

1999

Wydredge, LLC v. Airport Partners, LLC and J. Brent Parrish, individually: Brief of Appellee

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

WYDREDGE, L.L.C., a Utah limited
liability company,

Plaintiff-Appellant,

vs.

AIRPORT PARTNERS, L.L.C., a Utah
limited liability company and J. BRENT
PARRISH, individually,

Defendants-Appellees

Case No. 990786-CA

Priority No. 15

BRIEF OF APPELLEES

**APPEAL FROM THE FINAL JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,
THE HONORABLE SANDRA N. PEULER**

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FILED

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STATEMENT OF JURISDICTION

The Utah Supreme Court had jurisdiction over part of this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j), and properly transferred this appeal to this Court pursuant to *Utah Code Ann.* § 78-2-2(4), giving this Court partial jurisdiction pursuant to *Utah Code Ann.* § 78-2a-3(2)(j). The District Court entered its final Order and Judgment dismissing this action with prejudice on August 30, 1999 [R. 398-400, Appellant's Addendum ("Aplt. Add.") 4, 5]. Plaintiff-appellant Wydredge, L.L.C. ("Wydredge"), timely filed its Notice of Appeal from the final Order/Judgment on September 9, 1999 (R. 401-402), pursuant to Utah R. App. P. 3(a).

Appellant's Brief indicates Wydredge is also purporting to appeal from the District Court's Order Denying Motion to Stay Release of Lis Pendens pending appeal (Aplt. Add. 7).¹ However, Wydredge did not file a notice of appeal as to this Order or the November 30, 1999 Minute Entry. In addition, Wydredge's attempted appeal from this Order is moot, because, after the District Court's Minute Entry denying Wydredge's Motion to Stay Release of Lis Pendens, Wydredge did not seek a stay from the Utah Supreme Court, pursuant to *Utah R. App. P.* 8(a), and instead signed a Release of Lis Pendens on January 5, 2000, which was recorded on January 6, 2000 [Appellees' Addendum ("Aple. Add.") A]. After releasing the lis pendens, Wydredge then filed a Motion to Stay Release of Lis Pendens in this Court in February 2000.

¹Apparently this Order was never entered by the District Court, as it does not appear in the record on appeal. However, the District Court did enter a November 30, 1999 Minute Entry to the same effect (R. 426-427, Aplt. Add. 6).

Defendants filed a memorandum in opposition to that motion, and the motion is under advisement.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

ISSUE NO. 1: Whether the December 1, 1997 letter agreement ("Letter") between plaintiff-appellant Wydredge and defendants-appellees Airport Partners, L.L.C. ("Airport Partners") and J. Brent Parrish ("Parrish") (Airport Partners and Parrish are sometimes referred to herein collectively as "defendants") was too vague and illusory, and contained insufficient material terms with regard to the rights and responsibilities of the parties thereunder, in order to create an enforceable contract.

STANDARD OF REVIEW: Wydredge correctly states the standard of review applicable to this issue in the second paragraph on page 2 of Appellant's Brief.

ISSUE NO. 2: Whether Wydredge's purported appeal from the District Court's denial of Wydredge's Motion to Stay Release of Lis Pendens pending appeal is barred because Wydredge failed to file a notice of appeal regarding the denial of the Motion.

STANDARD OF REVIEW: Not applicable.

ISSUE NO. 3: Whether Wydredge's purported appeal from the District Court's denial of Wydredge's Motion to Stay Release of Lis Pendens pending appeal is moot, because, after the District Court's denial of Wydredge's Motion to Stay Release of Lis Pendens, Wydredge did not seek a stay from the Utah Supreme Court, pursuant to Utah R. App. P. 8(a), and instead released the lis pendens before filing its Motion to Stay Release of Lis Pendens in this Court.

STANDARD OF REVIEW: Not applicable. (Defendants also raised this issue in their memorandum in opposition to the motion to stay currently pending before this Court.)

ISSUE NO. 4: Whether the District Court correctly ordered Wydredge to release the lis pendens, and correctly denied Wydredge's Motion to Stay Release of Lis Pendens.

STANDARD OF REVIEW: Whether the District Court correctly ordered the release of the lis pendens is subject to the same standard of review as Issue No. 1. Whether the District Court correctly denied the motion to stay is reviewable only for abuse of discretion. See, Utah R. Civ. P. 62; Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart, Inc., 600 F.2d 1189, 1191 (5th Cir. 1979); Bruce Church, Inc. v. Superior Court, 774 P.2d 818, 821 (Ariz. App. 1989).

DETERMINATIVE STATUTES AND RULES

Utah Code Ann. § 48-2b-126(1) states: "An operating agreement may be adopted with the unanimous consent of the members." (Emphasis added.)

STATEMENT OF THE CASE

Nature of the Case

This is an action by plaintiff Wydredge seeking to enforce an alleged contract with defendants to create an entity for purposes of constructing and operating a hotel on real property owned by defendants. The terms of the alleged contract are set forth in the December 1, 1997 Letter (R. 10-11, Aplt. Add. 1) as allegedly supplemented by parol evidence. Defendants contend that the Letter and any alleged supplementary

parol evidence were too vague and illusory, and contained insufficient material terms with regard to the rights and responsibilities of the parties thereunder, in order to create an enforceable contract. Defendants also contend that Wydredge is liable for certain architectural fees incurred by Wydredge in anticipation of developing defendants' real property, a portion of which fees defendants paid.

Course of Proceedings

Wydredge filed its Verified Complaint on October 3, 1998 (R. 1-25). The Verified Complaint contains four causes of action, as follows:

(1) Seeking to impose a constructive trust on defendants' real property, based on the contract allegedly created by the Letter;

(2) Seeking to require specific performance of the contract allegedly created by the Letter;

(3) Seeking damages for alleged breach of the contract allegedly created by the Letter; and

(4) Seeking damages on the basis that defendants were allegedly estopped from denying the existence of the contract allegedly created by the Letter.

Shortly after filing the Verified Complaint, Wydredge also recorded a Notice of Lis Pendens against defendants' real property (R. 152-154).

Defendants filed their Answer and Counterclaim on November 25, 1998 (R. 30-38). In their Answer, defendants denied that the Letter created an enforceable contract. Defendants' Counterclaim alleged that Wydredge was liable for certain architectural fees incurred by Wydredge in anticipation of developing defendants' real

property, a portion of which fees defendants paid. Wydredge filed a Reply to Counterclaim on December 11, 1998 (R. 39-42).

After the parties conducted discovery, defendants filed a Motion for Summary Judgment on April 29, 1999 (R. 47-49), which the parties fully briefed (R. 50-154, 156-334, 335-387). Defendants' Motion sought dismissal of Wydredge's Verified Complaint on the basis that the Letter did not create an enforceable contract. Defendants' Motion also sought an order that Wydredge release the lis pendens, and judgment against Wydredge on defendants' Counterclaim for the architectural fees.

On August 2, 1999, the Court heard argument on defendants' Motion, and granted the portion of the Motion seeking dismissal of the Verified Complaint and release of the lis pendens. However, the Court denied the portion of the Motion seeking judgment on defendants' counterclaim (R. 397). The Court's Order and Judgment dismissing the entire action with prejudice and ordering the release of the lis pendens were entered on August 30, 1999 (R. 398-400, Aplt. Add. 4, 5).

On September 9, 1999, Wydredge filed its Notice of Appeal (R. 401-402) and a Motion to Stay Release of Lis Pendens in the District Court (R. 405-406). The parties fully briefed Wydredge's Motion to Stay (R. 407-410, 415-419, 420-422), which the District court denied on November 5, 1999 (R. 426-427, Aplt. Add. 6).

On January 5, 2000, Wydredge signed a Release of Lis Pendens, which was recorded on January 6, 2000 (Aple. Add. A). In February 2000, Wydredge filed a Motion to Stay Release of Lis Pendens in this Court, which defendants have opposed and which is under advisement.

