

2006

Welden L. Daines v. Richard B. Vincent : Addendum

Utah Court of Appeals

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Francis M. Wikstrom; Michael P. Petrogeorge; Parsons Behle and Latimer; Attorneys for Appellees. John Martinez; Nick J. Colessides; Attorneys for Appellant.

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ORIGINAL

IN THE UTAH SUPREME COURT

WELDEN L. DAINES, an individual	:	
	:	
Plaintiff-Appellant,	:	Supreme Court Case No. 20060838-SC
	:	
v.	:	
	:	Oral Argument Priority No. 15
RICHARD B. VINCENT, and ASC	:	
GROUP, L.C., a Utah limited liability	:	
company,	:	
	:	Trial Court Case No.: 030910378
Defendants-Appellees.	:	Trial Judge: Hon. Leslie Lewis
	:	

ADDENDUM (to appellant's opening brief)

APPEAL

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(Oral Argument and Published Decision Requested)

ADDENDUM

- Exhibit 1:** Judge Lewis *Memorandum Decision* (R. 968-72)
- Exhibit 2:** Judge Noel *Minute Entry* (R. 272-76)
- Exhibit 3:** Judge Noel *Order* (R. 269-71)
- Exhibit 4:** Judge Hilder's Decision (R. 575-616, at 590-603)
- Exhibit 5:** February 12, 2001 Term Sheet (R. 1619, Stipulated Trial Exhibit 8)
- Exhibit 6:** MOU (R. 1619, Stipulated Trial Exhibit 2)
- Exhibit 7:** List of physicians (R. 1727, p.174, ll.3-15--Trial Transcript, admitting into evidence Trial Exh. 67)
- Exhibit 8:** 4/23/03 fax and letter from Daines to Vincent (R. 1726, p. 897, ll.16-25, p.98, ll.1-18--Trial Transcript, admitting into evidence Trial Exh. 82)
- Exhibit 9:** Bill from Daines to Boyer Company (R. 1620, Stipulated Trial Exh. 59)
- Exhibit 10:** October 29, 2001 fax transmittal from Daines to Dr. Burrows (R. 1621, Stipulated Trial Exh. 80)
- Exhibit 11:** West Valley Surgical Center, LLC Board of Managers Meeting Minutes 10-30-2001 (R. 1621, Stipulated Trial Exh. 91)
- Exhibit 12:** December 10, 2001 McCray cover letter from Surgical Center to Daines (R. 1619, Stipulated Trial Exh. 10, at ASC001011)
- Exhibit 13:** Check from Boyer (R. 1620, Stipulated Trial Exh. 63)
- Exhibit 14:** Invoice #9 from Daines to Surgical Center (R. 1619, Stipulated Trial Exh. 10, at ASC001014)
- Exhibit 15:** Check Number 1010 from Surgical Center to Daines (R. 1619, Stipulated Trial Exh. 10, at ASC001013)
- Exhibit 16:** December 11, 2001 fax from Heywood/Kolstad of ASC Group to Daines (R. 1619, Stipulated Trial Exh. 10, at ASC001010)
- Exhibit 17:** Fax cover sheet from Bruce Heywood of ASC Group to Dan Tasset (R. 1619, Stipulated Trial Exh. 10, at ASC001009)
- Exhibit 18:** Conditional Release of Liability (R. 1619, Stipulated Trial Exh. 10, at ASC001012)
- Exhibit 19:** Judge Lewis Directed Verdict Order-for ASC (R. 1661-76)
- Exhibit 20:** Judge Lewis Directed Verdict Order-for Vincent (R. 1657-60)
- Exhibit 21:** Judge Lewis Directed Verdict Order-on Fraud and Punitives (R. 1651-56)
- Exhibit 22:** Judge Lewis 10-11-2006 "*Judgment*" (R. 1717-19)
- Exhibit 23:** Excerpt from Tasset deposition which was attached as Exhibit A to Reply pleading (R. 944-46, at 946)
- Exhibit 24:** Six-page Exhibit 10 at trial (R. 1619, Stipulated Trial Exh. 10)

CERTIFICATE OF SERVICE

Filed ten copies of the foregoing with the Clerk of the Supreme Court:

OFFICE OF THE CLERK OF THE COURT
SUPREME COURT OF THE STATE OF UTAH
450 SOUTH STATE STREET, FIFTH FLOOR
SALT LAKE CITY, UTAH 84114-0210

and served two copies of the foregoing upon the following:

Francis M. Wikstrom, Esq.
Michael P. Petrogeorge
Parsons Behle & Latimer
201 South Main Street #1800
P O Box 45898
Salt Lake City, Utah 84145-0898

via first class mail, postage pre-paid, this 21st day of December, 2006 addressed as set forth above.

A handwritten signature in black ink, appearing to read "John Marty", is written over two horizontal lines. The signature is fluid and cursive.

JUN - 7 2006

SALT LAKE COUNTY
By _____ Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WELDEN L. DAINES,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 030910378
vs.	:	
RICHARD B. VINCENT and ASC GROUP,	:	
L.C., a Utah limited liability	:	
company,	:	
Defendants.	:	

This matter came before the Court for a hearing on March 23, 2006, in connection with a number of pending Motions. The Court ruled on all of the Motions, with the exception of the defendants' Renewed Motion for Summary Judgment. At the conclusion of the hearing, the Court took the Renewed Motion under advisement to further consider the parties' written submissions, the relevant legal authority and counsels' oral argument. Being now fully informed, the Court rules as stated herein.

LEGAL ANALYSIS

The defendants filed their Renewed Motion for Summary Judgment after completing discovery and in light of recent case law from the Utah Supreme Court concerning contract interpretation. As in their initial Motion for Summary Judgment, the defendants maintain that they are entitled to summary judgment on the basis of the parties' Release, which they contend is unambiguous. The plaintiff counters that the language

within the four corners of the Release is ambiguous and requires this Court to examine the parties' intent through extrinsic evidence.

At the outset, the Court notes that the plaintiff failed to specifically controvert the defendants' undisputed facts, as set forth in the Renewed Motion. During oral argument, the Court focused on this procedural shortcoming and questioned counsel for the plaintiff about this failure. Counsel explained that the plaintiff had incorporated his original Opposition by way of reference and that this original Opposition controverted essentially the same set of undisputed facts as presented in the defendants' Renewed Motion. The Court is not persuaded that this type of incorporation by reference satisfies the procedural requirement under Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure. Rather, the plaintiff was required to specifically address the defendants' undisputed facts, as contained in their Renewed Motion, rather than the original Motion for Summary Judgment. Despite this procedural irregularity, the Court, in the interest of justice, will accept the plaintiff's underlying Opposition, insofar as it controverts the defendants' original set of undisputed facts, as a satisfactory response to the defendants' Renewed Motion.

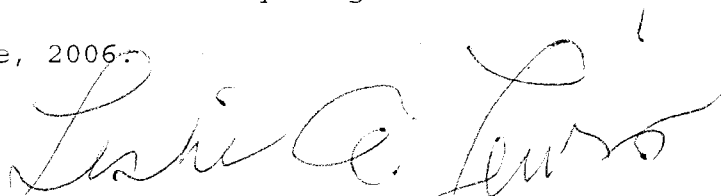
Proceeding to the substantive merits of the defendants' Renewed Motion, the Court has particularly focused on the recent case of Saleh v. Farmers Insurance Exchange, et. al., 2006 UT 1. The Saleh case emphasizes the fundamental principles of contract interpretation,

including the need to focus on the four corners of the contract to discern whether any ambiguity in the terms exists and, if not, to determine the parties' intent under the plain meaning of the contract language. Id. at ¶21.

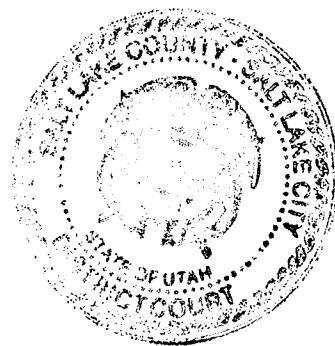
Having carefully reviewed the parties' Release, the Court determines that the language is ambiguous, requiring the Court to go outside of this document in order to discern the parties' intent. Foremost, the Court concludes that the scope and nature of the Release is ambiguous and cannot be resolved as a matter of law. Under the language of the Release, it is plausible that the claims being released by the plaintiff were limited in scope, as framed by the reference to certain identified services which the plaintiff had provided. In addition, the omission of any terms concerning the plaintiff's claim to 8 shares or \$150,000 creates further ambiguity as to the scope of the Release and whether this claim was intended to be encompassed within the Release. Because there are conflicting interpretations of the Release, each of which is reasonable, the Court determines that summary judgment is inappropriate. Therefore, the defendants' Renewed Motion for Summary Judgment is denied.

This Memorandum Decision will stand as the Order of the Court,
denying the defendants Renewed Motion for Summary Judgment.

Dated this 7 day of June, 2006.



LESLIE A. LEWIS
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 7 day of June, 2006:

Nick J. Colessides
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466 South 400 East, Suite 100
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2974 E. St. Mary's Circle
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ADDENDUM EXHIBIT 2

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WELDEN L. DAINES,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. ⁰³⁰⁹¹⁰³⁷⁸ 930910378
vs.	:	
RICHARD B. VINCENT, and ASC	:	
GROUP, L.C., a Utah limited	:	
liability company,	:	
Defendants.	:	

The Court has reviewed the defendant's Objection to plaintiff's proposed Order with regard to the Court's ruling on defendant's Motion for Summary Judgment, together with the Memoranda filed in connection therewith, and rules as follows:

The question raised in defendant's Objection centers upon the issue of whether there is an ambiguity in the terms of the contract entered into by the parties. It seems that defendant contends that the Court has ruled only that there is a fact question with regard to whether or not there is an ambiguity, and that the Court must take further evidence on that question. The Court disagrees with this analysis.

In Ward v. Intermountain Farmers Ass'n., 907 P.2d 264 (Utah 1995), and its progeny, the trial courts may look beyond the plain language of a contract or the "four corners" of a contract in

determining whether one of its provisions is ambiguous. It is reasoned that a contractual provision that may appear unambiguous and clear on its face may, nevertheless, be deemed ambiguous if, after looking at the parties' opposing interpretations of the provision, the court determines that the language reasonably supports both interpretations. This would appear to require a two-part factual inquiry. First, whether there is credible evidence of two different plausible interpretations of the contract, and if so, the provision may be ambiguous and the court must then take evidence to determine the intent of the parties and clarify the ambiguous terms.

It should be noted, however, that in this Court's opinion the first step in this inquiry, while it involves the receiving of some evidence as to the parties' contending interpretations, nevertheless, the Court does not determine credibility or reliability of evidence. The Court may look at the record, including Affidavits, depositions, etc., to determine what the contending interpretations of the parties are under the circumstances, and thereby make a determination as to whether the contending interpretations are both reasonably supported by the language of the contract. Having done so, the Court would then be in a position to rule as a matter of law whether the subject provision is or is not ambiguous. Since credibility and


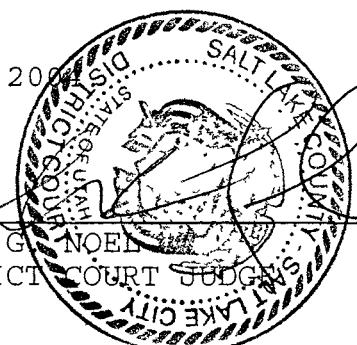
reliability of the evidence is not an issue in this first part of the inquiry, this Court is of the opinion that a full evidentiary hearing where witnesses are sworn and cross-examined is not required.

In this case, the Court has looked at the record, including the parties' interpretations of the subject contractual provisions based on the current state of the record in this case, including Affidavits, etc., and has found that the contending interpretations of the contract are both plausible and supported by the language of the contract, and that therefore the contract is ambiguous. That is now ruled upon by the Court as a matter of law. The remaining issue, therefore, is which interpretation the parties intended, and perhaps whether or not there was ever a meeting of the minds. Accordingly, defendant's Objection is denied.

Having stated the above, nevertheless, the Court feels that the Order proposed by plaintiff's lawyer may be interpreted to unduly limit the future course of this case to those questions delineated. The Court did not intend to prepare a pretrial Order limiting the issues remaining in this case. Accordingly, the Court has

prepared its own Order, and submits it herewith, having been signed of even date.

Dated this 14 day of January, 2004


FRANK G. NOEL
DISTRICT COURT JUDGE


MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 1st day of January, 2004:

Nick J. Colessides
Attorney for Plaintiff
466 South 400 East, Suite 100
Salt Lake City, Utah 84111-3325

Francis M. Wikstrom
Lara A. Reymann
Attorneys for Defendants
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A handwritten signature in cursive script, appearing to read "S. Adams", is written over a horizontal line.

ADDENDUM EXHIBIT 3

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

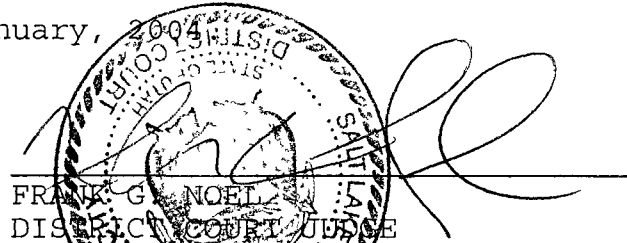
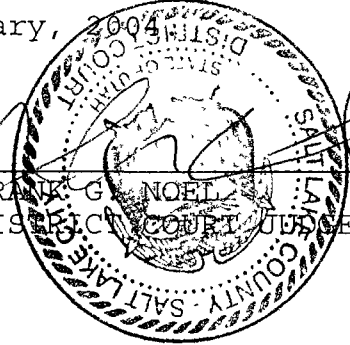
WELDEN L. DAINES,	:	ORDER DENYING DEFENDANT'S
Plaintiff,	:	MOTION FOR SUMMARY JUDGMENT
vs.	:	CASE NO. 030910378
RICHARD B. VINCENT, and ASC	:	
GROUP, L.C., a Utah limited	:	
liability company,	:	
Defendants.	:	

Defendant's ASC Group, L.C. (ASC's) Motion for Summary Judgment having come before the Court for hearing, with plaintiff being present and represented by counsel of record, Nick J. Colessides, and defendant, ASC, being represented by its counsel of record, Francis M. Wikstrom and Lara A. Reymann of Parsons, Behle & Latimer, the Court having reviewed the Memoranda of the parties, the record in this case, having heard argument on behalf of both parties, and having been fully advised in the premises, the Court now rules as follows:

Both of the opposing interpretations of the subject provisions of the contract in question appear to the Court to be reasonably supported by the language of the contract, and accordingly the Court finds that the contract is ambiguous and that fact issues

remain to clarify the ambiguity. ACCORDINGLY, defendant's Motion for Summary Judgment is hereby denied.

Dated this 14 day of January, 2004


FRANK G. NOEL
DISTRICT COURT JUDGE


MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Order Denying Defendant's Motion for Summary Judgment, to the following, this 14th day of January, 2004:

Nick J. Colessides
Attorney for Plaintiff
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Salt Lake City, Utah 84111-3325

Francis M. Wikstrom
Lara A. Reymann
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S. Adams

ADDENDUM EXHIBIT 4

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Judge Hilber's Decision

No.
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Third District Court
By *DS*
Deputy Clerk, Summit County

Steven C. Tycksen, #3300
Cory D. Memmott, #8346
ZOLL & TYCKSEN, L.C.
~~P. O. Box 590 5300 S. 360 W., Ste 360~~
~~Sandy, UT 84091-0590 Murray, UT 84123~~
Telephone: (801) ~~572-2700~~ 685-7800
Facsimile: (801) ~~572-6298~~ 685-7808
Attorneys for Plaintiff

IN THE THIRD DISTRICT COURT IN AND FOR SUMMIT COUNTY,
STATE OF UTAH, COALVILLE DEPARTMENT

JAMES W. LIPSCOMB,
Plaintiff,

vs.

