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.

REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

Defendants Inland American Winston Hotels, Inc. ("Inland American") and Winn Limited Partnership ("Winn LP") (collectively, "Inland") submit this reply in further support of their Motion to Dismiss the Amended Complaint filed by plaintiff Crockett Capital Corporation.

I. Introduction

The lynchpin of this case is a document setting forth the intent of the parties to consider jointly developing thirteen different hotel properties across the United States in which Inland held certain ownership interests (the "Development Memorandum"). What is undisputed is that the Development Memorandum called for Crockett Capital to submit preliminary proposals for the development of each of these properties, followed by a series of expanded proposals on each deal and, after evaluation and review, for the parties to negotiate and potentially enter into joint ventures with respect to any projects deemed desirable. What is disputed is the legal significance of that document, whether it served merely as a framework for future negotiation and agreement, as Inland contends, or whether by itself it was a legally binding contract that completely governed "all circumstances," as Crockett Capital contends.

Faced with legal precedent showing that such an agreement is a classic unenforceable agreement to agree, Capital Crockett has responded by citing what it argues are two key factors that bring this case outside the case law governing agreements to agree. First, Crockett Capital claims that, unlike the agreements to agree found in other cases, the Development Memorandum did not explicitly signify that it was a preliminary agreement. Second, Crockett Capital claims – and Inland wholeheartedly agrees – that a legally binding contract must have a mechanism by which to settle any unresolved terms left for future negotiation. Crockett Capital argues, however, that unlike other agreements to agree, the Development Memorandum has a "no-impasse mechanism" that provides a solution in "all circumstances." According to Crockett Capital, the fact that the parties contemplated that Crockett Capital would be entitled, but not obligated, to purchase any properties that Inland did not want to pursue means that the Development Memorandum provides a remedy in "all circumstances" and therefore is a complete and legally binding contract standing on its own.

Crockett Capital's attempt to distinguish this case is strained. With respect to the first point, whether or not the parties choose to title the Development Memorandum a "letter of intent" is irrelevant. It does not determine the legal significance of the document. What is controlling is the nature of the process envisioned – here, an agreement to consider the potential joint development of thirteen different properties. Moreover, the Development Memorandum is littered with references to the "preliminary" nature of these development proposals. As Crockett Capital admits, if, after a multi-stage preliminary evaluation process, the parties decided to jointly develop a particular property, they would need to reach agreement on various "material terms." The parties then would need to execute a series of contracts to enter into a joint venture. It is that process, not the label, which is controlling.

Neither does the second supposedly distinguishing point by Crockett Capital advance the argument that the Development Memorandum is legally binding. Undoubtedly, to be a legally binding contract, an agreement must have a provision by which to settle any disputes regarding terms left open for future negotiation. Yet what Crockett Capital terms a "no-impasse" mechanism hardly works to settle any disputes over unresolved terms. On its face, this provision applies only "should [Inland] elect not to develop a Pipeline Property." (Opp. at 3 (emphasis added).) In such a situation there would, by definition, be no "impasse" or dispute over terms left open for future negotiation.

Critically, this provision does not apply when both parties want to jointly develop a property but cannot come to terms on how to do so – the definition of an "impasse." This in fact is the situation presently before the Court. Should the case survive the motion to dismiss stage, the Court will be forced to wade into the numerous factual disputes regarding the evaluation, approvals, and negotiations undertaken for each of the thirteen Pipeline Properties. At this point, however, the sole question is whether the Development Memorandum is an enforceable contract. Because the Development Memorandum lacks what Crockett Capital emphasizes is critical to making this decision, it cannot be deemed an enforceable contract, much less one that governs "all circumstances."

Oddly, Crockett Capital offers up its alleged right to purchase certain properties as the way to distinguish this case from controlling legal precedent found in *Housing, Inc. v. Weaver*, in which the North Carolina Supreme Court found the document in question to be an agreement to agree. Yet the agreement to agree in *Weaver* had a nearly identical provision, giving one party the right to purchase the property at cost should the other party decide not to proceed with a joint venture. The fact that the agreement had such a provision was of no import to the Supreme

Court in determining that it was an agreement to agree. For Crockett Capital to now point to this same provision as differentiating the instant case from *Weaver* is perplexing.

