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15 **IN THE UNITED STATES DISTRICT COURT**
16 **IN AND FOR THE DISTRICT OF ARIZONA**

17 **COLONIAL NATIONAL**
18 **MORTGAGE, a division of**
19 **COLONIAL SAVINGS, F.A.**, a federal
20 charter savings and loan,

21 Plaintiff,

22 v.

23 **KEMPER MORTGAGE, INC.**, an
24 Illinois corporation; **DAVID PRINGLE**,
25 an individual; **SEYED KHAYAMI**, also
known as **SAM KHAYAMI**, an
individual; **HARRY FELTMAN**,
individually, and doing business as **THE**
APPRAISAL CENTER, and **DOES 1**
through 25, inclusive,

Defendants.
Jointly and Severally

Case No. **CV08-755-PHX-SRB**

**FIRST AMENDED COMPLAINT FOR
BREACH OF CONTRACT, BREACH
OF WARRANTY, BREACH OF THIRD
PARTY BENEFICIARY CONTRACT,
BREACH OF IMPLIED COVENANT
OF GOOD FAITH AND FAIR
DEALING, NEGLIGENT
MISREPRESENTATION,
NEGLIGENCE, INTENTIONAL
MISREPRESENTATION AND
SPECIFIC PERFORMANCE**

(JURY TRIAL REQUESTED)

(Assigned to the Honorable
Susan R. Bolton)

1 Plaintiff COLONIAL NATIONAL MORTGAGE, a division of COLONIAL
2 SAVINGS, F.A., (“COLONIAL” or “LENDER”), hereby alleges as follows for its
3 Complaint against Defendants:

4 **PARTIES**

5
6 1. COLONIAL is, and at all times herein mentioned was, a federal charter
7 savings and loan with its principal place of business in Fort Worth, Texas.
8 COLONIAL is doing, and at all times herein mentioned was authorized to do,
9 business in the State of Arizona. COLONIAL is, and at all times herein mentioned
10 was, engaged in the business of, *inter alia*, originating/funding residential mortgage
11 loans and selling closed residential mortgage loans to secondary market investors.

12
13 2. COLONIAL is informed, believes, and thereon alleges that Defendant
14 KEMPER MORTGAGE, INC. (“KEMPER” or “BROKER”) is, and at all times
15 herein mentioned was, a corporation duly organized under the laws of the State of
16 Illinois with its principal place of business in Miamisburg, Ohio, and is licensed to do
17 business in the State of Arizona. COLONIAL is informed, believes, and thereon
18 alleges that Defendant KEMPER, is, and at all times herein mentioned was, engaged
19 in the business of, *inter alia*, brokering residential mortgage loans.

20
21 3. COLONIAL is informed, believes, and thereon alleges that Defendant
22 DAVID PRINGLE (“PRINGLE”) is, and at all times herein mentioned was, an
23 individual domiciled in or around Scottsdale, Arizona, and doing business in or
24 around Tempe, Arizona. COLONIAL is informed, believes, and thereon alleges that
25 Defendant PRINGLE is, and at all times herein mentioned was, engaged in the

1 business of, *inter alia*, processing residential mortgage loans and was employed as a
2 loan officer by KEMPER.

3 4. COLONIAL is informed, believes, and thereon alleges that Defendant
4 SEYED KHAYAMI, also known as SAM KHAYAMI (“KHAYAMI”) is, and at all
5 times herein mentioned was, an individual domiciled in or around Scottsdale, Arizona,
6 and doing business in or around Tempe, Arizona. COLONIAL is informed, believes,
7 and thereon alleges that Defendant KHAYAMI is, and at all times herein mentioned
8 was, engaged in the business of, *inter alia*, processing residential mortgage loans and
9 was employed as a loan officer by KEMPER.

10
11 5. COLONIAL is informed, believes, and thereon alleges that Defendant
12 HARRY FELTMAN, individually, and doing business as THE APPRAISAL
13 CENTER (“APPRAISER”) is, and at all times mentioned herein was, an individual
14 residing and doing business in or around Sedona, Arizona. COLONIAL is further
15 informed and believes and thereon alleges that HARRY FELTMAN is, and at all
16 times mentioned herein, was an Arizona licensed appraiser, license no. 30874.

17
18 6. COLONIAL does not know the true names or legal capacities of
19 Defendants sued herein as DOES 1 through 25, inclusive, and therefore sues said
20 Defendants by such fictitious names. COLONIAL will amend this Complaint to insert
21 the true and correct names of the fictitiously named Defendants if and when
22 ascertained.