RICHARD B. VINCENT, JOANNE M.
VINCENT, TITLE WEST TITLE CO.,
BARNES BANKING COMPANY,
DOES 1-30,
Defendants.

RICHARD B. VINCENT,
Third-Party Complaint

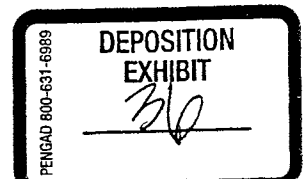
vs.

DOUG MONSON,
Third-Party Complaint.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER**

Case #970600134 CV

Honorable Robert K. Hilder



PLAINTIFF James W. Lipscomb's ("Lipscomb") Complaint and Defendant Richard B. Vincent's ("Vincent") Counterclaim came before the Court for Trial on December 4-5, 2000 before the Honorable Robert K. Hilder. Lipscomb was present in Court and represented by Steven C. Tycksen and Cory D. Memmott. Vincent was present in Court and represented by Brent D. Wride. Joanne Vincent did not appear, but was represented by Brent D. Wride. Title West Company and Barnes Banking Co. were never served in the action and did not appear. Prior to Trial, Lipscomb made a Motion to Dismiss Without Prejudice the Complaint against Title West Co. and Barnes Bank. The Court, sitting as trier of fact, heard and received testimony and documentary evidence in this matter, and now finds and rules as follows:

FINDINGS OF FACT

1. On August 12, 1993, Lipscomb, Vincent, and Doug Monson entered into an Agreement (the "8/12/93 Agreement") regarding Ceres Food, Inc. ("Ceres"). This Agreement was received into Evidence as Exhibit #1.
2. Under the terms of the 8/12/93 Agreement, Lipscomb provided Ceres with access to his personal line of credit with Zions Bank. Doug Monson and Richard Vincent agreed to sign promissory notes to

Lipscomb for any outstanding amount on that credit line that Ceres failed to repay.

3. Lipscomb provided Ceres with a line of credit from Zions Bank.
4. In the fall of 1994, the Zions Bank line of credit came due. Ceres was unable to pay down the credit line.
5. Ceres, Vincent, Monson, and Lipscomb sought re-financing of the credit line through Barnes Bank.
6. Barnes Bank provided Ceres with a \$200,000 credit line that was used to pay-off the Zions Bank credit line. Consistent with the 8/12/93 Agreement, Lipscomb, Monson and Vincent each personally guaranteed the line of credit.
7. By the fall of 1995, the amount outstanding on the Barnes Bank line of credit was approximately \$121,112.69 and was due and payable. Again, Ceres did not have the ability to payoff the credit line.
8. On November 5, 1995, Lipscomb, Vincent, Doug Monson, and Ceres made a proposal to Barnes Bank and signed an Agreement to extend the Barnes Bank obligation (the "11/5/95 Agreement"). Barnes Bank did not execute this document at that time. This Agreement was received into evidence as Exhibit #2.

9. Under the terms of the 11/5/95 Agreement, Doug Monson agreed to be primarily responsible to repay the Barnes Bank obligation and to hold both Vincent and Lipscomb harmless. Doug Monson granted Barnes Bank a second mortgage on his residence. Doug Monson was to refinance his home and use the proceeds to repay Barnes Bank. The personal residences of Vincent and Lipscomb would act as additional collateral to secure any shortfall in that process.
10. Vincent executed the 11/5/95 Agreement with Barnes Bank, but shortly thereafter, began to express concern to Barnes Bank, Monson, and Lipscomb that pledging his residence as security on the note could jeopardize his marriage.
11. The 11/5/95 Agreement was thereafter the subject of several attempts by the parties to modify the Agreement to accommodate the concerns of Vincent as well as to include developing information related to the re-financing of Monson's home. Several different drafts were circulated between the parties. One such modified version was received into evidence as Exhibit #15. Numerous meetings and negotiations took place over a period of days, if not weeks, in an attempt to finalize the agreed changes.

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12. During this process of renegotiating the 11/5/95 Agreement, Lipscomb informed Vincent that he would not allow his house to be used as collateral to Barnes Bank if Vincent did not pledge his home as well, but said that he would allow a side arrangement to be made.
13. On December 10, 1995, Lipscomb and Vincent met and signed an agreement that Vincent would not be required to pledge his home as security to Barnes Bank provided that he agreed to indemnify and hold Lipscomb harmless from the Barnes Bank obligation, including Lipscomb's attorney's fees, and would deliver to Lipscomb an unrecorded trust deed on his home for Lipscomb to hold (the "12/10/95 Agreement"). Vincent and Lipscomb signed the Agreement. This Agreement was received into evidence as Exhibit #3.
14. The 12/10/95 Agreement provided that if Vincent defaulted under his indemnification obligation that Lipscomb would be entitled to record and foreclose a trust deed against Vincent's interest in his residence.
15. Vincent later denied having signed the 12/10/95 Agreement and labeled it a forgery.
16. The Court finds that Vincent is not a credible witness regarding the 12/10/95 Agreement.

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17. The Court finds and is persuaded that the 12/10/95 Agreement is entirely consistent with Vincent's actions throughout the history of this case and is also consistent with the express intention of the parties from the inception of the 8/12/93 Agreement.
18. Exhibits #3 and #9 are good copies of the 12/10/95 Agreement. This Court finds no concerns over the authenticity of either document, notwithstanding the apparent unavailability of the original.
19. The variations in Vincent's signature are explained by the circumstances and stress surrounding Vincent's execution of the 12/10/95 Agreement. Vincent was attempting to fulfill his promises to Lipscomb, and at the same time, protect his own interests. Vincent was in a stressful situation and needed to sign the 12/10/95 Agreement as an inducement to Lipscomb to pay the Bank. Under those circumstances as explained by Dr. George Throckmorton, Vincent's expert at Trial, Vincent's signature varied from his normal signature sufficiently to cause doubt as to its authenticity.
20. The Court finds that in fact, Vincent executed the Agreement on a Sunday against his religious beliefs. This Court finds that Vincent's claim that he would never conduct business on Sunday is too unequivocal a statement to be given any weight.

21. ~~The Court finds that Vincent was inconsistent in his statements~~ regarding the pledging of his house. Vincent claims that he would never pledge his house, yet Vincent acknowledged on the stand during Trial that he executed the 11/5/95 Agreement in its original form as contained in Exhibit 2 and that said document included a pledge of his house.
22. The Court finds that Vincent has convenient lapses of memory regarding his actions in November and December 1995.
23. The Court finds that Vincent is not a credible witness based upon the overwhelming weight of the evidence that contradicts Vincent's in Court statements. The timing of the loan documents supplied by Barnes Bank, the dates of the documents and Lipscomb's testimony clearly rebuts Vincent's version of the facts and is persuasive to the Court.
24. This Court finds that the 12/10/95 Agreement was supported by adequate consideration because it allowed Vincent's house to be removed from the 11/5/95 Agreement.
25. The Court finds that the 36% interest rate contained in the 12/10/95 Agreement is not appropriate and is unconscionable. This Court finds that Lipscomb listed the rate of interest at 36% percent merely as an

attempt to impress upon Vincent his need to fulfill his promises and not default on this obligation.

26. Based upon the 12/10/95 Agreement, on December 12, 1995, Lipscomb, Vincent, Monson, and Ceres amended and ratified the 11/5/95 Agreement with Barnes Bank. Barnes Bank then executed the amended Agreement. The amended version of the 11/5/95 Agreement removed Vincent's residence as security to the Bank. This Agreement was received into evidence as Exhibit #7.
27. In reliance upon the 12/10/95 Agreement, Lipscomb brought the Barnes Bank obligation current by personally paying \$6,727.53 on December 12, 1995.
28. Doug Monson refinanced his house in October 1996 and paid \$77,000.00 toward the credit line, but failed to pay off the remaining Barnes Bank credit line.
29. In November 1996, Barnes Bank began to push for collection of the balance of the obligation and threatened to foreclose on Lipscomb's house.
30. On December 20, 1996, Lipscomb met with Vincent at the office of Lipscomb's attorney, Brian Steffensen, to discuss the Barnes Bank obligation and Monson's failure to pay.

31. During that meeting, Vincent admitted to Steffensen, a Notary Public, that he had executed the 12/10/95 Agreement.
32. Mr. Steffensen was a credible witness, and his testimony describing the 12/20/96 meeting and Vincent's tone and demeanor toward the 12/10/95 Agreement was persuasive to the Court. Mr. Steffensen testified that at that meeting, Vincent initially did not want to see, hold or acknowledge the 12/10/95 Agreement. Being pressed to do so by Mr. Steffensen, Vincent did hold, read, and finally acknowledge having signed the document. The Court concludes that Vincent made a clear acknowledgement to Steffensen, who was a Notary Public.
33. Based upon that acknowledgement, Steffensen notarized the 12/10/95 Agreement on December 20, 1996.
34. On December 23, 1996, Lipscomb recorded the notarized document as a notice of interest on Vincent's residence. A copy of the recorded document was received into evidence as Exhibit #9.
35. On December 27, 1996, Lipscomb paid in full the Barnes Bank obligation.
36. On October 8, 1996, Lipscomb initiated Third District Court for the State of Utah Case #960907047 against Doug Monson. However, this action was stayed, because Doug Monson and Ceres declared

bankruptcy in United States Bankruptcy Court for District of Utah Case #00-20933 and subsequently, the Lipscomb claim was discharged.

37. Vincent claimed that Lipscomb filed a wrongful lien against Vincent's home as defined by Utah Code Ann. §38-9-1(6) and that the one action rule bars Lipscomb's action against Vincent.
38. The one action rule is not applicable to this action, because no trust deed was ever pledged to Lipscomb by Monson to protect the obligation at issue in this action. The trust deed that was pledged to protect the \$77,000.00 obligation was pledged to Barnes Bank, and Barnes Bank had the only right to foreclose against the Monson's home.
39. This Court finds that there was no intent of the parties to merge the 8/12/93, 11/5/95 and 12/10/95 Agreements into one. All the Agreements subsequent to the 8/12/93 Agreements were merely attempts to stand behind the obligations promised in the 8/12/93 Agreement.
40. As of February 1, 2001, Vincent's failure to indemnify and hold Lipscomb harmless has damaged Lipscomb in the amount of \$80,580.62 plus attorney's fees, costs, and post-judgment interest at the statutory rate.

41. Lipscomb has incurred attorney's fees and Court costs in prosecuting this action. The 12/10/95 Agreement provided for recovery of all damages associated with the Barnes Bank obligation, including attorney's fees in enforcing the terms of the Agreement. The Court will allow the filing of an affidavit post trial to which counsel may object before ruling on the amount of fees to be awarded to Lipscomb.

CONCLUSIONS OF LAW

1. Under the terms of the 8/12/93 Agreement, the requirement of Vincent to provide Lipscomb a promissory note for any outstanding amount of the Ceres' line of credit is too indefinite to be an enforceable indemnification. However, Vincent's testimony from the stand admitted that it was the agreement of the parties that Vincent and Monson would indemnify Lipscomb.
2. The 11/5/95 Agreement, 12/10/95 Agreement and subsequent Barnes Banking negotiations were all part of the same transaction (i.e. the 8/12/93 Agreement).
3. No novation occurred in the case. The general rule is that "one contract will not merge into another unless it is plainly shown that that was the intent of the parties; and this is usually where the later

contract fully covers an earlier one ..." Footte v. Taylor, 635 P.2d 46, 48 (1981). The clear language of the 11/5/95 Agreement does not evidence intent by the parties to merge the contracts into another. Moreover, the 11/5/95 Agreement does not fully cover the 8/12/93 Agreement. Vincent has failed to meet his burden of proof regarding a novation.

4. Vincent executed the 12/10/95 Agreement and is equitably estopped from asserting that the 12/10/95 Agreement is of no effect. The 12/10/95 Agreement is an enforceable indemnification.
5. Lipscomb's promise to allow Vincent to remove his residence from the 11/5/95 Agreement constitutes adequate consideration for the 12/10/95 Agreement. "It is well settled that consideration may be something other than money. Any 'act or promise, bargained for and given in exchange for a promise' constitutes consideration." Coulter & Smith, Ltd. v. Russell, 925 P.2d 1258, 1261 (Utah App. 1996).
6. Under the terms of the 8/12/93 and 12/10/95 Agreements, Vincent is required to indemnify and hold Lipscomb harmless from the Barnes Bank obligation, including attorney's fees and costs incurred in enforcing the contract. The Barnes Bank obligations were clearly

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understood by all of the parties to be those set out in the 11/5/95 Agreement.

7. Vincent failed to do so and Lipscomb has been damaged in the amount of \$80,580.62 as of February 1, 2001 plus post judgment interest at the statutory rate and attorney's fees and costs to be established hereafter by affidavit.
8. The 12/10/95 Agreement as found in Exhibits #3 and #9 is a valid document and is not a "simulated forgery." The circumstances and stress surrounding the execution of the Agreement adequately explain any variances in Vincent's signature.
9. Lipscomb had the required legal authority to record the 12/10/95 Agreement under Utah Code Ann. §38-9-2(1996) because its recording was pursuant to a valid agreement between Lipscomb and Vincent.
10. The recording of the 12/10/95 Agreement was authorized under Utah Code Ann. §38-9-1 (1996) et seq. Therefore, Vincent's counterclaim of a wrongful lien is without merit.
11. The 36% interest in the 12/10/95 Agreement is unconscionable under the circumstances in this case. Lipscomb is entitled to pre-judgment interest at 10% and post-judgment interest at the statutory rate.

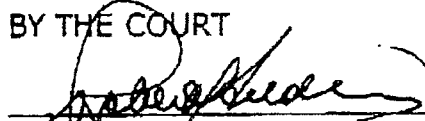
NOW THEREFORE, IT IS HEREBY ORDERED that Judgment be entered in favor of Lipscomb for \$80,580.62 as of February 1, 2001 plus post judgment interest at the statutory, attorney's fees and costs as established by affidavit hereafter, and the reasonable cost of collection including attorney's fees.

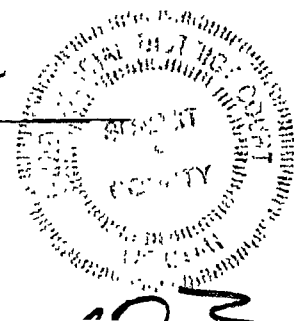
IT IS FURTHER ORDERED that Lipscomb is entitled to an equitable lien and a decree of foreclosure against said lien only on Vincent's interest in the property located at 3530 West Wrangler Way, Park City, Utah 84060 more particularly described as "All of Lot 95, Jeremy Ranch Plat No. 1," according to the official plat on file and/or record in the Summit County Recorder's Office.

