

COPY

1 HOWARTH & SMITH
DON HOWARTH, State Bar No. 53783
2 dhowarth@howarth-smith.com
SUZELLE M. SMITH, State Bar No. 113992
3 ssmith@howarth-smith.com
DARCY R. HARRIS, State Bar No. 200594
4 dharris@howarth-smith.com
523 West Sixth Street, Suite 728
5 Los Angeles, California 90014
Telephone: (213) 955-9400
6 Facsimile: (213) 622-0791

CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court

SEP 14 2010

John A. Clarke, Executive Officer/Clerk
BY MARY GARCIA, Deputy

7 Attorneys for Plaintiffs

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES

BC 445592

11 Muse Family Enterprises, Ltd., Linda Ehlers,
12 as Co-Trustee for the Muse Children's GS
Trust, JRM Interim Investors, LP, Oak Stream
13 Investors II, Ltd., Wood Luxembourg
Properties, SARL, Holbrook Properties, Inc.,
14 Strongback Holdings, ABF Note Holdco,
LLC, AWF Note Holdco, LLC, BCC Note
15 Holdco, LLC, BFC Note Holdco, LLC, DVB
Note Holdco, LLC, FFC Note Holdco, LLC,
16 IFC Note Holdco, LLC, NCC Note Holdco,
LLC, RMA Note Holdco, LLC, TTM Note
17 Holdco, LLC, TW Note Holdco, LLC, VOC
Note Holdco, LLC,

CASE NO.

COMPLAINT
FOR:

- 1) Breach of Contract
- 2) Fraud – Intentional Misrepresentation
- 3) Fraud – Concealment
- 4) Negligent Misrepresentation
- 5) Breach of Fiduciary Duty
- 6) Order Setting Aside and Annuling Fraudulent Transfers

18 Plaintiffs,

19 vs.

20 BTM Funding, Inc. a corporation; David T.
21 Smith, an individual; Carmen Copple Smith,
22 also known as Carmen Copple Silva, an
23 individual; Carmen Copple Silva, Trustee for
the Carmen Copple Silva Revocable Living
24 Trust, and Does 1 through 100, inclusive,

AND DEMAND FOR JURY TRIAL

25 Defendants.

26
27 ///

28 ///

1 4. Plaintiff JRM Interim Investors, LP, (“JRM Interim Investors”) is now, and at
2 all times herein mentioned was, a Limited Partnership organized under the laws of Texas,
3 with its principal place of business in Dallas, Texas. John Muse is now, and at all times
4 herein mentioned was, the President of JRM Management Company, LLC, which is the
5 General Partner of JRM Interim Investors.

6 5. Plaintiff Oak Stream Investors II, Ltd. (“Oak Stream”) is now, and at all times
7 herein mentioned was, a Limited Partnership organized under the laws of Texas, with its
8 principal place of business in Dallas, Texas. Robert Furst is a limited partner in Oak Stream.

9 6. Plaintiff Wood Luxembourg Properties, SARL (“Wood Luxembourg”) is a
10 limited liability company organized under the laws of Luxembourg with its principal place
11 of business in Luxembourg. Scott Wood is a partner in Wood Investment Partners, L.P.,
12 which is the sole owner of Wood European Properties, LLC which, in turn, is the sole
13 shareholder of Plaintiff Wood Luxembourg.

14 7. Plaintiff Holbrook Properties, Inc. (“Holbrook”) is a corporation organized
15 under the laws of Panama with its principal place of business in Switzerland.

16 8. Plaintiff Strongback Holdings (“Strongback”) is a corporation organized under
17 the laws the Cayman Islands with its principal place of business in Switzerland.

18 9. Plaintiffs Muse Family Enterprises, Ltd., Muse Children’s GS Trust, JRM
19 Interim Investors, LP, Oak Stream Investors II, Ltd., Wood Luxembourg Properties, SARL,
20 Holbrook Properties, Inc., and Strongback Holdings are hereinafter referred to collectively
21 as “Plaintiff Investor Entities” or “Plaintiffs.”

22 10. John Muse, Robert Furst, and Scott Wood are hereinafter referred to
23 collectively as “Plaintiff Principals.”

24 11. Plaintiff ABF Note Holdco, LLC, is a limited liability company formed under
25 the laws of Delaware, to which Plaintiffs Muse Family Enterprises, Muse Children’s GS
26 Trust, Oak Stream and Holbrook assigned their respective rights and interests in the Loan
27 Participations that Plaintiffs held pursuant to Participation Agreements with Defendant BTM
28 Funding, Inc. for the Antioch Bible Fellowship, Inc. Loan.

1 12. Plaintiff AWF Note Holdco, LLC, is a limited liability company formed under
2 the laws of Delaware, to which Plaintiffs Muse Family Enterprises, Muse Children's GS
3 Trust, Oak Stream and Wood Luxembourg assigned their respective rights and interests in
4 the Loan Participations that Plaintiffs held pursuant to Participation Agreements with
5 Defendant BTM Funding, Inc. for the Agape Word Church, Inc. Loan.

6 13. Plaintiff BCC Note Holdco, LLC, is a limited liability company formed under
7 the laws of Delaware, to which Plaintiffs Muse Family Enterprises, Muse Children's GS
8 Trust, Oak Stream and Strongback assigned their respective rights and interests in the Loan
9 Participations that Plaintiffs held pursuant to Participation Agreements with Defendant BTM
10 Funding, Inc. for the Brook Community Church Loan.

11 14. Plaintiff BFC Note Holdco, LLC, is a limited liability company formed under
12 the laws of Delaware, to which Plaintiffs Muse Family Enterprises, Muse Children's GS
13 Trust, Oak Stream and Strongback assigned their respective rights and interests in the Loan
14 Participations that Plaintiffs held pursuant to Participation Agreements with Defendant BTM
15 Funding, Inc. for the Believers Fellowship Loan.

16 15. Plaintiff DVB Note Holdco, LLC, is a limited liability company formed under
17 the laws of Delaware, to which Plaintiffs JRM Interim Investors, Oak Stream and Holbrook
18 assigned their respective rights and interests in the Loan Participations that Plaintiffs held
19 pursuant to Participation Agreements with Defendant BTM Funding, Inc. for the Delaware
20 Valley Baptist Church Loan.

21 16. Plaintiff FFC Note Holdco, LLC, is a limited liability company formed under
22 the laws of Delaware, to which Plaintiffs Muse Family Enterprises, Muse Children's GS
23 Trust, Oak Stream and Holbrook assigned their respective rights and interests in the Loan
24 Participations that Plaintiffs held pursuant to Participation Agreements with Defendant BTM
25 Funding, Inc. for the Family Fellowship Church Loan.

26 17. Plaintiff IFC Note Holdco, LLC, is a limited liability company formed under
27 the laws of Delaware, to which Plaintiffs Muse Family Enterprises, Muse Children's GS
28 Trust, Oak Stream and Strongback assigned their respective rights and interests in the Loan

1 Participations that Plaintiffs held pursuant to Participation Agreements with Defendant BTM
2 Funding, Inc. for the Insoul Fellowship Church Loan.

3 18. Plaintiff NCC Note Holdco, LLC, is a limited liability company formed under
4 the laws of Delaware, to which Plaintiffs Muse Family Enterprises, Muse Children's GS
5 Trust, Oak Stream, Holbrook and Strongback assigned their respective rights and interests in
6 the Loan Participations that Plaintiffs held pursuant to Participation Agreements with
7 Defendant BTM Funding, Inc. for the New Creation Church Loan.

8 19. Plaintiff RMA Note Holdco, LLC, is a limited liability company formed under
9 the laws of Delaware, to which Plaintiffs Muse Family Enterprises, Muse Children's GS
10 Trust, Oak Stream and Strongback assigned their respective rights and interests in the Loan
11 Participations that Plaintiffs held pursuant to Participation Agreements with Defendant BTM
12 Funding, Inc. for the Rush AME Loan.

13 20. Plaintiff TTM Note Holdco, LLC, is a limited liability company formed under
14 the laws of Delaware, to which Plaintiffs Muse Family Enterprises, Muse Children's GS
15 Trust, Oak Stream and Holbrook assigned their respective rights and interests in the Loan
16 Participations that Plaintiffs held pursuant to Participation Agreements with Defendant BTM
17 Funding, Inc. for the Truth Tabernacle Ministries, Inc. Loan.

18 21. Plaintiff TW Note Holdco, LLC, is a limited liability company formed under
19 the laws of Delaware, to which Plaintiffs Muse Family Enterprises, Muse Children's GS
20 Trust, Oak Stream and Strongback assigned their respective rights and interests in the Loan
21 Participations that Plaintiffs held pursuant to Participation Agreements with Defendant BTM
22 Funding, Inc. for the True Way Loan.

23 22. Plaintiff VOC Note Holdco, LLC, is a limited liability company formed under
24 the laws of Delaware, to which Plaintiff Holbrook assigned its rights and interests in the
25 Loan Participations that it held pursuant to the Participation Agreement with Defendant
26 BTM Funding, Inc. for the Victory Outreach Church Loan.

27 23. Plaintiffs ABF Note Holdco, LLC, AWF Note Holdco, LLC, BCC Note
28 Holdco, LLC, BFC Note Holdco, LLC, DVB Note Holdco, LLC, FFC Note Holdco, LLC,

1 IFC Note Holdco, LLC, NCC Note Holdco, LLC, RMA Note Holdco, LLC, TTM Note
2 Holdco, LLC, TW Note Holdco, LLC, and VOC Note Holdco, LLC, are hereinafter referred
3 to collectively as "Assignee Plaintiffs."

4 24. Plaintiffs are informed and believe, and thereon allege, that Defendant BTM
5 Funding, Inc. ("BTM") is now, and at all times herein mentioned was, a corporation
6 organized under the laws of Delaware, with its principal place of business in Broken Arrow,
7 Oklahoma. Plaintiffs are informed and believe, and thereon allege, that BTM was and is
8 registered with the California Secretary of State to do business in the State of California and
9 does and did business in California, located at least at 1545 Lachman Lane, in Pacific
10 Palisades, Los Angeles County, California, including doing business with Plaintiffs in
11 California, and at all times herein mentioned was operating out of Los Angeles County,
12 California, including through its President and 100% owner Defendant David Smith, who is
13 a resident of California, and owns property including real estate in California.

14 25. Plaintiffs are informed and believe, and thereon allege, that Defendant David
15 T. Smith ("David Smith" or "Smith") is now, and at all times herein mentioned was, a
16 resident of Los Angeles County, California, owning real estate and other property in Los
17 Angeles.

18 26. Plaintiffs are informed and believe, and thereon allege, that Defendant Carmen
19 Cople Smith, also known as Carmen Cople Silva, ("Cople") is now, and at all times
20 herein mentioned was, a resident of Los Angeles County, California. Defendant Cople is
21 the wife of Defendant David Smith and was at one time the title holder of the real property
22 situated at 1545 Lachman Lane, in Pacific Palisades, Los Angeles County, California (the
23 "Lachman Lane Property").

24 27. Plaintiffs are informed and believe, and thereon allege, that Defendant Carmen
25 Cople Silva is the Trustee for the Carmen Cople Silva Revocable Living Trust ("Cople
26 Trust"), which is the current title holder of the Lachman Lane Property.

27 28. At all times mentioned herein, Arks Funding, LLC (56.67% of which is owned
28 by Defendant David Smith and 10% of which is owned by Defendant Carmen Cople

1 Smith) and its predecessor Arks, Inc. (hereinafter "Arks"), Arks' wholly owned subsidiary
2 Noah Construction Company of North Carolina, LLC and its predecessor Noah
3 Construction, Inc. (hereinafter "Noah" or "Noah Construction"), and representatives of Arks
4 and Noah, including but not limited to, Sam Spatafore, Controller of Arks, Robert Stanley,
5 CFO of Arks, Robert Knowles, President of Arks, Randall (Randy) Barton, counsel for
6 Arks, Laura Page, general counsel for Arks, and John Ferguson, Director of Project
7 Construction at Noah, were the agents of Defendants BTM and Smith, and were acting
8 within the course and scope of said agency.

9 29. Plaintiffs are informed and believe, and on that basis, that Defendants Does 1
10 through 100, inclusive, and each of them, at all times mentioned herein were individuals,
11 corporations, and/or other organizations or entities organized and existing under the laws of
12 their states of incorporation, and were residents of, and/or doing business in, the State of
13 California.

14 30. Plaintiffs do not know the true names and capacities of those Defendants sued
15 herein as Does 1 through 100, inclusive, and therefore sue these Defendants by such
16 fictitious names. Plaintiffs will amend this complaint to allege their true names and
17 capacities when ascertained. Plaintiffs are informed and believe, and on that basis allege,
18 that the Defendants sued herein as Does 1 through 100, inclusive, are in some manner
19 legally responsible for the wrongful acts set forth herein.

20 31. At all times mentioned herein, each Defendant was the agent of each of the
21 other Defendants, and was acting within the course and scope of said agency.

22 **JURISDICTION AND VENUE**

23 32. At all times mentioned herein, Plaintiffs are informed and believe, and thereon
24 allege, that BTM was and is registered with the California Secretary of State to do business
25 in the State of California, and does and did business in California, located at least at 1545
26 Lachman Lane, in Pacific Palisades, Los Angeles County, California, including doing
27 business with Plaintiffs in California. Plaintiffs are informed and believe and thereon allege
28 that at all times herein mentioned, BTM was operating out of Los Angeles County,

1 California, including through its President and 100% owner Defendant David Smith, who
2 owns or owned property including real estate in California, and who is now, and at all times
3 herein mentioned was, a resident of Los Angeles County, California. BTM did business
4 with Plaintiffs in California, including by making a construction loan to the Victory
5 Outreach Church in Sacramento, California, soliciting and accepting Plaintiffs' investment
6 funds pursuant to Participation Agreements for participations in that construction loan, and
7 purportedly investing at least some portion of Plaintiffs' funds towards the Victory Outreach
8 Church loan and project in Sacramento, California. BTM transacted business in California
9 by telephone, facsimile, wire and United States mails, and has personally appeared in this
10 State by doing business and having offices here, including at 1545 Lachman Lane, in Pacific
11 Palisades, Los Angeles County, California.

12 33. Plaintiffs are informed and believe, and thereon allege, that Defendants Smith
13 and Copple are now, and at all times herein mentioned were, residents of Los Angeles
14 County, California, owning real estate and other property in Los Angeles.

15 34. Plaintiffs are informed and believe, and thereon allege, that the Carmen
16 Copple Silva Revocable Trust is a Trust organized under the laws of California and that at
17 all times mentioned herein, Carmen Copple Silva, as Trustee for the Copple Trust, is and
18 was a resident of Los Angeles County, California.

19 35. Venue is proper in the County of Los Angeles pursuant to California Code of
20 Civil Procedure § 395, which provides that venue is proper in the County where some of the
21 Defendants reside. Further, the real property that is the subject of Plaintiffs' claims for
22 fraudulent transfer (the "Lachman Lane Property") is situated in the County of Los Angeles.

23 **FACTUAL ALLEGATIONS**

24 **Plaintiff Muse Family Enterprises**

25 ***Truth Tabernacle Ministries, Inc. Loan***

26 **Contract Terms**

27 36. On April 16, 2008, Plaintiff Muse Family Enterprises entered into a
28 Construction Note Participation Agreement with Defendant BTM on a construction loan to

1 Truth Tabernacle Ministries, Inc. (“TTM Participation Agreement” or “Participation
2 Agreement”). The TTM Participation Agreement provided that Plaintiff (designated
3 “Participant”) would have a participation interest of 23 and 1/3% in the construction note
4 amount of \$2,210,736, which Defendant BTM (designated “Seller”) would loan to the
5 church, Truth Tabernacle Ministries, Inc., (designated “Borrower”). Under the TTM
6 Participation Agreement, Plaintiff committed to fund a total of \$515,764.71, to be advanced
7 to Defendant BTM in response to periodic draw requests from Defendant according to a
8 projected draw schedule. In consideration for Plaintiff’s advancing the funds, Plaintiff was
9 entitled to receive the return of the principal invested, as well as 10.5% interest on such
10 amount, and its pro rata portion (23 and 1/3%) of a Participation Fee (of \$33,161.04), with
11 interest and fees to be paid monthly, and the principal payable to Plaintiff at the issuance of
12 a Certificate of Occupancy for the Property or twelve (12) months from the date of Loan
13 Closing, whichever first occurs, as provided for in the Loan Agreement which was
14 specifically referenced by and incorporated into the Participation Agreement. The
15 Participation Agreement also provided that in the event Plaintiff had not received its return
16 of principal at the time specified, BTM was either to provide or to arrange additional
17 financing so that Plaintiff would receive all its funds.

18 37. Defendant BTM, for its part, agreed among other things, that:

- 19 • “In the event Seller [BTM] does not for any reason advance to Borrower
20 [church] the full amount of the contemplated advance [the draws of funds that
21 Defendants called for every month] on the date of receipt of such Purchase
22 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
23 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
24 to the amount of such contemplated advance not made.” (Participation
25 Agreement, Schedule 4, ¶2.)
- 26 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
27 the terms of the Loan Documents and with this Agreement. Seller [BTM]
28 shall provide loan servicing in accordance with commercially acceptable loan
servicing practices and with the same degree of care that is customarily
employed and exercised by Seller [BTM] in the administration and servicing
of loans of a similar nature held by it for its own account (the “Servicing
Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- “The Seller [BTM] shall maintain appropriate records and books of account
reflecting interest accrued and interest received, interest rate changes, principal
payments and all other transactions or actions affecting the Loan, which

1 records shall be kept in accordance with accounting principles consistently
2 and customarily applied by Seller [BTM].” (Participation Agreement,
Schedule 4, ¶9.)

- 3 • “Seller [BTM] further agrees that in performing its obligations hereunder,
4 Seller shall: (a) act in a custodial capacity on behalf of the Participant
5 [Plaintiff] with respect to its holding of any underlying instrument or collateral
6 and in holding any proceeds received for the Loan; (b) not commingle for any
7 significant period of time proceeds received on the Loan; (c) directly pass
8 through any proceeds received from the Loan to Participant [Plaintiff] as
9 provided in Section 4 of this Agreement, less any proceeds that represent
10 servicing or other compensation to Seller [BTM] or an interest in the Loan
11 retained by the Seller [BTM], all as more particularly provided for herein; and
12 (d) administer the Loan in accordance with the Servicing Standard as provided
13 herein.” (Participation Agreement, Schedule 4, ¶ 9.)
- 14 • “Seller [BTM] represents and warrants to Participant [Plaintiff] that, as of the
15 date hereof ... no default in the payment of principal or interest on the Loan
16 has occurred and remains uncured under the Loan Documents.” (Participation
17 Agreement, Schedule 4, ¶ 15.)
- 18 • “[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
19 may take or omit to take any action under any of the Loan Documents which
20 would result in the following (each a “Material Change”): (a) reduce or
21 increase the amounts of principal or interest payments of the Loan, (b) reduce
22 or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
23 postpone any due date for payment of principal or interest in which Participant
24 [Plaintiff] shares, including, without limitation, the final maturity date of the
25 Loan, (d) except as expressly permitted under the Loan Documents, release or
26 subordinate any existing collateral described in the Loan Documents, (e)
27 release the liability of Borrower or any guarantor for the Loan, (f) consent to
28 the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
(ii) any direct or indirect interest in Borrower ... (g) make or consent to any
change in the principal amount of the Note; or (h) waive a default under the
Loan Documents arising from the failure to make payments as and when due
on the Loan. . . .” (Participation Agreement, Schedule 4, ¶ 11.)
- “Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
of any material default with respect to the Loan of which Seller [BTM] is
actually aware and of any other matters which, in Seller’s judgment, materially
affect the interest of Participant [Plaintiff] with respect to the Loan
(collectively, a “Material Default”).” (Participation Agreement, Schedule 4, ¶
11.)

23 38. The parties agreed that the Plaintiff would advance funds to BTM, as called
24 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
25 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
26 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
27 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
28 (the Church), to service the loan and advance the funds towards the construction project,

1 according to the budget and plans approved and relied upon by the Plaintiff in entering into
2 the Participation Agreement. Upon information and belief, BTM had an agreement with
3 Arks whereby Arks took over the servicing and administration of the Loan to Truth
4 Tabernacle Ministries, Inc. The Participation Agreement specifically references and
5 incorporates the Loan Agreement, which is between Arks “and its affiliate BTM Funding,
6 Inc.” and the Borrower (the Church), and which provides that “the Loan proceeds are to be
7 used by Church solely for the construction of a church, church-related improvements, and/or
8 costs related thereto (the “Project”) upon the land described in the Security Instrument (the
9 “Property”) in accordance with the plans and specifications approved by ARKS.” See Build
10 to Minister Loan Agreement (Truth Tabernacle Ministries, Inc.), dated May 15, 2008.

11 39. Plaintiff agreed to advance the funds in response to periodic draws based on
12 the project plans and budget which were attached to the Participation Agreement and/or the
13 Loan Agreement that was incorporated into the Participation Agreement, and which had
14 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
15 committing to the Participation Agreement for the Truth Tabernacle Ministries, Inc. Loan.
16 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
17 contractors, suppliers and other third parties as well as specific project-related servicing fees
18 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
19 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
20 approval from Plaintiff for any material change to the budget or plans.

21 Contract Performance and Breach

22 40. Upon execution of the Participation Agreement, Plaintiff began funding draw
23 requests for the Truth Tabernacle Ministries, Inc. project based on draw requests by BTM
24 and its agents. Plaintiff Muse Family Enterprises advanced \$515,838 to BTM and its agents
25 for the Truth Tabernacle Ministries, Inc. Loan between July 2008 and May 2009.

26 41. Defendant BTM breached the Participation Agreement by, among other things,
27 the following:

28 ///

- 1 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
2 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
3 Ministries, Inc. (or to the servicers or contractors for authorized project
4 disbursements on the Borrower's behalf), and failing to return within five business
5 days to Plaintiff any funds not so advanced;
- 6 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
7 contractors, suppliers and other third parties as well as specific project-related
8 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
9 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
10 failing to get prior approval from Plaintiff for any material change to the budget or
11 plans;
- 12 • failing to maintain appropriate records and books of account reflecting interest
13 accrued and interest received, interest rate changes, principal payments and all other
14 transactions or actions affecting the Loan;
- 15 • not paying Plaintiff its return of principal at the earlier of the issuance of the
16 certificate of occupancy or within 12 months of the Loan Closing;
- 17 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
18 Closing and not providing or arranging additional financing to allow Plaintiff to
19 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
20 within 12 months of the Loan Closing;
- 21 • not paying Plaintiff its interest and fees on a monthly basis;
- 22 • failing to provide loan servicing and administration in accordance with the Loan
23 documents and with commercially acceptable loan servicing practices;
- 24 • requiring additional payments by Plaintiff beyond what was due under the
25 Participation Agreement and the approved budget and plans incorporated therein;
- 26 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
27 holding any proceeds received for the Loan;

28 ///

- 1 • commingling for significant periods of time proceeds received on the Loan with other
- 2 funds;
- 3 • failing to inform Plaintiff that as of the date of the Participation Agreement a default
- 4 in the payment of principal or interest on the Loan had occurred and remained
- 5 uncured;
- 6 • waiving a default under the Loan Documents arising from the failure to make
- 7 payments as and when due on the Loan without obtaining the consent of Plaintiff;
- 8 • postponing due dates for payment of principal or interest in which Plaintiff shared
- 9 without obtaining the consent of Plaintiff;
- 10 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
- 11 which Defendant was aware.

12 Contract Damages

13 42. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
14 as yet unascertained, but which Plaintiff believes is at least \$193,912 and which will be
15 proved at trial.

16 43. Additionally, Plaintiff incurred legal and administrative costs in addressing
17 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
18 have incurred.

19 Fraud – Defendants' Misrepresentations

20 44. On the periodic draw requests sent to Plaintiff beginning in July 2008, Smith's
21 and BTM's agents signed attestations that the monies advanced thus far by Plaintiff had
22 been spent on the Truth Tabernacle project, in accordance with the approved plans and
23 budget, as per the reports, forms, and spreadsheets submitted with the draw requests, and
24 that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
25 value of the project to that point.

26 45. Prior to Plaintiff's executing the Participation Agreement and making each
27 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
28 monthly) in response to draw requests and spoke to agents of Smith and BTM, including

1 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
2 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
3 updates on projects, including the Truth Tabernacle Ministries, Inc. project, and was told
4 that all funds previously advanced by Plaintiff to BTM and its agents on the Truth
5 Tabernacle loan had been put towards the project according to the budget and plans
6 submitted to, approved by and relied on by Plaintiff.

7 Fraud – True Facts

8 46. In fact, Defendants' representations to Plaintiff as described above were false.
9 The true facts were that:

- 10 • Plaintiff's funds had not been spent on the Truth Tabernacle project in accordance
11 with the approved plans and budget as per the reports, forms, and spreadsheets
12 submitted with the periodic draw requests sent to Plaintiff beginning in July 2008,
13 and the reports, forms, and spreadsheets submitted to Plaintiff did not accurately
14 represent the value of the project to that point;
- 15 • all funds previously advanced by Plaintiff to BTM and its agents on the Truth
16 Tabernacle loan had not been put towards the project according to the budget and
17 plans submitted to, approved by and relied on by Plaintiff;

18 Fraud - Concealment

19 47. Defendants David Smith and BTM, including through their agents, concealed
20 from and failed to disclose to Plaintiff the following:

- 21 • the true financial and operational status of the loans and projects, including the Truth
22 Tabernacle project;
- 23 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
24 projects, including the Truth Tabernacle project, and were not being applied only to
25 project-related costs, according to the plans and budgets submitted to, approved by
26 and relied on by Plaintiff;
- 27 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
28 including payments made to unrelated third parties - friends of David Smith and

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the Lachman Lane Property;

- that Smith and BTM were making undisclosed, unapproved payments for "legal fees" to Randy Barton and for "sales commissions" to Carmen Copple Smith;
- that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff and its investments in overseeing the management, servicing and administration of the loans and projects;
- that Smith and BTM were commingling for significant periods of time proceeds received on the Loan with other funds;
- that Smith and BTM did not intend to immediately advance the full amount of Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf or else return the funds to Plaintiff, and established money market accounts to hold such funds longer than five business days;
- that Smith and BTM were not maintaining appropriate records and books of account reflecting interest accrued and interest received, interest rate changes, principal payments and all other transactions or actions affecting the Loan.

Fraud – Reliance, Discovery and Damage

48. Plaintiff continued to fund the Truth Tabernacle loan and project in response to periodic draw requests from Defendants, based on continued assurances and representations of Defendants Smith and BTM, including through their agents at Arks and Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants' failure to disclose that Plaintiff's funds were being commingled with other funds and diverted to non-project related costs and payments. In or about February 2009, Plaintiff began working on a new program to take over the servicing and administration of the loans, expand the Build to Minister church loan program into various investment funds, and market those funds to third parties.

1 49. On or about July 31, 2009, during this effort to expand the loan program,
2 Plaintiff first learned of problems with the loans, including that Defendants and their agents
3 owed monies to third parties and were unable to pay them despite Plaintiff and other
4 investors having advanced funds as requested. Over the course of the next several months,
5 Plaintiff conducted an investigation in an attempt to determine what had happened to
6 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
7 misrepresentations, concealment and malfeasance. With respect to the problems discovered
8 with the loans, Plaintiff contributed additional monies in order to complete the projects,
9 including paying outstanding bills, liens, legal and administration fees, modifying the terms
10 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
11 new contractors to complete the construction.

12 50. But for Defendants' misrepresentations and concealment as described above,
13 Plaintiff would not have continued to provide funds in response to draw requests from
14 Defendants or their agents for the projects, including the Truth Tabernacle project, and
15 would not have invested efforts, time and money creating a new program to take over
16 servicing of the loans, expand the Build to Minister program into various investment funds,
17 and market those funds to third parties.

18 51. As a result of Defendants' misrepresentations and concealments, Plaintiff has
19 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
20 \$193,912 and which will be proved at trial. Additionally, Plaintiff incurred legal and
21 administrative costs in addressing and mitigating the harm caused by Defendants'
22 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
23 funds expended in creating a new program to take over servicing of the loans, expand the
24 Build to Minister program into various investment funds, and market those funds to third
25 parties, which it would not have expended but for Defendants' misrepresentations and
26 concealments.

27 ///

28 ///

1 *Agape Word Church, Inc. Loan*

2 Contract Terms

3 52. On December 16, 2008, Plaintiff Muse Family Enterprises entered into a
4 Construction Note Participation Agreement with Defendant BTM on a construction loan to
5 Agape Word Church, Inc. (“Agape Participation Agreement” or “Participation Agreement”).
6 The Agape Participation Agreement provided that Plaintiff (designated “Participant”) would
7 have a participation interest of 23 and 1/3% in the construction note amount of \$686,931,
8 which Defendant BTM (designated “Seller”) would loan to the church, Agape Word Church,
9 Inc. (designated “Borrower”). Under the Agape Participation Agreement, Plaintiff
10 committed to fund a total of \$160,261, to be advanced to Defendant BTM in response to
11 periodic draw requests from Defendant according to a projected draw schedule. In
12 consideration for Plaintiff’s advancing the funds, Plaintiff was entitled to receive the return
13 of the principal invested, as well as 10.5% interest on such amount, and its pro rata portion
14 (23 and 1/3%) of a Participation Fee (of \$10,303.96), with interest and fees to be paid
15 monthly, and the principal payable to Plaintiff at the issuance of a Certificate of Occupancy
16 for the Property or twelve (12) months from the date of Loan Closing, whichever first
17 occurs, as provided for in the Loan Agreement which was specifically referenced by and
18 incorporated into the Participation Agreement. The Participation Agreement also provided
19 that in the event Plaintiff had not received its return of principal at the time specified, BTM
20 was either to provide or to arrange additional financing so that Plaintiff would receive all its
21 funds.

22 53. Defendant BTM, for its part, agreed among other things, that:

- 23
- 24 • “In the event Seller [BTM] does not for any reason advance to Borrower
25 [church] the full amount of the contemplated advance [the draws of funds that
26 Defendants called for every month] on the date of receipt of such Purchase
27 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
28 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
to the amount of such contemplated advance not made.” (Participation
Agreement, Schedule 4, ¶2.)
 - “[T]he Seller [BTM] shall service and administer the Loan in accordance with
the terms of the Loan Documents and with this Agreement. Seller [BTM]
shall provide loan servicing in accordance with commercially acceptable loan

1 servicing practices and with the same degree of care that is customarily
2 employed and exercised by Seller [BTM] in the administration and servicing
of loans of a similar nature held by it for its own account (the "Servicing
Standard")." (Participation Agreement, Schedule 4, ¶9.)

- 3 • "The Seller [BTM] shall maintain appropriate records and books of account
4 reflecting interest accrued and interest received, interest rate changes, principal
5 payments and all other transactions or actions affecting the Loan, which
6 records shall be keep in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)
- 7 • "Seller [BTM] further agrees that in performing its obligations hereunder,
8 Seller shall: (a) act in a custodial capacity on behalf of the Participant
9 [Plaintiff] with respect to its holding of any underlying instrument or collateral
10 and in holding any proceeds received for the Loan; (b) not commingle for any
11 significant period of time proceeds received on the Loan; (c) directly pass
12 through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein." (Participation Agreement, Schedule 4, ¶ 9.)

13 54. The parties agreed that the Plaintiff would advance funds to BTM, as called
14 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
15 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM's
16 consent, and that BTM or its agents would thereupon transmit the funds to BTM's affiliate
17 Arks and/or Arks' wholly owned subsidiary Noah Construction, on behalf of the Borrower
18 (the Church), to service the loan and advance the funds towards the construction project,
19 according to the budget and plans approved and relied upon by the Plaintiff in entering into
20 the Participation Agreement. Upon information and belief, BTM had an agreement with
21 Arks whereby Arks took over the servicing and administration of the Loan to Agape Word
22 Church, Inc. The Participation Agreement specifically references and incorporates the Loan
23 Agreement, which is between Arks "and its affiliate BTM Funding, Inc." and the Borrower
24 (the Church), and which provides that "the Loan proceeds are to be used by Church solely
25 for the construction of a church, church-related improvements, and/or costs related thereto
26 (the "Project") upon the land described in the Security Instrument (the "Property") in
27 accordance with the plans and specifications approved by ARKS."

28 ///

- 1 • failing to maintain appropriate records and books of account reflecting interest
- 2 accrued and interest received, interest rate changes, principal payments and all other
- 3 transactions or actions affecting the Loan;
- 4 • not paying Plaintiff its return of principal at the earlier of the issuance of the
- 5 certificate of occupancy or within 12 months of the Loan Closing;
- 6 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
- 7 Closing and not providing or arranging additional financing to allow Plaintiff to
- 8 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
- 9 within 12 months of the Loan Closing;
- 10 • not paying Plaintiff its interest and fees on a monthly basis;
- 11 • failing to provide loan servicing and administration in accordance with the Loan
- 12 documents and with commercially acceptable loan servicing practices;
- 13 • requiring additional payments by Plaintiff beyond what was due under the
- 14 Participation Agreement and the approved budget and plans incorporated therein;
- 15 • postponing due dates for payment of principal or interest in which Plaintiff shared
- 16 without obtaining the consent of Plaintiff;
- 17 • failing to require Borrower to pay the equity down payment at Closing as required by
- 18 the Loan Documents;
- 19 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 20 holding any proceeds received for the Loan;
- 21 • commingling for significant periods of time proceeds received on the Loan with other
- 22 funds.

23 Contract Damages

24 58. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
25 as yet unascertained, but which Plaintiff believes is at least \$53,438 and which will be
26 proved at trial.

27 ///

28 ///

- 1 • all funds previously advanced by Plaintiff to BTM and its agents on the Agape Word
2 Church, Inc. loan had not been put towards the project according to the budget and
3 plans submitted to, approved by and relied on by Plaintiff;

4 Fraud - Concealment

5 63. Defendants David Smith and BTM, including through their agents, concealed
6 from and failed to disclose to Plaintiff the following:

- 7 • the true financial and operational status of the loans and projects, including the Agape
8 Word Church, Inc. project;
- 9 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
10 projects, including the Agape Word Church, Inc. project, and were not being applied
11 only to project-related costs, according to the plans and budgets submitted to,
12 approved by and relied on by Plaintiff;
- 13 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
14 including payments made to unrelated third parties - friends of David Smith and
15 David Smith's wife, Carmen Cople Smith, and payments of the mortgage on the
16 Lachman Lane Property;
- 17 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
18 and its investments in overseeing the management, servicing and administration of
19 the loans and projects;
- 20 • that Smith and BTM were commingling for significant periods of time proceeds
21 received on the Loan with other funds;
- 22 • that Smith and BTM did not intend to immediately advance the full amount of
23 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
24 or else return the funds to Plaintiff, and established money market accounts to hold
25 such funds longer than five business days;
- 26 • that Smith and BTM were not maintaining appropriate records and books of account
27 reflecting interest accrued and interest received, interest rate changes, principal
28 payments and all other transactions or actions affecting the Loan.

Fraud – Reliance, Discovery and Damage

1
2 64. Plaintiff continued to fund the Agape Word Church, Inc. loan and project in
3 response to periodic draw requests from Defendants, based on continued assurances and
4 representations of Defendants Smith and BTM, including through their agents at Arks and
5 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
6 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
7 failure to disclose that Plaintiff's funds were being commingled with other funds and
8 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
9 began working on a new program to take over the servicing and administration of the loans,
10 expand the Build to Minister church loan program into various investment funds, and market
11 those funds to third parties.

12 65. On or about July 31, 2009, during this effort to expand the loan program,
13 Plaintiff first learned of problems with the loans, including that Defendants and their agents
14 owed monies to third parties and were unable to pay them despite Plaintiff and other
15 investors having advanced funds as requested. Over the course of the next several months,
16 Plaintiff conducted an investigation in an attempt to determine what had happened to
17 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
18 misrepresentations, concealment and malfeasance. With respect to the problems discovered
19 with the loans, Plaintiff contributed additional monies in order to complete the projects,
20 including paying outstanding bills, liens, legal and administration fees, modifying the terms
21 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
22 new contractors to complete the construction.

23 66. But for Defendants' misrepresentations and concealment as described above,
24 Plaintiff would not have continued to provide funds in response to draw requests from
25 Defendants or their agents for the projects, including the Agape Word Church, Inc. project,
26 and would not have invested efforts, time and money creating a new program to take over

27 ///

28 ///

1 servicing of the loans, expand the Build to Minister program into various investment funds,
2 and market those funds to third parties.

3 67. As a result of Defendants' misrepresentations and concealments, Plaintiff has
4 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
5 \$53,438 and which will be proved at trial. Additionally, Plaintiff incurred legal and
6 administrative costs in addressing and mitigating the harm caused by Defendants'
7 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
8 funds expended in creating a new program to take over servicing of the loans, expand the
9 Build to Minister program into various investment funds, and market those funds to third
10 parties, which it would not have expended but for Defendants' misrepresentations and
11 concealments.

12 *Antioch Bible Fellowship, Inc. Loan*

13 Contract Terms

14 68. On February 27, 2008, Plaintiff Muse Family Enterprises entered into a
15 Construction Note Participation Agreement with Defendant BTM on a construction loan to
16 Antioch Bible Fellowship, Inc. ("Antioch Participation Agreement" or "Participation
17 Agreement"). The Antioch Participation Agreement provided that Plaintiff (designated
18 "Participant") would have a participation interest of 23 and 1/3% in the construction note
19 amount of \$954,000, which Defendant BTM (designated "Seller") would loan to the church,
20 Antioch Bible Fellowship, Inc. (designated "Borrower"). Under the Antioch Participation
21 Agreement, Plaintiff committed to fund a total of \$222,568.20, to be advanced to Defendant
22 BTM in response to periodic draw requests from Defendant according to a projected draw
23 schedule. In consideration for Plaintiff's advancing the funds, Plaintiff was entitled to
24 receive the return of the principal invested, as well as 10.5% interest on such amount, and its
25 pro rata portion (23 and 1/3%) of a Participation Fee (of \$14,310), with interest and fees to
26 be paid monthly, and the principal payable to Plaintiff at the issuance of a Certificate of
27 Occupancy for the Property or twelve (12) months from the date of Loan Closing, whichever
28 first occurs, as provided for in the Loan Agreement which was specifically referenced by

1 and incorporated into the Participation Agreement. The Participation Agreement also
2 provided that in the event Plaintiff had not received its return of principal at the time
3 specified, BTM was either to provide or to arrange additional financing so that Plaintiff
4 would receive all its funds.

5 69. Defendant BTM, for its part, agreed among other things, that:

- 6 • “In the event Seller [BTM] does not for any reason advance to Borrower
7 [church] the full amount of the contemplated advance [the draws of funds that
8 Defendants called for every month] on the date of receipt of such Purchase
9 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
10 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
11 to the amount of such contemplated advance not made.” (Participation
12 Agreement, Schedule 4, ¶2.)
- 13 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
14 the terms of the Loan Documents and with this Agreement. Seller [BTM]
15 shall provide loan servicing in accordance with commercially acceptable loan
16 servicing practices and with the same degree of care that is customarily
17 employed and exercised by Seller [BTM] in the administration and servicing
18 of loans of a similar nature held by it for its own account (the “Servicing
19 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 20 • “The Seller [BTM] shall maintain appropriate records and books of account
21 reflecting interest accrued and interest received, interest rate changes, principal
22 payments and all other transactions or actions affecting the Loan, which
23 records shall be kept in accordance with accounting principles consistently
24 and customarily applied by Seller [BTM].” (Participation Agreement,
25 Schedule 4, ¶9.)
- 26 • “Seller [BTM] further agrees that in performing its obligations hereunder,
27 Seller shall: (a) act in a custodial capacity on behalf of the Participant
28 [Plaintiff] with respect to its holding of any underlying instrument or collateral
and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)

24 70. The parties agreed that the Plaintiff would advance funds to BTM, as called
25 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
26 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
27 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
28 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower

1 (the Church), to service the loan and advance the funds towards the construction project,
2 according to the budget and plans approved and relied upon by the Plaintiff in entering into
3 the Participation Agreement. Upon information and belief, BTM had an agreement with
4 Arks whereby Arks took over the servicing and administration of the Loan to Antioch Bible
5 Fellowship, Inc. The Participation Agreement specifically references and incorporates the
6 Loan Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the
7 Borrower (the Church), and which provides that “the Loan proceeds are to be used by
8 Church solely for the construction of a church, church-related improvements, and/or costs
9 related thereto (the “Project”) upon the land described in the Security Instrument (the
10 “Property”) in accordance with the plans and specifications approved by ARKS.”

11 71. Plaintiff agreed to advance the funds in response to periodic draws based on
12 the project plans and budget which were attached to the Participation Agreement and/or the
13 Loan Agreement that was incorporated into the Participation Agreement, and which had
14 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
15 committing to the Participation Agreement for the Antioch Bible Fellowship, Inc. Loan.
16 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
17 contractors, suppliers and other third parties as well as specific project-related servicing fees
18 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
19 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
20 approval from Plaintiff for any material change to the budget or plans.

21 Contract Performance and Breach

22 72. Upon execution of the Participation Agreement, Plaintiff began funding draw
23 requests for the Antioch Bible Fellowship, Inc. project based on draw requests by BTM and
24 its agents. Plaintiff Muse Family Enterprises advanced \$222,600 to BTM and its agents for
25 the Antioch Bible Fellowship, Inc. Loan between February 2008 and December 2008.

