

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
(BUSINESS COURT DIVISION)

VANDALIA CAPITAL II, LLC, UNITED  
BANK, INC., RALPH BALLARD, III,  
STEPHEN B. FARMER, DAVID P.  
FERRETTI, SHAWN P. GEORGE, MARK A.  
GRIMMETT, ROBERT HUGGINS,  
ANDREW B. JORDAN, R. SCOTT LONG,  
ANDREW A. PAYNE, III, ROOKE ASSET  
PARTNERS, LP, ANDREW K. ROOKE and  
TIMOTHY K. WILCOX,

Plaintiffs,

v.

DAVID P. PRAY, Individually and as Trustee of  
the DAVID P. PRAY REVOCABLE TRUST,  
DAVID P. PRAY REVOCABLE TRUST, and  
JOHN/JANE DOE,

Defendants.

v.

THE WOODS DEVELOPMENT  
COMPANY, LLC,

Third-Party Defendant.

Case No. \_\_\_\_\_  
Kanawha County Civil Action No. 13-C-570  
(The Honorable Louis H. Bloom)

VANDALIA CAPITAL II LLC'S, UNITED BANK INC.'S, THE NON-BREACHING  
VANDALIA AFFILIATES', AND THE WOODS DEVELOPMENT COMPANY LLC'S  
MOTION TO REFER CIVIL ACTION TO THE BUSINESS COURT DIVISION

## EXHIBIT B

David P. Pray and the David P. Pray Revocable Trust's  
Answer, Counterclaims and Third-Party Complaint

# **BAILEY GLASSER LLP**

209 Capitol Street  
Charleston, WV 25301  
Tel: 304.345.6555  
Toll Free: 877.852.0342  
Fax: 304.342.1110

June 30, 2014

## **Via Hand Delivery**

Cathy S. Gatson, Clerk  
Kanawha County Circuit Court  
Judicial Annex  
111 Court Street  
Charleston, WV 25301

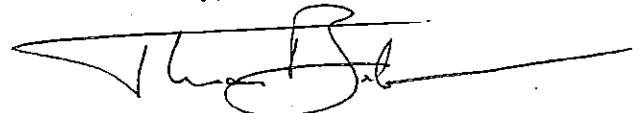
Re: *Vandalia Capital II, LLC, et al. V. David P. Pray and  
David P. Pray Revocable Trust*  
Civil Action No. 13-c-570 (Cir. Ct. Kanawha Co. W.Va.)

Dear Ms. Gatson:

Enclosed for filing please find **David P. Pray and the David P. Pray Revocable Trust's Answer, Counterclaims and Third-Party Complaint** in the above-referenced matter. Counsel was served as indicated on the Certificate of Service.

Thank you for your assistance in this regard. If you have any questions, please do not hesitate to call.

Sincerely,



Thanos Basdekis

TB/paw

Enclosure

cc: Scott S. Segal/Victor S. Woods (via hand-delivery)  
Mark R. Staun (via email)

# S U M M O N S

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

VANDALIA CAPITAL II, LLC,  
UNITED BANK, INC., RALPH BALLARD, III,  
STEPHEN B. FARMER, DAVID P. FERRETTI,  
SHAWN P. GEORGE, MARK A. GRIMMETT,  
ROBERT HUGGINS, ANDREW B. JORDAN, R.  
SCOTT LONG, ANDREW A. PAYNE, III,  
ROOKE ASSET PARTNERS, LP, ANDREW K.  
ROOKE and TIMOTHY K. WILCOX,

Plaintiffs,

v.

DAVID P. PRAY, Individually and as Trustee  
of the DAVID P. PRAY REVOCABLE TRUST,  
DAVID P. PRAY REVOCABLE TRUST,  
and JOHN/JANE DOE,

Defendants,

v.

THE WOODS DEVELOPMENT COMPANY,  
LLC,

Third-Party Defendant.

Civil Action No. 13-C-570

The Honorable Louis H. Bloom

TO THE ABOVE NAMED  
THIRD-PARTY DEFENDANT:

The Woods Development Company, LLC  
c/o Michael Sealy  
2901 Blythe Road  
Waxhaw, North Carolina 28173

IN THE NAME OF THE STATE OF WEST VIRGINIA, you are hereby summoned and required to serve upon Plaintiffs' counsel, Thanos Basdekis, Bailey & Glasser LLP, 209 Capitol Street, Charleston, West Virginia 25301, an Answer you may have to the Third-Party Complaint filed against you in the above-styled civil action, a true copy of which is herewith delivered to you. You are required to serve your Answer within thirty (30) days after service of this summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken for the relief demanded in the Complaint and you will thereafter be barred from asserting in another action any claim you may have which may be asserted in the above-styled action.

DATED:

CLERK OF COURT:

**CIVIL CASE INFORMATION STATEMENT  
CIVIL CASES**

In the Circuit Court of Wayne County, West Virginia

**I. CASE STYLE:**

VANDALIA CAPITAL II, LLC,  
UNITED BANK, INC., RALPH BALLARD, III,  
STEPHEN B. FARMER, DAVID P. FERRETTI,  
SHAWN P. GEORGE, MARK A. GRIMMETT,  
ROBERT HUGGINS, ANDREW B. JORDAN,  
R. SCOTT LONG, ANDREW A. PAYNE, III,  
ROOKE ASSET PARTNERS, LP, ANDREW K. ROOKE  
and TIMOTHY K. WILCOX,

Plaintiffs,

Case # 13-C-570

v.

Judge Louis H. Bloom

DAVID P. PRAY, Individually and as Trustee  
of the DAVID P. PRAY REVOCABLE TRUST, DAVID P.  
PRAY REVOCABLE TRUST, and JOHN/JANE DOE,

v.

THE WOODS DEVELOPMENT COMPANY, LLC,

Third-Party Defendant.

The Woods Development Company, LLC  
c/o Michael Sealy  
2901 Blythe Road  
Street  
Waxhaw, North Carolina 28173  
City, State, Zip

Days to  
Answer      Type of Service

30      Sec of State

Original and \_\_\_\_\_ copies of complaint furnished herewith.

Vandalia Capital, et al. v. David P. Pray, et al. v. The Woods Development Company LLC	CASE NUMBER:  13-C-570

II. TYPE OF CASE:

TORTS	OTHER CIVIL	
<input type="checkbox"/> Asbestos	<input type="checkbox"/> Adoption	<input type="checkbox"/> Appeal from Magistrate Court
<input type="checkbox"/> Professional Malpractice	<input type="checkbox"/> Contract	<input type="checkbox"/> Petition for Modification Of Magistrate Sentence
<input type="checkbox"/> Personal Injury	<input type="checkbox"/> Real Property	<input type="checkbox"/> Miscellaneous Civil
<input type="checkbox"/> Product Liability	<input type="checkbox"/> Mental Health	<input type="checkbox"/> Family Court Petition
<input checked="" type="checkbox"/> Other Tort	<input type="checkbox"/> Appeal of Administrative Agency	

III. JURY DEMAND: ☐ Yes ☐ No

CASE WILL BE READY FOR TRIAL BY (MONTH/YEAR): \_\_\_\_\_

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS DUE TO A DISABILITY OR AGE? ☐ YES ☒ NO  
IF YES, PLEASE SPECIFY:

- ☐ Wheelchair accessible hearing room and other facilities
- ☐ Interpreter or other auxiliary aid for the hearing impaired
- ☐ Reader or other auxiliary aid for the visually impaired
- ☐ Spokesperson or other auxiliary aid for the speech impaired
- ☐ Other: \_\_\_\_\_

Attorney Name: Thanos Basdekis (WVSB #9832)

Firm: **Bailey & Glasser, LLP**

Address: **209 Capitol Street  
Charleston, WV 25301**

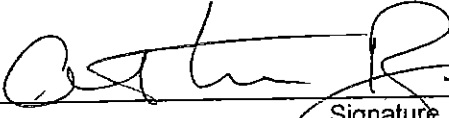
Telephone: **(304) 345-6555**

Facsimile: **(304) 342-1110**

Representing:

- ☐ Plaintiff
- ☐ Defendant
- ☐ Cross-Plaintiff
- ☐ Cross-Defendant

Dated: 6/30/2014

  
Signature

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

VANDALIA CAPITAL II, LLC,  
UNITED BANK, INC., RALPH  
BALLARD, III, STEPHEN B. FARMER,  
DAVID P. FERRETTI, SHAWN P.  
GEORGE, MARK A. GRIMMETT,  
ROBERT HUGGINS, ANDREW B.  
JORDAN, R. SCOTT LONG, ANDREW  
A. PAYNE, III, ROOKE ASSET  
PARTNERS, LP, ANDREW K. ROOKE  
and TIMOTHY K. WILCOX,

Plaintiffs,

v.

DAVID P. PRAY, Individually and as  
Trustee of the DAVID P. PRAY  
REVOCABLE TRUST, DAVID P. PRAY  
REVOCABLE TRUST, and JOHN/JANE  
DOE,

Defendants,

v.

THE WOODS DEVELOPMENT  
COMPANY, LLC,

Third-Party Defendant.

Civil Action No. 13-C-570

The Honorable Louis H. Bloom

**DAVID P. PRAY AND THE DAVID P. PRAY REVOCABLE TRUST'S  
ANSWER, COUNTERCLAIMS AND THIRD-PARTY COMPLAINT**

Defendants David P. Pray ("Pray") and the David P. Pray Revocable Trust (the "Trust") file their Answer, Counterclaims and Third-Party Complaint in response to Plaintiffs Vandalia Capital II, LLC ("Vandalia"), United Bank, Inc. ("United Bank"), Ralph Ballard, III, Stephen B. Farmer, David P. Ferretti, Shawn P. George, Mark A. Grimmert, Robert Huggins, Andrew B. Jordan, R. Scott Long, Andrew A. Payne, III, Rooke Asset Partners, LP, Andrew K. Rooke and

Timothy K. Wilcox's Amended Complaint. In support of their Answer, Affirmative Defenses, Counterclaims and Third-Party Complaint, Defendants assert the following:

Parties and Jurisdiction

1. Admitted.
2. Admitted.
3. Upon information and belief, admitted.
4. Upon information and belief, admitted.
5. Upon information and belief, admitted.
6. Upon information and belief, admitted.
7. Upon information and belief, admitted.
8. Upon information and belief, admitted.
9. Upon information and belief, admitted.
10. Upon information and belief, admitted.
11. Upon information and belief, admitted.
12. Upon information and belief, admitted.
13. Upon information and belief, admitted.
14. Upon information and belief, admitted.
15. Upon information and belief, admitted.
16. Upon information and belief, admitted.
17. Admitted.
18. Admitted.
19. Denied.

20. The allegations contained in paragraph 20 do not require a response. To the extent any response is required, the allegations are denied.

21. The allegations contained in paragraph 21 do not require a response. To the extent any response is required, it is denied that all parties to this action are domiciled in Kanawha County, West Virginia.

[Alleged] Operative Facts

22. Defendants incorporate by reference their preceding responses as if fully set forth herein.

23. Admitted.

24. Upon information and belief, admitted.

25. The allegations contained in paragraph 25 are directed at a written document. The contents of the written document speak for themselves. Any summary or characterization of the written document is denied. To the extent any response is required, the allegations are denied.

26. The allegations contained in paragraph 26 are directed at a written document. The contents of the written document speak for themselves. Any summary or characterization of the written document is denied. To the extent any response is required, the allegations are denied.

27. The allegations contained in paragraph 27 are directed at a written document. The contents of the written document speak for themselves. Any summary or characterization of the written document is denied. To the extent any response is required, the allegations are denied.

28. The allegations contained in paragraph 28 are directed at a written document. The contents of the written document speak for themselves. Any summary or characterization of the written document is denied. To the extent any response is required, the allegations are denied.



29. The allegations contained in paragraph 29 are directed at a written document. The contents of the written document speak for themselves. Any summary or characterization of the written document is denied. To the extent any response is required, the allegations are denied. It is specifically denied that the Guarantors, including Pray and the Trust, agreed amongst themselves and with IB Development, LLC (n/k/a The Woods Development Company, LLC ("Woods")) that they would each post Letters of Credit for United Bank's benefit.

30. The allegations contained in the first sentence of paragraph 30 are directed at a written document. The contents of the written document speak for themselves. Any summary or characterization of the written document is denied. To the extent any response is required, the allegations are denied. Pray and the Trust lack sufficient information to either admit or deny the remainder of the allegations contained in paragraph 30.

