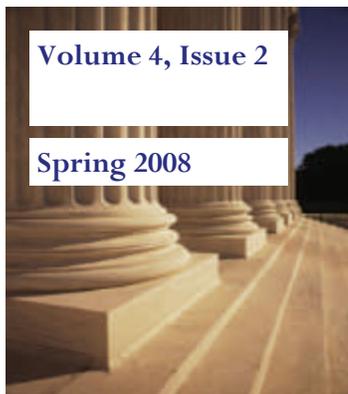




Wagenseller Law Firm

Real Estate Development and Law Newsletter



Volume 4, Issue 2

Spring 2008

Wagenseller Law Firm

- Full Service Business and Real Estate Law Firm
- Excellent Service in an efficient and cost-effective way
- Proven trial experience
- Results oriented
- Call us at (213) 996-8338 for any of your legal needs.
- www.wagensellerlaw.com

Inside this issue:

Real Estate LLCs: Dissident Members	1
Mr. Wagenseller Speaks At Investment Capital Conf.	1
Message from Laine T. Wagenseller	3
In the Works: What We Are Working On	3
Alexander Hamilton	3
News and Happenings	4



Real Estate LLCs: Dissident Members

"Put Your Money Where Your Mouth Is"

Real estate developments are typically structured as Limited Liability Companies with the developer designated as the manager. The manager is invested with all of the power to make decisions regarding the development and the investor members are typically intended to be silent partners.

However, when the project faces difficulties, a silent member may file suit in an effort to wrest control over the project from the manager. The dissident member will allege fraud, breach of fiduciary duties, self-dealing and gross negligence in an effort to show that the manager cannot be trusted to continue overseeing the project.

These lawsuits can be expensive and time consuming, especially in a development project where the builder is in a race to finish construction, pay off its construction lender and sell or refinance the project. The presence of an active lawsuit can scare

potential buyers and lenders.

In these situations, the dissident member is typically unable



to convince the other members to remove the manager or achieve a solution pursuant to the Operating Agreement. A lawsuit by the dissident member is either intended to take over the project or, more commonly, to extort a buy-out from the other members on preferential terms. The dissident member wants to get off the sinking ship and leave the others behind.

In most cases, a lawsuit by a member of the LLC is considered a derivative action.

What is a derivative action?

An action is derivative if the gravamen of the complaint is injury to the Company rather than to an individual member or members. In other words, if the injury complained of damaged the entire Company, such as reducing Company assets or decreasing every member's interests, then the action would be considered derivative.

In a real estate development structured as an LLC, shoddy construction, cost over-runs or other common development problems do not damage a particular member directly. "Because members of the LLC hold no direct ownership interest in the company's assets (Corp. Code

(continued p. 2)

Mr. Wagenseller to speak at Investment Capital Conference



Los Angeles Venture Association

Laine Wagenseller will be speaking at Los Angeles Venture

Association's annual **Investment Capital Conference** at the Biltmore Hotel on May 7, 2008.

Mr. Wagenseller will be part of a panel called "**Capitalizing on Commercial Real Estate.**" The panel will discuss the current market as well as flexible and cost efficient real estate solutions for business owners.

Other speakers at the conference include dean of Pepperdine University, **Kenneth Starr**, and the founder of Ben & Jerry's Ice Cream, **Jerry Greenfield**.

Visit our website for more information on this and other speaking engagements for Mr. Wagenseller, including the May meeting of the Los Angeles chapter of CCIM.



Leases: Did You Know...by Michelle Strassburg

Wagenseller Law Firm handles all aspects of the **commercial Landlord/Tenant relationship**, including drafting, negotiating and litigating all types of leases.

Recent examples of work we have done include an industrial lease for a start-up hi-tech manufacturing company in Azusa, an office lease extension for a PR firm in the Miracle Mile, a restaurant lease in an office building downtown, and creative

office space on behalf of a landlord for lease to Sony Studios.

Our litigation cases include a **specific performance lawsuit** on behalf of our fashion company tenant who had an option to purchase one of their warehouses, actions to collect rent from tenants, and actions to enforce **exclusivity clauses** in retail center leases.

We pride ourselves on bringing our depth of knowledge and experience to every transaction so that you receive timely, thorough and cost-efficient advice.

