CASE NO. 07-4164

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DEER CREST ASSOCIATES I, L.C.,

Plaintiff-Appellee,

v.

AVALON DEER VALLEY, L.L.C., et al.,

Defendants-Appellants.

On Appeal from the United States District Court,
District of Utah, Central Division
Honorable Ted Stewart
No. 2:04cv00220

BRIEF OF APPELLEE

Respectfully submitted,

DAN R. LARSEN (4865)
TROY L. BOOHER (9419)
SNELL & WILMER L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800

Attorneys for Plaintiff-Appellee

ORAL ARGUMENT IS REQUESTED

August 15, 2008

CORPORATE DISCLOSURE STATEMENT

Deer Crest Associates I, L.C. is a Utah limited liability company. Its current members are Utah Auspicious Venture, LLC, a Delaware limited liability company, and Grand Harvest Ventures, LC, a Delaware limited liability company. No publicly held corporation owns 10% or more of any corporate party to this appeal.

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None.

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

Appellants Avalon Deer Valley, LLC; Willamette Landing Development, Inc.; and A. Paul Brenneke (Avalon) raise three issues in their appeal from a final judgment entered in favor of Deer Crest Associates I, L.C. (DCA) after a five-day bench trial. Because the opening brief does not consistently construe the three issues, DCA will restate the issues and standards of review after briefly providing some context.

I

When outlining the first issue, Avalon states that the court is reviewing either the "grant of summary judgment" on Avalon's unjust enrichment claim or "the lower court's factual findings supporting the summary judgment or other judgment for clear error." (AOB at 1, 2.) In the argument section, however, Avalon states that it is not challenging the order granting summary judgment or any factual finding as clearly erroneous. (AOB at 27.) Instead, Avalon asserts that the district court violated law of the case doctrine when it first found, in adjudicating a motion for partial summary judgment, that an operating agreement terminated prior to May 15, 2002, and then later found, after a trial on the merits, that the agreement terminated on March 5, 2003. (AOB at 28-29.)

In fact, nowhere in the memorandum decision granting partial summary judgment does the district court find that the operating agreement terminated prior to May 15, 2002, as Avalon repeatedly asserts. (Aplt. App. (AA) 81-88.) While Avalon's memorandum in opposition to the motion for partial summary judgment states that Avalon terminated the agreement prior to May 15, 2002, this suggests, at most, that the district court accepted this allegation as true for purposes of adjudicating the motion for summary judgment, as required under Rule 56. (Aplee. Sup. App. (SA) 1232-34, 1264, 1271; AA 83, 85.)

Issue 1: Whether a district court's acceptance of a non-moving party's factual assertion for purposes of adjudicating a motion for partial summary judgment becomes law of the case and precludes the district court from entering a different factual finding in relation to different claims after hearing additional evidence in a trial on the merits.

Standard of Review: The court reviews the application of law of the case doctrine de novo. Procter & Gamble Co. v. Haugen, 317 F.3d 1121, 1126-27 (10th Cir. 2003) ("We review an application of the law of the case de novo.") (citation omitted).

II

The second issue Avalon raises is that the district court erred in failing to find that the operating agreement terminated when Avalon delivered a letter on January 8, 2002, purporting to withdraw from its contractual relationship with DCA. (AOB at 2.) Avalon represents that the facts are "largely undisputed," and therefore, de novo review is appropriate. (AOB at 2, 24, 32.) What Avalon asserts is undisputed is that the operating agreement terminated on January 8, 2002. (AOB at 24, 32-36, 38.) Based upon this assertion, Avalon frames the second issue as whether the parties' subsequent conduct created a new agreement or revived the terminated agreement. (AOB at 38-39.)

It is simply not undisputed that the January 8 letter terminated the operating agreement. The district court found that the January 8 letter "did not have the effect of terminating the agreement." (AA 938-39.) And Angela Sabella—principal for DCA—testified that she did not consider the operating agreement to have terminated on January 8, 2002, primarily because Paul Brenneke—principal for Avalon—stated when he delivered the letter that he wanted to renegotiate, not terminate their relationship. (AA 303-05, 319, 370-72.) After January 8, 2002, Avalon repeatedly confirmed in writing

that the operating agreement remained in effect. (AA 148-51, 157-58.) The threshold issue is therefore whether the operating agreement terminated on January 8, 2002.

Issue 2: Whether a letter in which a party purports to terminate its contractual relationship is effective where the letter is intended to induce renegotiation, not to terminate the relationship, and after the letter is delivered all parties continue to perform under, and enforce, the contract.

Standard of Review: Whether a party intends to terminate a contract is a question of fact reviewed under a clearly erroneous standard. Artesian Water Co. v. Delaware, 330 A.2d 441, 443 (Del. 1974)[1] ("Courts of this State have long looked to relevant facts and circumstances surrounding the contract, including the actions of the parties, in ascertaining the intention of the parties. Such actions are of great weight in determining the meaning and applicability of the contract, and lead the Court to a presumptively correct interpretation."); Connolly v. Harris Trust Co. of Cal. (In re Miniscribe Corp.), 309 F.3d 1234, 1240 (10th Cir. 2002) ("A finding of fact is clearly erroneous if it is without factual support in the record or if, after reviewing all of the evidence, we are left with the definite and firm conviction that a mistake has been made.").

III

Avalon's third issue is that the operating agreement automatically terminated on May 15, 2002. (AOB at 40.) In addressing this issue, Avalon (i) cites no case law, (ii) quotes no language from the agreement, and (iii) inconsistently asserts that DCA

[1] The agreement provides that it is governed by and construed in accordance with Delaware law. (AA 1027.)

acted in bad faith by failing to declare Avalon in default on May 15, 2002. (AOB at 40-44.) Avalon twice vaguely refers to some unspecified language—located somewhere in the 3½ single spaced pages of article 4.1 of the operating agreement—as "ambiguous," but cites no extrinsic evidence to construe the alleged ambiguity. (AOB at 40, 44.)

All arguably relevant sections of article 4.1 refer to article 11.2, which governs termination. While article 11.2 contemplates many scenarios for termination, all are initiated by the parties and most are triggered by a notice of default. (AA 1013-14.) No scenario involves automatic termination; at least, Avalon has not identified a scenario that does. Neither party chose to terminate the agreement on May 15, 2002—even though Avalon had the absolute right to do so—and no notice of default was served by either party until months later. (SA 1210; AA 1070.) The district court did not find that the agreement is ambiguous and ruled that the agreement terminated on March 5, 2003. (AA 84, 171.)

Issue 3: Whether a contract automatically terminates upon the failure of a party to exercise an option where the contract provides that it terminates only upon the election of a party or after service of a notice of default, and no party elected to terminate the contract or declare a default until months later.

Standard of Review: Interpretation of an unambiguous contract is a question of law reviewed de novo. Valley Improvement Ass'n v. United States Fid. & Guar. Corp., 129 F.3d 1108, 1115 (10th Cir. 1997). However, to the extent a district court relies on extrinsic evidence to interpret an ambiguous contract, this court reviews for clear error. Cavic v. Pioneer Astro Indus., Inc., 825 F.2d 1421, 1424 (10th Cir. 1987).

STATEMENT OF THE CASE

I. Nature of the Case

This case involves an agreement to develop approximately 90 acres of real property adjacent to Deer Valley Ski Resort near Park City, Utah. (AA 135, 207.) DCA owned the property but was not a developer, so in August 2001 DCA entered into an operating agreement with Avalon, an experienced developer who represented that it had investors lined up to fund what would be a $212 million project. (AA 212-13; SA 1179.) The agreement contemplated the construction and development of high-end condominium units, a world-class hotel, and private resort residences. (AA 134, 206-07.)

Under the agreement, DCA would contribute the property and Avalon would secure funding and develop the property. (AA 137.) The agreement provided Avalon the unconditional right to terminate the agreement before DCA contributed the property, but Avalon would remain obligated to pay any costs associated with its obligations up to the date of termination. (AA 143.) DCA could terminate the agreement only if Avalon failed to satisfy its obligations, including various milestones. (AA 142-43.) If Avalon satisfied its obligations, the agreement provided Avalon 60% ownership in the property and the project. (AA 137.) While Avalon assumed the risks associated with funding and development, if successful, Avalon would gain majority ownership in the project.

It is undisputed that Avalon did not satisfy the milestones. (AA 152-54.) On March 5, 2002, after having provided Avalon notice of default and Avalon failed to cure, DCA terminated the operating agreement. (AA 157-58.) This appeal involves various issues surrounding whether the operating agreement terminated on March 5, 2003, or on some earlier date.

II. Course of Proceedings and Disposition Below

In reciting the course of the proceedings, DCA will discuss only those claims relevant to this appeal. DCA filed a complaint against Avalon alleging (i) breach of contract for Avalon's failure to satisfy its obligations under the operating agreement; (ii) breach of Mr. Brenneke's personal guaranty of Avalon's obligations; (iii) negligent misrepresentation based upon Avalon's assurance that it had investors lined up to fund the project; (iv) unjust enrichment for Avalon's failure to re-convey all interests in the project to DCA, including plans, drawings, surveys, etc.; and (v) a declaration that Avalon had no remaining interest in the property or project. (AA 12-18.)

Avalon filed counterclaims alleging (i) unjust enrichment for DCA's retention of Avalon's contributions to the project; and (ii) breach of the implied covenant of good faith and fair dealing for DCA's failure to terminate the operating agreement earlier than March 5, 2003. (AA 105-07.)