31. The allegations contained in paragraph 31 are directed at a written document. The contents of the written document speak for themselves. Any summary or characterization of the written document is denied. To the extent any response is required, the allegations are denied.

32. Denied.

33. The allegations contained in paragraph 33 are directed at a written document. The contents of the written document speak for themselves. Any summary or characterization of the written document is denied. To the extent any response is required, the allegations are denied.

34. Pray and the Trust lack sufficient information to either admit or deny the allegations contained in paragraph 34.

35. Denied. The Trust admits that a discussion was held at a November 2009 meeting whereby the Vandalia members considered the option of Vandalia making voluntary interest

payments to United Bank on Woods' behalf for a short period of time and that Vandalia would have the right to stop payment of the interest at any time.

36. The Trust admits that Pray represented it at the November meeting and that Pray considered the option of Vandalia making voluntary interest payments to United Bank on Woods' behalf for a short period of time and that Vandalia would have the right to stop payment of the interest at any time. All other allegations are denied.

37. Denied.

38. The Trust admits that payments were made to United Bank on Woods' behalf following the November 2009 meeting. All other allegations are denied.

39. Denied.

40. Admitted that Pray informed certain individuals that the Trust was no longer going to fund Vandalia's voluntary payments to United Bank on Woods' behalf.

41. The Trust admits that it stopped funding Vandalia's voluntary payments to United Bank on Woods' behalf in the spring of 2011. All other allegations are denied.

42. It is admitted that the parties engaged in settlement discussions. All other allegations are denied.

43. Pray and the Trust lack sufficient information to either admit or deny the first sentence of paragraph 43. Pray and the Trust admit the facts alleged in the second sentence.

44. Pray and the Trust lack sufficient information to either admit or deny the allegations contained in paragraph 44.

45. Pray and the Trust lack sufficient information to either admit or deny the allegations contained in paragraph 45.

46. Admitted.

47. Admitted.

48. Admitted.

49. Pray and the Trust lack sufficient information to either admit or deny the allegations contained in the first clause of paragraph 49. It is admitted that the parties engaged in settlement discussions. All other allegations are denied.

50. It is admitted that the parties engaged in settlement discussions. All other allegations are denied.

51. It is admitted that the parties engaged in settlement discussions. All other allegations are denied.

52. It is admitted that the parties engaged in settlement discussions. All other allegations are denied.

53. Pray and the Trust lack sufficient information to either admit or deny the first sentence of paragraph 53 and what United Bank "determined." All other allegations are denied.

54. Denied.

55. Denied.

56. Denied.

57. Admitted.

58. Admitted.

59. Denied.

60. Pray and the Trust lack sufficient information to either admit or deny the allegations contained in the first clause of paragraph 60. It is admitted that the neither Pray nor the Trust have maintained a letter of credit since December 2011. All other allegations are denied.

61. The allegations contained in paragraph 61 are directed at a written document. The contents of the written document speak for themselves. Any summary or characterization of the written document is denied. To the extent any response is required, the allegations are denied.

Claims for Relief

Count I

(Declaratory Judgment Request by Vandalia and Vandalia Member Against Defendants)

62. Defendants incorporate by reference their preceding responses as if fully set forth herein.

63. The allegations contained in paragraph 63 state legal conclusions to which no response is required. To the extent any response is required, the allegations are denied.

64. The allegations contained in paragraph 64 are directed at a written document. The contents of the written document speak for themselves. Any summary or characterization of the written document is denied. To the extent any response is required, the allegations are denied.

65. Denied.

66. Denied that the Plaintiffs are entitled to the relief requested.

67. Denied that the Plaintiffs are entitled to the relief requested.

Count II

(Claim for Breach of Contract Against Defendants by Vandalia and the Vandalia Members)

68. Defendants incorporate by reference their preceding responses as if fully set forth herein.

69. Denied.

70. Denied.

Count III  
(Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing  
Against Defendants by Vandalia and the Vandalia Members)

71. Defendants incorporate by reference their preceding responses as if fully set forth herein.

72. Denied.

73. Denied.

Count IV  
(Declaratory Judgment Request by United Bank Against Defendants)

74. Defendants incorporate by reference their preceding responses as if fully set forth herein.

75. The allegations contained in paragraph 75 state legal conclusions to which no response is required. To the extent any response is required, the allegations are denied.

76. The allegations contained in paragraph 76 are directed at a written document. The contents of the written document speak for themselves. Any summary or characterization of the written document is denied. To the extent any response is required, the allegations are denied.

77. The allegations contained in paragraph 77 are directed at a written document. The contents of the written document speak for themselves. Any summary or characterization of the written document is denied. To the extent any response is required, the allegations are denied.

78. Denied that the Plaintiffs are entitled to the relief requested.

79. Denied that the Plaintiffs are entitled to the relief requested.

Count V  
(Breach of Contract/Third-Party Beneficiary Asserted by United Bank Against Defendants)

80. Defendants incorporate by reference their preceding responses as if fully set forth herein.

81. Denied.

82. Denied.

83. Denied.

84. Denied.

Count VI  
(Malicious Conduct and Common Law Bad Faith)

85. Defendants incorporate by reference their preceding responses as if fully set forth herein.

86. Denied.

87. Denied.

88. Denied.

Count VII  
(Fraudulent Transfers Involving David Pray and Jane/John Doe)

89. Defendants incorporate by reference their preceding responses as if fully set forth herein.

90. Admitted.

91. Denied.

92. Denied.

93. Denied.

94. Denied.

Count VIII  
(Equitable Contribution Against Defendants Asserted by the Vandalia Co-Guarantors)

95. Defendants incorporate by reference their preceding responses as if fully set forth herein.

96. Denied.

97. Denied.

98. Denied.

99. Denied.

### Affirmative Defenses

#### First Affirmative Defense

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

#### Second Affirmative Defense

Plaintiffs' claims are barred, in whole or part, by the express terms of the underlying contracts.

#### Third Affirmative Defense

Plaintiffs' claims are barred, in whole or part, by prior material breaches of contract.

#### Fourth Affirmative Defense

Plaintiffs' claims are barred, in whole or part, by the Statute of Frauds.

#### Fifth Affirmative Defense

Plaintiffs' claims are barred, in whole or part, by the economic loss doctrine.

#### Sixth Affirmative Defense

Plaintiffs' claims are barred, in whole or part, by the absence of a condition precedent.

#### Seventh Affirmative Defense

Plaintiffs' claims are not ripe.

#### Eighth Affirmative Defense

Plaintiffs' claims are barred, in whole or part, by failure of consideration.

#### Ninth Affirmative Defense

Plaintiffs' claims are barred, in whole or part, by an accord and satisfaction.

Tenth Affirmative Defense

Plaintiffs' claims must be dismissed given their failure to join a necessary and indispensable party.

Eleventh Affirmative Defense

Plaintiffs' alleged damages are barred, in whole or part, by the doctrines of set-off or recoupment.

Twelfth Affirmative Defense

The Co-Guarantors' equitable claim is barred because they have an adequate remedy at law.

Thirteenth Affirmative Defense

Plaintiffs' claims are barred, in whole or part, given a prior waiver.

Fourteenth Affirmative Defense

Plaintiffs' claims are barred, in whole or part, given a prior merger of interests.

Reservation of Rights

Defendants hereby give notice that they intend to rely on such other affirmative defenses as may become available or apparent during the course of discovery and, therefore, they reserve their right to amend their Answer to assert such defenses.

WHEREFORE, Defendants David P. Pray and the David P. Pray Revocable Trust respectfully request that judgment be entered in their favor and against Plaintiffs as follows:

- A. That Plaintiffs' claims be dismissed with prejudice;
- B. That Defendants be awarded their attorneys' fees, costs and expenses associated with this litigation; and



C. That Defendants be awarded such additional or further relief as the Court deems just and reasonable.

### **COUNTERCLAIMS AND THIRD-PARTY COMPLAINT**

Defendants, Counterclaim-Plaintiffs and Third-Party Plaintiffs David P. Pray ("Pray") and the David P. Pray Revocable Trust (the "Trust"), by and through their undersigned counsel, hereby assert their Counterclaims and Third-Party Complaint against United Bank, Inc. and The Woods Development Company, LLC. In support of their Counterclaims and Third-Party Complaint, Pray and the Trust allege the following:

#### **Parties**

1. Pray is an adult residing in Kanawha County, West Virginia.
2. The Trust is a trust formed by Pray. Pray is the Trust's trustee. The Trust is a member of Vandalia Capital II, LLC ("Vandalia").
3. United Bank, Inc. ("United Bank") is a banking institution formed under the laws of the State of West Virginia.
4. The Woods Development Company, LLC ("Woods") is a limited liability company organized and existing under the laws of the State of North Carolina. Prior to a name change on July 24, 2009, Woods was previously known as IB Development, LLC. Woods' registered agent and registered address in North Carolina is Michael Sealy, 2901 Blythe Road, Waxhaw, North Carolina 28173.

#### **Jurisdiction and Venue**

5. Pursuant to West Virginia Code § 51-2-2, this Court has original and general jurisdiction over the Counterclaims and Third-Party Complaint.

6. United Bank is subject to personal jurisdiction in this State because it is a West Virginia corporation.

7. Pursuant to West Virginia Code § 56-3-33, Woods is subject to personal jurisdiction in this State because it transacted business in this State. In addition, Woods contractually agreed to submit to personal jurisdiction in this county.

8. Pursuant to West Virginia Code § 56-1-1, venue is proper in this county because United Bank does business in this county and the claims arose in this county.

#### Facts

9. On or about October 27, 2006, the Vandalia members entered into an operating agreement (the "Operating Agreement"). (Attached as Exhibit 2 to the Amended Complaint). The Vandalia members include: the Trust, Ralph Ballard, III, Stephen B. Farmer, David P. Ferretti, Shawn P. George, Mark A. Grimmitt, Robert Huggins, Andrew B. Jordan, R. Scott Long, Andrew A. Payne, III, Rooke Asset Partners, LP and Timothy K. Wilcox (the "Vandalia Members").

10. Woods is a real estate development company that purchased real property in Weddington, North Carolina (the "Property") in 2006 for the purpose of developing a residential housing community (the "Project"). It was anticipated that the Project would include at least 190 lots, with lots delivering an average gross sales price of \$312,000 once lot development was complete.

11. On or about October 30, 2006, Woods and United Bank entered into a Loan Agreement pursuant to which United Bank loaned Woods in excess of \$28 million (the "Loan Agreement"). (Attached as Exhibit 3 to the Amended Complaint). The loan proceeds were used

to: (i) provide approximately \$23 million to purchase the Property; (ii) create an interest reserve of more than \$2.9 million; and (iii) pay more than \$560,000 to United Bank as a loan fee.

12. On or about October 30, 2006, Woods executed a Promissory Note and Security Agreement in United Bank's favor (the "Note"). (Attached as Exhibit 4 to the Amended Complaint). Pursuant to the Note, Woods is required to make all loan payments, including interest payments, to United Bank.

13. On or about October 30, 2006, Pray together with co-guarantors Ralph Ballard, III, Stephen B. Farmer, David P. Ferretti, Shawn P. George, Mark A. Grimmer, Robert Huggins, Andrew B. Jordan, R. Scott Long, Andrew A. Payne, III, Andrew K. Rooke and Timothy K. Wilcox (the "Co-Guarantors") executed separate Guaranties in United Bank's favor in support of Woods' Loan Agreement and Note (the "Guaranties" or, individually, a "Guaranty").

14. On or about October 30, 2006, Woods and Vandalia entered into a Fee Agreement. (Attached as Exhibit A). Pursuant to the Fee Agreement, Woods was required to pay Vandalia a fee of not less than \$12 million from the sale of the finished lots on the Property. Woods' agreement to pay Vandalia a fee of not less than \$12 million was to be memorialized in \$12 million Promissory Note issued to Vandalia (the "Fee Note").

15. Pursuant to the Fee Agreement, Woods agreed to several other responsibilities that were material to the Vandalia Members' consideration of the entire transaction. These included, but are not limited to, Woods: (i) paying Vandalia the \$12 million fee no later than May 1, 2008; (ii) covenanting to pay and discharge all of its indebtedness and obligations when due; (iii) covenanting to comply in a timely manner with all terms, conditions and provisions set forth in the Fee Agreement; and (iii) indemnifying Vandalia and the Guarantors for all losses (including attorneys' fees) they suffer as a result of Woods' breach of the Fee Agreement.