23
24 7. COLONIAL is informed, believes, and thereon alleges that each of the
25 Defendants designated herein as a DOE, is legally responsible in some manner for the

1 matters herein alleged and is legally responsible in some manner for causing the
2 injuries and damages to COLONIAL as herein alleged.

3 8. COLONIAL is informed, believes, and thereon alleges that each
4 Defendant, whether specifically named or designated herein as a DOE, was the agent,
5 representative, servant, employee, principal, joint venturer, co-conspirator and/or
6 representative of each of the remaining co-defendants, and in doing the acts
7 hereinafter alleged, was acting within the course and scope of said agency,
8 employment, joint venture, conspiracy, alter ego, agreement and/or service with the
9 approval, knowledge, authority, permission and/or consent of the remaining
10 Defendants.
11

12 **JURISDICTION AND VENUE**

13 9. The jurisdiction of the Court over the subject matter is predicated upon
14 28 U.S.C. §1332. The matter in controversy, exclusive of interest and costs, exceeds
15 the sum of \$75,000.00 and diversity of citizenship exists.
16

17 10. Venue is proper in the United States District Court, District of Arizona,
18 Phoenix Division pursuant to 28 U.S.C. § 1391(a) in that all the Defendants are
19 subject to personal jurisdiction in this judicial district. The events giving rise to this
20 Complaint occurred, and a substantial part of the properties that are the subject of this
21 Complaint are located, in the United States District Court, District of Arizona,
22 Phoenix Division.
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GENERAL ALLEGATIONS

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2 11. On or about October 15, 2003, COLONIAL and Defendant KEMPER
3 entered into a written agreement entitled “Mortgage Broker Agreement”
4 (“AGREEMENT”) which, *inter alia*, sets forth terms and conditions for the
5 submission of potential loans by Defendant KEMPER to COLONIAL for funding. A
6 true and correct copy of the AGREEMENT is attached hereto as Exhibit “A” and is
7 incorporated by reference as though fully set forth herein. The AGREEMENT has
8 been in full force and effect at all times relevant to the loans which are the subject of
9 this Complaint.
10

11 12. The AGREEMENT contains specific loan repurchase and
12 indemnification provisions, including, but not limited to, the following:

13 In the event any fraudulent “information” is submitted by
14 Broker with respect to a loan, and such loan is closed
15 and/or funded by Colonial, Broker agrees to repurchase
16 such loan immediately upon demand in accordance with
17 Section 7 hereof, and compensate Colonial for any costs
18 and expenses incurred by Colonial in connection with the
19 origination of that loan and repurchase by Broker. ...
20 [Agreement, p.2, sec. 1]

21 Broker agrees to indemnify Colonial and hold Colonial
22 harmless for any and all liability, loss, damages, attorney’s
23 fees and other expenses which Colonial may sustain or
24 incur by reason of, or in consequent of, Broker not
25 observing the stated provisions of this agreement or not
obtaining the necessary documentation as required by
Colonial. [Agreement, p.2, sec. 1]

Subject to the right to cure described in the paragraph
below, Broker agrees to repurchase from Colonial within
thirty business days after Colonial’s demand any closed

1 loan: ... (3) if any representation or warranty by Broker is
2 otherwise breached; ... [Agreement, p.3, sec. 7]

3 13. COLONIAL is informed, believes, and thereon alleges that subsequent
4 to the execution of the AGREEMENT, Defendant KEMPER and/or third parties
5 procured borrowers to purchase and/or refinance properties in or around the Tempe,
6 Arizona area.

7 14. COLONIAL is informed, believes, and thereon alleges that there were at
8 least five (5) loan application packages that were processed and submitted by
9 Defendants KEMPER, PRINGLE and/or KHAYAMI to COLONIAL, for funding.
10 COLONIAL is informed, believes, and thereon alleges that these five (5) loan
11 application packages contained numerous material misrepresentations and/or
12 omissions. These five (5) loan application packages at issue are as follows:

13 (a) Borrower Dominique Nguyen applied for loans (“NGUYEN LOANS”)
14 for the purchase of 20846 S. Hadrian Way, Queen Creek, AZ 85242, Loan Nos.
15 812784 (1st) and 812795 (2nd), in the principal amounts of \$540,000.00 and
16 \$135,000.00, respectively, and which loans closed on May 16, 2007.

17 (b) Borrowers Mildred and Philip Dersosia applied for a loan (“DEROSIA
18 LOAN”) for the purchase of 2695 S. Horton Drive, Cornville, Arizona 86325, Loan
19 No. 682385, in the principal amount of \$342,000.00, and which loan closed on
20 December 11, 2006.