Disposition in the District Court

In the District Court's August 30, 1999 Order on defendants' Motion for Summary Judgment (R. 399-400, Aplt. Add. 4), the Court ruled as follows, in pertinent part:

1. The December 1, 1997 letter agreement is vague and lacks sufficient material terms with regard to the rights and responsibilities of the parties thereunder, which renders the letter agreement unenforceable. Accordingly, the Defendants' Motion for Summary Judgment, that the letter agreement is not an enforceable contract, is granted.²

2. Because the December 1, 1997 agreement is not enforceable, the Defendants' Motion for Summary Judgment, with regard to the claim for reimbursement of costs and expenses, is denied.³

²In response to defendants' Motion for Summary Judgment, Wydredge argued only that the Letter, along with certain parole evidence, were sufficient to create an enforceable contract (R. 156-334), and repeats these arguments in its opening Brief before this Court. Because Wydredge made no separate arguments on its constructive trust or estoppel claims either in the District Court or this Court, any such arguments are waived. See, Strawberry Electric Service District v. Spanish Fork City, 918 P.2d 870, 880 (Utah 1996).

³Even though Wydredge had not filed its own motion for summary judgment on defendants' Counterclaim, this portion of the District Court's ruling necessarily resulted in dismissal of the Counterclaim as well, as reflected in the Judgment dismissing the entire action with prejudice (R. 398, Aplt. Add. 5). Although defendants did not cross appeal from the dismissal of their Counterclaim, if this Court were to reverse the District Court's ruling that the Letter is not an enforceable contract, this reversal would also reinstate defendants' Counterclaim, which is also based on the Letter. See, Halladay v. Cluff, 739 P.2d 643, 645 (Utah App. 1987), cert den., 765 P.2d 1277 (Utah 1987): "Cross-appeals are properly limited to grievances a party has with the judgment as it was entered--not grievances it might acquire depending on the outcome of the appeal."

3. The Plaintiff has no interest in the property underlying the dispute between the parties. Accordingly, the lis pendens filed by the Plaintiff is improper and shall be removed by the Plaintiff.⁴

. . .

STATEMENT OF FACTS

The following facts in the record are not disputed:⁵

1. Defendants purchased the real property upon which the parties later planned to build a hotel, on or about July 30, 1997. Defendants purchased the property from Alamo Rent-A-Car, Inc. ("Alamo") (R. 291). At the time of the purchase, Alamo was in the process of remediating petroleum groundwater contamination at the property, and agreed to indemnify defendants regarding that petroleum contamination (Parrish Depo.,⁶ pp. 6-8, R. 204).

2. This remediation activity was readily apparent to Wydredge from the groundwater monitoring wells located on the property (Appellant's Brief, p. 8). Based on Alamo's assumption of responsibility for remediating the petroleum contamination,

⁴Wydredge's memorandum in opposition to defendants' Motion for Summary Judgment (R. 156-334) also made no separate argument in opposition to defendants' request that the District Court order the release of the lis pendens. Accordingly, any argument Wydredge is now making as to any alleged error in the portion of the District Court's Order that the lis pendens be released is also waived. See, Strawberry Electric Service District, supra.

⁵Wydredge's statement of facts in its memorandum in opposition to defendants' Motion for Summary Judgment (R.156-164) did not dispute the statement of Material Facts in defendants' memorandum in support of their motion (R. 52-62). Accordingly, defendants' facts are deemed admitted. See, Rule 4-501(2)(B), Utah Rules of Judicial Administration.

⁶For the court's information, Parrish is one of the named defendants and a representative of co-defendant Airport Partners. Cutrubus, Rumpsa, Wyman and Eldgredge are representatives of Wydredge.

and Alamo's indemnity, defendants indicated to Wydredge that they did not believe the petroleum contamination would interfere with construction of a hotel on the property (Parrish Depo., p. 8, R. 204).

3. During the fall of 1997, the parties began negotiating over the possibility of building a hotel on defendants' real property, as set forth on pages 3 and 4 of the Statement of Facts in Appellant's Brief. The parties met on November 20, 1997 (not 1998, as set forth in Appellant's Brief on p. 4), to discuss the status of their negotiations. On that same day, defendants faxed a memo to Wydredge summarizing the outcome of the meeting (R. 300, Aple. Add. B).

4. The November 20, 1997 memo indicated that defendants were proposing to invest their real property, valued at \$850,000, plus \$650,000 cash, ". . . equaling a total maximum investment of \$1,500,000 and nothing more . . ." (emphasis added) for a 49% interest in the project. The memo also indicated that the parties would ". . . participate 50/50 . . . in expenses incurred (architect, engineering, survey licensing, etc.) up to the first phase of construction." (Aple. Add. B, emphasis added).

5. The November 20, 1997 memo went on to state that the parties ". . . have agreed to define an exit strategy for this project based upon mutually agreed to trigger mechanisms that would provide for the partners to elect to exit the project in whole or in part." Further, the memo stated: "A formal and legal agreement will be drawn and signed by all members prior to the first shovel being turned for this project." (Aple. Add. B, emphasis added.)

6. Wydredge prepared the December 1, 1997 Letter to defendants (which defendants also signed) in response to defendants' November 20, 1997 memo: "Thank you for your recap of the points agreed upon at our meeting" (R. 10, Aplt. Add. 1). The purpose of the November 30, 1997 meeting and the Letter was to create a procedure for determining the feasibility of the project (Rumpsa Aff., ¶¶ 1, 3, R. 169-170; Wydredge's memorandum in opposition to defendants' motion for summary judgment, p. 5, ¶ 21, R. 160; Appellant's Brief, p. 5).

7. Paragraph 2 of the Letter stated:

The feasibility of constructing on this site a hotel with approximately 100 rooms will be investigated. Such efforts will likely include, but not be limited to, obtaining preliminary indications of interest in project financing from qualified lenders, obtaining a preliminary appraisal, obtaining initial architectural plans, and possibly obtaining commitments regarding construction and term loan financing for the subject property. The two named partners, Airport Partners, L.L.C. and Wydredge, L.L.C., shall share the cost of all such efforts on a 49%-51% basis, respectively, which expenses will be paid by both partners as incurred.

(Aplt. Add. 1, emphasis added).

8. Paragraph 3 of the Letter stated:

Upon the determination that such a lodging facility can be constructed on the subject parcel without any significant or unusual site costs and that financing can be obtained for 60% or more of the total projected cost as an interest rate not to exceed 1% over prime relative to the term loan (minimum 15 year amortization and 5 year balloon), the undersigned parties will build and operate the subject hotel under the following terms and conditions.

(Aplt. Add. 1, emphasis added).

9. The Letter then set forth five numbered "terms and conditions," including the following:

- 1) A new entity will be formed with Airport Partners, L.L.C. holding 49% of such entity and Wydredge, L.L.C. holding 51% of such entity. The operating agreement for this entity, or other similar agreement shall specify, among other things, terms under which one or more members may dispose of their interest.
- 2) Airport Partners, L.L.C. and/or J. Brent Parrish will contribute \$650,000 cash and no more, less expenses paid as described in paragraph two above, as necessary - when necessary, to such entity and contribute the subject property, valued at \$850,000 for purposes of this transaction . . . to equal a full 49% share.

(Aplt. Add. 1, emphasis added). The Letter went on to provide that one of Wydredge's responsibilities was to obtain financing for the project, over and above defendants' cash contribution. (Id.)

10. As admitted on page 10 of the Appellant's Brief, defendants were unwilling to commit the \$650,000 in cash they had proposed to contribute until the "operating agreement," required by both Wydredge's December 1, 1997 Letter (Aplt. Add. 1) and defendants' November 20, 1997 memo, was signed. As stated in the November 20, 1997 memo: "A formal and legal agreement will be drawn and signed by all members prior to the first shovel being turned for this project" (Aple. Add. B).

11. As also stated on page 10 of Appellant's Brief, Wydredge presented defendants with its proposed form of operating agreement for a new limited liability

company ("LLC") on April 2, 1998⁷ (R. 309-313, Aplt. Add. 3). Wydredge's proposed operating agreement contained numerous provisions that were not contained either in defendants' November 20, 1997 memo or in Wydredge's December 1, 1997 Letter, and to which defendants had never agreed. (Compare Aple Add. B, Aplt. Add. 1, and Aplt. Add. 3).