26 73. Defendant BTM breached the Participation Agreement by, among other things,
27 the following:

28 ///

- 1 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
2 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
3 Ministries, Inc. (or to the servicers or contractors for authorized project
4 disbursements on the Borrower's behalf), and failing to return within five business
5 days to Plaintiff any funds not so advanced;
- 6 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
7 contractors, suppliers and other third parties as well as specific project-related
8 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
9 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
10 failing to get prior approval from Plaintiff for any material change to the budget or
11 plans;
- 12 • failing to maintain appropriate records and books of account reflecting interest
13 accrued and interest received, interest rate changes, principal payments and all other
14 transactions or actions affecting the Loan;
- 15 • not paying Plaintiff its return of principal at the earlier of the issuance of the
16 certificate of occupancy or within 12 months of the Loan Closing;
- 17 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
18 Closing and not providing or arranging additional financing to allow Plaintiff to
19 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
20 within 12 months of the Loan Closing;
- 21 • not paying Plaintiff its interest and fees on a monthly basis;
- 22 • failing to provide loan servicing and administration in accordance with the Loan
23 documents and with commercially acceptable loan servicing practices;
- 24 • requiring additional payments by Plaintiff beyond what was due under the
25 Participation Agreement and the approved budget and plans incorporated therein;
- 26 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
27 holding any proceeds received for the Loan;

28 ///

- 1 • commingling for significant periods of time proceeds received on the Loan with other
2 funds.

3 Contract Damages

4 74. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
5 as yet unascertained, but which Plaintiff believes is at least \$48,281 and which will be
6 proved at trial.

7 75. Additionally, Plaintiff incurred legal and administrative costs in addressing
8 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
9 have incurred.

10 Fraud – Defendants' Misrepresentations

11 76. On the periodic draw requests sent to Plaintiff beginning in February 2008,
12 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
13 had been spent on the Antioch Bible Fellowship, Inc. project, in accordance with the
14 approved plans and budget, as per the reports, forms, and spreadsheets submitted with the
15 draw requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
16 represented the value of the project to that point.

17 77. Prior to Plaintiff's executing the Participation Agreement and making each
18 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
19 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
20 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
21 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
22 updates on projects, including the Antioch Bible Fellowship, Inc. project, and was told that
23 all funds previously advanced by Plaintiff to BTM and its agents on the Antioch Bible
24 Fellowship, Inc. loan had been put towards the project according to the budget and plans
25 submitted to, approved by and relied on by Plaintiff.

26 Fraud – True Facts

27 78. In fact, Defendants' representations to Plaintiff as described above were false.
28 The true facts were that:

- 1 • Plaintiff's funds had not been spent on the Antioch Bible Fellowship, Inc. project in
2 accordance with the approved plans and budget as per the reports, forms, and
3 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
4 February 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
5 accurately represent the value of the project to that point;
- 6 • all funds previously advanced by Plaintiff to BTM and its agents on the Antioch
7 Bible Fellowship, Inc. loan had not been put towards the project according to the
8 budget and plans submitted to, approved by and relied on by Plaintiff;

9 Fraud - Concealment

10 79. Defendants David Smith and BTM, including through their agents, concealed
11 from and failed to disclose to Plaintiff the following:

- 12 • the true financial and operational status of the loans and projects, including the
13 Antioch Bible Fellowship, Inc. project;
- 14 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
15 projects, including the Antioch Bible Fellowship, Inc. project, and were not being
16 applied only to project-related costs, according to the plans and budgets submitted to,
17 approved by and relied on by Plaintiff;
- 18 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
19 including payments made to unrelated third parties - friends of David Smith and
20 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
21 Lachman Lane Property;
- 22 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
23 to Randy Barton and for "sales commissions" to Carmen Copple Smith;
- 24 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
25 and its investments in overseeing the management, servicing and administration of
26 the loans and projects;
- 27 • that Smith and BTM were commingling for significant periods of time proceeds
28 received on the Loan with other funds;

- 1 • that Smith and BTM did not intend to immediately advance the full amount of
- 2 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
- 3 or else return the funds to Plaintiff, and established money market accounts to hold
- 4 such funds longer than five business days;
- 5 • that Smith and BTM were not maintaining appropriate records and books of account
- 6 reflecting interest accrued and interest received, interest rate changes, principal
- 7 payments and all other transactions or actions affecting the Loan.

8 Fraud – Reliance, Discovery and Damage

9 80. Plaintiff continued to fund the Antioch Bible Fellowship, Inc. loan and project

10 in response to periodic draw requests from Defendants, based on continued assurances and

11 representations of Defendants Smith and BTM, including through their agents at Arks and

12 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the

13 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'

14 failure to disclose that Plaintiff's funds were being commingled with other funds and

15 diverted to non-project related costs and payments. In or about February 2009, Plaintiff

16 began working on a new program to take over the servicing and administration of the loans,

17 expand the Build to Minister church loan program into various investment funds, and market

18 those funds to third parties.

19 81. On or about July 31, 2009, during this effort to expand the loan program,

20 Plaintiff first learned of problems with the loans, including that Defendants and their agents

21 owed monies to third parties and were unable to pay them despite Plaintiff and other

22 investors having advanced funds as requested. Over the course of the next several months,

23 Plaintiff conducted an investigation in an attempt to determine what had happened to

24 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,

25 misrepresentations, concealment and malfeasance. With respect to the problems discovered

26 with the loans, Plaintiff contributed additional monies in order to complete the projects,

27 including paying outstanding bills, liens, legal and administration fees, modifying the terms

28 ///

1 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
2 new contractors to complete the construction.

3 82. But for Defendants' misrepresentations and concealment as described above,
4 Plaintiff would not have continued to provide funds in response to draw requests from
5 Defendants or their agents for the projects, including the Antioch Bible Fellowship, Inc.
6 project, and would not have invested efforts, time and money creating a new program to take
7 over servicing of the loans, expand the Build to Minister program into various investment
8 funds, and market those funds to third parties.

9 83. As a result of Defendants' misrepresentations and concealments, Plaintiff has
10 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
11 \$48,281 and which will be proved at trial. Additionally, Plaintiff incurred legal and
12 administrative costs in addressing and mitigating the harm caused by Defendants'
13 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
14 funds expended in creating a new program to take over servicing of the loans, expand the
15 Build to Minister program into various investment funds, and market those funds to third
16 parties, which it would not have expended but for Defendants' misrepresentations and
17 concealments.

18 *Believers Fellowship of Jacksonville Loan*

19 Contract Terms

20 84. On April 24, 2008, Plaintiff Muse Family Enterprises entered into a
21 Construction Note Participation Agreement with Defendant BTM on a construction loan to
22 Believers Fellowship of Jacksonville ("Believers Participation Agreement" or "Participation
23 Agreement"). The Believers Participation Agreement provided that Plaintiff (designated
24 "Participant") would have a participation interest of 23 and 1/3% in the construction note
25 amount of \$454,854, which Defendant BTM (designated "Seller") would loan to the church,
26 Believers Fellowship of Jacksonville (designated "Borrower"). Under the Believers
27 Participation Agreement, Plaintiff committed to fund a total of \$106,117.44, to be advanced
28 to Defendant BTM in response to periodic draw requests from Defendant according to a

1 projected draw schedule. In consideration for Plaintiff's advancing the funds, Plaintiff was
2 entitled to receive the return of the principal invested, as well as 10.5% interest, on such
3 amount and its pro rata portion (23 and 1/3%) of a Participation Fee (of \$6,822.81), with
4 interest and fees to be paid monthly, and the principal payable to Plaintiff at the issuance of
5 a Certificate of Occupancy for the Property or twelve (12) months from the date of Loan
6 Closing, whichever first occurs, as provided for in the Loan Agreement which was
7 specifically referenced by and incorporated into the Participation Agreement. The
8 Participation Agreement also provided that in the event Plaintiff had not received its return
9 of principal at the time specified, BTM was either to provide or to arrange additional
10 financing so that Plaintiff would receive all its funds.

11 85. Defendant BTM, for its part, agreed among other things, that:

- 12 • "In the event Seller [BTM] does not for any reason advance to Borrower
13 [church] the full amount of the contemplated advance [the draws of funds that
14 Defendants called for every month] on the date of receipt of such Purchase
15 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
16 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
17 to the amount of such contemplated advance not made." (Participation
18 Agreement, Schedule 4, ¶2.)
- 19 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
20 the terms of the Loan Documents and with this Agreement. Seller [BTM]
21 shall provide loan servicing in accordance with commercially acceptable loan
22 servicing practices and with the same degree of care that is customarily
23 employed and exercised by Seller [BTM] in the administration and servicing
24 of loans of a similar nature held by it for its own account (the "Servicing
25 Standard")." (Participation Agreement, Schedule 4, ¶9.)
- 26 • "The Seller [BTM] shall maintain appropriate records and books of account
27 reflecting interest accrued and interest received, interest rate changes, principal
28 payments and all other transactions or actions affecting the Loan, which
records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)
- "Seller [BTM] further agrees that in performing its obligations hereunder,
Seller shall: (a) act in a custodial capacity on behalf of the Participant
[Plaintiff] with respect to its holding of any underlying instrument or collateral
and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and

1 (d) administer the Loan in accordance with the Servicing Standard as provided
2 herein.” (Participation Agreement, Schedule 4, ¶ 9.)

- 3 • “Seller represents and warrants to Participant that, as of the date hereof ... no
4 default in the payment of principal or interest on the Loan has occurred and
5 remains uncured under the Loan Documents.” (Participation Agreement,
6 Schedule 4, ¶ 15.)
- 7 • “[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
8 may take or omit to take any action under any of the Loan Documents which
9 would result in the following (each a “Material Change”): (a) reduce or
10 increase the amounts of principal or interest payments of the Loan, (b) reduce
11 or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
12 postpone any due date for payment of principal or interest in which Participant
13 [Plaintiff] shares, including, without limitation, the final maturity date of the
14 Loan, (d) except as expressly permitted under the Loan Documents, release or
15 subordinate any existing collateral described in the Loan Documents, (e)
16 release the liability of Borrower or any guarantor for the Loan, (f) consent to
17 the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
18 (ii) any direct or indirect interest in Borrower ... (g) make or consent to any
19 change in the principal amount of the Note; or (h) waive a default under the
20 Loan Documents arising from the failure to make payments as and when due
21 on the Loan. . . .” ((Participation Agreement, Schedule 4, ¶ 11.)
- 22 • “Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
23 of any material default with respect to the Loan of which Seller [BTM] is
24 actually aware and of any other matters which, in Seller’s judgment, materially
25 affect the interest of Participant [Plaintiff] with respect to the Loan
26 (collectively, a “Material Default”).” (Participation Agreement, Schedule 4, ¶
27 11.)

28 86. The parties agreed that the Plaintiff would advance funds to BTM, as called
for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
(the Church), to service the loan and advance the funds towards the construction project,
according to the budget and plans approved and relied upon by the Plaintiff in entering into
the Participation Agreement. Upon information and belief, BTM had an agreement with
Arks whereby Arks took over the servicing and administration of the Loan to Believers
Fellowship of Jacksonville. The Participation Agreement specifically references and
incorporates the Loan Agreement, which is between Arks “and its affiliate BTM Funding,
Inc.” and the Borrower (the Church), and which provides that “the Loan proceeds are to be
used by Church solely for the construction of a church, church-related improvements, and/or

1 costs related thereto (the "Project") upon the land described in the Security Instrument (the
2 "Property") in accordance with the plans and specifications approved by ARKS."

3 87. Plaintiff agreed to advance the funds in response to periodic draws based on
4 the project plans and budget which were attached to the Participation Agreement and/or the
5 Loan Agreement that was incorporated into the Participation Agreement, and which had
6 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
7 committing to the Participation Agreement for the Believers Fellowship of Jacksonville
8 Loan. Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay
9 contractors, sub-contractors, suppliers and other third parties as well as specific project-
10 related servicing fees to itself, Arks and Noah, according to the budget and plans submitted
11 to and approved by Plaintiffs and incorporated into the Participation Agreement, and agreed
12 to get prior approval from Plaintiff for any material change to the budget or plans.

13 Contract Performance and Breach

14 88. Upon execution of the Participation Agreement, Plaintiff began funding draw
15 requests for the Believers Fellowship of Jacksonville project based on draw requests by
16 BTM and its agents. Plaintiff Muse Family Enterprises advanced \$106,132 to BTM and its
17 agents for the Believers Fellowship of Jacksonville Loan between June 2008 and September
18 2008.

19 89. Defendant BTM breached the Participation Agreement by, among other things,
20 the following:

- 21 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
22 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
23 Ministries, Inc. (or to the servicers or contractors for authorized project
24 disbursements on the Borrower's behalf), and failing to return within five business
25 days to Plaintiff any funds not so advanced;
- 26 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
27 contractors, suppliers and other third parties as well as specific project-related
28 servicing fees to itself, Arks and Noah, according to the budget and plans submitted

1 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
2 failing to get prior approval from Plaintiff for any material change to the budget or
3 plans;

- 4 • failing to maintain appropriate records and books of account reflecting interest
5 accrued and interest received, interest rate changes, principal payments and all other
6 transactions or actions affecting the Loan;
- 7 • not paying Plaintiff its return of principal at the earlier of the issuance of the
8 certificate of occupancy or within 12 months of the Loan Closing;
- 9 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
10 Closing and not providing or arranging additional financing to allow Plaintiff to
11 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
12 within 12 months of the Loan Closing;
- 13 • not paying Plaintiff its interest and fees on a monthly basis;
- 14 • failing to provide loan servicing and administration in accordance with the Loan
15 documents and with commercially acceptable loan servicing practices;
- 16 • requiring additional payments by Plaintiff beyond what was due under the
17 Participation Agreement and the approved budget and plans incorporated therein;
- 18 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
19 holding any proceeds received for the Loan;
- 20 • commingling for significant periods of time proceeds received on the Loan with other
21 funds;
- 22 • failing to inform Plaintiff that as of the date of the Participation Agreement a default
23 in the payment of principal or interest on the Loan had occurred and remained
24 uncured;
- 25 • waiving a default under the Loan Documents arising from the failure to make
26 payments as and when due on the Loan without obtaining the consent of Plaintiff;

27 ///

28 ///

- 1 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
2 which Defendant was aware.

3 Contract Damages

4 90. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
5 as yet unascertained, but which Plaintiff believes is at least \$43,853 and which will be
6 proved at trial.

7 91. Additionally, Plaintiff incurred legal and administrative costs in addressing
8 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
9 have incurred.

10 Fraud – Defendants' Misrepresentations

11 92. On the periodic draw requests sent to Plaintiff beginning in June 2008, Smith's
12 and BTM's agents signed attestations that the monies advanced thus far by Plaintiff had
13 been spent on the Believers Fellowship of Jacksonville project, in accordance with the
14 approved plans and budget, as per the reports, forms, and spreadsheets submitted with the
15 draw requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
16 represented the value of the project to that point.

17 93. Prior to Plaintiff's executing the Participation Agreement and making each
18 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
19 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
20 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
21 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
22 updates on projects, including the Believers Fellowship of Jacksonville project, and was told
23 that all funds previously advanced by Plaintiff to BTM and its agents on the Believers
24 Fellowship of Jacksonville loan had been put towards the project according to the budget
25 and plans submitted to, approved by and relied on by Plaintiff.

26 Fraud – True Facts

27 94. In fact, Defendants' representations to Plaintiff as described above were false.
28 The true facts were that:

- 1 • Plaintiff's funds had not been spent on the Believers Fellowship of Jacksonville
2 project in accordance with the approved plans and budget as per the reports, forms,
3 and spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning
4 in June 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
5 accurately represent the value of the project to that point;
- 6 • all funds previously advanced by Plaintiff to BTM and its agents on the Believers
7 Fellowship of Jacksonville loan had not been put towards the project according to the
8 budget and plans submitted to, approved by and relied on by Plaintiff;

9 Fraud - Concealment

10 95. Defendants David Smith and BTM, including through their agents, concealed
11 from and failed to disclose to Plaintiff the following:

- 12 • the true financial and operational status of the loans and projects, including the
13 Believers Fellowship of Jacksonville project;
- 14 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
15 projects, including the Believers Fellowship of Jacksonville project, and were not
16 being applied only to project-related costs, according to the plans and budgets
17 submitted to, approved by and relied on by Plaintiff;
- 18 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
19 including payments made to unrelated third parties - friends of David Smith and
20 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
21 Lachman Lane Property;
- 22 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
23 to Randy Barton and for "sales commissions" to Carmen Copple Smith;
- 24 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
25 and its investments in overseeing the management, servicing and administration of
26 the loans and projects;
- 27 • that Smith and BTM were commingling for significant periods of time proceeds
28 received on the Loan with other funds;

- 1 • that Smith and BTM did not intend to immediately advance the full amount of
- 2 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
- 3 or else return the funds to Plaintiff, and established money market accounts to hold
- 4 such funds longer than five business days;
- 5 • that Smith and BTM were not maintaining appropriate records and books of account
- 6 reflecting interest accrued and interest received, interest rate changes, principal
- 7 payments and all other transactions or actions affecting the Loan.

8 Fraud – Reliance, Discovery and Damage

9 96. Plaintiff continued to fund the Believers Fellowship of Jacksonville loan and
10 project in response to periodic draw requests from Defendants, based on continued
11 assurances and representations of Defendants Smith and BTM, including through their
12 agents at Arks and Noah, that Plaintiff's funds advanced thus far had gone towards the
13 projects according to the plans and budget reviewed, approved and relied upon by Plaintiff,
14 and based on Defendants' failure to disclose that Plaintiff's funds were being commingled
15 with other funds and diverted to non-project related costs and payments. In or about
16 February 2009, Plaintiff began working on a new program to take over the servicing and
17 administration of the loans, expand the Build to Minister church loan program into various
18 investment funds, and market those funds to third parties.

19 97. On or about July 31, 2009, during this effort to expand the loan program,
20 Plaintiff first learned of problems with the loans, including that Defendants and their agents
21 owed monies to third parties and were unable to pay them despite Plaintiff and other
22 investors having advanced funds as requested. Over the course of the next several months,
23 Plaintiff conducted an investigation in an attempt to determine what had happened to
24 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
25 misrepresentations, concealment and malfeasance. With respect to the problems discovered
26 with the loans, Plaintiff contributed additional monies in order to complete the projects,
27 including paying outstanding bills, liens, legal and administration fees, modifying the terms

28 ///

1 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
2 new contractors to complete the construction.

3 98. But for Defendants' misrepresentations and concealment as described above,
4 Plaintiff would not have continued to provide funds in response to draw requests from
5 Defendants or their agents for the projects, including the Believers Fellowship of
6 Jacksonville project, and would not have invested efforts, time and money creating a new
7 program to take over servicing of the loans, expand the Build to Minister program into
8 various investment funds, and market those funds to third parties.

9 99. As a result of Defendants' misrepresentations and concealments, Plaintiff has
10 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
11 \$85,964 and which will be proved at trial. Additionally, Plaintiff incurred legal and
12 administrative costs in addressing and mitigating the harm caused by Defendants'
13 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
14 funds expended in creating a new program to take over servicing of the loans, expand the
15 Build to Minister program into various investment funds, and market those funds to third
16 parties, which it would not have expended but for Defendants' misrepresentations and
17 concealments.

18 *Family Fellowship Worship Center Loan*

19 Contract Terms

20 100. On February 27, 2008, Plaintiff Muse Family Enterprises entered into a
21 Construction Note Participation Agreement with Defendant BTM on a construction loan to
22 Family Fellowship Worship Center ("Family Fellowship Participation Agreement" or
23 "Participation Agreement"). The Family Fellowship Participation Agreement provided that
24 Plaintiff (designated "Participant") would have a participation interest of 23 and 1/3% in the
25 construction note amount of \$1,071,900, which Defendant BTM (designated "Seller") would
26 loan to the church, Family Fellowship Worship Center (designated "Borrower"). Under the
27 Family Fellowship Participation Agreement, Plaintiff committed to fund a total of
28 \$259,074.27, to be advanced to Defendant BTM in response to periodic draw requests from

1 Defendant according to a projected draw schedule. In consideration for Plaintiff's
2 advancing the funds, Plaintiff was entitled to receive the return of the principal invested, as
3 well as 10.5% interest on such amount, and its pro rata portion (23 and 1/3%) of a
4 Participation Fee (of \$16,078.50), with interest and fees to be paid monthly, and the
5 principal payable to Plaintiff at the issuance of a Certificate of Occupancy for the Property
6 or twelve (12) months from the date of Loan Closing, whichever first occurs, as provided for
7 in the Loan Agreement which was specifically referenced by and incorporated into the
8 Participation Agreement. The Participation Agreement also provided that in the event
9 Plaintiff had not received its return of principal at the time specified, BTM was either to
10 provide or to arrange additional financing so that Plaintiff would receive all its funds.

11 101. Defendant BTM, for its part, agreed among other things, that:

- 12 • "In the event Seller [BTM] does not for any reason advance to Borrower
13 [church] the full amount of the contemplated advance [the draws of funds that
14 Defendants called for every month] on the date of receipt of such Purchase
15 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
16 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
17 to the amount of such contemplated advance not made." (Participation
18 Agreement, Schedule 4, ¶2.)
- 19 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
20 the terms of the Loan Documents and with this Agreement. Seller [BTM]
21 shall provide loan servicing in accordance with commercially acceptable loan
22 servicing practices and with the same degree of care that is customarily
23 employed and exercised by Seller [BTM] in the administration and servicing
24 of loans of a similar nature held by it for its own account (the "Servicing
25 Standard")." (Participation Agreement, Schedule 4, ¶9.)
- 26 • "The Seller [BTM] shall maintain appropriate records and books of account
27 reflecting interest accrued and interest received, interest rate changes, principal
28 payments and all other transactions or actions affecting the Loan, which
records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)
- "Seller [BTM] further agrees that in performing its obligations hereunder,
Seller shall: (a) act in a custodial capacity on behalf of the Participant
[Plaintiff] with respect to its holding of any underlying instrument or collateral
and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and

(d) administer the Loan in accordance with the Servicing Standard as provided herein.” (Participation Agreement, Schedule 4, ¶ 9.)

102. The parties agreed that the Plaintiff would advance funds to BTM, as called for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents, including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower (the Church), to service the loan and advance the funds towards the construction project, according to the budget and plans approved and relied upon by the Plaintiff in entering into the Participation Agreement. Upon information and belief, BTM had an agreement with Arks whereby Arks took over the servicing and administration of the Loan to Family Fellowship Worship Center. The Participation Agreement specifically references and incorporates the Loan Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower (the Church), and which provides that “the Loan proceeds are to be used by Church solely for the construction of a church, church-related improvements, and/or costs related thereto (the “Project”) upon the land described in the Security Instrument (the “Property”) in accordance with the plans and specifications approved by ARKS.”

103. Plaintiff agreed to advance the funds in response to periodic draws based on the project plans and budget which were attached to the Participation Agreement and/or the Loan Agreement that was incorporated into the Participation Agreement, and which had been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in committing to the Participation Agreement for the Family Fellowship Worship Center Loan. Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors, suppliers and other third parties as well as specific project-related servicing fees to itself, Arks and Noah, according to the budget and plans submitted to and approved by Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior approval from Plaintiff for any material change to the budget or plans.

///

///

Contract Performance and Breach

104. Upon execution of the Participation Agreement, Plaintiff began funding draw requests for the Family Fellowship Worship Center project based on draw requests by BTM and its agents. Plaintiff Muse Family Enterprises advanced \$250,110 to BTM and its agents for the Family Fellowship Worship Center Loan between February 2008 and August 2008.

105. Defendant BTM breached the Participation Agreement by, among other things, the following:

- failing, immediately after receiving funds from Plaintiff in response to draw requests, to advance the full amount of those funds directly to the Borrower, Truth Tabernacle Ministries, Inc. (or to the servicers or contractors for authorized project disbursements on the Borrower's behalf), and failing to return within five business days to Plaintiff any funds not so advanced;
- failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors, suppliers and other third parties as well as specific project-related servicing fees to itself, Arks and Noah, according to the budget and plans submitted to and approved by Plaintiffs and incorporated into the Participation Agreement, and failing to get prior approval from Plaintiff for any material change to the budget or plans;
- failing to maintain appropriate records and books of account reflecting interest accrued and interest received, interest rate changes, principal payments and all other transactions or actions affecting the Loan;
- not paying Plaintiff its return of principal at the earlier of the issuance of the certificate of occupancy or within 12 months of the Loan Closing;
- failing to ensure the certificate of occupancy issued within 12 months of the Loan Closing and not providing or arranging additional financing to allow Plaintiff to receive all of its funds at the earlier of the issuance of the certificate of occupancy or within 12 months of the Loan Closing;
- not paying Plaintiff its interest and fees on a monthly basis;

- 1 • failing to provide loan servicing and administration in accordance with the Loan
- 2 documents and with commercially acceptable loan servicing practices;
- 3 • requiring additional payments by Plaintiff beyond what was due under the
- 4 Participation Agreement and the approved budget and plans incorporated therein;
- 5 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 6 holding any proceeds received for the Loan;
- 7 • commingling for significant periods of time proceeds received on the Loan with other
- 8 funds.

9 Contract Damages

10 106. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
11 as yet unascertained, but which Plaintiff believes is at least \$32,920 and which will be
12 proved at trial.

13 107. Additionally, Plaintiff incurred legal and administrative costs in addressing
14 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
15 have incurred.

16 Fraud – Defendants' Misrepresentations

17 108. On the periodic draw requests sent to Plaintiff beginning in February 2008,
18 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
19 had been spent on the Family Fellowship Worship Center project, in accordance with the
20 approved plans and budget, as per the reports, forms, and spreadsheets submitted with the
21 draw requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
22 represented the value of the project to that point.

23 109. Prior to Plaintiff's executing the Participation Agreement and making each
24 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
25 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
26 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
27 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
28 updates on projects, including the Family Fellowship Worship Center project, and was told

1 that all funds previously advanced by Plaintiff to BTM and its agents on the Family
2 Fellowship Worship Center loan had been put towards the project according to the budget
3 and plans submitted to, approved by and relied on by Plaintiff.

4 Fraud – True Facts

5 110. In fact, Defendants' representations to Plaintiff as described above were false.
6 The true facts were that:

- 7 • Plaintiff's funds had not been spent on the Family Fellowship Worship Center project
8 in accordance with the approved plans and budget as per the reports, forms, and
9 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
10 February 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
11 accurately represent the value of the project to that point;
- 12 • all funds previously advanced by Plaintiff to BTM and its agents on the Family
13 Fellowship Worship Center loan had not been put towards the project according to
14 the budget and plans submitted to, approved by and relied on by Plaintiff;

15 Fraud - Concealment

16 111. Defendants David Smith and BTM, including through their agents, concealed
17 from and failed to disclose to Plaintiff the following:

- 18 • the true financial and operational status of the loans and projects, including the
19 Family Fellowship Worship Center project;
- 20 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
21 projects, including the Family Fellowship Worship Center project, and were not being
22 applied only to project-related costs, according to the plans and budgets submitted to,
23 approved by and relied on by Plaintiff;
- 24 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
25 including payments made to unrelated third parties - friends of David Smith and
26 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
27 Lachman Lane Property;

28 ///

- 1 • that Smith and BTM were making undisclosed, unapproved payments for “legal fees”
2 to Randy Barton and for “sales commissions” to Carmen Copple Smith;
- 3 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
4 and its investments in overseeing the management, servicing and administration of
5 the loans and projects;
- 6 • that Smith and BTM were commingling for significant periods of time proceeds
7 received on the Loan with other funds;
- 8 • that Smith and BTM did not intend to immediately advance the full amount of
9 Plaintiff’s funds directly to the Borrower or to servicers or contractors on their behalf
10 or else return the funds to Plaintiff, and established money market accounts to hold
11 such funds longer than five business days;
- 12 • that Smith and BTM were not maintaining appropriate records and books of account
13 reflecting interest accrued and interest received, interest rate changes, principal
14 payments and all other transactions or actions affecting the Loan.

15 Fraud – Reliance, Discovery and Damage

16 112. Plaintiff continued to fund the Family Fellowship Worship Center loan and
17 project in response to periodic draw requests from Defendants, based on continued
18 assurances and representations of Defendants Smith and BTM, including through their
19 agents at Arks and Noah, that Plaintiff’s funds advanced thus far had gone towards the
20 projects according to the plans and budget reviewed, approved and relied upon by Plaintiff,
21 and based on Defendants’ failure to disclose that Plaintiff’s funds were being commingled
22 with other funds and diverted to non-project related costs and payments. In or about
23 February 2009, Plaintiff began working on a new program to take over the servicing and
24 administration of the loans, expand the Build to Minister church loan program into various
25 investment funds, and market those funds to third parties.

26 113. On or about July 31, 2009, during this effort to expand the loan program,
27 Plaintiff first learned of problems with the loans, including that Defendants and their agents
28 owed monies to third parties and were unable to pay them despite Plaintiff and other

1 investors having advanced funds as requested. Over the course of the next several months,
2 Plaintiff conducted an investigation in an attempt to determine what had happened to
3 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
4 misrepresentations, concealment and malfeasance. With respect to the problems discovered
5 with the loans, Plaintiff contributed additional monies in order to complete the projects,
6 including paying outstanding bills, liens, legal and administration fees, modifying the terms
7 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
8 new contractors to complete the construction.

9 114. But for Defendants' misrepresentations and concealment as described above,
10 Plaintiff would not have continued to provide funds in response to draw requests from
11 Defendants or their agents for the projects, including the Family Fellowship Worship Center
12 project, and would not have invested efforts, time and money creating a new program to take
13 over servicing of the loans, expand the Build to Minister program into various investment
14 funds, and market those funds to third parties.

15 115. As a result of Defendants' misrepresentations and concealments, Plaintiff has
16 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
17 \$32,920 and which will be proved at trial. Additionally, Plaintiff incurred legal and
18 administrative costs in addressing and mitigating the harm caused by Defendants'
19 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
20 funds expended in creating a new program to take over servicing of the loans, expand the
21 Build to Minister program into various investment funds, and market those funds to third
22 parties, which it would not have expended but for Defendants' misrepresentations and
23 concealments.

24 *First Baptist Church of Texas City Loan*

25 Contract Terms

26 116. On October 24, 2008, Plaintiff Muse Family Enterprises entered into a
27 Construction Note Participation Agreement with Defendant BTM on a construction loan to
28 First Baptist Church of Texas City ("First Baptist Texas City Participation Agreement" or

1 “Participation Agreement”). The First Baptist Texas City Participation Agreement provided
2 that Plaintiff (designated “Participant”) would have a participation interest of 23 and 1/3% in
3 the construction note amount of \$931,845, which Defendant BTM (designated “Seller”)
4 would loan to the church, First Baptist Church of Texas City (designated “Borrower”).
5 Under the First Baptist Texas City Participation Agreement, Plaintiff committed to fund a
6 total of \$217,399.44, to be advanced to Defendant BTM in response to periodic draw
7 requests from Defendant according to a projected draw schedule. In consideration for
8 Plaintiff’s advancing the funds, Plaintiff was entitled to receive the return of the principal
9 invested, as well as 10.5% interest on such amount, and its pro rata portion (23 and 1/3%) of
10 a Participation Fee (of \$13,977.67), with interest and fees to be paid monthly, and the
11 principal payable to Plaintiff at the issuance of a Certificate of Occupancy for the Property
12 or twelve (12) months from the date of Loan Closing, whichever first occurs, as provided for
13 in the Loan Agreement which was specifically referenced by and incorporated into the
14 Participation Agreement. The Participation Agreement also provided that in the event
15 Plaintiff had not received its return of principal at the time specified, BTM was either to
16 provide or to arrange additional financing so that Plaintiff would receive all its funds.

17 117. Defendant BTM, for its part, agreed among other things, that:

- 18 • “In the event Seller [BTM] does not for any reason advance to Borrower
19 [church] the full amount of the contemplated advance [the draws of funds that
20 Defendants called for every month] on the date of receipt of such Purchase
21 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
22 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
23 to the amount of such contemplated advance not made.” (Participation
24 Agreement, Schedule 4, ¶2.)
- 25 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
26 the terms of the Loan Documents and with this Agreement. Seller [BTM]
27 shall provide loan servicing in accordance with commercially acceptable loan
28 servicing practices and with the same degree of care that is customarily
employed and exercised by Seller [BTM] in the administration and servicing
of loans of a similar nature held by it for its own account (the “Servicing
Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- “The Seller [BTM] shall maintain appropriate records and books of account
reflecting interest accrued and interest received, interest rate changes, principal
payments and all other transactions or actions affecting the Loan, which
records shall be keep in accordance with accounting principles consistently

1 and customarily applied by Seller [BTM].” (Participation Agreement,
Schedule 4, ¶9.)

- 2
- 3 • “Seller [BTM] further agrees that in performing its obligations hereunder,
4 Seller shall: (a) act in a custodial capacity on behalf of the Participant
5 [Plaintiff] with respect to its holding of any underlying instrument or collateral
6 and in holding any proceeds received for the Loan; (b) not commingle for any
7 significant period of time proceeds received on the Loan; (c) directly pass
8 through any proceeds received from the Loan to Participant [Plaintiff] as
9 provided in Section 4 of this Agreement, less any proceeds that represent
10 servicing or other compensation to Seller [BTM] or an interest in the Loan
11 retained by the Seller [BTM], all as more particularly provided for herein; and
12 (d) administer the Loan in accordance with the Servicing Standard as provided
13 herein.” (Participation Agreement, Schedule 4, ¶ 9.)
 - 14 • “Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
15 of any material default with respect to the Loan of which Seller [BTM] is
16 actually aware and of any other matters which, in Seller’s judgment, materially
17 affect the interest of Participant [Plaintiff] with respect to the Loan
18 (collectively, a “Material Default”).” (Participation Agreement, Schedule 4, ¶
19 11.)

12 118. The parties agreed that the Plaintiff would advance funds to BTM, as called
13 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
14 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
15 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
16 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
17 (the Church), to service the loan and advance the funds towards the construction project,
18 according to the budget and plans approved and relied upon by the Plaintiff in entering into
19 the Participation Agreement. Upon information and belief, BTM had an agreement with
20 Arks whereby Arks took over the servicing and administration of the Loan to First Baptist
21 Church of Texas City. The Participation Agreement specifically references and incorporates
22 the Loan Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the
23 Borrower (the Church), and which provides that “the Loan proceeds are to be used by
24 Church solely for the construction of a church, church-related improvements, and/or costs
25 related thereto (the “Project”) upon the land described in the Security Instrument (the
26 “Property”) in accordance with the plans and specifications approved by ARKS.”

27 119. Plaintiff agreed to advance the funds in response to periodic draws based on
28 the project plans and budget which were attached to the Participation Agreement and/or the

1 Loan Agreement that was incorporated into the Participation Agreement, and which had
2 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
3 committing to the Participation Agreement for the First Baptist Church of Texas City Loan.
4 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
5 contractors, suppliers and other third parties as well as specific project-related servicing fees
6 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
7 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
8 approval from Plaintiff for any material change to the budget or plans.

9 Contract Performance and Breach

10 120. Upon execution of the Participation Agreement, Plaintiff began funding draw
11 requests for the First Baptist Church of Texas City project based on draw requests by BTM
12 and its agents. Plaintiff Muse Family Enterprises advanced \$180,696 to BTM and its agents
13 for the First Baptist Church of Texas City Loan between October 2008 and June 2009.

14 121. Defendant BTM breached the Participation Agreement by, among other things,
15 the following:

- 16 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
17 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
18 Ministries, Inc. (or to the servicers or contractors for authorized project
19 disbursements on the Borrower's behalf), and failing to return within five business
20 days to Plaintiff any funds not so advanced;
- 21 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
22 contractors, suppliers and other third parties as well as specific project-related
23 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
24 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
25 failing to get prior approval from Plaintiff for any material change to the budget or
26 plans;

27 ///

28 ///

- 1 • failing to maintain appropriate records and books of account reflecting interest
- 2 accrued and interest received, interest rate changes, principal payments and all other
- 3 transactions or actions affecting the Loan;
- 4 • not paying Plaintiff its return of principal at the earlier of the issuance of the
- 5 certificate of occupancy or within 12 months of the Loan Closing;
- 6 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
- 7 Closing and not providing or arranging additional financing to allow Plaintiff to
- 8 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
- 9 within 12 months of the Loan Closing;
- 10 • not paying Plaintiff its interest and fees on a monthly basis;
- 11 • failing to provide loan servicing and administration in accordance with the Loan
- 12 documents and with commercially acceptable loan servicing practices;
- 13 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 14 holding any proceeds received for the Loan;
- 15 • commingling for significant periods of time proceeds received on the Loan with other
- 16 funds;
- 17 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
- 18 which Defendant was aware;
- 19 • failing to require Borrower to pay the equity down payment as required by the Loan
- 20 Documents.

21 Contract Damages

22 122. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
23 as yet unascertained, but which Plaintiff believes is at least \$212,098 and which will be
24 proved at trial.

25 123. Additionally, Plaintiff incurred legal and administrative costs in addressing
26 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
27 have incurred.

28 ///

1 Fraud – Defendants’ Misrepresentations

2 124. On the periodic draw requests sent to Plaintiff beginning in October 2008,
3 Smith’s and BTM’s agents signed attestations that the monies advanced thus far by Plaintiff
4 had been spent on the First Baptist Church of Texas City project, in accordance with the
5 approved plans and budget, as per the reports, forms, and spreadsheets submitted with the
6 draw requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
7 represented the value of the project to that point.

8 125. Prior to Plaintiff’s executing the Participation Agreement and making each
9 subsequent advance, Plaintiff’s agent Darren Maloney called periodically (approximately
10 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
11 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
12 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
13 updates on projects, including the First Baptist Church of Texas City project, and was told
14 that all funds previously advanced by Plaintiff to BTM and its agents on the First Baptist
15 Church of Texas City loan had been put towards the project according to the budget and
16 plans submitted to, approved by and relied on by Plaintiff.

17 Fraud – True Facts

18 126. In fact, Defendants’ representations to Plaintiff as described above were false.
19 The true facts were that:

- 20 • Plaintiff’s funds had not been spent on the First Baptist Church of Texas City project
21 in accordance with the approved plans and budget as per the reports, forms, and
22 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
23 October 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
24 accurately represent the value of the project to that point;
- 25 • all funds previously advanced by Plaintiff to BTM and its agents on the First Baptist
26 Church of Texas City loan had not been put towards the project according to the
27 budget and plans submitted to, approved by and relied on by Plaintiff;

28 ///

Fraud - Concealment

127. Defendants David Smith and BTM, including through their agents, concealed from and failed to disclose to Plaintiff the following:

- the true financial and operational status of the loans and projects, including the First Baptist Church of Texas City project;
- that 100% of the funds advanced by Plaintiff to BTM were not going toward the projects, including the First Baptist Church of Texas City project, and were not being applied only to project-related costs, according to the plans and budgets submitted to, approved by and relied on by Plaintiff;
- that Smith and BTM were diverting Plaintiff's funds for non-project related purposes, including payments made to unrelated third parties - friends of David Smith and David Smith's wife, Carmen Cople Smith, and payments of the mortgage on the Lachman Lane Property;
- that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff and its investments in overseeing the management, servicing and administration of the loans and projects;
- that Smith and BTM were commingling for significant periods of time proceeds received on the Loan with other funds;
- that Smith and BTM did not intend to immediately advance the full amount of Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf or else return the funds to Plaintiff, and established money market accounts to hold such funds longer than five business days;
- that Smith and BTM were not maintaining appropriate records and books of account reflecting interest accrued and interest received, interest rate changes, principal payments and all other transactions or actions affecting the Loan.

Fraud – Reliance, Discovery and Damage

128. Plaintiff continued to fund the First Baptist Church of Texas City loan and project in response to periodic draw requests from Defendants, based on continued

1 assurances and representations of Defendants Smith and BTM, including through their
2 agents at Arks and Noah, that Plaintiff's funds advanced thus far had gone towards the
3 projects according to the plans and budget reviewed, approved and relied upon by Plaintiff,
4 and based on Defendants' failure to disclose that Plaintiff's funds were being commingled
5 with other funds and diverted to non-project related costs and payments. In or about
6 February 2009, Plaintiff began working on a new program to take over the servicing and
7 administration of the loans, expand the Build to Minister church loan program into various
8 investment funds, and market those funds to third parties.

9 129. On or about July 31, 2009, during this effort to expand the loan program,
10 Plaintiff first learned of problems with the loans, including that Defendants and their agents
11 owed monies to third parties and were unable to pay them despite Plaintiff and other
12 investors having advanced funds as requested. Over the course of the next several months,
13 Plaintiff conducted an investigation in an attempt to determine what had happened to
14 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
15 misrepresentations, concealment and malfeasance. With respect to the problems discovered
16 with the loans, Plaintiff contributed additional monies in order to complete the projects,
17 including paying outstanding bills, liens, legal and administration fees, modifying the terms
18 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
19 new contractors to complete the construction.

20 130. But for Defendants' misrepresentations and concealment as described above,
21 Plaintiff would not have continued to provide funds in response to draw requests from
22 Defendants or their agents for the projects, including the First Baptist Church of Texas City
23 project, and would not have invested efforts, time and money creating a new program to take
24 over servicing of the loans, expand the Build to Minister program into various investment
25 funds, and market those funds to third parties.

26 131. As a result of Defendants' misrepresentations and concealments, Plaintiff has
27 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
28 \$212,098 and which will be proved at trial. Additionally, Plaintiff incurred legal and

1 administrative costs in addressing and mitigating the harm caused by Defendants'
2 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
3 funds expended in creating a new program to take over servicing of the loans, expand the
4 Build to Minister program into various investment funds, and market those funds to third
5 parties, which it would not have expended but for Defendants' misrepresentations and
6 concealments.