Somewhat incongruously, Crockett Capital also claims that the fact that Inland proceeded to evaluate the Pipeline Properties and to consider joint ventures acts as an admission by Inland as to the binding nature of the Development Agreement. This argument cannot bear its own weight. Inland and Crockett Capital set forth their expectations regarding the evaluation and consideration of numerous potential joint ventures. The fact that Inland proceeded to conduct future negotiations in good faith, as the parties contemplated, hardly means that Inland admitted that the Development Memorandum is a legally binding contract in and of itself.

Because the Development Memorandum merely sets forth the parties' intentions to evaluate and negotiate potential joint ventures on thirteen different properties – without any binding restrictions regarding what the parties could agree to on any individual property and without any process for resolving disputes – it is merely an agreement to agree.

II. Argument

1. The Development Memorandum Is An Agreement to Negotiate and Agree

The Development Memorandum contemplated Inland and Crockett Capital considering entering into joint ventures on thirteen different hotel sites across the country. Because the parties were contemplating a number of joint ventures, they decided to set forth a framework to guide their negotiations. As Crockett Capital described it, the Development Memorandum "prescribes the process by which the parties agreed to evaluate each Pipeline Property submitted

for development consideration." (Opp. at 3.) This process was to begin with initial feasibility projections, followed by a series of increasingly more detailed proposals by Crockett Capital.[1]

If and when the parties reached agreement on a particular property, they then would enter into a series of contracts for that site. As Crockett Capital recognizes, this required Inland and Crockett Capital first "agree[ing] upon all material terms of the Joint Venture arrangement." (Opp. at 6; *see also* Am. Compl. Ex. A at A.) The parties then would execute a battery of contracts for any particular property. As Crockett Capital itself has characterized it, this requires the parties going "the contractual distance" on an individual deal. (Opp. at 12.)

Inland pointed out in detail the number of steps that the parties had to take before coming to a final agreement – going "the contractual distance" – with respect to any individual property. As Inland further pointed out, the case law makes clear that an agreement such as this, in which the parties set forth their desire to subsequently negotiate and enter into stand-alone contracts, is by definition an agreement to negotiate and agree. *See Chappell v. Roth*, 353 N.C. 690, 692 (2001); *Housing, Inc. v. Weaver*, 305 N.C. 428 (1982); *Boyce v. McMahan*, 285 N.C. 730, 734 (1974); *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); *see also* 1-2 North Carolina Contract Law § 2031.

1. Crockett Capital Cannot Distinguish Prior Precedent

Faced with unquestionable legal precedent, Crockett Capital attempts to distinguish this case from the numerous others in which courts have refused to enforce similar agreements to agree. Crockett Capital argues that *Boyce*, *Weaver*, and *Durham* "turned on two features of the

[1] Crockett Capital acknowledges that it failed to submit proposals for six of the thirteen properties. (Opp. at 3, n.2.) Crockett Capital now contends that development of these properties "proved to be unfeasible" and that Inland agreed Crockett Capital did not have to submit proposals. (*Id.*) Although the allegation is not germane to a motion to dismiss, it shows that Crockett Capital wants to have its cake and eat it too. Crockett Capital argues that the Development Memorandum is a binding contract, but when it fails to perform on nearly half of the properties, it claims its obligations were waived. (*Id.*) That Crockett Capital dismisses out of hand its obligation to submit proposals for these properties highlights the preliminary nature of the agreement.

challenged writings that are absent from the Master Agreement." (Opp. at 7.) These two key features, according to Crockett Capital, are that agreements to agree: (1) "declare[] their preliminary nature," and (2) "contain[] no method for resolving disputes or eliminating impasses that might arise between the parties so as to guide a court in granting relief." (*Id.*) Neither of these two arguments is persuasive.

a. The Development Memorandum Was Preliminary In Nature

Crockett Capital first claims that the Development Memorandum is legally binding because it did not indicate its "preliminary nature." (Opp. at 8.) Crockett Capital emphasizes form over function, noting that the parties did not label the agreement a "letter of intent." (*Id.*) Semantics aside, the Development Memorandum indicates throughout that it is a preliminary overview of how future negotiations would proceed. The very subject matter was described as relating to an evaluation of "properties that *may be suitable for development* as hotel projects." (Am. Compl. Ex. A at A (emphasis added).) The purpose of the memorandum was that Inland "desire[d] to engage" Crockett Capital to assess the "feasibility" of developing these thirteen properties. (*Id.* at B.)

