

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

TM ASSOCIATES MANAGEMENT, INC.,  
a Maryland Corporation,

Plaintiff,

vs.

Civil Action No.: 15-C-568  
The Honorable Louis H. Bloom

DEER FOREST LIMITED PARTNERSHIP,  
a West Virginia Limited Partnership,  
DYLAN HEIGHTS LIMITED PARTNERSHIP,  
a West Virginia Limited Partnership,  
OLD ASH VILLAGE LIMITED PARTNERSHIP,  
a West Virginia Limited Partnership,  
PAULI HEIGHTS LIMITED PARTNERSHIP,  
a West Virginia Limited Partnership,  
BARBARA HEIGHTS LIMITED PARTNERSHIP,  
a West Virginia Limited Partnership,  
BROOK VILLAGE LIMITED PARTNERSHIP,  
a West Virginia Limited Partnership,  
DUNHILL LIMITED PARTNERSHIP,  
a West Virginia Limited Partnership,  
HUDSON PLACE LIMITED PARTNERSHIP,  
a West Virginia Limited Partnership,  
VANMETER HEIGHTS LIMITED PARTNERSHIP,  
a West Virginia Limited Partnership, and  
WILSHERE LANDING LIMITED PARTNERSHIP,  
a West Virginia Limited Partnership,

Defendants.

ANSWER AND COUNTERCLAIM

COME NOW, Defendants, Deer Forest Limited Partnership ("Deer Forest"), Dylan Heights Limited Partnership ("Dylan"), Old Ash Village Limited Partnership ("Old Ash"), Pauli Heights Limited Partnership ("Pauli"), Barbara Heights Limited Partnership ("Barbara Heights"), Brook

Village Limited Partnership ("Brook Village"), Dunhill Limited Partnership ("Dunhill"), Hudson Place Limited Partnership ("Hudson"), Vanmeter Heights Limited Partnership ("Vanmeter") and Wilshire Landing Limited Partnership ("Wilshire") (collectively "Defendants"), by counsel Mark A. Ferguson and the firm of Ferguson Law Office, PLLC, and file their Answer and Counterclaim to the Amended Complaint, and state as follows.

### ANSWER

1. Upon information and belief, Defendants admit the allegations contained in Paragraphs 1 through 11 of the Amended Complaint.

2. The statements contained in Paragraph 12 of the Amended Complaint constitute legal conclusions and Defendants neither admit nor deny the same.

3. In response to Paragraph 13 of the Amended Complaint Defendants respond that statements contained therein are conclusory and demand proof thereof.

4. In response to Paragraph 14 of the Amended Complaint Defendants admit that venue is proper in Kanawha County, West Virginia.

5. In response to Paragraph 15 of the Amended Complaint Defendants restate the answers in Paragraphs 1 through 4 above.

6. In response to Paragraph 16 of the Amended Complaint Defendant Dunhill admits that it executed a Management Agreement (as identified therein) with Plaintiff under which Plaintiff undertook management of the Dunhill Apartments located in Huntington, West Virginia. In all other respects Defendant Dunhill states that the Management Agreement speaks for itself, and Defendant Dunhill further states that any compensation due to Plaintiff for payments or advances of funds were limited by and subject to the express terms of that certain Partnership Interest Purchase Agreement

entered into between Douglas E. Pauley, Encore Management Company, Inc., St Martin Development Co., LLC, Marshall, LLC, Plaintiff and other affiliates of Plaintiff, dated March 1, 2013 ("Purchase Agreement").

7. In response to Paragraph 17 of the Amended Complaint Defendant Dunhill denies the allegations contained therein and demands strict proof thereof.

8. In response to Paragraph 18 of the Amended Complaint Defendant Brook Village admits that it executed a Management Agreement as identified therein with Plaintiff under which Plaintiff undertook management of the Brook Village housing development located in Lewisburg, West Virginia. In all other respects Defendant Brook Village states that the Management Agreement speaks for itself and Defendant Brook Village further states that any compensation due to Plaintiff for payments or advances of funds were limited by and subject to the express terms of the Purchase Agreement.

9. In response to Paragraph 19 of the Amended Complaint Defendant Brook Village denies the allegations contained therein and demands strict proof thereof.

10. In response to Paragraph 20 of the Amended Complaint Defendant Old Ash Village admits that it executed a Management Agreement as identified therein with Plaintiff under which Plaintiff undertook management of the Old Ash Village housing development located in New Haven, Mason County, West Virginia. In all other respects Defendant Old Ash Village states that the Management Agreement speaks for itself and Defendant Old Ash Village further states that any compensation due to Plaintiff for payments or advances of funds were limited by and subject to the express terms of the Purchase Agreement.