12. Accordingly, defendants indicated that they would not sign Wydredge's proposed operating agreement until after they had reviewed it with counsel. (Rumpsa Aff., ¶ 10, R. 173; R. 382). Paragraph 30 of Wydredge's statement of facts in its memorandum in opposition to defendants' Motion for Summary Judgment admits: "A proposed operating agreement for Intermountain Lodging [the new LLC] was also submitted to Parrish but was unsigned because he had some unspecified objections" (R. 162).

13. Under both defendants' November 20, 1997 memo (Aple. Add. B) and Wydredge's December 1, 1997 Letter (Aplt. Add. 1), defendants were not required to contribute any more than \$650,000 in cash⁸ plus their real property, in return for a 49% interest in the project. However, under Article V of Wydredge's proposed operating agreement, Wydredge could request additional capital contributions from defendants, and if defendants declined to make those contributions, Wydredge could

⁷Wydredge never filed the Articles of Organization the parties signed regarding the new LLC (R. 306-307, Aplt. Add. 2). Accordingly, the new LLC was never formed or organized. See, *Utah Code Ann.* §§ 48-2b-103(1) and 118(1).

⁸As indicated at p.11 of Appellants' Brief, defendants later proposed to reduce this amount to \$200,000, and Wydredge proposed a corresponding reduction in defendants' interest in the project to 35%.

make them instead, thereby diluting defendants' interest in the project (Aplt. Add. 3, R. 310). Thus, this provision was inconsistent with the Letter (Cutrubus Depo., pp. 70-73, R. 194).

14. Wydredge's proposed operating agreement also was silent as to the 51%/49% split of initial costs required by the Letter (Aplt. Add. 1, 3).

15. Under Article X.A of Wydredge's proposed operating agreement, and Wydredge's understanding of the Letter, Wydredge could have immediately sold defendants' real property and received 51%⁹ of the proceeds from the sale without contributing anything to the project (Cutrubus Depo., pp. 52-55, R. 189-190).

16. After consulting with their counsel (Parrish Depo., pp. 27-29, R. 209), on or about May 29, 1998 defendants sent Wydredge their own proposed form of operating agreement (R. 318-328; Aple. Add. C). Among other things, defendants proposed that they would receive a 50% interest in the project, and greater participation in management than under Wydredge's proposed operating agreement (Aple. Add. C; Parrish Depo., p. 29, R. 209).

17. Although the parties continued to negotiate, they never reached agreement on the form of an operating agreement (R. 330-334).

18. Both defendants' November 30, 1997 memo (Aple. Add. B) and Wydredge's December 1, 1997 Letter (Aplt. Add. 1) required the parties to reach

⁹65% according to page 11 of Appellant's Brief, based upon the reduction in defendants' cash contribution to \$200,000.

agreement on how the parties could "exit the project" or "dispose of their interest" in the project. No such agreement was ever reached (R. 330-334).

19. According to Wydredge, the parties never had a meeting of the minds as to division of initial costs, including architectural fees, which were supposed to be split 51%/49% under the Letter. Valentiner and Crane Architects submitted an invoice for \$81,830.80 in architectural fees related to proposed development of a hotel on defendants' property (R. 142). Defendants paid \$42,097.00, over 49% of that invoice. Wydredge refused to pay the remaining portion of the invoice, contending that it was only responsible to pay \$2,000 in architectural fees.¹⁰ (Cutrubus Depo. pp. 44-46, 92-94, R. 187-188, 199-200; Wyman Depo. pp. 39-42, R. 224-225.)

20. Defendants refunded the \$2,000 in architectural fees Wydredge paid (Parish Depo., p. 28, R. 209; R. 318). Accordingly, Wydredge has paid no costs towards development of a hotel on defendants' property (other than possibly the cost of a trip to Tucson, Arizona, to investigate hotel franchise opportunities for defendants, prior to defendants' November 30, 1997 memo) (Wyman Depo., pp.46-48, R. 226).

21. Any financing commitment Wydredge allegedly obtained regarding the hotel development was not binding because Wydredge never signed it, and Wydredge never paid any of the amounts required to obtain such a commitment (Cutrubus Depo., pp. 40-41, R. 186).

¹⁰Based on Wydredge's refusal to pay its share of the architect's fees, the architect has now sued all of the parties to the present action in the District Court, Civil No. 000900224. This Court can take judicial notice of the architect's lawsuit.

22. Any financing commitment Wydredge allegedly obtained was subject to the lender's due diligence, including, among other things, an appraisal of defendants' real property (as also required by the Letter) and an environmental assessment of defendants' real property. Wydredge never obtained an appraisal or an environmental assessment, or provided estimated costs of construction to the proposed lender. (Cutrubus Depo., pp. 27-28, 32-37, 39-40, 66-68, R. 183-186, 193; Wyman Depo., pp. 26-28, R. 221).

23. Wydredge's lender (First Security Bank) was concerned about environmental contamination at defendants' real property (Cutrubus Depo., pp. 32-37, R. 184-185). As discussed above, Alamo had assumed responsibility for petroleum contamination. However, during the unsuccessful negotiations with Wydredge over the form of the operating agreement, defendants learned of solvent contamination at the property, for which Alamo may not have assumed responsibility, and notified Wydredge accordingly (R. 140, 353-366, Parrish Depo., pp. 30-37, R. 210-211; Cutrubus Depo., pp. 84-85, R. 197; R. 330-334).

24. It is unclear how this solvent contamination would affect development of defendants' real property and, in particular, whether this contamination would create any "significant or unusual site costs" that could prevent development of the property, within the meaning of the Letter (Aplt. Add. 1, Parrish Depo., pp. 30-37, R. 210-211; R. 330-334).

25. Wydredge understood and agreed that if there were environmental problems with defendants' real property other than the petroleum contamination, these

problems might prevent development of the property (Rumpsa Aff. ¶ 3, R. 170; Cutrubus Depo., pp. 86-87, R. 198).

26. The Letter was silent on numerous issues addressed in the respective operating agreements proposed by both Wydredge (Aplt. Add. 3) and defendants (Aple. Add. C), upon which the parties never agreed. These issues included the following:

- a. Wydredge's capital contribution (Cutrubus Depo., pp. 51-52, R. 189).
- b. Repayment of defendants' capital contribution (Id.).
- c. Whether or when additional capital contributions would be required, and by whom.
- d. The appointment, identity, removal or replacement, and powers of the managing member of the proposed LLC.
- e. Division of profits or withdrawal of capital (Cutrubus Depo., pp. 50-51, R. 189).¹¹
- f. Payment of salaries or other compensation to the members of the proposed LLC.
- g. Transfer of a member's interest in the proposed LLC.
- h. Dissolution of the proposed LLC or sale of defendants' real property.

¹¹Wydredge's proposed operating agreement would have allowed Wydredge to withdraw capital without defendants' consent, but would not have allowed defendants to withdraw capital without Wydredge's consent (Aplt. Add. 3, Article VII; Cutrubus Depo., pp. 73-75, R. 194-195). Defendants never agreed to this proposal (Id.)

i. Loans by or to the proposed LLC or its members.

j. Indemnification of the members of the proposed LLC.

27. The Letter allowed Wydredge to back out of the proposed deal if Wydredge determined that the proposed hotel would not generate a sufficient level of profit (Cutrubus Depo., pp. 25-27, R. 182-183).

28. Wydredge never made a determination whether to move forward with development of defendants' real property (Cutrubus Depo., p. 92, R. 199).

29. Wydredge recorded a Notice of Lis Pendens against defendants' real property in this action (R. 152-154).

30. Wydredge recorded the lis pendens not because it was claiming an interest in the real property, but in order to stop any other development of the property. Wydredge has no interest in assuming any environmental liability that such an interest might create (Cutrubus Depo., pp. 87-89, 94-95, R. 198, 200).