Littered throughout the Development Memorandum are references to its "preliminary" nature. Prior to contemplating any joint ventures, Inland had to evaluate each property. The first step accordingly was for Crockett Capital 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.*) Left to the future was the parties' negotiation and execution of numerous contracts necessary to effectuate any particular deal. To claim that the

Development Agreement did not suggest its "preliminary nature" is belied by the document itself, as well as the very nature of what it envisioned.

b. The "Sale" Provision Only Applied if Inland Decided Not to Pursue a Property

Crockett Capital claims that the second key to whether a writing is an agreement to agree is whether the parties included a "method for resolving disputes or eliminating impasses." (Opp. at 3, 7.) On this point the parties wholeheartedly agree. The Supreme Court has noted that it is dispositive that a contract provide a mode of settlement for any unresolved terms subject to future negotiations. *Weaver*, 305 N.C. at 445; *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."). This is, however, one of the central inadequacies of the Development Memorandum. Inland pointed out in detail in its Motion to Dismiss how the evaluation process was rife with potential to disagree, as it required the parties to evaluate, negotiate and execute a number of different contracts for thirteen different properties. It hardly is surprising that the parties eventually reached an "impasse" with respect to several of the properties. Yet nothing in the Development Memorandum dictates what happens in such situations.[2]

What Crockett Capital relies heavily upon to distinguish this case from an agreement to agree is that the Development Memorandum included what Crockett Capital terms a "no-impasse mechanism." (Opp. at 3, 7.) The provision to which Crockett Capital refers was where the parties contemplated that Inland would sell a particular property to Crockett Capital if Inland decided not to develop that property. (*See id.*) Crockett Capital places an enormous amount of

[2] Purely as illustrative of the potential for break-down in negotiations over an individual joint venture, the negotiations over the RDU Aloft fell apart after Inland discovered that the project envisioned an easement over an adjoining hotel owned by Inland. This easement would significantly impact the adjoining property but Crockett Capital refused to provide any compensation. That is where the dispute currently stands. Although both parties affirmatively wanted to pursue development of this property, they now are at an "impasse." It is precisely such a dispute that is not governed by the Development Memorandum.

weight upon this provision, finding that it addresses any situation that could arise. According to Crockett Capital, this provision turns the Development Memorandum into a "self-contained contract that delineates the parties' rights and obligations under *all* circumstances," regardless of whether the parties ever entered into any joint ventures. (Opp. at 7 (emphasis added); *see also id.* at 7-9.)

Crockett Capital's interpretation of this provision is strained and contradicted by the Development Agreement itself. Despite Crockett Capital's attempt to characterize this provision as a "no-impasse mechanism," on its face it applies only "[i]n the event Inland at any point ***elects not to pursue the development of a property*** . . ." (Am. Compl. Ex. A at 5 (emphasis added); *see also id.* at (C)(5) (noting that the provision applies to "any Pipeline Property which Inland determines not to develop in a Joint Venture . . ."); Opp. at 3.) By definition, Inland would not be interested in pursuing the property and the parties would not be at an "impasse." More pointedly, this provision *does not apply* if the parties wanted to develop a property but disagreed about a particular aspect of the joint venture – what more properly is deemed an impasse. There is nothing in the Development Memorandum that dictates what happens if the parties are unable to resolve such a dispute (which is precisely why the parties are in litigation).

Crockett Capital attempts to slide past this point and characterize this provision as some band-aid catchall in the event of any disagreement whatsoever. Crockett Capital claims that the provision theoretically *could* apply to any dispute because Inland "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." (Opp. at 17.) This merely highlights the lack of any workable solution should the parties be unable to reach agreement on specific terms. Crockett Capital's all-or-nothing "solution" is to force Inland's hand to give up all rights in its own properties,

notwithstanding that Inland wants to develop the property. Were it correct, anytime the parties had the slightest disagreement about the most mundane detail of one of the many contracts under consideration, the only solution would be for Inland to surrender its rights in the property. This is hardly a solution, much less a "method for resolving disputes."

The Development Memorandum likewise does not dictate what happens should Crockett Capital decide that it does not make economic sense to develop a particular property. This is, in fact, the situation at hand. (Opp. at 3, n.2.) Crockett Capital now claims that Inland orally agreed that it did not have to submit preliminary development packages for six of the thirteen properties because their development "proved to be unfeasible." (*Id.*) Putting aside the accuracy of this allegation, it only highlights that the Development Memorandum is not "a self-contained contract that delineates the parties' rights and obligations under all circumstances." (*See id.* at 7.)