IT IS FURTHER ORDERED that the property located at 3530 West Wrangler Way, Park City, Utah 84060 more particularly described as "All of Lot 95, Jeremy Ranch Plat No. 1," be sold forthwith and all underlying encumbrances paid and Vincent's equity in the property be used to satisfy this judgment.

DATED this 2nd day of February 2001.

BY THE COURT


Honorable Robert K. Hilder
District Court Judge



West Valley Surgical Center

PROPOSED TERM SHEET

February 12, 2001

1. Size of Offering and Classes of Units – Ownership Percentages:

Maximum: \$850,000

Minimum: \$750,000

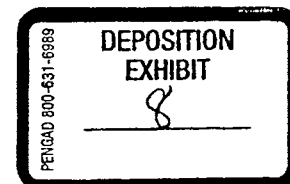
West Valley Surgical Center, LLC., a Utah limited liability company (“WVSC” or the “Company”), will utilize a capital structure with 2 classes of units. Class I units will be reserved for physicians while Class II units will be held by ASC Group (“ASC”), respectively. Except as described in #4 below, the price per unit of ownership (1% each) will be \$8,500. All investors, including ASC and the physicians, will pay the same amount per unit of ownership. Up to a maximum of 100 units will be offered for sale. An additional ten Class I ownership units will be held in “Treasury” for sale, at a future date, at the discretion of a vote of the majority of the units held by physicians. Physician investors will be limited to purchasing no more than five ownership interests (5% of the total ownership in the Company). ASC will be limited to no more than 20% of the ownership interests. The offering of shares will be prepared by ASC Group’s outside legal firm, Shook, Hardy & Bacon and will be pursued under an exemption to registration with the United States Securities & Exchange Commission and local authorities.

The ownership percentages and cost, respectively, shall be divided as follows:

Class I:	Physicians:	80.00%	\$680,000*
Class II:	ASC Group:	<u>20.00%</u>	<u>\$170,000*</u>
	TOTAL:	100.00%	\$850,000*

- Does not include the reduction in proceeds from the issuance of up to twenty Founders Units.

2. **The Feasibility Study:** Upon the signing of this term sheet by the “Founder” physician group (see #5 below) and the gathering of any remaining case volume from the physician practices, ASC will revise the initial Feasibility Study for the project. A final Feasibility Study will be completed once the ownership structure (including those parties who invest) has been finalized – approximately 2 months after the closing of the private offering. The initial Feasibility Study will include initial projected financial statements along with a functional relationship diagram and a signed copy of this term sheet. The fee for development of the Feasibility Study (\$25,000) will be paid from the proceeds raised from the Founders. If the project is approved by the Founders to proceed forward, ASC and its legal counsel shall commence with the drafting of the investment documents once the Founders Units have been subscribed to.



ASC001367

AS OF THE DATE OF THIS TERM SHEET, the project is contemplated to be a surgical center with 3 operating rooms and one endoscopy/procedure room. It is possible that the final Feasibility Study will recommend the viability of developing the center as a surgical hospital, including imaging services (MRI and CT initially), surgical recovery beds and possibly other complementary services. The terms of this document are based on that understanding.

3. **Private Placement Memorandum:** Within four weeks of the completion of the Feasibility Study, the signing of this agreement and the receipt of at least six Founders checks, the Company will publish and distribute a Private Placement Memorandum ("PPM") which will include all investment information and documents necessary for prospective investors to evaluate, subscribe to and purchase ownership units in the Company. The legal costs associated with the PPM will be \$35,000. It is expected that the PPM will be issued in mid to late March, 2000.
4. **Name of Entity:** West Valley Surgical Center or other suitable name that you select.
5. **Founders Units:** To provide leadership and direction to the project – as has been done to date - the Company will enlist the support of up to ten individuals or entities (including ASC Group) as "Founders" of the project. Each Founder or Founder entity, excluding ASC Group, may purchase up to one Founders units at a price of \$7,000 per unit. Founders will be given the right to subscribe to and receive up to three units (including their Founders units) prior to the sale of any units to a physician who is not a Founder. A minimum of six Founders units, must be purchased in order to proceed with the drafting and publication of the PPM. Founders are typically physicians (and ASC Group) who have a high degree of confidence in the project and are willing to provide leadership and generally bear more risk than general Members in the initial phase of the project. Seemingly, they include the physicians who have attended the meetings to date. Funds raised from Founders units will be used in part to pay for the legal and review costs of the PPM. Additional Founders funds will be used to cover the Feasibility Study, legal costs and other minor expenses of organizing the Company. Costs associated with this phase are primarily indicated in sections 2 and 3 above. If the project does not proceed, the remaining Founders funds will be returned to the Founders. All Founders' units will be non-dilutable. All Class I units purchased during the offering will be subject to the number of units available for purchase, in that class, and the corresponding number of units subscribed to in that class. If subscriptions exceed available units in Class I, that class of units will be reduced pro rata to equate with the number of units available in that class.
6. **Eligible Purchasers:** The PPM will designate that physicians who commonly practice in at Pioneer Valley Hospital and possibly Rocky Mountain Medical Center and who could perform services at or admit patients to the hospital for which the hospital can be reimbursed by Medicare are eligible to purchase ownership units in the Company. Under the direction of the Founders, ASC will exclusively consider which subscriptions to accept. The Founders will also be eligible to purchase units in the offering pursuant to the table of ownership indicated in section 1 above and the conditions of section 5.
7. **Board of Managers:** The Board of Managers will oversee and direct the business of the surgical facility. It will be comprised of five seats, four of which will be held by physicians and one by ASC Group. Physicians will serve as the Chairperson and Vice Chairperson of the Board and ASC Group will serve as the Secretary/Treasurer of both the Board and the Company. All physician Board positions will have a 2-year term except for the Vice-

~~Chairperson who will continue after his/her initial two years as the Chairperson for another 2-year term. The Board of Managers will govern all matters related to the Company except the following issues:~~

- Issuance of new equity (above the pre-approved ten Class I units)
- Sale or merger of the Company
- Dissolution of the Company
- Sales of more than 20% of the Company's assets
- Changes in the primary service contracts of the center

The aforementioned issues must be approved by members holding not less than 60% of the outstanding ownership units in the Company.

The Board will determine and monitor ASC in its capacity as the manager of this hospital and its execution of the strategic direction given it by the Board. The Board will have the right to dictate policy for the hospital, including the purchase of major equipment and the approval of primary vendors for the facility. The Board may also call for a review or audit of ASC's management services and the financial conditions of the Company.

- 8. Physician Ownership:** Physicians will own 80.00% of the initial ownership units of the Company, including Founders units. Founders will be given the right to subscribe to and receive up to three units (including their Founders units) prior to the sale of any units to a physician who is not a Founder. Additionally, it is expected that the physicians will own up to 85% of the equity in the to-be-formed real estate partnership.
- 9. ASC Ownership:** ASC Group will own 20.00% of the initial ownership units of the Company. ASC will purchase its Founders units at \$7,000 and 19.00 additional units at \$8,500 each during the PPM offering period.
- 10. Hospital Involvement:** It is not contemplated that any hospital will be involved as a partner in this project at this time. However, the Board of Managers could determine to allow hospital participation by the owning entity of Pioneer Valley Hospital.
- 11. Guarantees:** No personal guarantees are expected to be required of any physician or other investor; however, upon negotiation for financing, some form of pro rata guarantee may be required by a lender/lessor for the real estate. It is not expected that any form of guarantees would be required for the equipment or working capital financing.
- 12. Management Agreement:** The management agreement will have an initial term of five years with three five-year options to extend and will pertain to a facility that has an equal scope of services to that indicated in Section 2 above. The first option to extend will be automatic if the center is in compliance with the numbers set forth in the performance criteria, as agreed upon by the Board, for the first five years of operation. The services included in the management agreement and for which ASC will oversee all day-to-day operations includes coding, billing and collections; purchasing; management information systems and coordination; accounting, data entry, accounts payable and financial reporting; cash management, banking, loan and lease administration; staff education, training and supervision; community outreach and outcomes; risk management; tax planning; Board reporting and training; payer and employer contracting; clinical compliance; training and

facility-specific marketing and strategic planning; and facility compliance and procedural auditing pursuant to federal and state programs. From management fees, ASC shall pay the salaries and benefits cost of on-site staff performing coding, billing, collections and data entry. Additionally, in order to maintain accountability in the center, the salary and benefits of the Facility Administrator shall be the responsibility of the Company but he/she shall be the employee of ASC Group.

Furthermore, the management agreement will include performance criteria that will monitor and measure the effectiveness of the ASC Group program. Initially, these criteria are based the projections as revised shortly after the funding of the PPM. If the physicians who provided case volume numbers for ASC to include in the Feasibility Study actually bring the number of patients indicated in the Feasibility Study, ASC's management services will be measured against (i) percentage of collections (receivables management), (ii) supplies management, (iii) staff efficiencies, and (iv) net margin and patient satisfaction, such measurement to be further detailed in the Management Agreement. If ASC is notified that it is in violation of any of these criteria, it will have a period of 60 days to correct the default. If such default cannot be corrected, the Board of Managers will have the option to terminate the contract for "cause." If such termination of the management agreement is made by the Board, the Board will have a 120-day option to purchase the ownership interests of ASC Group at the then fair market value of such interests. If the Board and ASC cannot agree on a fair market value, the interests will be purchased pursuant to a formula of net operating cash flow (net income plus depreciation less repayment of loan or lease principal) multiplied by 5.

As long as the projected scope of services is, as is indicated previously, the total management fee in the first three years of operation of the center shall be the greater of 6.5% for net collected revenue or \$15,000 per month (see Exhibit B below). Beginning in the fourth year of the operation of the center, the management fee shall be the greater of 5.75% or \$25,000 per month. However, at no time shall the management fee exceed \$35,000 per month. If the level of the scope of services of the facility changes beyond that initially included herein, the management fees will be renegotiated at that time.

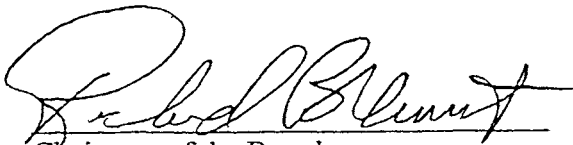
Additionally, in order to reduce physician primary personnel liabilities and to minimize the effects of employee related issues (i.e. new HIPAA laws, absenteeism, training, payroll records being kept or processed on-site) as well as have qualified personnel that can react to anticipated billing changeover (APC's or Ambulatory Payment Codes) planned by Medicare, ASC can also perform all payroll and personnel services as well as administration of benefits and training through its personnel leasing subsidiary, AmStaff. The fee payable to AmStaff is 3% of gross payroll or an estimated fee of approximately \$20,000 in the first year. This service will eliminate the need for any facility personnel to perform any AmStaff-type services. This program, while optional to the Board of the center, provides a competitive and comprehensive program for personnel/staffing issues.

13. **Development Fees:** ASC shall receive development fees of \$255,000. Expenses which exceed this estimate by more than 5% shall not be reimbursable without the prior written consent of the Board of Managers, which consent shall not be unreasonably withheld. The services included in the aforementioned fee and in the turnkey organization and development of this center are included in Exhibit A and will be payable in twelve equal monthly installments beginning at the closure of the PPM.

- 14. Real Estate Development:** ASC will source and oversee the design, construction and development of the real estate of the project. ASC will also draft the real estate lease between the Company and the to-be-formed real estate partnership (the "Partnership"). ASC will also be involved in the construction and permanent mortgage financing of WVSC. Due to its expertise, ASC will provide for the design, architecture and general contracting for the facility at the cost to provide such services, including a charge of 2% of construction cost payable to ASC Real Estate Development (a subsidiary of ASC Group) for site analysis, design, construction and development oversight (designed to bring the project construction in on time, at budget and in a quality manner), permanent mortgage financing and representation of the physician owners during the project.
- 15. Real Estate Ownership – Facility Lease:** The land and building that will house WVSC as well as the fixed equipment will be owned by the to-be-formed real estate Partnership. The Partnership will also acquire the land parcel at a price not to exceed \$6 per square foot. The Partnership will then lease the facility to the Company via a lease with an initial term the same as the term of the permanent mortgage and four, ten-year options for renewal. The lease will specify that rent will be fixed for each five-year period of the lease. The rent will increase at the beginning of each five-year period based on a factor that is one-half the amount of increase in the CPI for that prior five-year period. The initial lease rate will be based on the pre-construction budgeted cost of the facility times 12.5%.
- 16. Location/Description of Site:** To be determined.
- 17. Moveable Equipment:** The Company will lease or purchase non-fixed equipment via a five or seven-year lease or loan. The financing for this equipment will be non-recourse and will not require the personal guarantees of the Members. The lease payments will be not increase over the life of the lease.
- 18. Scope of Services:** The center will be licensed as a surgical center under the laws of the state of Utah. It is contemplated that initially, the center will provide outpatient surgery only with a capability of recovering patients for a 23 hour period. It is contemplated that the surgical and procedural services to be provided at the center will be from orthopedics, otolaryngology, ophthalmology, urology, gastroenterology, general surgery, gynecology, plastic surgery, podiatry and pain management.
- 19. Physician Investment Fund:** The physician investors in WVSC, by virtue of their partnership with ASC, will have an opportunity of investing in the ASC Group Physician Investment Funds as long as ASC Group holds a management contract with the center and maintains a 20% ownership level. These funds will purchase ownership interests in both operating and real estate companies associated with surgical-based facilities in which ASC Group both invests and manages and thereby will allow physicians the opportunities of spreading their investment risk as well as investing in centers similar to their own and which produce or are expected to produce returns on investment similar to those currently achieved or projected to be achieved by ASC Group. It is expected that the first fund will be available for subscription in the month of April, 2001.

This term sheet is to be signed by all of the Founders of the Company. All parties to this terms sheet and the proposed project recognize that considerable time, expertise and costs will be used in the development of this project. Each party agrees to keep confidential all information disclosed by any party in the development of the project. Furthermore, each party agrees that for a period of two years following the date of this agreement, it will not pursue or participate in the development of a center such is contemplated and outlined above, in the Salt Lake City, Utah area, except if developed within his/her office, without the participation of ASC Group.

AGREED TO:



Chairman of the Board
ASC Group, LC.

FOUNDERS:

Name: _____
Date: November ____, 2000

Name: _____
Date: November ____, 2000

Name: _____
Date: November ____, 2000

Name: _____
Date: November ____, 2000

Name: _____
Date: November ____, 2000

Name: _____
Date: November ____, 2000

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Name: _____
Date: November ____, 2000

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Date: November ____, 2000

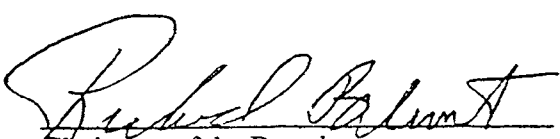
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Date: November ____, 2000

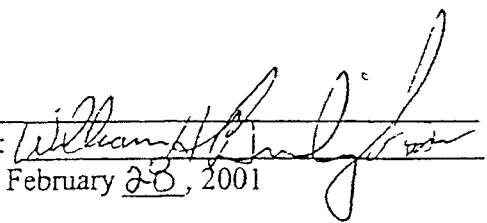
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AGREED TO:


Chairman of the Board
ASC Group, LC.