21 (c) Borrower Kyle Dibble applied for loans (“DIBBLE LOANS”) for the
22 purchase of 8700 E. Mountain View Road, Unit 1014, Scottsdale, Arizona 85258,
23
24
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1 Loan Nos. 813569 (1st) and 814091 (2nd), in the principal amounts of \$191,200.00 and
2 \$47,800.00, respectively, and which loans closed on June 1, 2007.

3 15. COLONIAL is informed, believes and thereon alleges that the
4 aforementioned material misrepresentations and/or omissions in the loan application
5 packages for the NGUYEN LOANS, DEROSIA LOAN, and DIBBLE LOANS
6 (hereinafter, collectively, the “LOANS”) include, but are not limited to, the following:
7

8 (a) NGUYEN LOANS: Defendants PRINGLE and KEMPER
9 processed and submitted the subject loan application packages to COLONIAL, which
10 loan application packages contained material misrepresentations and/or omissions
11 concerning Dominique Nguyen’s real property interests and encumbrances thereon.
12 Defendants PRINGLE and KEMPER failed to disclose at least two additional property
13 purchases, for which Dominique Nguyen had taken out loans in connection therewith -
14 - one which she had purchased within approximately two months of the subject loan
15 closing (20866 S. Hadrian Way, Queen Creek, Arizona), and another which closed
16 approximately one day prior to the subject loan closing (11549 E. Douglas Avenue,
17 Gilbert, Arizona). It was also discovered that the borrower had inappropriately acted
18 as a straw borrower, and, accordingly, had transferred title of the subject property to
19 another person less than 30 days after the loan closing. Defendants PRINGLE and
20 KEMPER knew and/or should have known of the foregoing facts at the time they
21 submitted the loan application packages to COLONIAL for funding.
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(b) DEROSIA LOAN:

i. Defendants KHAYAMI and KEMPER processed and submitted the subject loan application package to COLONIAL, which loan application package contained material misrepresentations and/or omissions concerning the relationship of the parties and the borrower’s true intentions regarding occupancy. Defendants KHAYAMI and KEMPER failed to disclose the relationship of the parties and the intentions of the parties to COLONIAL (i.e., the borrowers are believed to be the seller’s grandparents, and the sale was inappropriately being made as part of a foreclosure rescue scheme). Defendants KHAYAMI and KEMPER knew and/or should have known of the relationship between the parties and knew and/or should have known that the borrowers never intended to occupy the property as their primary residence. In furtherance of the scheme, the property was improperly quitclaimed back to the seller approximately twelve (12) days after closing.

ii. The loan application package for the DEROSIA LOAN included, among other things, a Uniform Residential Appraisal Report (“APPRAISAL”) for the subject property prepared by APPRAISER. A true and correct copy of the APPRAISAL is attached hereto as Exhibit “B,” and is incorporated by reference as though fully set forth herein. The purpose of the APPRAISAL was to determine whether the subject property (2695 S. Horton Drive, Cornville, Arizona 86325) was adequate security for the DEROSIA LOAN. The Appraisal was prepared on an industry standard Fannie Mae Form 1004/Freddie Mac Form 70, and represented, among other things, that it had been prepared in conformance with the

1 Uniform Standards of Professional Appraisal Practice (“USPAP”) and that the market
2 value of the Property was \$360,000 as of November 14, 2006. It was later discovered
3 that the APPRAISAL over-valued the true value of the property in that the
4 APPRAISER had selected comparable properties that were all substantially superior
5 to the subject property, and that the APPRAISER did not prepare the APPRAISAL in
6 conformance with USPAP. The APPRAISER knew and/or should have known that
7 the APPRAISAL misrepresented the true value of the subject property, and that
8 COLONIAL would rely on the accuracy of the APPRAISAL when making its funding
9 decision in connection with the DEROSIA LOAN.
10

11 (c) DIBBLE LOANS: Defendants PRINGLE and KEMPER
12 processed and submitted the subject loan application package to COLONIAL, which
13 loan application package contained material misrepresentations and/or omissions
14 regarding borrower Dibble’s intent with respect to occupancy of the property and
15 information regarding the borrower’s actual real property interests and encumbrances
16 thereon. Albeit, Defendants PRINGLE and KEMPER knew and/or should have
17 known of the foregoing facts, they failed to disclose such to COLONIAL (e.g., the
18 fact that the subject property was actually being purchased as an investment rather
19 than for the purpose of being the borrower’s primary residence, and, defendants
20 PRINGLE and KEMPER also failed to disclose the fact that the borrower had made
21 an additional property purchase of that property located at 14000 North 94th Street,
22 #1218, Scottsdale, Arizona, several days prior to the subject loan).
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1 16. In direct reliance on the material representations made by the
2 Defendants and the and certifications contained within the subject loan application
3 packages, which material representations and certifications the Defendants knew
4 and/or should have known COLONIAL would rely on, COLONIAL approved and
5 funded the aforementioned purchase money mortgage loans to its ultimate detriment.
6