Similarly, this provision does not apply automatically to resolve a dispute between the parties. According to Crockett Capital, the provision gives it the "right," but not the obligation, to develop a Pipeline Property should Inland decide not to develop. (*See* Am. Compl. Ex. A at (C)(5).) Were Crockett Capital correct, this essentially means that, not only must it treat any dispute as a flat-out rejection by Inland, Crockett Capital also must affirmatively choose to exercise an option to walk away entirely from a potential deal with Inland, opting instead to fund the project itself or find new investors. (*See id.*) The Development Memorandum does not provide for what happens if Crockett Capital decides not to do so. Presumably, if Crockett Capital remained interested in pursuing the project with Inland, it would be back to square one, with the parties unable to resolve the "impasse." This provision accordingly does not provide a

mode of settlement for unresolved terms subject to future negotiations, as is "central" to finding an enforceable contract. (Opp. at 7.) *See also Weaver*, 305 N.C. at 445; *Boyce*, 285 N.C. at 733.

It also is perplexing that Crockett Capital would offer up this provision as the key to distinguishing the case at hand from *Weaver*, given that the agreement in *Weaver* contained the same type of provision. *Housing, Inc. v. Weaver*, 305 N.C. 428 (1982). There the parties similarly envisioned entering into joint ventures to develop property. Either party had the right to withdraw, at which point, one party had the right to purchase from the other at cost any lands it had purchased. *Id.* at 433-34. The Supreme Court found it to be an agreement to agree – regardless of the provision in question. For Crockett Capital to now claim that this feature is "central" to what distinguishes the case at hand from being an agreement to agree is illogical.

2. ***The Development Memorandum is Not a Stand-Alone Agreement Under Sony-Erricson***

Crockett Capital further attempts to distance the Development Memorandum from the agreements to agree found in *Weaver*, *Boyce*, and *Durham Coca-Cola* by claiming that it is more like the binding contract found in *Sony-Ericcson v. Agere Systems, Inc.*, No. 06-CVS-17673, 2007 NCBC 28 (N.C. Sup. Ct. 2007). As an initial matter, it is nearly impossible to evaluate Crockett Capital's argument because the Court in *Sony-Ericcson* provided little context or description of the contract at issue. The decision was a dismissal for improper venue and the Court spent little time describing the actual contract. Whereas *Weaver*, *Boyce*, and *Durham Coca-Cola* involved agreements to enter into various land developments, the contract in *Sony-Ericcson* related to the development of a chip platform for wireless products. Beyond noting this fact, however, there is nothing in the Court's opinion by which to distinguish or analogize the particular contract in question. The Court never described what was set forth in the agreement at

issue, other than to state that it provided general terms and conditions governing the parties' relationship. *Sony-Ericcson*, 2007 NCBC 28, at ¶¶ 1, 19, 21.

More pointedly, Crockett Capital's reliance upon *Sony-Ericcson* extends no further than parroting legal labels and characterizing the Development Memorandum as a stand-alone agreement.[3] (Opp. at 10-11.) This merely begs the question. Crockett Capital's citation to *Sony-Ericcson* does nothing to answer the threshold question of whether the writing in question is a stand-alone agreement. In explaining why the Development Memorandum supposedly is a stand-alone agreement, Crockett Capital turns back to the so-called "no-impasse mechanism." (*Id.* at 11.) As discussed previously, this provision does not resolve an actual "impasse."

Crockett Capital admits that, in order to enter into any joint ventures, the parties must agree on certain "material terms." (Opp. at 6, 11; Am. Compl. ¶¶ 21, 38.) They point out that the parties in fact did reach agreement on "material terms" for some of the properties. (*See* Opp. at 16.) This only emphasizes that agreement on materials terms was necessary to go "the contractual distance." Crockett Capital suggests that the gaps to fill were not as large as may appear because the parties had "already negotiated and reached agreement as to almost all details, both major and minor." (*Id.* at 11.) Crockett Capital bases this upon the various templates attached as exhibits to the Development Memorandum. (*Id.*) It cannot legitimately be contended, however, that those templates were stand-alone agreements or that they were somehow contractually binding upon the parties. Undoubtedly, the parties expected to be guided