FOUNDERS:

Name: 
Date: February 20, 2001

Name: _____
Date: February ____, 2001

Name: _____
Date: February ____, 2001

Name: _____
Date: February ____, 2001

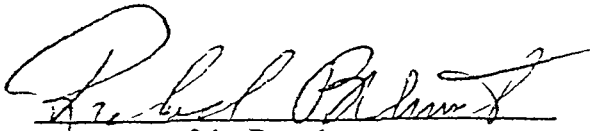
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Date: February ____, 2001


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AGREED TO:


Chairman of the Board
ASC Group, LC.

FOUNDERS:


Name: Jon R Adams, MD
Date: February 27, 2001

Name: _____
Date: February _____, 2001

Name: _____
Date: February _____, 2001

Name: _____
Date: February _____, 2001

Name: _____
Date: February _____, 2001

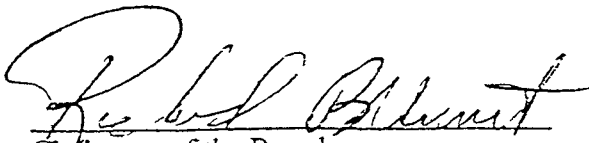
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3/13/01

This term sheet is to be signed by all of the Founders of the Company. All parties to this terms sheet and the proposed project recognize that considerable time, expertise and costs will be used in the development of this project. Each party agrees to keep confidential all information disclosed by any party in the development of the project. Furthermore, each party agrees that for a period of two years following the date of this agreement, it will not pursue or participate in the development of a center such is contemplated and outlined above, in the Salt Lake City, Utah area, except if developed within his/her office, without the participation of ASC Group.

AGREED TO:


Chairman of the Board
ASC Group, LC.

FOUNDERS:

*id
signature*

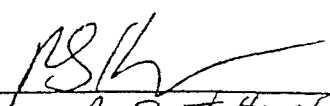
R. Scott Haupt MD
Name: _____
Date: February __, 2001

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Date: February __, 2001

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Date: February __, 2001

Name: _____
Date: February __, 2001

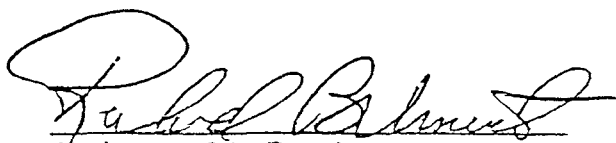
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Name: R. Scott Haupt
Date: February 22, 2001

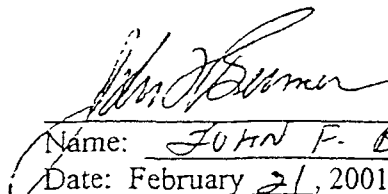
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AGREED TO:


Chairman of the Board
ASC Group, LC.

FOUNDERS:


Name: JOHN F. BERMEN
Date: February 21, 2001
JOHN F. BERMEN, M.D.
8485 S. PIONEER PARKWAY #5
WEST VALLEY CITY, UTAH 84120-2013
PHONE (801) 967-0282
FAX (801) 867-0565

Name: _____
Date: February _____, 2001

Name: _____
Date: February _____, 2001

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Date: February _____, 2001

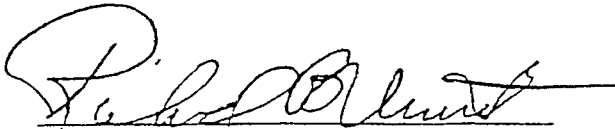
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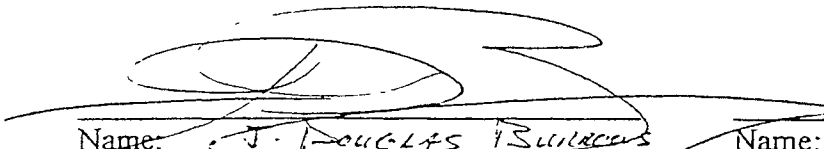
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AGREED TO:


Chairman of the Board
ASC Group, LC.

FOUNDERS:


Name: J. Douglas Sullivan Name: _____
Date: February 15, 2001 Date: February _____, 2001

Name: _____
Date: February _____, 2001

Name: _____
Date: February _____, 2001

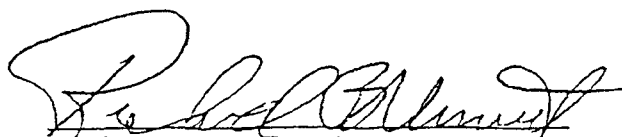
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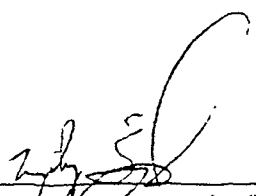
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AGREED TO:


Chairman of the Board
ASC Group, LC.

FOUNDERS:


Name: KIPLET SIBBALD
Date: February 24th, 2001

Name: _____
Date: February _____, 2001

Name: _____
Date: February _____, 2001

Name: _____
Date: February _____, 2001

Name: _____
Date: February _____, 2001

Name: _____
Date: February _____, 2001

uc
2/28/01

David W McCray, MD
Name: David W McCray
Date: February 21, 2001

Name: _____
Date: February _____, 2001

Name: _____
Date: February _____, 2001

Name: _____
Date: February _____, 2001


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Date: February _____, 2001

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Date: February _____, 2001

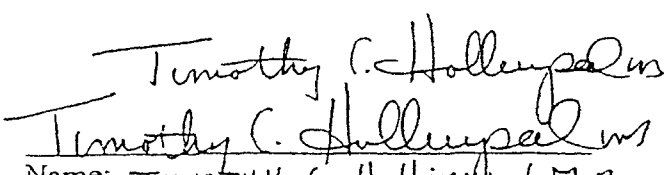
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AGREED TO:


Chairman of the Board
ASC Group, LC.

FOUNDERS:


Name: TIMOTHY C. Hollingshead MD
Date: February 25, 2001

Name: _____
Date: February _____, 2001

Name: _____
Date: February _____, 2001

Name: _____
Date: February _____, 2001

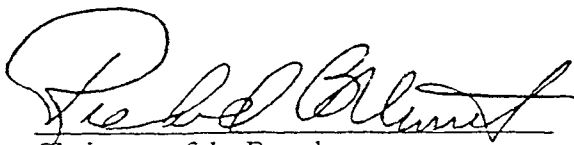
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REC'd 2/28/01

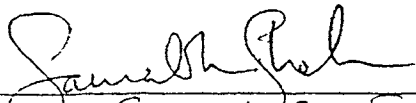
This term sheet is to be signed by all of the Founders of the Company. All parties to this terms sheet and the proposed project recognize that considerable time, expertise and costs will be used in the development of this project. Each party agrees to keep confidential all information disclosed by any party in the development of the project. Furthermore, each party agrees that for a period of two years following the date of this agreement, it will not pursue or participate in the development of a center such is contemplated and outlined above, in the Salt Lake City, Utah area, except if developed within his/her office, without the participation of ASC Group.

AGREED TO:

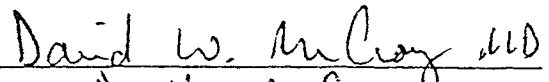


Chairman of the Board
ASC Group, LC.

FOUNDERS:



Name: SAURABH SHAH
Date: February 20, 2001



Name: David McCray
Date: February 21, 2001

Name: _____
Date: February __, 2001

Name: _____
Date: February __, 2001

Name: _____
Date: February __, 2001

Name: _____
Date: February __, 2001

MEMORANDUM OF UNDERSTANDING AND
NON-DISCLOSURE AGREEMENT

WHEREAS, Welden L. Daines and or his affiliates (hereinafter called "Daines") has a special relationship with unnamed physicians and,

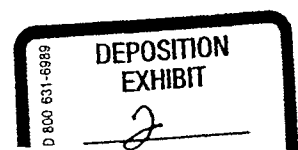
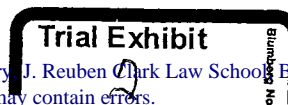
WHEREAS, ASC, Bob Smith, Richard Vincent, their affiliates, employees, partners, joint ventures, or assignees (hereinafter called "ASC") desire to explore the potential of building and operating a surgical center with related ancillary facilities. ASC desires that the information be disclosed to it in order to determine whether or not it should acquire, market or otherwise use the information for the building of a surgical center.

Now for full consideration the parties agree as follows:

1. Daines will divulge the location and potential surgeons involved,
2. Daines will arrange a meeting with the leaders of the surgeon physicians ASAP, and,
3. Daines will participate in the feasibility and due diligence phase of the project,
4. ASC will diligently use its resources to expeditiously determine the project's feasibility
5. ASC agrees to maintain in confidence and not to disclose any of the Proprietary Information to any other person or party, nor to use Proprietary Information for other than the purpose of investigating the feasibility and marketing of the project without the prior written consent of Daines. Nothing herein shall preclude the disclosure of such Proprietary Information to employees or professional agents of ASC in order to complete the investigation, but ASC shall advise such employees and agents of the terms of this agreement.

It is understood that the obligations of confidence and non-use shall not attach to information which was in the public domain at the time of disclosure and was known by ASC or its employees prior to the date of disclosure as evidenced by tangible records of ASC demonstrating such knowledge.

In the event that ASC considers any of the Proprietary information to be excluded from the above obligations of confidence and non-use and intends to disclose such information to or to use the same, ASC shall provide Daines written notice of the same within thirty (30) days of the date of disclosure of such information to ASC by Daines, which notice shall provide the basis upon which the information is believed to be excluded from the obligations of confidence and non-use as set forth in this Agreement. ASC shall not disclose such information, except as provided in this Agreement, during the thirty (30) day period. In the event that



Daines does not agree the information is not protected by the terms of this Agreement, it shall be incumbent upon Daines to obtain appropriate injunctive relief to restrain any such intended disclosure or use of the same.

In consideration to Daines, ASC or the entity to be formed will pay to Daines the sum of \$150,000. This amount shall be paid as follows:

1. \$50,000 at the commencement of business, and
2. Thereafter at the rate of \$4,167 per month for 24 months,
3. Daines shall be reimbursed for any out of pocket expenses approved by ASC.

In the event it becomes necessary for either party to commence an action to interpret or enforce the provisions of this agreement, such prevailing party to such action shall be entitled to reasonable attorney's fees and costs from the other party, which amounts shall be made a part of any judgement obtained by the prevailing party.

IN WITNESS WHEREOF, the parties have executed this Agreement this 22nd Day of September, 2000.


"Daines"

By:



Welden L. Daines

"ASC"

By:


Richard Vincent

By:


Bob Smith

Fax Transmittal

September 27, 2000

To: Richard B. Vincent, President

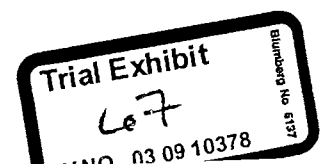
From: Welden L. Daines

Attached is list of potential investors for West Valley Surgical Center, see you 7:00PM @ Dr. Burrows Suite (4052 West Pioneer Parkway #208 Back phone # 966-4038).

Dr. McCray (Surgeon) and Dr. Burrows are the leaders and will be in attendance.

Welden

0157



Fax Transmittal

294-7600

September 27, 2000

To: Bob Smith

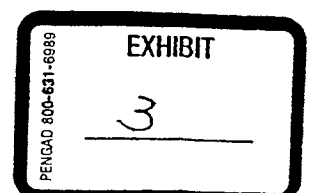
From: Welden L. Daines

Attached is list of potential investors for West Valley Surgical Center.

~~I will pick you up at 6:00PM your office. That will give us some time to drive by Granger Clinic. If not OK let me know.~~ I sent the list also to Richard Vincent.

Dr. McCray (Surgeon) and Dr. Burrows are the leaders and will be in attendance.

Welden



September 26, 2000.

To: Richard Vincent & Bob Smith
"ASC"

From: Welden L. Daines
"Daines"

List of Potential Physicians for @ West Valley, Utah

ENT

Aldous, Edwin (Granger Clinic)
3725 West 4100 South
West Valley City, UT 84119
965-3484

Aoki, John R.
4052 West Pioneer Parkway Suite 210
West Valley City, UT 84119
966-8534

? Meads, Garner B
3590 West 9000 South
West Jordan, UT
566-8304

Shah, Saurabh (Granger Clinic)
3725 West 4100 South
West Valley City, UT 84119
965-3484

? Stevens, Craig
3590 W 9000 South
West Jordan, UT
566-8304

EYE

Nelson, John C
3465 West 4155 South
West Valley, UT 84119
966-0081

0159

Smith, Robert E. (Granger Clinic)
3725 West 4100 South
West Valley, UT 84119
965-3786

Stanford, Gary (Granger Clinic)
3725 West 4100 South
West Valley, UT 84119
965-3479

Wagner, Francis J (Granger Clinic)
3725 West 4100 South
West Valley, UT 84119
965-3479

? Barney, Mitchell
3570 W 9000 So #210
West Jordan, UT
569-2626

OB-GYN

Colby, Spencer
3336 So 4155 West
West Valley, UT 84119
964-2229

Dinger, Steven (Granger Clinic)
3725 W 4100 So
West Valley City, UT 84119
965-3444

Hutchinson, Craig (Granger Clinic)
3725 W 4100 So
West Valley City, UT 84119
965-3444

Isaac, David (Granger Clinic)
3725 W 4100 So
West Valley City, UT 84119
965-3444

Thackeray, Steven
3336 So 4155 West
West Valley, UT 84119
964-2229

ORTHOPEDICS

Berman, John
3465 So 4155 W
West Valley City, UT 84120
967-0282

Bova, Charles (Granger Clinic)
3725 W 4100 So
West Valley City, UT 84119
965-3424

Colledge, Alan.
3336 So Pioneer Parkway
West Valley City, UT 84119
964-3156

Siggard, Kipley J.
3465 So 4155 West, Suite 5
West Valley City, UT 84119
967-0282

Walker, Dean N. (Granger Clinic)
3725 W 4100 So
West Valley City, UT 84119
965-3424

Brown, Alan ?
Howe, David
Larkham, John

PAIN CONTROL

None

GENERAL SURGERY

Irvine, Bruce (Granger Clinic)
3725 W 4100 So
West Valley City, UT 84119
965-3425

Hollingsed, Tim
3725 W 4100 So
West Valley City, UT 84119
965-3425

McCray, David W.
4052 West Pioneer Parkway Suite 4
West Valley, UT 84119
965-2600

Jones, Randall
3570 West 9000 So
West Jordan, UT 84088
569-1260

HAND SURGERY

Burrows, J. Douglas
4052 West Pioneer Parkway #208
West Valley City, UT 84119
966-3977

SKIN SURGERY

Southwick, Edward G
3465 So 4155 West
West Valley City, UT 84119
966-1403

UROLOGY

Western Urological Clinic PC
4052 W Pioneer Parkway
West Valley City, UT 84119
963+4001

&

3980 So 700 East
Salt Lake City, 84107
263-3311

Richardson, Stephen F
Childs, Lane C.
Gange, Steven N.
Hopkins, Scott A

PODIATRISTS

Burleigh, William (Granger Clinic)
3725 W 4100 So
West Valley City, UT 84119
965-3425

Campbell, Craig J.
5255 So 4015 W #140
Kearns, UT
969-1434

McManama, Craig A.
3540 So 4000 W, Suite 480
West Valley City, UT 84119
966-3556

GASTROENTEROLOTISTS

?