7 17. Subsequent to the funding of the LOANS, COLONIAL was not able to
8 sell the LOANS in the secondary market – due to the existence and discovery, in or
9 about July of 2007, of the aforementioned untrue and/or falsified information and/or
10 documentation that was contained within the subject loan application packages that
11 were submitted to COLONIAL.

12 18. In connection with the DEROSIA LOAN, COLONIAL has made proper
13 demand upon Defendant KEMPER to repurchase the LOAN, in compliance with the
14 AGREEMENT. Regardless, KEMPER failed and/or refused to comply with its
15 repurchase obligations under the AGREEMENT.
16

17 19. In connection with the NGUYEN LOANS, the property is currently in
18 foreclosure. COLONIAL had made proper demand upon KEMPER to repurchase the
19 LOANS in compliance with the AGREEMENT. Regardless, Defendant KEMPER
20 failed and/or refused to comply with its repurchase obligations under the
21 AGREEMENT.
22

23 20. In connection with the DIBBLE LOANS, COLONIAL had made proper
24 demand upon Defendant KEMPER to repurchase the LOANS, in compliance with the
25

1 AGREEMENT. Regardless, Defendant KEMPER has failed and/or refused to
2 comply with its repurchase obligation under the AGREEMENT.

3 21. Had any of the Defendants disclosed any of the material
4 misrepresentations and/or omissions noted herein, which misrepresentations and/or
5 omissions the Defendants knew and/or should have known were untrue/incomplete at
6 the time they made such to COLONIAL, and which were made with the intent that
7 COLONIAL rely upon such, COLONIAL would not have funded the LOANS and
8 would not have suffered any of the losses that it has and continues to suffer as a direct
9 result thereof.

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11 22. As a direct and proximate result of the foregoing, COLONIAL has
12 suffered damages and will continue to suffer damages in a final amount to be proven
13 at trial, but which are expected to exceed \$491,312.00, exclusive of interest, costs, and
14 attorneys' fees.

15
16 **FIRST CAUSE OF ACTION**
17 **FOR BREACH OF CONTRACT**
18 **(Against KEMPER)**

19 23. COLONIAL re-alleges and incorporates each of the allegations
20 contained in the preceding and subsequent paragraphs of the First Amended
21 Complaint as though fully set forth herein.

22 24. In or about October 3, 2003, COLONIAL entered into a complete, valid
23 and enforceable written Mortgage Broker Agreement ("AGREEMENT") with
24 Defendant KEMPER. (See, Exhibit A.)
25

1 25. Among the many terms contained within the AGREEMENT, Defendant
2 KEMPER:

3 (a) Warranted that any loan it submitted to COLONIAL for approval
4 would contain complete, true and valid information;

5 (b) Promised that:

6
7 [i]n the event any fraudulent information [was]
8 submitted by Broker [Defendant KEMPER] with
9 respect to a loan, and such loan is closed and/or
10 funded by Colonial, Broker [Defendant KEMPER]
11 agrees to repurchase such loan immediately upon
12 demand ... and compensate Colonial for any costs
13 and expenses incurred by Colonial in connection
14 with the origination of that loan and repurchase by
15 Broker. For purposes hereof, "information" shall
16 mean any and all information obtained from the
17 borrower or any reference source used in the loan
18 origination process. [See Exhibit A, p. 2.]

19 (c) Acknowledged that COLONIAL intended to sell closed loans in
20 the secondary market; and

21 (d) Agreed to indemnify COLONIAL and hold COLONIAL
22 harmless for any and all liability, loss, damages, attorney's fees and other expenses
23 which COLONIAL may sustain or incur by reason of, or in consequence of,
24 Defendant KEMPER not observing the stated provisions of the AGREEMENT or not
25 obtaining the necessary documentation as required by COLONIAL. (*See* Exhibit
"A".)

