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LOAN AGREEMENT

entered into between

ANDRE VAN DER WESTHUIZEN

and

BELLA VITA WINE ESTATE PROPERTY OWNERS' ASSOCIATION

THEMIS
EST 2005
COMMERCIAL LEGAL ADVISORS

Index

LOAN AGREEMENT

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1 INTERPRETATION

1.1 In this Agreement, unless inconsistent with or otherwise indicated by the context –

1.1.1 "**Agreement**" means the loan agreement set out in this document and the annexures hereto;

1.1.2 "**Borrower**" means La Bella Vita Wine Estate Property Owners' Association, a body corporate constituted in terms of section 29 of the Land Use Planning Ordinance, No. 15 of 1985, in respect of the Estate;

1.1.3 "**Business Day**" means any day that is not a Saturday, Sunday or South African public holiday;

1.1.4 "**Common Property**" means the common property of the Estate, being Portions 60, 61, and 63 of Farm Simonsvlei No. 791, Paarl Division, Western Cape Province, currently held by the Developer under deed of transfer T19783/2001;

1.1.5 "**Conveyancer**" means Hayes Incorporated of Unit 1 Roeland Square, Roeland Street, Cape Town (contact: Bibi Smit at bibi@themis.co.za);

1.1.6 "**Developer**" means Fundeals Sixteen (Pty) Ltd (in liquidation), registration number 2003/006985/07, a private company with limited liability registered in terms of the laws of the Republic of South Africa;

1.1.7 "**Estate**" means La Bella Vita Wine Estate, a group housing development situated outside Paarl, Western Cape Province, comprising of a subdivision of Portion 39 of the Farm Simonsvlei No. 791, Paarl Division, Western Cape Province;

1.1.8 "**Event of Default**" means an event of default contemplated in clause 10.1;

1.1.9 "**Final Repayment Date**" means [•] months following the Transfer Date, or such later date as may be agreed by the Parties in writing;

Commented [Themis1]: Please confirm.

1.1.10 "**Legal Costs**" means the legal costs relating to attendances by Bowman Gilfillan Inc in respect of the advice given to and services rendered to the liquidators of the Developer concerning the reinstatement of the Developer and the transfer of the Common Property to the Borrower;

1.1.11 "**Lender**" means Andre van der Westhuizen, an adult male with South African identity number 740215 5203 087 or such other party as may be nominated by Andre van der Westhuizen to act as the Lender;

1.1.12 "**Loan Amount**" means an amount equal to the sum of –

1.1.12.1 the Reinstatement Costs; R186,597-94

1.1.12.2 the Legal Costs; R45,000-00 (REDUCED FEE)

1.1.12.3 the Transfer Costs, as finally determined on the Transfer Date; and R 32,308-45

1.1.12.4 the legal costs relating to the negotiation and preparation of this Agreement, R ???

or any part thereof as the context may indicate;

1.1.13 "**Outstanding Amount**" means an amount equal to the Loan Amount advanced by the Lender to the Borrower from time to time, any other fees, costs, penalties and expenses provided for in this Agreement, and which amount remains unpaid;

1.1.14 "**Parties**" means the Lender and the Borrower, and "**Party**" means either one of them as the context indicates;

1.1.15 "**Reinstatement Costs**" means the total costs incurred by the Lender to reinstate the registration of the Developer in terms of regulations 40(6) and (7) of the Companies Regulations, 2011, including legal costs associated therewith, which costs are detailed in **Annexure 1** hereto;

1.1.16 "**Signature Date**" means the date on which this Agreement is signed by the Party signing last in time;

1.1.17 "**Transfer Costs**" means the total costs of registering the transfer of the Common Property into the name of the Borrower in the relevant deeds office, including but not limited to conveyancer fees, deeds office fees, and the costs of obtaining a rates clearance certificate from the local authority;

1.1.18 "**Transfer Date**" means the date on which the transfer of the Common Property is registered in the name of the Borrower in the relevant deeds office;

1.1.19 words importing the singular shall include the plural and *vice versa*; words importing natural persons shall include legal persons and partnerships and *vice versa*; and words importing one gender shall include the other genders;

1.1.20 any reference to an agreement or enactment is to that agreement or enactment as at the Signature Date and as amended or re-enacted from time to time.

1.2 The clause headings in this Agreement have been inserted for reference purposes only and shall not affect the interpretation of any provision of this Agreement.