(Exhibit A at ¶¶ 2.2(a)(v), 8.1(g), 8.1(h) and 10.6). The parties agreed that time was of the essence under the Fee Agreement.

16. Amongst other causes, Woods would be in default under the Fee Agreement when it: (i) “neglects, fails, or refuses to keep in full force and effect any permit or approval needed for the construction of the Project Improvements or the sale or closing of Lots” and (ii) breached a covenant under the Fee Agreement. (Exhibit A at ¶¶ 10.1(e) and 10.1(g)).

17. Following an event of default and at any time thereafter, Vandalia can accelerate the unpaid balance of the \$12 million fee to “become immediately due and payable without notice to Woods or any other person.” (Exhibit A at ¶ 10.2).

18. Prior to entering into the Loan Agreement, United Bank appraised the Property. United Bank informed the Vandalia Members that the Property’s value was in excess of \$26 million. This valuation was inaccurate because, amongst other reasons, there were water and sewer problems associated with the Project.

19. United Bank knew or should have known that this first appraisal was inaccurate and overvalued the Property. Nonetheless, United Bank permitted the Loan Agreement to close because it stood to earn more than \$560,000 from the loan fee and negotiated an interest rate of 7.8% and an interest reserve of more than \$2.9 million.

20. The Property was later appraised at a value much lower than \$26 million after the full scope of the water and sewer problems and other issues were recognized.

21. Pray and the Trust and presumably the other Vandalia Members and Co-Guarantors would not have agreed to the transaction if they knew that the Property was worth less than \$26 million.

22. The balance due under the Loan Agreement and Note was to be fully repaid by May 1, 2008. In spite of the fact that the economic downturn was just beginning to surface in the spring of 2008, Woods failed to make substantial progress in paying down the loan by that time. The interest reserve set aside from the proceeds from the Loan Agreement was completely exhausted by the fall of 2009. Ultimately, Woods was unable to service the interest payments as they came due under the Loan Agreement and Note.

23. The balance due under the Fee Agreement and Fee Note was to be fully repaid by May 1, 2008. Woods is in default under the Fee Agreement and, as a result, the Fee Note.

24. Prior to executing the agreements comprising this transaction, David Ferretti – acting on Vandalia’s behalf – understood that Pray would not participate in the transaction unless Woods or an individual affiliated with Woods would also post similar security for the loan United Bank was extending to Woods. This conversation took place over the telephone approximately 10-14 days prior to the transaction closing, wherein Pray specifically advised Ferretti that he and the Trust would not participate in the transaction absent this condition.

25. Both Pray and Ferretti understood that Ferretti and/or Vandalia would advise Pray (or the Trust) if Woods or an individual affiliated with Woods was not going to post similar security for the loan. No such notification occurred despite the fact that the transaction was consummated without Woods or an individual affiliated with Woods posting similar security for the loan. Pray and the Trust would not have agreed to this transaction if it was known to them that Woods or an individual affiliated with Woods was not going to post similar security for the loan.

26. Ferretti was and is a Vandalia member. Ferretti is also an attorney. Ferretti, and his law firm Spilman Thomas & Battle, PLLC (the “Spilman Firm”), represented Vandalia in this

transaction as its counsel. Ferretti and the Spilman Firm negotiated the terms of the operative agreements and the transaction generally for Vandalia, its members and the Guarantors. Prior to this transaction, the Spilman Firm was also counsel to the Trust and, as a result, had routine communications with Pray as the Trust's trustee. Based on this dual representation, Pray and the Trust had a right to and did in fact rely on Ferretti's understanding of Pray and the Trust's conditions. Upon information and belief, Ferretti and the Spilman Firm also served as counsel for other Vandalia Members with respect to this transaction.

27. The Vandalia Members met in November 2009 to discuss Woods' financial position. During this meeting, the members "discussed the fact that the [Woods] Note with United [Bank] is and remains the obligation of [Woods] and not Vandalia; that Vandalia is merely volunteering to pay the interest on [Woods'] Note to keep the project alive in the absence of payment by [Woods]; and that Vandalia has the right to stop payment of the interest at any time." (Meeting Minutes attached as Exhibit 7 to the Amended Complaint) (emphasis added). In addition, the Vandalia Members recognized that Woods "remains in default on its obligations to United [Bank] and to Vandalia." (Id.).

28. There was never any agreement amongst the Vandalia Members: (i) to require additional capital contributions to the Vandalia or (ii) that the individual members would be responsible for Vandalia's voluntary interest payments to United Bank on Woods' behalf – payments that could be stopped at any time.

29. Sometime after November 2009, the individual Vandalia Members made Vandalia's payments to United Bank. United Bank accepted these payments in place of Woods' interest payments. Upon information and belief, Vandalia accounts for the Vandalia Members' payments as its own expenses and accounts for them as additional capital contributions.

30. In the spring of 2011, the Trust no longer wished to fund Vandalia's voluntary interest payments to United Bank on Woods' behalf. Upon information and belief, Vandalia is still funding (through other Vandalia Members' contributions) interest payments to United Bank on Woods' behalf.

31. Through this litigation, United Bank is claiming that Pray is in default of his Guaranty. Pray and the Co-Guarantors' Guaranties are defined as "Loan Documents" under the Loan Agreement.

#### Demand Futility Allegations

32. With respect to the derivate claims the Trust is pursuing on Vandalia's behalf, demand is excused because Andrew A. Payne, III and Stephen B. Farmer, as the Vandalia managers, are hopelessly conflicted as to considering or accepting a demand made by the Trust. This is true because Payne and Farmer: (i) are suing the Trust in this litigation; (ii) are aligned with United Bank and Woods; and (iii) may be subject to contingent liability if Woods is unable to discharge its obligations under the Loan Agreement.

33. A special committee of the Vandalia Members would not be a viable alternative because the other Vandalia Members: (i) are suing the Trust in this litigation; (ii) are aligned with United Bank and Woods; and (iii) may be subject to contingent liability if Woods is unable to discharge its obligations under the Loan Agreement.

#### Causes of Action

##### Count One -- Declaratory Judgment (Against United Bank and Woods)

The Trust repeats and re-alleges the preceding allegations as if fully set forth herein.

34. Pursuant to West Virginia Code § 55-13-1, *et seq.*, a ripe and justiciable dispute exists as to the status of the Loan Agreement between United Bank and Woods.

35. The Trust requests that the Court declare Woods in default of the Loan Agreement.

36. Woods' default of the Loan Agreement is evidenced by:

- (i) Woods' failure to pay United Bank the interest payments it owes since at least November 2009;
- (ii) a cross default under the Loan Documents given United Bank's contention that Pray is presently in default of his Guaranty; and
- (iii) Woods being unable to pay its debts as they become due.

(Amended Complaint at Exhibit 3, ¶¶ 5(a)(i), 5(a)(ii) and 5(a)(vi)).

Count Two – Lender Liability  
(Against United Bank)

The Trust repeats and re-alleges the preceding allegations as if fully set forth herein.

37. The Trust asserts this Count derivatively, on Vandalia's behalf.

38. As described herein, United Bank knew or should have known that its first appraisal was inaccurate and overvalued the Property. Nonetheless, United Bank permitted the Loan Agreement to close because it stood to earn more than \$560,000 from the loan fee, a negotiated interest rate of 7.8% and an interest reserve of more than \$2.9 million.

39. The Property was later appraised at a value much lower than \$26 million after the full scope of the water and sewer problems and other issues were recognized.

40. Vandalia would not have agreed to the transaction if they knew that the Property was worth less than \$26 million.



41. As a result of United Bank's actions, Vandalia was caused to suffer damages in an amount to be determined at trial.

Count Three – Fraud  
(Against Vandalia)

Pray and the Trust repeat and re-allege the preceding allegations as if fully set forth herein.

42. As described herein, Vandalia – through David Ferretti – knew and understood that Pray and the Trust would only enter into the transaction if Woods or an individual affiliated with Woods would be posting similar security for the loan United Bank was extending to Woods.

43. Pray and the Trust reasonably relied on Vandalia's understanding of their conditions when they agreed to move forward with the transaction.

44. Vandalia, through Ferretti or its managers, had an obligation to inform Pray and the Trust that Woods or an individual affiliated with Woods failed or was relieved of posting similar security for the loan.

45. At the time Pray and the Trust executed the Guaranty and Operating Agreement (respectively) no one from Vandalia or any one on Vandalia's behalf informed Pray or the Trust that Woods or an individual affiliated with Woods failed or was relieved of posting similar security for the loan.

46. As a result of Vandalia and Ferretti's material omissions, Pray and the Trust were fraudulently induced into executing the Guaranty and Operating Agreement (respectively) and caused to suffer damages in an amount to be determined at trial.

Count Four – Indemnification/Contribution  
(Against Woods)

Pray and the Trust repeat and re-allege the preceding allegations as if fully set forth herein.

47. The Fee Agreement is a valid and enforceable contract.

48. Woods breached the Fee Agreement by not paying amounts owed under the Loan Agreement.

49. The Trust made certain payments on Woods' behalf to United Bank.

50. Pray and the Trust have in the past and are currently incurring losses as a result of Woods' breach of the Fee Agreement.

51. As a result of Woods' breach of the Fee Agreement and the losses Pray and the Trust have and are incurring, Pray and the Trust are entitled to indemnification of their losses by Woods under the express terms of the Fee Agreement.

52. In addition, Pray and the Trust are entitled to common law indemnification and contribution against Woods based on its failure to discharge its responsibilities to United Bank that are primary to Pray and the Trust's alleged responsibilities to United Bank.

Count Five – Set-off or Recoupment  
(Against United Bank and Vandalia)

Pray and the Trust repeat and re-allege the preceding allegations as if fully set forth herein.

53. To the extent that any direct or directive claims are time barred, Pray and the Trust assert those claims as a set-off or recoupment against any amounts claimed by and actually awarded to United Bank or Vandalia.

54. This claim is being asserted in a direct or derivate capacity, as appropriate.

WHEREFORE, Pray and the Trust, individually and derivatively on Vandalia's behalf, respectfully request that the Court enter judgment in their favor and against the Counterclaim Defendant and Third-Party Defendant as follows:

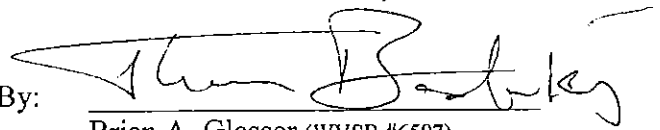
- A. Declaring the Loan Agreement in default;
- B. Issuing a mandatory injunction requiring United Bank to first liquidate its claims against Woods and the Property;
- C. Rescinding the Guaranty and Operating Agreement for Pray and the Trust, respectively;
- D. Awarding Pray and the Trust compensatory or rescissory damages in an amount to be determined at trial;
- E. Awarding Vandalia compensatory damages in an amount to be determined at trial;
- F. Awarding Pray, the Trust and Vandalia attorneys' fees, costs and expenses;
- G. Awarding Pray, the Trust and Vandalia both pre- and post-judgment interest; and
- H. Awarding Pray, the Trust and Vandalia such additional or further relief as the Court deems just and reasonable.

Dated: June 30, 2014

Respectfully submitted,

BAILEY & GLASSER, LLP

By:

A handwritten signature in black ink, appearing to read 'Thanos Basdekis', written over a horizontal line.

Brian A. Glasser (WVSB #6597)

Thanos Basdekis (WVSB #9832)

209 Capitol Street

Charleston, WV 25301

(304) 345-6555

(304) 342-1110 (facsimile)

[bglasser@baileyglasser.com](mailto:bglasser@baileyglasser.com)

[tbasdekis@baileyglasser.com](mailto:tbasdekis@baileyglasser.com)

*Counsel for Defendants*

### FEE AGREEMENT

THIS FEE AGREEMENT (this "Agreement"), made and entered into as of the 30<sup>th</sup> day of October, 2006, by and between IB DEVELOPMENT LLC, a limited liability company organized under the laws of the State of North Carolina ("IB"), and VANDALIA CAPITAL II, LLC, a limited liability company organized under the laws of the State of West Virginia ("Vandalia").

