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RECEIVED

JAN 30 2009

PUBLIC SERVICE
COMMISSION

January 29, 2009

VIA FEDERAL EXPRESS

Hon. Jeff Derouen
Executive Director
Public Service Commission
211 Sower Blvd.
Frankfort, KY 40601

Re: *In the Matter of: The Villas of Woodson Bend Condominium Association, Inc.
v. South Fork Development, Inc., Timothy L. Gross, and The Janice Gross
Living Revocable Trust, Janice Gross, Trustee, Case No. _____*

2009-00037

Dear Mr. Derouen:

Enclosed for filing in the above-referenced case are one original and eleven (11) copies of The Villas of Woodson Bend Condominium Association, Inc.'s Verified Complaint against South Fork Development, Inc., Timothy L. Gross, and the Janice Gross Living Revocable Trust, Janice Gorss, Trustee. Please file-stamp one copy, and return it to our courier.

The complaint seeks to prohibit the operator of a sewer treatment utility from following through on its threat to stop providing service. Accordingly, the Commission's prompt attention is very much appreciated, and we respectfully request an expedited hearing on the matter. The enclosed includes a faxed copy of the verification of the Association's president, Reed Hall. The Association anticipates filing the original signed verification shortly.

Thank you, and if you have any questions, please call me.

Sincerely,



Michael M. Hirn

MMH/sdt
Enclosures

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38830-1

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JAN 30 2009

PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE VILLAS OF WOODSON BEND)
CONDOMINIUM ASSOCIATION, INC., et. al.)

Complainant)

v.)

Case No. 2009-00037

SOUTH FORK DEVELOPMENT, INC.,)

TIMOTHY L. GROSS,)

and)

THE JANICE GROSS LIVING REVOCABLE)
TRUST, Janice Gross, Trustee)

Defendants)

VERIFIED COMPLAINT

The Villas of Woodson Bend Condominium Association, Inc. (the "Association"), by counsel, for its verified complaint against South Fork Development, Inc. ("South Fork"), Tim Gross, and the Janice Gross Trust, pursuant to KRS 278.260, hereby states as follows.

1. The full name and business address of the Association is The Villas of Woodson Bend Condominium Association, Inc., 2609 Idlewood Drive, Lexington, KY, 40513. The Association is a Kentucky non-stock, non-profit corporation comprised of the owners of the condominium units within the Villas of Woodson Bend (the "Villas"). The Villas condominium regime was established by master deed filed with the clerk of Pulaski County, Kentucky on or about April 1, 2002 at Deed Book 14 Page 514 (the "Master Deed"). The Condominium Property is comprised of 61 units incorporated in a mixture of quadruplexes, duplexes and single

family homes located on approximately 48 acres overlooking Lake Cumberland. The Association is vested with the authority and duty to protect the members' collective interest in the Condominium Property.

2. The full name and address of South Fork is South Fork Development, Inc. 100 ✓
The Villas, Bronston, KY, 42518. South Fork is a Kentucky corporation involved in various one or more land development projects within the state. South Fork is the developer of the Villas properties. In August of 2007 South Fork turned over control of the Association to the unit owners but retained control of the sewage treatment facility located adjacent to and providing sewage treatment services to the Association properties as well as other properties in the area.

3. The full name and address of Timothy Gross is Timothy L. Gross, 100 The Villas, ✓
Bronston, KY 42518. Gross is a Kentucky resident and the sole owner and president of South Fork.

4. The Janice Gross Living Revocable Trust, with Janice Gross as Trustee (the "Trust") is, upon information and belief, the owner or co-owner of the property upon which the sewage treatment facility is located as well as owner or co-owner of the sewage treatment facility itself.

5. The facts supporting this complaint are set forth more fully below; but briefly, this complaint concerns a sewage treatment facility owned and operated either collectively or separately by Defendants in violation of applicable law in several ways. First, the Defendants never sought nor received Commission certification or approval to build or operate a sewage treatment facility or to provide sewage treatment services to the Association, the unit owners, or other property owners in the vicinity of the Villas property. Second, the Defendants have unreasonably threatened to terminate the provision of sewage treatment services to the

Association and other property owners if past "rent" goes unpaid.¹ Third, the Defendants have not filed schedules of their rates with the Commission, and, thus, have not received Commission approval of their rates as just, fair, and reasonable. And, fourth, it is unclear whether Defendants are currently actively monitoring and managing the sewage treatment facility with personnel, qualified or otherwise. Not only are these actions in violation of applicable law, the very health and public safety of the Association, other property owners in the area, as well as that of Lake Cumberland which borders the Association property, are seriously threatened by the Defendants' actions.