26 26. While COLONIAL has performed all the terms, conditions and
27 covenants required to be performed by COLONIAL under the terms of the

1 AGREEMENT, aside from any terms, conditions and covenants that were excused,
2 discharged and/or waived, Defendant KEMPER materially breached the terms of the
3 AGREEMENT by, *inter alia*, doing the following:

4 (a) Failing to provide COLONIAL with loan application packages
5 for the LOANS that contained complete, true and/or valid information;
6

7 (b) Refusing and/or failing to repurchase the LOANS from
8 COLONIAL; and

9 (c) Refusing and/or failing to indemnify COLONIAL for the
10 damages it has and continues to suffer as a direct and proximate result of the material
11 misrepresentations and omissions that were made to COLONIAL in the loan
12 application packages for the LOANS.
13

14 27. As a direct and proximate result of Defendant KEMPER's breach of the
15 AGREEMENT, COLONIAL has suffered damages and will continue to suffer
16 damages in a final amount to be proven at trial, but which are expected to exceed
17 \$491,312.00, exclusive of interest, costs, and attorneys' fees.

18 28. WHEREFORE, COLONIAL prays for relief as hereinafter set forth
19 below.
20

21 **SECOND CAUSE OF ACTION**
22 **FOR BREACH OF WARRANTY**
23 **(Against KEMPER)**

24 29. COLONIAL re-alleges and incorporates each of the allegations
25 contained in the preceding and subsequent paragraphs of the First Amended
Complaint as though fully set forth herein.

1 30. Defendant KEMPER, at all times relevant herein, had a duty to act fairly
2 and in good faith with COLONIAL in performing under the terms of the
3 AGREEMENT.

4 31. By its actions, statements and writings, Defendant KEMPER expressly
5 and implicitly represented and warranted to COLONIAL that, *inter alia*, all the
6 information and documentation contained within the loan application packages for the
7 LOANS that Defendant KEMPER submitted to COLONIAL, was as represented and
8 warranted:
9

10 Broker [Defendant KEMPER] agrees to indemnify
11 Colonial and hold Colonial harmless for any and all
12 liability, loss, damages, attorney's fees and other expenses
13 which Colonial may sustain or incur by reason of, or in
14 consequence of, Broker not observing the stated provisions
of this agreement or not obtaining the necessary
documentation as required by Colonial.

15 32. The express and implied representations and warranties made by
16 Defendant KEMPER to COLONIAL were false and/or fraudulent.

17 33. Defendant KEMPER breached the express and implied representations
18 and warranties that it made to COLONIAL by providing false and fraudulent loan
19 application documentation to COLONIAL, and subsequently failing to indemnify
20 COLONIAL for its losses.

21 34. As a direct and proximate result Defendant KEMPER's breach of the
22 express and implied representations and warranties it made to COLONIAL,
23 COLONIAL has suffered damages and will continue to suffer damages in a final
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1 amount to be proven at trial, but which are expected to exceed \$491,312.00, exclusive
2 of interest, costs, and attorneys' fees.

3 35. WHEREFORE, COLONIAL prays for relief as hereinafter set forth
4 below.

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6 **THIRD CAUSE OF ACTION**
7 **FOR NEGLIGENCE**
8 **(Against APPRAISER)**

9 36. COLONIAL re-alleges and incorporates each of the allegations
10 contained in the preceding and subsequent paragraphs of the First Amended
11 Complaint as though fully set forth herein.

12 37. At all times herein mentioned, Defendant APPRAISER owed a duty to
13 COLONIAL to exercise reasonable care, skill, and diligence in accurately completing
14 the APPRAISAL.

15 38. Defendant APPRAISER materially breached its duty by failing to
16 prepare the APPRAISAL in conformity with USPAP and by failing to exercise
17 reasonable care, skill, and diligence in preparation of the APPRAISAL.

18 39. As a direct and proximate result of Defendant APPRAISER's
19 negligence in the preparation of the APPRAISAL, COLONIAL has suffered damages
20 and will continue to suffer damages in a final amount to be proven at trial, but which
21 are expected to exceed \$491,312.00, exclusive of interest, costs, and attorneys' fees.

22 40. WHEREFORE, COLONIAL prays for relief as hereinafter set forth
23 below.
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**FOURTH CAUSE OF ACTION
FOR NEGLIGENT MISREPRESENTATION
(Against APPRAISER)**

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3 41. COLONIAL re-alleges and incorporates each of the allegations
4 contained in the preceding and subsequent paragraphs of the First Amended
5 Complaint as though fully set forth herein.

6 42. Defendant APPRAISER made representations and certifications in the
7 APPRAISAL in connection with the DEROSIA LOAN.

8 43. Defendant APPRAISER knew or should have known that the
9 representations and certifications in the APPRAISAL were false.