7 ***Kingdom Church Loan***

8 Contract Terms

9 132. On March 27, 2008, Plaintiff Muse Family Enterprises entered into a
10 Construction Note Participation Agreement with Defendant BTM on a construction loan to
11 Kingdom Church ("Kingdom Church Participation Agreement" or "Participation
12 Agreement"). The Kingdom Church Participation Agreement provided that Plaintiff
13 (designated "Participant") would have a participation interest of 23 and 1/3% in the
14 construction note amount of \$2,179,674, which Defendant BTM (designated "Seller") would
15 loan to the church, Kingdom Church (designated "Borrower"). Under the Kingdom Church
16 Participation Agreement, Plaintiff committed to fund a total of \$508,517.94, to be advanced
17 to Defendant BTM in response to periodic draw requests from Defendant according to a
18 projected draw schedule. In consideration for Plaintiff's advancing the funds, Plaintiff was
19 entitled to receive the return of the principal invested, as well as 10.5% interest on such
20 amount, and its pro rata portion 23 and 1/3% of a Participation Fee (of \$32,695.11), with
21 interest and fees to be paid monthly, and the principal payable to Plaintiff at the issuance of
22 a Certificate of Occupancy for the Property or twelve (12) months from the date of Loan
23 Closing, whichever first occurs, as provided for in the Loan Agreement which was
24 specifically referenced by and incorporated into the Participation Agreement. The
25 Participation Agreement also provided that in the event Plaintiff had not received its return
26 of principal at the time specified, BTM was either to provide or to arrange additional
27 financing so that Plaintiff would receive all its funds.

28 133. Defendant BTM, for its part, agreed among other things, that:

- 1 • “In the event Seller [BTM] does not for any reason advance to Borrower
2 [church] the full amount of the contemplated advance [the draws of funds that
3 Defendants called for every month] on the date of receipt of such Purchase
4 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
5 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
6 to the amount of such contemplated advance not made.” (Participation
7 Agreement, Schedule 4, ¶2.)
- 8 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
9 the terms of the Loan Documents and with this Agreement. Seller [BTM]
10 shall provide loan servicing in accordance with commercially acceptable loan
11 servicing practices and with the same degree of care that is customarily
12 employed and exercised by Seller [BTM] in the administration and servicing
13 of loans of a similar nature held by it for its own account (the “Servicing
14 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 15 • “The Seller [BTM] shall maintain appropriate records and books of account
16 reflecting interest accrued and interest received, interest rate changes, principal
17 payments and all other transactions or actions affecting the Loan, which
18 records shall be kept in accordance with accounting principles consistently
19 and customarily applied by Seller [BTM].” (Participation Agreement,
20 Schedule 4, ¶9.)
- 21 • “Seller [BTM] further agrees that in performing its obligations hereunder,
22 Seller shall: (a) act in a custodial capacity on behalf of the Participant
23 [Plaintiff] with respect to its holding of any underlying instrument or collateral
24 and in holding any proceeds received for the Loan; (b) not commingle for any
25 significant period of time proceeds received on the Loan; (c) directly pass
26 through any proceeds received from the Loan to Participant [Plaintiff] as
27 provided in Section 4 of this Agreement, less any proceeds that represent
28 servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)
- “Seller represents and warrants to Participant that, as of the date hereof ... no
default in the payment of principal or interest on the Loan has occurred and
remains uncured under the Loan Documents.” (Participation Agreement,
Schedule 4, ¶ 15.)
- “[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
may take or omit to take any action under any of the Loan Documents which
would result in the following (each a “Material Change”): (a) reduce or
increase the amounts of principal or interest payments of the Loan, (b) reduce
or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
postpone any due date for payment of principal or interest in which Participant
[Plaintiff] shares, including, without limitation, the final maturity date of the
Loan, (d) except as expressly permitted under the Loan Documents, release or
subordinate any existing collateral described in the Loan Documents, (e)
release the liability of Borrower or any guarantor for the Loan, (f) consent to
the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
(ii) any direct or indirect interest in Borrower ... (g) make or consent to any
change in the principal amount of the Note; or (h) waive a default under the

///

1 Loan Documents arising from the failure to make payments as and when due
2 on the Loan. . . .” ((Participation Agreement, Schedule 4, ¶ 11.)

- 3 • “Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
4 of any material default with respect to the Loan of which Seller [BTM] is
5 actually aware and of any other matters which, in Seller’s judgment, materially
6 affect the interest of Participant [Plaintiff] with respect to the Loan
7 (collectively, a “Material Default”).” (Participation Agreement, Schedule 4, ¶
8 11.)

9 134. The parties agreed that the Plaintiff would advance funds to BTM, as called
10 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
11 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
12 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
13 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
14 (the Church), to service the loan and advance the funds towards the construction project,
15 according to the budget and plans approved and relied upon by the Plaintiff in entering into
16 the Participation Agreement. Upon information and belief, BTM had an agreement with
17 Arks whereby Arks took over the servicing and administration of the Loan to Kingdom
18 Church. The Participation Agreement specifically references and incorporates the Loan
19 Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower
20 (the Church), and which provides that “the Loan proceeds are to be used by Church solely
21 for the construction of a church, church-related improvements, and/or costs related thereto
22 (the “Project”) upon the land described in the Security Instrument (the “Property”) in
23 accordance with the plans and specifications approved by ARKS.”

24 135. Plaintiff agreed to advance the funds in response to periodic draws based on
25 the project plans and budget which were attached to the Participation Agreement and/or the
26 Loan Agreement that was incorporated into the Participation Agreement, and which had
27 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
28 committing to the Participation Agreement for the Kingdom Church Loan. Defendant BTM
agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors,
suppliers and other third parties as well as specific project-related servicing fees to itself,
Arks and Noah, according to the budget and plans submitted to and approved by Plaintiffs

1 and incorporated into the Participation Agreement, and agreed to get prior approval from
2 Plaintiff for any material change to the budget or plans.

3 Contract Performance and Breach

4 136. Upon execution of the Participation Agreement, Plaintiff began funding draw
5 requests for the Kingdom Church project based on draw requests by BTM and its agents.
6 Plaintiff Muse Family Enterprises advanced \$248,424 to BTM and its agents for the
7 Kingdom Church Loan between July 2008 and October 2008.

8 137. Defendant BTM breached the Participation Agreement by, among other things,
9 the following:

- 10 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
11 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
12 Ministries, Inc. (or to the servicers or contractors for authorized project
13 disbursements on the Borrower's behalf), and failing to return within five business
14 days to Plaintiff any funds not so advanced;
- 15 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
16 contractors, suppliers and other third parties as well as specific project-related
17 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
18 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
19 failing to get prior approval from Plaintiff for any material change to the budget or
20 plans;
- 21 • failing to maintain appropriate records and books of account reflecting interest
22 accrued and interest received, interest rate changes, principal payments and all other
23 transactions or actions affecting the Loan;
- 24 • accepting a \$1.8 million payoff from the secondary lender for \$2.3 million owed by
25 the Borrower and canceling the notes without informing or obtaining the consent of
26 Plaintiff;
- 27 • failing to provide loan servicing and administration in accordance with the Loan
28 documents and with commercially acceptable loan servicing practices;

- 1 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 2 holding any proceeds received for the Loan;
- 3 • commingling for significant periods of time proceeds received on the Loan with other
- 4 funds;
- 5 • failing to inform Plaintiff that as of the date of the Participation Agreement a default
- 6 in the payment of principal or interest on the Loan had occurred and remained
- 7 uncured;
- 8 • reducing or increasing the amounts of principal or interest payments of the Loan
- 9 without obtaining the consent of Plaintiff;
- 10 • postponing due dates for payment of principal or interest in which Plaintiff shared
- 11 without obtaining the consent of Plaintiff;
- 12 • releasing or subordinating existing collateral described in the Loan Documents
- 13 without obtaining the consent of Plaintiff;
- 14 • releasing the liability of Borrower or any guarantor for the Loan without obtaining the
- 15 consent of Plaintiff;
- 16 • consenting to the further sale, transfer, pledge, mortgage or assignment of the
- 17 Property or any direct or indirect interest in Borrower without obtaining the consent
- 18 of Plaintiff;
- 19 • waiving a default under the Loan Documents arising from the failure to make
- 20 payments as and when due on the Loan without obtaining the consent of Plaintiff;
- 21 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
- 22 which Defendant was aware, including Defendants' knowledge prior to closing that
- 23 Borrower had supplied inaccurate financial statements but allowed the loan to close
- 24 anyway without disclosure to Plaintiff;
- 25 • failing to require Borrower to pay the equity down payment as required by the Loan
- 26 Documents;

27 ///

28 ///

1 Contract Damages

2 138. Plaintiff has incurred legal and administrative costs in addressing and
3 mitigating the harm caused by Defendants' breaches which costs Plaintiff should not have
4 incurred, in an amount as yet unascertained and which will be proved at trial.

5 Fraud – Defendants' Misrepresentations

6 139. On the periodic draw requests sent to Plaintiff beginning in July 2008, Smith's
7 and BTM's agents signed attestations that the monies advanced thus far by Plaintiff had
8 been spent on the Kingdom Church project, in accordance with the approved plans and
9 budget, as per the reports, forms, and spreadsheets submitted with the draw requests, and
10 that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
11 value of the project to that point.

12 140. Prior to Plaintiff's executing the Participation Agreement and making each
13 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
14 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
15 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
16 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
17 updates on projects, including the Kingdom Church project, and was told that all funds
18 previously advanced by Plaintiff to BTM and its agents on the Kingdom Church loan had
19 been put towards the project according to the budget and plans submitted to, approved by
20 and relied on by Plaintiff.

21 Fraud – True Facts

22 141. In fact, Defendants' representations to Plaintiff as described above were false.
23 The true facts were that:

- 24 • Plaintiff's funds had not been spent on the Kingdom Church project in accordance
25 with the approved plans and budget as per the reports, forms, and spreadsheets
26 submitted with the periodic draw requests sent to Plaintiff beginning in July 2008,
27 and the reports, forms, and spreadsheets submitted to Plaintiff did not accurately
28 represent the value of the project to that point;

- 1 • all funds previously advanced by Plaintiff to BTM and its agents on the Kingdom
2 Church loan had not been put towards the project according to the budget and plans
3 submitted to, approved by and relied on by Plaintiff;

4 Fraud - Concealment

5 142. Defendants David Smith and BTM, including through their agents, concealed
6 from and failed to disclose to Plaintiff the following:

- 7 • the true financial and operational status of the loans and projects, including the
8 Kingdom Church project;
- 9 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
10 projects, including the Kingdom Church project, and were not being applied only to
11 project-related costs, according to the plans and budgets submitted to, approved by
12 and relied on by Plaintiff;
- 13 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
14 including payments made to unrelated third parties - friends of David Smith and
15 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
16 Lachman Lane Property;
- 17 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
18 and its investments in overseeing the management, servicing and administration of
19 the loans and projects;
- 20 • that Smith and BTM were commingling for significant periods of time proceeds
21 received on the Loan with other funds;
- 22 • that Smith and BTM knew prior to closing that Borrower had supplied inaccurate
23 financial statements, but allowed the loan to close anyway without disclosure to
24 Plaintiff;
- 25 • that Smith and BTM did not intend to immediately advance the full amount of
26 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
27 or else return the funds to Plaintiff, and established money market accounts to hold
28 such funds longer than five business days;

- 1 • that Smith and BTM were not maintaining appropriate records and books of account
2 reflecting interest accrued and interest received, interest rate changes, principal
3 payments and all other transactions or actions affecting the Loan.

4 Fraud – Reliance, Discovery and Damage

5 143. Plaintiff continued to fund the Kingdom Church loan and project in response
6 to periodic draw requests from Defendants, based on continued assurances and
7 representations of Defendants Smith and BTM, including through their agents at Arks and
8 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
9 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
10 failure to disclose that Plaintiff's funds were being commingled with other funds and
11 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
12 began working on a new program to take over the servicing and administration of the loans,
13 expand the Build to Minister church loan program into various investment funds, and market
14 those funds to third parties.

15 144. On or about July 31, 2009, during this effort to expand the loan program,
16 Plaintiff first learned of problems with the loans, including that Defendants and their agents
17 owed monies to third parties and were unable to pay them despite Plaintiff and other
18 investors having advanced funds as requested. Over the course of the next several months,
19 Plaintiff conducted an investigation in an attempt to determine what had happened to
20 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
21 misrepresentations, concealment and malfeasance. With respect to the problems discovered
22 with the loans, Plaintiff contributed additional monies in order to complete the projects,
23 including paying outstanding bills, liens, legal and administration fees, modifying the terms
24 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
25 new contractors to complete the construction.

26 145. But for Defendants' misrepresentations and concealment as described above,
27 Plaintiff would not have continued to provide funds in response to draw requests from
28 Defendants or their agents for the projects, including the Kingdom Church project, and

1 would not have invested efforts, time and money creating a new program to take over
2 servicing of the loans, expand the Build to Minister program into various investment funds,
3 and market those funds to third parties.

4 146. Plaintiff incurred legal and administrative costs in addressing and mitigating
5 the harm caused by Defendants' misrepresentations and concealments, in an amount as yet
6 unascertained and which will be proved at trial. Further, Plaintiff lost the value of its time,
7 efforts and funds expended in creating a new program to take over servicing of the loans,
8 expand the Build to Minister program into various investment funds, and market those funds
9 to third parties, which it would not have expended but for Defendants' misrepresentations
10 and concealments.

11 *Insoul Fellowship Church Loan*

12 Contract Terms

13 147. On June 24, 2008, Plaintiff Muse Family Enterprises entered into a
14 Construction Note Participation Agreement with Defendant BTM on a construction loan to
15 Insoul Fellowship Church ("Insoul Participation Agreement" or "Participation Agreement").
16 The Insoul Participation Agreement provided that Plaintiff (designated "Participant") would
17 have a participation interest of 23 and 1/3% in the construction note amount of \$1,341,250,
18 which Defendant BTM (designated "Seller") would loan to the church, Insoul Fellowship
19 Church (designated "Borrower"). Under the Insoul Participation Agreement, Plaintiff
20 committed to fund a total of \$312,913.63, to be advanced to Defendant BTM in response to
21 periodic draw requests from Defendant according to a projected draw schedule. In
22 consideration for Plaintiff's advancing the funds, Plaintiff was entitled to receive the return
23 of the principal invested, as well as 10.5% interest on such amount, and its pro rata portion
24 (23 and 1/3%) of a Participation Fee (of \$20,118.75), with interest and fees to be paid
25 monthly, and the principal payable to Plaintiff at the issuance of a Certificate of Occupancy
26 for the Property or twelve (12) months from the date of Loan Closing, whichever first
27 occurs, as provided for in the Loan Agreement which was specifically referenced by and
28 incorporated into the Participation Agreement. The Participation Agreement also provided

1 that in the event Plaintiff had not received its return of principal at the time specified, BTM
2 was either to provide or to arrange additional financing so that Plaintiff would receive all its
3 funds.

4 148. Defendant BTM, for its part, agreed among other things, that:

- 5 • “In the event Seller [BTM] does not for any reason advance to Borrower
6 [church] the full amount of the contemplated advance [the draws of funds that
7 Defendants called for every month] on the date of receipt of such Purchase
8 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
9 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
10 to the amount of such contemplated advance not made.” (Participation
11 Agreement, Schedule 4, ¶2.)
- 12 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
13 the terms of the Loan Documents and with this Agreement. Seller [BTM]
14 shall provide loan servicing in accordance with commercially acceptable loan
15 servicing practices and with the same degree of care that is customarily
16 employed and exercised by Seller [BTM] in the administration and servicing
17 of loans of a similar nature held by it for its own account (the “Servicing
18 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 19 • “The Seller [BTM] shall maintain appropriate records and books of account
20 reflecting interest accrued and interest received, interest rate changes, principal
21 payments and all other transactions or actions affecting the Loan, which
22 records shall be keep in accordance with accounting principles consistently
23 and customarily applied by Seller [BTM].” (Participation Agreement,
24 Schedule 4, ¶9.)
- 25 • “Seller [BTM] further agrees that in performing its obligations hereunder,
26 Seller shall: (a) act in a custodial capacity on behalf of the Participant
27 [Plaintiff] with respect to its holding of any underlying instrument or collateral
28 and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶9.)
- “[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
may take or omit to take any action under any of the Loan Documents which
would result in the following (each a “Material Change”): (a) reduce or
increase the amounts of principal or interest payments of the Loan, (b) reduce
or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
postpone any due date for payment of principal or interest in which Participant
[Plaintiff] shares, including, without limitation, the final maturity date of the
Loan, (d) except as expressly permitted under the Loan Documents, release or
subordinate any existing collateral described in the Loan Documents, (e)
release the liability of Borrower or any guarantor for the Loan, (f) consent to
the further sale, transfer, pledge, mortgage or assignment of (i) the Property or

1 (ii) any direct or indirect interest in Borrower ... (g) make or consent to any
2 change in the principal amount of the Note; or (h) waive a default under the
Loan Documents arising from the failure to make payments as and when due
on the Loan. . . ." ((Participation Agreement, Schedule 4, ¶ 11.)

- 3 • "Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
4 of any material default with respect to the Loan of which Seller [BTM] is
5 actually aware and of any other matters which, in Seller's judgment, materially
6 affect the interest of Participant [Plaintiff] with respect to the Loan
(collectively, a "Material Default")." (Participation Agreement, Schedule 4, ¶
11.)

7 149. The parties agreed that the Plaintiff would advance funds to BTM, as called
8 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
9 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM's
10 consent, and that BTM or its agents would thereupon transmit the funds to BTM's affiliate
11 Arks and/or Arks' wholly owned subsidiary Noah Construction, on behalf of the Borrower
12 (the Church), to service the loan and advance the funds towards the construction project,
13 according to the budget and plans approved and relied upon by the Plaintiff in entering into
14 the Participation Agreement. Upon information and belief, BTM had an agreement with
15 Arks whereby Arks took over the servicing and administration of the Loan to Insoul
16 Fellowship Church. The Participation Agreement specifically references and incorporates
17 the Loan Agreement, which is between Arks "and its affiliate BTM Funding, Inc." and the
18 Borrower (the Church), and which provides that "the Loan proceeds are to be used by
19 Church solely for the construction of a church, church-related improvements, and/or costs
20 related thereto (the "Project") upon the land described in the Security Instrument (the
21 "Property") in accordance with the plans and specifications approved by ARKS."

22 150. Plaintiff agreed to advance the funds in response to periodic draws based on
23 the project plans and budget which were attached to the Participation Agreement and/or the
24 Loan Agreement that was incorporated into the Participation Agreement, and which had
25 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
26 committing to the Participation Agreement for the Insoul Fellowship Church Loan.

27 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-

28 ///

1 contractors, suppliers and other third parties as well as specific project-related servicing fees
2 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
3 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
4 approval from Plaintiff for any material change to the budget or plans.

5 Contract Performance and Breach

6 151. Upon execution of the Participation Agreement, Plaintiff began funding draw
7 requests for the Insoul Fellowship Church project based on draw requests by BTM and its
8 agents. Plaintiff Muse Family Enterprises advanced \$285,640 to BTM and its agents for the
9 Insoul Fellowship Church Loan between October 2008 and June 2009.

10 152. Defendant BTM breached the Participation Agreement by, among other things,
11 the following:

- 12 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
13 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
14 Ministries, Inc. (or to the servicers or contractors for authorized project
15 disbursements on the Borrower's behalf), and failing to return within five business
16 days to Plaintiff any funds not so advanced;
- 17 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
18 contractors, suppliers and other third parties as well as specific project-related
19 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
20 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
21 failing to get prior approval from Plaintiff for any material change to the budget or
22 plans;
- 23 • failing to maintain appropriate records and books of account reflecting interest
24 accrued and interest received, interest rate changes, principal payments and all other
25 transactions or actions affecting the Loan;
- 26 • not paying Plaintiff its return of principal at the earlier of the issuance of the
27 certificate of occupancy or within 12 months of the Loan Closing;

28 ///

- 1 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
- 2 Closing and not providing or arranging additional financing to allow Plaintiff to
- 3 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
- 4 within 12 months of the Loan Closing;
- 5 • not paying Plaintiff its interest and fees on a monthly basis;
- 6 • failing to provide loan servicing and administration in accordance with the Loan
- 7 documents and with commercially acceptable loan servicing practices;
- 8 • requiring additional payments by Plaintiff beyond what was due under the
- 9 Participation Agreement and the approved budget and plans incorporated therein;
- 10 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 11 holding any proceeds received for the Loan;
- 12 • commingling for significant periods of time proceeds received on the Loan with other
- 13 funds;
- 14 • postponing due dates for payment of principal or interest in which Plaintiff shared
- 15 without obtaining the consent of Plaintiff;
- 16 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
- 17 which Defendant was aware;
- 18 • failing to require Borrower to pay the equity down payment as required by the Loan
- 19 Documents.

20 Contract Damages

21 153. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
22 as yet unascertained, but which Plaintiff believes is at least \$229,272 and which will be
23 proved at trial.

24 154. Additionally, Plaintiff incurred legal and administrative costs in addressing
25 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
26 have incurred.

27 ///

28 ///

Fraud - Concealment

158. Defendants David Smith and BTM, including through their agents, concealed from and failed to disclose to Plaintiff the following:

- the true financial and operational status of the loans and projects, including the Insoul Fellowship Church project;
- that 100% of the funds advanced by Plaintiff to BTM were not going toward the projects, including the Insoul Fellowship Church project, and were not being applied only to project-related costs, according to the plans and budgets submitted to, approved by and relied on by Plaintiff;
- that Smith and BTM were diverting Plaintiff's funds for non-project related purposes, including payments made to unrelated third parties - friends of David Smith and David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the Lachman Lane Property;
- that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff and its investments in overseeing the management, servicing and administration of the loans and projects;
- that Smith and BTM were commingling for significant periods of time proceeds received on the Loan with other funds;
- that Smith and BTM did not intend to immediately advance the full amount of Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf or else return the funds to Plaintiff, and established money market accounts to hold such funds longer than five business days;
- that Smith and BTM were not maintaining appropriate records and books of account reflecting interest accrued and interest received, interest rate changes, principal payments and all other transactions or actions affecting the Loan.

Fraud – Reliance, Discovery and Damage

159. Plaintiff continued to fund the Insoul Fellowship Church loan and project in response to periodic draw requests from Defendants, based on continued assurances and

1 representations of Defendants Smith and BTM, including through their agents at Arks and
2 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
3 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
4 failure to disclose that Plaintiff's funds were being commingled with other funds and
5 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
6 began working on a new program to take over the servicing and administration of the loans,
7 expand the Build to Minister church loan program into various investment funds, and market
8 those funds to third parties.

9 160. On or about July 31, 2009, during this effort to expand the loan program,
10 Plaintiff first learned of problems with the loans, including that Defendants and their agents
11 owed monies to third parties and were unable to pay them despite Plaintiff and other
12 investors having advanced funds as requested. Over the course of the next several months,
13 Plaintiff conducted an investigation in an attempt to determine what had happened to
14 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
15 misrepresentations, concealment and malfeasance. With respect to the problems discovered
16 with the loans, Plaintiff contributed additional monies in order to complete the projects,
17 including paying outstanding bills, liens, legal and administration fees, modifying the terms
18 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
19 new contractors to complete the construction.

20 161. But for Defendants' misrepresentations and concealment as described above,
21 Plaintiff would not have continued to provide funds in response to draw requests from
22 Defendants or their agents for the projects, including the Insoul Fellowship Church project,
23 and would not have invested efforts, time and money creating a new program to take over
24 servicing of the loans, expand the Build to Minister program into various investment funds,
25 and market those funds to third parties.

26 162. As a result of Defendants' misrepresentations and concealments, Plaintiff has
27 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
28 \$229,272 and which will be proved at trial. Additionally, Plaintiff incurred legal and

1 administrative costs in addressing and mitigating the harm caused by Defendants'
2 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
3 funds expended in creating a new program to take over servicing of the loans, expand the
4 Build to Minister program into various investment funds, and market those funds to third
5 parties, which it would not have expended but for Defendants' misrepresentations and
6 concealments.

7 *New Creation Church Loan*

8 Contract Terms

9 163. On December 11, 2008, Plaintiff Muse Family Enterprises entered into a
10 Construction Note Participation Agreement with Defendant BTM on a construction loan to
11 New Creation Church ("New Creation Participation Agreement" or "Participation
12 Agreement"). The New Creation Participation Agreement provided that Plaintiff
13 (designated "Participant") would have a participation interest of 23 and 1/3% in the
14 construction note amount of \$825,496, which Defendant BTM (designated "Seller") would
15 loan to the church, New Creation Church (designated "Borrower"). Under the New Creation
16 Participation Agreement, Plaintiff committed to fund a total of \$192,588.22, to be advanced
17 to Defendant BTM in response to periodic draw requests from Defendant according to a
18 projected draw schedule. In consideration for Plaintiff's advancing the funds, Plaintiff was
19 entitled to receive the return of the principal invested, as well as 10.5% interest on such
20 amount, and its pro rata portion (23 and 1/3%) of a Participation Fee (of \$12,382.44), with
21 interest and fees to be paid monthly, and the principal payable to Plaintiff at the issuance of
22 a Certificate of Occupancy for the Property or twelve (12) months from the date of Loan
23 Closing, whichever first occurs, as provided for in the Loan Agreement which was
24 specifically referenced by and incorporated into the Participation Agreement. The
25 Participation Agreement also provided that in the event Plaintiff had not received its return
26 of principal at the time specified, BTM was either to provide or to arrange additional
27 financing so that Plaintiff would receive all its funds.

28 164. Defendant BTM, for its part, agreed among other things, that:

- 1 • “In the event Seller [BTM] does not for any reason advance to Borrower
2 [church] the full amount of the contemplated advance [the draws of funds that
3 Defendants called for every month] on the date of receipt of such Purchase
4 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
5 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
6 to the amount of such contemplated advance not made.” (Participation
7 Agreement, Schedule 4, ¶2.)
- 8 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
9 the terms of the Loan Documents and with this Agreement. Seller [BTM]
10 shall provide loan servicing in accordance with commercially acceptable loan
11 servicing practices and with the same degree of care that is customarily
12 employed and exercised by Seller [BTM] in the administration and servicing
13 of loans of a similar nature held by it for its own account (the “Servicing
14 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 15 • “The Seller [BTM] shall maintain appropriate records and books of account
16 reflecting interest accrued and interest received, interest rate changes, principal
17 payments and all other transactions or actions affecting the Loan, which
18 records shall be kept in accordance with accounting principles consistently
19 and customarily applied by Seller [BTM].” (Participation Agreement,
20 Schedule 4, ¶9.)
- 21 • “Seller [BTM] further agrees that in performing its obligations hereunder,
22 Seller shall: (a) act in a custodial capacity on behalf of the Participant
23 [Plaintiff] with respect to its holding of any underlying instrument or collateral
24 and in holding any proceeds received for the Loan; (b) not commingle for any
25 significant period of time proceeds received on the Loan; (c) directly pass
26 through any proceeds received from the Loan to Participant [Plaintiff] as
27 provided in Section 4 of this Agreement, less any proceeds that represent
28 servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)

18 165. The parties agreed that the Plaintiff would advance funds to BTM, as called
19 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
20 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
21 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
22 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
23 (the Church), to service the loan and advance the funds towards the construction project,
24 according to the budget and plans approved and relied upon by the Plaintiff in entering into
25 the Participation Agreement. Upon information and belief, BTM had an agreement with
26 Arks whereby Arks took over the servicing and administration of the Loan to New Creation
27 Church. The Participation Agreement specifically references and incorporates the Loan
28 Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower

1 (the Church), and which provides that “the Loan proceeds are to be used by Church solely
2 for the construction of a church, church-related improvements, and/or costs related thereto
3 (the “Project”) upon the land described in the Security Instrument (the “Property”) in
4 accordance with the plans and specifications approved by ARKS.”

5 166. Plaintiff agreed to advance the funds in response to periodic draws based on
6 the project plans and budget which were attached to the Participation Agreement and/or the
7 Loan Agreement that was incorporated into the Participation Agreement, and which had
8 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
9 committing to the Participation Agreement for the New Creation Church Loan. Defendant
10 BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors,
11 suppliers and other third parties as well as specific project-related servicing fees to itself,
12 Arks and Noah, according to the budget and plans submitted to and approved by Plaintiffs
13 and incorporated into the Participation Agreement, and agreed to get prior approval from
14 Plaintiff for any material change to the budget or plans.

15 Contract Performance and Breach

16 167. Upon execution of the Participation Agreement, Plaintiff began funding draw
17 requests for the New Creation Church project based on draw requests by BTM and its
18 agents. Plaintiff Muse Family Enterprises advanced \$148,777 to BTM and its agents for the
19 New Creation Church Loan between November 2008 and March 2009.

20 168. Defendant BTM breached the Participation Agreement by, among other things,
21 the following:

- 22 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
23 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
24 Ministries, Inc. (or to the servicers or contractors for authorized project
25 disbursements on the Borrower’s behalf), and failing to return within five business
26 days to Plaintiff any funds not so advanced;
- 27 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
28 contractors, suppliers and other third parties as well as specific project-related

1 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
2 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
3 failing to get prior approval from Plaintiff for any material change to the budget or
4 plans;

- 5 • failing to maintain appropriate records and books of account reflecting interest
6 accrued and interest received, interest rate changes, principal payments and all other
7 transactions or actions affecting the Loan;
- 8 • not paying Plaintiff its return of principal at the earlier of the issuance of the
9 certificate of occupancy or within 12 months of the Loan Closing;
- 10 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
11 Closing and not providing or arranging additional financing to allow Plaintiff to
12 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
13 within 12 months of the Loan Closing;
- 14 • not paying Plaintiff its interest and fees on a monthly basis;
- 15 • failing to provide loan servicing and administration in accordance with the Loan
16 documents and with commercially acceptable loan servicing practices;
- 17 • requiring additional payments by Plaintiff beyond what was due under the
18 Participation Agreement and the approved budget and plans incorporated therein;
- 19 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
20 holding any proceeds received for the Loan;
- 21 • commingling for significant periods of time proceeds received on the Loan with other
22 funds.

23 Contract Damages

24 169. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
25 as yet unascertained, but which Plaintiff believes is at least \$185,807 and which will be
26 proved at trial.

27 ///

28 ///

1 170. Additionally, Plaintiff incurred legal and administrative costs in addressing
2 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
3 have incurred.

4 Fraud – Defendants' Misrepresentations

5 171. On the periodic draw requests sent to Plaintiff beginning in November 2008,
6 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
7 had been spent on the New Creation Church project, in accordance with the approved plans
8 and budget, as per the reports, forms, and spreadsheets submitted with the draw requests,
9 and that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
10 value of the project to that point.

11 172. Prior to Plaintiff's executing the Participation Agreement and making each
12 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
13 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
14 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
15 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
16 updates on projects, including the New Creation Church project, and was told that all funds
17 previously advanced by Plaintiff to BTM and its agents on the New Creation Church loan
18 had been put towards the project according to the budget and plans submitted to, approved
19 by and relied on by Plaintiff.

20 Fraud – True Facts

21 173. In fact, Defendants' representations to Plaintiff as described above were false.
22 The true facts were that:

- 23 • Plaintiff's funds had not been spent on the New Creation Church project in
24 accordance with the approved plans and budget as per the reports, forms, and
25 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
26 November 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did
27 not accurately represent the value of the project to that point;

28 ///

- 1 • all funds previously advanced by Plaintiff to BTM and its agents on the New Creation
2 Church loan had not been put towards the project according to the budget and plans
3 submitted to, approved by and relied on by Plaintiff;

4 Fraud - Concealment

5 174. Defendants David Smith and BTM, including through their agents, concealed
6 from and failed to disclose to Plaintiff the following:

- 7 • the true financial and operational status of the loans and projects, including the New
8 Creation Church project;
- 9 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
10 projects, including the New Creation Church project, and were not being applied only
11 to project-related costs, according to the plans and budgets submitted to, approved by
12 and relied on by Plaintiff;
- 13 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
14 including payments made to unrelated third parties - friends of David Smith and
15 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
16 Lachman Lane Property;
- 17 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
18 and its investments in overseeing the management, servicing and administration of
19 the loans and projects;
- 20 • that Smith and BTM were commingling for significant periods of time proceeds
21 received on the Loan with other funds;
- 22 • that Smith and BTM did not intend to immediately advance the full amount of
23 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
24 or else return the funds to Plaintiff, and established money market accounts to hold
25 such funds longer than five business days;
- 26 • that Smith and BTM were not maintaining appropriate records and books of account
27 reflecting interest accrued and interest received, interest rate changes, principal
28 payments and all other transactions or actions affecting the Loan.

Fraud – Reliance, Discovery and Damage

1
2 175. Plaintiff continued to fund the New Creation Church loan and project in
3 response to periodic draw requests from Defendants, based on continued assurances and
4 representations of Defendants Smith and BTM, including through their agents at Arks and
5 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
6 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
7 failure to disclose that Plaintiff's funds were being commingled with other funds and
8 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
9 began working on a new program to take over the servicing and administration of the loans,
10 expand the Build to Minister church loan program into various investment funds, and market
11 those funds to third parties.

12 176. On or about July 31, 2009, during this effort to expand the loan program,
13 Plaintiff first learned of problems with the loans, including that Defendants and their agents
14 owed monies to third parties and were unable to pay them despite Plaintiff and other
15 investors having advanced funds as requested. Over the course of the next several months,
16 Plaintiff conducted an investigation in an attempt to determine what had happened to
17 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
18 misrepresentations, concealment and malfeasance. With respect to the problems discovered
19 with the loans, Plaintiff contributed additional monies in order to complete the projects,
20 including paying outstanding bills, liens, legal and administration fees, modifying the terms
21 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
22 new contractors to complete the construction.

23 177. But for Defendants' misrepresentations and concealment as described above,
24 Plaintiff would not have continued to provide funds in response to draw requests from
25 Defendants or their agents for the projects, including the New Creation Church project, and
26 would not have invested efforts, time and money creating a new program to take over
27 servicing of the loans, expand the Build to Minister program into various investment funds,
28 and market those funds to third parties.

1 178. As a result of Defendants' misrepresentations and concealments, Plaintiff has
2 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
3 \$185,807 and which will be proved at trial. Additionally, Plaintiff incurred legal and
4 administrative costs in addressing and mitigating the harm caused by Defendants'
5 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
6 funds expended in creating a new program to take over servicing of the loans, expand the
7 Build to Minister program into various investment funds, and market those funds to third
8 parties, which it would not have expended but for Defendants' misrepresentations and
9 concealments

10 *Peace Baptist Church Loan*

11 Contract Terms

12 179. On September 26, 2008, Plaintiff Muse Family Enterprises entered into a
13 Construction Note Participation Agreement with Defendant BTM on a construction loan to
14 Peace Baptist Church ("Peace Participation Agreement" or "Participation Agreement"). The
15 Peace Participation Agreement provided that Plaintiff (designated "Participant") would have
16 a participation interest of 23 and 1/3% in the construction note amount of \$515,562, which
17 Defendant BTM (designated "Seller") would loan to the church, Peace Baptist Church
18 (designated "Borrower"). Under the Peace Participation Agreement, Plaintiff committed to
19 fund a total of \$120,280.61, to be advanced to Defendant BTM in response to periodic draw
20 requests from Defendant according to a projected draw schedule. In consideration for
21 Plaintiff's advancing the funds, Plaintiff was entitled to receive the return of the principal
22 invested, as well as 10.5% interest on such amount, and its pro rata portion (23 and 1/3%) of
23 a Participation Fee (of \$7,733.43), with interest and fees to be paid monthly, and the
24 principal payable to Plaintiff at the issuance of a Certificate of Occupancy for the Property
25 or twelve (12) months from the date of Loan Closing, whichever first occurs, as provided for
26 in the Loan Agreement which was specifically referenced by and incorporated into the
27 Participation Agreement. The Participation Agreement also provided that in the event

28 ///

1 Plaintiff had not received its return of principal at the time specified, BTM was either to
2 provide or to arrange additional financing so that Plaintiff would receive all its funds.

3 180. Defendant BTM, for its part, agreed among other things, that:

- 4 • “In the event Seller [BTM] does not for any reason advance to Borrower
5 [church] the full amount of the contemplated advance [the draws of funds that
6 Defendants called for every month] on the date of receipt of such Purchase
7 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
8 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
9 to the amount of such contemplated advance not made.” (Participation
10 Agreement, Schedule 4, ¶2.)
- 11 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
12 the terms of the Loan Documents and with this Agreement. Seller [BTM]
13 shall provide loan servicing in accordance with commercially acceptable loan
14 servicing practices and with the same degree of care that is customarily
15 employed and exercised by Seller [BTM] in the administration and servicing
16 of loans of a similar nature held by it for its own account (the “Servicing
17 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 18 • “The Seller [BTM] shall maintain appropriate records and books of account
19 reflecting interest accrued and interest received, interest rate changes, principal
20 payments and all other transactions or actions affecting the Loan, which
21 records shall be kept in accordance with accounting principles consistently
22 and customarily applied by Seller [BTM].” (Participation Agreement,
23 Schedule 4, ¶9.)
- 24 • “Seller [BTM] further agrees that in performing its obligations hereunder,
25 Seller shall: (a) act in a custodial capacity on behalf of the Participant
26 [Plaintiff] with respect to its holding of any underlying instrument or collateral
27 and in holding any proceeds received for the Loan; (b) not commingle for any
28 significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)
- “Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
of any material default with respect to the Loan of which Seller [BTM] is
actually aware and of any other matters which, in Seller’s judgment, materially
affect the interest of Participant [Plaintiff] with respect to the Loan
(collectively, a “Material Default”).” (Participation Agreement, Schedule 4, ¶
11.)

181. The parties agreed that the Plaintiff would advance funds to BTM, as called
for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s

1 consent, and that BTM or its agents would thereupon transmit the funds to BTM's affiliate
2 Arks and/or Arks' wholly owned subsidiary Noah Construction, on behalf of the Borrower
3 (the Church), to service the loan and advance the funds towards the construction project,
4 according to the budget and plans approved and relied upon by the Plaintiff in entering into
5 the Participation Agreement. Upon information and belief, BTM had an agreement with
6 Arks whereby Arks took over the servicing and administration of the Loan to Peace Baptist
7 Church. The Participation Agreement specifically references and incorporates the Loan
8 Agreement, which is between Arks "and its affiliate BTM Funding, Inc." and the Borrower
9 (the Church), and which provides that "the Loan proceeds are to be used by Church solely
10 for the construction of a church, church-related improvements, and/or costs related thereto
11 (the "Project") upon the land described in the Security Instrument (the "Property") in
12 accordance with the plans and specifications approved by ARKS."

13 182. Plaintiff agreed to advance the funds in response to periodic draws based on
14 the project plans and budget which were attached to the Participation Agreement and/or the
15 Loan Agreement that was incorporated into the Participation Agreement, and which had
16 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
17 committing to the Participation Agreement for the Peace Baptist Church Loan. Defendant
18 BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors,
19 suppliers and other third parties as well as specific project-related servicing fees to itself,
20 Arks and Noah, according to the budget and plans submitted to and approved by Plaintiffs
21 and incorporated into the Participation Agreement, and agreed to get prior approval from
22 Plaintiff for any material change to the budget or plans.

23 Contract Performance and Breach

24 183. Upon execution of the Participation Agreement, Plaintiff began funding draw
25 requests for the Peace Baptist Church project based on draw requests by BTM and its agents.
26 Plaintiff Muse Family Enterprises advanced \$46,490 to BTM and its agents for the Peace
27 Baptist Church Loan between March 2009 and June 2009.

28 ///

1 184. Defendant BTM breached the Participation Agreement by, among other things,
2 the following:

- 3 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
4 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
5 Ministries, Inc. (or to the servicers or contractors for authorized project
6 disbursements on the Borrower's behalf), and failing to return within five business
7 days to Plaintiff any funds not so advanced;
- 8 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
9 contractors, suppliers and other third parties as well as specific project-related
10 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
11 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
12 failing to get prior approval from Plaintiff for any material change to the budget or
13 plans;
- 14 • failing to maintain appropriate records and books of account reflecting interest
15 accrued and interest received, interest rate changes, principal payments and all other
16 transactions or actions affecting the Loan;
- 17 • not paying Plaintiff its return of principal at the earlier of the issuance of the
18 certificate of occupancy or within 12 months of the Loan Closing;
- 19 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
20 Closing and not providing or arranging additional financing to allow Plaintiff to
21 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
22 within 12 months of the Loan Closing;
- 23 • not paying Plaintiff its interest and fees on a monthly basis;
- 24 • failing to provide loan servicing and administration in accordance with the Loan
25 documents and with commercially acceptable loan servicing practices;
- 26 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
27 which Defendant was aware;

28 ///

- 1 • failing to require Borrower to pay the equity down payment as required by the Loan
- 2 Documents;
- 3 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 4 holding any proceeds received for the Loan;
- 5 • commingling for significant periods of time proceeds received on the Loan with other
- 6 funds.

7 Contract Damages

8 185. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
9 as yet unascertained, but which Plaintiff believes is at least \$73,373 and which will be
10 proved at trial.

11 186. Additionally, Plaintiff incurred legal and administrative costs in addressing
12 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
13 have incurred.

14 Fraud – Defendants' Misrepresentations

15 187. On the periodic draw requests sent to Plaintiff beginning in March 2009,
16 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
17 had been spent on the Peace Baptist Church project, in accordance with the approved plans
18 and budget, as per the reports, forms, and spreadsheets submitted with the draw requests,
19 and that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
20 value of the project to that point.