Applicable Law

6. Pursuant to KRS 278.040, the Commission has jurisdiction "over the regulation of rates and service of utilities" within the Commonwealth. *Id.*

7. Pursuant to KRS 278.260, the Commission is vested with the express authority to investigate and remedy "complaints as to rates or service of any utility." *Id.*

8. Pursuant to KRS 278.010(3)(f), a utility includes "any person . . . who owns, controls, operates or manages any facility used or to be used for . . . [t]he collection, transmission, or treatment of sewage for the public, for compensation." *Id.* Defendants, either collectively or separately, are such a utility.

9. Pursuant to KRS 278.020(1), "[n]o person, partnership, public or private corporation, or combination thereof shall commence providing utility service to or for the public or begin the construction of any plant, equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010 . . . until that person has obtained from

¹ The Association and South Fork are involved in a lawsuit currently pending in the Pulaski Circuit Court. Through that action (Case No. 08-CI-00386) the Association seeks *inter alia* a declaration that South Fork may no longer develop any additional units within the Condominium Property as well as damages in connection with the alleged faulty construction of the units and common areas.

the Public Service Commission a certificate that public convenience and necessity require the service or construction." Id. Defendants never obtained such a certificate of public convenience and necessity from the Commission prior to construction of the facility or the provision of service therefrom.

10. Pursuant to KRS 278.020(5), "[n]o person shall . . . abandon . . . [any utility], without prior approval by the commission." Id. Defendants have, without Commission approval, effectively abandoned the sewage treatment facility by not providing for its management and / or not paying for the electricity required to keep it operational.

11. Pursuant to KRS 278.030(1), "[e]very utility may demand, collect and receive fair, just and reasonable rates for the services rendered or to be rendered by it to any person." Because Defendants have not filed its rates for the provision of sewage treatment services with the Commission, which requires such rates, in fact, to be "just, fair and reasonable," it is unclear whether the "rent" charged by Defendants to date has met this standard.

12. Pursuant to KRS 278.030(2), "[e]very utility shall furnish adequate, efficient and reasonable service." Id. Defendants' refusal to pay the electric bill for the sewage treatment facility and threats to cease sewage treatment service within thirty (30) days if past "rent" is not paid are not reasonable.

13. Pursuant to KRS 278.160(1), "each utility shall file with the commission, within such time and in such form as the commission designates, schedules showing all rates and conditions for service established by it and collected or enforced." Id. Defendants have failed to file the required schedules with the Commission showing all rates and conditions for service.

14. Pursuant to KRS 278.160(2), "[n]o utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than

that prescribed in its filed schedules." Id. Defendants have been, contrary to KRS 278.160(2), charging the Association "rent" for the provision of sewage treatment services without filing such charges with the Commission.

Statement of Facts

15. In March 2001, South Fork purchased an approximately 160 acre plot of land located along the banks of Lake Cumberland from one of its then shareholders, Robert Kenison. Thereafter, South Fork Development began developing and promoting a condominium project known as "The Villas of Woodson Bend."

16. On April 1, 2002, South Fork Development filed the Master Deed establishing a condominium regime pursuant to KRS 381.805 *et. seq.* That document designated the approximately 48 acres that were to be included within the "The Villas of Woodson Bend" regime (the "Condominium Property").

17. Subsequently, on property located directly adjacent to the Condominium Property, and believed to be owned by the Trust, South Fork developed and constructed a sewage treatment facility for the purpose of providing sewage treatment services to the Association and other property owners in the area. Furthermore, and significantly, this sewage treatment facility is located approximately 300 to 400 yards from the banks of Lake Cumberland.

18. In marketing the condominium units to potential buyers, South Fork led those buyers to believe that the sewer treatment facility would be owned by them as part of the common elements of the Condominium Property and that they would not be charged for sewer services beyond their typical assessment.

19. Moreover, from 2002 through 2006, South Fork did not charge the unit owners for sewer treatment fees, but then, beginning in February 2007, it began attempting to

retroactively charge fees to January of 2007. Because they had multiple claims against South Fork and because the developer had never properly set rates for the provision of sewer treatment services, the Association and the unit owners declined to meet South Fork's demand for payment for those services.