10 44. Defendant APPRAISER intended that COLONIAL would rely on the
11 representations and certifications in the APPRAISAL when approving and funding the
12 DEROSIA LOAN. Had the APPRAISAL accurately estimated the value of the
13 subject property, COLONIAL would not have approved and funded the Loan.
14

15 45. COLONIAL reasonably and justifiably relied on the representations and
16 certifications in the APPRAISAL when approving and funding the DEROSIA LOAN.
17

18 46. As a direct and proximate result of Defendant APPRAISER's false
19 representations and certifications in the preparation of the APPRAISAL, COLONIAL
20 has suffered damages and will continue to suffer damages in a final amount to be
21 proven at trial, but which are expected to exceed \$491,312.00, exclusive of interest,
22 costs, and attorneys' fees.

23 47. WHEREFORE, COLONIAL prays for relief as hereinafter set forth
24 below.
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1 **FIFTH CAUSE OF ACTION**
2 **FOR BREACH OF THIRD PARTY BENEFICIARY CONTRACT**
3 **(Against APPRAISER)**

4 48. COLONIAL re-alleges and incorporates each of the allegations
5 contained in the preceding and subsequent paragraphs of the First Amended
6 Complaint as though fully set forth herein.

7 49. Defendant APPRAISER and Defendant KEMPER entered into a valid
8 contract wherein Defendant KEMPER procured Defendant APPRAISER to conduct
9 an appraisal of the real property located at 2695 S. Horton Drive, Cornville, Arizona
10 86325.

11 50. COLONIAL is not a party to the foregoing contract for appraisal
12 services.

13 51. Defendant APPRAISER and Defendant KEMPER intended that the
14 contract directly benefit COLONIAL. The APPRAISAL states that [t]he function of
15 the appraisal is to assist the above-named Lender in evaluating the subject property for
16 lending purposes.” (See, Exhibit “B,” p. 23.)

17 52. Defendant KEMPER materially breached the terms of the
18 AGREEMENT by failing to provide a true and accurate APPRAISAL, in conformity
19 with USPAP, upon which COLONIAL would rely to make its funding decision in
20 connection with the DEROSIA LOAN.

21 53. As a direct and proximate result Defendant APPRAISER’s false
22 representations and certifications in the preparation of the APPRAISAL, COLONIAL
23 has suffered damages and will continue to suffer damages in a final amount to be
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1 proven at trial, but which are expected to exceed \$491,312.00, exclusive of interest,
2 costs, and attorneys' fees.

3 54. WHEREFORE, COLONIAL prays for relief as hereinafter set forth
4 below.

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6 **SIXTH CAUSE OF ACTION**
7 **FOR BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR**
8 **DEALING**
9 **(Against KEMPER)**

10 55. COLONIAL re-alleges and incorporates each of the allegations
11 contained in the preceding and subsequent paragraphs of the First Amended
12 Complaint as though fully set forth herein.

13 56. Defendant KEMPER at all times relevant herein, had a duty to act fairly
14 and in good faith with COLONIAL in performing under the terms of the
15 AGREEMENT.

16 57. Implied in the AGREEMENT is Defendant KEMPER's obligation to act
17 fairly and in good faith with COLONIAL by making good faith efforts to fully and
18 truthfully disclose all material information in the loan application packages it submits
19 to COLONIAL, and to repurchase loans that were approved and funded as a result of
20 fraud and misrepresentation under the terms of the AGREEMENT.

21 58. Defendant KEMPER breached their obligation to act fairly and in good
22 faith toward COLONIAL.

23 59. As a direct and proximate result of the foregoing, COLONIAL has
24 suffered and will continue to suffer damages in a final amount to be proven at trial, but
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1 which are expected to exceed \$491,312.00, exclusive of interest, costs, fees, and
2 punitive damages.

3 60. WHEREFORE, Plaintiff COLONIAL prays for relief as hereinafter set
4 forth below.

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6 **SEVENTH CAUSE OF ACTION**
7 **FOR NEGLIGENT MISREPRESENTATION**
8 **(Against Defendants KEMPER, PRINGLE, and KHAYAMI)**

9 61. COLONIAL re-alleges and incorporates each of the allegations
10 contained in the preceding and subsequent paragraphs of the First Amended
11 Complaint as though fully set forth herein.

12 62. Defendants KEMPER, PRINGLE, and KHAYAMI made false
13 representations to COLONIAL concerning, *inter alia*, the information and
14 documentation contained with the loan application packages for the LOANS – as
15 herein alleged.

16 63. The representations of Defendants KEMPER, PRINGLE, and
17 KHAYAMI were false when made.