SUMMARY OF ARGUMENT

Wydredge's December 1, 1997 Letter (along with defendants' November 20, 1997 memo) were nothing more than unenforceable agreements to agree. The purpose of these documents was merely to establish a framework under which the parties would attempt to determine the feasibility of the proposed hotel project. Under these documents, if the parties determined that the project was feasible, they would then form an LLC and negotiate "[a] formal and legal agreement" (Aple. Add. B), i.e., an operating agreement for the new LLC (Aplt. Add. 1).

However, the parties never determined whether the hotel project was feasible. Among other things, newly discovered environmental problems with defendants' real property, and Wydredge's unwillingness to address those problems, may have prevented development of the property.

Moreover, even if the parties had determined that the project was feasible, they were never able to agree upon the terms of an operating agreement. Negotiations regarding the respective contributions, percentage interests, and rights and duties of the parties under the proposed LLC were never completed. Accordingly, the new LLC was never formed or organized.

The so-called "parol evidence" Wydredge relies upon as further evidence of a binding contract merely highlights the parties' failure to reach a meeting of the minds. The reason that defendants never agreed to Wydredge's proposed operating agreement was because it was one sided, and the obligations Wydredge purported to undertake under that agreement were illusory. Under Wydredge's version of the agreement, it could have immediately sold defendants' real property and kept 51%-65% of any proceeds, for no consideration.

The only parties harmed by the inability to reach agreement were defendants. They invested over \$49,000 in architect's fees toward the proposed project, and now face suit by the architect over Wydredge's failure to pay the remaining half of the architect's bill, as Wydredge agreed to do. Wydredge, on the other hand, invested nothing.

Wydredge recorded the lis pendens against defendants' real property not because it claimed a valid interest in the property, but to further harm defendants by preventing any other development of their property. Even if Wydredge's constructive trust claim provided a colorable basis for the lis pendens, dismissal of this action properly resulted in the order that Wydredge release the lis pendens, especially where Wydredge's opposition to defendants' motion for summary judgment did not argue against release of the lis pendens. Wydredge's release of the lis pendens, before seeking a stay of the order directing the release in the Supreme Court, waived any contention Wydredge makes about the propriety of the District Court Minute Entry denying the motion to stay the release filed below. In addition, Wydredge failed to file a notice of appeal from the District Court Minute Entry denying its motion to stay the release.

Thus, the District Court's Order and Judgment dismissing this action with prejudice, and ordering the release of the lis pendens, as well as the Minute Entry denying Wydredge's motion to stay, were proper and should be affirmed.

ARGUMENT

I. WYDREDGE'S DECEMBER 1, 1997 LETTER WAS TOO VAGUE AND INDEFINITE TO CREATE AN ENFORCEABLE CONTRACT, AND THE PARTIES NEVER REACHED A MEETING OF THE MINDS AS TO THE ISSUES THE LETTER LEFT UNRESOLVED.

The Utah Supreme Court has held that, "[i]t is fundamental that a meeting of the minds on the integral features of an agreement is essential to the formation of a contract." Richard Barton Enterprises, Inc. v. Tsern, 928 P.2d 368, 373 (Utah 1996).

"An agreement cannot be enforced if its terms are indefinite or demonstrate that there was no intent to contract." Id. In Tsern, the trial court found that the parties agreed to the concept of rent credit, but did not agree as to the amount. Based upon this finding, the trial court ruled that it could fix a reasonable amount.

The Supreme Court overturned the trial court's ruling, reasoning that, "[a] valid modification of a contract or lease requires 'a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness.'" Id. [quoting Valcarce v. Bitters, 362 P.2d 427 (Utah 1961)]. The Court also stated that, "when parties have not agreed on a reasonable price or a method for determining one, 'the agreement is too indefinite and uncertain for enforcement.'" Id. [quoting Joseph M. Perillo et al., *Corbin on Contracts* § 4.3, at 568 (rev. ed. 1993)]. See also, Lessley v. Hardage, 727 P.2d 440, 446 (Kan. 1986). (The general rule is that for an agreement to be binding, it must be substantially definite as to its terms and requirements as to enable a court to determine what acts are to be performed, and when performance is complete, and the court must be able to fix definitely the legal liability of the parties.)

The primary concern related to the enforcement of indefinite contracts is that the court, rather than the parties, will be required to create key terms of the agreement. The court in Setterlund v. Firestone, 700 P.2d 745, 746 (Wash. 1985) stated that, "[t]he legal principle with which we are concerned is that preliminary agreements must be definite enough on material terms to allow enforcement without a court supplying those terms. The problem is not one of determining how many more terms are

included in one agreement or another, but whether a particular agreement includes sufficient material terms." In Setterlund, the court refused to require specific performance of a promissory note because the parties had not agreed on the amount of interest to be paid.

The court noted that, "the court should not supply those terms upon which the parties have not agreed." Id. The Court concluded that, "the buyers had to prove the existence of a preliminary agreement which contained terms specific enough to be enforced without the court drafting the final documents." Id. See also, Griffin v. Griffin, 699 P.2d 407, 409 (Colo. 1985) (Agreements by which parties merely agree to negotiate and reach agreement at some future time are ordinarily unenforceable, because the court has no power to force the parties to reach agreement and cannot grant a remedy); Hauser v. Rose Health Care Systems, 857 P.2d 524, 528 (Colo. App. 1993), cert.den. 1993 Colo.App. LEXIS 50 (Aug. 30, 1993) (A contract is not enforceable if it appears that further negotiations are required to work out essential terms).

Here, like Tsern, the parties entered into preliminary negotiations and reached consensus on some basic concepts. However, the Letter which Wydredge is attempting to enforce is not definite enough to be enforceable. The parties simply did not agree, and in fact disagreed, about many key material terms of the proposed final operating agreement.

For example, defendants' November 20, 1997 memo required the parties to agree upon an "exit strategy" (Aple. Add. B). Similarly, Wydredge's December 1,

1997 Letter required the parties to agree upon "terms under which one or more members may dispose of their interest" (Aplt. Add. 1). It is undisputed that no such agreement was ever reached. (Compare Aplt. Add. 3 with Aple. Add. C.)

Also, both the November 20, 1997 memo and December 1, 1997 Letter indicated that in return for a 49% interest in the project, defendants would be required to invest no more than their real property and \$650,000. However, under Article V of Wydredge's proposed operating agreement, defendants could be required to invest additional capital in the project, under pain of having their percentage interest in the project diluted (Aplt. Add. 3, R. 310).

Also, according to Wydredge, the parties never reached agreement on sharing of initial costs of the project, such as architect's fees. Under the November 20, 1997 memo and December 1, 1997 Letter, Wydredge was supposed to pay 50%-51% of these fees. However, Wydredge's proposed operating agreement was silent on the issue, and Wydredge's position was that it was only required to pay \$2,000 of an architect's bill that was over \$80,000. (Cutrubus Depo., pp. 44-46, 92-94, R. 187-188; Wyman Depo., pp. 39-42, R. 224-225.) In addition, the Letter was silent upon, and the parties never reached agreement as to, a myriad of issues addressed in the proposed operating agreements of Wydredge and defendants, respectively. See, paragraph 26 of defendants' Statement of Facts above, subparagraphs a. through j.

Wydredge contends that defendants breached the Letter by attempting to change their percentage interest in the proposed project. However, no final agreement

on defendants' percentage interest was ever reached. (Aple. Add. B; Aplt. Add. 1; R. 382; R. 330-334.)

It is undisputed that the parties never considered the Letter to be anything more than a letter of intent, subject to later negotiation of a formal written contract. Defendants' November 20, 1997 memo required a "formal and legal agreement" to be executed. Similarly, Wydredge's December 1, 1997 Letter required the parties to enter into an "operating agreement" for the new LLC the parties planned to form.¹²

It is similarly undisputed that defendants never agreed to the terms of Wydredge's proposed operating agreement. While defendants may have indicated agreement in principal, any such agreement was subject to review of the operating agreement by defendants' counsel. (Rumpsa Aff., ¶ 10, R. 173; R. 382.) After their counsel's review of Wydredge's proposed agreement, defendants decided to propose their own operating agreement, and the parties were never able to reconcile the two. (Aple. Add. C; R. 330-334.)