11. In response to Paragraph 21 of the Amended Complaint Defendant Old Ash Village denies the allegations contained therein and demands strict proof thereof.

12. In response to Paragraph 22 of the Amended Complaint Defendant Deer Forest admits that it executed a Management Agreement as identified therein with Plaintiff under which Plaintiff undertook management of the Deer Forest housing development located in Gassaway, Braxton County, West Virginia. In all other respects Defendant Deer Forest states that the Management Agreement speaks for itself and Defendant Deer Forest further states that any compensation due to Plaintiff for payments or advances of funds were limited by and subject to the express terms of the Purchase Agreement.

13. In response to Paragraph 23 of the Amended Complaint Defendant Deer Forest denies the allegations contained therein and demands strict proof thereof.

14. In response to Paragraph 24 of the Amended Complaint Defendant Dylan Heights admits that it executed a Management Agreement as identified therein with Plaintiff under which Plaintiff undertook management of the Dylan Heights housing development located in Summersville, Nicholas County, West Virginia. In all other respects Defendant Dylan Heights states that the Management Agreement speaks for itself and Defendant Dylan Heights further states that any compensation due to Plaintiff for payments or advances of funds were limited by and subject to the express terms of the Purchase Agreement.

15. In response to Paragraph 25 of the Amended Complaint Defendant Dylan Heights denies the allegations contained therein and demands strict proof thereof.

16. In response to Paragraph 26 of the Amended Complaint Defendants Barbara Heights, Hudson Place, VanMeter Heights, Wilshire Landing, and Pauli Heights admit they executed

Management Agreements dated September 17, 2014, with Plaintiff under which Plaintiff undertook management of Barbara Heights located in Shinnston, Harrison County, West Virginia, Hudson Place located in Ripley, Jackson County, West Virginia, VanMeter Heights located in Beckley, Raleigh County, West Virginia, Wilshere Landing located in Lewisburg, Greenbrier County, West Virginia, and Pauli Heights located in Princeton, Mercer County, West Virginia.

17. In response to Paragraph 27 of the Amended Complaint Defendants Barbara Heights, Hudson Place, VanMeter Heights, Wilshere Landing and Pauli Heights state that each of the respective Management Agreements speak for themselves, and Defendants Barbara Heights, Hudson Place, VanMeter Heights, Wilshere Landing and Pauli Heights further state that any compensation due to Plaintiff for payments or advances of funds were limited by and subject to the express terms of the Purchase Agreement.

18. In response to Paragraph 28 of the Amended Complaint each of Barbara Heights, Hudson Place, VanMeter Heights, Wilshere Landing and Pauli Heights denies the allegations contained therein and demands strict proof thereof.

19. In response to Paragraph 29 of the Amended Complaint Defendant admits that it sent termination letters to Plaintiff with respect to seven (7) partnerships of which four (4), consisting of Deer Forest, Dylan Heights, Old Ash Village and Pauli Heights, are Defendants in this Civil Action. Otherwise, Defendant denies the allegations contained therein.

20. In response to Paragraph 30 of the Amended Complaint Defendants state that Douglas Pauley ("Pauley"), general partner of each of the Defendants, was not obligated to pay any amounts due and owing to Plaintiff, and thus made no payments. To the extent any payments were due and owing to Plaintiff by any of the Defendants with regard to allegations contained in the Amended

Complaint, such payments, due dates and terms of payment thereof, were conditioned by and subject to the terms of the Purchase Agreement.

#### COUNT I - DECLARATORY JUDGMENT

21. In response to Paragraph 31 of the Amended Complaint, Defendants restate the answers in Paragraphs 1 through 20 above.

22. In response to Paragraph 32 of the Amended Complaint Defendants deny the allegations contained therein and demand strict proof thereof.

23. In response to Paragraph 33 of the Amended Complaint Defendants state that it constitutes a legal conclusion and neither admit nor deny the same.

#### COUNT II - BREACH OF CONTRACT

24. In response to Paragraph 34 of the Amended Complaint, Defendants restate the answers in Paragraphs 1 through 23 above.

25. In response to Paragraph 35 of the Amended Complaint Defendants state that Pauley was not obligated to pay any amounts due and owing to Plaintiff, and thus made no payments. To the extent any payments were due and owing to Plaintiff by any of the Defendants with regard to allegations contained in the Amended Complaint, such payments, due dates and terms of payment thereof, were conditioned by and subject to the terms of the Purchase Agreement.

26. In response to Paragraph 36 of the Amended Complaint Defendants admit that, as of the current date, no payments have been made by Deer Forest, Dylan Heights, Old Ash and Pauli, the four partnerships for which Management Agreements were terminated with Plaintiff. To the extent Plaintiff is still managing other of the Defendants, pursuant to such Management Agreements,

Defendants have no knowledge as to whether payments have been made, and demand a full accounting thereof.