18 64. Defendants KEMPER, PRINGLE, and KHAYAMI were negligent in
19 making the misrepresentations and/or breached their business and professional duties
20 of care by failing to provide COLONIAL with complete, accurate and truthful
21 information that was to be and which was actually used by COLONIAL in making its
22 decision to approve and fund the LOANS.
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1 application packages that do not comply with the representations and warranties
2 contained in the AGREEMENT.

3 71. As a direct and proximate result of the foregoing, COLONIAL has
4 suffered and will continue to suffer damages in a final amount to be proven at trial, but
5 which are expected to exceed \$491,312.00, exclusive of interest, costs, fees, and
6 punitive damages.
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8 72. WHEREFORE, Plaintiff COLONIAL prays for relief as hereinafter set
9 forth below.

10 **NINTH CAUSE OF ACTION**
11 **INTENTIONAL MISREPRESENTATION**
12 **(Against Defendants PRINGLE and KHAYAMI)**

13 73. COLONIAL re-alleges and incorporates each of the allegations
14 contained in the preceding and subsequent paragraphs of the First Amended
15 Complaint as though fully set forth herein.

16 74. Defendant PRINGLE made or caused to be made false statements of
17 material fact and/or failed to disclose material facts in connection with the preparation
18 and submission of the loan application packages he processed and submitted to
19 COLONIAL for the approval and funding of the NGUYEN LOANS and the DIBBLE
20 LOAN. Such false statements and omissions, include, but are not limited to, failure to
21 disclose Dominique Nguyen's real property interests and encumbrances thereon in
22 connection with the NGUYEN LOANS; and occupancy misrepresentations and failure
23 to disclose the borrower's real property interests and encumbrances thereon in
24 connection with the DIBBLE LOANS.
25

1 75. Defendant KHAYAMI made or caused to be made false statements of
2 material fact and/or failed to disclose material facts in connection with the preparation
3 and submission of the loan application packages he processed and submitted to
4 COLONIAL for the approval and funding of the DEROSIA LOAN. Such false
5 statements and omissions, include, but are not limited to, occupancy
6 misrepresentations and KHAYAMI's deliberate failure to disclose the relationship
7 between the borrower and the property seller and their intentions (non arm's-length
8 transaction).
9

10 76. Defendants PRINGLE and KHAYAMI intended that COLONIAL
11 would rely on the false statements of material fact and/or the failure to disclose
12 material facts and that COLONIAL would be induced into funding the LOANS on
13 those bases.
14

15 77. COLONIAL believed and reasonably relied on PRINGLE and
16 KHAYAMI's statements of material fact and/or omission of material facts when
17 funding the LOANS. Had COLONIAL known the true facts, it would not have
18 funded the LOANS.
19

20 78. As a direct and proximate result of the foregoing, COLONIAL has
21 suffered and will continue to suffer damages in a final amount to be proven at trial, but
22 which are expected to exceed \$491,312.00, exclusive of interest, costs, fees, and
23 punitive damages.

24 79. WHEREFORE, Plaintiff COLONIAL prays for relief as hereinafter set
25 forth below.

**TENTH CAUSE OF ACTION
SPECIFIC PERFORMANCE
(Against Defendant KEMPER)**

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3 80. Plaintiff COLONIAL re-alleges and incorporates each of the allegations
4 contained in the preceding and subsequent paragraphs of the First Amended
5 Complaint as though fully set forth herein.
6

7 81. On or about October 15, 2003, COLONIAL and Defendant KEMPER
8 entered into the AGREEMENT, previously identified in paragraph 11 of this
9 Complaint. The AGREEMENT sets forth terms and conditions for the submission of
10 potential loans by Defendant KEMPER to COLONIAL for funding.

11 82. The AGREEMENT has been in full force and effect at all times relevant
12 to the LOANS which are the subject of this Complaint.
13

14 83. Under the terms of the AGREEMENT, defendant KEMPER “warrants
15 that any loan it submits to Colonial for approval will contain true and valid
16 information”

17 84. Under the terms of the AGREEMENT, Defendant KEMPER is required
18 to repurchase the LOANS within 30 business days after COLONIAL’s demand if the
19 loan application packages contain “fraudulent information” or are “incomplete,
20 incorrect, or improperly prepared” or if any “representation or warranty by Broker is
21 otherwise breached... .”
22

23 85. Under the terms of the AGREEMENT, if Defendant KEMPER breaches
24 any of its terms, and is forced to engage an attorney to enforce the AGREEMENT,
25

1 KEMPER shall reimburse COLONIAL for all court costs, expenses and attorney fees
2 associated with such enforcement action.