21 188. Prior to Plaintiff's executing the Participation Agreement and making each
22 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
23 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
24 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
25 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
26 updates on projects, including the Peace Baptist Church project, and was told that all funds
27 previously advanced by Plaintiff to BTM and its agents on the Peace Baptist Church loan

28 ///

1 had been put towards the project according to the budget and plans submitted to, approved
2 by and relied on by Plaintiff.

3 Fraud – True Facts

4 189. In fact, Defendants' representations to Plaintiff as described above were false.

5 The true facts were that:

- 6 • Plaintiff's funds had not been spent on the Peace Baptist Church project in
7 accordance with the approved plans and budget as per the reports, forms, and
8 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
9 March 2009, and the reports, forms, and spreadsheets submitted to Plaintiff did not
10 accurately represent the value of the project to that point;
- 11 • all funds previously advanced by Plaintiff to BTM and its agents on the Peace Baptist
12 Church loan had not been put towards the project according to the budget and plans
13 submitted to, approved by and relied on by Plaintiff;

14 Fraud - Concealment

15 190. Defendants David Smith and BTM, including through their agents, concealed
16 from and failed to disclose to Plaintiff the following:

- 17 • the true financial and operational status of the loans and projects, including the Peace
18 Baptist Church project;
- 19 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
20 projects, including the Peace Baptist Church project, and were not being applied only
21 to project-related costs, according to the plans and budgets submitted to, approved by
22 and relied on by Plaintiff;
- 23 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
24 including payments made to unrelated third parties - friends of David Smith and
25 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
26 Lachman Lane Property;

27 ///

28 ///

- 1 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
- 2 and its investments in overseeing the management, servicing and administration of
- 3 the loans and projects;
- 4 • that Smith and BTM were commingling for significant periods of time proceeds
- 5 received on the Loan with other funds;
- 6 • that Smith and BTM did not intend to immediately advance the full amount of
- 7 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
- 8 or else return the funds to Plaintiff, and established money market accounts to hold
- 9 such funds longer than five business days;
- 10 • that Smith and BTM were not maintaining appropriate records and books of account
- 11 reflecting interest accrued and interest received, interest rate changes, principal
- 12 payments and all other transactions or actions affecting the Loan.

13 Fraud – Reliance, Discovery and Damage

14 191. Plaintiff continued to fund the Peace Baptist Church loan and project in
15 response to periodic draw requests from Defendants, based on continued assurances and
16 representations of Defendants Smith and BTM, including through their agents at Arks and
17 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
18 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
19 failure to disclose that Plaintiff's funds were being commingled with other funds and
20 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
21 began working on a new program to take over the servicing and administration of the loans,
22 expand the Build to Minister church loan program into various investment funds, and market
23 those funds to third parties.

24 192. On or about July 31, 2009, during this effort to expand the loan program,
25 Plaintiff first learned of problems with the loans, including that Defendants and their agents
26 owed monies to third parties and were unable to pay them despite Plaintiff and other
27 investors having advanced funds as requested. Over the course of the next several months,
28 Plaintiff conducted an investigation in an attempt to determine what had happened to

1 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
2 misrepresentations, concealment and malfeasance. With respect to the problems discovered
3 with the loans, Plaintiff contributed additional monies in order to complete the projects,
4 including paying outstanding bills, liens, legal and administration fees, modifying the terms
5 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
6 new contractors to complete the construction.

7 193. But for Defendants' misrepresentations and concealment as described above,
8 Plaintiff would not have continued to provide funds in response to draw requests from
9 Defendants or their agents for the projects, including the Peace Baptist Church project, and
10 would not have invested efforts, time and money creating a new program to take over
11 servicing of the loans, expand the Build to Minister program into various investment funds,
12 and market those funds to third parties.

13 194. As a result of Defendants' misrepresentations and concealments, Plaintiff has
14 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
15 \$73,373 and which will be proved at trial. Additionally, Plaintiff incurred legal and
16 administrative costs in addressing and mitigating the harm caused by Defendants'
17 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
18 funds expended in creating a new program to take over servicing of the loans, expand the
19 Build to Minister program into various investment funds, and market those funds to third
20 parties, which it would not have expended but for Defendants' misrepresentations and
21 concealments.

22 *Rush AME Zion Church Loan*

23 Contract Terms

24 195. On April 28, 2008, Plaintiff Muse Family Enterprises entered into a
25 Construction Note Participation Agreement with Defendant BTM on a construction loan to
26 Rush AME Zion Church ("Rush Participation Agreement" or "Participation Agreement").
27 The Rush Participation Agreement provided that Plaintiff (designated "Participant") would
28 have a participation interest of 23 and 1/3% in the construction note amount of \$788,366,

1 which Defendant BTM (designated "Seller") would loan to the church, Rush AME Zion
2 Church (designated "Borrower"). Under the Rush Participation Agreement, Plaintiff
3 committed to fund a total of \$183,925.79, to be advanced to Defendant BTM in response to
4 periodic draw requests from Defendant according to a projected draw schedule. In
5 consideration for Plaintiff's advancing the funds, Plaintiff was entitled to receive the return
6 of the principal invested, as well as 10.5% interest on such amount, and its pro rata portion
7 (23 and 1/3%) of a Participation Fee (of \$11,825.49), with interest and fees to be paid
8 monthly, and the principal payable to Plaintiff at the issuance of a Certificate of Occupancy
9 for the Property or twelve (12) months from the date of Loan Closing, whichever first
10 occurs, as provided for in the Loan Agreement which was specifically referenced by and
11 incorporated into the Participation Agreement. The Participation Agreement also provided
12 that in the event Plaintiff had not received its return of principal at the time specified, BTM
13 was either to provide or to arrange additional financing so that Plaintiff would receive all its
14 funds.

15 196. Defendant BTM, for its part, agreed among other things, that:

- 16 • "In the event Seller [BTM] does not for any reason advance to Borrower
17 [church] the full amount of the contemplated advance [the draws of funds that
18 Defendants called for every month] on the date of receipt of such Purchase
19 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
20 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
21 to the amount of such contemplated advance not made." (Participation
22 Agreement, Schedule 4, ¶2.)
- 23 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
24 the terms of the Loan Documents and with this Agreement. Seller [BTM]
25 shall provide loan servicing in accordance with commercially acceptable loan
26 servicing practices and with the same degree of care that is customarily
27 employed and exercised by Seller [BTM] in the administration and servicing
28 of loans of a similar nature held by it for its own account (the "Servicing
Standard")." (Participation Agreement, Schedule 4, ¶9.)
- "The Seller [BTM] shall maintain appropriate records and books of account
reflecting interest accrued and interest received, interest rate changes, principal
payments and all other transactions or actions affecting the Loan, which
records shall be keep in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)
- "Seller [BTM] further agrees that in performing its obligations hereunder,
Seller shall: (a) act in a custodial capacity on behalf of the Participant

1 [Plaintiff] with respect to its holding of any underlying instrument or collateral
2 and in holding any proceeds received for the Loan; (b) not commingle for any
3 significant period of time proceeds received on the Loan; (c) directly pass
4 through any proceeds received from the Loan to Participant [Plaintiff] as
5 provided in Section 4 of this Agreement, less any proceeds that represent
6 servicing or other compensation to Seller [BTM] or an interest in the Loan
7 retained by the Seller [BTM], all as more particularly provided for herein; and
8 (d) administer the Loan in accordance with the Servicing Standard as provided
9 herein.” (Participation Agreement, Schedule 4, ¶ 9.)

- 6 • “[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
7 may take or omit to take any action under any of the Loan Documents which
8 would result in the following (each a “Material Change”): (a) reduce or
9 increase the amounts of principal or interest payments of the Loan, (b) reduce
10 or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
11 postpone any due date for payment of principal or interest in which Participant
12 [Plaintiff] shares, including, without limitation, the final maturity date of the
13 Loan, (d) except as expressly permitted under the Loan Documents, release or
14 subordinate any existing collateral described in the Loan Documents, (e)
15 release the liability of Borrower or any guarantor for the Loan, (f) consent to
16 the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
17 (ii) any direct or indirect interest in Borrower ... (g) make or consent to any
18 change in the principal amount of the Note; or (h) waive a default under the
19 Loan Documents arising from the failure to make payments as and when due
20 on the Loan. . . .” ((Participation Agreement, Schedule 4, ¶ 11.)

14 197. The parties agreed that the Plaintiff would advance funds to BTM, as called
15 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
16 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
17 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
18 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
19 (the Church), to service the loan and advance the funds towards the construction project,
20 according to the budget and plans approved and relied upon by the Plaintiff in entering into
21 the Participation Agreement. Upon information and belief, BTM had an agreement with
22 Arks whereby Arks took over the servicing and administration of the Loan to Rush AME
23 Zion Church. The Participation Agreement specifically references and incorporates the
24 Loan Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the
25 Borrower (the Church), and which provides that “the Loan proceeds are to be used by
26 Church solely for the construction of a church, church-related improvements, and/or costs
27 related thereto (the “Project”) upon the land described in the Security Instrument (the
28 “Property”) in accordance with the plans and specifications approved by ARKS.”

- 1 • failing to maintain appropriate records and books of account reflecting interest
- 2 accrued and interest received, interest rate changes, principal payments and all other
- 3 transactions or actions affecting the Loan;
- 4 • not paying Plaintiff its return of principal at the earlier of the issuance of the
- 5 certificate of occupancy or within 12 months of the Loan Closing;
- 6 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
- 7 Closing and not providing or arranging additional financing to allow Plaintiff to
- 8 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
- 9 within 12 months of the Loan Closing;
- 10 • not paying Plaintiff its interest and fees on a monthly basis;
- 11 • failing to provide loan servicing and administration in accordance with the Loan
- 12 documents and with commercially acceptable loan servicing practices;
- 13 • requiring additional payments by Plaintiff beyond what was due under the
- 14 Participation Agreement and the approved budget and plans incorporated therein;
- 15 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 16 holding any proceeds received for the Loan;
- 17 • commingling for significant periods of time proceeds received on the Loan with other
- 18 funds;
- 19 • postponing due dates for payment of principal or interest in which Plaintiff shared
- 20 without obtaining the consent of Plaintiff.

21 Contract Damages

22 201. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
23 as yet unascertained, but which Plaintiff believes is at least \$121,512 and which will be
24 proved at trial.

25 202. Additionally, Plaintiff incurred legal and administrative costs in addressing
26 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
27 have incurred.

28 ///

1 Fraud – Defendants’ Misrepresentations

2 203. On the periodic draw requests sent to Plaintiff beginning in October 2008,
3 Smith’s and BTM’s agents signed attestations that the monies advanced thus far by Plaintiff
4 had been spent on the Rush AME Zion Church project, in accordance with the approved
5 plans and budget, as per the reports, forms, and spreadsheets submitted with the draw
6 requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
7 represented the value of the project to that point.

8 204. Prior to Plaintiff’s executing the Participation Agreement and making each
9 subsequent advance, Plaintiff’s agent Darren Maloney called periodically (approximately
10 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
11 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
12 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
13 updates on projects, including the Rush AME Zion Church project, and was told that all
14 funds previously advanced by Plaintiff to BTM and its agents on the Rush AME Zion
15 Church loan had been put towards the project according to the budget and plans submitted
16 to, approved by and relied on by Plaintiff.

17 Fraud – True Facts

18 205. In fact, Defendants’ representations to Plaintiff as described above were false.
19 The true facts were that:

- 20 • Plaintiff’s funds had not been spent on the Rush AME Zion Church project in
21 accordance with the approved plans and budget as per the reports, forms, and
22 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
23 October 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
24 accurately represent the value of the project to that point;
- 25 • all funds previously advanced by Plaintiff to BTM and its agents on the Rush AME
26 Zion Church loan had not been put towards the project according to the budget and
27 plans submitted to, approved by and relied on by Plaintiff;

28 ///

Fraud - Concealment

206. Defendants David Smith and BTM, including through their agents, concealed from and failed to disclose to Plaintiff the following:

- the true financial and operational status of the loans and projects, including the Rush AME Zion Church project;
- that 100% of the funds advanced by Plaintiff to BTM were not going toward the projects, including the Rush AME Zion Church project, and were not being applied only to project-related costs, according to the plans and budgets submitted to, approved by and relied on by Plaintiff;
- that Smith and BTM were diverting Plaintiff's funds for non-project related purposes, including payments made to unrelated third parties - friends of David Smith and David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the Lachman Lane Property;
- that Smith and BTM were making undisclosed, unapproved payments for "legal fees" to Randy Barton and for "sales commissions" to Carmen Copple Smith;
- that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff and its investments in overseeing the management, servicing and administration of the loans and projects;
- that Smith and BTM were commingling for significant periods of time proceeds received on the Loan with other funds;
- that Smith and BTM did not intend to immediately advance the full amount of Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf or else return the funds to Plaintiff, and established money market accounts to hold such funds longer than five business days;
- that Smith and BTM were not maintaining appropriate records and books of account reflecting interest accrued and interest received, interest rate changes, principal payments and all other transactions or actions affecting the Loan.

///

Fraud – Reliance, Discovery and Damage

1
2 207. Plaintiff continued to fund the Rush AME Zion Church loan and project in
3 response to periodic draw requests from Defendants, based on continued assurances and
4 representations of Defendants Smith and BTM, including through their agents at Arks and
5 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
6 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
7 failure to disclose that Plaintiff's funds were being commingled with other funds and
8 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
9 began working on a new program to take over the servicing and administration of the loans,
10 expand the Build to Minister church loan program into various investment funds, and market
11 those funds to third parties.

12 208. On or about July 31, 2009, during this effort to expand the loan program,
13 Plaintiff first learned of problems with the loans, including that Defendants and their agents
14 owed monies to third parties and were unable to pay them despite Plaintiff and other
15 investors having advanced funds as requested. Over the course of the next several months,
16 Plaintiff conducted an investigation in an attempt to determine what had happened to
17 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
18 misrepresentations, concealment and malfeasance. With respect to the problems discovered
19 with the loans, Plaintiff contributed additional monies in order to complete the projects,
20 including paying outstanding bills, liens, legal and administration fees, modifying the terms
21 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
22 new contractors to complete the construction.

23 209. But for Defendants' misrepresentations and concealment as described above,
24 Plaintiff would not have continued to provide funds in response to draw requests from
25 Defendants or their agents for the projects, including the Rush AME Zion Church project,
26 and would not have invested efforts, time and money creating a new program to take over
27 servicing of the loans, expand the Build to Minister program into various investment funds,
28 and market those funds to third parties.

1 specified, BTM was either to provide or to arrange additional financing so that Plaintiff
2 would receive all its funds.

3 212. Defendant BTM, for its part, agreed among other things, that:

- 4
- 5 • “In the event Seller [BTM] does not for any reason advance to Borrower
6 [church] the full amount of the contemplated advance [the draws of funds that
7 Defendants called for every month] on the date of receipt of such Purchase
8 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
9 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
10 to the amount of such contemplated advance not made.” (Participation
11 Agreement, Schedule 4, ¶2.)
 - 12 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
13 the terms of the Loan Documents and with this Agreement. Seller [BTM]
14 shall provide loan servicing in accordance with commercially acceptable loan
15 servicing practices and with the same degree of care that is customarily
16 employed and exercised by Seller [BTM] in the administration and servicing
17 of loans of a similar nature held by it for its own account (the “Servicing
18 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
 - 19 • “The Seller [BTM] shall maintain appropriate records and books of account
20 reflecting interest accrued and interest received, interest rate changes, principal
21 payments and all other transactions or actions affecting the Loan, which
22 records shall be kept in accordance with accounting principles consistently
23 and customarily applied by Seller [BTM].” (Participation Agreement,
24 Schedule 4, ¶9.)
 - 25 • “Seller [BTM] further agrees that in performing its obligations hereunder,
26 Seller shall: (a) act in a custodial capacity on behalf of the Participant
27 [Plaintiff] with respect to its holding of any underlying instrument or collateral
28 and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)

22 213. The parties agreed that the Plaintiff would advance funds to BTM, as called
23 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
24 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
25 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
26 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
27 (the Church), to service the loan and advance the funds towards the construction project,
28

///

1 according to the budget and plans approved and relied upon by the Plaintiff in entering into
2 the Participation Agreement. Upon information and belief, BTM had an agreement with
3 Arks whereby Arks took over the servicing and administration of the Loan to Brook
4 Community Church. The Participation Agreement specifically references and incorporates
5 the Loan Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the
6 Borrower (the Church), and which provides that “the Loan proceeds are to be used by
7 Church solely for the construction of a church, church-related improvements, and/or costs
8 related thereto (the “Project”) upon the land described in the Security Instrument (the
9 “Property”) in accordance with the plans and specifications approved by ARKS.”

10 214. Plaintiff agreed to advance the funds in response to periodic draws based on
11 the project plans and budget which were attached to the Participation Agreement and/or the
12 Loan Agreement that was incorporated into the Participation Agreement, and which had
13 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
14 committing to the Participation Agreement for the Brook Community Church Loan.
15 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
16 contractors, suppliers and other third parties as well as specific project-related servicing fees
17 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
18 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
19 approval from Plaintiff for any material change to the budget or plans.

20 Contract Performance and Breach

21 215. Upon execution of the Participation Agreement, Plaintiff began funding draw
22 requests for the Brook Community Church project based on draw requests by BTM and its
23 agents. Plaintiff Muse Family Enterprises advanced \$261,974 to BTM and its agents for the
24 Brook Community Church Loan between February 2008 and October 2008.

25 216. Defendant BTM breached the Participation Agreement by, among other things,
26 the following:

27 ///

28 ///

- 1 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
2 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
3 Ministries, Inc. (or to the servicers or contractors for authorized project
4 disbursements on the Borrower's behalf), and failing to return within five business
5 days to Plaintiff any funds not so advanced;
- 6 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
7 contractors, suppliers and other third parties as well as specific project-related
8 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
9 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
10 failing to get prior approval from Plaintiff for any material change to the budget or
11 plans;
- 12 • failing to maintain appropriate records and books of account reflecting interest
13 accrued and interest received, interest rate changes, principal payments and all other
14 transactions or actions affecting the Loan;
- 15 • not paying Plaintiff its return of principal at the earlier of the issuance of the
16 certificate of occupancy or within 12 months of the Loan Closing;
- 17 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
18 Closing and not providing or arranging additional financing to allow Plaintiff to
19 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
20 within 12 months of the Loan Closing;
- 21 • not paying Plaintiff its interest and fees on a monthly basis;
- 22 • failing to provide loan servicing and administration in accordance with the Loan
23 documents and with commercially acceptable loan servicing practices;
- 24 • requiring additional payments by Plaintiff beyond what was due under the
25 Participation Agreement and the approved budget and plans incorporated therein;
- 26 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
27 holding any proceeds received for the Loan;

28 ///

- 1 • commingling for significant periods of time proceeds received on the Loan with other
2 funds.

3 Contract Damages

4 217. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
5 as yet unascertained, but which Plaintiff believes is at least \$52,042 and which will be
6 proved at trial.

7 218. Additionally, Plaintiff incurred legal and administrative costs in addressing
8 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
9 have incurred.

10 Fraud – Defendants' Misrepresentations

11 219. On the periodic draw requests sent to Plaintiff beginning in February 2008,
12 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
13 had been spent on the Brook Community Church project, in accordance with the approved
14 plans and budget, as per the reports, forms, and spreadsheets submitted with the draw
15 requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
16 represented the value of the project to that point.

17 220. Prior to Plaintiff's executing the Participation Agreement and making each
18 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
19 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
20 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
21 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
22 updates on projects, including the Brook Community Church project, and was told that all
23 funds previously advanced by Plaintiff to BTM and its agents on the Brook Community
24 Church loan had been put towards the project according to the budget and plans submitted
25 to, approved by and relied on by Plaintiff.

26 Fraud – True Facts

27 221. In fact, Defendants' representations to Plaintiff as described above were false.
28 The true facts were that:

- 1 • Plaintiff's funds had not been spent on the Brook Community Church project in
2 accordance with the approved plans and budget as per the reports, forms, and
3 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
4 February 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
5 accurately represent the value of the project to that point;
- 6 • all funds previously advanced by Plaintiff to BTM and its agents on the Brook
7 Community Church loan had not been put towards the project according to the budget
8 and plans submitted to, approved by and relied on by Plaintiff;

9 Fraud - Concealment

10 222. Defendants David Smith and BTM, including through their agents, concealed
11 from and failed to disclose to Plaintiff the following:

- 12 • the true financial and operational status of the loans and projects, including the Brook
13 Community Church project;
- 14 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
15 projects, including the Brook Community Church project, and were not being applied
16 only to project-related costs, according to the plans and budgets submitted to,
17 approved by and relied on by Plaintiff;
- 18 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
19 including payments made to unrelated third parties - friends of David Smith and
20 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
21 Lachman Lane Property;
- 22 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
23 to Randy Barton and for "sales commissions" to Carmen Copple Smith;
- 24 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
25 and its investments in overseeing the management, servicing and administration of
26 the loans and projects;
- 27 • that Smith and BTM were commingling for significant periods of time proceeds
28 received on the Loan with other funds;

- 1 • that Smith and BTM did not intend to immediately advance the full amount of
- 2 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
- 3 or else return the funds to Plaintiff, and established money market accounts to hold
- 4 such funds longer than five business days;
- 5 • that Smith and BTM were not maintaining appropriate records and books of account
- 6 reflecting interest accrued and interest received, interest rate changes, principal
- 7 payments and all other transactions or actions affecting the Loan.

8 Fraud – Reliance, Discovery and Damage

9 223. Plaintiff continued to fund the Brook Community Church loan and project in
10 response to periodic draw requests from Defendants, based on continued assurances and
11 representations of Defendants Smith and BTM, including through their agents at Arks and
12 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
13 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
14 failure to disclose that Plaintiff's funds were being commingled with other funds and
15 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
16 began working on a new program to take over the servicing and administration of the loans,
17 expand the Build to Minister church loan program into various investment funds, and market
18 those funds to third parties.

19 224. On or about July 31, 2009, during this effort to expand the loan program,
20 Plaintiff first learned of problems with the loans, including that Defendants and their agents
21 owed monies to third parties and were unable to pay them despite Plaintiff and other
22 investors having advanced funds as requested. Over the course of the next several months,
23 Plaintiff conducted an investigation in an attempt to determine what had happened to
24 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
25 misrepresentations, concealment and malfeasance. With respect to the problems discovered
26 with the loans, Plaintiff contributed additional monies in order to complete the projects,
27 including paying outstanding bills, liens, legal and administration fees, modifying the terms

28 ///

1 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
2 new contractors to complete the construction.

3 225. But for Defendants' misrepresentations and concealment as described above,
4 Plaintiff would not have continued to provide funds in response to draw requests from
5 Defendants or their agents for the projects, including the Brook Community Church project,
6 and would not have invested efforts, time and money creating a new program to take over
7 servicing of the loans, expand the Build to Minister program into various investment funds,
8 and market those funds to third parties.

9 226. As a result of Defendants' misrepresentations and concealments, Plaintiff has
10 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
11 \$52,042 and which will be proved at trial. Additionally, Plaintiff incurred legal and
12 administrative costs in addressing and mitigating the harm caused by Defendants'
13 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
14 funds expended in creating a new program to take over servicing of the loans, expand the
15 Build to Minister program into various investment funds, and market those funds to third
16 parties, which it would not have expended but for Defendants' misrepresentations and
17 concealments.

18 *True Way Church of God in Christ, Inc. Loan*

19 Contract Terms

20 227. On February 27, 2008, Plaintiff Muse Family Enterprises entered into a
21 Construction Note Participation Agreement with Defendant BTM on a construction loan to
22 True Way Church of God in Christ, Inc. ("True Way Participation Agreement" or
23 "Participation Agreement"). The True Way Participation Agreement provided that Plaintiff
24 (designated "Participant") would have a participation interest of 23 and 1/3% in the
25 construction note amount of \$267,100, which Defendant BTM (designated "Seller") would
26 loan to the church, True Way Church of God in Christ, Inc. ("True Way") (designated
27 "Borrower"). Under the True Way Participation Agreement, Plaintiff committed to fund a
28 total of \$62,314.43, to be advanced to Defendant BTM in response to periodic draw requests

1 from Defendant according to a projected draw schedule. In consideration for Plaintiff's
2 advancing the funds, Plaintiff was entitled to receive the return of the principal invested, as
3 well as 10.5% interest on such amount, and its pro rata portion (23 and 1/3%) of a
4 Participation Fee (of \$4,006.50), with interest and fees to be paid monthly, and the principal
5 payable to Plaintiff at the issuance of a Certificate of Occupancy for the Property or twelve
6 (12) months from the date of Loan Closing, whichever first occurs, as provided for in the
7 Loan Agreement which was specifically referenced by and incorporated into the
8 Participation Agreement. The Participation Agreement also provided that in the event
9 Plaintiff had not received its return of principal at the time specified, BTM was either to
10 provide or to arrange additional financing so that Plaintiff would receive all its funds.

11 228. Defendant BTM, for its part, agreed among other things, that:

- 12
- 13 • "In the event Seller [BTM] does not for any reason advance to Borrower
14 [church] the full amount of the contemplated advance [the draws of funds that
15 Defendants called for every month] on the date of receipt of such Purchase
16 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
17 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
18 to the amount of such contemplated advance not made." (Participation
19 Agreement, Schedule 4, ¶2.)
- 20 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
21 the terms of the Loan Documents and with this Agreement. Seller [BTM]
22 shall provide loan servicing in accordance with commercially acceptable loan
23 servicing practices and with the same degree of care that is customarily
24 employed and exercised by Seller [BTM] in the administration and servicing
25 of loans of a similar nature held by it for its own account (the "Servicing
26 Standard")." (Participation Agreement, Schedule 4, ¶9.)
- 27 • "The Seller [BTM] shall maintain appropriate records and books of account
28 reflecting interest accrued and interest received, interest rate changes, principal
payments and all other transactions or actions affecting the Loan, which
records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)
- "Seller [BTM] further agrees that in performing its obligations hereunder,
Seller shall: (a) act in a custodial capacity on behalf of the Participant
[Plaintiff] with respect to its holding of any underlying instrument or collateral
and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and

(d) administer the Loan in accordance with the Servicing Standard as provided herein.” (Participation Agreement, Schedule 4, ¶ 9.)

1
2 229. The parties agreed that the Plaintiff would advance funds to BTM, as called
3 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
4 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
5 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
6 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
7 (the Church), to service the loan and advance the funds towards the construction project,
8 according to the budget and plans approved and relied upon by the Plaintiff in entering into
9 the Participation Agreement. Upon information and belief, BTM had an agreement with
10 Arks whereby Arks took over the servicing and administration of the Loan to True Way.
11 The Participation Agreement specifically references and incorporates the Loan Agreement,
12 which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower (the Church),
13 and which provides that “the Loan proceeds are to be used by Church solely for the
14 construction of a church, church-related improvements, and/or costs related thereto (the
15 “Project”) upon the land described in the Security Instrument (the “Property”) in accordance
16 with the plans and specifications approved by ARKS.”

17 230. Plaintiff agreed to advance the funds in response to periodic draws based on
18 the project plans and budget which were attached to the Participation Agreement and/or the
19 Loan Agreement that was incorporated into the Participation Agreement, and which had
20 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
21 committing to the Participation Agreement for the True Way Loan. Defendant BTM agreed
22 to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors, suppliers and
23 other third parties as well as specific project-related servicing fees to itself, Arks and Noah,
24 according to the budget and plans submitted to and approved by Plaintiffs and incorporated
25 into the Participation Agreement, and agreed to get prior approval from Plaintiff for any
26 material change to the budget or plans.

27 ///

28 ///

- 1 • failing to provide loan servicing and administration in accordance with the Loan
- 2 documents and with commercially acceptable loan servicing practices;
- 3 • requiring additional payments by Plaintiff beyond what was due under the
- 4 Participation Agreement and the approved budget and plans incorporated therein;
- 5 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 6 holding any proceeds received for the Loan;
- 7 • commingling for significant periods of time proceeds received on the Loan with other
- 8 funds.

9 Contract Damages

10 233. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
11 as yet unascertained, but which Plaintiff believes is at least \$24,381 and which will be
12 proved at trial.

13 234. Additionally, Plaintiff incurred legal and administrative costs in addressing
14 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
15 have incurred.

16 Fraud – Defendants' Misrepresentations

17 235. On the periodic draw requests sent to Plaintiff beginning in February 2008,
18 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
19 had been spent on the True Way project, in accordance with the approved plans and budget,
20 as per the reports, forms, and spreadsheets submitted with the draw requests, and that the
21 reports, forms, and spreadsheets provided to Plaintiff accurately represented the value of the
22 project to that point.

23 236. Prior to Plaintiff's executing the Participation Agreement and making each
24 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
25 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
26 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
27 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status

28 ///

1 updates on projects, including the True Way project, and was told that all funds previously
2 advanced by Plaintiff to BTM and its agents on the True Way loan had been put towards the
3 project according to the budget and plans submitted to, approved by and relied on by
4 Plaintiff.

5 Fraud – True Facts

6 237. In fact, Defendants' representations to Plaintiff as described above were false.
7 The true facts were that:

- 8 • Plaintiff's funds had not been spent on the True Way project in accordance with the
9 approved plans and budget as per the reports, forms, and spreadsheets submitted with
10 the periodic draw requests sent to Plaintiff beginning in February 2008, and the
11 reports, forms, and spreadsheets submitted to Plaintiff did not accurately represent the
12 value of the project to that point;
- 13 • all funds previously advanced by Plaintiff to BTM and its agents on the True Way
14 loan had not been put towards the project according to the budget and plans submitted
15 to, approved by and relied on by Plaintiff;

16 Fraud - Concealment

17 238. Defendants David Smith and BTM, including through their agents, concealed
18 from and failed to disclose to Plaintiff the following:

- 19 • the true financial and operational status of the loans and projects, including the True
20 Way project;
- 21 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
22 projects, including the True Way project, and were not being applied only to project-
23 related costs, according to the plans and budgets submitted to, approved by and relied
24 on by Plaintiff;
- 25 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
26 including payments made to unrelated third parties - friends of David Smith and
27 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
28 Lachman Lane Property;

- 1 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
- 2 and its investments in overseeing the management, servicing and administration of
- 3 the loans and projects;
- 4 • that Smith and BTM were commingling for significant periods of time proceeds
- 5 received on the Loan with other funds;
- 6 • that Smith and BTM did not intend to immediately advance the full amount of
- 7 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
- 8 or else return the funds to Plaintiff, and established money market accounts to hold
- 9 such funds longer than five business days;
- 10 • that Smith and BTM were not maintaining appropriate records and books of account
- 11 reflecting interest accrued and interest received, interest rate changes, principal
- 12 payments and all other transactions or actions affecting the Loan.

13 Fraud – Reliance, Discovery and Damage

14 239. Plaintiff continued to fund the True Way loan and project in response to

15 periodic draw requests from Defendants, based on continued assurances and representations

16 of Defendants Smith and BTM, including through their agents at Arks and Noah, that

17 Plaintiff's funds advanced thus far had gone towards the projects according to the plans and

18 budget reviewed, approved and relied upon by Plaintiff, and based on Defendants' failure to

19 disclose that Plaintiff's funds were being commingled with other funds and diverted to non-

20 project related costs and payments. In or about February 2009, Plaintiff began working on a

21 new program to take over the servicing and administration of the loans, expand the Build to

22 Minister church loan program into various investment funds, and market those funds to third

23 parties.

24 240. On or about July 31, 2009, during this effort to expand the loan program,

25 Plaintiff first learned of problems with the loans, including that Defendants and their agents

26 owed monies to third parties and were unable to pay them despite Plaintiff and other

27 investors having advanced funds as requested. Over the course of the next several months,

28 Plaintiff conducted an investigation in an attempt to determine what had happened to

1 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
2 misrepresentations, concealment and malfeasance. With respect to the problems discovered
3 with the loans, Plaintiff contributed additional monies in order to complete the projects,
4 including paying outstanding bills, liens, legal and administration fees, modifying the terms
5 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
6 new contractors to complete the construction.

7 241. But for Defendants' misrepresentations and concealment as described above,
8 Plaintiff would not have continued to provide funds in response to draw requests from
9 Defendants or their agents for the projects, including the True Way project, and would not
10 have invested efforts, time and money creating a new program to take over servicing of the
11 loans, expand the Build to Minister program into various investment funds, and market those
12 funds to third parties.

13 242. As a result of Defendants' misrepresentations and concealments, Plaintiff has
14 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
15 \$24,381 and which will be proved at trial. Additionally, Plaintiff incurred legal and
16 administrative costs in addressing and mitigating the harm caused by Defendants'
17 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
18 funds expended in creating a new program to take over servicing of the loans, expand the
19 Build to Minister program into various investment funds, and market those funds to third
20 parties, which it would not have expended but for Defendants' misrepresentations and
21 concealments.

22 **Plaintiff Muse Children's GS Trust**

23 ***Truth Tabernacle Ministries, Inc. Loan***

24 **Contract Terms**

25 243. On April 16, 2008, Plaintiff Muse Children's GS Trust entered into a
26 Construction Note Participation Agreement with Defendant BTM on a construction loan to
27 Truth Tabernacle Ministries, Inc. ("TTM Participation Agreement" or "Participation
28 Agreement"). The TTM Participation Agreement provided that Plaintiff (designated

1 "Participant") would have a participation interest of 10% in the construction note amount of
2 \$2,210,736, which Defendant BTM (designated "Seller") would loan to the church, Truth
3 Tabernacle Ministries, Inc., (designated "Borrower"). Under the TTM Participation
4 Agreement, Plaintiff committed to fund a total of \$221,073.60, to be advanced to Defendant
5 BTM in response to periodic draw requests from Defendant according to a projected draw
6 schedule. In consideration for Plaintiff's advancing the funds, Plaintiff was entitled to
7 receive the return of the principal invested, as well as 10.5% interest on such amount, and its
8 pro rata portion (10%) of a Participation Fee (of \$33,161.04), with interest and fees to be
9 paid monthly, and the principal payable to Plaintiff at the issuance of a Certificate of
10 Occupancy for the Property or twelve (12) months from the date of Loan Closing, whichever
11 first occurs, as provided for in the Loan Agreement which was specifically referenced by
12 and incorporated into the Participation Agreement. The Participation Agreement also
13 provided that in the event Plaintiff had not received its return of principal at the time
14 specified, BTM was either to provide or to arrange additional financing so that Plaintiff
15 would receive all its funds.

16 244. Defendant BTM, for its part, agreed among other things, that:

- 17 • "In the event Seller [BTM] does not for any reason advance to Borrower
18 [church] the full amount of the contemplated advance [the draws of funds that
19 Defendants called for every month] on the date of receipt of such Purchase
20 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
21 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
22 to the amount of such contemplated advance not made." (Participation
23 Agreement, Schedule 4, ¶2.)
- 24 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
25 the terms of the Loan Documents and with this Agreement. Seller [BTM]
26 shall provide loan servicing in accordance with commercially acceptable loan
27 servicing practices and with the same degree of care that is customarily
28 employed and exercised by Seller [BTM] in the administration and servicing
of loans of a similar nature held by it for its own account (the "Servicing
Standard")." (Participation Agreement, Schedule 4, ¶9.)
- "The Seller [BTM] shall maintain appropriate records and books of account
reflecting interest accrued and interest received, interest rate changes, principal
payments and all other transactions or actions affecting the Loan, which
records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)

- 1 • “Seller [BTM] further agrees that in performing its obligations hereunder,
2 Seller shall: (a) act in a custodial capacity on behalf of the Participant
3 [Plaintiff] with respect to its holding of any underlying instrument or collateral
4 and in holding any proceeds received for the Loan; (b) not commingle for any
5 significant period of time proceeds received on the Loan; (c) directly pass
6 through any proceeds received from the Loan to Participant [Plaintiff] as
7 provided in Section 4 of this Agreement, less any proceeds that represent
8 servicing or other compensation to Seller [BTM] or an interest in the Loan
9 retained by the Seller [BTM], all as more particularly provided for herein; and
10 (d) administer the Loan in accordance with the Servicing Standard as provided
11 herein.” (Participation Agreement, Schedule 4, ¶ 9.)
- 12 • “Seller [BTM] represents and warrants to Participant [Plaintiff] that, as of the
13 date hereof ... no default in the payment of principal or interest on the Loan
14 has occurred and remains uncured under the Loan Documents.” (Participation
15 Agreement, Schedule 4, ¶ 15.)
- 16 • “[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
17 may take or omit to take any action under any of the Loan Documents which
18 would result in the following (each a “Material Change”): (a) reduce or
19 increase the amounts of principal or interest payments of the Loan, (b) reduce
20 or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
21 postpone any due date for payment of principal or interest in which Participant
22 [Plaintiff] shares, including, without limitation, the final maturity date of the
23 Loan, (d) except as expressly permitted under the Loan Documents, release or
24 subordinate any existing collateral described in the Loan Documents, (e)
25 release the liability of Borrower or any guarantor for the Loan, (f) consent to
26 the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
27 (ii) any direct or indirect interest in Borrower ... (g) make or consent to any
28 change in the principal amount of the Note; or (h) waive a default under the
Loan Documents arising from the failure to make payments as and when due
on the Loan. . . .” (Participation Agreement, Schedule 4, ¶ 11.)
- “Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
of any material default with respect to the Loan of which Seller [BTM] is
actually aware and of any other matters which, in Seller’s judgment, materially
affect the interest of Participant [Plaintiff] with respect to the Loan
(collectively, a “Material Default”).” (Participation Agreement, Schedule 4, ¶
11.)

22 245. The parties agreed that the Plaintiff would advance funds to BTM, as called
23 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
24 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
25 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
26 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
27 (the Church), to service the loan and advance the funds towards the construction project,
28 according to the budget and plans approved and relied upon by the Plaintiff in entering into

1 the Participation Agreement. Upon information and belief, BTM had an agreement with
2 Arks whereby Arks took over the servicing and administration of the Loan to Truth
3 Tabernacle Ministries, Inc. The Participation Agreement specifically references and
4 incorporates the Loan Agreement, which is between Arks “and its affiliate BTM Funding,
5 Inc.” and the Borrower (the Church), and which provides that “the Loan proceeds are to be
6 used by Church solely for the construction of a church, church-related improvements, and/or
7 costs related thereto (the “Project”) upon the land described in the Security Instrument (the
8 “Property”) in accordance with the plans and specifications approved by ARKS.” See Build
9 to Minister Loan Agreement (Truth Tabernacle Ministries, Inc.), dated May 15, 2008.

10 246. Plaintiff agreed to advance the funds in response to periodic draws based on
11 the project plans and budget which were attached to the Participation Agreement and/or the
12 Loan Agreement that was incorporated into the Participation Agreement, and which had
13 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
14 committing to the Participation Agreement for the Truth Tabernacle Ministries, Inc. Loan.
15 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
16 contractors, suppliers and other third parties as well as specific project-related servicing fees
17 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
18 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
19 approval from Plaintiff for any material change to the budget or plans.

20 Contract Performance and Breach

21 247. Upon execution of the Participation Agreement, Plaintiff began funding draw
22 requests for the Truth Tabernacle Ministries, Inc. project based on draw requests by BTM
23 and its agents. Plaintiff Muse Children’s GS Trust advanced \$221,074 to BTM and its
24 agents for the Truth Tabernacle Ministries, Inc. Loan between July 2008 and May 2009.

25 248. Defendant BTM breached the Participation Agreement by, among other things,
26 the following:

- 27 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
28 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle

1 Ministries, Inc. (or to the servicers or contractors for authorized project
2 disbursements on the Borrower's behalf), and failing to return within five business
3 days to Plaintiff any funds not so advanced;

- 4 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
5 contractors, suppliers and other third parties as well as specific project-related
6 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
7 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
8 failing to get prior approval from Plaintiff for any material change to the budget or
9 plans;
- 10 • failing to maintain appropriate records and books of account reflecting interest
11 accrued and interest received, interest rate changes, principal payments and all other
12 transactions or actions affecting the Loan;
- 13 • not paying Plaintiff its return of principal at the earlier of the issuance of the
14 certificate of occupancy or within 12 months of the Loan Closing;
- 15 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
16 Closing and not providing or arranging additional financing to allow Plaintiff to
17 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
18 within 12 months of the Loan Closing;
- 19 • not paying Plaintiff its interest and fees on a monthly basis;
- 20 • failing to provide loan servicing and administration in accordance with the Loan
21 documents and with commercially acceptable loan servicing practices;
- 22 • requiring additional payments by Plaintiff beyond what was due under the
23 Participation Agreement and the approved budget and plans incorporated therein;
- 24 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
25 holding any proceeds received for the Loan;
- 26 • commingling for significant periods of time proceeds received on the Loan with other
27 funds;

28 ///

- 1 • failing to inform Plaintiff that as of the date of the Participation Agreement a default
- 2 in the payment of principal or interest on the Loan had occurred and remained
- 3 uncured;
- 4 • waiving a default under the Loan Documents arising from the failure to make
- 5 payments as and when due on the Loan without obtaining the consent of Plaintiff;
- 6 • postponing due dates for payment of principal or interest in which Plaintiff shared
- 7 without obtaining the consent of Plaintiff;
- 8 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
- 9 which Defendant was aware.

10 Contract Damages

11 249. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
12 as yet unascertained, but which Plaintiff believes is at least \$83,105 and which will be
13 proved at trial.

14 250. Additionally, Plaintiff incurred legal and administrative costs in addressing
15 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
16 have incurred.

17 Fraud – Defendants' Misrepresentations

18 251. On the periodic draw requests sent to Plaintiff beginning in July 2008, Smith's
19 and BTM's agents signed attestations that the monies advanced thus far by Plaintiff had
20 been spent on the Truth Tabernacle project, in accordance with the approved plans and
21 budget, as per the reports, forms, and spreadsheets submitted with the draw requests, and
22 that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
23 value of the project to that point.