OTHER POSSIBILITIES

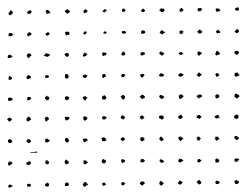
Haupt, Scott (Plastic Surgeon)
6040 So Fashion Blvd
Murray, UT 84107
264-9594

Brown, Randy (group)

New Ortho Group at Rocky Mtn
(Bertin, Skedros & Winterton)

ADDENDUM EXHIBIT 8

4/23/03 fax and letter from Daines to Vincent
Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
(R. 1726, p. 897, ll.16-25, p.98, ll.1-18-Trial Transcript.



Daines Associates LLC
Certified Public Accountants

FAX TRANSMITTAL SHEET

To: *Richard Vincent*

From: *Melden Dines*

Subject: *WV Surg Center*

Date: *4/23/03*

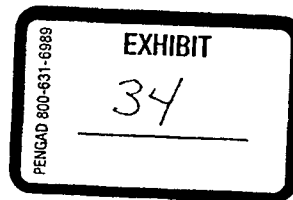
Fax # *435-615-6999*

Number of pages including fax cover sheet= *2*

Comments:

See attached letter

425 Medical Drive Ste 210
Fax & Telephone (801) 292-6551
E-Mail Weldend@aol.com
Cell (801)598-1818



0005



WELDEN L DAINES
425 MEDICAL DRIVE #210
BOUNTIFUL, UT 84010
801-292-6551

FAX (435-615-6999)

APRIL 23, 2003

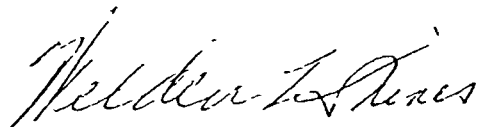
RICHARD VINCENT
ASC GROUP
PARK CITY UT 84060

Dear Richard:

I have filed an extension for filing my tax return. I have not received my K-1 yet on the West Valley Surgical Center LC. for the 8 shares promised by you. I looking forward to receiving the annuity you described to me.

You may fax to the above number or mail it to the above address.

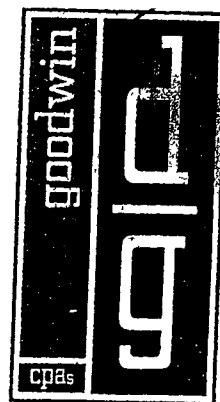
Sincerely,

A handwritten signature in cursive script that reads "Welden L. Daines".

Welden L. Daines

P.S. I should also have the Certificate of Membership for my records.

0006



a professional corporation

October 8, 2001

OCT 10 2001

Lynn Summerhays
The Boyer & Company
127 South 500 East
Salt Lake City, UT 84111

Dear Lynn:

Congratulations on the West Valley Surgical Center project. I feel that the decision to build adjacent to the Granger Clinic will be the right choice in the long run. I do hope that the financial stability of Granger Clinic will be enhanced.

As we agreed verbally, Bob Smith and I will accept \$50,000.00 as payment for our services. I believe we have finished our work at this time and should be paid.

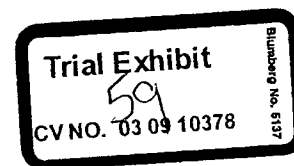
Please make the check out to Bob Smith and Welden L. Daines jointly. This will allow us to settle up between ourselves. Some part of the payment will be paid to Nick Colessides for his legal work and involvement.

As you know I put \$5,000 as earnest money on the 3100 South site. If you have any interest for this as a backup, I will be happy to transfer it to you at my cost.

Very truly yours,

Welden L. Daines,

Cc: Bob Smith
Nick J. Colessides



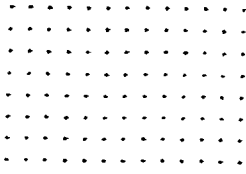
ASC000127

Daines Goodwin & Co.

ADDENDUM EXHIBIT 10

Digitized by the Howard M. Hunter Law Library, S. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

October 29, 2001 fax transmittal from Daines to Dr. Burrows



Daines Associates LLC

Certified Public Accountants

425 Medical Drive, Suite 210
Bountiful, Utah 84010
Tele: 801-292-6551

FAX TRANSMITTAL SHEET

To: *Mr. Burrows*

From: *Weldend*

Subject: *\$ 50K*

Date: *10/29/01*

Fax #

Number of pages including fax cover sheet = *2*

See letter attached

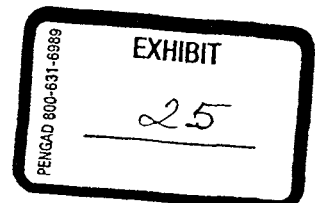
Comments:

Please. Since we are done with our work on WV we would appreciate seeing if you can get immediate payment from Boyer.

As you know I am old and future payment is probably of little value to me.

*Thanks
Weldend*

425 Medical Drive Ste 210
Fax & Telephone (801) 292-6551
E-Mail Weldend@aol.com



0030



October 8, 2001

Lynn Summerhays
The Boyer & Company
127 South 500 East
Salt Lake City, UT 84111

Dear Lynn:

Congratulations on the West Valley Surgical Center project. I feel that the decision to build adjacent to the Granger Clinic will be the right choice in the long run. I do hope that the financial stability of Granger Clinic will be enhanced.

As we agreed verbally, Bob Smith and I will accept \$50,000.00 as payment for our services. I believe we have finished our work at this time and should be paid.

Please make the check out to Bob Smith and Welden L. Daines jointly. This will allow us to settle up between ourselves. Some part of the payment will be paid to Nick Colessides for his legal work and involvement.

As you know I put \$5,000 as earnest money on the 3100 South site. If you have any interest for this as a backup, I will be happy to transfer it to you at my cost.

Very truly yours,

Welden L. Daines,

Cc: Bob Smith
Nick J. Colessides

ADDENDUM EXHIBIT 11

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.

Machine-generated OCR may contain errors.
West Valley Surgical Center, LLC Board of Managers Meeting Minutes 10-30-2001

**WEST VALLEY SURGICAL CENTER, LLC
BOARD OF MANAGERS MEETING MINUTES
10-30-2001**

Attendees:

Doug Burrows, M.D.
Kip Siggard, M.D.
David McCray, M.D.
Tim Hollingsed, M.D.
David Dixon, Architect
Lynn Summerhays, Boyer Company
David Summerhays, Boyer Company
Mark Hall, ASC Group
Bruce Heywood, ASC Group

DISCUSSION SUMMARY

1. Doug Burrows gave a list of health plans contracted with South Towne Surgical Center. Bruce Heywood indicated that West Valley should be able to get substantially the same contracts that are available to South Towne.

2. The minutes of the Boyer meeting with the City Planning Commission were reviewed. The following were action items that resulted from that discussion:
 - a. The next meeting date with the City is scheduled for November 14th at 7:00p.m. Lynn Summerhays asked that doctors attend if they are available.
 - b. Case volume data with the number of patients expected is needed before the next meeting with the city.
 - c. Boyer to seek for an administrative agreement with Granger for specified parking use as well as discuss with Granger about the relocation of their existing sign to the other side of the ingress/egress.
 - d. Boyer is to seek for 28,000 square feet of parking. (It was indicated that the HealthSouth 39th South and 7th East parking always has vacancies.)

3. The plans were discussed particularly in light of comments made by Barb Klein, Clinical Vice President for ASC Group.
 - a. The doctors wanted to know if the Clean Utility/ Sterile Processing corridor was necessary. Bruce was to address that issue with Barb Klein.
 - b. David Dixon indicated that final plans would be done after the city approved the preliminary set of plans for square footage, etc.
 - c. Dr. McCray asked again whether or not there was a limit on the number of 23-hour stay beds for ASC's. Bruce to find out.

4. The radiologists want a single waiting room area. Discussion with the radiologists about how costs should be shared needs to be initiated. ASC to recommend how to address the following.
 - a. Lease Rate
 - b. Common area cost allocation
 - c. Staff cost sharing, if any
 - d. Allocation of utility costs
 - i. Lynn Summerhays indicated the Radiology space would be sub-metered plus they should be allocated some of the house-metered costs.
 - ii. Also discussed mechanical isolation of radiology

5. Lynn indicated he would present a lease agreement at the next Board of Managers Meeting.

6. Dr. Burrows indicated that Weldon Daines' involvement is pretty well complete and asked whether or not he should be paid now. It was decided that Weldon should be paid \$6,000 now to cover his costs by West Valley, which would be reimbursed by Boyer once the lease is executed and the balance paid to Weldon.

7. Lynn indicated that the owner of the hospital was having a meeting with interested parties in the Pioneer Valley Hospital to determine the appropriate course of action when the lease with Iasis renews in a couple of years. The meeting was to be held at noon on Wednesday at Amichi's next to the E-Center.

8. Dr. McCray asked ASC to provide financial information at the next meeting.

The meeting was Adjourned and the next meeting scheduled for next Tuesday Morning at 6:00 a.m. at Doctor Burrow's office.

FOLLOWUP ACTION ITEMS

ASC

1. ASC to review list of South Towne payers and compare that list with payers it has with current facilities and have preliminary discussions with payers for this facility.
2. ASC to provide Lynn Summerhays with expected number of cases for this facility before November 14th meeting
3. ASC to research 23-hour bed limitation, if any for ASC's in the State of Utah.
4. ASC to indicate reason for Clean Utility/Sterile Processing Corridor.
5. ASC to pay Weldon Daines' actual out of pocket cost for the options on the properties out of West Valley Surgical Center funds.
6. ASC to provide financial information at the next meeting.
7. ASC to make recommendations to Board regarding lease rate, common area charges, common services, etc.

Boyer

1. Boyer to seek approval for 28,000 square feet of parking at the Nov. 14th City meeting.
2. Boyer to seek for an administrative agreement with Granger for specified parking and for moving of monument sign from left of ingress/egress to right of the same.
3. Boyer to provide first draft of lease agreement at the next meeting.
4. David Dixon to incorporate ASC Clinical changes into plans and review at the next meeting.

ADDENDUM EXHIBIT 12

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.

Machine-generated OCR may contain errors.

December 10, 2001 McCray cover letter from Surgical Center to Daines



**WEST VALLEY SURGICAL
CENTER, LLC**

December 10, 2001

Welden L. Daines, CPA
Daines & Associates
425 Medical Drive
Suite 210
Bountiful, UT 84010

RE: West Valley Surgical Center Invoice #9


Dear Welden:

Thank you for the services you rendered to West Valley Surgical Center, LLC during the due diligence and organizational phase of the development. Check Number 1010 in the amount of \$6,000.00 representing payment towards your fee totaling \$50,000 has been prepared by West Valley Surgical Center, LLC. The check will be sent you immediately upon receipt of the conditional release form attached to this letter.

As you know, The Boyer Company, Developer, will pay the balance upon commencement of the lease for the project.

Please call me should you have any questions.

Sincerely,


David McCray, Chairman
West Valley Surgical Center, LLC

Cc: Dan Saale, CFO, ASC Group, L.C.
West Valley Surgical Center Board Members.

Payor:	BOYER WEST VALLEY SURGICAL CTR DEV.	Vendor Id	3820	Date	3/20/2003	Check No.	000023	Check Amount	\$50,000.00
Payee:	DAINES ASSOCIATES								

retain this statement for your records

Line	Name	Invoice	Date	Reference	Amount	Net
57	BOYER WEST VALLEY SURGICAL	OCT 2001	3/20/2003	DEVELOPMENT FEE	50,000.00	50,000.00

Trial Exhibit
603
 CV NO. 03 09 10378
 Bumberg No. 6137

Payor:	BOYER WEST VALLEY SURGICAL CTR DEV.	Vendor Id	3820	Date	3/20/2003	Check No.	000023	Check Amount	\$50,000.00
Payee:	DAINES ASSOCIATES								

retain this statement for your records

BOYER WEST VALLEY SURGICAL CTR D
 90 South 400 West, Suite 200
 Salt Lake City, UT 84101

Zions First National Bank
 One Main Street
 Salt Lake City, UT 84111

1240
 31-1

Date
 3/20/2003

Check No.
 000023

Check Amount
 \$50,000.00

Fifty Thousand AND 00/100 Dollars

to the order of

DAINES ASSOCIATES
 C/O WELDON DAINES
 425 MEDICAL DRIVE
 BOUNTIFUL, UT 84010

ASC000009

Requires two signatures

ADDENDUM EXHIBIT 14

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.

Machine-generated OCR, may contain errors.

Invoice #9 from Daines to Surgical Center

Daines & Associates (w)elden L. Daines, CPA)

Invoice

425 Medical Drive
Suite 210
Bountiful, UT 84010

DATE	INVOICE #
11/1/2001	9

BILL TO
ASC WEST VALLEY SURGICAL CENTER C/O ASC P O BOX 683070 PARK CITY UT 84068

P.O. NO.	TERMS	PROJECT

QUANTITY	DESCRIPTION	RATE	AMOUNT
	PARTIAL FEE FOR BUILDING PORTION WV CITY BALANCE \$44,000.00 PAYABLE UPON SIGNING OF LEASE	6,000 00	6,000 00
	\$50,000 PROMISED BY BOYER COMPANY FOR WORK ON DIFFERENT SITES FOR WV SC BUILDING		
	CORRECTED INVOICE		
		Total	\$6,000 00

ASC001014

ADDENDUM EXHIBIT 16

Digitized by the Howard W. Hunter Law Library, Robert C. Law School, BYU.

Machine-generated OCR, may contain errors.

December 11, 2001 fax from Hayward/Kelsted of ASC Group to Deines



FAX LETTER OF TRANSMITTAL

(3 pages)

VIA FAX AND US MAIL

BH-file

cc: Dan Saale
3 pag

12/12/01
See attached signed "Cond Release of Liability"
Welden

From

Welden L. Daines, CPA
Daines & Associates
425 Medical Drive, Suite 210
Bountiful, UT 84010
Fax: 801/295-2087
295-6551

To

Bruce Heywood/Barbara Kolstad

Attn: Mike Madewe
3 pgs

Date: December 11, 2001

Re: West Valley Surgical Center Invoice #9 - Conditional Release of Liability

Dear Welden:

Bruce asked that the attached memo and Conditional Release of Liability be faxed and mailed to you. Please sign and have Bob Smith sign the waiver and either fax (435/615-6999) or mail it back to us. As soon as we receive the fax or original back we will forward on the \$6,000 check prepared by West Valley Surgical Center, LLC to you.

Please do not hesitate to call if you have any questions.

Thank you.

Cc: Dan Saale, CFO, ASC Group, LC

Kansas City
7520 W. 160th Street
Suite 100
Shawnee Mission, Kansas 66205
(913) 685-2111
Fax (913) 685-2208

Salt Lake City
PO Box 683073
Park City, UT 84088
(435) 615-2000
Fax (435) 615-6999

St. Louis
137 Lincoln Place Ct.
Suite 408
Helleville, IL 62221
(618) 239-0983
Fax (618) 239-0994

Dallas
GoBerlin Tower Two
13455 Noel Rd., Suite 1000
Dallas, TX 75240
(972) 778-8135
Fax (972) 778-8136

www.asc-group.net

ADDENDUM EXHIBIT 17

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.

Machine-generated OCR, may contain errors.

Fax cover sheet from Bruce Heywood of ASC Group to Dan Tasset



ASC GROUP, L.C.