3 86. Defendant KEMPER processed and submitted to COLONIAL
4 fraudulent, incomplete, and incorrect loan application documentation for the LOANS
5 at issue.

6
7 87. While COLONIAL has performed all of the conditions, covenants and
8 promises required on its part to be performed under the AGREEMENT, Defendant
9 KEMPER has failed and refused, and continues to fail and refuse, to perform pursuant
10 to the terms and conditions of the AGREEMENT, by failing to repurchase the
11 LOANS upon demand by COLONIAL.

12 88. For the reasons stated herein, COLONIAL has no adequate legal remedy
13 in that the LOANS subject to repurchase under the AGREEMENT are secured by real
14 property.

15
16 89. As a direct and proximate result of the foregoing, COLONIAL has
17 suffered and will continue to suffer damages in a final amount to be proven at trial, but
18 which are expected to exceed \$491,312.00, exclusive of interest, costs, fees, and
19 punitive damages.

20
21 90. WHEREFORE, Plaintiff COLONIAL prays for relief as hereinafter set
22 forth below.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiff COLONIAL prays for Judgment against Defendants,
25 and each of them as, as follows:

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First Cause of Action (Breach of Contract) Against Kemper:

1. For general damages according to proof;
2. For special damages of at least \$491,312.00 and additional amounts according to proof;
3. For attorneys' fees, and cost of suit; and,
4. For such other and further relief as the Court may deem just and proper.

Second Cause of Action (Breach of Warranty) Against Kemper:

1. For general damages according to proof;
2. For special damages of at least \$491,312.00 and additional amounts according to proof;
3. For attorneys' fees, and cost of suit; and,
4. For such other and further relief as the Court may deem just and proper.

Third Cause of Action (Negligence) Against Appraiser:

1. For general damages according to proof;
2. For special damages of at least \$491,312.00 and additional amounts according to proof;
3. For attorneys' fees, and cost of suit; and,
4. For such other and further relief as the Court may deem just and proper.

Fourth Cause of Action (Negligent Misrepresentation) Against Appraiser:

1. For general damages according to proof;
2. For special damages of at least \$491,312.00 and additional amounts according to proof;

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3. For attorneys' fees, and cost of suit; and,
4. For such other and further relief as the Court may deem just and proper.

Fifth Cause of Action (Breach of Third Party Beneficiary Contract) Against Appraiser:

1. For general damages according to proof;
2. For special damages of at least \$491,312.00 and additional amounts according to proof;
3. For attorneys' fees, and cost of suit; and,
4. For such other and further relief as the Court may deem just and proper.

Sixth Cause of Action (Breach of the Implied Covenant of Good Faith and Fair Dealing) Against Kemper:

1. For general damages according to proof;
2. For special damages of at least \$491,312.00 and additional amounts according to proof;
3. For attorneys' fees, and cost of suit; and,
4. For such other and further relief as the Court may deem just and proper.

Seventh Cause of Action (Negligent Misrepresentation) Against Kemper, Pringle, and Khayami:

1. For general damages according to proof;
2. For special damages of at least \$491,312.00 and additional amounts according to proof;
3. For attorneys' fees, and cost of suit; and,
4. For such other and further relief as the Court may deem just and proper.

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Eighth Cause of Action (Negligence) Against Kemper, Pringle, and Khayami:

1. For general damages according to proof;
2. For special damages of at least \$491,312.00 and additional amounts according to proof;
3. For attorneys’ fees, and cost of suit; and,
4. For such other and further relief as the Court may deem just and proper.

Ninth Cause of Action (Intentional Misrepresentation) Against Defendants Pringle and Khayami:

1. For general damages according to proof;
2. For special damages of at least \$491,312.00 and additional amounts according to proof;
3. For punitive and exemplary damages;
4. For attorneys’ fees, and cost of suit; and
5. For such other and further relief as the Court may deem just and proper.

Tenth Cause of Action (Specific Performance) Against Defendant Kemper:

1. For general damages according to proof;
2. For special damages of at least \$491,312.00 and additional amounts according to proof;
3. For the equitable relief of specific performance as set forth in the Seventh Cause of Action.
4. For attorneys’ fees, and cost of suit;
5. For such other and further relief as the Court may deem just and proper.

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RESPECTFULLY SUBMITTED this 5th day of June, 2008.

DODGE ANDERSON, LTD.

BY: /s/ Jess A. Lorona
 Jess A. Lorona
 Attorney for Plaintiff

I hereby certify that on June 5, 2008, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of Electronic Filing to any CM/ECF registrants and had one copy served on all Defendants listed herein:

 /s/ Talese Stone
Legal Assistant to Jess A. Lorona