24 252. Prior to Plaintiff's executing the Participation Agreement and making each
25 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
26 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
27 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
28 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status

1 updates on projects, including the Truth Tabernacle Ministries, Inc. project, and was told
2 that all funds previously advanced by Plaintiff to BTM and its agents on the Truth
3 Tabernacle loan had been put towards the project according to the budget and plans
4 submitted to, approved by and relied on by Plaintiff.

5 Fraud – True Facts

6 253. In fact, Defendants' representations to Plaintiff as described above were false.

7 The true facts were that:

- 8 • Plaintiff's funds had not been spent on the Truth Tabernacle project in accordance
9 with the approved plans and budget as per the reports, forms, and spreadsheets
10 submitted with the periodic draw requests sent to Plaintiff beginning in July 2008,
11 and the reports, forms, and spreadsheets submitted to Plaintiff did not accurately
12 represent the value of the project to that point;
- 13 • all funds previously advanced by Plaintiff to BTM and its agents on the Truth
14 Tabernacle loan had not been put towards the project according to the budget and
15 plans submitted to, approved by and relied on by Plaintiff;

16 Fraud - Concealment

17 254. Defendants David Smith and BTM, including through their agents, concealed
18 from and failed to disclose to Plaintiff the following:

- 19 • the true financial and operational status of the loans and projects, including the Truth
20 Tabernacle project;
- 21 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
22 projects, including the Truth Tabernacle project, and were not being applied only to
23 project-related costs, according to the plans and budgets submitted to, approved by
24 and relied on by Plaintiff;
- 25 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
26 including payments made to unrelated third parties - friends of David Smith and
27 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
28 Lachman Lane Property;

- 1 • that Smith and BTM were making undisclosed, unapproved payments for “legal fees”
2 to Randy Barton and for “sales commissions” to Carmen Cople Smith;
- 3 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
4 and its investments in overseeing the management, servicing and administration of
5 the loans and projects;
- 6 • that Smith and BTM were commingling for significant periods of time proceeds
7 received on the Loan with other funds;
- 8 • that Smith and BTM did not intend to immediately advance the full amount of
9 Plaintiff’s funds directly to the Borrower or to servicers or contractors on their behalf
10 or else return the funds to Plaintiff, and established money market accounts to hold
11 such funds longer than five business days;
- 12 • that Smith and BTM were not maintaining appropriate records and books of account
13 reflecting interest accrued and interest received, interest rate changes, principal
14 payments and all other transactions or actions affecting the Loan.

15 Fraud – Reliance, Discovery and Damage

16 255. Plaintiff continued to fund the Truth Tabernacle loan and project in response
17 to periodic draw requests from Defendants, based on continued assurances and
18 representations of Defendants Smith and BTM, including through their agents at Arks and
19 Noah, that Plaintiff’s funds advanced thus far had gone towards the projects according to the
20 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants’
21 failure to disclose that Plaintiff’s funds were being commingled with other funds and
22 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
23 began working on a new program to take over the servicing and administration of the loans,
24 expand the Build to Minister church loan program into various investment funds, and market
25 those funds to third parties.

26 256. On or about July 31, 2009, during this effort to expand the loan program,
27 Plaintiff first learned of problems with the loans, including that Defendants and their agents
28 owed monies to third parties and were unable to pay them despite Plaintiff and other

1 investors having advanced funds as requested. Over the course of the next several months,
2 Plaintiff conducted an investigation in an attempt to determine what had happened to
3 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
4 misrepresentations, concealment and malfeasance. With respect to the problems discovered
5 with the loans, Plaintiff contributed additional monies in order to complete the projects,
6 including paying outstanding bills, liens, legal and administration fees, modifying the terms
7 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
8 new contractors to complete the construction.

9 257. But for Defendants' misrepresentations and concealment as described above,
10 Plaintiff would not have continued to provide funds in response to draw requests from
11 Defendants or their agents for the projects, including the Truth Tabernacle project, and
12 would not have invested efforts, time and money creating a new program to take over
13 servicing of the loans, expand the Build to Minister program into various investment funds,
14 and market those funds to third parties.

15 258. As a result of Defendants' misrepresentations and concealments, Plaintiff has
16 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
17 \$83,105 and which will be proved at trial. Additionally, Plaintiff incurred legal and
18 administrative costs in addressing and mitigating the harm caused by Defendants'
19 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
20 funds expended in creating a new program to take over servicing of the loans, expand the
21 Build to Minister program into various investment funds, and market those funds to third
22 parties, which it would not have expended but for Defendants' misrepresentations and
23 concealments.

24 *Agape Word Church, Inc. Loan*

25 Contract Terms

26 259. On December 16, 2008, Plaintiff Muse Children's GS Trust entered into a
27 Construction Note Participation Agreement with Defendant BTM on a construction loan to
28 Agape Word Church, Inc. ("Agape Participation Agreement" or "Participation Agreement").

1 The Agape Participation Agreement provided that Plaintiff (designated "Participant") would
2 have a participation interest of 10% in the construction note amount of \$686,931, which
3 Defendant BTM (designated "Seller") would loan to the church, Agape Word Church, Inc.
4 (designated "Borrower"). Under the Agape Participation Agreement, Plaintiff committed to
5 fund a total of \$68,693.10, to be advanced to Defendant BTM in response to periodic draw
6 requests from Defendant according to a projected draw schedule. In consideration for
7 Plaintiff's advancing the funds, Plaintiff was entitled to receive the return of the principal
8 invested, as well as 10.5% interest on such amount, and its pro rata portion (10%) of a
9 Participation Fee (of \$10,303.96), with interest and fees to be paid monthly, and the
10 principal payable to Plaintiff at the issuance of a Certificate of Occupancy for the Property
11 or twelve (12) months from the date of Loan Closing, whichever first occurs, as provided for
12 in the Loan Agreement which was specifically referenced by and incorporated into the
13 Participation Agreement. The Participation Agreement also provided that in the event
14 Plaintiff had not received its return of principal at the time specified, BTM was either to
15 provide or to arrange additional financing so that Plaintiff would receive all its funds.

16 260. Defendant BTM, for its part, agreed among other things, that:

- 17 • "In the event Seller [BTM] does not for any reason advance to Borrower
18 [church] the full amount of the contemplated advance [the draws of funds that
19 Defendants called for every month] on the date of receipt of such Purchase
20 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
21 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
22 to the amount of such contemplated advance not made." (Participation
23 Agreement, Schedule 4, ¶2.)
- 24 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
25 the terms of the Loan Documents and with this Agreement. Seller [BTM]
26 shall provide loan servicing in accordance with commercially acceptable loan
27 servicing practices and with the same degree of care that is customarily
28 employed and exercised by Seller [BTM] in the administration and servicing
of loans of a similar nature held by it for its own account (the "Servicing
Standard")." (Participation Agreement, Schedule 4, ¶9.)
- "The Seller [BTM] shall maintain appropriate records and books of account
reflecting interest accrued and interest received, interest rate changes, principal
payments and all other transactions or actions affecting the Loan, which
records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)

///

- 1 • “Seller [BTM] further agrees that in performing its obligations hereunder,
2 Seller shall: (a) act in a custodial capacity on behalf of the Participant
3 [Plaintiff] with respect to its holding of any underlying instrument or collateral
4 and in holding any proceeds received for the Loan; (b) not commingle for any
5 significant period of time proceeds received on the Loan; (c) directly pass
6 through any proceeds received from the Loan to Participant [Plaintiff] as
7 provided in Section 4 of this Agreement, less any proceeds that represent
8 servicing or other compensation to Seller [BTM] or an interest in the Loan
9 retained by the Seller [BTM], all as more particularly provided for herein; and
10 (d) administer the Loan in accordance with the Servicing Standard as provided
11 herein.” (Participation Agreement, Schedule 4, ¶ 9.)

7 261. The parties agreed that the Plaintiff would advance funds to BTM, as called
8 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
9 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
10 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
11 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
12 (the Church), to service the loan and advance the funds towards the construction project,
13 according to the budget and plans approved and relied upon by the Plaintiff in entering into
14 the Participation Agreement. Upon information and belief, BTM had an agreement with
15 Arks whereby Arks took over the servicing and administration of the Loan to Agape Word
16 Church, Inc. The Participation Agreement specifically references and incorporates the Loan
17 Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower
18 (the Church), and which provides that “the Loan proceeds are to be used by Church solely
19 for the construction of a church, church-related improvements, and/or costs related thereto
20 (the “Project”) upon the land described in the Security Instrument (the “Property”) in
21 accordance with the plans and specifications approved by ARKS.”

22 262. Plaintiff agreed to advance the funds in response to periodic draws based on
23 the project plans and budget which were attached to the Participation Agreement and/or the
24 Loan Agreement that was incorporated into the Participation Agreement, and which had
25 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
26 committing to the Participation Agreement for the Agape Word Church, Inc. Loan.
27 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
28 contractors, suppliers and other third parties as well as specific project-related servicing fees

1 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
2 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
3 approval from Plaintiff for any material change to the budget or plans.

4 Contract Performance and Breach

5 263. Upon execution of the Participation Agreement, Plaintiff began funding draw
6 requests for the Agape Word Church, Inc. project based on draw requests by BTM and its
7 agents. Plaintiff Muse Children's GS Trust advanced \$26,134 to BTM and its agents for the
8 Agape Word Church, Inc. Loan between January 2009 and March 2009.

9 264. Defendant BTM breached the Participation Agreement by, among other things,
10 the following:

- 11 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
12 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
13 Ministries, Inc. (or to the servicers or contractors for authorized project
14 disbursements on the Borrower's behalf), and failing to return within five business
15 days to Plaintiff any funds not so advanced;
- 16 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
17 contractors, suppliers and other third parties as well as specific project-related
18 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
19 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
20 failing to get prior approval from Plaintiff for any material change to the budget or
21 plans;
- 22 • failing to maintain appropriate records and books of account reflecting interest
23 accrued and interest received, interest rate changes, principal payments and all other
24 transactions or actions affecting the Loan;
- 25 • not paying Plaintiff its return of principal at the earlier of the issuance of the
26 certificate of occupancy or within 12 months of the Loan Closing;
- 27 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
28 Closing and not providing or arranging additional financing to allow Plaintiff to

1 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
2 within 12 months of the Loan Closing;

- 3 • not paying Plaintiff its interest and fees on a monthly basis;
- 4 • failing to provide loan servicing and administration in accordance with the Loan
5 documents and with commercially acceptable loan servicing practices;
- 6 • requiring additional payments by Plaintiff beyond what was due under the
7 Participation Agreement and the approved budget and plans incorporated therein;
- 8 • postponing due dates for payment of principal or interest in which Plaintiff shared
9 without obtaining the consent of Plaintiff;
- 10 • failing to require Borrower to pay the equity down payment at Closing as required by
11 the Loan Documents;
- 12 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
13 holding any proceeds received for the Loan;
- 14 • commingling for significant periods of time proceeds received on the Loan with other
15 funds.

16 Contract Damages

17 265. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
18 as yet unascertained, but which Plaintiff believes is at least \$22,902 and which will be
19 proved at trial.

20 266. Additionally, Plaintiff incurred legal and administrative costs in addressing
21 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
22 have incurred.

23 Fraud – Defendants' Misrepresentations

24 267. On the periodic draw requests sent to Plaintiff beginning in January 2009,
25 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
26 had been spent on the Agape Word Church, Inc. project, in accordance with the approved
27 plans and budget, as per the reports, forms, and spreadsheets submitted with the draw

28 ///

1 requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
2 represented the value of the project to that point.

3 268. Prior to Plaintiff's executing the Participation Agreement and making each
4 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
5 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
6 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
7 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
8 updates on projects, including the Agape Word Church, Inc. project, and was told that all
9 funds previously advanced by Plaintiff to BTM and its agents on the Agape Word Church,
10 Inc. loan had been put towards the project according to the budget and plans submitted to,
11 approved by and relied on by Plaintiff.

12 Fraud – True Facts

13 269. In fact, Defendants' representations to Plaintiff as described above were false.
14 The true facts were that:

- 15 • Plaintiff's funds had not been spent on the Agape Word Church, Inc. project in
16 accordance with the approved plans and budget as per the reports, forms, and
17 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
18 January 2009, and the reports, forms, and spreadsheets submitted to Plaintiff did not
19 accurately represent the value of the project to that point;
- 20 • all funds previously advanced by Plaintiff to BTM and its agents on the Agape Word
21 Church, Inc. loan had not been put towards the project according to the budget and
22 plans submitted to, approved by and relied on by Plaintiff;

23 Fraud - Concealment

24 270. Defendants David Smith and BTM, including through their agents, concealed
25 from and failed to disclose to Plaintiff the following:

- 26 • the true financial and operational status of the loans and projects, including the Agape
27 Word Church, Inc. project;

28 ///

- 1 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
2 projects, including the Agape Word Church, Inc. project, and were not being applied
3 only to project-related costs, according to the plans and budgets submitted to,
4 approved by and relied on by Plaintiff;
- 5 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
6 including payments made to unrelated third parties - friends of David Smith and
7 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
8 Lachman Lane Property;
- 9 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
10 and its investments in overseeing the management, servicing and administration of
11 the loans and projects;
- 12 • that Smith and BTM were commingling for significant periods of time proceeds
13 received on the Loan with other funds;
- 14 • that Smith and BTM did not intend to immediately advance the full amount of
15 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
16 or else return the funds to Plaintiff, and established money market accounts to hold
17 such funds longer than five business days;
- 18 • that Smith and BTM were not maintaining appropriate records and books of account
19 reflecting interest accrued and interest received, interest rate changes, principal
20 payments and all other transactions or actions affecting the Loan.

21 Fraud – Reliance, Discovery and Damage

22 271. Plaintiff continued to fund the Agape Word Church, Inc. loan and project in
23 response to periodic draw requests from Defendants, based on continued assurances and
24 representations of Defendants Smith and BTM, including through their agents at Arks and
25 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
26 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
27 failure to disclose that Plaintiff's funds were being commingled with other funds and
28 diverted to non-project related costs and payments. In or about February 2009, Plaintiff

1 began working on a new program to take over the servicing and administration of the loans,
2 expand the Build to Minister church loan program into various investment funds, and market
3 those funds to third parties.

4 272. On or about July 31, 2009, during this effort to expand the loan program,
5 Plaintiff first learned of problems with the loans, including that Defendants and their agents
6 owed monies to third parties and were unable to pay them despite Plaintiff and other
7 investors having advanced funds as requested. Over the course of the next several months,
8 Plaintiff conducted an investigation in an attempt to determine what had happened to
9 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
10 misrepresentations, concealment and malfeasance. With respect to the problems discovered
11 with the loans, Plaintiff contributed additional monies in order to complete the projects,
12 including paying outstanding bills, liens, legal and administration fees, modifying the terms
13 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
14 new contractors to complete the construction.

15 273. But for Defendants' misrepresentations and concealment as described above,
16 Plaintiff would not have continued to provide funds in response to draw requests from
17 Defendants or their agents for the projects, including the Agape Word Church, Inc. project,
18 and would not have invested efforts, time and money creating a new program to take over
19 servicing of the loans, expand the Build to Minister program into various investment funds,
20 and market those funds to third parties.

21 274. As a result of Defendants' misrepresentations and concealments, Plaintiff has
22 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
23 \$22,902 and which will be proved at trial. Additionally, Plaintiff incurred legal and
24 administrative costs in addressing and mitigating the harm caused by Defendants'
25 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
26 funds expended in creating a new program to take over servicing of the loans, expand the
27 Build to Minister program into various investment funds, and market those funds to third

28 ///

1 parties, which it would not have expended but for Defendants' misrepresentations and
2 concealments.

3 *Antioch Bible Fellowship, Inc. Loan*

4 Contract Terms

5 275. On February 28, 2008, Plaintiff Muse Children's GS Trust entered into a
6 Construction Note Participation Agreement with Defendant BTM on a construction loan to
7 Antioch Bible Fellowship, Inc. ("Antioch Participation Agreement" or "Participation
8 Agreement"). The Antioch Participation Agreement provided that Plaintiff (designated
9 "Participant") would have a participation interest of 10% in the construction note amount of
10 \$954,000, which Defendant BTM (designated "Seller") would loan to the church, Antioch
11 Bible Fellowship, Inc. (designated "Borrower"). Under the Antioch Participation
12 Agreement, Plaintiff committed to fund a total of \$95,400, to be advanced to Defendant
13 BTM in response to periodic draw requests from Defendant according to a projected draw
14 schedule. In consideration for Plaintiff's advancing the funds, Plaintiff was entitled to
15 receive the return of the principal invested, as well as 10.5% interest on such amount, and its
16 pro rata portion (10%) of a Participation Fee (of \$14,310), with interest and fees to be paid
17 monthly, and the principal payable to Plaintiff at the issuance of a Certificate of Occupancy
18 for the Property or twelve (12) months from the date of Loan Closing, whichever first
19 occurs, as provided for in the Loan Agreement which was specifically referenced by and
20 incorporated into the Participation Agreement. The Participation Agreement also provided
21 that in the event Plaintiff had not received its return of principal at the time specified, BTM
22 was either to provide or to arrange additional financing so that Plaintiff would receive all its
23 funds.

24 276. Defendant BTM, for its part, agreed among other things, that:

- 25 • "In the event Seller [BTM] does not for any reason advance to Borrower
26 [church] the full amount of the contemplated advance [the draws of funds that
27 Defendants called for every month] on the date of receipt of such Purchase
28 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
to the amount of such contemplated advance not made." (Participation
Agreement, Schedule 4, ¶2.)

- 1 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
2 the terms of the Loan Documents and with this Agreement. Seller [BTM]
3 shall provide loan servicing in accordance with commercially acceptable loan
4 servicing practices and with the same degree of care that is customarily
5 employed and exercised by Seller [BTM] in the administration and servicing
6 of loans of a similar nature held by it for its own account (the “Servicing
7 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 8 • “The Seller [BTM] shall maintain appropriate records and books of account
9 reflecting interest accrued and interest received, interest rate changes, principal
10 payments and all other transactions or actions affecting the Loan, which
11 records shall be keep in accordance with accounting principles consistently
12 and customarily applied by Seller [BTM].” (Participation Agreement,
13 Schedule 4, ¶9.)
- 14 • “Seller [BTM] further agrees that in performing its obligations hereunder,
15 Seller shall: (a) act in a custodial capacity on behalf of the Participant
16 [Plaintiff] with respect to its holding of any underlying instrument or collateral
17 and in holding any proceeds received for the Loan; (b) not commingle for any
18 significant period of time proceeds received on the Loan; (c) directly pass
19 through any proceeds received from the Loan to Participant [Plaintiff] as
20 provided in Section 4 of this Agreement, less any proceeds that represent
21 servicing or other compensation to Seller [BTM] or an interest in the Loan
22 retained by the Seller [BTM], all as more particularly provided for herein; and
23 (d) administer the Loan in accordance with the Servicing Standard as provided
24 herein.” (Participation Agreement, Schedule 4, ¶ 9.)

25 277. The parties agreed that the Plaintiff would advance funds to BTM, as called
26 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
27 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
28 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
(the Church), to service the loan and advance the funds towards the construction project,
according to the budget and plans approved and relied upon by the Plaintiff in entering into
the Participation Agreement. Upon information and belief, BTM had an agreement with
Arks whereby Arks took over the servicing and administration of the Loan to Antioch Bible
Fellowship, Inc. The Participation Agreement specifically references and incorporates the
Loan Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the
Borrower (the Church), and which provides that “the Loan proceeds are to be used by
Church solely for the construction of a church, church-related improvements, and/or costs

27 ///

28 ///

1 related thereto (the "Project") upon the land described in the Security Instrument (the
2 "Property") in accordance with the plans and specifications approved by ARKS."

3 278. Plaintiff agreed to advance the funds in response to periodic draws based on
4 the project plans and budget which were attached to the Participation Agreement and/or the
5 Loan Agreement that was incorporated into the Participation Agreement, and which had
6 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
7 committing to the Participation Agreement for the Antioch Bible Fellowship, Inc. Loan.
8 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
9 contractors, suppliers and other third parties as well as specific project-related servicing fees
10 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
11 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
12 approval from Plaintiff for any material change to the budget or plans.

13 Contract Performance and Breach

14 279. Upon execution of the Participation Agreement, Plaintiff began funding draw
15 requests for the Antioch Bible Fellowship, Inc. project based on draw requests by BTM and
16 its agents. Plaintiff Muse Children's GS Trust advanced \$95,400 to BTM and its agents for
17 the Antioch Bible Fellowship, Inc. Loan between February 2008 and December 2008.

18 280. Defendant BTM breached the Participation Agreement by, among other things,
19 the following:

- 20 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
21 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
22 Ministries, Inc. (or to the servicers or contractors for authorized project
23 disbursements on the Borrower's behalf), and failing to return within five business
24 days to Plaintiff any funds not so advanced;
- 25 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
26 contractors, suppliers and other third parties as well as specific project-related
27 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
28 to and approved by Plaintiffs and incorporated into the Participation Agreement, and

- 1 failing to get prior approval from Plaintiff for any material change to the budget or
- 2 plans;
- 3 • failing to maintain appropriate records and books of account reflecting interest
- 4 accrued and interest received, interest rate changes, principal payments and all other
- 5 transactions or actions affecting the Loan;
- 6 • not paying Plaintiff its return of principal at the earlier of the issuance of the
- 7 certificate of occupancy or within 12 months of the Loan Closing;
- 8 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
- 9 Closing and not providing or arranging additional financing to allow Plaintiff to
- 10 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
- 11 within 12 months of the Loan Closing;
- 12 • not paying Plaintiff its interest and fees on a monthly basis;
- 13 • failing to provide loan servicing and administration in accordance with the Loan
- 14 documents and with commercially acceptable loan servicing practices;
- 15 • requiring additional payments by Plaintiff beyond what was due under the
- 16 Participation Agreement and the approved budget and plans incorporated therein;
- 17 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 18 holding any proceeds received for the Loan;
- 19 • commingling for significant periods of time proceeds received on the Loan with other
- 20 funds.

21 Contract Damages

22 281. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
23 as yet unascertained, but which Plaintiff believes is at least \$20,692 and which will be
24 proved at trial.

25 282. Additionally, Plaintiff incurred legal and administrative costs in addressing
26 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
27 have incurred.

28 ///

1 Fraud – Defendants’ Misrepresentations

2 283. On the periodic draw requests sent to Plaintiff beginning in February 2008,
3 Smith’s and BTM’s agents signed attestations that the monies advanced thus far by Plaintiff
4 had been spent on the Antioch Bible Fellowship, Inc. project, in accordance with the
5 approved plans and budget, as per the reports, forms, and spreadsheets submitted with the
6 draw requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
7 represented the value of the project to that point.

8 284. Prior to Plaintiff’s executing the Participation Agreement and making each
9 subsequent advance, Plaintiff’s agent Darren Maloney called periodically (approximately
10 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
11 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
12 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
13 updates on projects, including the Antioch Bible Fellowship, Inc. project, and was told that
14 all funds previously advanced by Plaintiff to BTM and its agents on the Antioch Bible
15 Fellowship, Inc. loan had been put towards the project according to the budget and plans
16 submitted to, approved by and relied on by Plaintiff.

17 Fraud – True Facts

18 285. In fact, Defendants’ representations to Plaintiff as described above were false.
19 The true facts were that:

- 20 • Plaintiff’s funds had not been spent on the Antioch Bible Fellowship, Inc. project in
21 accordance with the approved plans and budget as per the reports, forms, and
22 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
23 February 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
24 accurately represent the value of the project to that point;
- 25 • all funds previously advanced by Plaintiff to BTM and its agents on the Antioch
26 Bible Fellowship, Inc. loan had not been put towards the project according to the
27 budget and plans submitted to, approved by and relied on by Plaintiff;

28 ///

Fraud - Concealment

286. Defendants David Smith and BTM, including through their agents, concealed from and failed to disclose to Plaintiff the following:

- the true financial and operational status of the loans and projects, including the Antioch Bible Fellowship, Inc. project;
- that 100% of the funds advanced by Plaintiff to BTM were not going toward the projects, including the Antioch Bible Fellowship, Inc. project, and were not being applied only to project-related costs, according to the plans and budgets submitted to, approved by and relied on by Plaintiff;
- that Smith and BTM were diverting Plaintiff's funds for non-project related purposes, including payments made to unrelated third parties - friends of David Smith and David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the Lachman Lane Property;
- that Smith and BTM were making undisclosed, unapproved payments for "legal fees" to Randy Barton and for "sales commissions" to Carmen Copple Smith;
- that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff and its investments in overseeing the management, servicing and administration of the loans and projects;
- that Smith and BTM were commingling for significant periods of time proceeds received on the Loan with other funds;
- that Smith and BTM did not intend to immediately advance the full amount of Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf or else return the funds to Plaintiff, and established money market accounts to hold such funds longer than five business days;
- that Smith and BTM were not maintaining appropriate records and books of account reflecting interest accrued and interest received, interest rate changes, principal payments and all other transactions or actions affecting the Loan.

///

Fraud – Reliance, Discovery and Damage

1
2 287. Plaintiff continued to fund the Antioch Bible Fellowship, Inc. loan and project
3 in response to periodic draw requests from Defendants, based on continued assurances and
4 representations of Defendants Smith and BTM, including through their agents at Arks and
5 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
6 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
7 failure to disclose that Plaintiff's funds were being commingled with other funds and
8 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
9 began working on a new program to take over the servicing and administration of the loans,
10 expand the Build to Minister church loan program into various investment funds, and market
11 those funds to third parties.

12 288. On or about July 31, 2009, during this effort to expand the loan program,
13 Plaintiff first learned of problems with the loans, including that Defendants and their agents
14 owed monies to third parties and were unable to pay them despite Plaintiff and other
15 investors having advanced funds as requested. Over the course of the next several months,
16 Plaintiff conducted an investigation in an attempt to determine what had happened to
17 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
18 misrepresentations, concealment and malfeasance. With respect to the problems discovered
19 with the loans, Plaintiff contributed additional monies in order to complete the projects,
20 including paying outstanding bills, liens, legal and administration fees, modifying the terms
21 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
22 new contractors to complete the construction.

23 289. But for Defendants' misrepresentations and concealment as described above,
24 Plaintiff would not have continued to provide funds in response to draw requests from
25 Defendants or their agents for the projects, including the Antioch Bible Fellowship, Inc.
26 project, and would not have invested efforts, time and money creating a new program to take
27 over servicing of the loans, expand the Build to Minister program into various investment
28 funds, and market those funds to third parties.

1 was either to provide or to arrange additional financing so that Plaintiff would receive all its
2 funds.

3 292. Defendant BTM, for its part, agreed among other things, that:

- 4 • “In the event Seller [BTM] does not for any reason advance to Borrower
5 [church] the full amount of the contemplated advance [the draws of funds that
6 Defendants called for every month] on the date of receipt of such Purchase
7 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
8 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
9 to the amount of such contemplated advance not made.” (Participation
10 Agreement, Schedule 4, ¶2.)
- 11 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
12 the terms of the Loan Documents and with this Agreement. Seller [BTM]
13 shall provide loan servicing in accordance with commercially acceptable loan
14 servicing practices and with the same degree of care that is customarily
15 employed and exercised by Seller [BTM] in the administration and servicing
16 of loans of a similar nature held by it for its own account (the “Servicing
17 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 18 • “The Seller [BTM] shall maintain appropriate records and books of account
19 reflecting interest accrued and interest received, interest rate changes, principal
20 payments and all other transactions or actions affecting the Loan, which
21 records shall be keep in accordance with accounting principles consistently
22 and customarily applied by Seller [BTM].” (Participation Agreement,
23 Schedule 4, ¶9.)
- 24 • “Seller [BTM] further agrees that in performing its obligations hereunder,
25 Seller shall: (a) act in a custodial capacity on behalf of the Participant
26 [Plaintiff] with respect to its holding of any underlying instrument or collateral
27 and in holding any proceeds received for the Loan; (b) not commingle for any
28 significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)
- “Seller represents and warrants to Participant that, as of the date hereof ... no
default in the payment of principal or interest on the Loan has occurred and
remains uncured under the Loan Documents.” (Participation Agreement,
Schedule 4, ¶ 15.)
- “[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
may take or omit to take any action under any of the Loan Documents which
would result in the following (each a “Material Change”): (a) reduce or
increase the amounts of principal or interest payments of the Loan, (b) reduce
or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
postpone any due date for payment of principal or interest in which Participant
[Plaintiff] shares, including, without limitation, the final maturity date of the
Loan, (d) except as expressly permitted under the Loan Documents, release or

1 subordinate any existing collateral described in the Loan Documents, (e)
2 release the liability of Borrower or any guarantor for the Loan, (f) consent to
3 the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
4 (ii) any direct or indirect interest in Borrower ... (g) make or consent to any
5 change in the principal amount of the Note; or (h) waive a default under the
6 Loan Documents arising from the failure to make payments as and when due
7 on the Loan. . . ." (Participation Agreement, Schedule 4, ¶ 11.)

- 8 • "Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
9 of any material default with respect to the Loan of which Seller [BTM] is
10 actually aware and of any other matters which, in Seller's judgment, materially
11 affect the interest of Participant [Plaintiff] with respect to the Loan
12 (collectively, a "Material Default")." (Participation Agreement, Schedule 4, ¶
13 11.)

14 293. The parties agreed that the Plaintiff would advance funds to BTM, as called
15 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
16 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM's
17 consent, and that BTM or its agents would thereupon transmit the funds to BTM's affiliate
18 Arks and/or Arks' wholly owned subsidiary Noah Construction, on behalf of the Borrower
19 (the Church), to service the loan and advance the funds towards the construction project,
20 according to the budget and plans approved and relied upon by the Plaintiff in entering into
21 the Participation Agreement. Upon information and belief, BTM had an agreement with
22 Arks whereby Arks took over the servicing and administration of the Loan to Believers
23 Fellowship of Jacksonville. The Participation Agreement specifically references and
24 incorporates the Loan Agreement, which is between Arks "and its affiliate BTM Funding,
25 Inc." and the Borrower (the Church), and which provides that "the Loan proceeds are to be
26 used by Church solely for the construction of a church, church-related improvements, and/or
27 costs related thereto (the "Project") upon the land described in the Security Instrument (the
28 "Property") in accordance with the plans and specifications approved by ARKS."

29 294. Plaintiff agreed to advance the funds in response to periodic draws based on
30 the project plans and budget which were attached to the Participation Agreement and/or the
31 Loan Agreement that was incorporated into the Participation Agreement, and which had
32 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
33 committing to the Participation Agreement for the Believers Fellowship of Jacksonville
34 Loan. Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay

1 contractors, sub-contractors, suppliers and other third parties as well as specific project-
2 related servicing fees to itself, Arks and Noah, according to the budget and plans submitted
3 to and approved by Plaintiffs and incorporated into the Participation Agreement, and agreed
4 to get prior approval from Plaintiff for any material change to the budget or plans.

5 Contract Performance and Breach

6 295. Upon execution of the Participation Agreement, Plaintiff began funding draw
7 requests for the Believers Fellowship of Jacksonville project based on draw requests by
8 BTM and its agents. Plaintiff Muse Children's GS Trust advanced \$45,845 to BTM and its
9 agents for the Believers Fellowship of Jacksonville Loan between June 2008 and September
10 2008.

11 296. Defendant BTM breached the Participation Agreement by, among other things,
12 the following:

- 13 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
14 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
15 Ministries, Inc. (or to the servicers or contractors for authorized project
16 disbursements on the Borrower's behalf), and failing to return within five business
17 days to Plaintiff any funds not so advanced;
- 18 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
19 contractors, suppliers and other third parties as well as specific project-related
20 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
21 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
22 failing to get prior approval from Plaintiff for any material change to the budget or
23 plans;
- 24 • failing to maintain appropriate records and books of account reflecting interest
25 accrued and interest received, interest rate changes, principal payments and all other
26 transactions or actions affecting the Loan;
- 27 • not paying Plaintiff its return of principal at the earlier of the issuance of the
28 certificate of occupancy or within 12 months of the Loan Closing;

- 1 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
- 2 Closing and not providing or arranging additional financing to allow Plaintiff to
- 3 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
- 4 within 12 months of the Loan Closing;
- 5 • not paying Plaintiff its interest and fees on a monthly basis;
- 6 • failing to provide loan servicing and administration in accordance with the Loan
- 7 documents and with commercially acceptable loan servicing practices;
- 8 • requiring additional payments by Plaintiff beyond what was due under the
- 9 Participation Agreement and the approved budget and plans incorporated therein;
- 10 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 11 holding any proceeds received for the Loan;
- 12 • commingling for significant periods of time proceeds received on the Loan with other
- 13 funds;
- 14 • failing to inform Plaintiff that as of the date of the Participation Agreement a default
- 15 in the payment of principal or interest on the Loan had occurred and remained
- 16 uncured;
- 17 • waiving a default under the Loan Documents arising from the failure to make
- 18 payments as and when due on the Loan without obtaining the consent of Plaintiff;
- 19 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
- 20 which Defendant was aware.

21 Contract Damages

22 297. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
23 as yet unascertained, but which Plaintiff believes is at least \$18,794 and which will be
24 proved at trial.

25 298. Additionally, Plaintiff incurred legal and administrative costs in addressing
26 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
27 have incurred.

28 ///

1 Fraud – Defendants’ Misrepresentations

2 299. On the periodic draw requests sent to Plaintiff beginning in June 2008, Smith’s
3 and BTM’s agents signed attestations that the monies advanced thus far by Plaintiff had
4 been spent on the Believers Fellowship of Jacksonville project, in accordance with the
5 approved plans and budget, as per the reports, forms, and spreadsheets submitted with the
6 draw requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
7 represented the value of the project to that point.

8 300. Prior to Plaintiff’s executing the Participation Agreement and making each
9 subsequent advance, Plaintiff’s agent Darren Maloney called periodically (approximately
10 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
11 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
12 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
13 updates on projects, including the Believers Fellowship of Jacksonville project, and was told
14 that all funds previously advanced by Plaintiff to BTM and its agents on the Believers
15 Fellowship of Jacksonville loan had been put towards the project according to the budget
16 and plans submitted to, approved by and relied on by Plaintiff.

17 Fraud – True Facts

18 301. In fact, Defendants’ representations to Plaintiff as described above were false.
19 The true facts were that:

- 20 • Plaintiff’s funds had not been spent on the Believers Fellowship of Jacksonville
21 project in accordance with the approved plans and budget as per the reports, forms,
22 and spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning
23 in June 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
24 accurately represent the value of the project to that point
- 25 • all funds previously advanced by Plaintiff to BTM and its agents on the Believers
26 Fellowship of Jacksonville loan had not been put towards the project according to the
27 budget and plans submitted to, approved by and relied on by Plaintiff;

28 ///

Fraud - Concealment

1
2 302. Defendants David Smith and BTM, including through their agents, concealed
3 from and failed to disclose to Plaintiff the following:

- 4 • the true financial and operational status of the loans and projects, including the
5 Believers Fellowship of Jacksonville project;
- 6 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
7 projects, including the Believers Fellowship of Jacksonville project, and were not
8 being applied only to project-related costs, according to the plans and budgets
9 submitted to, approved by and relied on by Plaintiff;
- 10 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
11 including payments made to unrelated third parties - friends of David Smith and
12 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
13 Lachman Lane Property;
- 14 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
15 to Randy Barton and for "sales commissions" to Carmen Copple Smith;
- 16 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
17 and its investments in overseeing the management, servicing and administration of
18 the loans and projects;
- 19 • that Smith and BTM were commingling for significant periods of time proceeds
20 received on the Loan with other funds;
- 21 • that Smith and BTM did not intend to immediately advance the full amount of
22 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
23 or else return the funds to Plaintiff, and established money market accounts to hold
24 such funds longer than five business days;
- 25 • that Smith and BTM were not maintaining appropriate records and books of account
26 reflecting interest accrued and interest received, interest rate changes, principal
27 payments and all other transactions or actions affecting the Loan.

28 ///

Fraud – Reliance, Discovery and Damage

1
2 303. Plaintiff continued to fund the Believers Fellowship of Jacksonville loan and
3 project in response to periodic draw requests from Defendants, based on continued
4 assurances and representations of Defendants Smith and BTM, including through their
5 agents at Arks and Noah, that Plaintiff's funds advanced thus far had gone towards the
6 projects according to the plans and budget reviewed, approved and relied upon by Plaintiff,
7 and based on Defendants' failure to disclose that Plaintiff's funds were being commingled
8 with other funds and diverted to non-project related costs and payments. In or about
9 February 2009, Plaintiff began working on a new program to take over the servicing and
10 administration of the loans, expand the Build to Minister church loan program into various
11 investment funds, and market those funds to third parties.

12 304. On or about July 31, 2009, during this effort to expand the loan program,
13 Plaintiff first learned of problems with the loans, including that Defendants and their agents
14 owed monies to third parties and were unable to pay them despite Plaintiff and other
15 investors having advanced funds as requested. Over the course of the next several months,
16 Plaintiff conducted an investigation in an attempt to determine what had happened to
17 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
18 misrepresentations, concealment and malfeasance. With respect to the problems discovered
19 with the loans, Plaintiff contributed additional monies in order to complete the projects,
20 including paying outstanding bills, liens, legal and administration fees, modifying the terms
21 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
22 new contractors to complete the construction.

23 305. But for Defendants' misrepresentations and concealment as described above,
24 Plaintiff would not have continued to provide funds in response to draw requests from
25 Defendants or their agents for the projects, including the Believers Fellowship of
26 Jacksonville project, and would not have invested efforts, time and money creating a new
27 program to take over servicing of the loans, expand the Build to Minister program into
28 various investment funds, and market those funds to third parties.

1 of principal at the time specified, BTM was either to provide or to arrange additional
2 financing so that Plaintiff would receive all its funds.

3 308. Defendant BTM, for its part, agreed among other things, that:

- 4
- 5 • “In the event Seller [BTM] does not for any reason advance to Borrower
6 [church] the full amount of the contemplated advance [the draws of funds that
7 Defendants called for every month] on the date of receipt of such Purchase
8 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
9 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
10 to the amount of such contemplated advance not made.” (Participation
11 Agreement, Schedule 4, ¶2.)
 - 12 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
13 the terms of the Loan Documents and with this Agreement. Seller [BTM]
14 shall provide loan servicing in accordance with commercially acceptable loan
15 servicing practices and with the same degree of care that is customarily
16 employed and exercised by Seller [BTM] in the administration and servicing
17 of loans of a similar nature held by it for its own account (the “Servicing
18 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
 - 19 • “The Seller [BTM] shall maintain appropriate records and books of account
20 reflecting interest accrued and interest received, interest rate changes, principal
21 payments and all other transactions or actions affecting the Loan, which
22 records shall be keep in accordance with accounting principles consistently
23 and customarily applied by Seller [BTM].” (Participation Agreement,
24 Schedule 4, ¶9.)
 - 25 • “Seller [BTM] further agrees that in performing its obligations hereunder,
26 Seller shall: (a) act in a custodial capacity on behalf of the Participant
27 [Plaintiff] with respect to its holding of any underlying instrument or collateral
28 and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)

22 309. The parties agreed that the Plaintiff would advance funds to BTM, as called
23 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
24 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
25 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
26 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
27 (the Church), to service the loan and advance the funds towards the construction project,
28

///
28

1 according to the budget and plans approved and relied upon by the Plaintiff in entering into
2 the Participation Agreement. Upon information and belief, BTM had an agreement with
3 Arks whereby Arks took over the servicing and administration of the Loan to Family
4 Fellowship Worship Center. The Participation Agreement specifically references and
5 incorporates the Loan Agreement, which is between Arks “and its affiliate BTM Funding,
6 Inc.” and the Borrower (the Church), and which provides that “the Loan proceeds are to be
7 used by Church solely for the construction of a church, church-related improvements, and/or
8 costs related thereto (the “Project”) upon the land described in the Security Instrument (the
9 “Property”) in accordance with the plans and specifications approved by ARKS.”

10 310. Plaintiff agreed to advance the funds in response to periodic draws based on
11 the project plans and budget which were attached to the Participation Agreement and/or the
12 Loan Agreement that was incorporated into the Participation Agreement, and which had
13 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
14 committing to the Participation Agreement for the Family Fellowship Worship Center Loan.
15 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
16 contractors, suppliers and other third parties as well as specific project-related servicing fees
17 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
18 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
19 approval from Plaintiff for any material change to the budget or plans.

20 Contract Performance and Breach

21 311. Upon execution of the Participation Agreement, Plaintiff began funding draw
22 requests for the Family Fellowship Worship Center project based on draw requests by BTM
23 and its agents. Plaintiff Muse Children’s GS Trust advanced \$107,190 to BTM and its
24 agents for the Family Fellowship Worship Center Loan between February 2008 and August
25 2008.

26 312. Defendant BTM breached the Participation Agreement by, among other things,
27 the following:

28 ///

- 1 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
2 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
3 Ministries, Inc. (or to the servicers or contractors for authorized project
4 disbursements on the Borrower's behalf), and failing to return within five business
5 days to Plaintiff any funds not so advanced;
- 6 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
7 contractors, suppliers and other third parties as well as specific project-related
8 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
9 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
10 failing to get prior approval from Plaintiff for any material change to the budget or
11 plans;
- 12 • failing to maintain appropriate records and books of account reflecting interest
13 accrued and interest received, interest rate changes, principal payments and all other
14 transactions or actions affecting the Loan;
- 15 • not paying Plaintiff its return of principal at the earlier of the issuance of the
16 certificate of occupancy or within 12 months of the Loan Closing;
- 17 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
18 Closing and not providing or arranging additional financing to allow Plaintiff to
19 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
20 within 12 months of the Loan Closing;
- 21 • not paying Plaintiff its interest and fees on a monthly basis;
- 22 • failing to provide loan servicing and administration in accordance with the Loan
23 documents and with commercially acceptable loan servicing practices;
- 24 • requiring additional payments by Plaintiff beyond what was due under the
25 Participation Agreement and the approved budget and plans incorporated therein;
- 26 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
27 holding any proceeds received for the Loan;

28 ///

- 1 • commingling for significant periods of time proceeds received on the Loan with other
2 funds.