The district court dismissed Avalon's unjust enrichment claim under Rule 56 after the court found that Avalon had "offered no evidence to prove a misleading act or other inequity on the part of [DCA]." (AA 85-86.) After a bench trial, the district court also denied Avalon's claim for breach of the covenant of good faith and fair dealing, finding that any delay in DCA's terminating the agreement did not violate the implied covenant because Avalon (i) could have terminated the operating agreement at any time, (ii) knew that it was in default under the operating agreement by May 15, 2002, and (iii) nonetheless deliberately chose to accept the risk of continuing to work on the project in the hope of securing an amended agreement. (AA 186-89.)

After a bench trial, the district court entered detailed findings of facts and conclusions of law in favor of DCA on all of its claims and awarded DCA attorney fees under the operating agreement. (AA 133-89; SA 1277.) The district court found that DCA had the right to terminate the agreement because DCA had substantially performed under the agreement, but Avalon had failed to perform. (AA 152-54, 155-56.) The district court then found that the agreement terminated on March 5, 2003, and therefore, Avalon was liable for costs associated with its obligations through March 5, 2003, as well as costs and damages that survived the termination of the agreement. (AA 158-69.)

On June 27, 2007, the district court entered final judgment, awarding DCA $1,673,082.45. (AA 192-93.) The district court then awarded DCA an additional $276,729.00 in attorney fees and costs pursuant to article 9.2 of the operating agreement. (AA 180, 1006; SA 1277.) Avalon has not appealed the attorney fees or costs award.

STATEMENT OF THE FACTS

In the opening brief, Avalon states that it does not challenge any of the district court's factual findings. Nonetheless, the fact section of the opening brief contains a number of factual assertions rejected by the district court. (AOB at 11-21.) For example, the opening brief quotes Mr. Brenneke's testimony concerning his understanding of the intent and effect of a January 8, 2002 letter. (AOB at 11.) However, Judge Stewart emphatically rejected this testimony as lacking any credibility: "I have to tell you that I don't buy anything he just said. I am embarrassed for him. He testified yesterday that he had done 50 of these deals, and he sits here and expects me to believe the testimony he just gave about his interpretation of this agreement." (AA 739.) Because Avalon does

not argue that any findings are clearly erroneous, DCA will restate the facts consistent with the district court's extensive findings following a bench trial. (AA 133-69.)

I. Avalon and DCA Negotiate for Six Months, Avalon Performs Due Diligence, and Avalon Represents that It Can Perform Under the Terms of the Operating Agreement

DCA is the owner or lessee of certain real property located near Deer Valley Ski Resort in Utah. (AA 134, 206-11.) DCA sought an experienced developer to fund and develop a project consisting of high-end condominium units, a world-class hotel, and private resort residences. (AA 134, 212.) DCA planned to contribute the property for the project, and the developer would be responsible for construction, marketing, and sales, as well as for securing funding, entitlements, and a hotel operator. (AA 212, 215.)

In February 2001, DCA entered into negotiations with Paul Brenneke—principal for Avalon—because Mr. Brenneke was completing an upscale hotel project in Portland and was developing another hotel project in Seattle. (AA 214, 216, 225.) Mr. Brenneke was an attractive option because he was an experienced developer and was then working with Rosewood Hotels & Resorts, an upscale "six-star caliber hotel operator" that would be perfect as hotel operator on DCA's property. (AA 214.)

During negotiations, Angela Sabella—principal of DCA—informed Mr. Brenneke that he must commit a minimum of $15 million in cash equity. (AA 136, 217-18, 944.) In response, Mr. Brenneke assured Ms. Sabella that he could "fund it in a heartbeat." (AA 222-23; 729.) Specifically, on February 24, 2001, Mr. Brenneke stated that he had "already spoke[n] to one of [his] key investors, who is familiar with [the DCA] project already, and he [had] committed 5 million on the spot." (AA 729; SA 1113-14.)

Ms. Sabella and Mr. Brenneke then negotiated the terms of their joint venture project. Ms. Sabella asked Mr. Brenneke to propose milestones or "hurdle dates" by which Avalon could perform its various duties under the contract, including "achieve full equity funding, secure building permits, get the development loan commitment, commence construction, Certificate of Occupancy, etc." (AA 944.)

In March 2001, Avalon performed due diligence, including verifying entitlements and fees and performing a market study to ensure the project was viable. (AA 137, 221, 225.) Thus, contrary to Avalon's suggestion in the opening brief, Mr. Brenneke had months to perform due diligence and negotiate terms prior to Avalon beginning its work on the project in June 2001. (AOB at 5.) In fact, the agreement acknowledges that Avalon satisfactorily completed its due diligence. (AA 228.)

Mr. Brenneke also had months to determine whether he would agree to satisfy the milestones. (AA 220.) These milestones became part of the operating agreement and are the milestones that Avalon later failed to satisfy, ultimately leading to DCA's termination of the operating agreement on March 5, 2003. (AA 974-76.)

By June 2001, the parties had sufficiently agreed on terms that Avalon began work on the project. (AA 227.) Although the parties did not sign the operating agreement until August 2001, there is no indication—or allegation—that the terms of the agreement changed materially between June 2001 and August 2001. (AA 137, 225.)

II. After Extensive Negotiations, Avalon Signs the Operating Agreement with Its Various Milestones for Avalon's Performance

The operating agreement created a separate entity to develop the project, Deer Crest Resort Group, LLC (DCRG). (AA 954, 956-57.) DCA and Avalon were the members of DCRG. The operating agreement divided between DCA and Avalon various obligations and expenses associated with developing the project through DCRG. (AA 137-45.) Although only Avalon and DCA were members of DCRG, the agreement expressly states that "DCA, Avalon and the Developer [Willamette] are referred to herein as the 'Parties.'" (AA 954.) Willamette was an entity associated with Mr. Brenneke that was to oversee the development of the project. (AA 954-55.)

Phase I of the project included construction of the hotel. In Phase I, Avalon was to contribute or raise the capital for DCRG to complete the hotel portion of the project, and, once completed, DCA would transfer the real property to DCRG. (AA 136-37.) Under the terms of the agreement, once Phase I was completed, Avalon would own 60% of the property and project through DCRG and DCA would own 40%. (AA 219.) In essence, "Mr. Brenneke and the Avalon parties were required to fund the entire development project;" whereas, "DCA ha[d] no monetary obligations."[2] (AA 238, 239)

[2] This understanding is expressed in article 3.5(a) of the agreement: "DCA shall not be required to perform, or bear the cost of, any services or work performed with respect to the property or the project, or to otherwise incur any obligations or perform any duties with respect to the property or the project, any and all of which shall be the responsibility of, and borne by, Avalon or the company following the effective date." (AA 966.)
In the event the agreement was terminated prior to completion of Phase I, DCA was responsible to reimburse Avalon for the hard construction costs up to $2.5 million upon Avalon's relinquishment of any interest in the project. (AA 286.) Although the agreement was eventually terminated, DCA never paid any reimbursement costs to Avalon because Avalon had never paid any hard construction costs during the project. (AA 287.)

Along with the funding obligations, Avalon agreed to meet certain milestones, some of which are the following:

By August 14, 2001:

- pay $300,000 for professional services (AA 975);
- immediately pay all carrying costs accrued between May 1, 2001, and July 31, 2001, and then pay all carrying costs on a monthly basis (AA 968);
- fund marketing efforts (AA 969);
- enter into $200,000 worth of contracts with structural engineering firms (AA 975);

By December 1, 2001:

- pay for, prepare, and file grading permits (AA 975)
- break ground on Phase I of the project (AA 975);

By May 16, 2002:

- enter into a hotel management agreement (AA 975);
- obtain $15 million in equity for the project (AA 975, 987);
- pay for all plans and permits necessary for Phase I of the development (AA 975);
- fund $1.5 million in expenditures for carrying costs, water rights, and reimburse DCA for certain ancillary agreements (AA 975; 968-69).

It is undisputed that Avalon failed to satisfy some of these milestones, and the trial court found that Avalon failed to satisfy several others, as outlined in more than 45 numbered paragraphs in the trial court's findings. (AA 171-80) Under the agreement, when Avalon failed to satisfy a milestone, DCA had the right—but not the obligation—to

declare a default, which would have provided Avalon 15 days to cure any monetary default and 60 days to cure any non-monetary default. (AA 1013-14.) In contrast, Avalon could have terminated the agreement at any time prior to completion of Phase I—which was never completed—and from that point forward simply could have walked away from the project and its obligations. (AA 281, 1014.)

III. In January 2002, Avalon Sought to Renegotiate the Operating Agreement Because It Failed to Satisfy Milestones

In the fall of 2001, Avalon became concerned about its ability to satisfy the milestones. The most significant problem was that, contrary to Avalon's representations prior to entering into the operating agreement, Avalon was unable to fund the initial construction phase of the project. (AA 303.) In short, Avalon had cash flow problems because the investors who were ready to invest "on the spot" never invested, so Avalon had not paid the carrying costs associated with the project. (AA 1045.) In addition, Avalon had not broken ground by December 31, 2001, another milestone. (AA 975.)

On January 8, 2002, Mr. Brenneke asked to meet Ms. Sabella to discuss the project and the agreement. At the meeting, Mr. Brenneke handed Ms. Sabella a letter, signed by Robert S. Simon, counsel for Avalon, in which Avalon purported to withdraw as a member of DCRG. (AA 313.) At the meeting, Mr. Brenneke stated that the purpose of the letter was to ask for more time to satisfy the milestones and to restructure Avalon's financial obligations. (AA 303.) As Ms. Sabella testified, and as the district court found, Avalon never withdrew as a member of DCRG, but instead merely sought to renegotiate the deal. (AA 304, 371, 396.) Whether Avalon would have withdrawn from the agreement had Ms. Sabella refused to restructure Avalon's various obligations is

irrelevant because, in fact, Ms. Sabella did agree to restructure Avalon's obligations, which explains why every bit of evidence at trial—other than Mr. Brenneke's self-serving testimony emphatically rejected by the district court as incredible[3]—is consistent with the trial court's finding that the agreement did not terminate on January 8, 2002.

