in the complaint. *Sutter v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). When the complaint fails to allege the necessary elements of a claim, or where it alleges facts that defeat any claim, the complaint should be dismissed under Rule 12(b)(6). *See Hudson Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341 (1999). In making this determination, the Court may consider documents that are the subject of a complaint and specifically referred to by that complaint. *See Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60 (2001). "Thus the Court can reject allegations that are contradicted by the supplementary documents presented to it." *Schlieper v. Johnson*, 2007 NCBC 29, ¶ 27 (N.C. Sup. Ct. 2007) (*citing E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000)).

IV. ARGUMENT

A. Agreements to Negotiate Future Contracts Are Void and Unenforceable

The overriding question of law facing the Court is whether the development memorandum, on its face, is a legally binding and enforceable contract in its own right. If instead it is merely an agreement to agree, it is void and unenforceable. This threshold question

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Pipeline Properties by no later than August 29, 2007, Crockett Capital admits in the Amended Complaint that it only prepared and submitted development packages for seven of those properties. (Am. Compl. ¶¶ 28, 32.) If the development memorandum were a legally binding contract in its own right, the fact that Crockett Capital failed entirely to submit development packages for nearly half of the properties undoubtedly would amount to a material breach of contract by Crockett Capital. Yet the fact that Crockett Capital instead has proceeded piecemeal, selectively choosing to submit development proposals only for some of those properties, while entirely disregarding others, serves to emphasize that the development memorandum was merely a framework for evaluating these numerous potential developments.

of law is dispositive of the entire Amended Complaint, which is based solely on an alleged breach of the development memorandum by Inland.[5]

Because the development memorandum sets forth the parties' intentions to subsequently negotiate and enter into a series of contracts relating to specific hotel properties, it is merely an agreement to agree and thereby unenforceable as a matter of law. It is a fundamental precept of North Carolina law that "a contract, or offer to contract, leaving material portions open for *future agreement* is nugatory and void for indefiniteness." *E.g.*, *Boyce v. McMahan*, 285 N.C. 730, 734 (1974) (emphasis added) (declaring void an agreement to develop land where the parties set forth their overriding intentions with the expectation that they would "execute a more detailed agreement at a later date"); *see also Chappell v. Roth*, 353 N.C. 690, 692 (2001) (holding that a settlement agreement leaving terms of release to be agreed upon by parties was void for lack of mutual consent); *Housing, Inc. v. Weaver*, 305 N.C. 428 (1982) (affirming decision as a matter of law that agreement to develop real estate properties was unenforceable because it contemplated the parties entering into a future joint venture agreement); *Durham Coca-Cola Bottling Co. v. Coca-Cola Bottling Co. Consol.*, No. 99-CVS-2459, 2003 NCBC 3, at ¶ 37 (N.C. Sup. Ct. 2003) ("The acceptance of a proposal *to make a future contract*, the terms of which are to be subsequently fixed, is not binding.") (emphasis added).

Where parties execute a document that sets forth their intent to enter into future contracts, it therefore is merely an agreement to agree. Such an agreement "is not enforceable, even if the parties intended the document to be a final agreement." *Durham Coca-Cola Bottling Co.*, 2003 NCBC at ¶ 37. "The reason for this rule is that there would be no way by which the court could

[5] This is Inland's second motion to dismiss. Crockett Capital filed an amended complaint in response to Inland's first motion to dismiss, which was based on these same grounds. The amended complaint, although longer, suffers from the same infirmity as the original complaint in that both are grounded solely upon an alleged breach of what is purely an agreement to agree.

determine what sort of a contract the negotiations would result in ...." *Boyce*, 285 N.C. at 734. To be enforceable, "a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations." *Id.* Where a document on its face expressly states that it is subject to *future* negotiations and agreements, as a matter of law, it is not an enforceable contract. *E.g.*, *Boyce*, 285 N.C. at 734; *Weaver*, 305 N.C. at 444-445; *Durham Coca-Cola Bottling Co.*, 2003 NCBC at ¶¶ 39-40; *see also* 1-2 North Carolina Contract Law § 2031.[6]