Any conditional approval of Wydredge's proposed operating agreement by defendants did not create a binding contract. Wydredge cites C&Y Corp. v. General Biometrics, Inc., 896 P.2d 47 (Utah App. 1995) for the proposition that the parties need not agree upon all details of a contract in order for it to be enforceable, so long as there is agreement upon the essential terms. However, in C&Y Corp. this Court found that the alleged contract was not enforceable, in part because one party's agreement to

¹²It is also undisputed that the new LLC was never formed or organized because the parties never filed the Articles of Organization they signed. See, Utah Code Ann. §§ 48-2b-103(1) and 118(1)

the contract was made subject to approval by the party's board of directors. Similarly, here, conditional approval of the concept of Wydredge's proposed operating agreement, subject to review by defendants' counsel, was not binding.

Wydredge also cites Nixon and Nixon, Inc. v. John New & Assoc., Inc., 641 P.2d 144 (Utah 1982) for the same proposition as C&Y Corp., supra. However, in Nixon, the parties had reached agreement on all terms of the contract except the timing of performance. The court relied upon law to the effect that where a contract is silent as to the time for performance, it will be presumed that the parties intended completion of performance within a reasonable time under all the circumstances. Here, it would have been impossible for the District Court to have determined "reasonable" terms upon which the parties could dispose of their interest in the project, "reasonable" percentage interests in the project, or a "reasonable" cost sharing allocation. Instead, the District Court would have had to create an agreement the parties themselves were never able to reach, which the District Court properly refused to do. See, Setterlund, supra.

Wydredge cites Shields v. Harris, 934 P.2d 653 (Utah App. 1997) as support for using parol evidence to prove an enforceable contract. In Shields, the court was able to harmonize two lease and option to purchase proposals. Here, however, the parol evidence is merely further evidence of the parties' inability to agree. Neither the District Court nor the parties could "harmonize" the two operating agreements proposed by the respective parties. (Aplt. Add. 3; Aple. Add. C.)

Wydredge's proposed operating agreement (1) omitted terms found in its December 1, 1997 Letter (e.g., the 51%/49% cost sharing), (2) had terms contrary to the Letter (e.g., a provision that defendants could be required to make capital contributions beyond their real property and initial cash contribution, or have their interest diluted), and (3) contained numerous terms not contained in the Letter, upon which the parties were never able to agree. See, paragraph 26 of defendants' Statement of Facts, above, subparagraphs a. through j. Under *Utah Code Ann.* § 48-2b-126(1), the members of an LLC must reach "unanimous consent" upon the terms of an operating agreement, which never occurred here.

The purpose of Wydredge's December 1, 1997 Letter was to create a procedure to determine whether the hotel project was feasible. Paragraph 2 of the Letter states: "The feasibility of constructing on this site [defendants' real property] a hotel with approximately 100 rooms will be investigated." (Aplt. Add. 1, emphasis added.) See also, Rumpsa Aff. ¶¶ 1 and 3, R. 169-170; Wydredge's memorandum in opposition to defendants' motion for summary judgment, p. 5, ¶ 21, R. 160; Appellants' Brief, p. 5. However, no determination of feasibility was ever made.

While the defendants were attempting to negotiate the terms of the operating agreement, defendants discovered solvent contamination that Alamo may not have been obligated to remediate, and that may not have been covered by Alamo's indemnity. (R. 140, 330-334, 353-366; Parrish Depo. pp. 30-37, R. 210-211; Cutrubus Depo., pp. 84-85, R. 197.) This solvent contamination may have prevented Wydredge from obtaining the financing necessary for the hotel project, as contemplated in Wydredge's

December 1, 1997 Letter. (Aplt Add. 1, ¶ 3; Cutrubus Depo., pp. 32-37, 86-87; R. 184-185, 198.) At the very least, the solvent contamination may have created "significant or unusual site costs" that would have prevented development even under the Letter. (Aplt. Add. 1, ¶ 3; Parrish Depo., pp. 30-37; R. 210-211; R. 330-334.) Moreover, Wydredge wanted no part of the solvent contamination. (Cutrubus Depo., pp. 87-89, 94-95, R. 198, 200.)

The only parties hurt by the inability to reach agreement on the terms of an enforceable contract were defendants. After the December 1, 1997 Letter was signed, Wydredge did not invest one penny in the proposed project. (Wyman Depo., pp. 46-48, R. 226.) Defendants, on the other hand, invested over \$49,000 in architect's fees, while still facing suit by the architect, over Wydredge's failure to pay the remaining half of that bill, as it agreed to do. (R. 142.)

For these reasons, Wydredge's December 1, 1997 Letter, along with any supplementary parol evidence, were too vague and indefinite to create an enforceable contract.

**II. WYDREDGE'S OBLIGATIONS UNDER ITS
DECEMBER 1, 1997 LETTER WERE TOO
ILLUSORY FOR THE LETTER TO BE
ENFORCEABLE.**

The Utah Supreme Court has held that, "[w]hen there exists only the facade of a promise, i.e., a statement made in such vague or conditional terms that the person making it commits himself to nothing, the alleged 'promise' is said to be 'illusory'."

Resource Management Company v. Weston Ranch and Livestock Co., Inc., 706 P.2d

1028, 1036 (Utah 1985). The Court continued: "An illusory promise neither binds the person making it, . . . nor functions as consideration in return for the promise." Id. [citing 1 *Corbin on Contracts* § 145 (1963)]. See also, Davis v. General Foods Corp., 21 F.Supp. 445 (S.D.N.Y. 1937) (Where the promisor retains an unlimited right to decide the nature or extent of his performance, the promise is illusory and too indefinite for legal enforcement); Wharf Restaurant, Inc. v. Port of Seattle, 605 P.2d 334, 339 (Wash. App. 1979) (A supposed promise is illusory when it is so indefinite that it cannot be enforced, or where its provisions are such as to make its performance optional or entirely discretionary on the part of the claimed promisor).

Here, Wydredge's December 1, 1997 Letter is illusory in several ways.¹³ First, as argued above, the Letter is indefinite and vague. The rights and duties of the parties are uncertain and, thus, unenforceable.

In addition, the Letter is illusory because Wydredge could avoid its obligations thereunder at its sole discretion, if it determined that the proposed hotel would not generate sufficient profit. (Cutrube Depo. p. 25-27, R. 182-183.) It was also Wydredge's position that it could have immediately sold defendants' real property

¹³Defendants argued that the Letter was illusory in their memorandum in support of their motion for summary judgment. (R. 67-69.) However, Wydredge never responded to this argument in their memorandum in opposition (R. 156-334) and, thus, waived any argument on this appeal. See, Strawberry Electric Service District, *supra*. Also, although the District Court did not expressly rule that the contract was illusory, the District Court may be affirmed on any ground argued below. See, Salt Lake County v. Bangerter, 928 P.2d 384, 386 (Utah 1996).

and pocketed 51 % (or 65 %) of the proceeds from the sale, without contributing anything to the project. (Cutrubus Depo., pp. 52-55, R. 189-190.)

Any financing commitment Wydredge alleges it obtained was also illusory, because Wydredge never signed the alleged commitment or paid the requisite fees. (Cutrubus Depo., pp. 40-41, R. 186.) Also, any such commitment was subject to the lender's due diligence, including an appraisal of defendants' real property (which the Letter also required) and an environmental assessment, neither of which Wydredge ever obtained. (Cutrubus Depo., pp. 27-28, 32-37, 39-40, 66-68, R. 183-186, 193; Wyman Depo., pp. 26-28, R. 221.) Consistent with the foregoing, Wydredge never made a determination whether to go forward with the project. (Cutrubus Depo., p. 92, R. 199.)

Thus, Wydredge's December 1, 1997 Letter was not enforceable for these reasons as well.