The January 8 letter begins by purporting to terminate Avalon's involvement with DCRG and to withdraw as a member. (AA 1043-46.) The letter then lists a number of obligations DCA had allegedly failed to fulfill, but, as the district court found, DCA satisfied all of its obligations under the operating agreement, a finding Avalon does not challenge on appeal. (AA 180-83.) The letter ends by discussing the future of the project and the need to negotiate new terms consistent with the positions outlined by Avalon. (AA 1044-46.) In particular, Avalon suggests that its failure to pay costs should not be interposed "as a bar to executing the Interim Development Loan." (AA 1046.)

After Mr. Brenneke handed the January 8 letter to Ms. Sabella, the two discussed how the operating agreement could be amended to address Avalon's funding concerns and permit Avalon continue the project. (AA 303-06.) They agreed that because Avalon lacked funds to pay the general contractor—Bud Bailey—DCA would guaranty up to $2.5 million of the construction costs by recording a promissory note and trust deed in favor of Bud Bailey, and Avalon could then pay the construction costs as funds became available. (AA 304.) Consistent with an amendment—but not termination—neither Avalon nor DCA began winding up DCRG after the January 8 meeting.[4] (AA 1014.)

[3] "I have to tell you that I don't buy anything he just said. I am embarrassed for him. He testified yesterday that he had done 50 of these deals, and he sits here and expects me to believe the testimony he just gave about his interpretation of this agreement." (AA 739.)

[4] Notably, the termination procedures and wrapping up of business under Section 11.2 of the agreement did not occur until after March 5, 2003. (AA 1078-80; SA 1222-23.)

IV. After January 8, 2002, Avalon and DCA Amend the Operating Agreement on Terms More Favorable to Avalon and Thereafter Both Parties Perform Under the Operating Agreement, as Amended

Consistent with the parties' understanding during the January 8 meeting, on January 16, 2002, Avalon, through its counsel, Mr. Simon, drafted a letter agreement with DCA. (AA 1047-51.) In the letter agreement, Avalon represented to DCA that it was still a member of DCRG and that the operating agreement was still in effect. (AA 1047-48.) Specifically, Avalon identifies itself as "Avalon Deer Valley, LLC, Member, Deer Crest Resort Group LLC." (AA 669-70, 1048 (emphasis added).) The letter agreement acknowledges that "[t]his letter agreement constitutes an amendment to the Operating Agreement." (AA 148-149, 1048.)

In the letter agreement, DCA agreed to guaranty payment of $2.5 million of the construction costs to Bud Bailey and to deduct any amounts DCA paid to Bud Bailey from any monies DCA may come to owe Avalon. (AA 250, 1047-48.) The letter agreement also provides that its terms will be incorporated into an amended operating agreement. (AA 1048.) Consistent with the letter agreement, DCA recorded a trust deed in favor of Bud Bailey on other property owned by DCA to ensure construction would not be delayed. (AA 304.) Construction began the next week, on January 21, 2002. (AA 305.)

A. On February 8, 2002, Avalon Reaffirms that the Operating Agreement Remained Effective by Signing a Memorandum of Understanding

On February 8, 2002, Avalon and DCA entered into a Memorandum of Understanding (MOU), in which both Avalon and DCA are referred to as "Members" of DCRG. (AA 1052.) The MOU confirms the parties' understanding not only that the operating agreement remained effective, but also that it had been "amended by that Bud

Bailey Construction Letter Agreement, dated January 16, 2002." (AA 1052.) The MOU incorporates the definitions of terms in the operating agreement, and then outlines various amended obligations agreed to by the "Members." (AA 1052-69.)

While the MOU contemplates a future agreement memorializing its terms,[5] the MOU also has specific terms that immediately amend the operating agreement. (AA 311.) The MOU specifically states that the "Members have agreed to make certain modifications to the Operating Agreement as more particularly set forth below." (AA 1052.) The modifications were specific and capable of immediate enforcement. One modification was that the "date Avalon is required to commence construction is extended to January 31, 2002." (AA 1057.) Another modification was that "[o]n or prior to the seventh day following the execution and delivery of this MOU, Avalon will satisfy and discharge the liens recorded by HKS against the Property (or any other real estate owned by DCA) with respect to services performed or costs incurred by HKS in connection with the Project (totaling approximately $500,000 as of the date of this MOU)." (AA 1060.)

The only express condition on the future enforceability of the MOU is that Mr. Brenneke was required to execute a personal guaranty "to evidence his obligation to discharge the liabilities listed immediately above his name on the signature page of the Operating Agreement and any other obligations which are to be covered by the Personal Guarantee as expressly set forth in this MOU." (AA 1058.) On May 14, 2002, Mr. Brenneke did execute this personal guaranty. (AA 151, 377-78.)

[5] Consistent with the provisions of the MOU, DCA presented Avalon with a draft of the first restated operating agreement on February 14, 2002 with a black-line of the changes from the original operating agreement. (SA 1140, 1178; AA 151.) However, Avalon never signed the revised operating agreement or provided comments (SA 1178; AA 151.)

In the stipulated pretrial order, Avalon agreed that "The MOU, if determined to be a binding agreement, amended various provisions of the Operating Agreement." (AA 117, 350.) On February 25, 2003, Avalon sent a letter to DCA in which it again reiterated that the MOU and original operating agreement remained binding. (AA 911.) This is significant because Avalon argues on appeal that the MOU did not constitute an amendment to the original operating agreement. (AOB at 35-36.)

B. Mr. Brenneke Represents That Obligations Outlined in the Operating Agreement Are Enforceable in a May 14, 2002 Personal Guaranty

As noted, on May 14, 2002, Mr. Brenneke executed the personal guaranty contemplated in the MOU. Mr. Brenneke personally guarantied Avalon's obligation to pay DCA "under that certain Operating Agreement of Deer Crest Resort Group, LLC, dated as of June 14, 2002." (SA 1173.) Mr. Brenneke testified at trial that he understood he was signing a personal guaranty of Avalon's obligations under the operating agreement. (AA 617.)

On May 14, 2002, Mr. Brenneke also knew Avalon was in default. (AA 629-30, 728.) And even though Mr. Brenneke knew Avalon could terminate the operating agreement at this point, he deliberately chose not to terminate: "My choices were to walk away and walk away from over a million dollars or try to put the deal together. Unfortunately, I probably made a bad decision in investing more money because I never got the deal put together, but it's a choice a developer makes sometimes in trying to move forward that deal, you risk money." (AA 633 (emphasis added).)

Instead, on May 15, 2002, Avalon represented to DCA that "it is the position of Avalon Deer Valley that we are willing to invest further funds, in excess of the amount

invested thus far, in order to keep the project moving on schedule with the hope, but not promise, of reaching a January 04 opening." (AA 259.) Thereafter, Avalon borrowed money from Ms. Sabella and invested it into the project in the hope that the operating agreement could be amended again to allow Avalon to complete the project and obtain majority ownership in the project. (AA 772-78.)

On May 15, 2002, Avalon did not terminate the operating agreement, and DCA did not send a notice of default, just as DCA did not send a notice of default in the fall of 2001 when Avalon failed to satisfy certain milestones, such as paying carrying costs. Instead, like before, DCA was "hoping that [Avalon] will continue to work on the default and bring it up to date," as Avalon had indicated it would. (AA 268.)

C. After May 15, 2002, Avalon Represents to DCA and Lehman Brothers That Avalon Remained a Member of DCRG

During the summer of 2002, construction activities continued while Avalon continued to search for financing. (AA 400-01.) On September 3, 2002, Avalon signed a term sheet with Lehman Brothers for equity financing, which indicated that Avalon was a partner with DCA in the project. (SA 1179-81.)

By October 4, 2002, after the Lehman Brothers term sheet expired on its own terms, it seemed unlikely that Avalon would secure financing or otherwise complete the project, so DCA sent a notice detailing Avalon's monetary and non-monetary defaults. (AA 1070-71.) At this point, Avalon still had the right to terminate the operating agreement, but chose not to terminate. (AA 1014.) DCA continued to try to work with Avalon to keep the project alive. (SA 1182.) DCA did not terminate the agreement immediately after the default period lapsed because construction had halted and there was

still a chance a new agreement could be reached and the project could be completed. (SA 1207.) However, it eventually became apparent that Avalon had not paid any contractors, as the contractors began recording liens against the property.[6] (AA 359.)

On February 25, 2003, Avalon responded to DCA's default notice and included a notice of default to DCA. In the letter, signed by Mr. Simon, Avalon reaffirms that "[t]here are three operative agreements now in effect: (1) the Operating Agreement, (2) Memorandum of Understanding (MOU); and (3) The Bud Bailey Letter of Understanding."[7] (SA 1210.) Avalon then explains that the parties had been unable to enter into an amended operating agreement—not because of any bad faith on the part of DCA—but "due to disruptions of the equity markets which bear on the Project." (Id.) Avalon next outlines various obligations it claims DCA had not satisfied under the operating agreement and MOU, repeatedly stating that the MOU constituted an amendment to the operating agreement. (SA 1211-12.) At the end of the letter, Avalon states that it "rejects any suggestion that the agreements are terminated and in turn demands the DCA cure the defaults set forth herein so that Avalon may proceed to perform the items required to advance the Project." (SA 1215.)