20. On June 20, 2008, Defendant Gross admitted under oath by way of deposition that as of that date Defendants have neither sought nor received Commission approval for the construction or operation of the sewage treatment facility. Furthermore, Defendant Gross admitted that "it is probably necessary" for Defendants to seek Commission approval or certification for the operation of the sewage treatment facility. (See Deposition of Timothy Gross at 42:21-43:4, attached as **Exhibit A**).

21. Upon information and belief, Defendants have become financially unstable and no longer able to adequately and safely own, control, or otherwise operate safely the sewage treatment facility. This includes Defendants' inability and / or refusal to pay the electric bills for the sewage treatment facility and the threat of foreclosure by the mortgagee bank on the sewage treatment facility and / or the property upon which the sewage treatment facility is located.

22. On November 4, 2008, Defendant Gross sent an email to his former attorney, Jay McShurley, which was subsequently forwarded to the Association, stating that the local electric company "will turn off power to sewer system if bills not paid by 11.10.08. . . . [L]et **RECC turn it off**. Maybe that would get the owners to do something." This email was not forwarded to the Association until November 8, 2008, only two days prior to the electricity for the facility being shut off. (A copy of this November 4th and 8th email is attached as **Exhibit B**).

23. Again, on December 4, 2008, Defendant Gross's former attorney, Jay McShurley, sent the Association an email notifying it that South Fork "does not have funds to pay [the

electric] bill. I don't know what happens if power is shut off, but my guess is that the sewer facility stops working." (A copy of this December 4th email is attached as **Exhibit C**). The Association thereafter paid the electric bill to secure the continued operation of the facility.

24. On January 7, 2009, South Fork, through its current attorney, Daniel G. Yeast, sent a letter to the Association threatening the discontinuance of sewage treatment service within thirty (30) days if "all back rent is not paid in full." (A copy of this January 7th letter is attached as **Exhibit D**).

25. The Defendant's ownership, operation, control and / or management of the sewage treatment facility for the purpose of providing sewage treatment services to the Association and other property owners qualifies Defendants as a utility under KRS 278.010(3)(f).

26. The Defendants' failure to apply for and receive a certificate of public convenience and necessity from the Commission is in direct violation of KRS 278.020, which requires such a certification prior to the construction of a sewage treatment facility and / or the provision of sewage treatment services to the public. One of the essential reasons for requiring such an application process is for the Commission to be assured that owners and operators of public utilities have the necessary financial means and expertise to adequately provide the public with uninterrupted and safe utility services. The Defendants' dire financial circumstances, as a result, have placed the public health and safety of the Association and other property owners in the area at serious risk if and when the sewage treatment facility ceases to operate.

27. Defendants' refusal or inability to pay for the electric service required to keep the sewage treatment facility in operation, lack of adequate personnel to monitor its safe and reasonable operation, and threatened cessation of service to the Association has resulted in what

amounts to an effective abandonment of the sewage treatment facility in violation of KRS 278.020(5).

28. Furthermore, Defendant's demand for "all back rent" in relation to the provision of sewage treatment services is in violation of both KRS 278.160(1) and (2) which require a utility to file with the Commission schedules showing all rates that will be charged for its service, and then limits that utility to charging or collecting only that rate as it appears on those filed schedules.

WHEREFORE, the Association respectfully requests that the Public Service Commission:

A. Order an inspection of the sewage treatment facility with no or short notice to Defendants.

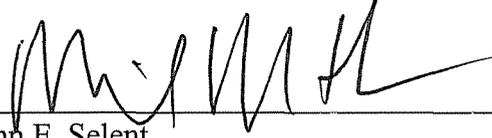
B. Order that Defendants keep the sewage treatment facility open indefinitely with adequate personnel to monitor and manage the facility.

C. Order that a suitable trustee take over the sewage treatment facility in the interim, or, alternatively, an order that the Association may have access to the facility to provide for its continued operation.

D. Confirm that the Defendants cannot charge the Association or the unit owners for sewer services provided prior to the time the Commission sets rates that are determined to be fair, just, and reasonable.

E. Grant all other relief to which the Association may appear to be entitled.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael M. Hirn", written over a horizontal line.