### WITNESSETH:

WHEREAS, IB has entered into one or more agreements to purchase approximately 274 acres of real property, located near North Carolina Highway 84 in or near the Town of Weddington, Union County, North Carolina, more particularly described in Exhibit A attached hereto and made a part hereof (the "Real Property"); and

WHEREAS, IB proposes to take all actions necessary to subdivide the Real Property into approximately 190 separate subdivided lots ("Lots") for sale to the public and to construct infrastructure and improvements as are necessary and appropriate for the sale of the Lots (collectively, the "Project") to the public, and to sell and close the sale of such Lots as soon as possible; and

WHEREAS, IB desires to borrow from United Bank, Inc., a West Virginia banking corporation located in Charleston, West Virginia ("United"), and United is willing to loan to IB, subject to the terms and conditions of a Loan Agreement of even date herewith among United and IB (the "Loan Agreement"), the amount of Twenty-Eight Million Two Hundred Twelve Thousand and Five Hundred Ninety-Four Dollars (\$28,212,594.00) (the "Loan") for the purposes hereinafter set forth, in accordance with the terms and conditions of the Loan Agreement and the other Loan Documents (as defined in the Loan Agreement) (the "Loan Documents"); and

WHEREAS, Vandalia has agreed to facilitate the above-described financing from United to IB, and in consideration for the members of Vandalia (the "Guarantors") executing Guaranty Agreements in favor of United (the "Guaranty Agreements") to enable IB to obtain such financing from United, IB has agreed to pay to Vandalia a fee as hereinafter set forth;

NOW, THEREFORE, in consideration of the foregoing premises, which are an integral part of this Agreement, and in consideration of the mutual covenants and promises of the parties contained herein and in the Loan Agreement and the other Loan Documents, and in further consideration for Vandalia facilitating the Loan for IB and the signing and delivering of the Guaranty Agreements, the parties hereto agree as follows:

### ARTICLE 1 THE LOAN

1.1 Loan. Vandalia agrees to facilitate and accommodate a loan from United to IB in the original principal amount of Twenty-Eight Million Two Hundred Twelve Thousand and Five



Hundred Ninety-Four Dollars (\$28,212,594.00) (the "Loan") as financing for the purposes set forth in the Loan Agreement.

1.2 Terms and Conditions of Loan. The Loan shall be made upon the terms and conditions set forth in the Loan Agreement.

## ARTICLE 2 THE FEE

2.1 The Fee. For the consideration and benefits provided by Vandalia and the Guarantors to IB relating to the Loan as set forth herein and in the Loan Agreement and the other Loan Documents, IB shall pay to Vandalia a fee as more particularly described in Section 2.2 hereof (the "Fee"), subject to the terms and conditions set forth herein.

2.2 Terms and Conditions of the Fee. The Fee shall be paid by IB to Vandalia upon the following terms and conditions:

a. The Fee shall be evidenced by a negotiable promissory note (the "Fee Note") made by IB and payable to the order of Vandalia with a term of eighteen (18) months. The Fee Note will have the following terms:

(i) The Fee Note shall be entitled to the benefits of this Agreement and the other Fee Documents (as hereinafter defined), shall be dated as of the date hereof, shall be payable to the order of Vandalia, and shall be in the principal amount of Twelve Million Dollars (\$12,000,000.00), subject to increase in the event that the "Net Profit" (as defined herein) of the Project exceeds \$24,000,000, as set forth in (iii)(C) below.

(ii) The Fee Note shall not bear interest.

(iii) IB shall make principal reduction payments first to United as set forth in the Loan Agreement until the Loan and all sums due in connection therewith are paid in full. Thereafter, IB shall make principal reduction payments on the Fee Note to Vandalia upon the closing of each sale of a Lot until the Fee and all sums due in connection therewith are paid in full. Each such payment shall be made within seven (7) business days after the sale of a Lot. Such payments shall be made from the "Net Proceeds from Sales" of each Lot, which shall be defined for purposes of this Agreement as the Closed Gross Sales Price of the Lot, less Buyer's Interest Carry, Closing Costs and Sales Commission, as such terms are used in the Budget (as hereinafter defined in Section 5.1). The amount of each such payment by IB to Vandalia shall be as follows:

(A) IB shall pay to Vandalia 75% of the Net Proceeds from Sales of each Lot, with IB retaining the other 25%; provided, however, that if at any time before the Fee Note is paid in full, the Project is not progressing, in the sole judgment and discretion of Vandalia, in

substantial compliance with the financial terms and timetable set forth in the Budget (as hereinafter defined in Section 5.1), then Vandalia shall be paid 100% of the Net Proceeds from Sales of each Lot as described above until such time as Vandalia is satisfied that the Project is progressing in substantial compliance with the Budget. Such payments shall continue until Vandalia has received the total sum of \$12,000,000 from such payments (the "Initial Fee").

(B) After Vandalia has received \$12,000,000 in Net Proceeds from Sales of Lots as set forth in (A) above, IB shall retain the entire Net Proceeds of Sales of Lots until IB has received a total of \$12,000,000 in Net Proceeds from Sales of Lots, including the 25% of Net Proceeds from Sales retained by it while the Initial Fee was being paid to Vandalia.

(C) After IB has received \$12,000,000 in Net Proceeds from Sales of Lots as set forth in (B) above and Vandalia has received \$12,000,000 in Net Proceeds from Sales of Lots as set forth in (A) above, thereafter Vandalia and IB each shall receive 50% of the Net Profit of the Project. "Net Profit" shall be calculated as such term is calculated on the Budget (as hereinafter defined in Section 5.1). Such payments of Net Profit shall be made to Vandalia on the 15<sup>th</sup> day after the end of each calendar quarter with respect to the preceding calendar quarter, with a true-up to be done between the parties at the end of the Project.

(iv) The average Gross Sales Price for all Lots sold by IB shall be not less than Three Hundred Twelve Thousand Dollars (\$312,000) per Lot (as shown on the Budget).

(v) All outstanding and unpaid amounts owing on the Fee and the Fee Note shall be paid to Vandalia by IB on May 1, 2008 (the "Maturity Date").

(vi) The Fee Note titled "Promissory Note" shall have such other terms and provisions as are set forth in the Fee Note, a copy of which is attached hereto marked Exhibit 2.2(a)(v) and by this reference made a part hereof.

b. The payment of the Fee shall be made at Vandalia's offices located at 300 Capitol Street, Suite 1503, Charleston, West Virginia 25301, in immediately available funds.

### ARTICLE 3 SECURITY FOR THE FEE

3.1 Security. IB shall provide the following security for the Fee (collectively, the "Collateral"):

a. IB shall execute a credit line deed of trust, security agreement and fixture filing in proper form (the "Vandalia Deed of Trust") whereby IB shall grant a deed of trust lien to Vandalia encumbering the Real Property described in Exhibit A attached hereto, together with all improvements, buildings, appurtenances and fixtures now or hereafter located thereon and together with all easements and cross-use rights as are appurtenant thereto and encumbering all equipment, materials, supplies and other property of every kind or nature, whether now or hereafter owned by IB or in which it has or shall have an interest, procured for incorporation by IB in or to be used in connection with the Project or the operation of the Project, to secure all principal, accrued interest and other sums due and owing to Vandalia for the Fee. The Vandalia Deed of Trust shall include a "due on sale or encumbrance, absent prior written consent by Vandalia" clause (excluding Lot sales as permitted hereunder).

b. IB shall execute a collateral assignment of the interest of IB in and to each and every contract entered into, and each and every right or interest possessed, by IB pertaining to (i) the Real Property, (ii) the Project, (iii) the construction of the Project Improvements on the Real Property and all work related thereto, (iv) the sales of the Lots, and (v) all of IB's rights under any declaration establishing a homeowner's association with respect to the Real Property or any portion thereof, to be recorded by IB prior to or upon completion of the Project (the "Vandalia Omnibus Assignment"), including without limitation all assignable licenses, permits, certificates of occupancy, approvals, dedications, subdivision maps or plats and entitlements issued, approved or granted by any governmental authority or otherwise, in connection with the Real Property and/or any part thereof, any and all assignable development rights and other intangible rights, titles, interests, privileges and appurtenances owned by Assignor and in any way related to or used in connection with the Real Property and/or any part thereof and its renovation, construction, use, maintenance, repair, leasing and operation, and all assignable licenses, consents, easements, rights of way and approvals obtained or required from private parties to make use of utilities and to insure vehicular and pedestrian ingress and egress to or development of the Property and/or any part thereof.

### 3.2 Priority of the Liens.

a. The Vandalia Deed of Trust, and the Vandalia Omnibus Assignment granted to Vandalia by IB to secure the Fee (which together with this Agreement, the Fee Note, that certain intercreditor agreement between United and Vandalia of even date herewith (the "Intercreditor Agreement"), any documents creating and/or perfecting a lien and all other documents, assignments, financing statements, affidavits, instruments, certificates, agreements, contracts or other writings executed to evidence the Fee or in connection with this Agreement, as the same may be modified, amended, restated, substituted for, replaced, consolidated, renewed or extended from time to time, are referred to herein as the "Fee Documents") shall each create second in priority liens in favor of Vandalia, which shall be junior to no liens other than the first in priority liens granted by IB to United in connection with the Loan.

b. Without the prior written consent of United and Vandalia, IB shall not create, permit to be created or suffer to exist any lien upon any of the collateral for the Fee *except* for (i) United's first liens which secure IB's obligations to United under the Loan Documents,



and (ii) Vandalia's second liens which secure IB's obligations to Vandalia under this Agreement (which shall be junior only to United's first lien and no others).

### 3.3 Subordinations, Releases.

a. Upon receipt by United or Vandalia of a principal reduction payment in an amount described in Section 2.2 (a)(iii) above for a sold Lot, Vandalia shall provide to IB a recordable release releasing such sold Lot and the improvements located thereon from the liens of its Deed of Trust and other security documents and from any other lien it has or might claim against such Lot and the improvements located thereon. In the event that Vandalia receives a principal reduction payment before IB's obligations under the Loan Documents have been satisfied in full, Vandalia shall hold such payment in trust for the benefit of United and immediately shall remit such payment to United.

b. Vandalia shall execute such documents as are appropriate to fully subordinate its liens on the Real Property and related to the Real Property to the following documents, and the rights and benefits existing pursuant thereto, to the same extent as if such documents had been recorded prior in time to the recording of the Vandalia Deed of Trust and the Assignment: any declaration establishing a homeowner's association with respect to the Real Property or any portion thereof, and which has been approved by Vandalia, or any other amendment thereto approved by Vandalia.

c. Vandalia agrees that so long as IB is not in default hereunder, it will fully cooperate with IB in IB's efforts to develop and improve the Real Property as set forth herein.

## ARTICLE 4 GUARANTIES

4.1 Loan to be Guaranteed. The Loan shall be guaranteed by the Guarantors, all of whom are listed on the form of Guaranty Agreement attached Exhibit 4.1 and by this reference made a part hereof.

4.2 Guaranty Agreement. The Guaranty Agreement shall be (i) an absolute, irrevocable, and unconditional guarantee; (ii) not joint and several, but only several, and, with respect to the Individual Guarantors, in a maximum amount of one hundred percent (100%) of each Individual Guarantor's percentage of direct, indirect or beneficial equity ownership of Vandalia times the Loan amount, e.g., if member A holds 8.33% of the equity in Vandalia, member A's guarantee would be for 8.33% of the total Obligations as defined in the Guaranty Agreement existing at the time of United's demand under the Guaranty Agreement; and (iii) upon such other terms and provisions as are set forth in the form Guaranty Agreement attached hereto as Exhibit 4.1 and by this reference made a part hereof.

## ARTICLE 5 CONSTRUCTION OF IMPROVEMENTS

5.1. Construction. IB shall cause the construction of the Project Improvements to be prosecuted with diligence and continuity, in a good and workmanlike manner, and in all material respects in accordance with the pro-forma budget and timeline attached hereto and made a part hereof as Exhibit 5.1, as modified and amended from time to time as acceptable to Vandalia (the "Budget"). IB shall deliver to Vandalia and United a revised and updated pro-forma budget within 7 days of the Closing of the Loan that incorporates the actual costs to purchase the Property, including all Bank fees and costs and other closing fees and costs associated with the Loan Transaction or the Fee Transaction, which pro-forma budget shall replace Exhibit 5.1 and become the "Budget," until modified or amended as permitted herein.

5.2. Compliance With Applicable Laws. All work on the Project shall be performed in strict compliance with all applicable laws, ordinances, rules and regulations of federal, state, county, or municipal governments or agencies now in force or that may be enacted hereafter, and with all directions, rules and regulations of the fire marshal, health officer, building inspector or other officers of every governmental agency now having or hereafter acquiring jurisdiction.