III. IT WAS PROPER FOR THE DISTRICT COURT TO ORDER THE RELEASE OF THE LIS PENDENS WYDREDGE RECORDED AGAINST DEFENDANTS' REAL PROPERTY AND TO DENY WYDREDGE'S MOTION TO STAY THE RELEASE.

As discussed above, Wydredge never filed a notice of appeal from the District Court order denying Wydredge's Motion to Stay Release of Lis Pendens (November 30, 1999 Minute Entry, Aplt. Add. 6). In addition, the issue is moot or has been waived by Wydredge because after the District Court denied Wydredge's Motion to Stay, Wydredge signed a release of the lis pendens, which defendants promptly recorded, well before Wydredge filed its Motion to Stay Release of Lis

Pendens Pending Appeal in this Court (Aple. Add. A). See, Ottenheimer v. Mountain States Supply Co., 56 Utah 190, 193, 188 P. 1117, 1118 (1920). For these reasons alone, this portion of Wydredge's appeal must be dismissed.

Nevertheless, and even though Wydredge also made no argument against releasing the lis pendens in opposing defendants' motion for summary judgment, defendants will briefly address the merits of the portion of the District Court's Order directing that Wydredge release the lis pendens. (Aplt. Add. 4.) Wydredge did not record the lis pendens because it was claiming an interest in defendants' real property. To the contrary, Wydredge did not want to risk assuming the environmental liability that owning an interest in the property might involve. Instead, Wydredge recorded the lis pendens in order to prevent other development of the property. (Cutrubus Depo., pp. 87-89, 94-95, R. 198, 200.) In addition, dismissal of the action warranted release of the lis pendens, especially where Wydredge declined to post a supersedeas bond to stay the release. See, Gardner v. Perry, 2000 Ut. App. 1, ¶¶ 23, 24, 386 Utah Adv.Rep. 47.¹⁴ Accordingly, the District Court ruled properly on these issues as well.

CONCLUSION

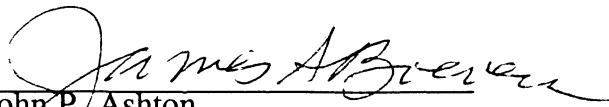
Based on the foregoing, defendants respectfully urge this Court to affirm the District Court's Order and Judgment dismissing this action with prejudice, and ordering

¹⁴Further arguments regarding the District Court's denial of Wydredge's motion to stay release of the lis pendens are set forth in defendants' Memorandum in Opposition to Wydredge's Motion to Stay Release of Lis Pendens Pending Appeal, on file in this Court, and will not be repeated here. That motion is currently pending before the Court.

Wydredge to release the Notice of Lis Pendens recorded against defendants' real property, and the District Court's Minute Entry denying Wydredge's Motion to Stay Release of Lis Pendens.

DATED this 22nd day of March, 2000.

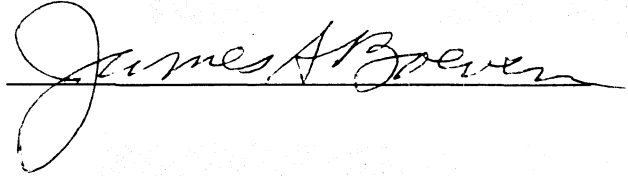
PRINCE, YEATES & GELDZAHLER

By 
John P. Ashton
James A. Boevers
Roger J. McConkie
Attorneys for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of March, 2000, I caused the original and seven copies of the foregoing BRIEF OF APPELLEES to be mailed, first-class postage prepaid thereon, to the Court of Appeals, and two copies to be mailed, first-class postage prepaid thereon, to the following:

Brian R. Florence
Attorney for Plaintiff-Appellant
5790 Harrison Boulevard
Ogden, UT 84403

A handwritten signature in cursive script, reading "James A. Brewer", is written over a horizontal line.

G:\EA\Jab\Parrish, Brent\Appellee's Brief.wpd
9308-8

ADDENDUM

- A. Release of Lis Pendens**
- B. Defendants' November 20, 1997 Memo**
- C. Defendants' Proposed Operating Agreement**

Tab A

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JAN - 6

PRINCE, YEATES, GELDZAHLER

PRINCE, YEATES & GELDZAHLER
Roger J. McConkie (5513)
Attorneys for Defendants
City Centre I, Suite 900
175 East 400 South
Salt Lake City, UT 84111
(801) 524-1000

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01/06/2000 04:37 PM 16.00
NANCY WORKMAN
RECORDER, SALT LAKE COUNTY, UTAH
PRINCE YEATES & GELDZAHLER
175 E 4TH S STE. 900
SLC UT 84111

IN THE THIRD JUDICIAL DISTRICT COURT BY: RDJ, DEPUTY - WI 3 P.

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WYDREDGE, L.L.C., a Utah limited
liability company,

Plaintiff,

vs.

AIRPORT PARTNERS, L.L.C., a Utah
limited liability company, and J. BRENT
PARRISH, individually,

Defendants.

RELEASE OF
LIS PENDENS

Civil No. 980909956
Judge Sandra Pueller

Comes now the undersigned attorney for plaintiff, Wydredge, L.L.C., and releases
the Lis Pendens recorded on OCTOBER 5, 1998, as Entry No. 7109148, Book 8116,
Page 0307-9, in the official records of the Salt Lake County Recorder, and affecting the real
property as described on Exhibit "A" attached hereto.

DATED this 5th day of January, 2000.



Brian R. Florence
Attorney for Plaintiff

PRINCE, YEATES
& GELDZAHLER
City Centre I, Suite 900
175 East 400 South
Salt Lake City
Utah 84111
(801) 524-1000

1-5-2000

[page 2 of Release of Lis Pendens in re *Wydredge, L.L.C. v. Airport Partners, L.L.C., and J. Brent Parrish*, Civil No. 980909956, in the Third Judicial District Court, State of Utah]

STATE OF UTAH)
 :SS.
COUNTY OF WEBER)

The foregoing RELEASE OF LIS PENDENS was acknowledged before me this

5th day of January, 2000, by Brian R. Florence.

Joann Tsakalos
NOTARY PUBLIC
Residing at: Weber County Ut

My Commission Expires: _____

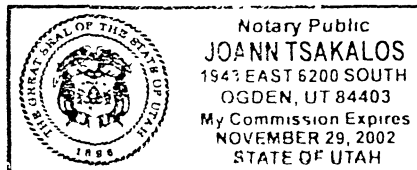


EXHIBIT "A"

PARCEL I:

Beginning 8.5 feet North and 33 feet West from the South quarter corner of Section 33, Township 1 North, Range 1 West, Salt Lake Base and Meridian; thence North 151.04 feet; thence West 175.61 feet; thence North 294.22 feet; thence West 132.10 feet; thence South 445.26 feet; thence East 307.71 feet to the point of beginning.

PARCEL II:

Beginning 309.54 feet North and 33 feet West of the South Quarter corner of Section 33, Township 1 North, Range 1 West, Salt Lake Base and Meridian, and thence North 150 feet; thence West 175.61 feet; thence South 150 feet; thence East 175.61 feet to the place of beginning.

PARCEL III:

Beginning 33 feet West and 159.54 feet North from the South Quarter corner of Section 33, Township 1 North, Range 1 West, Salt Lake Base and Meridian, thence North 150 feet, thence West 175.61 feet; thence South 150 feet; thence East 175.61 feet to the point of beginning.

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Tab B

November 20, 1997

To: Homer Cutrubus
Phidia Cutrubus
Barry Eldredge
Clayton Wyman
Jim Ramps

This is the recap of my immediate impressions of our meeting today.