As the district court later found, DCA was not in default of any of its obligations under the operating agreement or MOU, a finding Avalon does not challenge on appeal. (AA 180-83.) On March 5, 2003, DCA terminated the operating agreement. (AA 1078-

[6] These liens included HKS Architects on November 12, 2002 (SA 1185); SWA Group on December 11, 2002 (SA 1203); CCI Mechanical, Inc. on January 30, 2003 (SA 1208); Henriksen Design Associates, Inc. on March 10, 2003 (SA 1216); Psomas on March 13, 2003 (SA 1220); Bud Bailey Construction Inc. on April 22, 2003 (SA 1224).

[7] Consistent with this letter, on December 3, 2002, Avalon had sent a letter to one of the contractors on the project—CCI Mechanical—in which Mr. Brenneke signed as "Managing Partner, Deer Crest Resort Group." (SA 1189.)

80.) In a letter dated March 25, 2003, Avalon then purports to "hereby terminate the agreement . . . [c]onsistent with Section 11.2 of the Operating Agreement," the very agreement it claims on appeal that (i) Avalon terminated on January 8, 2002; or (ii) Avalon terminated on May 15, 2002; or (iii) automatically terminated on May 15, 2002. (SA 1222-23; AOB at 30, 32, 40.)

SUMMARY OF THE ARGUMENT

Avalon gambled and lost. Avalon agreed to satisfy certain milestones in an operating agreement for developing a real estate project near Deer Valley Resort, hoping to be rewarded with majority ownership in the multi-million dollar development. After Avalon failed to satisfy milestones, DCA agreed to amend the terms of the agreement to change Avalon's milestone requirements. After Avalon failed to satisfy milestones in the amended agreement, Avalon continued to work on the project instead of terminating the agreement—which was its unconditional right—hoping again to secure new terms and eventually gain majority ownership in the development.

The parties could not agree to new terms after Avalon's second round of missed milestones, and on March 5, 2003, DCA terminated the agreement. In the opening brief, Avalon advances three arguments that the agreement terminated prior to March 5, 2003, on one of two dates: January 8, 2002, or May 15, 2002. All three arguments fail.

Avalon's first argument is that the district court's finding of fact after trial that the agreement terminated on March 5, 2003, and its "finding" when it entered summary judgment on Avalon's unjust enrichment claim are inconsistent, and therefore, reversal of one of the two findings is required. Avalon argues that either (i) summary judgment must be reversed because dismissal of Avalon's unjust enrichment claim was premised upon the operating agreement terminating prior to May 15, 2002, or (ii) the post-trial ruling must be reversed because law of the case doctrine mandated that the district court find after trial that the agreement terminated prior to May 15, 2002. These alternative arguments fail for a number of reasons.

The most glaring problem with Avalon's alternative arguments is that the district court did not make a finding concerning a termination date in its summary judgment ruling. The district court dismissed Avalon's unjust enrichment claim because Avalon "offered no evidence to prove a misleading act or other inequity on the part of [DCA]," which has nothing to do with a termination date. (AA 85.) While the district court elaborated that this "is especially true" because Avalon terminated the agreement, at most, this indicates the court accepted Avalon's assertion in its opposition papers that it had terminated the agreement prior to May 15, 2002. A non-material, implied construal of a fact to adjudicate a summary judgment motion does not implicate law of the case doctrine to bind a court after a full trial on the merits. Similarly, because the termination date was immaterial to the summary judgment ruling, applying the later termination date to the summary judgment ruling makes no difference. Both alternative arguments fail.

Avalon's second argument is that Avalon terminated the operating agreement on January 8, 2002, when Mr. Brenneke delivered a letter to Ms. Sabella in which Avalon purports to withdraw as a member of DCRG. The agreement did not terminate on January 8, 2002. When Mr. Brenneke delivered the letter to Ms. Sabella, it was clear from his actions and the content of the letter that it was designed to invoke renegotiation of the agreement, not terminate their relationship. Every scrap of evidence supports this view, with the exception of Mr. Brenneke's self-serving testimony that the district court found to lack credibility to the point of being embarrassing. To cite just some of the evidence: (i) Avalon drafted a letter agreement a few days after January 8 and sign it as a member of DCRG; (ii) both parties performed under the agreement after January 8, 2002; (iii) on May 14, 2002, Mr. Brenneke signed a personal guaranty required by the

agreement; and (iv) in February 2003, Avalon stated in writing that it rejected any notion that operating agreement was unenforceable. Based upon this (and other) evidence, the district court found that the effect of the January 8 letter was to inspire renegotiation—which is what occurred—not to terminate the agreement. This finding was not clearly erroneous. Moreover, because DCA relied upon Avalon's repeated representations that the operating agreement remained in effect, Avalon is estopped from claiming otherwise. For both reasons, Avalon's second argument fails.

Avalon's third argument is that the agreement automatically terminated on May 15, 2002, pursuant to some unspecified language in article 4.1 of the agreement. The only arguably relevant language in article 4.1 refers to article 11.2, which governs termination and provides that termination was optional, not mandatory or automatic. Avalon could terminate the agreement at any time, and DCA could terminate after providing notice of default. Avalon later appears to recognize this when it inconsistently claims to be "troubled" by DCA's failure to declare Avalon in default on May 15, 2002.

Moreover, on May 15, 2002, Avalon represented to DCA that it remained "willing to invest further funds, in excess of the amount invested thus far, in order to keep the project moving on schedule with the hope, but not promise, of reaching a January 04 opening." (AA 259.) Ironically, on February 25, 2003, Avalon declared DCA in default of the very operating agreement it now claims automatically terminated nearly a year earlier. A month later, Avalon then purported to terminate the agreement, again with no mention that it believed the agreement had automatically terminated. Thus, neither the facts nor the terms of the operating agreement support Avalon's third argument. The court should affirm.

ARGUMENT

Avalon voluntarily entered into an agreement to fund and develop a real estate project under the terms of an operating agreement, hoping to reap the reward of majority ownership in the project. Both the risks and the benefits were significant. If Avalon did not satisfy certain milestones in the agreement, then DCA had the option to terminate the agreement and Avalon would lose its investment in the project up to the date of termination. However, if Avalon satisfied the milestones, then DCA was required to transfer to Avalon 60% ownership of the property and project, which, once completed, will consist of high-end condominium units, private residential units, and a world-class hotel worth more than $200 million.

It is undisputed that Avalon failed to satisfy the contractual milestones. Prior to this litigation, Avalon's position was that the operating agreement terminated no earlier than March 5, 2003, when DCA terminated the agreement for Avalon's numerous defaults. During this litigation, however, Avalon argues that the agreement terminated on various earlier dates. On appeal, Avalon claims that (i) Avalon terminated the agreement on January 8, 2002; (ii) Avalon terminated the agreement on May 15, 2002; or (iii) the agreement terminated automatically on May 15, 2002. (AOB at 30, 32, 40.) Avalon also implies—but does not challenge a district court finding to the contrary—that DCA acted in bad faith by failing to declare Avalon in default prior to October 4, 2002. (AOB at 43.)

After a bench trial, the district court agreed with Avalon's prior position and found that the agreement terminated on March 5, 2003. Avalon advances three arguments on appeal, which DCA will address in turn.

I. The District Court's Construal of Facts in Adjudicating a Motion for Summary Judgment (i) Are Not Inconsistent With Its Findings After a Full Trial on the Merits and (ii) Do Not Implicate Law of the Case Doctrine

The first issue raised in the opening brief is somewhat difficult to frame, but appears to consist of two alternative arguments. Avalon argues that either the district court's order granting summary judgment on its unjust enrichment claim must be reversed or the district court's final judgment must be reversed. (AOB at 25-31.) These alternative arguments are premised upon Avalon's assertion that the district court's finding after trial that the operating agreement terminated on March 5, 2003, is inconsistent with the district court's summary judgment ruling, in which the district court appears to accept as true Avalon's assertion that the agreement terminated no later than May 15, 2002. (AOB at 25-27.) Avalon then argues that either (i) law of the case doctrine required the district court to find after trial that the agreement terminated no later than May 15, 2002, or (ii) the finding after trial that the agreement terminated on March 5, 2003, somehow retroactively applies to the summary judgment order, making the district court's dismissal of Avalon's unjust enrichment claim inappropriate. (AOB at 27-31.) The alternative arguments fail for a number of reasons.

A. The District Court's Construal of Facts in a Light Most Favorable to Avalon to Adjudicate a Motion for Summary Judgment Does Not Constitute a Finding that Invokes Law of the Case Doctrine

Avalon's first alternative argument is that law of the case doctrine required the district court to make the same findings after a full trial on the merits as it did in adjudicating a motion for summary judgment. Avalon cites a number of Utah cases applying law of the case doctrine, all of which stand for the unremarkable propositions

that (i) a trial court is bound by an appellate court's mandate;[8] (ii) trial courts have discretion to revisit their own decisions;[9] or (iii) appellate courts should reverse a trial court's set of factual findings where the findings are internally inconsistent.[10] The cases not only fail to support Avalon's position, but they are also inapplicable, as federal law of the case doctrine applies in federal court.[11] Haberman v. Hartford Ins. Group, 443 F.3d 1257, 1264 (10th Cir. 2006). DCA will therefore address Avalon's first alternative argument under federal law.

Avalon's law of the case argument is premised upon its assertion that in adjudicating DCA's motion for partial summary judgment, the district court found that the operating agreement terminated prior to May 15, 2002. (AOB at 26.) This assertion is inaccurate. The district court found that Avalon had "offered no evidence to prove a misleading act or other inequity on the part of [DCA]," an element of unjust enrichment

[8] Jensen v. IHC Hosps., Inc., 2003 UT 51, ¶67, 82 P.3d 1076 (a "lower court must not depart" from an appellate court's mandate).