5.3. Inspections. Vandalia, through its officers, agents or employees, shall have the right at all reasonable times:

a. To enter upon the Real Property and inspect the work of construction to determine that the same is in conformity with the Pro-Forma and all the requirements hereof.

b. Subject to the limitation hereinafter set forth, to examine the books, records, accounting data and other documents (and to make extracts therefrom or copies thereof) of IB and all contractors and their subcontractors supplying goods and/or services in connection with the work of constructing the Project Improvements. The books, records and documents shall be made available to Vandalia promptly upon written demand therefor.

5.4. Protection Against Lien Claims. IB agrees to pay fully and discharge all claims for labor done, material and services furnished in connection with the construction of the Project Improvements, and to take all other reasonable steps to forestall and preclude the assertion of claims of lien relative to the Real Property, the other Collateral or the Project Improvements; provided, however, that if IB has in good faith commenced efforts to resolve such claims and the claims cannot reasonably be resolved within thirty (30) days after the assertion of such claims, then as long as IB proceeds in good faith to resolve the claims and Vandalia's Collateral is not at risk, IB shall have a reasonable amount of time to resolve the claims.

## ARTICLE 6 CONDITIONS PRECEDENT TO GUARANTY AGREEMENTS

6.1 Conditions to be Satisfied by IB. Vandalia and the Guarantors shall have no obligation to execute and deliver the Guaranty Agreements until IB has fully and completely satisfied each and every one of the following conditions precedent:

a. The Manager or members of IB shall have duly adopted resolutions approving the execution, delivery and performance of this Agreement and all transactions and documentation contemplated herein.

b. The Secretary (or a Manager) of IB shall have provided to Vandalia a certificate (i) setting forth the resolutions required by Section 6.1(a) above and certifying that the resolutions are true and correct, have not been altered or repealed, are binding on the IB and are in full force and effect; (ii) identifying the validly designated Manager(s) of IB authorized to execute and deliver the Fee Documents on behalf of IB; (iii) identifying and providing copies of the IB's Articles of Organization and the Operating Agreement and all amendments thereto (collectively, the "Organizational Documents"); and (iv) identifying the validly designated person to act as IB's Project Manager and/or IB's Project Representative, together with a description of his/her authority as such Project Manager/Project Representative.

c. All documentation required by this Agreement shall have been duly executed by the necessary parties, including, but not limited to, the Fee Note, the Vandalia Deed of Trust, the Vandalia Omnibus Assignment and the Intercreditor Agreement; and all Fee Documents required to be filed for public record shall have been properly filed.

d. IB and United shall have executed and delivered the Loan Agreement.

e. IB shall have procured and provided to Vandalia such insurance policies as are specified in the Vandalia Deed of Trust. The policy or policies of public liability insurance shall list Vandalia as an additional named insured and have coverage comparable to a broad form comprehensive general liability endorsement.

f. IB shall have procured and provided to United a commitment for and thereafter timely issuance of a policy of title insurance issued by a title insurance company acceptable to Vandalia in the American Land Title Association (ALTA) form insuring that the IB possesses a good and marketable title to the Real Property and insuring that Vandalia, in the appropriate insurable amount never to exceed the principal amount of the Fee, possesses a second lien on the Real Property, free and clear of all liens, encumbrances, easements, encroachments, and other interest of any kind, except the first lien of United relating to the Loan and such other exceptions to title as shall be satisfactory to Vandalia or Vandalia's counsel. The policy of title insurance must insure Vandalia that the Fee as secured by the Vandalia Deed of Trust will have priority over any and all liens that could be filed in connection with the construction of the Project Improvements, except the first lien of United relating to the Loan.

g. The Budget shall have been prepared accurately by IB and provided to Vandalia. The Budget also shall show a timeline reflecting the projected time of expenditure of all such costs.

h. IB shall have provided to Vandalia an opinion by counsel to IB that addresses all appropriate matters required by Vandalia or by Vandalia's counsel with respect to the Fee and the documentation for the Fee, including, but not limited to, an opinion that the loan

documentation has been duly authorized and constitutes valid, enforceable and legally binding obligations of IB.

i. All financing statements and the Vandalia Deed of Trust shall be duly recorded and/or filed in such manner and in such places as is required by law to establish, preserve, protect and perfect the interests and rights created by the Fee Documents and all taxes, fees and other charges in connection with the execution, delivery or filing of the same shall be timely and duly paid by IB.

j. Vandalia shall have received from IB such information and other documents as may be reasonably requested by Vandalia to carry out the terms of this Agreement and the other Loan Documents.

## ARTICLE 7 REPRESENTATIONS AND WARRANTIES

**7.1 Representations and Warranties of IB.** IB hereby represents, warrants and covenants to Vandalia as follows:

a. IB is a duly organized and validly existing limited liability company under the laws of the State of North Carolina, all limited liability company fees and taxes have been timely paid by IB, and IB is in good standing under the laws of the State of North Carolina.

b. The execution, delivery and performance of this Agreement and all other Fee Documents and writings referred to herein to which IB is a party (i) are within IB's limited liability company powers, (ii) have been duly authorized by IB, (iii) are not in contravention of the law, the terms of its Organizational Documents or other entity documents, or of any indenture or agreement to which IB is a party or by which it is bound, (iv) do not require additional consent or approval of any person, and (v) do not cause Borrower to be in default or breach under any law or any indenture, agreement, contract, lease or instrument to which the Borrower is a party or by which its property is bound. All of Borrower's Organizational Documents are in full force and effect and have not been amended or modified.

c. IB's exact legal name is as set forth in this Agreement, and IB has not, during the preceding five (5) years, been known as or used any other name, nor has it been the surviving entity of a merger or consolidation of another entity.

d. IB is a newly formed entity and therefore does not have any historical financial statements. IB does not have any material contingent liabilities required to be disclosed under GAAP which have not been disclosed in writing to Vandalia.

e. The Budget is materially true and correct as of its date and fairly discloses the costs of the Project. IB shall not vary materially from the Budget without the express written consent of Vandalia.

f. This Agreement and the other Fee Documents constitute, and any document required to be given by IB hereunder will, when executed and delivered, constitute the legal, valid and binding obligation of IB enforceable against IB in accordance with their respective terms.

g. No litigation or other claim or demand is pending or threatened against IB, the Real Property, the other Collateral, the Project, or any portion thereof, and no other event has occurred which may materially, adversely affect IB's financial condition or assets or the Project. Moreover, no material fact exists that has not been disclosed to Vandalia that would have a material, adverse affect on the respective properties, business prospects or financial conditions of IB, the Real Property, the other Collateral, the Project, or any portion thereof.

h. IB has no actual or constructive knowledge that any condition, activity or conduct exists on or in connection with the Real Property that constitutes a violation of any "Environmental Law" (as defined in Section 8.1(k)(i)(a) below).

i. IB has obtained, or will obtain in a timely fashion, all necessary federal, state and local permits, licenses, authorizations and approvals for its present and intended use of the Real Property and the construction of the Project Improvements.

j. IB shall perform, construct and complete the Project and the Project Improvements substantially in accordance with the financial information and the timetable set forth in the Budget.

k. There are no brokers, consultants or finders involved with the Real Property or the Project or any part of the transactions contemplated in this Fee Agreement, and no fees, commissions or similar payments are due with respect to the Real Property or the Project or any part of the transactions contemplated in this Fee Agreement, except that IB discloses that the IP Fee, K-Ted Fee and the Base Fee are to be paid as set forth in the Budget.

## ARTICLE 8 AFFIRMATIVE COVENANTS

8.1 Affirmative Covenants of IB. IB covenants and agrees that while any part of the Fee is outstanding, IB shall:

a. Promptly inform Vandalia in writing of (i) all material, adverse changes in its financial condition, and (ii) all litigation and claims, either pending or threatened, relating to IB that could have a materially adverse effect on its financial condition or the Real Property or the timely completion of the Project Improvements or the Project.

b. Within sixty (60) days after the close of each quarterly fiscal period, provide Vandalia with a copy of the unaudited or internal financial statements of IB with respect to the Project.

c. Within thirty (30) days after receipt of a written request from Vandalia, furnish to Vandalia and United such additional financial information with respect to the Project as Vandalia may request, such as lists of assets and liabilities, budgets, forecasts and other reports with respect to the Project.

d. With regard to insurance:

i. Maintain in full force and effect the insurance required by Section 6.1(h) above and such other insurance as Vandalia may reasonably require with respect to the Real Property, in form, amounts, coverages and with insurance companies reasonably acceptable to Vandalia with Vandalia named as a loss payee;

ii. Maintain in full force and effect the title insurance required by this Agreement.

iii. Maintain proper worker's compensation coverage and other insurance against other risks as are commonly insured against by companies in similar types of business, all in a manner satisfactory to Vandalia.

Upon request of Vandalia, IB shall deliver to Vandalia from time to time the policies or certificates of insurance in a form satisfactory to Vandalia, including stipulations that coverage will not be canceled or diminished without at least thirty (30) days prior written notice to Vandalia.

e. Use all proceeds from the Loan solely for the purposes set forth in Section 1.1 of this Agreement.

f. Comply with all terms and provisions of the Loan Agreement and all other agreements and documents relating thereto. IB shall not modify or amend the Loan Agreement with United without the prior written consent of Vandalia.

g. Pay and discharge when due all of IB's indebtedness and obligations, including, without limitation, all assessments, taxes, governmental charges, levies and liens of every kind and nature, imposed upon the Real Property prior to the date on which penalties would attach, and all lawful claims that, if unpaid, might become a lien or charge upon the Real Property; provided, however, that IB will not be required to pay and discharge any such assessment, tax, charge, levy, lien or claim so long as: (i) the legality of the same shall be contested in good faith by appropriate proceedings, and (ii) IB shall have established on its books adequate reserves with respect to such contested assessment, tax, charge, levy, lien, or claim in accordance with generally accepted accounting practices. Where applicable, upon demand of Vandalia, IB will furnish to Vandalia evidence of payment of the assessments, taxes, charges, levies, liens and claims and will authorize the appropriate governmental official to deliver to Vandalia at any time a written statement of any assessments, taxes, charges, levies, liens and claims against any equipment and machinery of IB.

h. Perform and comply in a timely manner with all terms, conditions and provisions set forth in this Agreement and in all other Fee Documents mentioned herein and in the Loan Agreement and in all other agreements and documents relating thereto.

i. Conduct its business affairs in a reasonable and prudent manner and in compliance with all applicable federal, state and municipal laws, ordinances, rules and regulations respecting its properties, leases, charters, businesses and operations.

j. Permit Vandalia, or its designees, at any reasonable time during regular business hours to inspect any and all Collateral, examine and audit IB's books, accounts and records and make copies and memoranda of its books, accounts, and records. If IB now or at any time hereafter maintains any financial records (including without limitation computer generated records and computer programs for the generation of such records) in the possession of a third party, then it shall, upon request of Vandalia, notify such party to permit Vandalia, or its designees, free access to such records not subject to privilege at all reasonable times during regular business hours, and to provide Vandalia, or its designees, with copies of any records it may request.

k. With regard to environmental compliance:

(i) The following definitions shall apply for purposes of this Agreement:

(a) "Environmental Law" shall mean any federal, state or local statute, regulation or ordinance or any judicial or administrative decree or decision now or hereafter promulgated with respect to any "Hazardous Substance" (as hereinafter defined), drinking water, ground water, landfills, open dumps, storage tanks, underground storage tanks, solid waste, waste water, storm water runoff, waste emissions, or wells.

(b) "Release" shall mean any spilling, leaking, pumping, emitting, emptying, discharging, injecting, storing, escaping, leaching, dumping, or discharging, burying, abandoning, or disposing into the environment by IB or any predecessor in interest of IB on, under or in any way involving or affecting the Real Property.

(c) "Hazardous Substance" shall mean each and every element, compound, chemical mixture, petroleum and gas product, substance, contaminant, pollutant, including, without limitation, substances which are toxic, carcinogenic, ignitable, corrosive or otherwise dangerous to human, plant or animal health or well-being, and any other substance defined as a "hazardous substance," "hazardous waste," "hazardous material," "toxic material," "toxic waste," or "special waste" under any Environmental Law and any other substance which by law requires special handling in its collection, storage, treatment or disposal.