1.3 Words and expressions defined in any sub-clause shall, for the purpose of the clause of which the sub-clause forms part, bear the meaning assigned to such words and expressions in that sub-clause.

1.4 If any provision in a definition is a substantive provision conferring rights or imposing obligations on any Party, effect shall be given to it as if it were a substantive clause in the body of the Agreement, notwithstanding that it is only contained in this interpretation clause.

1.5 If any period is referred to in this Agreement by way of reference to a number of days, the days shall be reckoned exclusively of the first and inclusively of the last day unless the last day falls on a day which is not a Business Day, in which case the day shall be the next succeeding Business Day.

1.6 The rule of construction that the contract shall be interpreted against the Party responsible for the drafting or preparation of this Agreement, shall not apply.

1.7 This Agreement shall be governed by and construed and interpreted in accordance with the law of the Republic of South Africa.

1.8 Expressions defined in this Agreement shall bear the same meanings in any annexure hereto which does not contain its own definitions.

2 BACKGROUND

2.1 The Developer (in liquidation) is the developer of the Estate and remains the registered owner of the Common Property. The Developer was deregistered by the Companies and Intellectual Property Commission during 2010 for failing to submit annual returns.

2.2 The Lender owns immovable property at the Estate and is accordingly a member of the Borrower. To facilitate the transfer of the Common Property from the Developer to the Borrower, the Lender has paid the Reinstatement Costs and is prepared to pay the costs of transferring the

Common Property from the Developer to the Borrower, on behalf of the Borrower, subject to the terms of this Agreement.

2.3 The Parties agree that such payments shall constitute the advance of a loan by the Lender to the Borrower and shall be regulated by the terms and conditions set out in this Agreement.

3 APPLICATION OF THE NATIONAL CREDIT ACT

The Parties record and agree that the provisions of the National Credit Act No. 34 of 2005 ("**NCA**") are not applicable to this Agreement as this Agreement contemplates an arrangement in which the Parties are not independent of each other and consequently do not necessarily strive to obtain the utmost possible advantage out of the transaction, as envisaged in section 4(2)(b)(iv) of the NCA,

4 LOAN

The Lender agrees, subject to the terms of this Agreement, to advance the Loan Amount to the Borrower for the sole purposes of –

4.1 the repayment to the Lender of the Reinstatement Costs necessary for the reinstatement of the Developer, which Costs are set out in **Annexure 1** hereto and which Costs have already been paid by the Lender;

4.2 the payment of the Legal Costs relating to the legal services rendered to the liquidators of the Developer, which costs are set out in **Annexure 2** hereto;

4.3 the payment of the Transfer Costs, an estimate of which is annexed as **Annexure 3** hereto but which costs will be finally determined by the Lender on the Transfer Date; and

4.4 the payment of the legal costs relating to the preparation of this Agreement.

5 ADVANCE OF LOAN

5.1 Reinstatement Costs and Legal Costs

The Parties record that the Lender has advanced the Loan Amount referred to in clause 1.1.12.1 and clause 1.1.12.2 to the Borrower by making payment of the Reinstatement Costs and the Legal Costs directly to the relevant recipients on behalf of the Borrower.

5.2 Transfer Costs

5.2.1 The Lender shall advance the Loan Amount referred to in clause 1.1.12.3 by making payment of that amount into the trust account of the Conveyancer within 5 Business Days of a written request for such funds by the Conveyancer.

5.2.2 If any amount comprising the Transfer Costs is required to be paid by the Borrower to a third party, the Lender shall be entitled to elect to pay such amounts due by the Borrower to such third party directly. The payment by the Lender of any part of the Transfer Costs directly to the third party shall constitute an advance of the Loan Amount to the Borrower.

5.2.3 The Loan Amount referred to in clause 1.1.12.3 will be applied solely towards the costs of the Borrower's acquisition of the Common Property.

5.3 Other Costs

The Lender shall advance the Loan Amount referred to in clause 1.1.12.4 to the Borrower by making payment of such costs to the third parties concerned, or capitalising such costs against the Loan Amount in accordance with clause 12.1.

5.4 General

5.4.1 The Lender shall not be obliged to advance any part of the Loan Amount to the Borrower following the occurrence of an Event of Default.

5.4.2 The Lender shall not be obliged to re-advance to the Borrower any portion of the Loan Amount which has been repaid or prepaid by the Borrower prior to the Final Repayment Date.