[9] Thurston v. Box Elder County, 892 P.2d 1034, 1038 (Utah 1995) (explaining that a trial court "may reconsider" its own prior decisions); Anderson v. Thompson, 2008 UT App 3, ¶23 , 176 P.3d 464 ("the law of the case doctrine does not prevent a judge from reconsidering his or her previous nonfinal orders") (emphasis added); Mower v. Jorgensen, 2006 UT App 329, *3, 2006 Utah App. LEXIS 368 ("trial court acted within the bounds of its discretion when it declined to revisit this issue") (emphasis added).

[10] Starley v. McDowell, 1999 UT App 46, *3, 1999 Utah App. LEXIS 173 (reversing due to inconsistent findings within the same findings of fact); Grahn v. Gregory, 800 P.2d 320, 328 (Utah Ct. App. 1990) (reversing due to inconsistent findings within the same findings of fact).

[11] The only federal case Avalon cites involves a legal decision not challenged on a prior appeal; it does not involve a construal of a fact in adjudicating a motion for summary judgment. Martinez v. Roscoe, 100 F.3d 121, 123 (10th Cir. 1996) ("a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation").

under Utah law.[12] (AA 85.) This finding has nothing to do with a termination date, so there was no such finding to trigger law of the case doctrine in the first place. For this reason alone, the court should reject Avalon's law of the case argument.

The district court mentions termination only when it cites an additional reason for dismissing Avalon's unjust enrichment claim. Specifically, the district court found that it is "especially true" that DCA had not engaged in any inequitable conduct "in light of the fact that it was [Avalon] who terminated the agreement, and the agreement expressly provided for the disbursement of compensation and liability upon termination." (AA 85-86 (emphasis added).) This language merely states that Avalon terminated the agreement; it does not state that Avalon terminated it on a certain date. And the fact Avalon also purported to terminate the agreement on March 25, 2003, suggests that a May 15, 2002 termination date cannot simply be mechanically into the district court's ruling.

Moreover, assuming the district court's additional ground includes a finding that Avalon terminated the agreement prior to May 15, 2002—which it does not—the elaboration is dicta,[13] which "is not subject to the law of the case doctrine." United States v. Rice, No. 95-2174, 1996 U.S. App. LEXIS 1529, *13 (10th Cir. Feb. 5, 1996) (unpublished) ("we agree with the majority of our sister circuits in holding that dicta is

[12] Knight v. Post, 748 P.2d 1097, 1101 (Utah Ct. App. 1988) ("the mere fact that a third person benefits from a contract between two others does not make such third person liable in quasi-contract, unjust enrichment, or restitution. *There must be some misleading act, request for services, or the like, to support such an action.*").

[13] This court defines "dicta" as "statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand." Rohrbaugh v. Celotex Corp., 53 F.3d 1181, 1184 (10th Cir. 1995).

not subject to the law of the case doctrine."). For this additional reason, the court should reject Avalon's law of the case argument.

And even if the reference to termination were not dicta, and even if the district court's dispositive ruling had included a specific finding that the agreement terminated before May 15, 2002, this finding would be based only upon the district court's "[a]ccepting all of the facts in the light most favorable to [Avalon] as the non-moving party." (AA 83.) In Avalon's papers opposing DCA's summary judgment motion, Avalon asserts that the agreement terminated on or before May 15, 2002. (SA 1232-34, 1264-65.) It is therefore reasonable to assume that the district court accepted this fact for purposes of adjudicating the motion. Richmond v. ONEOK, Inc., 120 F.3d 205, 208 (10th Cir. 1997) (in adjudicating a Rule 56 motion, courts "construe the factual record and reasonable inferences therefrom in the light most favorable to the nonmovant").

Construing facts in favor of a non-moving party does not constitute a "finding" that triggers law of the case doctrine, especially where, as here, the prior finding was invited by and favored the party later invoking the doctrine. Northwest Cent. Pipeline Corp. v. JER P'ship, 943 F.2d 1219, 1225 (10th Cir. 1991) (district court twice reversed course on the question of whether contracts were ambiguous); United States v. Deberry, 430 F.3d 1294, 1302 (10th Cir. 2005) ("[T]he invited-error doctrine precludes a party from arguing that the district court erred in adopting a proposition that the party had urged the district court to adopt").

Avalon has cited no cases holding that construing facts to adjudicate a summary judgment motion rises to the level of a "finding of fact" that becomes law of the case. DCA has located none. Thus, even if the district court had expressly found that the

agreement terminated on a specific date and even if this finding were material to its summary judgment order, the court nonetheless should reject Avalon's law of the case argument.

Finally, even if law of the case doctrine were somehow implicated, a well-known exception to the doctrine would have applied here. United States v. Alvarez, 142 F.3d 1243 (10th Cir. 1998) (an exception to law of the case doctrine is where "evidence in a subsequent trial is substantially different"). At trial, the district court was presented additional evidence that was not part of the summary judgment record. (See e.g., SA 1210-15, 1222-23.) After viewing additional evidence and hearing testimony, the district court based its decision upon "weighing the evidence and making credibility assessments," something it could not have done in adjudicating a motion for partial summary judgment. (AA 911.) Therefore, even under law of the case doctrine, Avalon's first alternative argument fails.

In the end, Avalon's first alternative argument concerning law of the case doctrine fails for four separate reasons. First, the district court did not find that the contract terminated on a certain date in its summary judgment order, so there was no prior finding to serve as law of the case. Second, a termination date—or who terminated the agreement—had nothing to do with the trial court's dismissal of Avalon's unjust enrichment claim, so any implicit finding is dicta, which cannot serve as law of the case. Third, any implicit finding concerning a termination date was the result of the district court construing facts in the light most favorable to Avalon, and Avalon has cited no authority that such a "construal" can serve as law of the case when a district court later adjudicates a different claim at trial. Fourth, even if law of the case doctrine were

implicated by the district court's summary judgment order, an exception would apply because the district court heard additional evidence at trial. For all of these reasons, the court should reject Avalon's first alternative argument.

B. If the Agreement Terminated on March 5, 2003, Instead of May 15, 2002, then Dismissal of Avalon's Unjust Enrichment Claim Was More Appropriate, Not Less Appropriate

Avalon's second alternative argument is that if the district court's finding after trial—that the operating agreement terminated on March 5, 2003—is correct, then summary judgment on Avalon's unjust enrichment claim was inappropriate and must be reversed. Specifically, Avalon asserts—without argument—that if DCA terminated the agreement at a later date, instead of Avalon terminating the agreement at some earlier date, then dismissal of Avalon's unjust enrichment claim would have been inappropriate. (AOB at 31.) This alternative argument also fails for a number of reasons.

First, unjust enrichment is available only to the extent that a remedy at law is unavailable. Under Utah law,[14] "the general rule is that equitable jurisdiction is precluded if the plaintiff has an adequate remedy at law and will not suffer substantial irreparable injury. Equitable jurisdiction is not justifiable simply because a party's remedy at law failed." Buckner v. Kennard, 2004 UT 78, ¶56, 99 P.3d 842. Here, the operating agreement sets forth the parties' obligations in the event that the agreement is terminated. If these provisions were breached or DCA acted in bad faith, then Avalon would have had a remedy at law. However, in the same summary judgment order that

[14] The agreement provided that any disputes not governed by the agreement would be governed by Utah law. (AA 1027.)

dismissed Avalon's unjust enrichment claim, the district court dismissed Avalon's breach of contract claim, a ruling Avalon does not appeal. (AA 83-85.)

Avalon nonetheless asserts that if the district court's finding that the agreement terminated on March 5, 2003, were applied to the district court's summary judgment order, then dismissal of Avalon's unjust enrichment claim would have been improper. (AOB at 31.) Frankly, this argument makes no sense. If the agreement governed the relationship between the parties until March 5, 2003, instead of only until May 15, 2002, then Avalon's remedy at law under the agreement would encompass the parties' entire relationship, not just their relationship up to May 15, 2002. Where the parties' risks and obligations are expressly governed by contract, it is not, as Avalon asserts, "unjust to permit [DCA] to reap the benefits gratis while Avalon left the project nearly $1.8 million poorer with nothing to show for it." (AOB at 31.) This is precisely what Avalon, a sophisticated developer, bargained for when it entered into the operating agreement and agreed to the milestones for its performance.[15] Therefore, the district court's dismissal of Avalon's unjust enrichment would be more appropriate, not less, if the agreement governed the parties' relationships longer.

Perhaps the best evidence of this is that in DCA's motion papers in support of summary judgment, DCA asserted that the agreement terminated on March 5, 2003; whereas in Avalon's opposition papers, Avalon asserted that the agreement terminated

[15] As the district court noted, "[s]ection 11.2(b) states that [Avalon] shall have no right to receive reimbursement from [Deer Crest] for any funds expended in connection with the Property or Project, to claim any interest in the Company, the Project or the Property, or to receive compensation for the value of their time and efforts expended in connection thereto," and "[s]ection 3.8(b)(iii) sets forth that [Avalon] waive[d] any right to seek a lien or to initiate any similar action or claim, or to otherwise assert any ownership, equitable or other interest in the property or project prior to closing." (AA 86).

before May 15, 2002. (SA 1232-34, 1264-65.) Avalon plainly understood then what it implicitly denies now: the longer the parties' relationship was governed by the agreement, the less successful its equitable claim. The court should reject Avalon's second alternative argument.

In addition, and as demonstrated above, incorporating the March 5, 2003 termination date to the summary judgment order would have no material effect on the district court's ruling. The district court dismissed Avalon's unjust enrichment claim because it had "offered no evidence to prove a misleading act or other inequity on the party of [DCA]." (AA 85.) This has nothing to do with the termination date, or who terminated the agreement. For this addition reason, the court should reject Avalon's second alternative argument.