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[3] The Court describes the contract in *Sony-Ericcson* as a "stop-gap" agreement that "is definite on its own terms." *Sony-Ericcson*, 2007 NCBC 28, at ¶ 21. Although such a contract "looks to the formation of an ultimate agreement" it explicitly governs the parties' relationship during the "interim" period. *Id.* Whether or not the parties later entered into a long-term contract was an entirely different issue because at that point they would be governed by the future contract. The court likened the contract to a "life insurance 'binder.' It typically does not contain the terms of the insurance policy but is definite as to its own terms, binding upon the parties during its effective period, and may merge with the ultimate insurance policy." *Id.* at n. 9. Again, this assumes that the agreement explicitly controls all terms of the relationship during the interim period. *Id.*

by those templates, but they were not required to execute those exact templates on each individual property. The parties were free to structure a contract however they liked, depending on the facets of a particular deal. Crockett Capital admits as much when it notes that any executed contracts were envisioned only to be in "substantially the form" as the exhibits, although it was not mandated that they be identical. (*Id.* at 15.) Moreover, as Inland discussed in its Motion to Dismiss, and as Crockett Capital admits, these templates left open material terms. (*Id.*)

Crockett Capital suggests that, although the Development Memorandum leaves open material terms, such as ownership percentages, it nevertheless "prescribes a process" by which the parties will resolve those terms. (*Id.* at 12, 16.) The so-called "process" is that Inland "may accept or reject" the terms proposed by Crockett Capital. (*Id.*) A flat-out ability to reject a proposed term is hardly a mode by which to reach a "settlement" on an unresolved term. It instead puts the parties at an all or nothing juggernaut – the very problem faced in *Weaver*.

Once again, the fundamental problem is that the process of negotiation and agreement for the individual joint ventures was left for the future. On its face, this makes the Development Memorandum an agreement to negotiate and agree. The overriding question is whether such an agreement is enforceable and what happens when negotiations break down.

Crockett Capital belittles the policy implications that arise from enforcing such an agreement to agree. It claims that it is not asking the Court to divine what the parties would have done. Its solution is simple: it only "asks that the Court enforce the parties' bargain – nothing more nor less." (Opp. at 17.)[4] This misses the point entirely. The problem is that the parties'

[4] Crockett Capital claims that Inland is "bound to concede" that it "rejected three of the four Pipeline Properties at issue." (Opp. at 13.) Inland unequivocally denies this. While the specifics of the dispute are not germane to this motion, it highlights the difficulty facing the Court in determining the proper outcome, given that the parties left to the future the negotiation of individual joint ventures and did not provide a means of resolving such disputes.

bargain never was explicitly spelled out. Although the Development Agreement provided for the situation where Inland had no interest in pursuing a property, it makes no provision for the situation where both are interested in proceeding but get hung up in negotiations.

3. The Fact that Inland Proceeded In Good Faith to Negotiate Potential Deals Is not an Admission that the Development Memorandum is Legally Binding

Crockett Capital also claims that Inland's behavior is inconsistent with its view of the Development Memorandum as an agreement to agree. Crockett Capital points to the fact that Inland proceeded to evaluate and negotiate various Pipeline Properties as proof that it must have viewed the writing as binding. (Opp. at 5.) Inland's behavior is hardly inconsistent. There is a fundamental distinction between negotiating in good faith and conceding that one is contractually bound. At no point has Inland suggested that it did not intend to negotiate potential joint ventures. The entire point of the Development Memorandum was to provide a framework for those negotiations. The fact that Inland proceeded to evaluate and negotiate individual Pipeline Properties only shows that it went into those negotiations in good faith. With agreements to agree, the parties typically proceed to negotiate. *See, e.g.*, *Weaver*, 305 N.C. at 439. The dilemma comes when those negotiations break down.

III. Conclusion

The Development Memorandum merely contemplated that the parties would engage in future negotiations. As such, it was an agreement to agree, not a legally binding contract. It therefore is unenforceable as a matter of law.

Dated: May 15, 2008

Respectfully submitted,

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DEFENDANTS' RULE 15.8 CERTIFICATE

Defendants Inland American Winston Hotels, Inc. and Winn Limited Partnership hereby certify that their Reply Brief in Further Support of their Motion to Dismiss the Amended Complaint complies with Business Court Rule 15.8.

Dated: May 15, 2008

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of May, 2008, copies of the foregoing Inland American Winston Hotels, Inc.'s Reply Brief in Further Support of Motion to Dismiss Amended Complaint were mailed first-class, postage prepaid to the following:

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