6 INTEREST

6.1 The Outstanding Amount shall not attract interest.

7 REPAYMENT

7.1 The Borrower shall repay the Outstanding Amount to the Lender by raising a special levy upon its members for the specific purpose of funding the repayment of the Outstanding Amount in terms of this Agreement.

7.2 To this end, the Borrower undertakes to do all such things as may be necessary to propose, table and obtain member approval of the imposition of the special levy as soon as reasonably possible after the Signature Date. Notwithstanding anything to the contrary contained herein, the Lender will not be obliged to advance any part of the Loan Amount until he is satisfied that the special levy has been properly authorised by the members of the Borrower.

7.3 All amounts paid to the Borrower in respect of the special levy shall be applied towards reducing the Outstanding Amount as and when such amounts are received by the Borrower.

7.4 Notwithstanding clause 7.3, the Borrower shall repay the Outstanding Amount in full by not later than the Final Repayment Date.

7.5 The Borrower shall be entitled to prepay any or all of the Outstanding Amount at any time prior to the Final Repayment Date, without prior notice to the Lender and without penalty.

8 PAYMENT COVENANTS

8.1 The Borrower shall make all payments to the Lender timeously and in accordance with this Agreement, exclusive of any and all costs incurred in the transfer of funds (which costs shall be borne by the Borrower), and without any deduction or set-off whatsoever, by way of an electronic transfer of cleared funds to the bank account nominated by the Lender in writing, provided that any such payment shall only be deemed to have been made once the Lender has unrestricted and irrevocable access to all funds so transferred.

8.2 Any payments received by the Lender from the Borrower shall firstly be applied to reduce legal costs, if any, and then Capital or in such other way as the Lender in its sole and unfettered discretion may decide.

9 CERTIFICATE OF INDEBTEDNESS

A certificate signed by the Lender shall be –

9.1 *prima facie* proof of the quantum of the Outstanding Amount; and

9.2 valid, together herewith, for any purpose and as a liquid document (alternatively, as proof of a liquidated amount) in any Court of competent jurisdiction for the purpose of obtaining provisional sentence, summary judgement or any other judgment against the Borrower,

and the Borrower acknowledges its indebtedness in respect of any amount so certified.

10 EVENTS OF DEFAULT

10.1 Each of the following events, if occurring whilst the Borrower is indebted to the Lender for any amount in terms of or arising from this Agreement, shall constitute an "**Event of Default**":

10.1.1 if the Borrower fails to pay to the Lender any amount which becomes payable by it pursuant to this Agreement on the due date for payment; and/or

10.1.2 if the Borrower commits any other breach of a material term of this Agreement and, in the case of a breach that is capable of being remedied, fails to remedy that breach within 7 days from written notice by the Lender calling upon it to remedy such breach; and/or

10.1.3 if the Borrower suffers any one of more of the following insolvency events:

10.1.3.1 the Borrower compromises or attempts to compromise with its creditors, or defers or attempts to defer payment of debts owing by the Borrower to its creditors generally;

10.1.3.2 the members or trustees of the Borrower propose or pass a resolution for its liquidation, winding-up or similar proceedings, as the case may be;

10.1.3.3 the Borrower has an order granted against or in respect of it, in terms of which the Borrower is sought to be provisionally or finally wound up, liquidated, dissolved, or has any equivalent application or proceedings brought against it in terms of any equivalent applicable legislation;

10.1.3.4 the Borrower commits any act which would be an act of insolvency within the meaning of section 8 of the Insolvency Act No. 24 of 1936; and/or

10.1.3.5 the Borrower has any final judgment of any court or arbitral forum awarded against it and fails to satisfy such judgment within a period of 15 business days after becoming aware thereof, and for purposes of this sub-clause, a "final judgment" means a judgment which is –

10.1.3.5.1 not appealable, or is appealable, but the period for lodging of an appeal has lapsed and the Borrower has failed to institute appeal proceedings;

10.1.3.5.2 not capable of recission, or is capable of rescission but the period for applying for rescission has lapsed and the Borrower has failed to apply for rescission or the Borrower's application for rescission has been denied.

10.2 If an Event of Default occurs and is continuing, then, in addition to any other right which the Lender may have, in terms of or arising from this Agreement or at law, the Lender shall be entitled to –

10.2.1 cancel this Agreement forthwith by written notice to the Borrower, with or without claiming damages; or

10.2.2 obtain an order against the Borrower for specific performance, with or without claiming damages; or

10.2.3 claim such damages as it may have suffered in lieu of specific performance together with all amounts owing under or in terms of this Agreement.