3 Contract Damages

4 313. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
5 as yet unascertained, but which Plaintiff believes is at least \$14,109 and which will be
6 proved at trial.

7 314. Additionally, Plaintiff incurred legal and administrative costs in addressing
8 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
9 have incurred.

10 Fraud – Defendants' Misrepresentations

11 315. On the periodic draw requests sent to Plaintiff beginning in February 2008,
12 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
13 had been spent on the Family Fellowship Worship Center project, in accordance with the
14 approved plans and budget, as per the reports, forms, and spreadsheets submitted with the
15 draw requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
16 represented the value of the project to that point.

17 316. Prior to Plaintiff's executing the Participation Agreement and making each
18 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
19 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
20 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
21 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
22 updates on projects, including the Family Fellowship Worship Center project, and was told
23 that all funds previously advanced by Plaintiff to BTM and its agents on the Family
24 Fellowship Worship Center loan had been put towards the project according to the budget
25 and plans submitted to, approved by and relied on by Plaintiff.

26 Fraud – True Facts

27 317. In fact, Defendants' representations to Plaintiff as described above were false.
28 The true facts were that:

- 1 • Plaintiff's funds had not been spent on the Family Fellowship Worship Center project
2 in accordance with the approved plans and budget as per the reports, forms, and
3 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
4 February 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
5 accurately represent the value of the project to that point;
- 6 • all funds previously advanced by Plaintiff to BTM and its agents on the Family
7 Fellowship Worship Center loan had not been put towards the project according to
8 the budget and plans submitted to, approved by and relied on by Plaintiff;

9 Fraud - Concealment

10 318. Defendants David Smith and BTM, including through their agents, concealed
11 from and failed to disclose to Plaintiff the following:

- 12 • the true financial and operational status of the loans and projects, including the
13 Family Fellowship Worship Center project;
- 14 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
15 projects, including the Family Fellowship Worship Center project, and were not being
16 applied only to project-related costs, according to the plans and budgets submitted to,
17 approved by and relied on by Plaintiff;
- 18 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
19 including payments made to unrelated third parties - friends of David Smith and
20 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
21 Lachman Lane Property;
- 22 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
23 to Randy Barton and for "sales commissions" to Carmen Copple Smith;
- 24 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
25 and its investments in overseeing the management, servicing and administration of
26 the loans and projects;
- 27 • that Smith and BTM were commingling for significant periods of time proceeds
28 received on the Loan with other funds;

- 1 • that Smith and BTM did not intend to immediately advance the full amount of
- 2 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
- 3 or else return the funds to Plaintiff, and established money market accounts to hold
- 4 such funds longer than five business days;
- 5 • that Smith and BTM were not maintaining appropriate records and books of account
- 6 reflecting interest accrued and interest received, interest rate changes, principal
- 7 payments and all other transactions or actions affecting the Loan.

8 Fraud – Reliance, Discovery and Damage

9 319. Plaintiff continued to fund the Family Fellowship Worship Center loan and

10 project in response to periodic draw requests from Defendants, based on continued

11 assurances and representations of Defendants Smith and BTM, including through their

12 agents at Arks and Noah, that Plaintiff's funds advanced thus far had gone towards the

13 projects according to the plans and budget reviewed, approved and relied upon by Plaintiff,

14 and based on Defendants' failure to disclose that Plaintiff's funds were being commingled

15 with other funds and diverted to non-project related costs and payments. In or about

16 February 2009, Plaintiff began working on a new program to take over the servicing and

17 administration of the loans, expand the Build to Minister church loan program into various

18 investment funds, and market those funds to third parties.

19 320. On or about July 31, 2009, during this effort to expand the loan program,

20 Plaintiff first learned of problems with the loans, including that Defendants and their agents

21 owed monies to third parties and were unable to pay them despite Plaintiff and other

22 investors having advanced funds as requested. Over the course of the next several months,

23 Plaintiff conducted an investigation in an attempt to determine what had happened to

24 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,

25 misrepresentations, concealment and malfeasance. With respect to the problems discovered

26 with the loans, Plaintiff contributed additional monies in order to complete the projects,

27 including paying outstanding bills, liens, legal and administration fees, modifying the terms

28 ///

1 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
2 new contractors to complete the construction.

3 321. But for Defendants' misrepresentations and concealment as described above,
4 Plaintiff would not have continued to provide funds in response to draw requests from
5 Defendants or their agents for the projects, including the Family Fellowship Worship Center
6 project, and would not have invested efforts, time and money creating a new program to take
7 over servicing of the loans, expand the Build to Minister program into various investment
8 funds, and market those funds to third parties.

9 322. As a result of Defendants' misrepresentations and concealments, Plaintiff has
10 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
11 \$14,109 and which will be proved at trial. Additionally, Plaintiff incurred legal and
12 administrative costs in addressing and mitigating the harm caused by Defendants'
13 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
14 funds expended in creating a new program to take over servicing of the loans, expand the
15 Build to Minister program into various investment funds, and market those funds to third
16 parties, which it would not have expended but for Defendants' misrepresentations and
17 concealments.

18 *First Baptist Church of Texas City Loan*

19 Contract Terms

20 323. On October 27, 2008, Plaintiff Muse Children's GS Trust entered into a
21 Construction Note Participation Agreement with Defendant BTM on a construction loan to
22 First Baptist Church of Texas City ("First Baptist Texas City Participation Agreement" or
23 "Participation Agreement"). The First Baptist Texas City Participation Agreement provided
24 that Plaintiff (designated "Participant") would have a participation interest of 10% in the
25 construction note amount of \$931,845, which Defendant BTM (designated "Seller") would
26 loan to the church, First Baptist Church of Texas City (designated "Borrower"). Under the
27 First Baptist Texas City Participation Agreement, Plaintiff committed to fund a total of
28 \$93,184.50, to be advanced to Defendant BTM in response to periodic draw requests from

1 Defendant according to a projected draw schedule. In consideration for Plaintiff's
2 advancing the funds, Plaintiff was entitled to receive the return of the principal invested, as
3 well as 10.5% interest on such amount, and its pro rata portion (10%) of a Participation Fee
4 (of \$13,977.67), with interest and fees to be paid monthly, and the principal payable to
5 Plaintiff at the issuance of a Certificate of Occupancy for the Property or twelve (12) months
6 from the date of Loan Closing, whichever first occurs, as provided for in the Loan
7 Agreement which was specifically referenced by and incorporated into the Participation
8 Agreement. The Participation Agreement also provided that in the event Plaintiff had not
9 received its return of principal at the time specified, BTM was either to provide or to arrange
10 additional financing so that Plaintiff would receive all its funds.

11 324. Defendant BTM, for its part, agreed among other things, that:

- 12 • "In the event Seller [BTM] does not for any reason advance to Borrower
13 [church] the full amount of the contemplated advance [the draws of funds that
14 Defendants called for every month] on the date of receipt of such Purchase
15 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
16 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
17 to the amount of such contemplated advance not made." (Participation
18 Agreement, Schedule 4, ¶2.)
- 19 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
20 the terms of the Loan Documents and with this Agreement. Seller [BTM]
21 shall provide loan servicing in accordance with commercially acceptable loan
22 servicing practices and with the same degree of care that is customarily
23 employed and exercised by Seller [BTM] in the administration and servicing
24 of loans of a similar nature held by it for its own account (the "Servicing
25 Standard")." (Participation Agreement, Schedule 4, ¶9.)
- 26 • "The Seller [BTM] shall maintain appropriate records and books of account
27 reflecting interest accrued and interest received, interest rate changes, principal
28 payments and all other transactions or actions affecting the Loan, which
records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)
- "Seller [BTM] further agrees that in performing its obligations hereunder,
Seller shall: (a) act in a custodial capacity on behalf of the Participant
[Plaintiff] with respect to its holding of any underlying instrument or collateral
and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and

(d) administer the Loan in accordance with the Servicing Standard as provided herein.” (Participation Agreement, Schedule 4, ¶ 9.)

- “Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff] of any material default with respect to the Loan of which Seller [BTM] is actually aware and of any other matters which, in Seller’s judgment, materially affect the interest of Participant [Plaintiff] with respect to the Loan (collectively, a “Material Default”).” (Participation Agreement, Schedule 4, ¶ 11.)

325. The parties agreed that the Plaintiff would advance funds to BTM, as called for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents, including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower (the Church), to service the loan and advance the funds towards the construction project, according to the budget and plans approved and relied upon by the Plaintiff in entering into the Participation Agreement. Upon information and belief, BTM had an agreement with Arks whereby Arks took over the servicing and administration of the Loan to First Baptist Church of Texas City. The Participation Agreement specifically references and incorporates the Loan Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower (the Church), and which provides that “the Loan proceeds are to be used by Church solely for the construction of a church, church-related improvements, and/or costs related thereto (the “Project”) upon the land described in the Security Instrument (the “Property”) in accordance with the plans and specifications approved by ARKS.”

326. Plaintiff agreed to advance the funds in response to periodic draws based on the project plans and budget which were attached to the Participation Agreement and/or the Loan Agreement that was incorporated into the Participation Agreement, and which had been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in committing to the Participation Agreement for the First Baptist Church of Texas City Loan. Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors, suppliers and other third parties as well as specific project-related servicing fees

///

1 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
2 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
3 approval from Plaintiff for any material change to the budget or plans.

4 Contract Performance and Breach

5 327. Upon execution of the Participation Agreement, Plaintiff began funding draw
6 requests for the First Baptist Church of Texas City project based on draw requests by BTM
7 and its agents. Plaintiff Muse Children's GS Trust advanced \$77,441 to BTM and its agents
8 for the First Baptist Church of Texas City Loan between October 2008 and June 2009.

9 328. Defendant BTM breached the Participation Agreement by, among other things,
10 the following:

- 11 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
12 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
13 Ministries, Inc. (or to the servicers or contractors for authorized project
14 disbursements on the Borrower's behalf), and failing to return within five business
15 days to Plaintiff any funds not so advanced;
- 16 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
17 contractors, suppliers and other third parties as well as specific project-related
18 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
19 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
20 failing to get prior approval from Plaintiff for any material change to the budget or
21 plans;
- 22 • failing to maintain appropriate records and books of account reflecting interest
23 accrued and interest received, interest rate changes, principal payments and all other
24 transactions or actions affecting the Loan;
- 25 • not paying Plaintiff its return of principal at the earlier of the issuance of the
26 certificate of occupancy or within 12 months of the Loan Closing;
- 27 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
28 Closing and not providing or arranging additional financing to allow Plaintiff to

- 1 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
2 within 12 months of the Loan Closing;
- 3 • not paying Plaintiff its interest and fees on a monthly basis;
 - 4 • failing to provide loan servicing and administration in accordance with the Loan
5 documents and with commercially acceptable loan servicing practices;
 - 6 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
7 holding any proceeds received for the Loan;
 - 8 • commingling for significant periods of time proceeds received on the Loan with other
9 funds;
 - 10 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
11 which Defendant was aware;
 - 12 • failing to require Borrower to pay the equity down payment as required by the Loan
13 Documents.

14 Contract Damages

15 329. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
16 as yet unascertained, but which Plaintiff believes is at least \$90,899 and which will be
17 proved at trial.

18 330. Additionally, Plaintiff incurred legal and administrative costs in addressing
19 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
20 have incurred.

21 Fraud – Defendants' Misrepresentations

22 331. On the periodic draw requests sent to Plaintiff beginning in October 2008,
23 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
24 had been spent on the First Baptist Church of Texas City project, in accordance with the
25 approved plans and budget, as per the reports, forms, and spreadsheets submitted with the
26 draw requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
27 represented the value of the project to that point.

28 ///

1 332. Prior to Plaintiff's executing the Participation Agreement and making each
2 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
3 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
4 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
5 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
6 updates on projects, including the First Baptist Church of Texas City project, and was told
7 that all funds previously advanced by Plaintiff to BTM and its agents on the First Baptist
8 Church of Texas City loan had been put towards the project according to the budget and
9 plans submitted to, approved by and relied on by Plaintiff.

10 Fraud – True Facts

11 333. In fact, Defendants' representations to Plaintiff as described above were false.
12 The true facts were that:

- 13 • Plaintiff's funds had not been spent on the First Baptist Church of Texas City project
14 in accordance with the approved plans and budget as per the reports, forms, and
15 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
16 October 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
17 accurately represent the value of the project to that point;
- 18 • all funds previously advanced by Plaintiff to BTM and its agents on the First Baptist
19 Church of Texas City loan had not been put towards the project according to the
20 budget and plans submitted to, approved by and relied on by Plaintiff;

21 Fraud - Concealment

22 334. Defendants David Smith and BTM, including through their agents, concealed
23 from and failed to disclose to Plaintiff the following:

- 24 • the true financial and operational status of the loans and projects, including the First
25 Baptist Church of Texas City project;
- 26 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
27 projects, including the First Baptist Church of Texas City project, and were not being

28 ///

- 1 applied only to project-related costs, according to the plans and budgets submitted to,
2 approved by and relied on by Plaintiff;
- 3 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
4 including payments made to unrelated third parties - friends of David Smith and
5 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
6 Lachman Lane Property;
 - 7 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
8 and its investments in overseeing the management, servicing and administration of
9 the loans and projects;
 - 10 • that Smith and BTM were commingling for significant periods of time proceeds
11 received on the Loan with other funds;
 - 12 • that Smith and BTM did not intend to immediately advance the full amount of
13 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
14 or else return the funds to Plaintiff, and established money market accounts to hold
15 such funds longer than five business days;
 - 16 • that Smith and BTM were not maintaining appropriate records and books of account
17 reflecting interest accrued and interest received, interest rate changes, principal
18 payments and all other transactions or actions affecting the Loan.

19 Fraud – Reliance, Discovery and Damage

20 335. Plaintiff continued to fund the First Baptist Church of Texas City loan and
21 project in response to periodic draw requests from Defendants, based on continued
22 assurances and representations of Defendants Smith and BTM, including through their
23 agents at Arks and Noah, that Plaintiff's funds advanced thus far had gone towards the
24 projects according to the plans and budget reviewed, approved and relied upon by Plaintiff,
25 and based on Defendants' failure to disclose that Plaintiff's funds were being commingled
26 with other funds and diverted to non-project related costs and payments. In or about
27 February 2009, Plaintiff began working on a new program to take over the servicing and

28 ///

1 administration of the loans, expand the Build to Minister church loan program into various
2 investment funds, and market those funds to third parties.

3 336. On or about July 31, 2009, during this effort to expand the loan program,
4 Plaintiff first learned of problems with the loans, including that Defendants and their agents
5 owed monies to third parties and were unable to pay them despite Plaintiff and other
6 investors having advanced funds as requested. Over the course of the next several months,
7 Plaintiff conducted an investigation in an attempt to determine what had happened to
8 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
9 misrepresentations, concealment and malfeasance. With respect to the problems discovered
10 with the loans, Plaintiff contributed additional monies in order to complete the projects,
11 including paying outstanding bills, liens, legal and administration fees, modifying the terms
12 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
13 new contractors to complete the construction.

14 337. But for Defendants' misrepresentations and concealment as described above,
15 Plaintiff would not have continued to provide funds in response to draw requests from
16 Defendants or their agents for the projects, including the First Baptist Church of Texas City
17 project, and would not have invested efforts, time and money creating a new program to take
18 over servicing of the loans, expand the Build to Minister program into various investment
19 funds, and market those funds to third parties.

20 338. As a result of Defendants' misrepresentations and concealments, Plaintiff has
21 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
22 \$90,899 and which will be proved at trial. Additionally, Plaintiff incurred legal and
23 administrative costs in addressing and mitigating the harm caused by Defendants'
24 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
25 funds expended in creating a new program to take over servicing of the loans, expand the
26 Build to Minister program into various investment funds, and market those funds to third
27 parties, which it would not have expended but for Defendants' misrepresentations and
28 concealments.

1 *Kingdom Church Loan*

2 Contract Terms

3 339. On March 27, 2008, Plaintiff Muse Children's GS Trust entered into a
4 Construction Note Participation Agreement with Defendant BTM on a construction loan to
5 Kingdom Church ("Kingdom Church Participation Agreement" or "Participation
6 Agreement"). The Kingdom Church Participation Agreement provided that Plaintiff
7 (designated "Participant") would have a participation interest of 10% in the construction
8 note amount of \$2,179,674, which Defendant BTM (designated "Seller") would loan to the
9 church, Kingdom Church (designated "Borrower"). Under the Kingdom Church
10 Participation Agreement, Plaintiff committed to fund a total of \$217,967.40, to be advanced
11 to Defendant BTM in response to periodic draw requests from Defendant according to a
12 projected draw schedule. In consideration for Plaintiff's advancing the funds, Plaintiff was
13 entitled to receive the return of the principal invested, as well as 10.5% interest on such
14 amount, and its pro rata portion (10%) of a Participation Fee (of \$32,695.11), with interest
15 and fees to be paid monthly, and the principal payable to Plaintiff at the issuance of a
16 Certificate of Occupancy for the Property or twelve (12) months from the date of Loan
17 Closing, whichever first occurs, as provided for in the Loan Agreement which was
18 specifically referenced by and incorporated into the Participation Agreement. The
19 Participation Agreement also provided that in the event Plaintiff had not received its return
20 of principal at the time specified, BTM was either to provide or to arrange additional
21 financing so that Plaintiff would receive all its funds.

22 340. Defendant BTM, for its part, agreed among other things, that:

- 23
- 24 • "In the event Seller [BTM] does not for any reason advance to Borrower [church] the full amount of the contemplated advance [the draws of funds that Defendants called for every month] on the date of receipt of such Purchase Payment, Seller [BTM] shall within five (5) Business Days thereafter return the portion of such Purchase Payment to Participant [Plaintiff] as corresponds to the amount of such contemplated advance not made." (Participation Agreement, Schedule 4, ¶2.)
 - 25
 - 26
 - 27 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with the terms of the Loan Documents and with this Agreement. Seller [BTM] shall provide loan servicing in accordance with commercially acceptable loan
 - 28

1 servicing practices and with the same degree of care that is customarily
2 employed and exercised by Seller [BTM] in the administration and servicing
of loans of a similar nature held by it for its own account (the "Servicing
Standard")." (Participation Agreement, Schedule 4, ¶9.)

- 3 • "The Seller [BTM] shall maintain appropriate records and books of account
4 reflecting interest accrued and interest received, interest rate changes, principal
5 payments and all other transactions or actions affecting the Loan, which
6 records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)
- 7 • "Seller [BTM] further agrees that in performing its obligations hereunder,
8 Seller shall: (a) act in a custodial capacity on behalf of the Participant
[Plaintiff] with respect to its holding of any underlying instrument or collateral
9 and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
10 through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
11 servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
12 (d) administer the Loan in accordance with the Servicing Standard as provided
herein." (Participation Agreement, Schedule 4, ¶ 9.)
- 13 • "Seller represents and warrants to Participant that, as of the date hereof ... no
14 default in the payment of principal or interest on the Loan has occurred and
remains uncured under the Loan Documents." (Participation Agreement,
Schedule 4, ¶ 15.)
- 15 • "[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
16 may take or omit to take any action under any of the Loan Documents which
would result in the following (each a "Material Change"): (a) reduce or
17 increase the amounts of principal or interest payments of the Loan, (b) reduce
or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
18 postpone any due date for payment of principal or interest in which Participant
[Plaintiff] shares, including, without limitation, the final maturity date of the
19 Loan, (d) except as expressly permitted under the Loan Documents, release or
subordinate any existing collateral described in the Loan Documents, (e)
20 release the liability of Borrower or any guarantor for the Loan, (f) consent to
the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
21 (ii) any direct or indirect interest in Borrower ... (g) make or consent to any
change in the principal amount of the Note; or (h) waive a default under the
22 Loan Documents arising from the failure to make payments as and when due
on the Loan. . . ." ((Participation Agreement, Schedule 4, ¶ 11.)
- 23 • "Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
24 of any material default with respect to the Loan of which Seller [BTM] is
actually aware and of any other matters which, in Seller's judgment, materially
25 affect the interest of Participant [Plaintiff] with respect to the Loan
(collectively, a "Material Default")." (Participation Agreement, Schedule 4, ¶
26 11.)

27 341. The parties agreed that the Plaintiff would advance funds to BTM, as called
28 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,

1 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM's
2 consent, and that BTM or its agents would thereupon transmit the funds to BTM's affiliate
3 Arks and/or Arks' wholly owned subsidiary Noah Construction, on behalf of the Borrower
4 (the Church), to service the loan and advance the funds towards the construction project,
5 according to the budget and plans approved and relied upon by the Plaintiff in entering into
6 the Participation Agreement. Upon information and belief, BTM had an agreement with
7 Arks whereby Arks took over the servicing and administration of the Loan to Kingdom
8 Church. The Participation Agreement specifically references and incorporates the Loan
9 Agreement, which is between Arks "and its affiliate BTM Funding, Inc." and the Borrower
10 (the Church), and which provides that "the Loan proceeds are to be used by Church solely
11 for the construction of a church, church-related improvements, and/or costs related thereto
12 (the "Project") upon the land described in the Security Instrument (the "Property") in
13 accordance with the plans and specifications approved by ARKS."

14 342. Plaintiff agreed to advance the funds in response to periodic draws based on
15 the project plans and budget which were attached to the Participation Agreement and/or the
16 Loan Agreement that was incorporated into the Participation Agreement, and which had
17 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
18 committing to the Participation Agreement for the Kingdom Church Loan. Defendant BTM
19 agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors,
20 suppliers and other third parties as well as specific project-related servicing fees to itself,
21 Arks and Noah, according to the budget and plans submitted to and approved by Plaintiffs
22 and incorporated into the Participation Agreement, and agreed to get prior approval from
23 Plaintiff for any material change to the budget or plans.

24 Contract Performance and Breach

25 343. Upon execution of the Participation Agreement, Plaintiff began funding draw
26 requests for the Kingdom Church project based on draw requests by BTM and its agents.
27 Plaintiff Muse Children's GS Trust advanced \$106,467 to BTM and its agents for the
28 Kingdom Church Loan between July 2008 and October 2008.

1 344. Defendant BTM breached the Participation Agreement by, among other things,
2 the following:

- 3 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
4 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
5 Ministries, Inc. (or to the servicers or contractors for authorized project
6 disbursements on the Borrower's behalf), and failing to return within five business
7 days to Plaintiff any funds not so advanced;
- 8 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
9 contractors, suppliers and other third parties as well as specific project-related
10 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
11 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
12 failing to get prior approval from Plaintiff for any material change to the budget or
13 plans;
- 14 • failing to maintain appropriate records and books of account reflecting interest
15 accrued and interest received, interest rate changes, principal payments and all other
16 transactions or actions affecting the Loan;
- 17 • accepting a \$1.8 million payoff from the secondary lender for \$2.3 million owed by
18 the Borrower and canceling the notes without informing or obtaining the consent of
19 Plaintiff;
- 20 • failing to provide loan servicing and administration in accordance with the Loan
21 documents and with commercially acceptable loan servicing practices;
- 22 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
23 holding any proceeds received for the Loan;
- 24 • commingling for significant periods of time proceeds received on the Loan with other
25 funds;
- 26 • failing to inform Plaintiff that as of the date of the Participation Agreement a default
27 in the payment of principal or interest on the Loan had occurred and remained
28 uncured;

- 1 • reducing or increasing the amounts of principal or interest payments of the Loan
- 2 without obtaining the consent of Plaintiff;
- 3 • postponing due dates for payment of principal or interest in which Plaintiff shared
- 4 without obtaining the consent of Plaintiff;
- 5 • releasing or subordinating existing collateral described in the Loan Documents
- 6 without obtaining the consent of Plaintiff;
- 7 • releasing the liability of Borrower or any guarantor for the Loan without obtaining the
- 8 consent of Plaintiff;
- 9 • consenting to the further sale, transfer, pledge, mortgage or assignment of the
- 10 Property or any direct or indirect interest in Borrower without obtaining the consent
- 11 of Plaintiff;
- 12 • waiving a default under the Loan Documents arising from the failure to make
- 13 payments as and when due on the Loan without obtaining the consent of Plaintiff;
- 14 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
- 15 which Defendant was aware, including Defendants' knowledge prior to closing that
- 16 Borrower had supplied inaccurate financial statements but allowed the loan to close
- 17 anyway without disclosure to Plaintiff;
- 18 • failing to require Borrower to pay the equity down payment as required by the Loan
- 19 Documents.

20 Contract Damages

21 345. Plaintiff has incurred legal and administrative costs in addressing and
22 mitigating the harm caused by Defendants' breaches which costs Plaintiff should not have
23 incurred, in an amount as yet unascertained and which will be proved at trial.

24 Fraud – Defendants' Misrepresentations

25 346. On the periodic draw requests sent to Plaintiff beginning in July 2008, Smith's
26 and BTM's agents signed attestations that the monies advanced thus far by Plaintiff had
27 been spent on the Kingdom Church project, in accordance with the approved plans and
28 budget, as per the reports, forms, and spreadsheets submitted with the draw requests, and

1 that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
2 value of the project to that point.

3 347. Prior to Plaintiff's executing the Participation Agreement and making each
4 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
5 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
6 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
7 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
8 updates on projects, including the Kingdom Church project, and was told that all funds
9 previously advanced by Plaintiff to BTM and its agents on the Kingdom Church loan had
10 been put towards the project according to the budget and plans submitted to, approved by
11 and relied on by Plaintiff.

12 Fraud – True Facts

13 348. In fact, Defendants' representations to Plaintiff as described above were false.
14 The true facts were that:

- 15 • Plaintiff's funds had not been spent on the Kingdom Church project in accordance
16 with the approved plans and budget as per the reports, forms, and spreadsheets
17 submitted with the periodic draw requests sent to Plaintiff beginning in July 2008,
18 and the reports, forms, and spreadsheets submitted to Plaintiff did not accurately
19 represent the value of the project to that point;
- 20 • all funds previously advanced by Plaintiff to BTM and its agents on the Kingdom
21 Church loan had not been put towards the project according to the budget and plans
22 submitted to, approved by and relied on by Plaintiff;

23 Fraud - Concealment

24 349. Defendants David Smith and BTM, including through their agents, concealed
25 from and failed to disclose to Plaintiff the following:

- 26 • the true financial and operational status of the loans and projects, including the
27 Kingdom Church project;

28 ///

- 1 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
2 projects, including the Kingdom Church project, and were not being applied only to
3 project-related costs, according to the plans and budgets submitted to, approved by
4 and relied on by Plaintiff;
- 5 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
6 including payments made to unrelated third parties - friends of David Smith and
7 David Smith's wife, Carmen Cople Smith, and payments of the mortgage on the
8 Lachman Lane Property;
- 9 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
10 and its investments in overseeing the management, servicing and administration of
11 the loans and projects;
- 12 • that Smith and BTM were commingling for significant periods of time proceeds
13 received on the Loan with other funds;
- 14 • that Smith and BTM knew prior to closing that Borrower had supplied inaccurate
15 financial statements, but allowed the loan to close anyway without disclosure to
16 Plaintiff;
- 17 • that Smith and BTM did not intend to immediately advance the full amount of
18 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
19 or else return the funds to Plaintiff, and established money market accounts to hold
20 such funds longer than five business days;
- 21 • that Smith and BTM were not maintaining appropriate records and books of account
22 reflecting interest accrued and interest received, interest rate changes, principal
23 payments and all other transactions or actions affecting the Loan.

24 Fraud – Reliance, Discovery and Damage

25 350. Plaintiff continued to fund the Kingdom Church loan and project in response
26 to periodic draw requests from Defendants, based on continued assurances and
27 representations of Defendants Smith and BTM, including through their agents at Arks and
28 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the

1 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
2 failure to disclose that Plaintiff's funds were being commingled with other funds and
3 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
4 began working on a new program to take over the servicing and administration of the loans,
5 expand the Build to Minister church loan program into various investment funds, and market
6 those funds to third parties.

7 351. On or about July 31, 2009, during this effort to expand the loan program,
8 Plaintiff first learned of problems with the loans, including that Defendants and their agents
9 owed monies to third parties and were unable to pay them despite Plaintiff and other
10 investors having advanced funds as requested. Over the course of the next several months,
11 Plaintiff conducted an investigation in an attempt to determine what had happened to
12 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
13 misrepresentations, concealment and malfeasance. With respect to the problems discovered
14 with the loans, Plaintiff contributed additional monies in order to complete the projects,
15 including paying outstanding bills, liens, legal and administration fees, modifying the terms
16 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
17 new contractors to complete the construction.

18 352. But for Defendants' misrepresentations and concealment as described above,
19 Plaintiff would not have continued to provide funds in response to draw requests from
20 Defendants or their agents for the projects, including the Kingdom Church project, and
21 would not have invested efforts, time and money creating a new program to take over
22 servicing of the loans, expand the Build to Minister program into various investment funds,
23 and market those funds to third parties.

24 353. Plaintiff incurred legal and administrative costs in addressing and mitigating
25 the harm caused by Defendants' misrepresentations and concealments, in an amount as yet
26 unascertained and which will be proved at trial. Further, Plaintiff lost the value of its time,
27 efforts and funds expended in creating a new program to take over servicing of the loans,
28 expand the Build to Minister program into various investment funds, and market those funds

1 to third parties, which it would not have expended but for Defendants' misrepresentations
2 and concealments.

3 *Insoul Fellowship Church Loan*

4 Contract Terms

5 354. On June 23, 2008, Plaintiff Muse Children's GS Trust entered into a
6 Construction Note Participation Agreement with Defendant BTM on a construction loan to
7 Insoul Fellowship Church ("Insoul Participation Agreement" or "Participation Agreement").
8 The Insoul Participation Agreement provided that Plaintiff (designated "Participant") would
9 have a participation interest of 10% in the construction note amount of \$1,341,250, which
10 Defendant BTM (designated "Seller") would loan to the church, Insoul Fellowship Church
11 (designated "Borrower"). Under the Insoul Participation Agreement, Plaintiff committed to
12 fund a total of \$134,125, to be advanced to Defendant BTM in response to periodic draw
13 requests from Defendant according to a projected draw schedule. In consideration for
14 Plaintiff's advancing the funds, Plaintiff was entitled to receive the return of the principal
15 invested, as well as 10.5% interest on such amount, and its pro rata portion (10%) of a
16 Participation Fee (of \$20,118.75), with interest and fees to be paid monthly, and the
17 principal payable to Plaintiff at the issuance of a Certificate of Occupancy for the Property
18 or twelve (12) months from the date of Loan Closing, whichever first occurs, as provided for
19 in the Loan Agreement which was specifically referenced by and incorporated into the
20 Participation Agreement. The Participation Agreement also provided that in the event
21 Plaintiff had not received its return of principal at the time specified, BTM was either to
22 provide or to arrange additional financing so that Plaintiff would receive all its funds.

23 355. Defendant BTM, for its part, agreed among other things, that:

- 24 • "In the event Seller [BTM] does not for any reason advance to Borrower
25 [church] the full amount of the contemplated advance [the draws of funds that
26 Defendants called for every month] on the date of receipt of such Purchase
27 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
28 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
to the amount of such contemplated advance not made." (Participation
Agreement, Schedule 4, ¶2.)

28 ///

- 1 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
2 the terms of the Loan Documents and with this Agreement. Seller [BTM]
3 shall provide loan servicing in accordance with commercially acceptable loan
4 servicing practices and with the same degree of care that is customarily
5 employed and exercised by Seller [BTM] in the administration and servicing
6 of loans of a similar nature held by it for its own account (the “Servicing
7 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 8 • “The Seller [BTM] shall maintain appropriate records and books of account
9 reflecting interest accrued and interest received, interest rate changes, principal
10 payments and all other transactions or actions affecting the Loan, which
11 records shall be kept in accordance with accounting principles consistently
12 and customarily applied by Seller [BTM].” (Participation Agreement,
13 Schedule 4, ¶9.)
- 14 • “Seller [BTM] further agrees that in performing its obligations hereunder,
15 Seller shall: (a) act in a custodial capacity on behalf of the Participant
16 [Plaintiff] with respect to its holding of any underlying instrument or collateral
17 and in holding any proceeds received for the Loan; (b) not commingle for any
18 significant period of time proceeds received on the Loan; (c) directly pass
19 through any proceeds received from the Loan to Participant [Plaintiff] as
20 provided in Section 4 of this Agreement, less any proceeds that represent
21 servicing or other compensation to Seller [BTM] or an interest in the Loan
22 retained by the Seller [BTM], all as more particularly provided for herein; and
23 (d) administer the Loan in accordance with the Servicing Standard as provided
24 herein.” (Participation Agreement, Schedule 4, ¶ 9.)
- 25 • “[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
26 may take or omit to take any action under any of the Loan Documents which
27 would result in the following (each a “Material Change”): (a) reduce or
28 increase the amounts of principal or interest payments of the Loan, (b) reduce
or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
postpone any due date for payment of principal or interest in which Participant
[Plaintiff] shares, including, without limitation, the final maturity date of the
Loan, (d) except as expressly permitted under the Loan Documents, release or
subordinate any existing collateral described in the Loan Documents, (e)
release the liability of Borrower or any guarantor for the Loan, (f) consent to
the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
(ii) any direct or indirect interest in Borrower ... (g) make or consent to any
change in the principal amount of the Note; or (h) waive a default under the
Loan Documents arising from the failure to make payments as and when due
on the Loan. . . .” ((Participation Agreement, Schedule 4, ¶ 11.)
- “Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
of any material default with respect to the Loan of which Seller [BTM] is
actually aware and of any other matters which, in Seller’s judgment, materially
affect the interest of Participant [Plaintiff] with respect to the Loan
(collectively, a “Material Default”).” (Participation Agreement, Schedule 4, ¶
11.)

356. The parties agreed that the Plaintiff would advance funds to BTM, as called
for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s

1 consent, and that BTM or its agents would thereupon transmit the funds to BTM's affiliate
2 Arks and/or Arks' wholly owned subsidiary Noah Construction, on behalf of the Borrower
3 (the Church), to service the loan and advance the funds towards the construction project,
4 according to the budget and plans approved and relied upon by the Plaintiff in entering into
5 the Participation Agreement. Upon information and belief, BTM had an agreement with
6 Arks whereby Arks took over the servicing and administration of the Loan to Insoul
7 Fellowship Church. The Participation Agreement specifically references and incorporates
8 the Loan Agreement, which is between Arks "and its affiliate BTM Funding, Inc." and the
9 Borrower (the Church), and which provides that "the Loan proceeds are to be used by
10 Church solely for the construction of a church, church-related improvements, and/or costs
11 related thereto (the "Project") upon the land described in the Security Instrument (the
12 "Property") in accordance with the plans and specifications approved by ARKS."

13 357. Plaintiff agreed to advance the funds in response to periodic draws based on
14 the project plans and budget which were attached to the Participation Agreement and/or the
15 Loan Agreement that was incorporated into the Participation Agreement, and which had
16 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
17 committing to the Participation Agreement for the Insoul Fellowship Church Loan.
18 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
19 contractors, suppliers and other third parties as well as specific project-related servicing fees
20 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
21 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
22 approval from Plaintiff for any material change to the budget or plans.

23 Contract Performance and Breach

24 358. Upon execution of the Participation Agreement, Plaintiff began funding draw
25 requests for the Insoul Fellowship Church project based on draw requests by BTM and its
26 agents. Plaintiff Muse Children's GS Trust advanced \$122,417 to BTM and its agents for
27 the Insoul Fellowship Church Loan between October 2008 and June 2009.

28 ///

1 359. Defendant BTM breached the Participation Agreement by, among other things,
2 the following:

- 3 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
4 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
5 Ministries, Inc. (or to the servicers or contractors for authorized project
6 disbursements on the Borrower's behalf), and failing to return within five business
7 days to Plaintiff any funds not so advanced;
- 8 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
9 contractors, suppliers and other third parties as well as specific project-related
10 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
11 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
12 failing to get prior approval from Plaintiff for any material change to the budget or
13 plans;
- 14 • failing to maintain appropriate records and books of account reflecting interest
15 accrued and interest received, interest rate changes, principal payments and all other
16 transactions or actions affecting the Loan;
- 17 • not paying Plaintiff its return of principal at the earlier of the issuance of the
18 certificate of occupancy or within 12 months of the Loan Closing;
- 19 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
20 Closing and not providing or arranging additional financing to allow Plaintiff to
21 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
22 within 12 months of the Loan Closing;
- 23 • not paying Plaintiff its interest and fees on a monthly basis;
- 24 • failing to provide loan servicing and administration in accordance with the Loan
25 documents and with commercially acceptable loan servicing practices;
- 26 • requiring additional payments by Plaintiff beyond what was due under the
27 Participation Agreement and the approved budget and plans incorporated therein;

28 ///

- 1 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 2 holding any proceeds received for the Loan;
- 3 • commingling for significant periods of time proceeds received on the Loan with other
- 4 funds;
- 5 • postponing due dates for payment of principal or interest in which Plaintiff shared
- 6 without obtaining the consent of Plaintiff;
- 7 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
- 8 which Defendant was aware;
- 9 • failing to require Borrower to pay the equity down payment as required by the Loan
- 10 Documents.

11 Contract Damages

12 360. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
13 as yet unascertained, but which Plaintiff believes is at least \$98,259 and which will be
14 proved at trial.

15 361. Additionally, Plaintiff incurred legal and administrative costs in addressing
16 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
17 have incurred.

18 Fraud – Defendants' Misrepresentations

19 362. On the periodic draw requests sent to Plaintiff beginning in October 2008,
20 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
21 had been spent on the Insoul Fellowship Church project, in accordance with the approved
22 plans and budget, as per the reports, forms, and spreadsheets submitted with the draw
23 requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
24 represented the value of the project to that point.

25 363. Prior to Plaintiff's executing the Participation Agreement and making each
26 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
27 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
28 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks

1 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
2 updates on projects, including the Insoul Fellowship Church project, and was told that all
3 funds previously advanced by Plaintiff to BTM and its agents on the Insoul Fellowship
4 Church loan had been put towards the project according to the budget and plans submitted
5 to, approved by and relied on by Plaintiff.

6 Fraud – True Facts

7 364. In fact, Defendants' representations to Plaintiff as described above were false.
8 The true facts were that:

- 9 • Plaintiff's funds had not been spent on the Insoul Fellowship Church project in
10 accordance with the approved plans and budget as per the reports, forms, and
11 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
12 October 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
13 accurately represent the value of the project to that point;
- 14 • all funds previously advanced by Plaintiff to BTM and its agents on the Insoul
15 Fellowship Church loan had not been put towards the project according to the budget
16 and plans submitted to, approved by and relied on by Plaintiff;

17 Fraud - Concealment

18 365. Defendants David Smith and BTM, including through their agents, concealed
19 from and failed to disclose to Plaintiff the following:

- 20 • the true financial and operational status of the loans and projects, including the Insoul
21 Fellowship Church project;
- 22 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
23 projects, including the Insoul Fellowship Church project, and were not being applied
24 only to project-related costs, according to the plans and budgets submitted to,
25 approved by and relied on by Plaintiff;
- 26 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
27 including payments made to unrelated third parties - friends of David Smith and

28 ///

1 David Smith's wife, Carmen Cople Smith, and payments of the mortgage on the
2 Lachman Lane Property;

- 3 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
4 and its investments in overseeing the management, servicing and administration of
5 the loans and projects;
- 6 • that Smith and BTM were commingling for significant periods of time proceeds
7 received on the Loan with other funds;
- 8 • that Smith and BTM did not intend to immediately advance the full amount of
9 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
10 or else return the funds to Plaintiff, and established money market accounts to hold
11 such funds longer than five business days;
- 12 • that Smith and BTM were not maintaining appropriate records and books of account
13 reflecting interest accrued and interest received, interest rate changes, principal
14 payments and all other transactions or actions affecting the Loan.

15 Fraud – Reliance, Discovery and Damage

16 366. Plaintiff continued to fund the Insoul Fellowship Church loan and project in
17 response to periodic draw requests from Defendants, based on continued assurances and
18 representations of Defendants Smith and BTM, including through their agents at Arks and
19 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
20 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
21 failure to disclose that Plaintiff's funds were being commingled with other funds and
22 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
23 began working on a new program to take over the servicing and administration of the loans,
24 expand the Build to Minister church loan program into various investment funds, and market
25 those funds to third parties.

26 367. On or about July 31, 2009, during this effort to expand the loan program,
27 Plaintiff first learned of problems with the loans, including that Defendants and their agents
28 owed monies to third parties and were unable to pay them despite Plaintiff and other

1 investors having advanced funds as requested. Over the course of the next several months,
2 Plaintiff conducted an investigation in an attempt to determine what had happened to
3 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
4 misrepresentations, concealment and malfeasance. With respect to the problems discovered
5 with the loans, Plaintiff contributed additional monies in order to complete the projects,
6 including paying outstanding bills, liens, legal and administration fees, modifying the terms
7 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
8 new contractors to complete the construction.

9 368. But for Defendants' misrepresentations and concealment as described above,
10 Plaintiff would not have continued to provide funds in response to draw requests from
11 Defendants or their agents for the projects, including the Insoul Fellowship Church project,
12 and would not have invested efforts, time and money creating a new program to take over
13 servicing of the loans, expand the Build to Minister program into various investment funds,
14 and market those funds to third parties.