### COUNT III - UNJUST ENRICHMENT

27. In response to Paragraph 37 of the Amended Complaint, Defendants restate the answers in Paragraphs 1 through 26 above.

28. In response to Paragraph 38 of the Amended Complaint Defendants state that, with respect to any benefits received for services of Plaintiff under the Management Agreements, Plaintiff has been compensated pursuant to the terms of both the Management Agreement and the Purchase Agreement, and any remaining amounts due and owing to Plaintiff thereunder are either offset by or deferred, as set forth in Defendants' Counterclaim.

29. In response to Paragraph 39 of the Amended Complaint Defendants deny the allegations contained therein and demand strict proof thereof.

### AFFIRMATIVE DEFENSES

#### First Defense

The Amended Complaint fails to state a claim against each Defendant upon which relief can be granted, and thus must be dismissed pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

#### Second Defense

Plaintiff's claims are barred or limited due to Plaintiff's comparative or contributory negligence and fault, which proximately caused or contributed to damages of which Plaintiff complains and which negligence equaled or exceeded any alleged negligence of Defendants.

### Third Defense

Any damages of which Plaintiff complains were the result of acts or omissions of a party other than each Defendant.

### Fourth Defense

The Amended Complaint fails to name necessary and indispensable parties in whose absence complete relief cannot be accorded.

### Fifth Defense

To the extent Plaintiff alleges facts giving rise to any claim for damages, Plaintiff has failed in its duty to mitigate such damages.

### Sixth Defense

Plaintiff's claims are barred by the applicable statutes of limitations.

### Seventh Defense

Each Defendant pleads the doctrines of accord and satisfaction, failure of consideration, estoppel, payment, laches, license, release, waiver, consent, statute of fraud, parole evidence rule, collateral and any and all affirmative defenses under Rule 8(c) of the West Virginia Rules of Civil Procedure.

### Eighth Defense

Each Defendant reserves the right to assert any defenses asserted by any other party, not inconsistent with such Defendant's position, or which discovery may reveal appropriate.

### Ninth Defense

Each Defendant further asserts any and all defenses related to the enforceability of any of the Management Agreements to which each such Defendant is a party, including but not limited to



misrepresentation, negligence, fraud, negligent misrepresentation, lack of consideration, lack of mutual asset, or any other defenses based on commercial reasonableness, whether arising in contract or tort.

WHEREFORE, Defendants request that the allegations against each Defendant be dismissed with prejudice, and that attorneys fees, costs and interest be awarded to Defendants, together with such other and further relief as this Court may deem proper.

### **COUNTERCLAIM**

COME NOW, Defendants, Deer Forest Limited Partnership ("Deer Forest"), Dylan Heights Limited Partnership ("Dylan"), Old Ash Village Limited Partnership ("Old Ash"), Pauli Heights Limited Partnership ("Pauli"), Barbara Heights Limited Partnership ("Barbara Heights"), Brook Village Limited Partnership ("Brook Village"), Dunhill Limited Partnership ("Dunhill"), Hudson Place Limited Partnership ("Hudson"), Vanmeter Heights Limited Partnership ("Vannmeter") and Wilshire Landing Limited Partnership ("Wilshire") and set forth their joint counterclaim against Plaintiff, as set forth herein.

1. Each Defendant entered into a Management Agreement with Plaintiff arising pursuant to the transaction contemplated in the Purchase Agreement, whereby Marshall, an affiliate of Plaintiff, would purchase from Pauley general partnership interests in more than twenty-five limited partnerships, including limited partnerships which are the Defendants in this Civil Action, and that such management would be temporary on an interim basis pending closing of that acquisition.

2. Due solely to unilateral actions of affiliates of Plaintiff, such affiliates terminated the Purchase Agreement, without proper grounds and thereafter abandoned any efforts to purchase the partnership units from Pauley, including the general partnership interest in each of the Defendants.

3. Following the improper termination of the Purchase Agreement Plaintiff continued as Manager of the Defendants under the respective Management Agreements.

4. Because of increasing concerns related to ineffective management and costs overruns Pauley, the general partner of each of the Defendants, as well as the general partner of other partnerships subject to management agreements with Plaintiff, terminated Management Agreements held by Plaintiff for seven partnerships of which four - Deer Forest, Dylan Heights, Old Ash and Pauli, are Defendants in this Civil Action.