(ii) Comply with all Environmental Laws and shall obtain all necessary environmental authorizations and approvals from the appropriate governmental agencies for its present and intended uses of the Real Property.

(iii) Indemnify, defend and hold Vandalia harmless from and against any and all claims, demands, losses, liabilities, strict liabilities, damages, sanctions, penalties, fines, injuries, expenses, costs (including reasonable and necessary attorney's fees), settlements, or judgments of any and every kind whatsoever paid incurred or suffered by, or asserted against Vandalia, by any person, entity or governmental agency arising out of, in connection with or related in any way to any act, omission, condition, conduct, transaction or occurrence with regard to the Real Property in violation of any Environmental Law, regardless of whether or not caused by or within the control of IB, or the breach by United of any of the representations or warranties of IB contained herein or any Release of Hazardous Substance at, upon, under or within the Real Property. The foregoing indemnification will survive payment of the Fee Note.

(iv) Permit Vandalia and its designees to inspect the Real Property and to perform tests thereupon and take samples therefrom during reasonable business hours to determine whether environmental hazards exist with regard to the Real Property and whether IB is in compliance with all applicable Environmental Laws; provided, however, that Vandalia shall be under no obligation to make any such inspections or to perform any such tests.

l. Notify Vandalia in writing at least twenty (20) days prior to any change in IB's exact legal name or any change in its business location.

m. Make, execute and deliver to Vandalia such promissory notes, security agreements, priority agreements, instruments, documents and other agreements as Vandalia or its counsel may reasonably request to evidence and secure the payment of the Fee and to create and perfect all liens described herein. Moreover, at the request of Vandalia, IB shall promptly and duly execute and deliver such additional documents and assurances and take such additional actions as may be necessary or desirable in order to correct any defect, error or omission which may at any time be discovered or to more effectively carry out the interest and purpose of this Agreement.

n. Construct the Project Improvements in a good and workmanlike manner, in accordance with the Budget and in compliance with all applicable legal requirements.

o. If any proceedings are filed seeking to enjoin or otherwise prevent or declare unlawful the construction or the occupancy, maintenance or operation of the Project, the Project Improvements, or any portion thereof, give immediate notice thereof to Vandalia and, at its sole expense (i) cause such proceedings to be vigorously contested in good faith, and (ii) in the event of an adverse ruling or decision, prosecute all allowable appeals therefrom. Without limiting the generality of the foregoing, IB shall resist the entry or seek the stay of any temporary



or permanent injunction that may be entered and act in good faith to bring about a favorable and speedy disposition of all such proceedings.

p. Take all necessary steps to subdivide the Real Property into approximately 190 separate Lots and to prepare such Lots for sale to the public and to close the sale of such Lots to members of the public in accordance with the timetable set forth in the Budget.

q. Perform all of its material obligations under applicable covenants, conditions and easements and restrictions affecting the Project and all other Permitted Encumbrances (as defined in the Vandalia Deed of Trust) and enforce the obligations of all other parties to such applicable covenants, conditions and easements and restrictions affecting the Project and all other Permitted Encumbrances. Upon the breach by IB of any such undertakings, Vandalia, prior to payment in full of the Fee Note, shall have the right, but not the obligation, to perform such obligations or enforce such obligations as with respect to such other parties to the extent necessary to effect the conversion of all Reservation Agreements to Sales Contracts and closing under the Sales Contracts. All costs and expenses incurred by Vandalia in connection with the foregoing shall be secured by the Fee Documents.

r. All future management and leasing agreements, if any, shall be subject to the prior review and approval by Vandalia, which shall not be unreasonably withheld, and, if required by Vandalia, shall provide that Vandalia shall have the right to terminate such agreements in the event Vandalia acquires title to the Real Property.

s. In all matters pertaining to this Agreement, time is of the essence.

## ARTICLE 9 NEGATIVE COVENANTS

9.1 Negative Covenants of IB. IB covenants and agrees that while any part of the Fee is outstanding, IB shall not:

a. Without the prior written consent of Vandalia, create, permit to be created or suffer to exist any lien upon any of the Collateral, except for the first in priority liens to United which secure IB's obligations respecting the Loan Agreement and the Note, subject, however, to Section 5.3 of this Agreement.

b. Except as otherwise permitted herein, sell, assign, exchange, transfer, hypothecate, convey or otherwise dispose of any of the Collateral without Vandalia's prior written consent.

c. Furnish Vandalia any certificate or other document containing any untrue statement of material fact or omitting a material fact necessary to make it not misleading in light of the circumstances under which it was furnished.

d. Enter into any lease for a Lot or all or any portion of the Real Property without the prior written consent of Vandalia.

## ARTICLE 10 DEFAULT AND REMEDIES

10.1 Events of Default. The following events shall constitute events of default ("Events of Default") hereunder:

a. Any material deviations in the work of construction from the Budget without the prior written approval of Vandalia, or the appearance of defective workmanship or materials, which said material deviations or defects are not corrected within fifteen (15) days after written notice thereof; provided, however, that if IB has in good faith commenced efforts to cure the default within the fifteen (15) day period and the default cannot reasonably be cured before the end of such period, then as long as IB proceeds in good faith to cure the default and Vandalia's Collateral is not at risk, IB shall have a reasonable amount of time to cure the default.

b. The filing of any claim or lien against the Real Property, the Project Improvements or any part thereof, or any interest or right made appurtenant thereto, and the continued maintenance of said claim of lien for a period of thirty (30) days without discharge or satisfaction thereof or provision therefor satisfactory to Vandalia in accordance with the terms hereof.

c. Any representation or warranty contained herein or in the other Fee Documents or any representation to Vandalia concerning the Budget, the financial condition or credit standing of IB proves to be materially false or misleading.

d. Any person obtains an order or decree in any court of competent jurisdiction enjoining the construction of the Project Improvements or the sale or closing of Lots or enjoining or prohibiting IB or Vandalia or either of them from performing this Agreement, and such proceedings are not discontinued and such decree is not vacated within thirty (30) days after the granting thereof.

e. IB neglects, fails, or refuses to keep in full force and effect any permit or approval needed for the construction of the Project Improvements or the sale or closing of Lots.

f. Except as permitted herein, any sale, assignment, exchange, transfer, hypothecation, conveyance or other disposal by IB of any of the Collateral or any interest in the Collateral without Vandalia's prior written consent.

g. The breach by IB of any other covenant, warranty, promise, or representation herein contained and the continuance of such breach for a period of fifteen (15) days after written notice thereof to Vandalia; provided, however, that if IB has in good faith commenced efforts to cure the default within the fifteen (15) day period and the default cannot reasonably be cured before the end of such period, then as long as IB proceeds in good faith to

cure the default and Vandalia's Collateral is not at risk, IB shall have a reasonable amount of time to cure the default.

h. The failure after the expiration of the cure period, if any, to pay any sum or make any payment due or the occurrence of any other default or event of default under the Vandalia Note, Vandalia Deed of Trust, Vandalia Omnibus Assignment, or any other Fee Document.

**10.2 Acceleration.** Upon the happening of an Event of Default and at any time thereafter, the entire unpaid balance of the Fee, and all other sums owing by IB under the Fee Documents, shall, at the option of Vandalia, become immediately due and payable without notice to IB or any other person.

**10.3 Right to Complete Construction.** Upon the happening of an Event of Default, Vandalia shall have the right, in addition to all other rights and remedies available to Vandalia hereunder or under the Note, Deed of Trust or other documents pertaining to the Loan, to enter into possession of the Real Property and perform any and all work and labor necessary to complete the Project Improvements, and employ watchmen to protect the Real Property from injury. All sums so expended by Vandalia shall be deemed to have been paid to IB and secured by the Vandalia Deed of Trust and other security for the Fee. Effective upon such a default, IB hereby assigns to Vandalia all of IB's interest in contracts relating to the construction of the Project Improvements, but this assignment shall not, in the absence of affirmative ratification of such contracts by Vandalia, be deemed to impose upon Vandalia any of IB's obligations under any such contracts. IB hereby constitutes and appoints Vandalia its true and lawful attorney-in-fact, with full power of substitution in the premises, to complete the Project Improvements in the name of IB. It is further understood and agreed that this power of attorney, which shall be deemed to be a power coupled with an interest, cannot be revoked.

**10.4 Other Remedies.** Upon an Event of Default and at any time thereafter, Vandalia may do any one or more of the following in addition to the other rights and remedies set forth herein:

(i) Exercise any or all of the rights of Vandalia under the Fee Documents, and/or Vandalia's rights as a secured party under the West Virginia Uniform Commercial Code and applicable laws upon default by a debtor/obligor, and/or otherwise available to Vandalia at law or in equity.

(ii) Sell, foreclose upon or otherwise dispose of the Collateral. Vandalia shall have no obligation to preserve rights to the Collateral against prior parties or to marshal any Collateral for the benefit of any person.

(iii) Seek to have IB specifically perform its obligations under this Agreement and/or the other Fee Documents.

(iv) Enter into and/or take possession of and/or collect and receive the Collateral and take all appropriate steps to secure and protect the Collateral. All

sums expended by Vandalia for such purpose shall be deemed to have been paid to IB and shall be secured by the Collateral.

(v) Vandalia is under no obligation to invoke any remedy provided herein or in the other Fee Documents, and Vandalia may avail itself of any one or more or all of the remedies described above and any or all other remedies available to it at law or in equity or hereunder, and all such remedies shall be cumulative and none shall be deemed exclusive of any other. No delay or omission of Vandalia to exercise any right or power occurring upon any Event of Default shall impair the future exercise of such right or power in respect of such or any other Event of Default, present or future, or impair any rights or remedies consequently thereto. In addition, IB, at the request of Vandalia, will make such further assignments and transfers to Vandalia, by appropriate document or instrument, of all of Vandalia's right, title and interest in and to any contracts or agreements as Vandalia may require. IB does hereby constitute Vandalia its attorney in fact (coupled with an interest and irrevocable) with full power of substitution, to act in IB's name, to execute assignments and contracts and to realize upon IB's right, title and interest therein and to negotiate, receive and receipt for all goods, funds or credits which may be owing IB, and to such end to initiate legal action and prosecute or compromise all claims relating thereto.

**10.5 Cross-Default.** An Event of Default under any of the Loan Documents or any of the Fee Documents will constitute an Event of Default under this Agreement, and an Event of Default under any other agreements with or in favor of Vandalia related to the Fee and under any evidence of obligations held by Vandalia, whether or not such is specified therein.

**10.6 Indemnification for Breach.** IB agrees to forever fully and promptly indemnify, protect, defend, discharge, and hold Vandalia and the Guarantors harmless from and against all losses, costs, damages (including without limitation consequential and punitive damages), attorneys' fees, court costs, expert witness fees, settlements, judgments, and expenses of every kind and nature which Vandalia or the Guarantors or any of their respective members, owners, managers, contractors, agents, employees, attorneys, successors and assigns (collectively, "Indemnified Persons," and individually, an "Indemnified Person"), may suffer, expend or incur, directly or indirectly, under, or by reason of, or in consequence of, or in relation to, any breach by IB of any representation, warranty, covenant or obligation contained in this Agreement, including without limitation all costs and expenses incurred by Vandalia or any Guarantor or any other Indemnified Person in connection with the enforcement of this Agreement with respect to any such breach (collectively, the "Obligations"). In the event Vandalia or any Guarantor or any other Indemnified Person is made a party to any lawsuit or administrative action or other proceeding that requires legal representation relating in any way to any of the Obligations, Vandalia and the Guarantors and all other Indemnified Persons shall have the right to select legal counsel acceptable to them or to their successors or assigns to represent them, and to have the fees, costs and expenses of such legal counsel paid by IB in accordance with the requirements of this section.

**10.7 Remedies Are Cumulative.** All remedies of Vandalia provided for in this Agreement are cumulative and shall be in addition to any and all other rights and remedies

provided by law and by the provisions of the Fee Note, the Vandalia Deed of Trust, the Vandalia Omnibus Assignment, and the other Fee Documents. The exercise of any right or remedy by Vandalia hereunder shall not in any way constitute a cure or waiver of default hereunder or under the Vandalia Deed of Trust or the other Fee Documents, or invalidate any act done pursuant to any notice of default, or prejudice Vandalia in the exercise of any of its rights hereunder or under the Fee Note, Vandalia Deed of Trust, Vandalia Omnibus Assignment, or the other Fee Documents, unless, in the exercise of said rights, Vandalia realizes all amounts owed to it under the Fee Note, the Vandalia Deed of Trust and the other Fee Documents.