- I. The group consisting of Homer Cutrubus, Phidia Cutrubus, Barry Eldredge, Clayton Wyman, and Jim Ramps et al will represent 51% and Brent Parrish and/or his assigns will represent 49% of a joint venture 100 room hotel to be built on the property located at 37 North 2400 West, Salt Lake City Airport, UT.
- II. Rough terms of this partnership are: a. Parrish will bring the land (valued by this agreement at \$850,000.) And \$650,000. cash equaling a total maximum investment of \$1,500,000. and nothing more, including loan guarantees or additional cash assessments, for a 49% interest and Cutrubus et al will bring all else needed, ie cash, financing, planning, development, building and management for their 51% interest. Parrish, as good faith, is to put \$650,000. on deposit by a date yet to be identified and will participate 50/50 out of this deposit with Cutrubus et al in expenses incurred (architect, engineering, survey licensing, etc.) up to the first phase of construction. Parrish will also subordinate the property free and clear as the balance of his 49% investment subsequent to his \$650,000 deposit but as a part of the security to the construction loan and ultimately any permanent loan for the hotel.
- III. Cutrubus et al and Parrish have agreed to define an exit strategy for this project based upon mutually agreed to trigger mechanisms that would provide for the partners to elect to exit the project in whole or in part.
- IV. Every individual of this partnership will exercise appropriate diligence and commitment to the project to insure its success with no remuneration until such time as the business is able to generate appropriate income and thus cash distribution beyond fees for management.
- V. A formal and legal agreement will be drawn and signed by all members prior to the first shovel being turned for this project.

Tab C

AIRPORT PARTNERS, LLC

*c/o Parrish Management
1399 South 700 East Ste. #1
Salt Lake City, UT 84105
(801) 467-2887*

May 29, 1998

Mr. Homer Cuttrubus
Rocky Mountain
770 W. Riverdale Road
Ogden, UT 84405

Dear Homer,

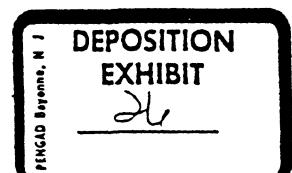
Re: the last revision of the operating agreement

In the spirit of forming a true partnership in the hotel project proposed at 37-49 North 2400 West, Salt Lake City, UT, I send you the revised (5/29/98) copy of an operating agreement for the proposed Intermountain Lodging LLC, partnership of Airport Partners LLC and Wydredge LLC.

Please evaluate this agreement completely and I am sure you will agree that it exemplifies the true spirit of partnership.


cc Barry Eldredge

P.S. Enclosed to Wydredge is a check for \$2,000 - repaying that amount for funds expended as initial deposit to Valentiner & Crane Architects for this project.



00318

Exhibit 27

OPERATING AGREEMENT
INTERMOUNTAIN LODGING, L.L.C.
(Revised 5/29/98)

THIS OPERATING AGREEMENT (the "Agreement") is made and entered into as of the ____ day of _____, 1998, by and between AIRPORT PARTNERS, L.L.C., a Utah limited liability company ("Airport"), and WYDREDGE, L.L.C., a Utah limited liability company ("Wydredge") (sometimes collectively referred to as "Members" and individually as "Member").

I
INTRODUCTION

The Members have formed a limited liability company known as Intermountain Lodging, L.L.C. (The "Company") for the primary purpose of operating a company to acquire, sell, lease, use, own manage, operate, and act in every other way upon hotel, motel, and similar accommodations, real property, fixtures, and personal property incidental thereto, and for the purpose of conducting any other lawful business. The Members initially intend to construct and operate a hotel on the Property, as defined herein (the "Hotel").

II
BUSINESS

The principal place of business of the Company shall be 1399 S. 700 East, Suite 1, Salt Lake City UT 84105, or such other address to which the business may from time to time be moved.

III
DURATION

In accordance with the Utah Limited Liability Company Act (the "Act"), the term of the Company shall commence upon the filing of the Company's articles of organization with the Utah Division of Corporations and Commercial Code and shall continue for a term of not to exceed fifty (50) years thereafter, unless terminated sooner by operation of law or in accordance with the terms



IV.
OWNERSHIP/SHARING RATIOS

The Members agree to share in all profits and losses in the following ownership percentages:

<u>NAME</u>	<u>OWNERSHIP/SHARING PERCENTAGE</u>
Wydredge	50%
Airport	50%

The Members agree that the Company will not issue any additional interests in the Company without the unanimous consent of the Members.

V.
CAPITAL CONTRIBUTIONS

Each partner will contribute up to a maximum of 20% in cash or equivalent such as land of the total projected development costs, borrowing to be no more than 60% of the total costs. Costs to be included are the land, the construction, FF&E, reservation system technology and all expenses necessary to the opening of a "suites type" hotel. This project will conform to all of the necessary requirements of the brand chosen for a hotel of 100-120 rooms. The total costs of this development shall not exceed \$5,500,000, including the land currently titled to Airport Partners which is to be valued at \$1,100,000, see exhibit "A" hereto (property). Specific contribution from each partner is \$1,100,000. Airport will fund its contribution with the "free and clear" parcel of property as described in Exhibit "A" (property) valued at \$1,100,000. Wydredge will contribute \$1,100,000 in cash. Both Airport (its principals) and Wydredge (its principals) will do whatever necessary including personal guarantees to provide the remaining 60% of indebtedness both in the form of a construction loan and permanent financing to the lender yet to be named.

No sooner than six months after the original certificate of occupancy is issued, the Members may contribute in amounts proportionate to their respective ownership interest in the Company any additional capital deemed necessary (by those Members owning at least 51% of the interests in the Company) for the operation, as opposed to the construction and/or permanent financing, and/or opening, of the Company and/or the Hotel; provided however, that in the event that any Member refuses or fails to contribute its proportionate share of any or all of the additional capital, then the other Members or any one of them may contribute the additional capital not paid in by such refusing Member and shall receive therefore an increase in proportionate share of the ownership or interest in the entire Company in direct proportion to the said additional capital contributed.

An individual capital account shall be maintained for each Member in accordance with applicable Treasury Regulations under Section 704 of the Internal Revenue Code of 1986 (the "Code"). This account: (a) shall be credited with such Member's: (i) original contribution of capital; (ii) additional capital contributions; and (iii) allocations to a Member of Company income and gain (or items thereof), including income and gain exempt from tax and income and gain, as computed for book purposes, in accordance with Treas. Reg. § 1.704-1(b)(2)(iv)(g); and (b) shall be charged with: (i) any distributions to such Member in reduction of Company capital; and (ii) the Member's share of Company's losses that are charged to the capital account of the Member.

VI PURPOSE

The purpose of the Company is to acquire, sell, lease, use, own, manage, operate the Hotel, and act in every other way upon Hotel, motel, and similar accommodations, real property, fixtures, and personal property incidental thereto, and to conduct any other lawful business.

VII DIVISION OF PROFITS AND LOSSES

Each of the Members shall own an interest in the Company as set forth in Paragraph IV, entitled "Ownership/Sharing Ratios", except as the same may hereafter vary or change as provided in Paragraph V, entitled "Capital Contributions". All profits and losses of the Company enterprise be shared by each of said Members according to the percentage of interest each Member owns. A separate capital account shall be maintained for each Member. No Member shall make any withdrawals from capital without prior approval of the Members. If the capital account of the Member becomes impaired, his share of subsequent Company profits shall be first credited to his capital account until that account has been restored.

VIII RIGHTS AND DUTIES OF THE PARTIES

The Members agree to mutually undertake the responsibilities for business operations and in that regard, each shall have a contributory responsibility of time and effort to the Company. Company decisions and actions shall be decided by a 51% majority in interest of the Members, at meeting regularly called with notice to all Members. For purposes of determining a "majority in interest", a member's interest will be his interest in profits and losses as set forth in Paragraph VII, and a majority will mean more than seventy percent (51%).

IX

MANAGEMENT

The Company will pay Efficiency Management, L.L.C., a management fee in the amount of 4% of gross revenues generated by hotel operations on a monthly basis for those services and expertise, and such management will be paid, and such management duties will be rendered pursuant to the terms of a written management agreement reviewed and approved in form and substance by the Members. No management duties will be rendered and no payments therefor will be made until such management agreement has been executed by the parties.