Dan Soble

2052 PROSPECTOR AVE., SUITE 200
P.O. BOX 683070
PARK CITY, UT 84068
(435)615-2000, (435)615-6999 FAX

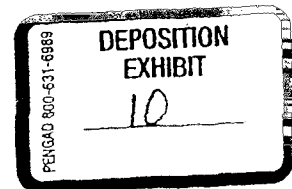
FACSIMILE TRANSMITTAL SHEET

TO: *DAN Tasset* FROM: *Bruce H.*
COMPANY: DATE:
FAX NUMBER: *913 685-2708* TOTAL NO. OF PAGES INCLUDING COVER:
PHONE NUMBER: RE: *Weldon Darnes*
CC:

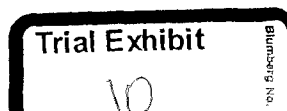
URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

NOTES/COMMENTS:

Highly Important



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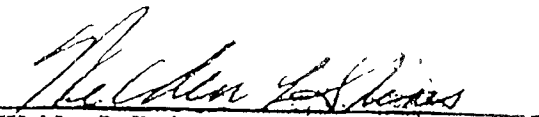



ASC001009

CONDITIONAL RELEASE OF LIABILITY

We, Welden L. Daines and Robert Smith, do hereby conditionally release West Valley Surgical Center, LLC or any of its members from any and all liabilities and or claims in connection with services provided by us for the due diligence, acquisition of real estate, or any other services rendered to date for West Valley Surgical Center, or on behalf of its members, for the organization, development and operation of an ambulatory surgical center in the West Valley and any services connected with the same. This release encompasses and satisfies any prior agreements and discussions whether written or verbal by West Valley Surgical Center, LLC or any of its members.

This release shall be consummated upon the receipt of \$50,000 due and payable from the real estate developer of the West Valley City Surgical Center. In addition, by signing below, we agree that any partial amounts paid against the \$50,000 liability either by West Valley Surgical Center, LLC or by The Royer Company, Developer of the Real Estate for the project for amounts owed us shall become unconditionally released by us upon confirmed receipt of said partial payments.


Welden L. Daines


Robert Smith

ASC001012

The Court, having heard all of the evidence offered by Plaintiff at trial and the arguments of counsel, and construing the evidence in the light most favorable to Plaintiff, finds and concludes as follows:

1. In this case, Plaintiff seeks damages for breach of an alleged oral contract with ASC to transfer to him eight of the twenty units of ownership (“Shares”) held by ASC in West Valley Surgical Center, LLC (now known as Utah Surgical Center, LLC) (“Surgical Center”). Plaintiff seeks an award of specific performance plus delay damages, or, in the alternative, compensatory damages of approximately \$4 million representing the alleged present value of the future earnings Plaintiff claims he would have received from the eight Shares.

2. Defendants deny that any oral contract was formed, but contend that whether or not the contract was formed, Plaintiff signed a fully integrated release and accepted payments totaling \$56,000 pursuant to the release, thereby relinquishing any rights he may have had under the alleged oral contract.

3. In ruling on a motion for directed verdict at the close of Plaintiff’s case, the Court must construe the evidence presented in the light most favorable to Plaintiff and then determine, as a matter of law, whether there is any reasonable basis in the evidence and inferences to be drawn therefrom that would support a judgment in favor of Plaintiff. *See Management Comm. of Graystone Pine Homeowners Ass’n v. Graystone Pines, Inc.*, 652 P.2d 896, 897-98 (Utah 1982).

4. Construed in the light most favorable to Plaintiff, there is barely a scintilla of evidence, consisting solely of the testimony of Plaintiff, that Plaintiff and ASC entered into an oral agreement by which ASC agreed to give Plaintiff eight of its Shares in West Valley Surgical

Center, LLC. Plaintiff testified that the agreement was reached in a meeting between himself and Richard Vincent on December 13, 2000, and that the consideration for the oral agreement consisted of Plaintiff giving up his right to receive \$150,000 as a finder's fee pursuant to an earlier written Memorandum of Understanding and Non-Disclosure Agreement ("MOU") (Trial Ex. 2). In essence, Plaintiff testified that ASC agreed to give him the eight Shares to avoid the obligation to pay him the \$150,000, which would have been payable \$50,000 upon start-up of the Surgical Center and the balance in 24 monthly installments thereafter.

5. The Court notes, however, that for the jury to find the existence of the alleged oral contract, it would have had to ignore the following facts presented during Plaintiff's case:

(a) Plaintiff had a long-standing professional relationship with certain physicians who were interested in establishing a surgical center in West Valley. One of those physicians, Dr. Burrows, who testified on behalf of Plaintiff, was paying Plaintiff a monthly retainer to act as his financial advisor. Both Dr. Burrows and Plaintiff agreed that Plaintiff owed Dr. Burrows fiduciary duties.

(b) Plaintiff testified that Dr. Burrows asked Plaintiff to assist in finding a company that could set up a surgical center for him and his colleagues. Unbeknownst to Dr. Burrows, Plaintiff approached ASC but refused to introduce the doctors unless ASC signed the MOU agreeing that ASC, or the surgical center to be formed, would pay Plaintiff a \$150,000 finder's fee.

(c) Dr. Burrows did not learn of the existence of the MOU until months after litigation commenced, more than three years after it was signed, and well after the Surgical Center began operations. Dr. Burrows testified that he and the other physicians never would have agreed to pay Plaintiff just for introducing them to ASC.

(d) Plaintiff testified that the alleged oral agreement was made on December 13, 2000, yet there is not a single piece of paper that reflects or even alludes to the alleged agreement. There are no notes of the meeting. There is no confirmatory letter or email. In the winter of 2000-2001, Plaintiff did not mention the existence of the alleged eight Shares agreement to any of the doctors or anyone at ASC (other than the claimed conversation with Richard Vincent on December 13). None of the various term sheets exchanged between ASC and the doctors mention anything about Plaintiff's alleged right to receive eight Shares.

(e) Plaintiff's own damages expert, Scott Stuart, testified that it would be unreasonable for any business to agree to give Plaintiff eight Shares with a discounted cash flow of approximately \$4 million to avoid paying \$150,000 under the MOU.

(f) Plaintiff admitted that he met with Richard Vincent and Bruce Heywood of ASC on December 20, 2000, one week after the alleged agreement. The only notes of that meeting indicate there was a discussion about "4 shares" or

“pay the fee” to Plaintiff. (Trial Exs. 65, 34). This contradicts Plaintiff’s testimony that there had been an oral agreement the week before to give Plaintiff eight Shares.

(g) There was testimony from Dr. Burrows that the doctors met with Plaintiff in December 2000. During that meeting, they had a discussion about the fact that Plaintiff could not represent both ASC and the doctors in the negotiations surrounding the Surgical Center. Dr. Burrows testified that he would have considered it a conflict of interest for Plaintiff to be paid a fee by ASC and at the same time negotiate on behalf of the doctors. According to Dr. Burrows, Plaintiff and the doctors agreed that Plaintiff would therefore proceed solely to represent the doctors in negotiations for the Surgical Center. Plaintiff specifically testified that he worked to negotiate the best deal he could for the doctors, because he owed them an obligation as his clients.

(h) Plaintiff admitted that he had a conversation with Richard Vincent on January 4, 2001, in which he told ASC that he had “torn up” the MOU and would be working solely for the doctors. (Trial Ex. 32.) By this point, the MOU had been voluntarily terminated and abandoned.

(i) On January 10, 2001, Plaintiff sent an email to ASC in which he clearly was negotiating on behalf of the doctors, and against ASC, some of the critical terms that needed to be decided before the Surgical Center could be

formed. Plaintiff testified that he reviewed all of the term sheets on behalf of the doctors.

(j) The initial term sheets had been prepared and presented in November 2000 and contained language proposing that the Surgical Center (not ASC) pay Plaintiff a fee of \$150,000 under the MOU, or that unspecified cash or equity to be agreed upon be paid to Plaintiff's company. (Trial Exs. 3, 4.) But, in his January 10 email, in addition to the changes to the term sheet he proposed on behalf of the doctors, Plaintiff specifically wrote: "Nothing for me." (Trial Ex. 73.) Consistent with this statement, none of the term sheets prepared thereafter, up to and including the final term sheet signed by ASC and the doctors in February 2001, contains a provision for any compensation, in the form of equity or a fee, to Plaintiff or his company. (Trial Exs. 52, 54, 8.)

(k) During the course of the negotiations between ASC and the doctors, Plaintiff negotiated aggressively on behalf of the doctors and was able, *inter alia*, to get ASC to reduce its development fee by \$100,000 and reduce the initial term of its management agreement from ten to five years. (Trial Exs. 3, 5, 8.)

(l) After the final term sheet was signed in February 2001 (Trial Ex. 8), a Private Placement Memorandum was prepared ("PPM"). The PPM provided that only ASC could purchase *and hold* Class II Shares in the Surgical Center,

and that no one other than ASC could hold more than five Shares. (Trial Ex. 56.) Under the PPM, the transfer of eight Shares to Plaintiff would not have been permitted.

(m) Plaintiff estimated that he worked approximately fifty hours during the introduction and due diligence period from September 2000 through November 16, 2000. If Plaintiff were to receive the approximately \$4 million in damages sought through this lawsuit, he would be compensated at the rate of approximately \$80,000 per hour for this work. The unreasonableness of the compensation further casts doubt on the existence of an oral agreement.

(n) Plaintiff testified that he called Richard Vincent of ASC on September 25, 2001, and asked about his eight Shares, and that Vincent's response was "What eight Shares?" Plaintiff testified that he made this phone call because he was "uncomfortable" with how things were proceeding, and that it was clear to him after that call that ASC was disputing there was an oral agreement to give him eight Shares.

(o) Plaintiff's own handwritten notes, which he testified he made around September 25, 2001, do not reflect an actual agreement to give him eight Shares. Rather, they say "All we *asked for* was 8 shares for me." (Trial Ex. 64, emphasis added.)

6. The Court has serious doubts whether there is a reasonable basis in the evidence to support a finding that an enforceable oral contract was formed and doubts that any reasonable jury could so find. But it is not necessary to make this determination in order to resolve the motion for a directed verdict. Accordingly, and for purposes of this motion, the Court will assume that the alleged oral agreement was made.

7. The evidence is uncontroverted that ASC disputed the existence of the alleged oral agreement in a telephone conversation between Plaintiff and Richard Vincent on or about September 25, 2001.

8. The evidence is uncontroverted, including admissions by Plaintiff, that Plaintiff had, prior to September 30, 2001, rendered services relating to the due diligence, the acquisition of real estate, and the organization, development, and operation of what became the Surgical Center.

9. The evidence is uncontroverted that in the fall of 2001 there were discussions among the members of West Valley Surgical Center, LLC concerning whether and how much Plaintiff should be paid for his services related to the Surgical Center. It was determined that Plaintiff, and another party, would be paid \$50,000, and that the money would come from the Boyer Company, the company selected as developer of the real estate for the Surgical Center.

10. On October 29, 2001, Plaintiff faxed to Dr. Burrows, his client and a member of the Board of Managers for West Valley Surgical Center, a message that said: "Since we are done with our work on W[est] V[alley] we would appreciate seeing if you can get immediate payment from Boyer." (Trial Ex. 80.) Attached to the fax cover sheet was a letter to The Boyer Company

in which Plaintiff stated: "As we agreed verbally, Bob Smith and I will accept \$50,000.00 as payment for our services. I believe we have finished our work at this time and should be paid."

(Id.)

11. As of December 2001, the members of West Valley Surgical Center, LLC included approximately twenty physicians and ASC. It is uncontroverted that Plaintiff knew at that time that the members of West Valley Surgical Center, LLC included ASC.

12. Plaintiff received and read a cover letter, dated December 10, 2001, from Dr. McCray, Chairman of West Valley Surgical Center. (Trial Exs. 10 & 62.) The cover letter states, in part:

Thank you for the services you rendered to West Valley Surgical Center, LLC *during the due diligence and organizational phase of the development*. Check Number 1010 in the amount of \$6,000.00 representing payment *towards your fee totaling \$50,000 has been prepared by West Valley Surgical Center, LLC*. The check will be sent to you immediately upon receipt of the conditional release form attached to this letter.

As you know, The Boyer Company, Developer, will pay the balance upon commencement of the lease for the project.

(Emphasis added.)

13. Enclosed with the cover letter from Dr. McCray was a document entitled "Conditional Release of Liability" ("Release"). (Trial Exs. 10, 35, 62.) (Trial Ex. 35 is attached hereto.)

14. The Release is clear and unambiguous as a matter of law. Its broad and all-encompassing language provides:

We, Welden L. Daines and Robert Smith, do hereby conditionally release West Valley Surgical Center, LLC or any of its members from any and all liabilities and or claims in connection with services provided by us for the due diligence, acquisition of real estate, or any other services rendered to date for West Valley Surgical Center, or on behalf of its members, for the organization, development and operation of an ambulatory surgical center in West Valley and any services connected with the same.

15. The term “members,” which is repeated several times in the Release, clearly includes ASC and the member physicians.

16. Plaintiff and two of his witnesses testified that Plaintiff had performed a list of services prior to September 30, 2001. That list of services tracks the specific services recited in the Release. Moreover, the Release used all-encompassing language such as “any and all liabilities and or claims,” “any other services,” and “any other services rendered to date” in addition to the services specifically listed in the Release. Any claim that Plaintiff conceivably had that related in any way to his services in connection with the Surgical Center was clearly and unambiguously covered by the Release.

17. Dr. Burrows testified that he saw the Release before it was sent to Plaintiff, that it was a broad release intended to protect the Surgical Center and its members from any continuing responsibilities or liabilities for any financial obligations to Plaintiff for anything having to do with the development of the Surgical Center, and that ASC was “by definition” a member of the Surgical Center. Plaintiff admitted that ASC was a member of West Valley Surgical Center, LLC, at the time he signed the Release.

18. There is no question that the Release operated in favor of ASC as an undisputed member of West Valley Surgical Center, LLC. Plaintiff's counsel conceded in oral argument that the Release applied in favor of West Valley Surgical Center, LLC and all of the doctors who are its members. By the express language of the Release and the logic of Plaintiff's counsel's own argument, the Release also applies in favor of ASC as an undisputed member of the Surgical Center at the time the Release was signed.

19. On November 1, 2001, Plaintiff sent to ASC, on behalf of the Surgical Center, an invoice (Trial Ex. 10) purporting to suggest that the \$50,000 payment covered only his efforts to locate a site for the Surgical Center. A month after the invoice was sent, however, Plaintiff received and read the cover letter (Trial Ex. 10) and the Release, which clearly and unambiguously applied to any and all services Plaintiff provided or performed in connection with the Surgical Center, not merely the real estate activities.

20. Plaintiff read and signed the Release, and requested no changes to the language of the Release.

21. Plaintiff is a sophisticated businessman and Certified Public Accountant, and concedes that he was not under any duress or disability when he signed the Release.

22. The Release contains an integration clause stating: "This release encompasses and satisfies any prior agreements and discussions whether written or verbal by West Valley Surgical Center, LLC or any of its members."

23. As a result of the integration clause, the Release clearly and unambiguously supersedes any and all other contracts, whether written or oral, between Plaintiff and the Surgical

Center, or any of its members, including ASC, and clearly and unambiguously covers any previous agreements, discussions, or understandings, including the alleged oral contract of December 13, 2000, to transfer eight Shares.

24. The Release was conditioned only on Plaintiff's receipt of future payments. Plaintiff received those payments in the form of a check for \$6,000 from West Valley Surgical Center, LLC, and a check for \$50,000 from The Boyer Company, and thereupon the conditions of the Release were fully satisfied.