B. The Development Memorandum is an Unenforceable Agreement to Agree

1. *The Development Memorandum Contemplates the Parties Entering Into a Series of Future Contracts Before Pursuing any Property*

The development memorandum is nothing more than an overview of the parties' intentions to subsequently negotiate and enter into a series of individual agreements relating to thirteen different potential development properties – that is, once specific proposals for those properties had been created by Crockett Capital and vetted by Inland. The development memorandum thus is merely an agreement to subsequently enter into further negotiations and agreements, as evidenced by the fact that Plaintiff claims Inland's alleged breach of contract was that it "*refused to enter into* a Limited Liability Company *Agreement* ..." (Am. Compl. at ¶ 46 (emphasis added).)

The fact that the development memorandum is an agreement to subsequently negotiate and enter into future agreements is evident on its face. The document talks broadly in terms of

[6] Crockett Capital now alleges in its Amended Complaint that all parties intended the development memorandum to be valid and enforceable at the time it was executed. (Am. Compl. ¶ 26.) Inland denies that it ever viewed the development memorandum as a binding contract in its own right and instead always viewed it as documenting the parties' understandings and expectations for how future negotiations would proceed. For purposes of this motion, however, Inland must accept Crockett Capital's allegation as true. Yet the point is entirely moot. An agreement to enter into future negotiations and contracts is not legally binding, *regardless* of whether the parties themselves intended it to be. *Durham*, 2003 NCBC at ¶ 37. The reason for this is obvious. Otherwise, were such agreements legally enforceable, the court would be forced to make its own judgments about how those future negotiations might have proceeded and the terms that might have resulted. *See Boyce*, 285 N.C. at 734; *Durham*, 2003 NCBC at ¶ 37.

the parties' "desires" and intentions to potentially enter into future agreements, all subject to future negotiation. (*See generally* Am. Compl. Ex. A.) The Amended Complaint likewise acknowledges that the development memorandum related to "prospective transactions." (*See* Am. Compl. ¶ 7.) The development memorandum merely sets forth a global structure around which the parties anticipated negotiating these individual proposals. After proceeding through an evaluation and approval process for each Pipeline Property, if Inland decided to develop a particular property, Inland and Crockett Capital then anticipated they would enter into a series of contracts with respect to that property.

If the parties reached agreement to develop a particular property, that accordingly was only the beginning. The development memorandum (and the Amended Complaint) is littered with various contracts the parties must agree on and execute with respect to any development project the parties decided to pursue. (Am. Compl. ¶¶ 14-15, 17-18.) First, they would have to form a joint venture company, which meant deciding key issues such as the specific ownership percentages of each partner. (Am. Compl. Ex. A at C(3).) Plaintiff admits in the Amended Complaint that this means the parties would need to agree on material terms. Crockett Capital acknowledges that, "*prior* to Inland's giving notice of its final determination to proceed" with a particular joint venture, the parties first would need to "*agree[] on all material terms of the Joint Ventures*," such as the percentage of "equity interest in the Joint Venture" that was to be held by each partner. (Am. Compl. at ¶ 38 (emphasis added).)

The parties then would have to execute a limited liability company operating agreement to govern the joint venture. (Am. Compl. Ex. A at C(3).) Then, the to-be-formed joint venture would need to enter into a lease agreement to lease the property to another to-be-formed entity ("an entity (the 'Lessee') to be formed between [Crockett Capital] and an affiliate of Inland....").

(*Id.*) Again, the specifics, such as rent, would need to be agreed upon. (*See id.*; *see* also Am. Compl. ¶ 16.) Finally, the parties would need to execute various development, construction, and management contracts between the to-be-formed joint venture and either Crockett Capital or Inland, depending on the particular services to be offered. (Am. Compl. Ex. A at C(4).)[7]

Although the parties attempted to provide overarching guidance through templates, these documents were only that – templates. They are not binding in any way on the parties. The development memorandum only states that it is expected that any contracts be "substantially similar." (*Id.* at C(3)-(4).) Moreover, these templates left open issues such as ownership percentages, rent, and compensation. (*See generally* Am. Compl. Ex. A.) These "material terms" had to be agreed upon "prior" to entering into the joint venture agreements. (Am. Compl. ¶ 38.)