10.3 Notwithstanding anything to the contrary contained herein, upon the occurrence of an Event of Default, the Outstanding Amount shall, at the Lender's election, become due and payable in full and the Lender may institute proceedings for the recovery thereof in accordance with the provisions of this Agreement.

11 RENUNCIATION OF BENEFITS

The Borrower hereby renounces the benefits of the following legal exceptions –

11.1 no cause of debt and no value received (these are defences that there are no grounds for a debt or that no value was received; when these benefits are renounced the Borrower bears the burden to prove that the Borrower is not indebted to the Lender or that it received no benefit);

11.2 revision of accounts and errors of calculation (these defences apply where the Borrower wishes to show that its account has been wrongly drawn up or calculated; when this benefit is renounced, the Borrower bears the burden to prove that the accounts are wrong); and

11.3 *non numeratae pecuniae* (this defence applies where the Borrower wishes to show that the loan was not paid out or properly counted; when this benefit is renounced, the Borrower bears the burden to prove that the loan was not paid out or properly counted),

the full force, meaning and effect whereof the Borrower declares itself to be acquainted with.

12 COSTS

12.1 The Borrower shall be responsible for all legal costs payable incurred by the Lender in respect of the negotiation, drafting and finalisation of this Agreement, any related documentation required to implement, authorise or give effect hereto, or any amendment or restructure of such agreements. The Borrower hereby authorises the Lender to debit such costs against the Loan Amount and pay such costs to the relevant attorneys upon receipt of an invoice(s) from the attorneys.

12.2 If in any legal proceedings or arbitration relating to the enforcement by either Party of its rights in terms of this Agreement, a court or arbitrator awards costs to any Party, such costs shall be determined and recoverable on the scale as between an attorney and own client and shall include collection charges, the costs incurred by such Party in endeavouring to enforce such rights prior to the institution of legal proceedings, and the costs incurred in connection with the satisfaction or enforcement of any award or judgment awarded in favour of such Party in relation to its rights in terms of or arising out of this Agreement.

12.3 It is recorded that the Parties intend that the substantially successful Party should be awarded a full indemnity for all the costs reasonably incurred by that Party and not merely the costs on the High Court or any other applicable scale.

13 DISPUTE RESOLUTION

13.1 In the event that a dispute arises between the Parties in terms of or in connection with this Agreement (including a dispute as to the validity or enforceability of this Agreement or any provision hereof), either Party may demand that the dispute be determined in terms of this clause 13 by written notice given to the other Party in accordance with the Expedited Rules of the Arbitration Foundation of Southern Africa ("**AFSA**").

13.2 This clause shall not prevent any Party from obtaining interim relief on an urgent basis from a court of competent jurisdiction, pending the decision of an arbitrator.

13.3 The Parties hereby consent to the arbitration being dealt with on an urgent basis in terms of the Expedited Rules of AFSA should either Party, by written notice, require the arbitration to be held on an urgent basis. In such event either Party may apply to the AFSA Secretariat as required in terms of the said Rules to facilitate such urgent arbitration.

13.4 The arbitration shall be held –

13.4.1 before a single arbitrator at Cape Town, South Africa;

13.4.2 with only the legal and other representatives of the Parties to the dispute present thereat; and

13.4.3 in terms of the Arbitration Act, No. 42 of 1965 ("**Arbitration Act**"), unless otherwise provided for herein.

13.5 The arbitrator shall be a practising advocate of the Cape Bar of at least 10 years' standing, appointed by agreement between the Parties. Should the Parties fail to agree on an arbitrator within 14 days after the referral of the dispute to arbitration in terms of clause 13.1, the arbitrator shall be appointed by the Chairperson of the Cape Bar Council (or by AFSA if the Cape Bar Council no longer exists), at the request of either Party.

13.6 The decision of the arbitrator shall be final and binding on the Parties and may be made an order of the High Court of South Africa at the instance of either Party. The Parties hereby consent to the jurisdiction of the Western Cape Division of the High Court of South Africa, Cape Town, in respect of any such proceedings.

13.7 The Parties agree to keep the arbitration, including the subject matter of the arbitration and the evidence heard during the arbitration, confidential and not to disclose it to anyone except for purposes of obtaining an order as contemplated herein.