We look forward to helping you with all of your lease issues. If you have any questions, please feel free to call me at (213) 996-8340 or email me at m.strassburg@wagensellerlaw.com.

LEGAL UPDATE

Specific performance cannot be denied merely because the purchaser intends to quickly turn the property for profit.

A trial court found a property owner breached his contract to sell a parcel to an investment company. However, the trial court found that monetary damages were adequate.

The Appellate Court reversed, noting that all property is considered unique and the breach of an agreement to sell that property cannot be adequately relieved by monetary compensation, even if only for investment.

Real Estate Analytics, LLC v. Vallas (Feb. 26, 2008) 2008 SOS 1264.

Real Estate LLCs: Dissident Members (cont'd)

§17300), the members cannot be directly injured when the company is improperly deprived of those assets. The injury [is] essentially a diminution in the value of their membership interest in the LLC occasioned by the loss of the company's assets." *Paalink Communication International, Inc. v. Sup. Ct.* (2001) 90 Cal.App.4th 958, 964. Corp. Code §17300 provides that "a membership interest and an economic interest in a limited liability company constitute personal property of the member or assignee. A member or assignee has no interest in the specific limited liability company property."

Under California law, a member cannot bring a direct action for damages against management on the theory their alleged wrongdoing decreased the value of his or her interest (e.g., by reducing Company assets and net worth). The Company itself must bring such an action, or a derivative suit may be brought on the Company's behalf. As the courts have noted, a different rule would allow multiple lawsuits by different members and would ignore the corporate entity.

Ask for a bond. The Company's first tool in battling a dissident member's lawsuit is to ask that member to put its money where its mouth is. The Company should seek a bond under Corporations Code §17501 in order to secure the Company's costs in fighting the lawsuit. Section 17501 provides that in any derivative action, the Company "may move the court for an order...requiring the plaintiff to furnish security" of up to \$50,000.

The Company must show that there is no reasonable possibility that the prosecution of the lawsuit will benefit the Company or its members.

Oftentimes, the action will damage the Company rather than benefit it. The Company will fact huge legal bills and may have its construction and financing disrupted. Actions by the Company against the general contractor are usually better delayed until the project is completed since a lawsuit by the Company against the contractor prior to completion may lead to a halt of construction and mechanic's liens against the property.

The purpose of the section 17501 security provision is to prevent unwarranted member derivative lawsuits. The idea is that the Company is the one entitled to bring the lawsuit and the Company, using its business judgment, has decided not to pursue a lawsuit. Therefore, the dissident member must post security if it wishes to substitute its judgment for that of the manager or the Company.

Once the motion is filed, the entire action is stayed until the motion is disposed of. The motion is either disposed of by a court ruling on the motion or, if the dissident member wishes, it can post the bond voluntarily before the hearing and continue its lawsuit. Practically speaking, the lawsuit typically arises due to cost-over-runs, member capital calls and a desire by the member to not invest any more money in the Company. Fighting the motion and posting a bond will cause the member to incur more expenses. If the court orders the member to post a bond and no bond is posted, the lawsuit can be dismissed.



Message from Laine Wagenseller...

Business philosopher Jim Rohn points out that a farmer cannot simply tell the field that he needs a crop. He must first plant the seed. Then he must nurture the field before he can reap the harvest. The field is not interested in the farmer's needs, only in his seeds.

Then there is the story of the man who sat freezing by his fireplace, telling the fireplace that as soon as it started providing heat, he would give it wood.

The idea is that our abundance comes from our service, our contribution and our giving. As lawyers we are focused on serv-

ing our clients and solving their problems. Our success is a byproduct of helping others reach their goals.

While we are thankful for our own abundance and successes, we aim to help our friends and clients reach their own levels of abundance and success. We particularly enjoy working with our clients to solve their problems and to help take their business to the next level. We look forward to helping you live a life of abundance.

Laine



In The Works: Cases We Are Working On

LITIGATION

- We are helping our developer client battle a lawsuit by a dissident LLC member alleging breaches of fiduciary duties and gross negligence. We have moved for a \$50,000 bond from the plaintiff.
- A client has asked us to handle a case against it involving claims of \$3.7 million by a now insolvent Korean manufacturer.
- We were successful in getting our real estate brokerage client dismissed from a lawsuit within

days of being served.