25. By signing the Release and accepting the payments without any protest or complaint, Plaintiff voluntarily released and discharged ASC from any and all claims in connection with his services relating to the West Valley Surgical Center, gave up any right he may have had to receive further compensation from ASC for such services, under the alleged oral agreement or otherwise, and gave up any right he may have had to pursue the claims asserted against ASC in this lawsuit.

26. Plaintiff offered no evidence that would support an alternative interpretation of the Release that is plausible and reasonable in light of the language used in the Release. *See, e.g., Saleh v. Farmers Ins. Exch.*, 2006 UT 20 ¶ 17. The construction and interpretation of the Release is therefore a question of law for the Court.

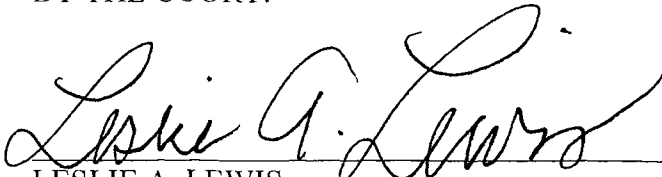
27. Construing all of the evidence presented at trial in the light most favorable to Plaintiff, and based on the plain and unambiguous language of the Release, the Court concludes that reasonable minds could not differ on the interpretation of the Release. As a matter of law, Plaintiff released and discharged ASC from the claims Plaintiff has asserted in this lawsuit.

Based on the foregoing, it is hereby ORDERED, ADJUDGED, AND DECREED that:

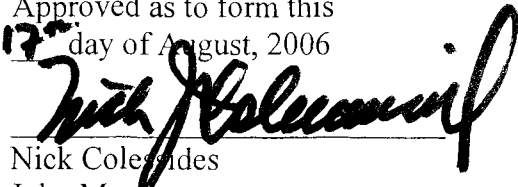
1. A directed verdict shall be and hereby is entered in favor of ASC Group, L.C., and against Plaintiff on all of Plaintiff's claims;
2. All of Plaintiff's claims against ASC Group, L.C., shall be and hereby are dismissed with prejudice; and
3. Judgment shall be entered in favor of ASC Group, L.C., and against Plaintiff.

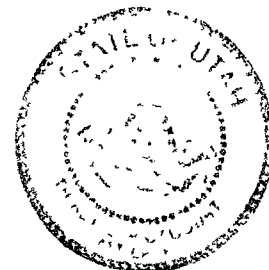
DATED this 22nd day of August, 2006.

BY THE COURT:


LESLIE A. LEWIS
DISTRICT COURT JUDGE

Approved as to form this
17th day of August, 2006


Nick Cole and
John Martinez
Attorneys for Plaintiff



CERTIFICATE OF SERVICE

I hereby certify that on this 15^m day of August, 2006, I caused to be hand delivered a true and correct copy of the foregoing **[PROPOSED] ORDER GRANTING MOTION FOR DIRECTED VERDICT ON ALL CLAIMS AGAINST ASC GROUP, L.C.**, to:

Nick J. Colessides
466 South 400 East, Suite 100
Salt Lake City, UT 84111-3325

John Martinez
2974 East St. Mary's Circle
Salt Lake City, UT 84108

Attorneys for Plaintiff

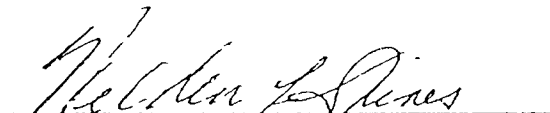
A handwritten signature in black ink, appearing to read "Michael J. Petrucci". The signature is written in a cursive style with a horizontal line drawn through the middle of the letters.

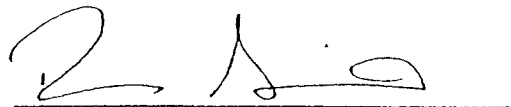
“APPENDIX A”

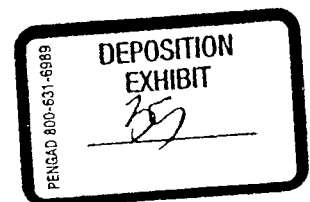
CONDITIONAL RELEASE OF LIABILITY

We, Welden L. Daines and Robert Smith, do hereby conditionally release West Valley Surgical Center, LLC or any of its members from any and all liabilities and or claims in connection with services provided by us for the due diligence, acquisition of real estate, or any other services rendered to date for West Valley Surgical Center, or on behalf of its members, for the organization, development and operation of an ambulatory surgical center in the West Valley and any services connected with the same. This release encompasses and satisfies any prior agreements and discussions whether written or verbal by West Valley Surgical Center, LLC or any of its members.

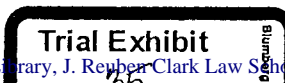
This release shall be conditioned upon the receipt of \$50,000 due and payable from the real estate developer of the West Valley City Surgical Center. In addition, by signing below, we agree that any partial amounts paid against the \$50,000 liability either by West Valley Surgical Center, LLC or by The Boyer Company, Developer of the Real Estate for the project for amounts owed us shall become unconditionally released by us upon confirmed receipt of said partial payments.


Welden L. Daines


Robert Smith



0029



ADDENDUM EXHIBIT 20

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Judge Lewis Directed Verdict Order-for Vincent

Prepared and proposed by
FRANCIS M. WIKSTROM (3462)
MICHAEL P. PETROGEORGE (8870)
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Salt Lake City, UT 84111
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

FILED DISTRICT COURT
Third Judicial District

AUG 22 2006

SALT LAKE COUNTY
Deputy Clerk

Attorneys for Defendants

**IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH**

WELDEN L. DAINES,

Plaintiff,

vs.

RICHARD B. VINCENT, and ASC GROUP,
L.C.,

Defendants.

**ORDER GRANTING MOTION FOR
DIRECTED VERDICT ON ALL OF
PLAINTIFF'S CLAIMS AGAINST
RICHARD VINCENT, INDIVIDUALLY**

Judge Leslie A. Lewis

030910378

This matter came on regularly for jury trial, commencing August 7, 2006. Plaintiff Welden Daines ("Plaintiff") rested his case on August 8, 2006. Defendants Richard B. Vincent and ASC Group, L.C. then made several motions for directed verdicts pursuant to Rule 50(a) of the Utah Rules of Civil Procedure, including a motion for a directed verdict in favor of Mr. Vincent and against Plaintiff on all of Plaintiff's claims against Mr. Vincent individually.¹

¹ By separate orders, this Court has entered a directed verdict in favor of Defendant ASC Group, L.C. and against Plaintiff, dismissing all of Plaintiff's claims against ASC Group, L.C., with prejudice,

The Court, having heard all of the evidence offered by Plaintiff at trial in support of his claims and argument from the parties, and construing all of the evidence in the light most favorable to Plaintiff, finds and concludes as follows:

1. In ruling on a motion for directed verdict at the close of Plaintiff's case, the Court must construe the evidence presented in the light most favorable to Plaintiff and then determine, as a matter of law, whether there is any reasonable basis in the evidence and inferences to be drawn therefrom that would support a judgment in favor of Plaintiff. *See Management Comm. of Graystone Pine Homeowners Ass'n v. Graystone Pines, Inc.*, 652 P.2d 896, 897-98 (Utah 1982).

2. Plaintiff has presented no evidence to establish that Defendant Richard Vincent was acting in an individual rather than in a representative capacity on behalf of ASC Group, or that he undertook or breached any duty to Plaintiff as an individual.

3. The only evidence urged by Plaintiff as supporting a claim against Mr. Vincent individually is the Memorandum of Understanding and Non-Disclosure Agreement ("MOU"), drafted by Plaintiff. Even if the Court were to assume that the MOU was still in effect, notwithstanding the undisputed evidence that it was not, it is clear from the document that Mr. Vincent signed in a representative capacity on behalf of ASC Group.

4. Plaintiff offered no other evidence at trial to establish that Mr. Vincent, during the course of his dealings with Plaintiff, acted in an individual capacity, rather than as a representative of ASC Group.

and a directed verdict in favor of Defendants and against Plaintiff, dismissing Plaintiff's fraud and punitive damage claims, with prejudice.

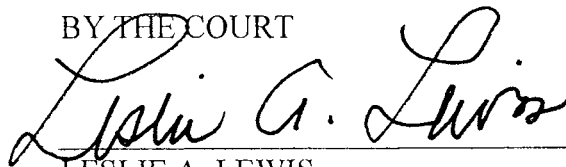
5. Even viewing all of the evidence presented at trial in the light most favorable to Plaintiff, no reasonable jury could conclude that Defendant Mr. Vincent acted in any way other than as a representative of ASC Group in his dealings with Plaintiff.

Based on the foregoing, it his hereby ORDERED, ADJUDGED, AND DECREED that:

1. A directed verdict shall be and hereby is entered in favor of Richard Vincent and against Plaintiff on all of Plaintiff's claims against Richard Vincent individually;
2. All of Plaintiff's individual claims against Richard Vincent shall be and hereby are dismissed with prejudice; and
3. Judgment shall be entered in favor of Defendant Richard Vincent and against Plaintiff.

DATED this 22nd day of August, 2006:

BY THE COURT



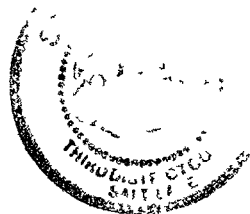
LESLIE A. LEWIS

THIRD DISTRICT COURT JUDGE

Approved as to form this
17th day of August, 2006



Nick Colesides
John Martinez
Attorneys for Plaintiff



CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2006, I caused to be hand-delivered a true and correct copy of the foregoing **[PROPOSED] ORDER GRANTING MOTION FOR DIRECTED VERDICT ON ALL OF PLAINTIFF'S CLAIMS AGAINST RICHARD VINCENT INDIVIDUALLY**, to:

Nick J. Colessides
466 South 400 East, Suite 100
Salt Lake City, Utah 84111-3325

John Martinez
2974 East St. Mary's Circle
Salt Lake City, Utah 84108

Attorneys for Plaintiff

A handwritten signature in black ink, reading "Michael Petrogenze". The signature is written in a cursive style and is positioned over a horizontal line.

Prepared and proposed by
FRANCIS M. WIKSTROM (3462)
MICHAEL P. PETROGEORGE (8870)
Parsons Behle & Latimer
One Utah Center
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

FILED DISTRICT COURT
Third Judicial District

AUG 7 / 2006

By SALT LAKE COUNTY
Deputy Clerk

Attorneys for Defendants

**IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH**

WELDEN L. DAINES,

Plaintiff,

vs.

RICHARD B. VINCENT, and ASC GROUP,
L.C.,

Defendants.

**ORDER GRANTING MOTION FOR
DIRECTED VERDICT ON
PLAINTIFF'S CLAIMS FOR
FRAUDULENT INDUCEMENT AND
PUNITIVE DAMAGES**

Judge Leslie A. Lewis

This matter came on regularly for jury trial, commencing August 7, 2006. Plaintiff Welden Daines ("Plaintiff") rested his case on August 8, 2006. Defendants Richard B. Vincent and ASC Group, L.C. (collectively "Defendants") then made motions for directed verdicts pursuant to Rule 50(a) of the Utah Rules of Civil Procedure on each of Plaintiff's claims for

relief, including a motion for directed verdicts in favor of Defendants and against Plaintiff on his claims for fraudulent inducement and punitive damages ¹

The Court, having heard all of the evidence offered by Plaintiff at trial in support of his claims and argument from the parties, and construing all of the evidence in the light most favorable to Plaintiff, finds and concludes as follows

1 Plaintiff's fraud claim is based on his assertion that Defendant ASC Group, L C , by and through Mr Vincent, represented that it would transfer to him eight of ASC Group's twenty units of interest ("Shares") in West Valley Surgical Center, LLC ("Surgical Center"), and that Plaintiff relied on that representation in foregoing his right to payment of \$150,000 under a Memorandum of Understanding and Non-Disclosure Agreement ("MOU") (Trial Ex 2) and/or continuing to participate in the formation, organization, and development of the Surgical Center

2 To prevail on this claim, Plaintiff must establish, by clear and convincing evidence, that (1) Defendants made a representation, (2) concerning a presently existing and material fact, (3) which was false, (4) which Defendants either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation, (5) for the purpose of inducing Plaintiff to act upon it, (6) that Plaintiff, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it, (8) and was thereby induced to act, (9) to his

¹By separate Orders, this Court has entered a directed verdict in favor of defendant Richard Vincent and against Plaintiff dismissing all of Plaintiff's claims against Mr Vincent, as an individual, with prejudice, and a directed verdict in favor of ASC Group, L C , and against Plaintiff, dismissing all of Plaintiff's claims based on a release of liability voluntarily signed by Plaintiff

injury and damage. *See The Republic Group, Inc. v. Won-Dor Corp.*, 883 P.2d 285, 292 (Utah Ct. App. 1994).

3. In ruling on a motion for directed verdict at the close of Plaintiff's case, the Court must construe the evidence presented in the light most favorable to Plaintiff and then determine, as a matter of law, whether there is any reasonable basis in the evidence and inferences to be drawn therefrom that would support a judgment in favor of Plaintiff. *See Management Comm. of Graystone Pine Homeowners Ass'n v. Graystone Pines, Inc.*, 652 P.2d 896, 897-98 (Utah 1982).

4. Although the evidence of a representation is extremely thin, there is some evidence that it was made. Therefore, the Court must find that this element is satisfied for purposes of Rule 50(a).

5. For a representation to constitute a false statement of presently existing and material fact, however, Plaintiff must prove, by clear and convincing evidence, that Defendants had no present intent to transfer the eight Shares at the time the representation was made. *See Republic Group*, 883 P.2d at 292. Construing all evidence in favor of Plaintiff, Plaintiff did not satisfy his burden on this element. Plaintiff has offered no evidence that ASC Group had no present intent to transfer the eight Shares to Plaintiff, or that the statement was knowingly false or recklessly made.

6. Even assuming that there is sufficient evidence for a reasonable juror to conclude that the alleged representation was made, Plaintiff has presented no evidence to establish that Defendants did not intend to transfer the eight Shares at the time that statement was made, or that Defendants made the representation with any intent to induce Plaintiff to take action in reliance

thereon, and no reasonable juror could find for Plaintiff on his fraud claim based on the evidence presented at trial.

7. Plaintiff's claim is at best a breach of contract claim and, based on the evidence presented by Plaintiff, the contract claim cannot be elevated into a fraud claim.

8. Plaintiff's punitive damage claim is based entirely on his claim for fraudulent inducement.

9. To recover punitive damages, Plaintiff must prevail on his fraud claim, and must prove, by clear and convincing evidence, that Defendants engaged in willful and malicious or intentionally fraudulent conduct, or in conduct that demonstrated a knowing and reckless indifference toward, and a disregard of, the rights of others. *See* U.C.A. § 78-18-1 (2006); *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 807 n.23 (Utah 1991). Willful and malicious misconduct is that which is done with an evil intent or motive, and with the purpose of injuring Plaintiff. *Calhoun v. Universal Credit Co.*, 146 P.2d 284 (Utah 1944).

10. Plaintiff has presented no evidence to establish that Defendants acted with any such intent, motive, or purpose, and no reasonable juror could find, based on the evidence presented at trial, that Plaintiff is entitled to an award of punitive damages.