15 369. As a result of Defendants' misrepresentations and concealments, Plaintiff has
16 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
17 \$98,259 and which will be proved at trial. Additionally, Plaintiff incurred legal and
18 administrative costs in addressing and mitigating the harm caused by Defendants'
19 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
20 funds expended in creating a new program to take over servicing of the loans, expand the
21 Build to Minister program into various investment funds, and market those funds to third
22 parties, which it would not have expended but for Defendants' misrepresentations and
23 concealments.

24 *New Creation Church Loan*

25 Contract Terms

26 370. On December 16, 2008, Plaintiff Muse Children's GS Trust entered into a
27 Construction Note Participation Agreement with Defendant BTM on a construction loan to
28 New Creation Church ("New Creation Participation Agreement" or "Participation

1 Agreement”). The New Creation Participation Agreement provided that Plaintiff
2 (designated “Participant”) would have a participation interest of 10% in the construction
3 note amount of \$825,496, which Defendant BTM (designated “Seller”) would loan to the
4 church, New Creation Church (designated “Borrower”). Under the New Creation
5 Participation Agreement, Plaintiff committed to fund a total of \$82,549.60, to be advanced
6 to Defendant BTM in response to periodic draw requests from Defendant according to a
7 projected draw schedule. In consideration for Plaintiff’s advancing the funds, Plaintiff was
8 entitled to receive the return of the principal invested, as well as 10.5% interest on such
9 amount, and its pro rata portion (10%) of a Participation Fee (of \$12,382.44, with interest
10 and fees to be paid monthly, and the principal payable to Plaintiff at the issuance of a
11 Certificate of Occupancy for the Property or twelve (12) months from the date of Loan
12 Closing, whichever first occurs, as provided for in the Loan Agreement which was
13 specifically referenced by and incorporated into the Participation Agreement. The
14 Participation Agreement also provided that in the event Plaintiff had not received its return
15 of principal at the time specified, BTM was either to provide or to arrange additional
16 financing so that Plaintiff would receive all its funds.

17 371. Defendant BTM, for its part, agreed among other things, that:

- 18 • “In the event Seller [BTM] does not for any reason advance to Borrower
19 [church] the full amount of the contemplated advance [the draws of funds that
20 Defendants called for every month] on the date of receipt of such Purchase
21 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
22 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
23 to the amount of such contemplated advance not made.” (Participation
24 Agreement, Schedule 4, ¶2.)
- 25 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
26 the terms of the Loan Documents and with this Agreement. Seller [BTM]
27 shall provide loan servicing in accordance with commercially acceptable loan
28 servicing practices and with the same degree of care that is customarily
employed and exercised by Seller [BTM] in the administration and servicing
of loans of a similar nature held by it for its own account (the “Servicing
Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- “The Seller [BTM] shall maintain appropriate records and books of account
reflecting interest accrued and interest received, interest rate changes, principal
payments and all other transactions or actions affecting the Loan, which
records shall be keep in accordance with accounting principles consistently

1 and customarily applied by Seller [BTM].” (Participation Agreement,
2 Schedule 4, ¶9.)

- 3 • “Seller [BTM] further agrees that in performing its obligations hereunder,
4 Seller shall: (a) act in a custodial capacity on behalf of the Participant
5 [Plaintiff] with respect to its holding of any underlying instrument or collateral
6 and in holding any proceeds received for the Loan; (b) not commingle for any
7 significant period of time proceeds received on the Loan; (c) directly pass
8 through any proceeds received from the Loan to Participant [Plaintiff] as
9 provided in Section 4 of this Agreement, less any proceeds that represent
10 servicing or other compensation to Seller [BTM] or an interest in the Loan
11 retained by the Seller [BTM], all as more particularly provided for herein; and
12 (d) administer the Loan in accordance with the Servicing Standard as provided
13 herein.” (Participation Agreement, Schedule 4, ¶ 9.)

14 372. The parties agreed that the Plaintiff would advance funds to BTM, as called
15 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
16 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
17 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
18 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
19 (the Church), to service the loan and advance the funds towards the construction project,
20 according to the budget and plans approved and relied upon by the Plaintiff in entering into
21 the Participation Agreement. Upon information and belief, BTM had an agreement with
22 Arks whereby Arks took over the servicing and administration of the Loan to New Creation
23 Church. The Participation Agreement specifically references and incorporates the Loan
24 Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower
25 (the Church), and which provides that “the Loan proceeds are to be used by Church solely
26 for the construction of a church, church-related improvements, and/or costs related thereto
27 (the “Project”) upon the land described in the Security Instrument (the “Property”) in
28 accordance with the plans and specifications approved by ARKS.”

373. Plaintiff agreed to advance the funds in response to periodic draws based on
the project plans and budget which were attached to the Participation Agreement and/or the
Loan Agreement that was incorporated into the Participation Agreement, and which had
been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
committing to the Participation Agreement for the New Creation Church Loan. Defendant
BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors,

1 suppliers and other third parties as well as specific project-related servicing fees to itself,
2 Arks and Noah, according to the budget and plans submitted to and approved by Plaintiffs
3 and incorporated into the Participation Agreement, and agreed to get prior approval from
4 Plaintiff for any material change to the budget or plans.

5 Contract Performance and Breach

6 374. Upon execution of the Participation Agreement, Plaintiff began funding draw
7 requests for the New Creation Church project based on draw requests by BTM and its
8 agents. Plaintiff Muse Children's GS Trust advanced \$63,762 to BTM and its agents for the
9 New Creation Church Loan between November 2008 and March 2009.

10 375. Defendant BTM breached the Participation Agreement by, among other things,
11 the following:

- 12 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
13 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
14 Ministries, Inc. (or to the servicers or contractors for authorized project
15 disbursements on the Borrower's behalf), and failing to return within five business
16 days to Plaintiff any funds not so advanced;
- 17 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
18 contractors, suppliers and other third parties as well as specific project-related
19 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
20 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
21 failing to get prior approval from Plaintiff for any material change to the budget or
22 plans;
- 23 • failing to maintain appropriate records and books of account reflecting interest
24 accrued and interest received, interest rate changes, principal payments and all other
25 transactions or actions affecting the Loan;
- 26 • not paying Plaintiff its return of principal at the earlier of the issuance of the
27 certificate of occupancy or within 12 months of the Loan Closing;

28 ///

- 1 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
- 2 Closing and not providing or arranging additional financing to allow Plaintiff to
- 3 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
- 4 within 12 months of the Loan Closing;
- 5 • not paying Plaintiff its interest and fees on a monthly basis;
- 6 • failing to provide loan servicing and administration in accordance with the Loan
- 7 documents and with commercially acceptable loan servicing practices;
- 8 • requiring additional payments by Plaintiff beyond what was due under the
- 9 Participation Agreement and the approved budget and plans incorporated therein;
- 10 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 11 holding any proceeds received for the Loan;
- 12 • commingling for significant periods of time proceeds received on the Loan with other
- 13 funds.

14 Contract Damages

15 376. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
16 as yet unascertained, but which Plaintiff believes is at least \$79,632 and which will be
17 proved at trial.

18 377. Additionally, Plaintiff incurred legal and administrative costs in addressing
19 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
20 have incurred.

21 Fraud – Defendants' Misrepresentations

22 378. On the periodic draw requests sent to Plaintiff beginning in November 2008,
23 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
24 had been spent on the New Creation Church project, in accordance with the approved plans
25 and budget, as per the reports, forms, and spreadsheets submitted with the draw requests,
26 and that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
27 value of the project to that point.

28 ///

1 to project-related costs, according to the plans and budgets submitted to, approved by
2 and relied on by Plaintiff;

- 3 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
4 including payments made to unrelated third parties - friends of David Smith and
5 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
6 Lachman Lane Property;
- 7 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
8 and its investments in overseeing the management, servicing and administration of
9 the loans and projects;
- 10 • that Smith and BTM were commingling for significant periods of time proceeds
11 received on the Loan with other funds;
- 12 • that Smith and BTM did not intend to immediately advance the full amount of
13 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
14 or else return the funds to Plaintiff, and established money market accounts to hold
15 such funds longer than five business days;
- 16 • that Smith and BTM were not maintaining appropriate records and books of account
17 reflecting interest accrued and interest received, interest rate changes, principal
18 payments and all other transactions or actions affecting the Loan.

19 Fraud – Reliance, Discovery and Damage

20 382. Plaintiff continued to fund the New Creation Church loan and project in
21 response to periodic draw requests from Defendants, based on continued assurances and
22 representations of Defendants Smith and BTM, including through their agents at Arks and
23 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
24 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
25 failure to disclose that Plaintiff's funds were being commingled with other funds and
26 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
27 began working on a new program to take over the servicing and administration of the loans,

28 ///

1 expand the Build to Minister church loan program into various investment funds, and
2 market those funds to third parties.

3 383. On or about July 31, 2009, during this effort to expand the loan program,
4 Plaintiff first learned of problems with the loans, including that Defendants and their agents
5 owed monies to third parties and were unable to pay them despite Plaintiff and other
6 investors having advanced funds as requested. Over the course of the next several months,
7 Plaintiff conducted an investigation in an attempt to determine what had happened to
8 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
9 misrepresentations, concealment and malfeasance. With respect to the problems discovered
10 with the loans, Plaintiff contributed additional monies in order to complete the projects,
11 including paying outstanding bills, liens, legal and administration fees, modifying the terms
12 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
13 new contractors to complete the construction.

14 384. But for Defendants' misrepresentations and concealment as described above,
15 Plaintiff would not have continued to provide funds in response to draw requests from
16 Defendants or their agents for the projects, including the New Creation Church project, and
17 would not have invested efforts, time and money creating a new program to take over
18 servicing of the loans, expand the Build to Minister program into various investment funds,
19 and market those funds to third parties.

20 385. As a result of Defendants' misrepresentations and concealments, Plaintiff has
21 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
22 \$79,632 and which will be proved at trial. Additionally, Plaintiff incurred legal and
23 administrative costs in addressing and mitigating the harm caused by Defendants'
24 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
25 funds expended in creating a new program to take over servicing of the loans, expand the
26 Build to Minister program into various investment funds, and market those funds to third
27 parties, which it would not have expended but for Defendants' misrepresentations and
28 concealments.

1 *Peace Baptist Church Loan*

2 Contract Terms

3 386. On September 26, 2008, Plaintiff Muse Children's GS Trust entered into a
4 Construction Note Participation Agreement with Defendant BTM on a construction loan to
5 Peace Baptist Church ("Peace Participation Agreement" or "Participation Agreement"). The
6 Peace Participation Agreement provided that Plaintiff (designated "Participant") would have
7 a participation interest of 10% in the construction note amount of \$515,562, which
8 Defendant BTM (designated "Seller") would loan to the church, Peace Baptist Church
9 (designated "Borrower"). Under the Peace Participation Agreement, Plaintiff committed to
10 fund a total of \$120,280.61, to be advanced to Defendant BTM in response to periodic draw
11 requests from Defendant according to a projected draw schedule. In consideration for
12 Plaintiff's advancing the funds, Plaintiff was entitled to receive the return of the principal
13 invested, as well as 10.5% interest on such amount, and its pro rata portion (10%) of a
14 Participation Fee (of \$7,733.43), with interest and fees to be paid monthly, and the principal
15 payable to Plaintiff at the issuance of a Certificate of Occupancy for the Property or twelve
16 (12) months from the date of Loan Closing, whichever first occurs, as provided for in the
17 Loan Agreement which was specifically referenced by and incorporated into the
18 Participation Agreement. The Participation Agreement also provided that in the event
19 Plaintiff had not received its return of principal at the time specified, BTM was either to
20 provide or to arrange additional financing so that Plaintiff would receive all its funds.

21 387. Defendant BTM, for its part, agreed among other things, that:

- 22
- 23 • "In the event Seller [BTM] does not for any reason advance to Borrower
24 [church] the full amount of the contemplated advance [the draws of funds that
25 Defendants called for every month] on the date of receipt of such Purchase
26 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
27 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
28 to the amount of such contemplated advance not made." (Participation
Agreement, Schedule 4, ¶2.)
 - "[T]he Seller [BTM] shall service and administer the Loan in accordance with
the terms of the Loan Documents and with this Agreement. Seller [BTM]
shall provide loan servicing in accordance with commercially acceptable loan
servicing practices and with the same degree of care that is customarily
employed and exercised by Seller [BTM] in the administration and servicing

1 of loans of a similar nature held by it for its own account (the "Servicing
Standard")." (Participation Agreement, Schedule 4, ¶9.)

- 2 • "The Seller [BTM] shall maintain appropriate records and books of account
3 reflecting interest accrued and interest received, interest rate changes, principal
4 payments and all other transactions or actions affecting the Loan, which
5 records shall be kept in accordance with accounting principles consistently
6 and customarily applied by Seller [BTM]." (Participation Agreement,
7 Schedule 4, ¶9.)
- 8 • "Seller [BTM] further agrees that in performing its obligations hereunder,
9 Seller shall: (a) act in a custodial capacity on behalf of the Participant
10 [Plaintiff] with respect to its holding of any underlying instrument or collateral
11 and in holding any proceeds received for the Loan; (b) not commingle for any
12 significant period of time proceeds received on the Loan; (c) directly pass
13 through any proceeds received from the Loan to Participant [Plaintiff] as
14 provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein." (Participation Agreement, Schedule 4, ¶ 9.)
- "Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
of any material default with respect to the Loan of which Seller [BTM] is
actually aware and of any other matters which, in Seller's judgment, materially
affect the interest of Participant [Plaintiff] with respect to the Loan
(collectively, a "Material Default")." (Participation Agreement, Schedule 4, ¶
11.)

15 388. The parties agreed that the Plaintiff would advance funds to BTM, as called
16 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
17 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM's
18 consent, and that BTM or its agents would thereupon transmit the funds to BTM's affiliate
19 Arks and/or Arks' wholly owned subsidiary Noah Construction, on behalf of the Borrower
20 (the Church), to service the loan and advance the funds towards the construction project,
21 according to the budget and plans approved and relied upon by the Plaintiff in entering into
22 the Participation Agreement. Upon information and belief, BTM had an agreement with
23 Arks whereby Arks took over the servicing and administration of the Loan to Peace Baptist
24 Church. The Participation Agreement specifically references and incorporates the Loan
25 Agreement, which is between Arks "and its affiliate BTM Funding, Inc." and the Borrower
26 (the Church), and which provides that "the Loan proceeds are to be used by Church solely
27 for the construction of a church, church-related improvements, and/or costs related thereto

28 ///

1 (the "Project") upon the land described in the Security Instrument (the "Property") in
2 accordance with the plans and specifications approved by ARKS."

3 389. Plaintiff agreed to advance the funds in response to periodic draws based on
4 the project plans and budget which were attached to the Participation Agreement and/or the
5 Loan Agreement that was incorporated into the Participation Agreement, and which had
6 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
7 committing to the Participation Agreement for the Peace Baptist Church Loan. Defendant
8 BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors,
9 suppliers and other third parties as well as specific project-related servicing fees to itself,
10 Arks and Noah, according to the budget and plans submitted to and approved by Plaintiffs
11 and incorporated into the Participation Agreement, and agreed to get prior approval from
12 Plaintiff for any material change to the budget or plans.

13 Contract Performance and Breach

14 390. Upon execution of the Participation Agreement, Plaintiff began funding draw
15 requests for the Peace Baptist Church project based on draw requests by BTM and its agents.
16 Plaintiff Muse Children's GS Trust advanced \$19,924 to BTM and its agents for the Peace
17 Baptist Church Loan between March 2009 and June 2009.

18 391. Defendant BTM breached the Participation Agreement by, among other things,
19 the following:

- 20 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
21 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
22 Ministries, Inc. (or to the servicers or contractors for authorized project
23 disbursements on the Borrower's behalf), and failing to return within five business
24 days to Plaintiff any funds not so advanced;
- 25 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
26 contractors, suppliers and other third parties as well as specific project-related
27 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
28 to and approved by Plaintiffs and incorporated into the Participation Agreement, and

- 1 failing to get prior approval from Plaintiff for any material change to the budget or
2 plans;
- 3 • failing to maintain appropriate records and books of account reflecting interest
4 accrued and interest received, interest rate changes, principal payments and all other
5 transactions or actions affecting the Loan;
 - 6 • not paying Plaintiff its return of principal at the earlier of the issuance of the
7 certificate of occupancy or within 12 months of the Loan Closing;
 - 8 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
9 Closing and not providing or arranging additional financing to allow Plaintiff to
10 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
11 within 12 months of the Loan Closing;
 - 12 • not paying Plaintiff its interest and fees on a monthly basis;
 - 13 • failing to provide loan servicing and administration in accordance with the Loan
14 documents and with commercially acceptable loan servicing practices;
 - 15 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
16 holding any proceeds received for the Loan;
 - 17 • commingling for significant periods of time proceeds received on the Loan with other
18 funds;
 - 19 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
20 which Defendant was aware;
 - 21 • failing to require Borrower to pay the equity down payment as required by the Loan
22 Documents.

23 Contract Damages

24 392. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
25 as yet unascertained, but which Plaintiff believes is at least \$31,446 and which will be
26 proved at trial.

27 ///

28 ///

1 393. Additionally, Plaintiff incurred legal and administrative costs in addressing
2 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
3 have incurred.

4 Fraud – Defendants' Misrepresentations

5 394. On the periodic draw requests sent to Plaintiff beginning in March 2009,
6 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
7 had been spent on the Peace Baptist Church project, in accordance with the approved plans
8 and budget, as per the reports, forms, and spreadsheets submitted with the draw requests,
9 and that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
10 value of the project to that point.

11 395. Prior to Plaintiff's executing the Participation Agreement and making each
12 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
13 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
14 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
15 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
16 updates on projects, including the Peace Baptist Church project, and was told that all funds
17 previously advanced by Plaintiff to BTM and its agents on the Peace Baptist Church loan
18 had been put towards the project according to the budget and plans submitted to, approved
19 by and relied on by Plaintiff.

20 Fraud – True Facts

21 396. In fact, Defendants' representations to Plaintiff as described above were false.
22 The true facts were that:

- 23 • Plaintiff's funds had not been spent on the Peace Baptist Church project in
24 accordance with the approved plans and budget as per the reports, forms, and
25 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
26 March 2009, and the reports, forms, and spreadsheets submitted to Plaintiff did not
27 accurately represent the value of the project to that point;

28 ///

- 1 • all funds previously advanced by Plaintiff to BTM and its agents on the Peace Baptist
2 Church loan had not been put towards the project according to the budget and plans
3 submitted to, approved by and relied on by Plaintiff;

4 Fraud - Concealment

5 397. Defendants David Smith and BTM, including through their agents, concealed
6 from and failed to disclose to Plaintiff the following:

- 7 • the true financial and operational status of the loans and projects, including the Peace
8 Baptist Church project;
- 9 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
10 projects, including the Peace Baptist Church project, and were not being applied only
11 to project-related costs, according to the plans and budgets submitted to, approved by
12 and relied on by Plaintiff;
- 13 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
14 including payments made to unrelated third parties - friends of David Smith and
15 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
16 Lachman Lane Property;
- 17 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
18 and its investments in overseeing the management, servicing and administration of
19 the loans and projects;
- 20 • that Smith and BTM were commingling for significant periods of time proceeds
21 received on the Loan with other funds;
- 22 • that Smith and BTM did not intend to immediately advance the full amount of
23 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
24 or else return the funds to Plaintiff, and established money market accounts to hold
25 such funds longer than five business days;
- 26 • that Smith and BTM were not maintaining appropriate records and books of account
27 reflecting interest accrued and interest received, interest rate changes, principal
28 payments and all other transactions or actions affecting the Loan.

Fraud – Reliance, Discovery and Damage

1
2 398. Plaintiff continued to fund the Peace Baptist Church loan and project in
3 response to periodic draw requests from Defendants, based on continued assurances and
4 representations of Defendants Smith and BTM, including through their agents at Arks and
5 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
6 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
7 failure to disclose that Plaintiff's funds were being commingled with other funds and
8 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
9 began working on a new program to take over the servicing and administration of the loans,
10 expand the Build to Minister church loan program into various investment funds, and market
11 those funds to third parties.

12 399. On or about July 31, 2009, during this effort to expand the loan program,
13 Plaintiff first learned of problems with the loans, including that Defendants and their agents
14 owed monies to third parties and were unable to pay them despite Plaintiff and other
15 investors having advanced funds as requested. Over the course of the next several months,
16 Plaintiff conducted an investigation in an attempt to determine what had happened to
17 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
18 misrepresentations, concealment and malfeasance. With respect to the problems discovered
19 with the loans, Plaintiff contributed additional monies in order to complete the projects,
20 including paying outstanding bills, liens, legal and administration fees, modifying the terms
21 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
22 new contractors to complete the construction.

23 400. But for Defendants' misrepresentations and concealment as described above,
24 Plaintiff would not have continued to provide funds in response to draw requests from
25 Defendants or their agents for the projects, including the Peace Baptist Church project, and
26 would not have invested efforts, time and money creating a new program to take over
27 servicing of the loans, expand the Build to Minister program into various investment funds,
28 and market those funds to third parties.

1 Plaintiff had not received its return of principal at the time specified, BTM was either to
2 provide or to arrange additional financing so that Plaintiff would receive all its funds.

3 403. Defendant BTM, for its part, agreed among other things, that:

- 4 • “In the event Seller [BTM] does not for any reason advance to Borrower
5 [church] the full amount of the contemplated advance [the draws of funds that
6 Defendants called for every month] on the date of receipt of such Purchase
7 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
8 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
9 to the amount of such contemplated advance not made.” (Participation
10 Agreement, Schedule 4, ¶2.)
- 11 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
12 the terms of the Loan Documents and with this Agreement. Seller [BTM]
13 shall provide loan servicing in accordance with commercially acceptable loan
14 servicing practices and with the same degree of care that is customarily
15 employed and exercised by Seller [BTM] in the administration and servicing
16 of loans of a similar nature held by it for its own account (the “Servicing
17 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 18 • “The Seller [BTM] shall maintain appropriate records and books of account
19 reflecting interest accrued and interest received, interest rate changes, principal
20 payments and all other transactions or actions affecting the Loan, which
21 records shall be kept in accordance with accounting principles consistently
22 and customarily applied by Seller [BTM].” (Participation Agreement,
23 Schedule 4, ¶9.)
- 24 • “Seller [BTM] further agrees that in performing its obligations hereunder,
25 Seller shall: (a) act in a custodial capacity on behalf of the Participant
26 [Plaintiff] with respect to its holding of any underlying instrument or collateral
27 and in holding any proceeds received for the Loan; (b) not commingle for any
28 significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)
- “[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
may take or omit to take any action under any of the Loan Documents which
would result in the following (each a “Material Change”): (a) reduce or
increase the amounts of principal or interest payments of the Loan, (b) reduce
or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
postpone any due date for payment of principal or interest in which Participant
[Plaintiff] shares, including, without limitation, the final maturity date of the
Loan, (d) except as expressly permitted under the Loan Documents, release or
subordinate any existing collateral described in the Loan Documents, (e)
release the liability of Borrower or any guarantor for the Loan, (f) consent to
the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
(ii) any direct or indirect interest in Borrower ... (g) make or consent to any
change in the principal amount of the Note; or (h) waive a default under the

1 Loan Documents arising from the failure to make payments as and when due
2 on the Loan. . . .” ((Participation Agreement, Schedule 4, ¶ 11.)

3 404. The parties agreed that the Plaintiff would advance funds to BTM, as called
4 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
5 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
6 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
7 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
8 (the Church), to service the loan and advance the funds towards the construction project,
9 according to the budget and plans approved and relied upon by the Plaintiff in entering into
10 the Participation Agreement. Upon information and belief, BTM had an agreement with
11 Arks whereby Arks took over the servicing and administration of the Loan to Rush AME
12 Zion Church. The Participation Agreement specifically references and incorporates the
13 Loan Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the
14 Borrower (the Church), and which provides that “the Loan proceeds are to be used by
15 Church solely for the construction of a church, church-related improvements, and/or costs
16 related thereto (the “Project”) upon the land described in the Security Instrument (the
17 “Property”) in accordance with the plans and specifications approved by ARKS.”

18 405. Plaintiff agreed to advance the funds in response to periodic draws based on
19 the project plans and budget which were attached to the Participation Agreement and/or the
20 Loan Agreement that was incorporated into the Participation Agreement, and which had
21 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
22 committing to the Participation Agreement for the Rush AME Zion Church Loan.
23 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
24 contractors, suppliers and other third parties as well as specific project-related servicing fees
25 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
26 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
27 approval from Plaintiff for any material change to the budget or plans.

28 ///

 ///

- 1 • failing to provide loan servicing and administration in accordance with the Loan
2 documents and with commercially acceptable loan servicing practices;
3 • requiring additional payments by Plaintiff beyond what was due under the
4 Participation Agreement and the approved budget and plans incorporated therein;
5 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
6 holding any proceeds received for the Loan;
7 • commingling for significant periods of time proceeds received on the Loan with other
8 funds;
9 • postponing due dates for payment of principal or interest in which Plaintiff shared
10 without obtaining the consent of Plaintiff.

11 Contract Damages

12 408. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
13 as yet unascertained, but which Plaintiff believes is at least \$52,077 and which will be
14 proved at trial.

15 409. Additionally, Plaintiff incurred legal and administrative costs in addressing
16 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
17 have incurred.

18 Fraud – Defendants' Misrepresentations

19 410. On the periodic draw requests sent to Plaintiff beginning in October 2008,
20 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
21 had been spent on the Rush AME Zion Church project, in accordance with the approved
22 plans and budget, as per the reports, forms, and spreadsheets submitted with the draw
23 requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
24 represented the value of the project to that point.

25 411. Prior to Plaintiff's executing the Participation Agreement and making each
26 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
27 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
28 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks

1 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
2 updates on projects, including the Rush AME Zion Church project, and was told that all
3 funds previously advanced by Plaintiff to BTM and its agents on the Rush AME Zion
4 Church loan had been put towards the project according to the budget and plans submitted
5 to, approved by and relied on by Plaintiff.

6 Fraud – True Facts

7 412. In fact, Defendants' representations to Plaintiff as described above were false.
8 The true facts were that:

- 9 • Plaintiff's funds had not been spent on the Rush AME Zion Church project in
10 accordance with the approved plans and budget as per the reports, forms, and
11 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
12 October 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
13 accurately represent the value of the project to that point;
- 14 • all funds previously advanced by Plaintiff to BTM and its agents on the Rush AME
15 Zion Church loan had not been put towards the project according to the budget and
16 plans submitted to, approved by and relied on by Plaintiff;

17 Fraud - Concealment

18 413. Defendants David Smith and BTM, including through their agents, concealed
19 from and failed to disclose to Plaintiff the following:

- 20 • the true financial and operational status of the loans and projects, including the Rush
21 AME Zion Church project;
- 22 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
23 projects, including the Rush AME Zion Church project, and were not being applied
24 only to project-related costs, according to the plans and budgets submitted to,
25 approved by and relied on by Plaintiff;
- 26 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
27 including payments made to unrelated third parties - friends of David Smith and

28 ///

- 1 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
2 Lachman Lane Property;
- 3 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
4 to Randy Barton and for "sales commissions" to Carmen Copple Smith;
 - 5 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
6 and its investments in overseeing the management, servicing and administration of
7 the loans and projects;
 - 8 • that Smith and BTM were commingling for significant periods of time proceeds
9 received on the Loan with other funds;
 - 10 • that Smith and BTM did not intend to immediately advance the full amount of
11 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
12 or else return the funds to Plaintiff, and established money market accounts to hold
13 such funds longer than five business days;
 - 14 • that Smith and BTM were not maintaining appropriate records and books of account
15 reflecting interest accrued and interest received, interest rate changes, principal
16 payments and all other transactions or actions affecting the Loan.

17 Fraud – Reliance, Discovery and Damage

18 414. Plaintiff continued to fund the Rush AME Zion Church loan and project in
19 response to periodic draw requests from Defendants, based on continued assurances and
20 representations of Defendants Smith and BTM, including through their agents at Arks and
21 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
22 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
23 failure to disclose that Plaintiff's funds were being commingled with other funds and
24 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
25 began working on a new program to take over the servicing and administration of the loans,
26 expand the Build to Minister church loan program into various investment funds, and market
27 those funds to third parties.

28 ///

1 415. On or about July 31, 2009, during this effort to expand the loan program,
2 Plaintiff first learned of problems with the loans, including that Defendants and their agents
3 owed monies to third parties and were unable to pay them despite Plaintiff and other
4 investors having advanced funds as requested. Over the course of the next several months,
5 Plaintiff conducted an investigation in an attempt to determine what had happened to
6 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
7 misrepresentations, concealment and malfeasance. With respect to the problems discovered
8 with the loans, Plaintiff contributed additional monies in order to complete the projects,
9 including paying outstanding bills, liens, legal and administration fees, modifying the terms
10 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
11 new contractors to complete the construction.

12 416. But for Defendants' misrepresentations and concealment as described above,
13 Plaintiff would not have continued to provide funds in response to draw requests from
14 Defendants or their agents for the projects, including the Rush AME Zion Church project,
15 and would not have invested efforts, time and money creating a new program to take over
16 servicing of the loans, expand the Build to Minister program into various investment funds,
17 and market those funds to third parties.

18 417. As a result of Defendants' misrepresentations and concealments, Plaintiff has
19 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
20 \$52,077 and which will be proved at trial. Additionally, Plaintiff incurred legal and
21 administrative costs in addressing and mitigating the harm caused by Defendants'
22 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
23 funds expended in creating a new program to take over servicing of the loans, expand the
24 Build to Minister program into various investment funds, and market those funds to third
25 parties, which it would not have expended but for Defendants' misrepresentations and
26 concealments.

27 ///

28 ///

1 *Brook Community Church Loan*

2 Contract Terms

3 418. On February 28, 2008, Plaintiff Muse Children's GS Trust entered into a
4 Construction Note Participation Agreement with Defendant BTM on a construction loan to
5 Brook Community Church ("Brook Participation Agreement" or "Participation
6 Agreement"). The Brook Participation Agreement provided that Plaintiff (designated
7 "Participant") would have a participation interest of 10% in the construction note amount of
8 \$1,122,745, which Defendant BTM (designated "Seller") would loan to the church, Brook
9 Community Church (designated "Borrower"). Under the Brook Participation Agreement,
10 Plaintiff committed to fund a total of \$112,275, to be advanced to Defendant BTM in
11 response to periodic draw requests from Defendant according to a projected draw schedule.
12 In consideration for Plaintiff's advancing the funds, Plaintiff was entitled to receive the
13 return of the principal invested, as well as 10.5% interest on such amount, and its pro rata
14 portion (10%)of a Participation Fee (of \$16,841.17), with interest and fees to be paid
15 monthly, and the principal payable to Plaintiff at the issuance of a Certificate of Occupancy
16 for the Property or twelve (12) months from the date of Loan Closing, whichever first
17 occurs, as provided for in the Loan Agreement which was specifically referenced by and
18 incorporated into the Participation Agreement. The Participation Agreement also provided
19 that in the event Plaintiff had not received its return of principal at the time specified, BTM
20 was either to provide or to arrange additional financing so that Plaintiff would receive all its
21 funds.

22 419. Defendant BTM, for its part, agreed among other things, that:

- 23
- 24 • "In the event Seller [BTM] does not for any reason advance to Borrower
25 [church] the full amount of the contemplated advance [the draws of funds that
26 Defendants called for every month] on the date of receipt of such Purchase
27 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
28 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
to the amount of such contemplated advance not made." (Participation
Agreement, Schedule 4, ¶2.)
 - "[T]he Seller [BTM] shall service and administer the Loan in accordance with
the terms of the Loan Documents and with this Agreement. Seller [BTM]
shall provide loan servicing in accordance with commercially acceptable loan

1 servicing practices and with the same degree of care that is customarily
2 employed and exercised by Seller [BTM] in the administration and servicing
of loans of a similar nature held by it for its own account (the "Servicing
Standard")." (Participation Agreement, Schedule 4, ¶9.)

- 3 • "The Seller [BTM] shall maintain appropriate records and books of account
4 reflecting interest accrued and interest received, interest rate changes, principal
5 payments and all other transactions or actions affecting the Loan, which
6 records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)
- 7 • "Seller [BTM] further agrees that in performing its obligations hereunder,
8 Seller shall: (a) act in a custodial capacity on behalf of the Participant
[Plaintiff] with respect to its holding of any underlying instrument or collateral
9 and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
10 through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
11 servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
12 (d) administer the Loan in accordance with the Servicing Standard as provided
herein." (Participation Agreement, Schedule 4, ¶9.)

13 420. The parties agreed that the Plaintiff would advance funds to BTM, as called
14 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
15 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM's
16 consent, and that BTM or its agents would thereupon transmit the funds to BTM's affiliate
17 Arks and/or Arks' wholly owned subsidiary Noah Construction, on behalf of the Borrower
18 (the Church), to service the loan and advance the funds towards the construction project,
19 according to the budget and plans approved and relied upon by the Plaintiff in entering into
20 the Participation Agreement. Upon information and belief, BTM had an agreement with
21 Arks whereby Arks took over the servicing and administration of the Loan to Brook
22 Community Church. The Participation Agreement specifically references and incorporates
23 the Loan Agreement, which is between Arks "and its affiliate BTM Funding, Inc." and the
24 Borrower (the Church), and which provides that "the Loan proceeds are to be used by
25 Church solely for the construction of a church, church-related improvements, and/or costs
26 related thereto (the "Project") upon the land described in the Security Instrument (the
27 "Property") in accordance with the plans and specifications approved by ARKS."

28 ///

- 1 • failing to maintain appropriate records and books of account reflecting interest
- 2 accrued and interest received, interest rate changes, principal payments and all other
- 3 transactions or actions affecting the Loan;
- 4 • not paying Plaintiff its return of principal at the earlier of the issuance of the
- 5 certificate of occupancy or within 12 months of the Loan Closing;
- 6 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
- 7 Closing and not providing or arranging additional financing to allow Plaintiff to
- 8 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
- 9 within 12 months of the Loan Closing;
- 10 • not paying Plaintiff its interest and fees on a monthly basis;
- 11 • failing to provide loan servicing and administration in accordance with the Loan
- 12 documents and with commercially acceptable loan servicing practices;
- 13 • requiring additional payments by Plaintiff beyond what was due under the
- 14 Participation Agreement and the approved budget and plans incorporated therein;
- 15 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 16 holding any proceeds received for the Loan;
- 17 • commingling for significant periods of time proceeds received on the Loan with other
- 18 funds.

19 Contract Damages

20 424. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
21 as yet unascertained, but which Plaintiff believes is at least \$22,304 and which will be
22 proved at trial.

23 425. Additionally, Plaintiff incurred legal and administrative costs in addressing
24 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
25 have incurred.

26 Fraud – Defendants' Misrepresentations

27 426. On the periodic draw requests sent to Plaintiff beginning in February 2008,
28 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff

1 had been spent on the Brook Community Church project, in accordance with the approved
2 plans and budget, as per the reports, forms, and spreadsheets submitted with the draw
3 requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
4 represented the value of the project to that point.

5 427. Prior to Plaintiff's executing the Participation Agreement and making each
6 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
7 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
8 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
9 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
10 updates on projects, including the Brook Community Church project, and was told that all
11 funds previously advanced by Plaintiff to BTM and its agents on the Brook Community
12 Church loan had been put towards the project according to the budget and plans submitted
13 to, approved by and relied on by Plaintiff.

14 Fraud – True Facts

15 428. In fact, Defendants' representations to Plaintiff as described above were false.
16 The true facts were that:

- 17 • Plaintiff's funds had not been spent on the Brook Community Church project in
18 accordance with the approved plans and budget as per the reports, forms, and
19 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
20 February 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
21 accurately represent the value of the project to that point;
- 22 • all funds previously advanced by Plaintiff to BTM and its agents on the Brook
23 Community Church loan had not been put towards the project according to the budget
24 and plans submitted to, approved by and relied on by Plaintiff;

25 Fraud - Concealment

26 429. Defendants David Smith and BTM, including through their agents, concealed
27 from and failed to disclose to Plaintiff the following:

28 ///

- 1 • the true financial and operational status of the loans and projects, including the Brook
2 Community Church project;
- 3 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
4 projects, including the Brook Community Church project, and were not being applied
5 only to project-related costs, according to the plans and budgets submitted to,
6 approved by and relied on by Plaintiff;
- 7 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
8 including payments made to unrelated third parties - friends of David Smith and
9 David Smith's wife, Carmen Cople Smith, and payments of the mortgage on the
10 Lachman Lane Property;
- 11 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
12 to Randy Barton and for "sales commissions" to Carmen Cople Smith;
- 13 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
14 and its investments in overseeing the management, servicing and administration of
15 the loans and projects;
- 16 • that Smith and BTM were commingling for significant periods of time proceeds
17 received on the Loan with other funds;
- 18 • that Smith and BTM did not intend to immediately advance the full amount of
19 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
20 or else return the funds to Plaintiff, and established money market accounts to hold
21 such funds longer than five business days;
- 22 • that Smith and BTM were not maintaining appropriate records and books of account
23 reflecting interest accrued and interest received, interest rate changes, principal
24 payments and all other transactions or actions affecting the Loan.

25 Fraud – Reliance, Discovery and Damage

26 430. Plaintiff continued to fund the Brook Community Church loan and project in
27 response to periodic draw requests from Defendants, based on continued assurances and
28 representations of Defendants Smith and BTM, including through their agents at Arks and

1 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
2 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
3 failure to disclose that Plaintiff's funds were being commingled with other funds and
4 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
5 began working on a new program to take over the servicing and administration of the loans,
6 expand the Build to Minister church loan program into various investment funds, and market
7 those funds to third parties.

8 431. On or about July 31, 2009, during this effort to expand the loan program,
9 Plaintiff first learned of problems with the loans, including that Defendants and their agents
10 owed monies to third parties and were unable to pay them despite Plaintiff and other
11 investors having advanced funds as requested. Over the course of the next several months,
12 Plaintiff conducted an investigation in an attempt to determine what had happened to
13 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
14 misrepresentations, concealment and malfeasance. With respect to the problems discovered
15 with the loans, Plaintiff contributed additional monies in order to complete the projects,
16 including paying outstanding bills, liens, legal and administration fees, modifying the terms
17 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
18 new contractors to complete the construction.

19 432. But for Defendants' misrepresentations and concealment as described above,
20 Plaintiff would not have continued to provide funds in response to draw requests from
21 Defendants or their agents for the projects, including the Brook Community Church project,
22 and would not have invested efforts, time and money creating a new program to take over
23 servicing of the loans, expand the Build to Minister program into various investment funds,
24 and market those funds to third parties.

25 433. As a result of Defendants' misrepresentations and concealments, Plaintiff has
26 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
27 \$22,304 and which will be proved at trial. Additionally, Plaintiff incurred legal and
28 administrative costs in addressing and mitigating the harm caused by Defendants'

1 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
2 funds expended in creating a new program to take over servicing of the loans, expand the
3 Build to Minister program into various investment funds, and market those funds to third
4 parties, which it would not have expended but for Defendants' misrepresentations and
5 concealments.

6 *True Way Church of God in Christ, Inc. Loan*

7 Contract Terms

8 434. On February 28, 2008, Plaintiff Muse Children's GS Trust entered into a
9 Construction Note Participation Agreement with Defendant BTM on a construction loan to
10 True Way Church of God in Christ, Inc. ("True Way Participation Agreement" or
11 "Participation Agreement"). The True Way Participation Agreement provided that Plaintiff
12 (designated "Participant") would have a participation interest of 10% in the construction
13 note amount of \$267,100, which Defendant BTM (designated "Seller") would loan to the
14 church, True Way Church of God in Christ, Inc. ("True Way") (designated "Borrower").
15 Under the True Way Participation Agreement, Plaintiff committed to fund a total of
16 \$26,710, to be advanced to Defendant BTM in response to periodic draw requests from
17 Defendant according to a projected draw schedule. In consideration for Plaintiff's
18 advancing the funds, Plaintiff was entitled to receive the return of the principal invested, as
19 well as 10.5% interest on such amount, and its pro rata amount (10%) of a Participation Fee
20 (of \$4,006.50), with interest and fees to be paid monthly, and the principal payable to
21 Plaintiff at the issuance of a Certificate of Occupancy for the Property or twelve (12) months
22 from the date of Loan Closing, whichever first occurs, as provided for in the Loan
23 Agreement which was specifically referenced by and incorporated into the Participation
24 Agreement. The Participation Agreement also provided that in the event Plaintiff had not
25 received its return of principal at the time specified, BTM was either to provide or to arrange
26 additional financing so that Plaintiff would receive all its funds.