John E. Selent

Michael M. Hirn

Stephen D. Thompson

DINSMORE & SHOHL LLP

1400 PNC Plaza

500 West Jefferson Street

Louisville, KY 40202

(502) 540-2300 (Phone)

(502) 585-2207 (Fax)

michael.hirn@dinslaw.com (E-mail)

**COUNSEL TO THE VILLAS AT
WOODSON BEND CONDOMINIUM
ASSOCIATION, INC.**



COMMONWEALTH OF KENTUCKY
PULASKI CIRCUIT COURT
DIVISION 12
CASE NO. 08-CI-00386

THE VILLAS OF WOODSON BEND CONDOMINIUM ASSOCIATION, et al. PLAINTIFFS

VS.

SOUTHFORK DEVELOPMENT, INC., et al. DEFENDANTS

DEPOSITION OF TIMOTHY L. GROSS

The deposition of TIMOTHY L. GROSS was taken before Judy Fothergill, Stenotype Deposition Reporter and Notary Public in and for the Commonwealth of Kentucky, at the Law Offices of Hon. Jay McShurley, 126 North Maple Street, Somerset, Kentucky on Friday, June 20, 2008, beginning at the approximate hour of 11:00 a.m.

Said deposition was taken pursuant to notice, and is to be used for all purposes consistent with the Kentucky Rules of Civil Procedure.

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1 APPEARANCES
2
3 ON BEHALF OF THE PLAINTIFFS,
4 The Villas of Woodson Bend Condominium Association, et al.:
5
6 Hon. Michael M. Hirn
7 Dinsmore & Shohl
8 1400 PNC Plaza
9 Louisville, Kentucky 40202
10 ON BEHALF OF THE DEFENDANT,
11 Southfork Development, Inc., et al.:
12
13 Hon. Jay McShurley
14 126 North Main Street
15 Somerset, Kentucky 42501
16 ON BEHALF OF THE DEFENDANT,
17 Citizens National Bank:
18
19 Hon. Susan J. Ham
20 200 East Mount Vernon Street
21 Somerset, Kentucky 42501
22 ON BEHALF OF THE DEFENDANT,
23 Epcor Communities:
24
25 Hon. Matthew A. Stinnett
Greenbaum Doll & McDonald
300 West Vine Street, Suite 1100
Lexington, Kentucky 40507

1 TIMOTHY L. GROSS,
2 after first being duly sworn, was examined and testified as
3 follows:
4 EXAMINATION
5 BY MR. HIRN:
6 Q. Sir, will you please state your full name for the
7 record.
8 A. Timothy L. Gross.
9 Q. Mr. Gross, I'm going to show you a document that was
10 served on your counsel earlier. Have you seen that before?
11 (Witness reviewing document.)
12 A. Yes.
13 Q. Are you prepared to talk about the items that are
14 identified on that document?
15 A. Yes.
16 MR. HIRN:
17 I'll make that Exhibit 1.
18 (A copy of a "Notice to Take Deposition Pursuant to
19 CR 30.02(6)" is marked as Exhibit 1, and copies are attached
20 to the original and each copy of this deposition transcript.)
21 Q. Sir, I'm going to ask you a series of questions
22 today, and if at any point you don't understand the question,
23 will you please ask me to repeat it?
24 A. Mmm-hmm.
25 Q. And I need you to give a yes or no answer to make it



1 I have no idea. I've never said that.
 2 Q. Well, the sales people were working for Southfork;
 3 weren't they?
 4 A. They can work for Southfork. I still don't control
 5 what they say.
 6 Q. Are you responsible for what they say?
 7 A. That's another legal question. I don't know.
 8 Q. Did you ever give the sales folks guidance as to what
 9 they should say in process --
 10 A. Absolutely.
 11 Q. Let me finish the question. Did you ever give the
 12 sales folks guidance in terms of what they should say in
 13 marketing the units?
 14 A. Yes.
 15 Q. What instructions did you give them in that regard?
 16 A. I can't even tell you. We're going back in time
 17 five, six years. My former partner's wife was in there, you
 18 know, I don't know what was told to her.
 19 Q. Did you ever advise the sales people to tell would-be
 20 buyers that there would be such amenities as walking trails
 21 made available to the unit purchasers?
 22 A. No. We were just -- they were just there. It's 160
 23 acres.
 24 Q. At any point did Southfork make any representations
 25 or promises to the condominium units regarding amenities that