In the end, both of Avalon's alternative arguments fail because the district court's dismissal of Avalon's unjust enrichment claim was not premised upon a finding that the agreement was terminated on any particular date by any particular party. Because any "finding" concerning the termination date was not material to the district court's summary judgment ruling, it cannot serve as law of the case and the outcome would not have changed had the date had been later. The court should reject both of Avalon's alternative arguments.

II. Avalon Did Not Withdraw as a Member of DCRG with the January 8, 2002 Letter, But Instead Used the Letter to Renegotiate the Agreement

Avalon's second argument is that the operating agreement terminated on January 8, 2002, when Avalon delivered to DCA a letter purporting to withdraw as a member of DCRG. (AOB at 32-39.) This argument fails for two reasons. First, the district court's

finding that the January 8 letter served as a basis for renegotiation, not termination, of the agreement is not clearly erroneous. Second, Avalon is estopped from asserting that on January 8, 2002, it withdrew as a member of DCRG because Avalon immediately and repeatedly represented both that it remained a member of DCRG and that the operating agreement remained enforceable, representations on which DCA relied. For both reasons, the court should reject Avalon's second argument.

A. The District Court's Finding That Neither Avalon Nor DCA Considered the January 8 Letter to Terminate the Agreement Is Not Clearly Erroneous

Avalon asserts that it is undisputed that the operating agreement terminated on January 8, 2002, and then frames the second issue as whether the agreement was resuscitated or the parties entered into a new agreement. (AOB at 32-33.) As support for this assertion, Avalon cites the testimony of Mr. Brenneke and selectively quotes from the testimony of Ms. Sabella. (AOB at 32-34.) The problem with this evidence is that the district court emphatically rejected Mr. Brenneke's testimony concerning the intend and effect of the January 8 letter, and Ms. Sabella consistently clarified (just after the testimony Avalon cites) that Avalon never "withdrew" as a member of DCRG, making this issue hardly undisputed.

First, after Mr. Brenneke testified that the January 8 letter terminated the operating agreement—and Avalon was therefore working "off contract" while investing millions of dollars for more than a year after that date—the district court stated, "I have to tell you that I don't buy anything he just said. I am embarrassed for him. He testified yesterday that he had done 50 of these deals, and he sits here and expects me to believe the testimony he just gave about his interpretation of this agreement." (AA 739.) Based

upon this credibility determination, Mr. Brenneke's self-serving and incredible testimony should carry almost no weight on appeal.

Second, Avalon's selective quotes of Ms. Sabella fair no better. For example, Avalon asserts Ms. Sabella admitted that the January 8 letter terminated the agreement by citing to page 390 of its appendix, but on the very same page Ms. Sabella clarifies that Avalon "never withdrew formally." (AA 390.) Avalon then cites Ms. Sabella's affirmative answer to an ambiguous question concerning whether the January 8 letter was hand-delivered or had the effect of Avalon withdrawing as a member of DCRG as demonstrating that Ms. Sabella "acknowledged" that Avalon withdrew from DCRG. (AOB at 33.) However, just three lines later in her testimony, Ms. Sabella clarifies that Avalon never withdrew. (AA 393.)

The district court rejected Avalon's contention that on January 8, 2002, it withdrew as a member of DCRG or otherwise terminated the operating agreement. The district court first quoted Delaware law[16] to explain that whether parties to a contract intend to terminate the contract or intend it to remain in effect is a question of fact answered in light to the relevant facts and circumstances surrounding the contract, including the actions of the parties. "Courts of this State have long looked to relevant facts and circumstances surrounding the contract, including the actions of the parties, in ascertaining the intention of the parties. Such actions are of great weight in determining the meaning and applicability of the contract, and lead the Court to a presumptively

[16] The agreement provides that it is governed by and construed in accordance with Delaware law. (AA 1027.)

correct interpretation." Artesian Water Co. v. Delaware, 330 A.2d 441, 443 (Del. 1974).[17]

In Artesian Water, the court explained that unless an agreement expires by its own terms automatically, the "actions of the parties" determine whether a contract remains operative. Id. at 443. Where the parties continue to perform under a contract, "[s]uch conduct amount[s] to an acquiescence or affirmance of the contract and g[i]ve[s] it continuing validity, despite the fact that conditions may have warranted a rescission of the contract." Id. at 444.

After discussing Artesian Water, the district court ruled that "[b]ased on the evidence submitted to the Court, the Court concludes that the actions of the parties as detailed above were such that the Operating Agreement as amended could not have terminated until March 5, 2003." (AA 170-71.) When ruling from the bench, the district court was even more clear: "In weighing the evidence and making credibility assessments, it is clear to the Court that [the January 8] letter did not have the effect of terminating the agreement." (AA 939.)

There is an abundance of evidence to support the district court's finding that on January 8, 2002, Avalon did not withdraw as member of DCRG and the operating agreement did not terminate.

[17] Confirming this, the final pretrial order identifies as contested issue of fact "[w]hether the Operating Agreement was terminated on January 8, 2002, May 15, 2002, or March 5, 2002. (AA 119.) In addition, Avalon identified as a disputed issue of fact for purposes of summary judgment whether the agreement terminated on January 8, 2002, or May 15, 2002. (SA 1232-24, 1264-65.)

First, Ms. Sabella's testimony supports the district court's finding:

- Avalon's purpose for the January 8 letter was not to terminate the relationship, but "[t]o ask for more time" or "to work out a resolution" to Avalon's cash flow problems. (AA 303, 305, 319, 363.)
- Specifically, Avalon's purpose was to ask DCA to issue a promissory note in favor of the general contractor—Bud Bailey—so construction could begin despite Avalon having cash flow problems. (AA 304.)
- On January 8, 2002, Avalon did not "withdraw as a member of [DCRG]" because Avalon and DCA "worked out the problem" during the January 8 meeting. (AA 304, 370-71.)
- After January 8, 2002, Avalon continued to perform under the operating agreement. (AA 370.)

Second, the January 8 letter supports the district court's finding:

- The letter outlines the reasons that Avalon could not perform under the operating agreement, and then expresses a willingness to continue with the project if new terms could be negotiated. (AA 1044-46.)

Third, the January 16, 2002 letter agreement between DCA and Avalon supports the district court's finding:

- Avalon's legal counsel drafted the letter agreement, which DCA and Avalon entered into for the express purpose of allowing Bud Bailey to begin construction. (AA 306.)
- The letter agreement references and incorporates the terms of the operating agreement and expressly states that "this letter constitutes an amendment to

the operating agreement, which amendment shall be superseded in its entirety by the First Amendment when and if executed by the Members." (AA 1048 (emphasis added).)

- Mr. Brenneke signed the letter agreement as "Avalon Deer Valley, LLC, Member, Deer Crest Resort Group LLC and as President of Willamette Landing Development Inc., "Developer."" (AA 1048 (emphasis added).)

Fourth, the February 8, 2002 Memorandum of Understanding (MOU) between DCA and Avalon supports the district court's finding:

- The MOU memorializes many of the changes Ms. Sabella and Mr. Brenneke had agreed to at their January 8, 2002 meeting. (AA 311.)
- The MOU was immediately operative and governed until the parties could execute a First Amended Operating Agreement. (AA 377-78.)
- The MOU defines Avalon as a "Member" who had "entered into that certain Operating Agreement of Deer Crest Resort Group LLC, dated as of June 14, 2001, between Avalon, the Developer, and DCA, as the same was amended by that Bud Bailey Construction Letter Agreement, Dated January 16, 2002, authorizing the release of the Bud Bailey Note and Trust Deed, among the Members." (AA 1052.)
- The MOU defines "Operating Agreement" as the original operating agreement as amended by the Bud Bailey agreement. (Id.)
- The MOU then states that the "Members have agreed to make certain modifications to the Operating Agreement as more particularly set forth below." (Id. (emphasis added).)

- The MOU also states that the parties intend to enter into a First Amendment to the operating agreement that would "supersede in their entity the Letter Agreement and this MOU." (AA 1052.)
- Mr. Brenneke signed the MOU on behalf of both Avalon Deer Valley, LLC and Willamette Landing Development Inc. (AA 1069.)
- The only express condition placed on the effectiveness of the MOU was that Mr. "Brenneke shall execute and deliver to DCA a Personal Guarantee" of certain of Avalon's obligations under the operating agreement, as amended. (AA 1067.)

Fifth, the May 14, 2002 personal guaranty signed by Mr. Brenneke supports the district court's finding:

- On May 14, 2002, Mr. Brenneke did execute and deliver to DCA the personal guaranty contemplated in the MOU. (SA 1173-77.)
- Mr. Brenneke agreed to guaranty the obligations of Avalon, Willamette, or "any manager appointed by Avalon to represent its interest in [DCRG] . . . under that certain Operating Agreement of Deer Crest Resort Group, LLC, dated as of June 14, 2002, . . . by and among DCA, Avalon and Developer, that Certain Memorandum of Understanding dated as of February 8, 2002, by and among DCA, Avalon and Developer." (SA 1173 (emphasis added).)
- Mr. Brenneke expressly agreed that the guaranty "shall be binding upon the undersigned." (SA 1176.)

- Mr. Brenneke signed the personal guaranty on behalf of himself. (SA 1177.)

Sixth, the May 15, 2002 correspondence from Avalon to DCA supports the district court's finding:

- Avalon states that "it is the position of Avalon Deer Valley that we are willing to invest further funds, in excess of the amount invested thus far, in order to keep the project moving on schedule with the hope, but not promise, of reaching a January 04 opening." (AA 259.)

Seventh, a September 3, 2002 term sheet with Lehman Brothers supports the district court's finding:

- On September 3, 2002, Avalon entered into a term sheet with Lehman Brothers to finance the project by representing that it was involved in "a Partnership between Avalon Deer Valley, L.L.C. and Deer Crest Associates I, L.L.C. (SA 1179-80.)