## ARTICLE 11 MISCELLANEOUS

11.1 **Headings.** The Article and Section headings used in this Agreement are for convenience of reference only and shall not enter into the interpretation or construction of this Agreement.

11.2 **No Waiver.** No waiver of any default or breach by IB hereunder shall be implied from any omission by Vandalia to take action on account of such default if such default persists or is repeated, and no express waiver shall affect any default other than the default specified in the waiver and it shall be operative only for the time and to the extent therein stated. Waivers of any covenant, term, or condition contained herein shall not be construed as a waiver of any subsequent breach of the same covenant, term, or condition. The consent or approval by Vandalia to or of any act by IB requiring further consent or approval shall not be deemed to waive or render unnecessary the consent or approval to or of any subsequent similar act.

11.3 **Third Parties.** This Agreement is made and entered into for the sole protection and benefit of Vandalia and IB and their respective successors and assigns, and no other person or persons other than Vandalia and IB shall have any right to action hereon and no person or persons other than IB and Vandalia shall have any rights hereunder at any time, *except* that each of the Guarantors expressly shall be entitled to the protection and the benefit of the rights set forth herein for its benefit and shall have all rights to action hereon to enforce such rights.

11.4 **Notices.** All notices required to be given hereunder shall be in writing and shall be deemed served twenty-four (24) hours after deposit in the United States mail, postage prepaid, certified with return receipt requested, and addressed to the parties as follows:

a. **IB:**

IB Development LLC  
13850 Ballantyne Corporate Place  
Suite 150  
Charlotte, North Carolina 28277  
Attention: C. Ashley Campbell  
Telephone: (704) 927-5202  
Facsimile: (704) 887-4901  
E-mail: Ashley.Campbell@InfinityPartners.com

*With a copy to:*

The Law Offices of Paul H. Bass, PLLC  
15720 John J. Delaney Drive  
Suite 203  
Charlotte, North Carolina 28277  
Attention: Paul Bass, Esq.  
Telephone: (704) 644-1855  
Facsimile: (704) 644-1856  
E-mail:

b. Vandalia:

Vandalia Capital II, LLC  
300 Capitol Street, Suite 1503  
Charleston, West Virginia 25301  
Attn: Andrew A. Payne, III  
Telephone: (304) 344-9203  
Facsimile: (304) 343-9240  
E-Mail: drewpayne@charter.net

*With a copy to:*

Spilman Thomas & Battle, PLLC  
300 Kanawha Boulevard, East  
Charleston, West Virginia 25301  
Attention: David P. Ferretti  
Telephone: (304) 340-3859  
Facsimile: (304) 340-3801  
E-Mail: dferretti@spilmanlaw.com

Such addresses may be changed by notice to the other parties given in the same manner as above provided. IB agrees to forward to Vandalia, without delay, any notices, letters or other communications delivered to the Property or to IB naming Vandalia as addressee.

**11.5 Applicable Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of West Virginia. Any action, suit or proceeding in connection with this Agreement and all other Loan Documents, may be brought against IB or Vandalia in the Circuit Court of Kanawha County, West Virginia, or of the United States District Court for the Southern District of West Virginia; IB and Vandalia hereby consenting and submitting to the jurisdiction thereof. Nothing herein shall affect the right of Vandalia to commence legal proceedings or otherwise to proceed against IB in any other jurisdiction or to serve process in any manner permitted by applicable law. Nothing in this section shall affect the right of Vandalia to serve process in any manner permitted by law or limit any right that Vandalia may have to enforce in any lawful manner a judgment obtained in one jurisdiction in any other jurisdiction.

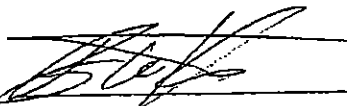
**11.6 Successors and Assigns.** The terms hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto; provided, however, that IB shall not assign its rights hereunder in whole or in part without the prior written consent of Vandalia and that any such assignments without said consent shall be void.

**11.7 Entire Agreement; Amendments.** This Agreement and the other Fee Documents referred to herein and therein constitute the entire agreement between and among the parties hereto relating to the subject matter hereof, incorporate or rescind all prior agreements and understandings between and among the parties hereto relating to the subject matter hereof, and cannot be changed or terminated orally and shall be deemed effective as of the date they are accepted by Vandalia. No amendment or waiver of any provision of this Agreement or the other Fee Documents shall be effective unless the same shall be in writing and signed by Vandalia and IB and then such waiver and consent shall be effective only in the specific instance and for the specific purpose for which given.

IN WITNESS WHEREOF, IB and Vandalia have caused this Agreement to be executed by their respective duly authorized officers as of the date first above written:

IB DEVELOPMENT, LLC  
by its Manager, INFINITY PARTNERS LLC

By:



Member of Infinity Partners LLC

VANDALIA CAPITAL II, LLC

By:



Its: Manager

- Exhibit A** - Description of Real Property
- Exhibit 2.2(a)(v)** - Promissory Note
- Exhibit 4.1** - Guaranty Agreement
- Exhibit 5.1** - Budget and Timeline



**EXHIBIT A**

**Description of Real Property**

GRANTOR: THE EMILY PIERCE WHITT TRUST  
GRANTEE: IB DEVELOPMENT LLC  
BRIEF DESCRIPTION: 23.645 ACRES, MORE OR LESS, HWY 84 WEDDINGTON

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LYING AND BEING IN SANDY RIDGE TOWNSHIP, UNION COUNTY, NORTH CAROLINA,  
AND BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT FOUND IN THE CENTERLINE OF HWY 84 WEDDINGTON ROAD (ASSUMED 100' R/W), SAID POINT BEING THE NORTH WEST CORNER OF MARY B. MACKEY PROPERTY (DEED BOOK 184 AT PAGE 618) AND BEING LOCATED N27°26'23"E 50.22' FROM A #4 REBAR FOUND ON THE SOUTHERLY MARGIN OF THE RIGHT OF WAY OF HWY 84 ; THENCE WITH THE MACKEY PROPERTY THE FOLLOWING FOUR COURSES:

- 1) S27°26'23"W 50.22' TO A #4 REBAR FOUND ON THE SOUTHERN EDGE OF THE AFOREMENTIONED R/W.
- 2) S27°26'23"W 269.93' TO AN ANGLE IRON FOUND (MARKING THE COMMON CORNER OF THE AFORESAID MACKEY PROPERTY AND THE MARY B. MACKEY PROPERTY (DEED BOOK 206 AT PAGE 89), SAID ANGLE IRON BEING N61°39'28"W 122.24' FROM A #4 BAR FOUND.
- 3) S27°26'23"W 153.94' TO AN ANGLE IRON FOUND (MARKING THE COMMON CORNER OF THE AFORESAID MACKEY PROPERTY AND THE MARGARAT AVLONA MATTHEWS PROPERTY (DEED BOOK 66 AT PAGE 15), SAID ANGLE IRON BEING N60°49'42"W 284.05' FROM A TIE POINT FOUND.
- 4) S27°26'23"W 562.47' TO A IRON PIN SET. A COMMON CORNER OF CLAUDE A. DEAL, HEIRS PROPERTY (DEED BOOK 63 AT PAGE 449).

THENCE TURNING AND RUNNING WITH THE DEAL PROPERTY N62°57'14"W 703.52' TO A 1/2" PIPE FOUND, A COMMON CORNER OF LOT 13 ABELLA ESTATES PHASE III (MAP BOOK H AT PAGE 964) AND PIPE FOUND BEING N14°55'42"E 95.25' FROM A #4 BAR FOUND; THENCE WITH LOT 13 N62°46'56"W 289.92' TO A STONE FOUND. A COMMON CORNER OF MARY BOARD MATTHEWS PROPERTY (DEED BOOK 104 AT PAGE 556); THENCE WITH MARY BOARD MATTHEWS PROPERTY N14°24'26"E 309.95' TO A STONE FOUND AT THE COMMON CORNER OF CHARLES E. PLYLER PROPERTY (DEED BOOK 296 AT PAGE 124 AND BOOK 345, PAGE 851); THENCE WITH THE PLYLER PROPERTY THE FOLLOWING FOUR COURSES:

- 1) N44°38'13"E 374.92' TO A #4 BAR FOUND.
- 2) N44°38'13"E 431.21' TO AN IRON PIN SET.
- 3) N44°38'13"E 24.25' TO A 1" IRON PIPE FOUND IN THE SOUTHERLY MARGIN OF THE RIGHT OF WAY OF HWY 84.
- 4) N44°38'13"E 25.82' TO A POINT IN THE CENTERLINE OF SAID HWY 84.

THENCE TURNING AND RUNNING WITH THE CENTERLINE THE FOLLOWING THREE COURSES:

- 1) WITH THE ARC OF A CIRCULAR CURVE TO THE LEFT HAVING A RADIUS OF 2,244.25' A LENGTH OF 465.93' AND A CHORD OF S54°25'46"E 465.09' TO A POINT COMPUTED.
- 2) S60°22'36"E 186.53' TO A POINT COMPUTED
- 3) S61°03'27"E 163.42' TO THE POINT OF BEGINNING.

CONTAINING 23.645 ACRES, MORE OR LESS

The above-described property was conveyed to EMILY PIERCE WHITT Trustee U/A Emily Pierce Whitt, dated December 1, 2997, from Charles Russell Whitt and wife, Emily Pierce Whitt as more particularly set forth in that Deed of Gift recorded in Deed Book 1048 at Page 503

All as more particularly shown on that "Boundary Survey of Whitt Property," prepared by Stephen S. Dyer, N.C.P.L.S. (L-3509) of the ISAACS GROUP and dated March 31, 2005.

All Deed Book, Map Book and Page references are found in the Union County, North Carolina Public Registry unless otherwise noted.

EXHIBIT 2.2(a)(v)

NON-REVOLVING PROMISSORY NOTE

("Fee Note")

\$12,000,000.00  
(subject to increase  
as described herein)

Charlotte, North Carolina  
October 30, 2006

FOR VALUE RECEIVED, IB DEVELOPMENT LLC, a North Carolina limited liability company (the "Borrower"), does hereby promise to pay to the order of VANDALIA CAPITAL II, LLC, a West Virginia limited liability company (the "Lender"), at its main office and place of business at 300 Capitol Street, Suite 1503, Charleston, West Virginia 25301, the principal sum of \$12,000,000.00, subject to increase as described herein, together with interest in the event of default as provided below on the unpaid principal balances outstanding from time to time on this "Fee Note," computed on the basis of a 360 day year, payable for the actual number of days in the payment period, and together with the additional amounts described herein. Terms used in this Fee Note that are not defined herein shall be defined as provided in that certain Fee Agreement between Borrower and Lender of even date herewith ("Fee Agreement") to which reference is made and incorporated herein.

1. Payments. The principal of this Note shall be payable as follows:

a. Borrower shall make principal reduction payments first to United Bank, Inc. ("Bank") pursuant to that promissory note of even date herewith ("Bank Loan") and as set forth in the Loan Agreement between Borrower and Bank of even date herewith ("Bank Loan Agreement") until the Bank Loan and all sums due in connection therewith are paid in full. Thereafter, IB shall make principal reduction payments on this Fee Note to Lender upon the closing of each sale of a Lot until the Fee and all sums due in connection therewith are paid in full. Each such payment shall be made within seven (7) business days after the sale of a Lot. Such payments shall be made from the "Net Proceeds from Sales" of each Lot, which shall be defined as the Closed Gross Sales Price of the Lot, less Buyer's Interest Carry, Closing Costs and Sales Commission, as such terms are used in the Budget (as defined in Section 5.1 of the Fee Agreement). The amount of each such payment by Borrower to Lender shall be as follows:

(i) Borrower shall pay to Lender 75% of the Net Proceeds from Sales of each Lot, with Borrower retaining the other 25%; provided, however, that if at any time before this Fee Note is paid in full, the Project is not progressing, in the sole judgment and discretion of Lender, in substantial compliance with the financial terms and timetable set forth in the Budget (as defined in Section 5.1 of the Fee Agreement), then Lender shall be paid 100% of the Net Proceeds from Sales of each Lot as described above until such time as Lender is satisfied that the Project is progressing in substantial compliance with the Budget. Such payments

shall continue until Lender has received the total sum of \$12,000,000 from such payments (the "Base Fee").