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1 would be available to them in connection with the Villas of
 2 Woodson Bend development?
 3 A. Other than a swimming pool, no.
 4 Q. And the swimming pool was not available last year at
 5 all; was it?
 6 A. No.
 7 Q. Was it Southfork's obligation to provide the unit
 8 owners a swimming pool last summer?
 9 A. I don't know if it was a legal obligation. But, yes,
 10 we wanted to provide a swimming pool.
 11 Q. Why were you unable to do so?
 12 A. Inspectors said it did not meet code.
 13 Q. All right, sir, I'm going to switch gears a minute.
 14 I want to talk about the sewer treatment facility for a
 15 moment. The land on which that treatment facility sets is
 16 owned by the Janice Gross Trust; is that correct?
 17 A. Yes.
 18 Q. Is that property still managed by Gross Enterprises,
 19 LLC?
 20 A. Yes.
 21 Q. Has either the managing LLC or the trust itself done
 22 anything to file with the Public Service Commission to obtain
 23 rights to act as a utility?
 24 A. No.
 25 Q. Did you ever seek any opinion from the PSC as to

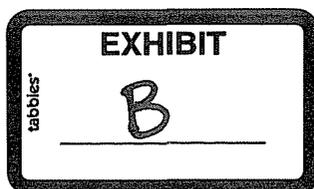
42

1 whether that would be necessary?
 2 A. No.
 3 Q. Do you believe that it is not necessary?
 4 A. At this time, I would say it probably is necessary.
 5 Q. Earlier this year the city of Burnside expressed some
 6 interest in purchasing the sewer treatment facility; is that
 7 correct?
 8 A. Yes.
 9 Q. When was the last time you talked to anybody in
 10 connection with the possible purchase of that by Burnside?
 11 A. Months ago.
 12 Q. Do you have any knowledge of their current intentions
 13 with respect to purchasing the sewer treatment facility?
 14 A. No direct knowledge.
 15 Q. What indirect knowledge do you have?
 16 A. That they were applying for a loan or grant from the
 17 government, and if they obtain that, they would be interested
 18 in purchasing the sewer system.
 19 Q. Who have you communicated with other than your
 20 attorney regarding the sale of that sewer treatment facility
 21 to Burnside?
 22 A. The bank and my attorney.
 23 Q. Have you ever talked to Chuck Forman or anybody with
 24 the City?
 25 A. I talked to Chuck once or twice.

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1 Q. When were those conversations?
 2 A. I don't know. It's in conjunction with my attorney.
 3 Q. Has that been within the last two months?
 4 A. I would say probably not.
 5 Q. Tell me about the conversations you've had with the
 6 bank relative to the purchase of the sewer treatment facility.
 7 Have they offered financing?
 8 A. I believe you would have to ask them.
 9 Q. Well, I'm asking you.
 10 A. I don't know.
 11 Q. What do you recall about those conversations?
 12 A. Like I say, I don't recall anything at the moment.
 13 Q. Why did you talk to the bank about the purchase?
 14 A. To see if they would approve it or not.
 15 Q. Well, I assume that they would be paid in part out of
 16 the proceeds; wouldn't they?
 17 A. They have to approve any sale. And your question is,
 18 yes, they would be paid out of the proceeds.
 19 Q. Pursuant to the loan agreement with the bank, when
 20 you sell a unit what percentage of the sale amount do you have
 21 to give to the bank?
 22 A. We give it all to the bank because it's against the
 23 line of credit.
 24 Q. Do you keep any percentage of it for operating
 25 capital?

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HIRN, MICHAEL

From: jmcshurley@aol.com
Sent: Saturday, November 08, 2008 2:22 PM
To: HIRN, MICHAEL
Subject: Fwd: RECC bills for sewer
Attachments: scan0001.bmp; scan0002.bmp

Mkke:

Tim Gross sent me the two bills which are attached hereto. Those electric bills are for the sewage treatment facility. Tim instructed me to send the bills to you.

Jay McShurley, Lawyer, CFP & CELA
P.O. Box 1827
126 N. Maple Street
Somerset, KY 42502-1827
Tel. 606 677-9014
Fax. 606 677-0142

-----Original Message-----

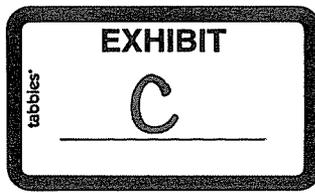
From: Tim Gross <tlgross144@sbcglobal.net>
To: Jay McShurley <jmcshurley@aol.com>
Sent: Tue, 4 Nov 2008 12:31 pm
Subject: RECC bills for sewer