Eighth, the December 3, 2002 letter from Avalon to a contractor, CCI Mechanical supports the district court finding:

- Avalon represents that it is "still in the Due Diligence phase for financing," and Mr. Brenneke signs the letter as "Managing Partner, Deer Crest Resort Group." (SA 1189.)

Ninth, the February 25, 2003 notice of default Avalon sent to DCA supports the district court's finding:

- In the notice, Avalon represents that "there are three operative agreements now in effect; (1) the Operating Agreement, (2) Memorandum of

Understanding, and (3) The Bud Bailey Letter of Understanding." (SA 1210 (emphasis added).)

- Avalon cites to numerous provisions of the operating agreement that it believed DCA had breached subsequent to January 8, 2002. (SA 1210-15.)
- At the end of the letter, "Avalon rejects any suggestion that the agreements are terminated and in turn demands the DCA cure the defaults set forth herein so that Avalon may proceed to perform the items required to advance the Project." (SA 1215 (emphasis added).)

Tenth, the March 25, 2003 termination letter that Avalon sent to DCA supports the district court's finding:

- On March 25, 2003, Avalon sent a termination letter to DCA, in which Avalon purports "in light of the uncured material defaults of DCA, Avalon Deer Valley LLC hereby terminates the agreement." (SA 1222.)
- Avalon then represents that article 11.2 of the operating agreement governs the parties' respective responsibilities after termination. (SA 1222.)

Given this evidence, the district court had little choice but to find that on January 8, 2002, Avalon did not withdraw from DCRG or terminate the agreement. It is astonishing in the face of this evidence that Avalon could represent that it is undisputed that the January 8 letter terminated the operating agreement. At the very least, and all that is required on appeal, this evidence does not give rise to "the definite and firm

conviction that a mistake has been made." In re Miniscribe Corp., 309 F.3d 1234, 1240 (10th Cir. 2002). Therefore, Avalon's challenge to the district court's finding fails.[18]

B. The Same Evidence that Supports the District Court's Finding Also Demonstrates that Avalon is Estopped From Claiming That the Operating Agreement Terminated on January 5, 2002

Avalon's repeated representations on and after January 8, 2002, that it remained a member of DCRG and the operating agreement remained in effect, not only supports the district court's finding, but also estops Avalon from now asserting otherwise.[19] A party is equitably estopped from repudiating a representation where (i) the party makes a representation to a second party, (ii) the second party reasonably relies upon that representation, and (iii) the second party would be damaged if the first party is permitted to repudiate his representation. Blackhurst v. Transamerica Ins. Co., 699 P.2d 688 (Utah 1985); U.S. Bank National v. Swanson, 918 A.2d 339, 340 (Del. 2006) (Equitable

[18] Even if Avalon were correct that the contract was terminated "for a split second," the doctrine of ratification would allow the contract to be resuscitated. The subsequent acts of Avalon ratified the operating agreement. Cache Valley Banking Co. v. Logan Lodge No. 1453, B.P.O.E., 88 Utah 577, 56 P.2d 1046, 1047-48 (1936) ("Ratification may be implied by acquiescence in, or recognition of, the act of the officers by the corporation or by acts tending to show an acceptance or adoption of the contract."); see also Ockey v. Lehmer, 2008 UT 37, ¶19, 2008 Utah LEXIS 81 (explaining that any contract that does not offend public policy may be ratified); Restatement (Second) of Contracts § 230 (a promise to perform despite the occurrence of a termination event is not revoked after the termination event where the other party reasonably relies upon the promise); Bakerman v. Sidney Frank Importing Co., 2006 Del. Ch. LEXIS 180 (Del. Ch. Oct. 10, 2006) ("Acquiescence arises where a complainant has full knowledge of his rights and the material facts and (1) remains inactive for a considerable time; (2) freely does what amounts to recognition of the complained of act; or (3) acts in a manner inconsistent with the subsequent repudiation, which leads the other party to believe the act has been approved.").

[19] B-S Steel of Kan., Inc. v. Tex. Indus., Inc., 439 F.3d 653, 666 n.15 (10th Cir. 2006) (noting appellate court may affirm on grounds not relied upon by the district court).

estoppel applies "when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment.").

The Utah Supreme Court has recently applied this doctrine to prevent a party from denying the validity of a contract where the other party had relied upon his representation to the contrary. Swan Creek Vill. Homeowners Ass'n v. Warne, 2006 UT 22, ¶35, 134 P.3d 1122 (equitable estoppel allows courts to "prevent a party from denying the validity of a contract when one party has relied on another party's conduct").

At the January 8 meeting, Mr. Brenneke represented to Ms. Sabella that the purpose of the January 8 letter was to spark renegotiation, not terminate their relationship. (AA 303, 305, 319, 363.) A week later in the letter agreement—drafted by Avalon's same counsel that drafted the January 8 letter—Avalon represented that it remained a member of DCRG and that the operating agreement remained operative. (AA 1047-48.) DCA relied upon these representations in continuing to perform under the terms of the operating agreement. In particular, in reliance on Avalon's representations, DCA recorded a $2.5 million promissory note in favor of Bud Bailey Construction to induce it to begin construction.[20]

And DCA would be damaged by permitting Avalon to repudiate its numerous representations that it remained a member of DCRG and the agreement remained operative, as Avalon could escape its contractual obligations entirely. The doctrine of equitable estoppel is designed to "ensure that justice is met and prevents parties from

[20] Following the letter agreement, Avalon, as a member of DCRG, continued to enter into professional agreements with construction design consultants. (SA 1142.) Until at least October, 2002, Avalon, as a member of DCRG, continued reviewing and approving applications and certificates of payment for Bud Bailey, who was continuing to construct the project. (AA 152, 699-700.)

avoiding valid obligations due to technicalities." Swan Creek, 2006 UT 22 at ¶34. Therefore, Avalon is equitably estopped from now claiming that the operating agreement terminated on January 8, 2002. For this additional reason, the Court should reject Avalon's second argument.[21]

III. The Agreement Does Not Provide For Automatic Termination, and Therefore, the Agreement Did Not Automatically Terminate on May 15, 2002

Avalon's third argument is that the operating agreement automatically terminated on May 15, 2002, pursuant to some unspecified, but allegedly ambiguous, language in article 4.1 of the operating agreement. (AOB at 40-43.) Avalon cites no case law, quotes no particular language from the agreement, and provides no extrinsic evidence to construe any alleged ambiguity. Instead, and inconsistent with its automatic termination argument, Avalon asserts that it is "troubled" by DCA's failure to declare Avalon in default of the agreement on May 15, 2002. (AOB at 42-43.)

Avalon not only fails to cite or quote the specific contract language under which the agreement automatically terminated, but also fails to explain how DCA's failure to declare Avalon in default can be "troubling" where Avalon had the unconditional right to

[21] Avalon also asserts that the letter agreement and MOU could not constitute amendments to the operating agreement because Mr. Brenneke did not sign them personally. (AOB at 36.) Avalon appears to rely upon article 13.3 of the operating agreement, which governs amendments. Aside from being hyper-technical, this argument also fails for a number of reasons.

Article 13.3 requires the signature of any Party whose right would be materially decreased or whose obligations would be materially increased by an amendment. (AA 1025.) In the first line of the operating agreement the term "Party" is defined to include DCA, Avalon, and Willamette, and not Mr. Brenneke, and therefore, Mr. Brenneke's signature was not required. In addition, since the Bud Bailey agreement and MOU amended the agreement in ways that were more favorable to Avalon and Mr. Brenneke, his rights were not materially diminished nor were his obligations materially increased. The only possible exception to this would be the personal guaranty Mr. Brenneke was required to sign; however, the personal guaranty did contain Mr. Brenneke's signature.

terminate the agreement at any time, including on May 15, 2002.[22] Instead of terminating the agreement, Avalon sent correspondence to DCA on May 15, 2002, reaffirming its commitment to try to work through its various defaults. (AA 259.) Avalon then continued to perform under the operating agreement and continued to expect DCA to fulfill its obligations under the parties' agreements. (SA 1210-15.) Avalon's third argument therefore fails both because the agreement does contemplate automatic termination and because Avalon is estopped from claiming that the agreement was not in effect after May 15, 2002.

A. Avalon's Third Argument Concerning Automatic Termination Is Inadequately Briefed and Is Therefore Waived

Avalon argues that the operating agreement automatically terminated on May 15, 2002, pursuant to some unspecified language in article 4.1 of the operating agreement due to Avalon's "inability to exercise" a Second Year Option. (AOB at 40.) Avalon does not quote the language it believes supports its argument, does not cite any cases that it believes supports its argument, and does not cite any extrinsic evidence to construe the unspecified language that it calls an "ambiguous legal writing." (AOB at 40.) Avalon's third argument is therefore inadequately briefed and waived. Adler v. Wal-Mart Stores, 144 F.3d 664, 679 (10th Cir. 1998) ("Arguments inadequately briefed in the opening brief are waived"). The court therefore need not consider Avalon's third argument.

[22] As Mr. Brenneke testified, he was aware of this option but deliberately chose not to terminate the agreement: "My choices were to walk away and walk away from over a million dollars or try to put the deal together. Unfortunately, I probably made a bad decision in investing more money because I never got the deal put together, but it's a choice a developer makes sometimes in trying to move forward that deal, you risk money." (AA 633 (emphasis added).)