5. To the extent management fees are owed by any of the Defendants to Plaintiff with regard to services under each of the respective Management Agreements, such fees are subject to subordination and deferral of payment until sufficient cash flow of each Partnership allows such payment, as set forth in the express terms of Section 3.5(d) of the Purchase Agreement.

6. To the extent Plaintiff has advanced any sums, or made any loans or injected any capital into any of the Defendant partnerships, such advances required the prior approval of Pauley, as general partner of each partnership, pursuant to the express provisions of Section 3.5(d) of the Purchase Agreement.

7. In no case did Plaintiff notify or advise Pauley of any such advances, nor in any case did Pauley consent to such advances as required therein.

8. Pursuant to the terms of Section 3.5(d) of the Purchase Agreement, such advances must be treated as capital contributions, since they did not qualify or constitute proper loan advances under the express language of the Purchase Agreement.

9. Each of the Defendants acknowledges that to the extent Plaintiff can prove that sums were advanced to the respective partnerships, such sums may be appropriate for repayment as and

when the cash flow of each of the Partnerships allows such repayment, subject to and following all other obligations, liabilities and other amounts owed by each such Defendant.

10. As a result of wrongful conduct of Plaintiff in advancing funds and incurring excess and unwarranted management fees and expenses with regard to the respective Defendants, each such Partnership has suffered loss and damage as a result of such actions by Plaintiff.

11. As a result of such actions by Plaintiff, contrary to the terms of each Management Agreement and the Purchase Agreement, Defendants are entitled to offset of sums ultimately due and owing to Plaintiff for management fees, as well as deferral of repayment of any subordinated capital infusions which Plaintiff can establish by proper proof were made with respect to each Defendant.

12. As a result of actions and conduct of Plaintiff contrary to and in breach of the terms of the Purchase Agreement and the respective Management Agreements, each Defendant has suffered further loss, damage, annoyance, inconvenience, including attorneys fees.

WHEREFORE, as a result of wrongful conduct of Plaintiff with respect to duties and obligations under the Management Agreements and the Purchase Agreement, each Defendant demands an exact accounting by Plaintiff of any funds advanced to Defendant including date and amount of such advances, the purpose of such advances, as well as an accounting and justification of all other expenses incurred by each Defendant during the period of its management by Plaintiff, together with an accounting of all alleged management fees allegedly due by each Defendant to Plaintiff with respect to each of the Management Agreements; each Defendant further requests recovery of costs, loss and damage as a result of Plaintiff's actions in breach of, and contrary to the terms of, the Management Agreements and the Purchase Agreement, including an offset or reduction


of any management fees allegedly due and owing by each of the Defendants to Plaintiff, together with all other costs, interests, attorneys fees and all other relief the Court deems due and proper.

Defendants request a jury trial on all matters arising in this action.

Respectfully Submitted:

DEER FOREST LIMITED PARTNERSHIP  
DYLAN HEIGHTS LIMITED PARTNERSHIP  
OLD ASH VILLAGE LIMITED PARTNERSHIP  
PAULI HEIGHTS LIMITED PARTNERSHIP  
BARBARA HEIGHTS LIMITED PARTNERSHIP  
BROOK VILLAGE LIMITED PARTNERSHIP  
DUNHILL LIMITED PARTNERSHIP  
HUDOSN PLACE LIMITED PARTNERSHIP  
VANMETER HEIGHTS LIMITED PARTNERSHIP  
WILSHERE LANDING LIMITED PARTNERSHIP

Defendants,  
By Counsel



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Mark A. Ferguson (WV Bar No. 1182)  
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(304) 342-9100

Counsel for Defendants

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a West Virginia Limited Partnership, and  
WILSHERE LANDING LIMITED PARTNERSHIP,  
a West Virginia Limited Partnership,


CERTIFICATE OF SERVICE

I, Mark A. Ferguson, counsel for Defendants, Deer Forest Limited Partnership, Dylan Heights Limited Partnership, Old Ash Village Limited Partnership, Pauli Heights Limited Partnership, Barbara Heights Limited Partnership, Brook Village Limited Partnership, Dunhill Limited Partnership, Hudson Place Limited Partnership, Vanmeter Heights Limited Partnership and Wilshire

Landing Limited Partnership, do hereby certify that the foregoing ANSWER AND COUNTERCLAIM has been served upon counsel of record as indicated below by mailing a true and exact copy thereof to:

Jared M. Tully, Esq.  
Elizabeth A. Moore, Esq.  
Frost, Brown, Todd, LLC  
500 Lee Street, East  
Laidley Tower, Suite 401  
Charleston, WV 25301

in a properly stamped and addressed envelope, postage prepaid, and depositing the same in the regular course of the United States mail this 29<sup>th</sup> day of April, 2015.

  
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Mark A. Ferguson