Hi Jay,
RECC states they will turn off power to sewer system if bills not paid by 11.10.08. I am sending you a copy of the 2 bills. One for lift station & one for aeration.
I would not send Hirn a copy until the 10th. Or, just don't send him a copy period & let RECC turn it off. Maybe that would get the owners to do something. They are trying to get me to go bankrupt & wish to use the stall method to everything.
Let me know.
Thanks,
Tim

[Image Removed]

[Image Removed]

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From: jmcshurley@aol.com [mailto:jmcshurley@aol.com]
Sent: Thursday, December 04, 2008 2:57 PM
To: Vicki Cooper
Subject: Fwd: Sewer Aerator Bill

1/20/2009

Vicki:

Tim Gross sent me a copy of an electric bill for the sewer aerator. He does not have funds to pay that bill. I don't know what happens if power is shut off, but my guess is that the sewer facility stops working.

Also, with respect to the options sent out to homeowners--none of those are what I prefer. So, I will not submit a response, but will attend the meeting on the 13th.

Thanks,

Jay McShurley, Lawyer, CFP & CELA
P.O. Box 1827
126 N. Maple Street
Somerset, KY 42502-1827
Tel. 606 677-9014
Fax. 606 677-0142

-----Original Message-----

From: Tim Gross <tlgross144@sbcglobal.net>
To: Jay McShurley <jmcsurley@aol.com>
Sent: Thu, 4 Dec 2008 2:18 pm
Subject: Sewer Aerator Bill

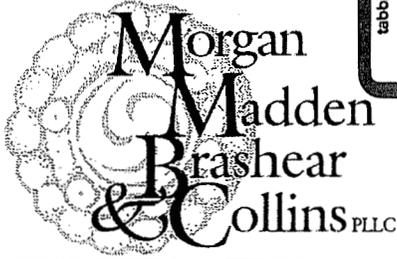
[Image Removed]

Trim your tree and your spending! [Get the AOL Holiday Shopping Toolbar](#) for money saving offers and gift ideas.

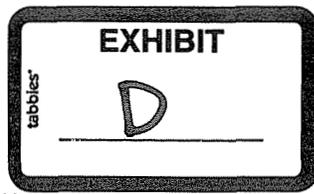
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ATTORNEYS AT LAW



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McKinley Morgan • R. Scott Madden • Leonard H. Brashear
Jeffery Morgan • Roy G. Collins • Daniel G. Yeast

Roger Riggs • Stacy Taulbee

January 7, 2009

Hon. Mike Hirn
Dinsmore & Shohl, LLP
1400 PNC Plaza
Louisville, KY 40202

**Re: The Villas of Woodson Bend Condominium Association, Inc. vs.
South Fork Development, Inc.
Pulaski Circuit Court**

Dear Mr. Hirn:

It is my understanding that The Villas of Woodson Bend Condominium Association, Inc. has stopped paying their sewer rent. As you might expect, it costs money to provide this service. If all back rent is not paid in full within thirty (30) days sewer service will cease.

Also, you should inform the association that any of them that keep their boats at the dock should probably be looking elsewhere to moor their boats. It is becoming very likely that the dock may have to be shut down.

Should you have any questions, please feel free to contact me.

Yours truly,

Daniel G. Yeast
DGY/jp

S:\jp.dan.clients.southfork.hirn.re.boats.sewer.1.7.09

Annville Office: 4527 Highway 30 West • Annville, KY 40402 • (606) 364-2963 or 364-3933 • Fax (606) 364-2973
Hazard Office: 21 Grand Oak Lane • P.O. Box 509 • Hazard, KY 41702 • (606) 436-4361 or 785-0971 • Fax (606) 487-9381
Hyden Office: 22977 Hwy. 421/Rockhouse • P.O. Box 677 • Hyden, KY 41749 • (606) 672-2142 or 672-3577 • Fax (606) 672-2142
London Office: 921 South Main Street • London, KY 40741 • (606) 864-6451 or 877-1401 • Fax (606) 864-8712
Manchester Office: 109 Dickenson Street • Manchester, KY 40962 • (606) 598-6124 or 598-2122 • Fax (606) 598-7842
Mt. Sterling Office: 51 North Maysville Street • Mt. Sterling, KY 40353 • (859) 499-3433 • Fax (859) 499-3434
Richmond Office: 1419 Lexington Road • Richmond, KY 40475 • (859) 625-5900 or 625-9933 • Fax (859) 624-8951