11. Even giving the Plaintiff the benefit of all reasonable inferences, the most that has been proved is that Defendants breached an oral contract to transfer to Plaintiff eight of ASC Group's twenty Shares in West Valley Surgical Center, LLC. As a matter of law, punitive damages are not available for a breach of contract. *See, e.g., Norman v. Arnold*, 2002 UT 81, ¶ 35, 57 P.2d 997, 1006.

Based on the foregoing, it is hereby ORDERED, ADJUDGED, AND DECREED that:

1. A directed verdict shall be and hereby is entered in favor of Defendants and against Plaintiff on Plaintiff's claim for fraudulent inducement to contract;

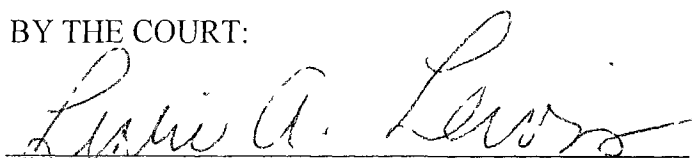
2. A directed verdict shall be and hereby is entered in favor of Defendants and against Plaintiff on Plaintiff's claim for punitive damages;

3. Plaintiff's claims for fraudulent inducement and punitive damages shall be and hereby are dismissed with prejudice; and

4. Judgment shall be entered in favor of Defendants, and against Plaintiff, on Plaintiff's claims for fraudulent inducement and punitive damages.

DATED this 22nd day of August, 2006.

BY THE COURT:

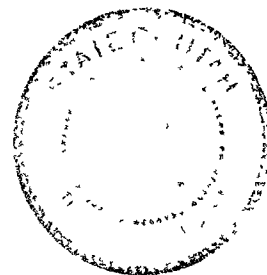


LESLIE A. LEWIS
THIRD DISTRICT COURT JUDGE

Approved as to form this
17th day of August, 2006



Nick Colesides
John Martinez
Attorneys for Plaintiff



CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2006, I caused to be hand-delivered a true and correct copy of the foregoing **[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION FOR DIRECTED VERDICT ON PLAINTIFF'S CLAIMS FOR FRAUDULENT INDUCEMENT AND PUNITIVE DAMAGES**, to:

Nick J. Colessides
466 South 400 East, Suite 100
Salt Lake City, UT 84111-3325

John Martinez
2974 East St. Mary's Circle
Salt Lake City, UT 84108

Attorneys for Plaintiff

A handwritten signature in black ink, reading "Michael Petrovich", written over a horizontal line.

Oct 11 PM 1:08

Prepared and proposed by:
FRANCIS M. WIKSTROM (3462)
MICHAEL P. PETROGEORGE (8870)
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
Telephone: (801) 532-1234
Facsimile: (801) 536-6111

M. Snare

Attorneys for Defendants

**IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH**

WELDEN L. DAINES,

Plaintiff,

vs.

RICHARD B. VINCENT, and ASC
GROUP, L.C.,

Defendants.

JUDGMENT

Case No. 030910378

Judge Leslie A. Lewis

This matter came on regularly for jury trial, the Honorable Leslie A. Lewis, District Judge, presiding, and the Court, having heard all of Plaintiff's evidence and the arguments of counsel, and having previously entered an Order Granting Motion for Directed Verdict on All of Plaintiff's Claims Against Richard Vincent, an Order Granting Motion for Directed Verdict on All Claims Against ASC Group, L.C., and an Order Granting Motion for Directed Verdict on Plaintiff's Claims for Fraudulent Inducement and Punitive Damages, and good cause appearing, it is hereby,

ORDERED, ADJUDGED, AND DECREED that judgment shall be and hereby is entered in favor of Defendants Richard L. Vincent and ASC Group, L.C., and against Plaintiff Welden L. Daines, that Plaintiff take nothing, that the action be dismissed on the merits and with prejudice, and that Defendants recover court costs from Plaintiff.

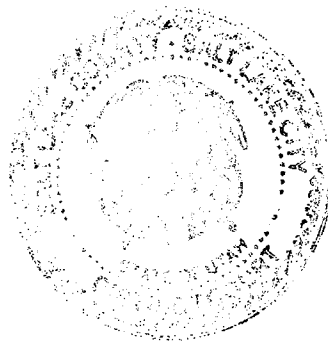
DATED this 10th day of ~~September~~ ^{Oct.}, 2006.

BY THE COURT:

Leslie A. Lewis

LESLIE A. LEWIS
DISTRICT COURT JUDGE

mem: objections denied



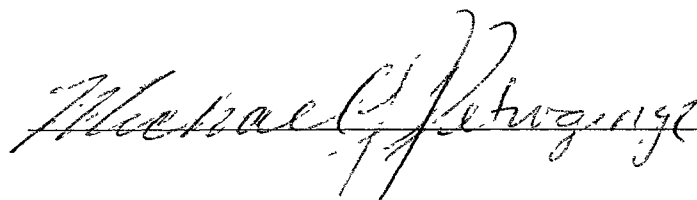
CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September, 2006, I caused to be sent by U.S. Mail, postage pre-paid, a true and correct copy of the foregoing [proposed] **JUDGMENT** to:

Nick J. Colessides
466 South 400 East, Suite 100
Salt Lake City, UT 84111-3325

John Martinez
2974 East St. Mary's Circle
Salt Lake City, UT 84108

Attorneys for Welden L. Daines

A handwritten signature in cursive script, reading "Michael J. Rutledge". The signature is written in black ink and is positioned on the right side of the page, below the attorney information.

ADDENDUM EXHIBIT 23

Digitized by the Howard M. Hunter Law Library, Cumberland Law School, BYU.

Machine-generated OCR, may contain errors.

Excerpt from Tasset deposition which was attached as Exhibit A to Reply pleading

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

WELDEN L. DAINES, : **COPY**
 :
 Plaintiff, :
 :
 vs. : Case No. 030910378
 : Judge Noel
 RICHARD B. VINCENT, and ASC GROUP, :
 L.C., Utah limited liability :
 company, :
 :
 Defendants. :
 :

DEPOSITION UPON ORAL EXAMINATION OF
DANIEL R. TASSET

TAKEN AT: 466 South 400 East
Suite 100
Salt Lake City, Utah 84111
DATE: February 25, 2004
REPORTED BY: AMBER PARK, RPR, CSR



353 SOUTH RIO GRANDI SUITE F
SALT LAKE CITY, UTAH 84101
(801) 328-1188 / 1 800 DEPOMAX
FAX 328 1189



INDEX

1

2

3

4

5

1 Q But Boyer paid that?

2 A That was a condition of him doing the
3 development of the real estate but it was to satisfy
4 money that he wanted for helping on putting this
5 project together. That's the way I understood it,
6 Nick.

7 Q I respect that and I appreciate that. But
8 that money in it's totality came from different bank
9 accounts, it did not come from any bank account that
10 was connected either with the ASC or the Utah Surgical
11 Center, isn't that correct?

12 A All but the 6,000. The 50 the answer is
13 correct, the 6,000 came from the Utah Surgery Center.

14 Q Excellent, thank you.

15 A That we are a member.

16 Q But did you personally -- did you have an
17 expectation that Welden Daines would put you in touch
18 with the doctors and receive no compensation, is that
19 what your expectation was in September of the year
20 2000?

21 A My expectation would be at that time,
22 September of 2000 or thereabouts, that he would put us
23 in touch with the doctors, help with the process and
24 likely receive some compensation.

25 Q Good. You did not expect Welden's

1 services to be a gift to you, did you?

2 A I expected someone would pay him
3 something.

4 Q That's not the question, Mr. Tasset.
5 Listen to the question, it's a very simple question.
6 Did you expect Mr. Daines to make a gift of his
7 services to ASC Group?

8 A Yes.

9 Q You expected that? Did you have any
10 discussion about that?

11 A With who?

12 Q I don't know. With whom? You've got to
13 tell me that.

14 A No.

15 Q Did you discuss that part with
16 Mr. Vincent?

17 A You asked if that was my expectation that
18 we would get the introduction of these doctors.

19 Q For nothing?

20 A Absolutely.

21 Q As a gift?

22 A Yes.

23 Q Despite the written agreement that you
24 had?

25 A Now the written agreement stated that

INDI
1
2
3



ASC GROUP, L.C.

Dan Seale

2052 PROSPECTOR AVE., SUITE 200
P.O. BOX 683070
PARK CITY, UT 84068
(435)615-2000, (435)615-6999 FAX

FACSIMILE TRANSMITTAL SHEET

TO: DAN Tasset FROM: Bruce H.
COMPANY: DATE:
FAX NUMBER: 913 685-2708 TOTAL NO. OF PAGES INCLUDING COVER:
PHONE NUMBER: RE: Welden Dames
CC:

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

NOTES/COMMENTS.

Highly Important!

DEPOSITION EXHIBIT 10
PENGAD 800-631-6989

THE INFORMATION TRANSMITTED WITH THIS COVER SHEET IS CONFIDENTIAL AND MAY BE PROTECTED FROM DISCLOSURE BY LAW AS PROPRIETARY INFORMATION. IT IS INTENDED FOR THE EXCLUSIVE USE OF THE RECIPIENT NAMED ABOVE. IF YOU ARE NOT THE RECIPIENT NAMED ABOVE, YOU ARE HEREBY NOTIFIED THAT ANY USE, COPYING, DISCLOSURE OR DISTRIBUTION OF THE INFORMATION WITH THIS COVER SHEET MAY BE SUBJECT TO LEGAL RESTRICTION OR SANCTION, AND YOU ARE REQUESTED TO CALL ASC GROUP AT 435-615-6999 TO ARRANGE FOR THE RETURN OR DESTRUCTION OF THE INFORMATION AND ALL COPIES.

Trial Exhibit
Blumenthal
No.

ASC001009



FAX LETTER OF TRANSMITTAL

(3 pages)

VIA FAX AND US MAIL

BH-file²

cc: Dan Saalc
3 pages

12/12/01
See attached signed "Cond. Release of Liability"
Walden

From:

Walden L. Daines, CPA
Daines & Associates
425 Medical Drive, Suite 110
Bountiful, UT 84010
Fax: 801/295-2987
292-6551

To:

Bruce Heywood/Barnara Kolstad

Date:

December 11, 2001

Re:

West Valley Surgical Center Invoice #9 - Conditional Release

Attn: Mike Madewe
3/11/01

Dear Walden

Bruce asked that the attached memo and Conditional Release of Liability be faxed and mailed to you. Please sign and have Bob Smith sign the waiver and either fax (435/615-6999) or mail it back to us. As soon as we receive the fax or original back we will forward on the \$6,000 check prepared by West Valley Surgical Center, LLC to you.

Please do not hesitate to call if you have any questions.

Thank you.

cc: Dan Saalc, CPO, ASC Group, LC

Kansas City
7520 W. 160th Street
Suite 100
Shawnee Mission, Kansas 66205
(913) 685-2111
Fax (913) 685-2208

Salt Lake City
PO Box 683079
Park City, UT 84068
(435) 615-2100
Fax (435) 615-6919

St. Louis
137 Lincoln Place Ct.
Suite 408
Hellsville, IL 62231
(618) 239-0983
Fax (618) 289-0994

Dallas
Galleria Tower Two
13455 Noel Rd., Suite 1000
Dallas, TX 75240
(972) 778-8135
Fax (972) 778-8136

www.ascgroup.net



**WEST VALLEY SURGICAL
CENTER, LLC**

December 10, 2001

Welden L. Daines, CPA
Daines & Associates
425 Medical Drive
Suite 210
Bountiful, UT 84010

RE: West Valley Surgical Center Invoice #9

Dear Welden:

Thank you for the services you rendered to West Valley Surgical Center, LLC during the due diligence and organizational phase of the development. Check Number 1010 in the amount of \$6,000.00 representing payment towards your fee totaling \$50,000 has been prepared by West Valley Surgical Center, LLC. The check will be sent you immediately upon receipt of the conditional release form attached to this letter.

As you know, The Boyer Company, Developer, will pay the balance upon commencement of the lease for the project.

Please call me should you have any questions.

Sincerely,


David McCray
David McCray, Chairman
West Valley Surgical Center, LLC


Co: Dan Saale, CFO, ASC Group, L.C
West Valley Surgical Center Board Members.

CONDITIONAL RELEASE OF LIABILITY

We, Welden L. Daines and Robert Smith, do hereby conditionally release West Valley Surgical Center, LLC or any of its members from any and all liabilities and or claims in connection with services provided by us for the due diligence, acquisition of real estate, or any other services rendered to date for West Valley Surgical Center, or on behalf of its members, for the organization, development and operation of an ambulatory surgical center in the West Valley and any services connected with the same. This release encompasses and satisfies any prior agreements and discussions whether written or verbal by West Valley Surgical Center, LLC or any of its members.

This release shall be conditioned upon the receipt of \$50,000 due and payable from the real estate developer of the West Valley City Surgical Center. In addition, by signing below, we agree that any partial amounts paid against the \$50,000 liability either by West Valley Surgical Center, LLC or by the Boyer Company, Developer of the Real Estate for the project for amounts owed us shall become unconditionally released by us upon confirmed receipt of said partial payments.


Welden L. Daines


Robert Smith

ASC001012

West Valley Surgical Center, LLC
 DAIASS DAINES & ASSOCIATES

0000000000000026 11/30/01

0001010

Invoice Number	Invoice Date	Invoice Amount	Amount Paid	Discount	Net Amount
00000000000019	11/29/01	\$6,000.00	\$6,000.00	\$0.00	\$6,000.00
		\$6,000.00	\$6,000.00	\$0.00	\$6,000.00

THE FACE OF THIS DOCUMENT HAS A COLORED BACKGROUND ON WHITE PAPER

West Valley Surgical Center, LLC
 Accounts Payable
 7520 W. 160th St.
 Shawnee Mission, KS 66085

BARNES BANKING COMPANY
 33 SOUTH MAIN STREET
 KAYSVILLE, UT 84037

87-74 01
 1243

11/30/01	0001010	\$ 6,000.00
----------	---------	-------------

PAY Six Thousand Dollars And 00 Cents

TO THE ORDER OF

DAINES & ASSOCIATES
 425 MEDICAL DRIVE
 SUITE 210
 BOUNTIFUL UT 84010

NOT VALID AFTER 90 DAYS

AUTHORIZED SIGNATURE

THE BACK OF THIS DOCUMENT CONTAINS AN ARTIFICIAL WATERMARK—HOLD AT AN ANGLE TO VIEW

⑈0001010⑈ ⑆124300741⑆01 0268647⑈

Daines & Associates (welden L. Daines, CPA)

11/1/2001

425 Medical Drive
 Suite 210
 Bountiful, UT 84010

DATE	INVOICE #
11/1/2001	9

BILL TO
ASC WEST VALLEY SURGICAL CENTER C/O ASC P O BOX 683070 PARK CITY UT 84068

P.O. NO.	TERMS	PROJECT

QUANTITY	DESCRIPTION	RATE	AMOUNT
	PARTIAL FEE FOR BUILDING PORTION WV CITY BALANCE \$44,000.00 PAYABLE UPON SIGNING OF LEASE	6,000.00	6,000.00
	\$50,000 PROMISED BY BOYER COMPANY FOR WORK ON DIFFERENT SITES FOR WV SC BUILDING		
	CORRECTED INVOICE		
		Total	\$6,000.00