- Our client, a real estate investor, has hired us to fight a lawsuit by his former business partner and investment partner over a joint investment.
- A local distributor has hired us to defend it against claims by an import company for \$2 million.

LEASES AND NEGOTIATIONS

- We are negotiating a lease extension for a national PR firm's office space in the Miracle Mile.

- A business owner has asked us to negotiate a lease buy-out for his restaurant space by a national retailer. Another downtown restaurant has asked us to negotiate a sale agreement.
- We recently helped a downtown professional services firm with their lease for office space in a downtown high rise.
- A real estate developer retained us to negotiate with its construction lender over a town-home development that is over-budget and delayed.

Our Vision:

To be the preeminent boutique real estate law firm in Los Angeles

"Alexander Hamilton" by Ron Chernow (2004)

"[Alexander] Hamilton was the supreme double threat among the founding fathers, at once thinker and doer, sparkling theoretician and masterful executive. He and James Madison were the prime movers behind the summoning of the Constitutional Convention and the chief authors of that classic gloss on the national charter, *The Federalist*, which Hamilton supervised.

As the first treasury secretary and principal architect of the

new government, Hamilton took constitutional principles and infused them with expansive life, turning abstractions into institutional realities. He had a pragmatic mind that minted comprehensive programs. In contriving the smoothly running machinery of a modern nation-state—including a budget system, a funded debt, a tax system, a central bank, a customs service, and a coast guard—and justifying them in some of America's most influential state

papers, he set a high-water mark for administrative competence that has never been equaled. If Jefferson provided the essential poetry of American political discourse, Hamilton established the prose of American statecraft. No other founder articulated such a clear and prescient vision of America's future political, military, and economic strength or crafted such ingenious mechanisms to bind the nation together."





Wagenseller Law Firm

555 West Fifth Street
31st Floor
Los Angeles, California 90013
Tel: (213) 996-8338
Fax: (213) 996-8339

www.wagensellerlaw.com ltw@wagensellerlaw.com

Results Oriented Legal Services

Laine T. Wagenseller
T: (213) 996-8338
ltw@wagensellerlaw.com

For more information or questions about how we can help you achieve your goals, please feel free to contact us.

Michelle K. Strassburg
T: (213) 996-8341
m.strassburg@wagensellerlaw.com

Jason S. Lee
T: (213) 996-8340
office@wagensellerlaw.com

News and Happenings...

- Mr. Wagenseller will be a panelist at the Los Angeles Venture Association's **Investment Capital Conference** on May 7, 2008 at the Biltmore Hotel. The panel's topic is "Capitalizing on Commercial Real Estate."

- **Buchanan Street Partners** held their Annual Real Estate Summit at the Balboa Bay Club, which Mr. Wagenseller attended.

- Mr. Wagenseller was the featured speaker at **Lambda Alpha's** Los Angeles chapter luncheon in April at the California Club. Mr. Wagenseller spoke on the subprime crisis and its effect on commercial real estate. Mr. Wagenseller will also speak to the Los Angeles chapter of **CCIM** in May on the same topic.

- **"Partition: Splitting Up Is Hard To Do"**, an article by Mr. Wagenseller, was published by Stewart Title in its February 2008 Commercial Real Estate Update.

- David Davenport spoke about "A Republic, If You Can Keep It" at a **Hoover Institute** breakfast, which Mr. Wagenseller attended. Mr. Davenport talked about why the founding fathers created a republic rather than direct democracy. He also talked about the dangers of recent attempts to rewrite the constitution.

- Tim Liewicke gave a tour of the new Nokia Theater and then spoke to the USC Marshall School of Business alumni in February, which Mr. Wagenseller attended. The West Los Angeles chapter of **USC Marshall Partners**, of which Mr. Wagenseller is a board member, hosted "Red, Blue, Cardinal & Gold: A Night of Political Discussion" featuring Susan Estrich and Dan Schnur at the Fox Studios.

Announcing...

Our new real estate development and law blog at

[www. SoCalRealEstateLaw.com](http://www.SoCalRealEstateLaw.com)

Updates on commercial real estate development and law

- Mr. Wagenseller attended the **Los Angeles Business Journal's** Commercial Real Estate awards at the Biltmore Hotel.

- Mr. Wagenseller also attended the **Los Angeles Economic Development Corporation's** Forecast and Outlook for Los Angeles for 2008.