B. Article 4.1 of the Agreement Does Not Provide for Automatic Termination on May 15, 2002

Although Avalon does not say so, DCA will assume that Avalon is referring to article 4.1(c), which governs termination of the Parcel I Option. This provision states that "the Parcel I option and this Agreement shall terminate pursuant to Section 11.2, at DCA's election, in the event [DCRG] and/or any of the Avalon Parties fail to timely satisfy any of the Phase I Milestones set forth in Section 4.1(h) below." (AA 973 (emphasis added).) Later in the same paragraph, the agreement provides that "if Avalon fails to exercise the Parcel I Option in accordance with the time limitations and in the manner set forth herein, then the Parcel I Option and the Parcel II Option shall expire and this Agreement shall terminate pursuant to Article 11.2." (AA 973 (emphasis added.) Avalon apparently contends that this latter sentence supports its view that the agreement automatically terminated on May 15, 2002, the date Avalon was to exercise the Partial I Option.

If this is Avalon's argument, it fails. Both sentences in article 4.1(c) refer to article 11.2, the provision of the agreement governing termination. (AA 973, 1013.) Article 11.2 provides that anytime prior to a Parcel I Closing, "this agreement may be terminated" upon Avalon's failure to timely exercise the Second Year Option. (AA 1013-14 (emphasis added).) Avalon's exercising the "Second Year Option" consists of Avalon notifying DCA "whether it elects to continue with the project" on or before May 15, 2002. (AA 973.) In fact, Avalon did notify DCA that it would continue with the project on May 15, 2002, by sending correspondence stating: "it is the position of Avalon Deer Valley that we are willing to invest further funds, in excess of the amount invested thus far, in order to keep the project moving on schedule with the hope, but not

promise, of reaching a January 04 opening." (AA 259.) Thus, even if Avalon had not sent correspondence reaffirming its commitment to the project, article 11.2 provided only that DCA "may" terminate the agreement.

Moreover, the only condition that could prevent Avalon from exercising the Second Year Option is "if the Agreement has been previously terminated pursuant to Sections 11.1 or 11.2, or if Avalon is in default of its obligations hereunder and has failed to cure such default within the time period permitted hereunder." (AA 973 (emphasis added).) Article 4.1(h)(i) then provides that the failure to satisfy the milestones "shall be considered a 'default' by Avalon" and then expressly adopts the cure periods set forth in article 11.2," concluding that if Avalon fails to cure, then "DCA may elect to terminate this Agreement with respect to Parcel I pursuant to [Article] 11.2." (AA 976 (emphasis added).) Article 11.2, in turn, sets the time period within which a default for a failure to satisfy milestones are 15 days from the time DCA provides Avalon notice of its default. (AA 1013-14.) DCA did not provide Avalon notice of its default until October 4, 2002.[23] Therefore, for this additional reason, the agreement did not terminate automatically on May 15, 2002.

DCA assumes that these are the provisions upon which Avalon relies. If Avalon has some different argument that demonstrates automatic termination, it may not raise it for the first time in its reply brief. Wheeler v. Comm'r of Internal Revenue, 521 F.3d

[23] Correspondence between DCA and Avalon following the notice of default explains that Avalon was attempting to cure the defaults by securing equity funding and a hotel operator. (SA 1179, 1181-83, 1189, 1207.) In this correspondence, Avalon expresses its concern that the notice of default would likely cause any potential equity lender to reject the deal if the operating agreement was in default. (SA 1183.) This further explains why DCA and Avalon were both reluctant to terminate the operating agreement until March 2003.

1289, 1291 (10th Cir. 2008) ("issues raised by an appellant for the first time on appeal in a reply brief are generally deemed waived").

C. Even if the Agreement Did Automatically Terminate on May 15, 2002, Avalon Is Estopped From Asserting Otherwise

In addition to Avalon's automatic termination argument lacking any support in the agreement, Avalon's statements and conduct before, on, and after May 15, 2002, indicate that Avalon did not believe the agreement automatically terminated that day. Because DCA relied upon these representations to its detriment, Avalon is estopped from now representing that the agreement terminated on May 15, 2002.[24]

The doctrine of equitable estoppel is designed to "ensure that justice is met and prevents parties from avoiding valid obligations due to technicalities." Swan Creek Vill. Homeowners Ass'n v. Warne, 2006 UT 22, ¶34, 134 P.3d 1122. The doctrine estops a party from repudiating a representation that a contract is operative where the second party reasonably relies upon the representation and would be damaged if the first party is permitted to repudiate the representation. Blackhurst v. Transamerica Ins. Co., 699 P.2d 688 (Utah 1985); Swan Creek, 2006 UT 22 at ¶35 (equitable estoppel allows courts to "prevent a party from denying the validity of a contract when one party has relied on another party's conduct"); U.S. Bank National v. Swanson, 918 A.2d 339, 340 (Del. 2006) (Equitable estoppel applies "when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment.").

[24] B-S Steel of Kan., Inc. v. Tex. Indus., Inc., 439 F.3d 653, 666 n.15 (10th Cir. 2006) (noting appellate court may affirm on grounds not relied upon by the district court).

As discussed above, on May 14, 2002, Mr. Brenneke signed a personal guaranty, in which he guarantied the obligations of Avalon, Willamette, or "any manager appointed by Avalon to represent its interest in [DCRG] . . . under that certain Operating Agreement of Deer Crest Resort Group, LLC, dated as of June 14, 2002, by and among DCA, Avalon and Developer, that Certain Memorandum of Understanding dated as of February 8, 2002, by and among DCA, Avalon and Developer." (SA 1173.) On May 15, 2002, Avalon stated that "it is the position of Avalon Deer Valley that we are willing to invest further funds, in excess of the amount invested thus far, in order to keep the project moving on schedule with the hope, but not promise, of reaching a January 04 opening." (AA 259.) Thereafter, Avalon continued to perform (or at least attempted to perform) under the terms of the operating agreement and repeatedly demanded that DCA comply with various provisions of the agreement. (SA 1210-15.)

DCA relied upon these representations by continuing to perform and not replacing Avalon immediately after May 15, 2002, with another developer who could fund and construct the project. Restatement (Second) of Contracts § 230 (a promise to perform despite the occurrence of a termination event is not revoked after the termination event where the other party reasonably relies upon the promise).

Therefore, even if the operating agreement did provide for automatic termination, and the conditions for automatic termination had been satisfied on May 15, 2002, Avalon is now equitably estopped from claiming that the agreement terminated on that date. For this additional reason, the court should reject Avalon's automatic termination argument.

CONCLUSION

The Court should reject Avalon's belated contention that the operating agreement terminated on January 8, 2002, or May 15, 2002, instead of in March 2003, as Avalon originally contended and as the district court found. In essence, Avalon asks the Court to create a better agreement for Avalon than the one Avalon made for itself. In the operating agreement, Avalon—a sophisticated developer—agreed to risk the value of its contribution to a project for the chance to gain majority ownership in the project in the event Avalon satisfied certain milestones. Avalon could mitigate any loss from this risk by terminating the agreement at any time. Instead of terminating, however, Avalon chose to continue working on the project until March 2003.

On appeal, Avalon asks the Court to do what it deliberately chose not to do for itself: declare the agreement terminated as of January 8, 2002, or as of May 15, 2002. The Court should decline the invitation. Nearly all of the evidence at trial supports the district court's finding that Avalon did not intend to terminate the agreement on January 8, 2002. The supplemental appendix contains much of this evidence, which demonstrates that the district court's finding is not clearly erroneous. In addition, Avalon does not explain how the agreement terminated automatically on May 15, 2002. This issue is inadequately briefed. In any event, the agreement does not contemplate automatic termination, but instead requires a party to terminate the agreement, or at least provide notice of default. The Court should reject all of Avalon's arguments.

Oral argument is necessary to address any arguments Avalon raises for the first time in its reply brief and to address the somewhat complex nature of the contractual relationship between the parties.

RELIEF SOUGHT

For all of the reasons set forth above, the Court should affirm the final judgment of the district court. By separate motion, DCA will seek its attorney fees on appeal under the same provision of the operating agreement that the district court awarded DCA its attorney fees below.

Dated: August 15, 2008

Respectfully submitted,

SNELL & WILMER L.L.P.

/s/ Troy L. Booher
Troy L. Booher
Attorney for Deer Crest Associates I, L.C.

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Dated: August 15, 2008

Respectfully submitted,

SNELL & WILMER L.L.P.

/s/ Troy L. Booher
Troy L. Booher
Attorney for Deer Crest Associates I, L.C.

NOTICE OF ELECTRONIC FILING

This is to certify that on the 15th day of August, 2008, I caused to be mailed via Federal Express an original and seven copies of BRIEF OF APPELLEE and two copies of SUPPLEMENTAL APPENDIX to the Clerk of Court, United States Court of Appeals for the Tenth Circuit, 1823 Stout Street, Denver, Colorado 80257. I also certify that on the 15th day of August, 2008, I caused to be transmitted the Digital Form of BRIEF OF APPELLEE as an attachment in Digital Form, identical to the written documents submitted to the Court, to the Clerk of Court at the following e-mail address: esubmission@ca10.uscourts.gov.

/s/Troy L. Booher

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I hereby certify that all privacy redactions required by the Federal Rules of Appellate Procedure, the Rules of the United States Court of Appeals for the Tenth Circuit, and any other applicable privacy rules have been made, and that with the exception of those redactions (of which there were none), every document submitted in Digital Form or scanned PDF format to the Court and to opposing counsel is an exact copy of the written documents filed with the Clerk.

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/s/Troy L. Booher

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This is to certify that 2 copies of BRIEF OF APPELLEE and 1 copy of SUPPLEMENTAL APPENDIX were mailed, postage prepaid, this 15th day of August, 2008, to the following:

Julianne P. Blanch
Snow, Christensen & Martineau
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, UT 84145

Paxton R. Guymon
Joel T. Zenger
Miller Guymon
165 South Regent Street
Salt Lake City, UT 84111

Attorneys for Defendants-Appellants

/s/Troy L. Booher