The development memorandum sets forth no mechanism to resolve any disputes that might arise in the course of these negotiations. It does not, for example, provide for the situation in which both parties want to develop a particular Pipeline Property but cannot reach agreement on the terms of the financing for the joint venture. Given the issues left to future negotiations and the battery of contracts that would need to be executed between not-yet-formed entities for any individual property approved by Inland, the fact that negotiations broke down at some point and the parties were unable to agree on a particular joint venture agreement is hardly surprising.

[7] As a prime example, the parties eventually did reach an agreement to develop an Aloft brand hotel in Birmingham, Alabama. After proceeding through a series of development proposals, the parties decided to enter into a joint venture agreement to develop this hotel. (Am. Compl. at ¶¶ 36-37.) To do so, they first "agreed on all material terms of the Joint Ventures." (*Id.* at ¶ 38.) The parties then negotiated and executed various contracts, including a limited liability company agreement, a hotel management agreement, and a development agreement for the Birmingham property. (*Id.* at ¶¶ 39-41.) The fact that the parties later negotiated and executed stand-alone contracts for this project only underscores that the development memorandum contemplated future contract negotiation.

2. *The Development Memorandum is Unenforceable as a Matter of North Carolina Law*

The Supreme Court of North Carolina in *Housing, Inc. v. Weaver*, 305 N.C. 428 (1982), interpreted a memorandum of understanding for real estate development strikingly similar to the one at issue here and held as a matter of law that it was an unenforceable agreement to agree, void on its face. As in this instance, *Weaver* involved an agreement between "two experienced and relatively sophisticated entrepreneurs who contemplated the joint development and construction" of certain property. *Id.* at 431. The parties executed a "memoranda of understanding with respect to a proposed joint venture" between the two companies "for the development" of public housing projects. *Id.* As in this case, the parties also contemplated developing several options that Housing, Inc. had acquired.

The memorandum of understanding in *Weaver* broadly set forth the parties' expectations regarding ownership; the provision and reimbursement of working capital; the amount of compensation due to each; the precise allocation of profits and losses between the parties; the ownership shares of any completed projects; possible division of properties upon completion; remedies for withdrawal; and terms of settlement. *Id.* at 431-34. Either party had the right to withdraw, at which point, Housing Inc. had the right to purchase from the other party any lands it had purchased at cost plus any acquisition expenses. *Id.* at 433-34.

As in the instant case, the parties in *Weaver* cooperated on the project for several months, at which point the negotiations surrounding the joint venture began to break down. *Id.* at 434. Although the parties eventually reached an agreement to sever their respective interests, Housing, Inc. later refused to honor that settlement agreement, claiming it had been negotiated under economic duress because the other party had threatened to breach the initial agreement.

Housing Inc. brought suit, claiming it had the right to purchase the properties at cost, as specified under the initial agreement. *Id.*

The trial court concluded as a matter of law, however, that the initial agreement was *not* a legally enforceable contract, but merely an agreement to agree. *Id.* at 647. This conclusion of law was upheld by both the Court of Appeals and the Supreme Court. In making its decision, the Supreme Court found the case controlled by *Boyce*, which is the "definitive decision on agreements to agree." *Id.* at 652. The court noted that, on any agreement, "[i]f any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement." *Id.* (citing *Boyce*, 285 N.C. at 734).

For all of the reasons that the memorandum of understanding in *Weaver* was not an enforceable contract, the development memorandum in this instance likewise is a mere agreement to agree. The Supreme Court in *Weaver* found it controlling that, similar to the development memorandum in this case, the agreements in both *Boyce* and *Weaver* on their face showed that they were "subject to *more definitive agreements to be executed subsequently.*" *Weaver*, 305 N.C. at 444 (emphasis added); *see also Boyce*, 285 N.C. at 734. As with the development memorandum in this case, the agreements in both *Weaver* and *Boyce* "specified the intentions and desires of the parties rather than their agreement." *Weaver*, 305 N.C. at 444.