13.8 It is recorded that it is the intention of the Parties that any dispute referred to arbitration in terms of clause 13.1 shall be resolved strictly in accordance with the provisions of this clause. Each Party accordingly agrees and undertakes that –

13.8.1 it shall not make any application to Court as contemplated in terms of section 3(2) of the Arbitration Act;

13.8.2 it shall not make any application to court as contemplated in terms of section 20(1); and

13.8.3 the periods set out in section 23 of the Arbitration Act shall not be applicable to any arbitration proceedings arising out of this Agreement.

13.9 The provisions of this clause 13 are severable from the rest of this Agreement and shall remain in effect despite the termination or invalidity of this Agreement for whatever reason.

14 NOTICES AND DOMICILIA

14.1 Each Party chooses as its *domicilia citandi et executandi* the respective addresses set out in this clause for the purposes of the giving of any notice, the serving of any process and for any other purpose arising out of or in connection with this Agreement.

14.2 Each Party shall be entitled from time to time to vary its *domicilia citandi et executandi* to any other address on written notice to the other Party.

14.3 For purposes of this Agreement, the Parties' respective addresses shall be –

14.3.1 **Lender**:

Physical Address: c/o Hayes Incorporated, Unit 1 Roeland Square, Roeland Street, Cape Town, 8001

Email: andrev@emeraldlife.co.za

14.3.2 **Borrower:**

Physical Address: La Bella Vita Wine Estate

Email: [•]

Attention: Trustees

Commented [Themis2]: Please furnish details.

14.4 Any notice given in terms of this Agreement shall be in writing and shall –

14.4.1 if delivered by hand, be deemed to have been duly received by the addressee on the date of delivery;

14.4.2 if transmitted by electronic mail, be deemed to have been received by the addressee on the expiration of 24 hours after transmission;

14.4.3 if sent by courier be deemed to have been received on the date of delivery as recorded by the courier service concerned,

unless the contrary is proved.

14.5 Notwithstanding anything to the contrary contained or implied in this Agreement, a written notice or communication actually received by a Party from the other Party shall be adequate written notice or communication to such Party.

15 GENERAL

15.1 **Whole Agreement.** This Agreement constitutes the entire agreement between the Parties as to the subject matter hereof and save as may be expressly set out herein, no agreements, representations or warranties between the Parties regarding the subject matter hereof other than those set out herein are binding on the Parties.

15.2 **Severance**. Each of the provisions of this Agreement is separate and severable and enforceable accordingly. If any such term or condition is or becomes unenforceable for any reason whatsoever, that term or condition is severable from and shall not affect the validity of any other term or condition contained in this Agreement.

15.3 **Variation**. No addition to, alteration, cancellation, variation or novation of this Agreement and no waiver of any right arising from this Agreement or its breach or termination shall be of any force or effect unless reduced to writing and signed by all the Parties or their duly authorised representatives.

15.4 **Survival**. The expiration, cancellation or other termination of this Agreement shall not affect those provisions of this Agreement which expressly provide that they will operate after such expiration, cancellation or other termination or which of necessity must continue to endure after such expiration, cancellation or other termination, notwithstanding that the relevant clause may not expressly provide for such continuation.

15.5 **Indulgence**. No indulgence, leniency or extension of time which any Party may give or allow to the other Party in respect of the performance of any obligation hereunder, shall in any way prejudice the Party giving or allowing the indulgence, leniency or extension or preclude such Party from exercising any of its rights an enforcing the obligations of the other Party in terms of this Agreement.

16 CESSION AND ASSIGNMENT

No Party shall be entitled to cede, assign or delegate any of his rights and/or obligations in terms of or arising from this Agreement to any third party without the prior written consent of the other Party.

17 SIGNATURE

17.1 This Agreement is signed by the Parties on the dates and at the places indicated opposite their respective names. The persons signing this Agreement in a representative capacity warrant their authority to do so.

17.2 This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall be taken together and deemed to be one instrument.

ANDRE VAN DER WESTHUIZEN	Date:	Place:
LA BELLA VITA PROPERTY OWNERS' ASSOCIATION (Duly authorised)	Date:	Place:

ANNEXURE 1

REINSTATEMENT COSTS

ANNEXURE 2

LEGAL COSTS

ANNEXURE 3

TRANSFER COSTS