X

MANAGEMENT DUTIES AND RESTRICTIONS

- A. Except as provided in Subparagraphs "B" and "C" of this Section, all Members will have proportionate rights in the management of the Company. No Member will, without the consent of the other Members, endorse any note or act as an accommodation party, or otherwise become surety for any person in any transaction involved in the Company. Without the consent of the Company, no Member shall on behalf of the Company borrow or lend money, or make, deliver or accept any commercial paper, or execute any mortgage, security agreement, bond, or lease, or purchase or contract to purchase, or sell or contract to sell any property for or of the Company. No Member shall, except with the consent of the other Members, mortgage, grant a security interest in its share in the Company or in the Company capital assets or property. Neither shall any Member do any act detrimental to the best interests of the Company or which would make it impossible to carry on the ordinary purpose of the Company.
- B. The Company may from time to time elect to designate one of its Members as General Manager for the Company. Such person so designated shall have authority to execute all instruments in the name of the Company, except that all members shall execute instruments of indebtedness which responsibility shall not be delegated to the Manager.
- C. Barry B. Eldredge, a partner in Wyndridge, is hereby designated as General Manager for a period of one (1) year from June 1, 1998, and thereafter until a successor is elected and qualified, to act in accordance with the provisions of Subparagraph "B" of this part, and specifically to execute documents in conjunction with the construction and operation of commercial facilities, except as limited by the prior paragraph that all Members shall execute instruments of indebtedness.
- D. Barry B. Eldredge, for his one year term, will have management responsibilities over the accommodation aspects of the business, as well as over food and beverage sales and related entertainment aspects of the business.

- E. James Rumpsa, a Member, shall have the management responsibilities of the Company finances and shall on a monthly basis provide each of the other Members with a general accounting and current financial condition of the Company.
- F. Any act or omission of the Manager, the effect of which may cause or result in loss or damage to the Company or the Members, if done in good faith to promote the best interests of the Company, shall not subject the Managers to any liability to the Members.

The Company shall indemnify the Manager and each Member against expenses (including attorneys' fees), judgments, fines, costs, and all other amounts actually and reasonably incurred by such Manager or Member in connection with any actual or threatened legal action, whether incurred before or after trial or appeal, against the Company or against the Manager or Member arising from activities in behalf of the Company, but only if the Manager or Member acted in good faith and in a manner it or they reasonably believed to be in or not opposed to the best interests of the Company, and with respect to any criminal action, had no reasonable cause to believe such conduct was unlawful. The Company shall provide insurance for "errors and omissions" as well as general liabilities of Manager and Members.

- G. The Manager shall cause the Company to keep at its principal place of business the following:
- (a) a current list in alphabetical order of the full name and last known business street address of each Member;
 - (b) a copy of the stamped articles or organization and all certificates of amendment to them, together with executed copies of any powers of attorney pursuant to which any certificate of amendment has been executed;
 - (c) copies of the Company's federal, state and local income tax returns and reports, if any, and
 - (d) copies of any financial statements of the Company, if any.
- H. Unless specifically prohibited by the Company's Articles, any action required to be taken at a meeting of the Manager or the Members, or any other action which may be taken at a meeting of the Manager or the Members may be taken without a

meeting, if a consent in writing, setting forth the action so taken, shall be signed by the Manager alone or by all the Members. Any such consent, including the election or replacement of any Manager, signed by all of the Manager or all the Members owning at least 70% of the interests in the Company shall have the same effect as a unanimous vote, and may be stated as such in any document filed with any governmental agency or provided to anyone else.

XI BANKING

All funds of the Company shall be deposited in its name in such checking account or accounts as shall be designated by the Members. All withdrawals therefrom are to be made upon checks which must be signed by two representatives designated by the Members.

XII BOOKS

The Company's books shall be kept at the offices of Inermountain Lodging I.L.C. on a calendar year basis in accordance with the generally accepted accounting principles and shall be closed and balanced at the end of each year. An audit shall be made as of the closing date, by a firm of certified public accounts selected by the Members owning at least 51% of the interests in the Company. Each of the parties to this Agreement hereby covenants and agrees to cause all known business transactions pertaining to the Company to be entered properly and completely into said books. The Company will furnish annual financial statements to the Members, and prepare tax returns at least two weeks prior to the tax return due date or any duly extended due date, furnishing copies to all Members at least two weeks before they are filed and after they are filed by the Company.

XIII INSURANCE

During the term of the Company's existence, the Company shall carry liability insurance in such amounts as are deemed appropriate unanimously by the Members.

XIV. VOLUNTARY TERMINATION

The Company may be dissolved at any time by agreement of all the Members, in which event the Members shall proceed with reasonable promptness to liquidate the Company. The assets of the Company shall be issued and distributed in the following order:

- A. To pay or provide for the payment of all Company liabilities to creditors other than Members and liquidate expenses and obligations;
- B. To pay debts owing to Members in respect to original and subsequent contributions of capital; and
- C. To pay debts owing Members in respect to profits in ownership shares as identified in paragraph IV of this agreement.

XV. WITHDRAWAL OF MEMBER BY SALE

Any Member who shall be desirous of selling his share and interest in the Company shall give the right of first refusal to all Members other than the selling Member to purchase said share and interest at the price equal to two and one half times the average gross revenues of all related facilities and operations for the previous two years, or on such other terms as are mutually agreeable. Such revenues shall be verified by audit and determined using generally accepted accounting principles and the accrual method of accounting. Each member electing to purchase the selling member's share and interest shall have the right to purchase that percentage of the share being sold which is equal to the result of dividing his respective percentage of the Company by the total percentage of all Members electing to purchase such share and interest.

XVI. DEATH OF A MEMBER

In the event of the death of a Member the remaining Members shall have the option to purchase the deceased Member's share and interest from the deceased's heir or heirs. If one or more Members elect to purchase the deceased Member's share and interest, the deceased's interest shall be valued and sold in accordance with the provisions of Paragraph XVI entitled "Withdrawal of Member by Sale" and the proceeds distributed to the heir or heirs within ninety (90) days of an election by the remaining Member or Members to purchase such share interest. If the deceased's share and interest is not sold, the Company shall, as soon as practicable, provide a

document by which the heir or heirs personally affirm and accept all the terms, conditions and provisions of this Operating Agreement binding themselves to the same in writing, and select a designated representative of the deceased Member as an acting Member in his place.

XVII DISSOLUTION

The term of the Company shall be as set forth herein; provided, however, that the Company shall be dissolved and thereafter terminated earlier upon:

- (a) Any disposition by the Company (other than a conveyance to a nominee) of its ~~entire interest in substantially all of the Company property, including all mortgages, leasehold interests, stock, securities or other property (other than cash) which may be acquired by the Company in exchange therefor, except for the planned sale of some or all of the units located at the subject property,~~
- (b) Except to the extent prohibited by law, the unanimous decision of the Members to terminate the Company;
- (c) The period fixed for the duration of the Company shall expire pursuant to the terms hereof; and
- (d) Notwithstanding any other provision of this Agreement, however, no dissolution shall occur if any Member other than an individual Member is dissolved for any reason, and notwithstanding the provisions in the Article XIV, upon the occurrence of an event of dissolution described herein or otherwise, any of the Members holding at least 50% of the interests in the Company shall have the right to continue the business of the Company within ninety (90) days after the occurrence of the event of dissolution. The business of the Company may also continue in the event of a dissolution by the exercise of a certain purchase option granted to the Company and the Members hereunder. If the right to continue is not exercised, the Company's affairs shall be wound up as provided herein and in the Act.

In the event of dissolution, the Company's affairs shall be wound down reasonable promptness, and the Company's assets shall be distributed, after paying all Company debts and obligations, to the Members in accordance with the Act and generally accepted accounting principles.

XVIII
VIOLATION OF THIS AGREEMENT

Any Member who shall violate any of the terms, conditions, and provisions of this agreement shall keep and save harmless the Company property and shall also indemnify the other then Members from any and all claims, demands and actions of every kind and nature whatsoever which may arise out of or by reason of such violation of any of the terms and conditions of this agreement.

IN WITNESS WHEREOF, the parties have hereunto set their hands effective the day and month first above written.

AIRPORT PARTNERS, L.L.C.
A Utah Limited Liability Company

WYDREDGE, L.L.C.
A Utah Limited Liability Company

by: _____
JAMES BRENT DADDISH JR.

by: _____