The Supreme Court also found it dispositive that, as in this instance, neither agreement provided a mode of settlement for any unresolved terms that were subject to future negotiations. *Id.* at 445; *see also Boyce*, 285 N.C. at 733 ("If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement.") (quoting *Croom v. Goldsboro Lumber Co.*, 182 N.C. 217, 220 (1921)).

In fact, the parties in *Weaver* had reached prior agreement upon certain key issues with respect to the proposed joint ventures that are absent from the development memorandum here – issues such as the precise allocation of profits and losses between the parties and the ownership shares of any completed projects. *See Weaver*, 305 N.C. at 431-34. The critical point, however, was that, notwithstanding this basic agreement, the parties had left the agreement open for future negotiations. *Id.* As in this instance, it was through those future negotiations that the parties expected to finalize and enter into joint ventures. Although indicative of their intent to do so, the memorandum of understanding was merely an unenforceable agreement to agree. *Id.*

As a matter of law, the development memorandum cannot be construed as a binding contractual obligation that requires the parties to enter into joint venture agreements. At best, it reflects the intent of the parties to capitalize upon Crockett Capital's familiarity with the Pipeline Properties and potentially enter into various joint ventures and other related contracts in order to develop certain of those properties. The nitty-gritty of negotiating individual deals was left for a future point in time, once the parties were further along in their evaluation of the individual deals. The determination of which properties, the execution of the individual contracts, the negotiation of ownership terms – all these key issues were expressly left open to future negotiations. Because the development memorandum expressly leaves "material portions open for future agreement [it] is nugatory and void for indefiniteness." *See Boyce*, 285 N.C. at 734. As a matter of law, then, Crockett Capital cannot turn to the courts for enforcement of the development memorandum.

To hold otherwise would negate the basic contractual requirement that there be a meeting of the minds and would substitute the Court's judgment as to what reasonable contractual requirements should be for that of the parties themselves. To find that the development

memorandum is a binding contract would require the Court to construe what the result of future negotiations would have been for thirteen unique and complicated potential hotel developments, each posing different issues and circumstances. The impossibility of the court's determining this is precisely the reason that agreements to agree are void as a matter of law. As the Supreme Court has explained, the "reason" for the rule that such agreements are unenforceable "is that there would be no way by which the court could determine what sort of a contract the negotiations would result in ...." *Boyce*, 285 N.C. at 734.

V. CONCLUSION

The development memorandum is not a binding contract but an agreement to negotiate and potentially enter into additional contracts at a future point in time. It therefore is void as a matter of law. Because the Amended Complaint is based entirely upon an alleged breach of contract relating to this development memorandum, it cannot survive as a matter of law. Inland accordingly respectfully requests that the Amended Complaint be dismissed with prejudice in its entirety.

VI. RULE 15.8 CERTIFICATE

Defendants hereby certify that this brief complies with Business Court Rule 15.8.

Dated: March 26, 2008

Respectfully submitted,

s/Scott M. Tyler
Scott M. Tyler
Moore & Van Allen PLLC
100 North Tryon Street
Suite 4700
Charlotte, NC 28202-4003

Admitted *Pro Hac Vice*:
Jeffrey Herschman
Megan Hanley Baer
DLA Piper US LLP
6225 Smith Avenue
Baltimore, Maryland 21209

Attorneys for Defendants
Inland American Winston Hotels, Inc. and
Winn Limited Partnership

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of March, 2008, copies of the foregoing Brief in Support of Defendants' Motion to Dismiss were filed electronically and served by first-class mail, postage prepaid to the following:

John R. Wester
Louis A. Bledsoe, III
Robinson, Bradshaw & Hinson, P.A.
101 North Tryon Street, Suite 1900
Charlotte, NC 28246
jwester@rbh.com

Attorneys for Plaintiff Crockett Capital Corporation

s/Scott M. Tyler
Scott M. Tyler