(ii) After Lender has received \$12,000,000 in Net Proceeds from Sales of Lots as set forth above, Borrower shall retain the entire Net Proceeds of Sales of Lots until Borrower has received a total of \$12,000,000 in Net Proceeds from Sales of Lots, including the 25% of Net Proceeds from Sales retained by it while the Base Fee was being paid to Lender.

b. No interest shall be payable except in the event of a Default as defined in the Fee Documents (as defined in the Fee Agreement).

c. On May 1, 2008, the entire principal sum, and the additional amount described in Paragraph 2 of this Note, and all other amounts outstanding shall be due and payable.

d. The loan evidenced by this Note is non-revolving in nature and principal repaid will not be available for reborrowing.

2. Additional Fee Payment Obligation – After Borrower has received \$12,000,000 in Net Proceeds from Sales of Lots as set forth in 1.a.(ii) above and Lender has received \$12,000,000 in Net Proceeds from Sales of Lots as set forth in 1.a.(i) above, thereafter Lender and Borrower each shall receive 50% of the Net Profit of the Project. "Net Profit" shall be calculated as such term is calculated on the Budget (as defined in Section 5.1 of the Fee Agreement). Such payments of Net Profit shall be made to Lender on the 15<sup>th</sup> day after the end of each calendar quarter with respect to the preceding calendar quarter, with a true-up to be done between the parties at the end of the Project. Such additional amounts shall not be considered interest on the principal sum, but rather is part of the principal and an integral component of the Fee owed under the Fee Agreement and represents part of the compensation for the consideration and benefits provided by Lender and the Guarantors (as defined in the Fee Agreement) (the "Guarantors") to Borrower relating to that certain loan from Bank to Borrower in the principal amount of \$28,212,594.00, which has been facilitated and made possible by Lender and the Guarantors as more particularly set forth in the Fee Agreement and the other Fee Documents (as defined in the Fee Agreement) and in the Bank Loan Agreement and the other Loan Documents (as defined in the Bank Loan Agreement). For all purposes of this Note and the other Fee Documents, such additional amount shall be included in and shall be considered an integral component and part of the Fee and the amount due under this Note.

3. Prepayment. This Note may be prepaid at any time without penalty.

4. Interest Rate. No interest shall apply to this Note, except for a Default Interest Rate in the event of a Default as described below.

5. Evidence and Security. This Note is fully issued and the proceeds are fully advanced and disbursed as of the date hereof pursuant to, in accordance with and for the

consideration set forth in the Fee Agreement, the receipt and adequacy of which consideration and proceeds are hereby acknowledged by Borrower. Repayment of this Note is secured as provided for in the Fee Agreement, in the Vandalia Mortgage (as defined in the Fee Agreement), and in the Fee Documents (as defined in the Fee Agreement).

6. Remedies. If Borrower shall fail to pay any installment of principal as and when the same is due and payable hereunder or on any other indebtedness of Borrower due and owing to Lender, or if there shall have occurred and be continuing an Event of Default under the Fee Agreement, then the entire unpaid principal balance of this Note shall, at the option of the holder hereof, without notice, immediately become due and payable for all purposes, and the holder may exercise the rights and remedies provided for in the Fee Documents and under applicable law.

7. Default Interest. Should any payment of interest or principal remain outstanding at any time after its due date, then the entire principal balance with accrued interest shall, at the election of the Lender, become immediately due and payable. Such outstanding amounts shall bear a default rate of interest equal to the prime lending rate, as published by The Wall Street Journal, plus 2.00 percentage points (the "Default Interest Rate").

8. Applicable Law. This Note shall be governed by the laws of the State of West Virginia.

9. Waiver. Each party to this Note, whether as principal, endorser, guarantor, surety or otherwise, jointly and severally, waives presentment, demand, protest and notice of dishonor and agrees that an extension or extensions of time of payment of this Note or any installment hereof may be made before, at or after maturity by agreement with any one or more of the parties hereto without notice to and without releasing the liability of any other party.

IN WITNESS WHEREOF, the undersigned has caused this Note to be executed as of the date first set forth above.

**IB DEVELOPMENT LLC**  
By Infinity Partners LLC, as Manager

By: \_\_\_\_\_  
Brian Hilbrant  
Its: Member

## EXHIBIT 4.1

### Form of Guaranty Agreement

#### **GUARANTY**

(Specific Debt - Limited)

**DATE AND PARTIES.** The date of this Guaranty is October 30, 2006. The parties and their addresses are:

**LENDER:**

UNITED BANK, INC.  
500 Virginia Street - East  
Charleston, West Virginia 25301  
Telephone: (304) 348-8400

**BORROWER:**

IB DEVELOPMENT, LLC  
a North Carolina Limited Liability Company  
13850 Ballantyne Corporate Place  
Suite 150  
Charlotte, North Carolina 28277

**GUARANTOR:**

**1. DEFINITIONS.** As used in this Guaranty, the terms have the following meanings:

- A. **Pronouns.** The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.
- B. **Note.** "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.
- C. **Property.** "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

**2. SPECIFIC DEBT GUARANTY.** For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce you, at your option, to make loans or engage in any other transactions with the Borrower from time to time, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of the following described Debt(s) of the Borrower including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, No. 3026937-8001, dated October 30, 2006, from IB Development, LLC (Borrower) to you, in the amount of \$28,212,594.00, which has a maturity date of May 1, 2008.

My liability will not exceed the sum of 8.340 percent of the original principal amount of the Debt, plus accrued interest, attorneys' fees and collection costs, when allowed by law, and all other costs, fees and expenses agreed to be paid under all agreements evidencing the Debt and securing the payment of the Debt. You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

**3. EXTENSIONS.** I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

**4. UNCONDITIONAL LIABILITY.** I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other circumstances which make the indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

**5. BANKRUPTCY.** If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me. I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all

times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you, pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

**6. REVOCATION.** I agree that this is an absolute and unconditional Guaranty. This Guaranty cannot be revoked and will remain in effect until the Debt is paid in full.

**7. PROPERTY.** I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeating, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me or my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

**8. DEFAULT.** I will be in default if any of the following occur:

A. Payments. I fail to make a payment in full when due.

B. Insolvency or Bankruptcy. The dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me or Borrower.

C. Death or Incompetency. I die or am declared legally incompetent.

D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Guaranty.

E. Other Documents. A default occurs under the terms of any other document relating to the Debt.

F. Other Agreements. I am in default on any other debt or agreement I have with you.

G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. I fail to satisfy or appeal any judgment against me.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. I change my name or assume an additional name without notifying you before making such a change.

K. Property Transfer. I transfer all or a substantial part of my money or property.

L. Property Value. You determine in good faith that the value of the Property has declined or is impaired.

M. Insecurity. You determine in good faith that a material adverse change has occurred in my financial condition from the conditions set forth in my most recent financial statement before the date of this Guaranty or that the prospect for payment or performance of the Debt is impaired for any reason.

**9. WAIVERS AND CONSENT.** To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property.

(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, until the obligations of the Borrower to Lender have been paid in full, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or other person in control or a close relative of any of these other persons.) Any Guarantor who is not an Insider makes these waivers until all Debt is fully repaid.

**B. No Waiver By Lender.** Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

**C. Waiver of Claims.** I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

**10. REMEDIES.** After the Borrower or I default, and after you give any legally required notice and opportunity to cure the default, you may at your option do any one or more of the following.

**A. Acceleration.** You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

**B. Sources.** You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

**C. Insurance Benefits.** You may make a claim for any and all insurance benefits or refunds that may be available on default.

**D. Payments Made on the Borrower's Behalf.** Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

**E. Termination.** You may terminate my right to obtain advances and may refuse to make any further extensions of credit.

**F. Attachment.** You may attach or garnish my wages or earnings.

**G. Set-Off.** You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

**H. Waiver.** Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

**11. COLLECTION EXPENSES AND ATTORNEYS' FEES.** On or after Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I



agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

**12. WARRANTIES AND REPRESENTATIONS.** I have the right and authority to enter into this Guaranty. The execution and delivery of this Guaranty will not violate any agreement governing me or to which I am a party.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

**13. RELIANCE.** I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and I have signed this Guaranty to induce you to extend such credit. I represent and warrant to you that I have a direct and substantial economic interest in the Borrower and expect to derive substantial benefits from any loans and financial accommodations resulting in the creation of indebtedness guaranteed hereby.

**14. APPLICABLE LAW.** This Guaranty is governed by the laws of West Virginia, the United States of America, and to the extent required, by the laws of the jurisdiction where the Property is located, except to the extent such state laws are preempted by federal law.

**15. AMENDMENT, INTEGRATION AND SEVERABILITY.** This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty is the complete and final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

**16. ASSIGNMENT.** If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unimpaired right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

**17. INTERPRETATION.** Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Guaranty.

**18. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete. I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

**19. CREDIT INFORMATION.** I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such information to others.

**20. SIGNATURES.** By signing under seal, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty and acknowledged that I have read the Note and all related Loan Documents.

**21. CONTRIBUTION AMONG MEMBER GUARANTORS.** As among the Guarantors who are Members of Vandalia Capital II, LLC, or who have any interest in an entity that is a Member of Vandalia Capital II, LLC or who have any interest in an entity that is a Member of Vandalia Capital II, LLC (the "Member Guarantors"), and without affecting the right of the Beneficiary to proceed severally against each of the Member Guarantors as set forth herein, it is agreed by and among the Member Guarantors that:

- (a) Each Member Guarantor shall promptly contribute his 100% proportion of any and all Debt due hereunder to Beneficiary and shall deal with all other Member Guarantors in good faith, in order to ensure that all liability for Debt hereunder shall be shared equally among the Member Guarantors.
- (b) This Section of the Guaranty provides to Member Guarantors the benefits and obligations of contractual contribution and restitution as to all future payments made by Member Guarantors, or any of them, to Beneficiary by reason of this Guaranty, and each Member Guarantor shall have a cause of action against every other Member Guarantor to enforce his or its rights hereunder. Member Guarantors hereby waive any right to assert in any manner against the other Member

Guarantors any claim, defense, counterclaim and off-set of any kind or nature, whether legal or equitable, that the Member Guarantors, or any of them, may now or at any time hereafter have against one or more of the other Member Guarantors.

- (c) Each of the Member Guarantors agrees to pay, forthwith and on demand made after the Debt has been completely and finally satisfied, all amounts rightfully owing pursuant to the terms hereof to the demanding Member Guarantors.

**GUARANTOR:**

\_\_\_\_\_ (Seal)

Individually

**LENDER:**

United Bank, Inc.

By \_\_\_\_\_ (Seal)  
Julie R Gurtis, Senior Vice President

**EXHIBIT 5.1**  
**Budget and Timeline**

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

VANDALIA CAPITAL II, LLC, :  
UNITED BANK, INC., RALPH :  
BALLARD, III, STEPHEN B. FARMER, :  
DAVID P. FERRETTI, SHAWN P. :  
GEORGE, MARK A. GRIMMETT, :  
ROBERT HUGGINS, ANDREW B. :  
JORDAN, R. SCOTT LONG, ANDREW :  
A. PAYNE, III, ROOKE ASSET :  
PARTNERS, LP, ANDREW K. ROOKE :  
and TIMOTHY K. WILCOX, :

Plaintiffs, :

v. :

DAVID P. PRAY, Individually and as :  
Trustee of the DAVID P. PRAY :  
REVOCABLE TRUST, DAVID P. PRAY :  
REVOCABLE TRUST, and JOHN/JANE :  
DOE, :

Defendants, :

v. :

THE WOODS DEVELOPMENT :  
COMPANY, LLC, :

Third-Party Defendants. :

Civil Action No. 13-C-570

The Honorable Louis H. Bloom

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing David P. Pray and the David P. Pray Revocable Trust's Answer, Counterclaims and Third-Party Complaint was served, as indicated, on this 30<sup>th</sup> day of June, 2014, on the following counsel of record in this case:

By Hand Delivery

Scott S. Segal, Esq.  
The Segal Law Firm, L.C.  
810 Kanawha Boulevard, East  
Charleston, WV 25301

By Email

Mark R. Staun, Esq.  
Hartley & O'Brien, PLLC  
2001 Main Street, Suite 600  
Wheeling, WV 26003  
*Counsel for Plaintiffs*

A handwritten signature in black ink, appearing to read 'Thanos Basdekis', with a long horizontal line extending to the right.

Thanos Basdekis (WVSB #9832)