27 435. Defendant BTM, for its part, agreed among other things, that:

28 ///

- 1 • “In the event Seller [BTM] does not for any reason advance to Borrower
2 [church] the full amount of the contemplated advance [the draws of funds that
3 Defendants called for every month] on the date of receipt of such Purchase
4 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
5 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
6 to the amount of such contemplated advance not made.” (Participation
7 Agreement, Schedule 4, ¶2.)
- 8 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
9 the terms of the Loan Documents and with this Agreement. Seller [BTM]
10 shall provide loan servicing in accordance with commercially acceptable loan
11 servicing practices and with the same degree of care that is customarily
12 employed and exercised by Seller [BTM] in the administration and servicing
13 of loans of a similar nature held by it for its own account (the “Servicing
14 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 15 • “The Seller [BTM] shall maintain appropriate records and books of account
16 reflecting interest accrued and interest received, interest rate changes, principal
17 payments and all other transactions or actions affecting the Loan, which
18 records shall be kept in accordance with accounting principles consistently
19 and customarily applied by Seller [BTM].” (Participation Agreement,
20 Schedule 4, ¶9.)
- 21 • “Seller [BTM] further agrees that in performing its obligations hereunder,
22 Seller shall: (a) act in a custodial capacity on behalf of the Participant
23 [Plaintiff] with respect to its holding of any underlying instrument or collateral
24 and in holding any proceeds received for the Loan; (b) not commingle for any
25 significant period of time proceeds received on the Loan; (c) directly pass
26 through any proceeds received from the Loan to Participant [Plaintiff] as
27 provided in Section 4 of this Agreement, less any proceeds that represent
28 servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)

436. The parties agreed that the Plaintiff would advance funds to BTM, as called for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents, including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower (the Church), to service the loan and advance the funds towards the construction project, according to the budget and plans approved and relied upon by the Plaintiff in entering into the Participation Agreement. Upon information and belief, BTM had an agreement with Arks whereby Arks took over the servicing and administration of the Loan to True Way. The Participation Agreement specifically references and incorporates the Loan Agreement,

1 which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower (the Church),
2 and which provides that “the Loan proceeds are to be used by Church solely for the
3 construction of a church, church-related improvements, and/or costs related thereto (the
4 “Project”) upon the land described in the Security Instrument (the “Property”) in accordance
5 with the plans and specifications approved by ARKS.”

6 437. Plaintiff agreed to advance the funds in response to periodic draws based on
7 the project plans and budget which were attached to the Participation Agreement and/or the
8 Loan Agreement that was incorporated into the Participation Agreement, and which had
9 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
10 committing to the Participation Agreement for the True Way Loan. Defendant BTM agreed
11 to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors, suppliers and
12 other third parties as well as specific project-related servicing fees to itself, Arks and Noah,
13 according to the budget and plans submitted to and approved by Plaintiffs and incorporated
14 into the Participation Agreement, and agreed to get prior approval from Plaintiff for any
15 material change to the budget or plans.

16 Contract Performance and Breach

17 438. Upon execution of the Participation Agreement, Plaintiff began funding draw
18 requests for the True Way project based on draw requests by BTM and its agents. Plaintiff
19 Muse Children’s GS Trust advanced \$26,710 to BTM and its agents for the True Way Loan
20 between February 2008 and December 2008.

21 439. Defendant BTM breached the Participation Agreement by, among other things,
22 the following:

- 23 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
24 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
25 Ministries, Inc. (or to the servicers or contractors for authorized project
26 disbursements on the Borrower’s behalf), and failing to return within five business
27 days to Plaintiff any funds not so advanced;

28 ///

- 1 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
2 contractors, suppliers and other third parties as well as specific project-related
3 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
4 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
5 failing to get prior approval from Plaintiff for any material change to the budget or
6 plans;
- 7 • failing to maintain appropriate records and books of account reflecting interest
8 accrued and interest received, interest rate changes, principal payments and all other
9 transactions or actions affecting the Loan;
- 10 • not paying Plaintiff its return of principal at the earlier of the issuance of the
11 certificate of occupancy or within 12 months of the Loan Closing;
- 12 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
13 Closing and not providing or arranging additional financing to allow Plaintiff to
14 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
15 within 12 months of the Loan Closing;
- 16 • not paying Plaintiff its interest and fees on a monthly basis;
- 17 • failing to provide loan servicing and administration in accordance with the Loan
18 documents and with commercially acceptable loan servicing practices;
- 19 • requiring additional payments by Plaintiff beyond what was due under the
20 Participation Agreement and the approved budget and plans incorporated therein;
- 21 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
22 holding any proceeds received for the Loan;
- 23 • commingling for significant periods of time proceeds received on the Loan with other
24 funds.

25 Contract Damages

26 440. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
27 as yet unascertained, but which Plaintiff believes is at least \$10,449 and which will be
28 proved at trial.

1 441. Additionally, Plaintiff incurred legal and administrative costs in addressing
2 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
3 have incurred.

4 Fraud – Defendants' Misrepresentations

5 442. On the periodic draw requests sent to Plaintiff beginning in February 2008,
6 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
7 had been spent on the True Way project, in accordance with the approved plans and budget,
8 as per the reports, forms, and spreadsheets submitted with the draw requests, and that the
9 reports, forms, and spreadsheets provided to Plaintiff accurately represented the value of the
10 project to that point.

11 443. Prior to Plaintiff's executing the Participation Agreement and making each
12 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
13 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
14 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
15 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
16 updates on projects, including the True Way project, and was told that all funds previously
17 advanced by Plaintiff to BTM and its agents on the True Way loan had been put towards the
18 project according to the budget and plans submitted to, approved by and relied on by
19 Plaintiff.

20 Fraud – True Facts

21 444. In fact, Defendants' representations to Plaintiff as described above were false.
22 The true facts were that:

- 23 • Plaintiff's funds had not been spent on the True Way project in accordance with the
24 approved plans and budget as per the reports, forms, and spreadsheets submitted with
25 the periodic draw requests sent to Plaintiff beginning in February 2008, and the
26 reports, forms, and spreadsheets submitted to Plaintiff did not accurately represent the
27 value of the project to that point;

28 ///

- 1 • all funds previously advanced by Plaintiff to BTM and its agents on the True Way
2 loan had not been put towards the project according to the budget and plans submitted
3 to, approved by and relied on by Plaintiff;

4 Fraud - Concealment

5 445. Defendants David Smith and BTM, including through their agents, concealed
6 from and failed to disclose to Plaintiff the following:

- 7 • the true financial and operational status of the loans and projects, including the True
8 Way project;
- 9 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
10 projects, including the True Way project, and were not being applied only to project-
11 related costs, according to the plans and budgets submitted to, approved by and relied
12 on by Plaintiff;
- 13 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
14 including payments made to unrelated third parties - friends of David Smith and
15 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
16 Lachman Lane Property;
- 17 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
18 and its investments in overseeing the management, servicing and administration of
19 the loans and projects;
- 20 • that Smith and BTM were commingling for significant periods of time proceeds
21 received on the Loan with other funds;
- 22 • that Smith and BTM did not intend to immediately advance the full amount of
23 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
24 or else return the funds to Plaintiff, and established money market accounts to hold
25 such funds longer than five business days;
- 26 • that Smith and BTM were not maintaining appropriate records and books of account
27 reflecting interest accrued and interest received, interest rate changes, principal
28 payments and all other transactions or actions affecting the Loan.

Fraud – Reliance, Discovery and Damage

1
2 446. Plaintiff continued to fund the True Way loan and project in response to
3 periodic draw requests from Defendants, based on continued assurances and representations
4 of Defendants Smith and BTM, including through their agents at Arks and Noah, that
5 Plaintiff's funds advanced thus far had gone towards the projects according to the plans and
6 budget reviewed, approved and relied upon by Plaintiff, and based on Defendants' failure to
7 disclose that Plaintiff's funds were being commingled with other funds and diverted to non-
8 project related costs and payments. In or about February 2009, Plaintiff began working on a
9 new program to take over the servicing and administration of the loans, expand the Build to
10 Minister church loan program into various investment funds, and market those funds to third
11 parties.

12 447. On or about July 31, 2009, during this effort to expand the loan program,
13 Plaintiff first learned of problems with the loans, including that Defendants and their agents
14 owed monies to third parties and were unable to pay them despite Plaintiff and other
15 investors having advanced funds as requested. Over the course of the next several months,
16 Plaintiff conducted an investigation in an attempt to determine what had happened to
17 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
18 misrepresentations, concealment and malfeasance. With respect to the problems discovered
19 with the loans, Plaintiff contributed additional monies in order to complete the projects,
20 including paying outstanding bills, liens, legal and administration fees, modifying the terms
21 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
22 new contractors to complete the construction.

23 448. But for Defendants' misrepresentations and concealment as described above,
24 Plaintiff would not have continued to provide funds in response to draw requests from
25 Defendants or their agents for the projects, including the True Way project, and would not
26 have invested efforts, time and money creating a new program to take over servicing of the
27 loans, expand the Build to Minister program into various investment funds, and market those
28 funds to third parties.

1 449. As a result of Defendants' misrepresentations and concealments, Plaintiff has
2 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
3 \$10,449 and which will be proved at trial. Additionally, Plaintiff incurred legal and
4 administrative costs in addressing and mitigating the harm caused by Defendants'
5 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts
6 and funds expended in creating a new program to take over servicing of the loans, expand
7 the Build to Minister program into various investment funds, and market those funds to third
8 parties, which it would not have expended but for Defendants' misrepresentations and
9 concealments.

10 **Plaintiff Oak Stream**

11 ***Truth Tabernacle Ministries, Inc. Loan***

12 **Contract Terms**

13 450. On April 14, 2008, Plaintiff Oak Stream entered into a Construction Note
14 Participation Agreement with Defendant BTM on a construction loan to Truth Tabernacle
15 Ministries, Inc. ("TTM Participation Agreement" or "Participation Agreement"). The TTM
16 Participation Agreement provided that Plaintiff (designated "Participant") would have a
17 participation interest of 16 and 2/3% in the construction note amount of \$2,210,736, which
18 Defendant BTM (designated "Seller") would loan to the church, Truth Tabernacle
19 Ministries, Inc., (designated "Borrower"). Under the TTM Participation Agreement,
20 Plaintiff committed to fund a total of \$368,529.69, to be advanced to Defendant BTM in
21 response to periodic draw requests from Defendant according to a projected draw schedule.
22 In consideration for Plaintiff's advancing the funds, Plaintiff was entitled to receive the
23 return of the principal invested, as well as 10.5% interest on such amount , and its pro rata
24 amount (16 and 2/3%) of a Participation Fee (of \$33,161.04), with interest and fees to be
25 paid monthly, and the principal payable to Plaintiff at the issuance of a Certificate of
26 Occupancy for the Property or twelve (12) months from the date of Loan Closing, whichever
27 first occurs, as provided for in the Loan Agreement which was specifically referenced by
28 and incorporated into the Participation Agreement. The Participation Agreement also

1 provided that in the event Plaintiff had not received its return of principal at the time
2 specified, BTM was either to provide or to arrange additional financing so that Plaintiff
3 would receive all its funds.

4 451. Defendant BTM, for its part, agreed among other things, that:

- 5 • “In the event Seller [BTM] does not for any reason advance to Borrower
6 [church] the full amount of the contemplated advance [the draws of funds that
7 Defendants called for every month] on the date of receipt of such Purchase
8 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
9 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
10 to the amount of such contemplated advance not made.” (Participation
11 Agreement, Schedule 4, ¶2.)
- 12 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
13 the terms of the Loan Documents and with this Agreement. Seller [BTM]
14 shall provide loan servicing in accordance with commercially acceptable loan
15 servicing practices and with the same degree of care that is customarily
16 employed and exercised by Seller [BTM] in the administration and servicing
17 of loans of a similar nature held by it for its own account (the “Servicing
18 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 19 • “The Seller [BTM] shall maintain appropriate records and books of account
20 reflecting interest accrued and interest received, interest rate changes, principal
21 payments and all other transactions or actions affecting the Loan, which
22 records shall be kept in accordance with accounting principles consistently
23 and customarily applied by Seller [BTM].” (Participation Agreement,
24 Schedule 4, ¶9.)
- 25 • “Seller [BTM] further agrees that in performing its obligations hereunder,
26 Seller shall: (a) act in a custodial capacity on behalf of the Participant
27 [Plaintiff] with respect to its holding of any underlying instrument or collateral
28 and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)
- “Seller [BTM] represents and warrants to Participant [Plaintiff] that, as of the
date hereof ... no default in the payment of principal or interest on the Loan
has occurred and remains uncured under the Loan Documents.” (Participation
Agreement, Schedule 4, ¶ 15.)
- “[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
may take or omit to take any action under any of the Loan Documents which
would result in the following (each a “Material Change”): (a) reduce or
increase the amounts of principal or interest payments of the Loan, (b) reduce
or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
postpone any due date for payment of principal or interest in which Participant

1 [Plaintiff] shares, including, without limitation, the final maturity date of the
2 Loan, (d) except as expressly permitted under the Loan Documents, release or
3 subordinate any existing collateral described in the Loan Documents, (e)
4 release the liability of Borrower or any guarantor for the Loan, (f) consent to
5 the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
6 (ii) any direct or indirect interest in Borrower ... (g) make or consent to any
7 change in the principal amount of the Note; or (h) waive a default under the
8 Loan Documents arising from the failure to make payments as and when due
9 on the Loan. . . ." (Participation Agreement, Schedule 4, ¶ 11.)

- "Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff] of any material default with respect to the Loan of which Seller [BTM] is actually aware and of any other matters which, in Seller's judgment, materially affect the interest of Participant [Plaintiff] with respect to the Loan (collectively, a "Material Default")." (Participation Agreement, Schedule 4, ¶ 11.)

9 452. The parties agreed that the Plaintiff would advance funds to BTM, as called
10 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
11 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM's
12 consent, and that BTM or its agents would thereupon transmit the funds to BTM's affiliate
13 Arks and/or Arks' wholly owned subsidiary Noah Construction, on behalf of the Borrower
14 (the Church), to service the loan and advance the funds towards the construction project,
15 according to the budget and plans approved and relied upon by the Plaintiff in entering into
16 the Participation Agreement. Upon information and belief, BTM had an agreement with
17 Arks whereby Arks took over the servicing and administration of the Loan to Truth
18 Tabernacle Ministries, Inc. The Participation Agreement specifically references and
19 incorporates the Loan Agreement, which is between Arks "and its affiliate BTM Funding,
20 Inc." and the Borrower (the Church), and which provides that "the Loan proceeds are to be
21 used by Church solely for the construction of a church, church-related improvements, and/or
22 costs related thereto (the "Project") upon the land described in the Security Instrument (the
23 "Property") in accordance with the plans and specifications approved by ARKS." See Build
24 to Minister Loan Agreement (Truth Tabernacle Ministries, Inc.), dated May 15, 2008.

25 453. Plaintiff agreed to advance the funds in response to periodic draws based on
26 the project plans and budget which were attached to the Participation Agreement and/or the
27 Loan Agreement that was incorporated into the Participation Agreement, and which had
28 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in

1 committing to the Participation Agreement for the Truth Tabernacle Ministries, Inc. Loan.
2 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
3 contractors, suppliers and other third parties as well as specific project-related servicing fees
4 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
5 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
6 approval from Plaintiff for any material change to the budget or plans.

7 Contract Performance and Breach

8 454. Upon execution of the Participation Agreement, Plaintiff began funding draw
9 requests for the Truth Tabernacle Ministries, Inc. project based on draw requests by BTM
10 and its agents. Plaintiff Oak Stream advanced \$368,456 to BTM and its agents for the Truth
11 Tabernacle Ministries, Inc. Loan between July 2008 and May 2009.

12 455. Defendant BTM breached the Participation Agreement by, among other things,
13 the following:

- 14 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
15 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
16 Ministries, Inc. (or to the servicers or contractors for authorized project
17 disbursements on the Borrower's behalf), and failing to return within five business
18 days to Plaintiff any funds not so advanced;
- 19 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
20 contractors, suppliers and other third parties as well as specific project-related
21 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
22 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
23 failing to get prior approval from Plaintiff for any material change to the budget or
24 plans;
- 25 • failing to maintain appropriate records and books of account reflecting interest
26 accrued and interest received, interest rate changes, principal payments and all other
27 transactions or actions affecting the Loan;

28 ///

- 1 • not paying Plaintiff its return of principal at the earlier of the issuance of the
- 2 certificate of occupancy or within 12 months of the Loan Closing;
- 3 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
- 4 Closing and not providing or arranging additional financing to allow Plaintiff to
- 5 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
- 6 within 12 months of the Loan Closing;
- 7 • not paying Plaintiff its interest and fees on a monthly basis;
- 8 • failing to provide loan servicing and administration in accordance with the Loan
- 9 documents and with commercially acceptable loan servicing practices;
- 10 • requiring additional payments by Plaintiff beyond what was due under the
- 11 Participation Agreement and the approved budget and plans incorporated therein;
- 12 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 13 holding any proceeds received for the Loan;
- 14 • commingling for significant periods of time proceeds received on the Loan with other
- 15 funds;
- 16 • failing to inform Plaintiff that as of the date of the Participation Agreement a default
- 17 in the payment of principal or interest on the Loan had occurred and remained
- 18 uncured;
- 19 • waiving a default under the Loan Documents arising from the failure to make
- 20 payments as and when due on the Loan without obtaining the consent of Plaintiff;
- 21 • postponing due dates for payment of principal or interest in which Plaintiff shared
- 22 without obtaining the consent of Plaintiff;
- 23 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
- 24 which Defendant was aware.

25 Contract Damages

26 456. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
27 as yet unascertained, but which Plaintiff believes is at least \$138,509 and which will be
28 proved at trial.

1 457. Additionally, Plaintiff incurred legal and administrative costs in addressing
2 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
3 have incurred.

4 Fraud – Defendants' Misrepresentations

5 458. On the periodic draw requests sent to Plaintiff beginning in July 2008, Smith's
6 and BTM's agents signed attestations that the monies advanced thus far by Plaintiff had
7 been spent on the Truth Tabernacle project, in accordance with the approved plans and
8 budget, as per the reports, forms, and spreadsheets submitted with the draw requests, and
9 that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
10 value of the project to that point.

11 459. Prior to Plaintiff's executing the Participation Agreement and making each
12 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
13 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
14 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
15 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
16 updates on projects, including the Truth Tabernacle Ministries, Inc. project, and was told
17 that all funds previously advanced by Plaintiff to BTM and its agents on the Truth
18 Tabernacle loan had been put towards the project according to the budget and plans
19 submitted to, approved by and relied on by Plaintiff.

20 Fraud – True Facts

21 460. In fact, Defendants' representations to Plaintiff as described above were false.
22 The true facts were that:

- 23 • Plaintiff's funds had not been spent on the Truth Tabernacle project in accordance
24 with the approved plans and budget as per the reports, forms, and spreadsheets
25 submitted with the periodic draw requests sent to Plaintiff beginning in July 2008,
26 and the reports, forms, and spreadsheets submitted to Plaintiff did not accurately
27 represent the value of the project to that point;

28 ///

- 1 • all funds previously advanced by Plaintiff to BTM and its agents on the Truth
2 Tabernacle loan had not been put towards the project according to the budget and
3 plans submitted to, approved by and relied on by Plaintiff;

4 Fraud - Concealment

5 461. Defendants David Smith and BTM, including through their agents, concealed
6 from and failed to disclose to Plaintiff the following:

- 7 • the true financial and operational status of the loans and projects, including the Truth
8 Tabernacle project;
- 9 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
10 projects, including the Truth Tabernacle project, and were not being applied only to
11 project-related costs, according to the plans and budgets submitted to, approved by
12 and relied on by Plaintiff;
- 13 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
14 including payments made to unrelated third parties - friends of David Smith and
15 David Smith's wife, Carmen Cople Smith, and payments of the mortgage on the
16 Lachman Lane Property;
- 17 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
18 to Randy Barton and for "sales commissions" to Carmen Cople Smith;
- 19 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
20 and its investments in overseeing the management, servicing and administration of
21 the loans and projects;
- 22 • that Smith and BTM were commingling for significant periods of time proceeds
23 received on the Loan with other funds;
- 24 • that Smith and BTM did not intend to immediately advance the full amount of
25 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
26 or else return the funds to Plaintiff, and established money market accounts to hold
27 such funds longer than five business days;

28 ///

- 1 • that Smith and BTM were not maintaining appropriate records and books of account
2 reflecting interest accrued and interest received, interest rate changes, principal
3 payments and all other transactions or actions affecting the Loan.

4 Fraud – Reliance, Discovery and Damage

5 462. Plaintiff continued to fund the Truth Tabernacle loan and project in response
6 to periodic draw requests from Defendants, based on continued assurances and
7 representations of Defendants Smith and BTM, including through their agents at Arks and
8 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
9 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
10 failure to disclose that Plaintiff's funds were being commingled with other funds and
11 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
12 began working on a new program to take over the servicing and administration of the loans,
13 expand the Build to Minister church loan program into various investment funds, and market
14 those funds to third parties.

15 463. On or about July 31, 2009, during this effort to expand the loan program,
16 Plaintiff first learned of problems with the loans, including that Defendants and their agents
17 owed monies to third parties and were unable to pay them despite Plaintiff and other
18 investors having advanced funds as requested. Over the course of the next several months,
19 Plaintiff conducted an investigation in an attempt to determine what had happened to
20 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
21 misrepresentations, concealment and malfeasance. With respect to the problems discovered
22 with the loans, Plaintiff contributed additional monies in order to complete the projects,
23 including paying outstanding bills, liens, legal and administration fees, modifying the terms
24 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
25 new contractors to complete the construction.

26 464. But for Defendants' misrepresentations and concealment as described above,
27 Plaintiff would not have continued to provide funds in response to draw requests from
28 Defendants or their agents for the projects, including the Truth Tabernacle project, and

1 would not have invested efforts, time and money creating a new program to take over
2 servicing of the loans, expand the Build to Minister program into various investment funds,
3 and market those funds to third parties.

4 465. As a result of Defendants' misrepresentations and concealments, Plaintiff has
5 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
6 \$138,509 and which will be proved at trial. Additionally, Plaintiff incurred legal and
7 administrative costs in addressing and mitigating the harm caused by Defendants'
8 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
9 funds expended in creating a new program to take over servicing of the loans, expand the
10 Build to Minister program into various investment funds, and market those funds to third
11 parties, which it would not have expended but for Defendants' misrepresentations and
12 concealments.

13 *Agape Word Church, Inc. Loan*

14 Contract Terms

15 466. On December 15, 2008, Plaintiff Oak Stream entered into a Construction Note
16 Participation Agreement with Defendant BTM on a construction loan to Agape Word
17 Church, Inc. ("Agape Participation Agreement" or "Participation Agreement"). The Agape
18 Participation Agreement provided that Plaintiff (designated "Participant") would have a
19 participation interest of 16 and 2/3% in the construction note amount of \$686,931, which
20 Defendant BTM (designated "Seller") would loan to the church, Agape Word Church, Inc.
21 (designated "Borrower"). Under the Agape Participation Agreement, Plaintiff committed to
22 fund a total of \$114,511.40, to be advanced to Defendant BTM in response to periodic draw
23 requests from Defendant according to a projected draw schedule. In consideration for
24 Plaintiff's advancing the funds, Plaintiff was entitled to receive the return of the principal
25 invested, as well as 10.5% interest on such amount, and its pro rata portion (16 and 2/3%) of
26 a Participation Fee (of \$10,303.96), with interest and fees to be paid monthly, and the
27 principal payable to Plaintiff at the issuance of a Certificate of Occupancy for the Property
28 or twelve (12) months from the date of Loan Closing, whichever first occurs, as provided for

1 in the Loan Agreement which was specifically referenced by and incorporated into the
2 Participation Agreement. The Participation Agreement also provided that in the event
3 Plaintiff had not received its return of principal at the time specified, BTM was either to
4 provide or to arrange additional financing so that Plaintiff would receive all its funds.

5 467. Defendant BTM, for its part, agreed among other things, that:

- 6 • “In the event Seller [BTM] does not for any reason advance to Borrower
7 [church] the full amount of the contemplated advance [the draws of funds that
8 Defendants called for every month] on the date of receipt of such Purchase
9 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
10 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
11 to the amount of such contemplated advance not made.” (Participation
12 Agreement, Schedule 4, ¶2.)
- 13 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
14 the terms of the Loan Documents and with this Agreement. Seller [BTM]
15 shall provide loan servicing in accordance with commercially acceptable loan
16 servicing practices and with the same degree of care that is customarily
17 employed and exercised by Seller [BTM] in the administration and servicing
18 of loans of a similar nature held by it for its own account (the “Servicing
19 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 20 • “The Seller [BTM] shall maintain appropriate records and books of account
21 reflecting interest accrued and interest received, interest rate changes, principal
22 payments and all other transactions or actions affecting the Loan, which
23 records shall be kept in accordance with accounting principles consistently
24 and customarily applied by Seller [BTM].” (Participation Agreement,
25 Schedule 4, ¶9.)
- 26 • “Seller [BTM] further agrees that in performing its obligations hereunder,
27 Seller shall: (a) act in a custodial capacity on behalf of the Participant
28 [Plaintiff] with respect to its holding of any underlying instrument or collateral
and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)

24 468. The parties agreed that the Plaintiff would advance funds to BTM, as called
25 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
26 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
27 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
28 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower

1 (the Church), to service the loan and advance the funds towards the construction project,
2 according to the budget and plans approved and relied upon by the Plaintiff in entering into
3 the Participation Agreement. Upon information and belief, BTM had an agreement with
4 Arks whereby Arks took over the servicing and administration of the Loan to Agape Word
5 Church, Inc. The Participation Agreement specifically references and incorporates the Loan
6 Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower
7 (the Church), and which provides that “the Loan proceeds are to be used by Church solely
8 for the construction of a church, church-related improvements, and/or costs related thereto
9 (the “Project”) upon the land described in the Security Instrument (the “Property”) in
10 accordance with the plans and specifications approved by ARKS.”

11 469. Plaintiff agreed to advance the funds in response to periodic draws based on
12 the project plans and budget which were attached to the Participation Agreement and/or the
13 Loan Agreement that was incorporated into the Participation Agreement, and which had
14 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
15 committing to the Participation Agreement for the Agape Word Church, Inc. Loan.
16 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
17 contractors, suppliers and other third parties as well as specific project-related servicing fees
18 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
19 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
20 approval from Plaintiff for any material change to the budget or plans.

21 Contract Performance and Breach

22 470. Upon execution of the Participation Agreement, Plaintiff began funding draw
23 requests for the Agape Word Church, Inc. project based on draw requests by BTM and its
24 agents. Plaintiff Oak Stream advanced \$43,557 to BTM and its agents for the Agape Word
25 Church, Inc. Loan between January 2009 and March 2009.

26 471. Defendant BTM breached the Participation Agreement by, among other things,
27 the following:

28 ///

- 1 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
2 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
3 Ministries, Inc. (or to the servicers or contractors for authorized project
4 disbursements on the Borrower's behalf), and failing to return within five business
5 days to Plaintiff any funds not so advanced;
- 6 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
7 contractors, suppliers and other third parties as well as specific project-related
8 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
9 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
10 failing to get prior approval from Plaintiff for any material change to the budget or
11 plans;
- 12 • failing to maintain appropriate records and books of account reflecting interest
13 accrued and interest received, interest rate changes, principal payments and all other
14 transactions or actions affecting the Loan;
- 15 • not paying Plaintiff its return of principal at the earlier of the issuance of the
16 certificate of occupancy or within 12 months of the Loan Closing;
- 17 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
18 Closing and not providing or arranging additional financing to allow Plaintiff to
19 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
20 within 12 months of the Loan Closing;
- 21 • not paying Plaintiff its interest and fees on a monthly basis;
- 22 • failing to provide loan servicing and administration in accordance with the Loan
23 documents and with commercially acceptable loan servicing practices;
- 24 • requiring additional payments by Plaintiff beyond what was due under the
25 Participation Agreement and the approved budget and plans incorporated therein;
- 26 • postponing due dates for payment of principal or interest in which Plaintiff shared
27 without obtaining the consent of Plaintiff;

28 ///

- 1 • failing to require Borrower to pay the equity down payment at Closing as required by
- 2 the Loan Documents;
- 3 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 4 holding any proceeds received for the Loan;
- 5 • commingling for significant periods of time proceeds received on the Loan with other
- 6 funds.

7 Contract Damages

8 472. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
9 as yet unascertained, but which Plaintiff believes is at least \$38,170 and which will be
10 proved at trial.

11 473. Additionally, Plaintiff incurred legal and administrative costs in addressing
12 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
13 have incurred.

14 Fraud – Defendants' Misrepresentations

15 474. On the periodic draw requests sent to Plaintiff beginning in January 2009,
16 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
17 had been spent on the Agape Word Church, Inc. project, in accordance with the approved
18 plans and budget, as per the reports, forms, and spreadsheets submitted with the draw
19 requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
20 represented the value of the project to that point.

21 475. Prior to Plaintiff's executing the Participation Agreement and making each
22 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
23 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
24 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
25 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
26 updates on projects, including the Agape Word Church, Inc. project, and was told that all
27 funds previously advanced by Plaintiff to BTM and its agents on the Agape Word Church,

28 ///

1 Inc. loan had been put towards the project according to the budget and plans submitted to,
2 approved by and relied on by Plaintiff.

3 Fraud – True Facts

4 476. In fact, Defendants' representations to Plaintiff as described above were false.
5 The true facts were that:

- 6 • Plaintiff's funds had not been spent on the Agape Word Church, Inc. project in
7 accordance with the approved plans and budget as per the reports, forms, and
8 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
9 January 2009, and the reports, forms, and spreadsheets submitted to Plaintiff did not
10 accurately represent the value of the project to that point;
- 11 • all funds previously advanced by Plaintiff to BTM and its agents on the Agape Word
12 Church, Inc. loan had not been put towards the project according to the budget and
13 plans submitted to, approved by and relied on by Plaintiff;

14 Fraud - Concealment

15 477. Defendants David Smith and BTM, including through their agents, concealed
16 from and failed to disclose to Plaintiff the following:

- 17 • the true financial and operational status of the loans and projects, including the Agape
18 Word Church, Inc. project;
- 19 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
20 projects, including the Agape Word Church, Inc. project, and were not being applied
21 only to project-related costs, according to the plans and budgets submitted to,
22 approved by and relied on by Plaintiff;
- 23 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
24 including payments made to unrelated third parties - friends of David Smith and
25 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
26 Lachman Lane Property;

27 ///

28 ///

- 1 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
- 2 and its investments in overseeing the management, servicing and administration of
- 3 the loans and projects;
- 4 • that Smith and BTM were commingling for significant periods of time proceeds
- 5 received on the Loan with other funds;
- 6 • that Smith and BTM did not intend to immediately advance the full amount of
- 7 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
- 8 or else return the funds to Plaintiff, and established money market accounts to hold
- 9 such funds longer than five business days;
- 10 • that Smith and BTM were not maintaining appropriate records and books of account
- 11 reflecting interest accrued and interest received, interest rate changes, principal
- 12 payments and all other transactions or actions affecting the Loan.

13 Fraud – Reliance, Discovery and Damage

14 478. Plaintiff continued to fund the Agape Word Church, Inc. loan and project in
15 response to periodic draw requests from Defendants, based on continued assurances and
16 representations of Defendants Smith and BTM, including through their agents at Arks and
17 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
18 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
19 failure to disclose that Plaintiff's funds were being commingled with other funds and
20 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
21 began working on a new program to take over the servicing and administration of the loans,
22 expand the Build to Minister church loan program into various investment funds, and market
23 those funds to third parties.

24 479. On or about July 31, 2009, during this effort to expand the loan program,
25 Plaintiff first learned of problems with the loans, including that Defendants and their agents
26 owed monies to third parties and were unable to pay them despite Plaintiff and other
27 investors having advanced funds as requested. Over the course of the next several months,
28 Plaintiff conducted an investigation in an attempt to determine what had happened to

1 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
2 misrepresentations, concealment and malfeasance. With respect to the problems discovered
3 with the loans, Plaintiff contributed additional monies in order to complete the projects,
4 including paying outstanding bills, liens, legal and administration fees, modifying the terms
5 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
6 new contractors to complete the construction.

7 480. But for Defendants' misrepresentations and concealment as described above,
8 Plaintiff would not have continued to provide funds in response to draw requests from
9 Defendants or their agents for the projects, including the Agape Word Church, Inc. project,
10 and would not have invested efforts, time and money creating a new program to take over
11 servicing of the loans, expand the Build to Minister program into various investment funds,
12 and market those funds to third parties.

13 481. As a result of Defendants' misrepresentations and concealments, Plaintiff has
14 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
15 \$38,170 and which will be proved at trial. Additionally, Plaintiff incurred legal and
16 administrative costs in addressing and mitigating the harm caused by Defendants'
17 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
18 funds expended in creating a new program to take over servicing of the loans, expand the
19 Build to Minister program into various investment funds, and market those funds to third
20 parties, which it would not have expended but for Defendants' misrepresentations and
21 concealments.

22 *Antioch Bible Fellowship, Inc. Loan*

23 Contract Terms

24 482. On February 28, 2008, Plaintiff Oak Stream entered into a Construction Note
25 Participation Agreement with Defendant BTM on a construction loan to Antioch Bible
26 Fellowship, Inc. ("Antioch Participation Agreement" or "Participation Agreement"). The
27 Antioch Participation Agreement provided that Plaintiff (designated "Participant") would
28 have a participation interest of 16 and 2/3% in the construction note amount of \$954,000,

1 which Defendant BTM (designated "Seller") would loan to the church, Antioch Bible
2 Fellowship, Inc. (designated "Borrower"). Under the Antioch Participation Agreement,
3 Plaintiff committed to fund a total of \$159,031.80, to be advanced to Defendant BTM in
4 response to periodic draw requests from Defendant according to a projected draw schedule.
5 In consideration for Plaintiff's advancing the funds, Plaintiff was entitled to receive the
6 return of the principal invested, as well as 10.5% interest on such amount, and its pro rata
7 portion (16 and 2/3%) of a Participation Fee (of \$14,310), with interest and fees to be paid
8 monthly, and the principal payable to Plaintiff at the issuance of a Certificate of Occupancy
9 for the Property or twelve (12) months from the date of Loan Closing, whichever first
10 occurs, as provided for in the Loan Agreement which was specifically referenced by and
11 incorporated into the Participation Agreement. The Participation Agreement also provided
12 that in the event Plaintiff had not received its return of principal at the time specified, BTM
13 was either to provide or to arrange additional financing so that Plaintiff would receive all its
14 funds.

15 483. Defendant BTM, for its part, agreed among other things, that:

- 16 • "In the event Seller [BTM] does not for any reason advance to Borrower
17 [church] the full amount of the contemplated advance [the draws of funds that
18 Defendants called for every month] on the date of receipt of such Purchase
19 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
20 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
21 to the amount of such contemplated advance not made." (Participation
22 Agreement, Schedule 4, ¶2.)
- 23 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
24 the terms of the Loan Documents and with this Agreement. Seller [BTM]
25 shall provide loan servicing in accordance with commercially acceptable loan
26 servicing practices and with the same degree of care that is customarily
27 employed and exercised by Seller [BTM] in the administration and servicing
28 of loans of a similar nature held by it for its own account (the "Servicing
Standard")." (Participation Agreement, Schedule 4, ¶9.)
- "The Seller [BTM] shall maintain appropriate records and books of account
reflecting interest accrued and interest received, interest rate changes, principal
payments and all other transactions or actions affecting the Loan, which
records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)

///

- “Seller [BTM] further agrees that in performing its obligations hereunder, Seller shall: (a) act in a custodial capacity on behalf of the Participant [Plaintiff] with respect to its holding of any underlying instrument or collateral and in holding any proceeds received for the Loan; (b) not commingle for any significant period of time proceeds received on the Loan; (c) directly pass through any proceeds received from the Loan to Participant [Plaintiff] as provided in Section 4 of this Agreement, less any proceeds that represent servicing or other compensation to Seller [BTM] or an interest in the Loan retained by the Seller [BTM], all as more particularly provided for herein; and (d) administer the Loan in accordance with the Servicing Standard as provided herein.” (Participation Agreement, Schedule 4, ¶ 9.)

484. The parties agreed that the Plaintiff would advance funds to BTM, as called for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents, including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower (the Church), to service the loan and advance the funds towards the construction project, according to the budget and plans approved and relied upon by the Plaintiff in entering into the Participation Agreement. Upon information and belief, BTM had an agreement with Arks whereby Arks took over the servicing and administration of the Loan to Antioch Bible Fellowship, Inc. The Participation Agreement specifically references and incorporates the Loan Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower (the Church), and which provides that “the Loan proceeds are to be used by Church solely for the construction of a church, church-related improvements, and/or costs related thereto (the “Project”) upon the land described in the Security Instrument (the “Property”) in accordance with the plans and specifications approved by ARKS.”

485. Plaintiff agreed to advance the funds in response to periodic draws based on the project plans and budget which were attached to the Participation Agreement and/or the Loan Agreement that was incorporated into the Participation Agreement, and which had been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in committing to the Participation Agreement for the Antioch Bible Fellowship, Inc. Loan. Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors, suppliers and other third parties as well as specific project-related servicing fees

1 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
2 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
3 approval from Plaintiff for any material change to the budget or plans.

4 Contract Performance and Breach

5 486. Upon execution of the Participation Agreement, Plaintiff began funding draw
6 requests for the Antioch Bible Fellowship, Inc. project based on draw requests by BTM and
7 its agents. Plaintiff Oak Stream advanced \$159,000 to BTM and its agents for the Antioch
8 Bible Fellowship, Inc. Loan between February 2008 and December 2008.

9 487. Defendant BTM breached the Participation Agreement by, among other things,
10 the following:

- 11 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
12 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
13 Ministries, Inc. (or to the servicers or contractors for authorized project
14 disbursements on the Borrower's behalf), and failing to return within five business
15 days to Plaintiff any funds not so advanced;
- 16 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
17 contractors, suppliers and other third parties as well as specific project-related
18 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
19 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
20 failing to get prior approval from Plaintiff for any material change to the budget or
21 plans;
- 22 • failing to maintain appropriate records and books of account reflecting interest
23 accrued and interest received, interest rate changes, principal payments and all other
24 transactions or actions affecting the Loan;
- 25 • not paying Plaintiff its return of principal at the earlier of the issuance of the
26 certificate of occupancy or within 12 months of the Loan Closing;
- 27 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
28 Closing and not providing or arranging additional financing to allow Plaintiff to

1 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
2 within 12 months of the Loan Closing;

- 3 • not paying Plaintiff its interest and fees on a monthly basis;
- 4 • failing to provide loan servicing and administration in accordance with the Loan
5 documents and with commercially acceptable loan servicing practices;
- 6 • requiring additional payments by Plaintiff beyond what was due under the
7 Participation Agreement and the approved budget and plans incorporated therein;
- 8 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
9 holding any proceeds received for the Loan;
- 10 • commingling for significant periods of time proceeds received on the Loan with other
11 funds.

12 Contract Damages

13 488. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
14 as yet unascertained, but which Plaintiff believes is at least \$34,487 and which will be
15 proved at trial.

16 489. Additionally, Plaintiff incurred legal and administrative costs in addressing
17 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
18 have incurred.

19 Fraud – Defendants' Misrepresentations

20 490. On the periodic draw requests sent to Plaintiff beginning in February 2008,
21 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
22 had been spent on the Antioch Bible Fellowship, Inc. project, in accordance with the
23 approved plans and budget, as per the reports, forms, and spreadsheets submitted with the
24 draw requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
25 represented the value of the project to that point.

26 491. Prior to Plaintiff's executing the Participation Agreement and making each
27 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
28 monthly) in response to draw requests and spoke to agents of Smith and BTM, including

1 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
2 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
3 updates on projects, including the Antioch Bible Fellowship, Inc. project, and was told that
4 all funds previously advanced by Plaintiff to BTM and its agents on the Antioch Bible
5 Fellowship, Inc. loan had been put towards the project according to the budget and plans
6 submitted to, approved by and relied on by Plaintiff.

7 Fraud – True Facts

8 492. In fact, Defendants' representations to Plaintiff as described above were false.
9 The true facts were that:

- 10 • Plaintiff's funds had not been spent on the Antioch Bible Fellowship, Inc. project in
11 accordance with the approved plans and budget as per the reports, forms, and
12 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
13 February 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
14 accurately represent the value of the project to that point;
- 15 • all funds previously advanced by Plaintiff to BTM and its agents on the Antioch
16 Bible Fellowship, Inc. loan had not been put towards the project according to the
17 budget and plans submitted to, approved by and relied on by Plaintiff;

18 Fraud - Concealment

19 493. Defendants David Smith and BTM, including through their agents, concealed
20 from and failed to disclose to Plaintiff the following:

- 21 • the true financial and operational status of the loans and projects, including the
22 Antioch Bible Fellowship, Inc. project;
- 23 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
24 projects, including the Antioch Bible Fellowship, Inc. project, and were not being
25 applied only to project-related costs, according to the plans and budgets submitted to,
26 approved by and relied on by Plaintiff;
- 27 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
28 including payments made to unrelated third parties - friends of David Smith and

- 1 David Smith's wife, Carmen Cople Smith, and payments of the mortgage on the
2 Lachman Lane Property;
- 3 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
4 to Randy Barton and for "sales commissions" to Carmen Cople Smith;
 - 5 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
6 and its investments in overseeing the management, servicing and administration of
7 the loans and projects;
 - 8 • that Smith and BTM were commingling for significant periods of time proceeds
9 received on the Loan with other funds;
 - 10 • that Smith and BTM did not intend to immediately advance the full amount of
11 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
12 or else return the funds to Plaintiff, and established money market accounts to hold
13 such funds longer than five business days;
 - 14 • that Smith and BTM were not maintaining appropriate records and books of account
15 reflecting interest accrued and interest received, interest rate changes, principal
16 payments and all other transactions or actions affecting the Loan.

17 Fraud – Reliance, Discovery and Damage

18 494. Plaintiff continued to fund the Antioch Bible Fellowship, Inc. loan and project
19 in response to periodic draw requests from Defendants, based on continued assurances and
20 representations of Defendants Smith and BTM, including through their agents at Arks and
21 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
22 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
23 failure to disclose that Plaintiff's funds were being commingled with other funds and
24 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
25 began working on a new program to take over the servicing and administration of the loans,
26 expand the Build to Minister church loan program into various investment funds, and market
27 those funds to third parties.

28 ///

1 495. On or about July 31, 2009, during this effort to expand the loan program,
2 Plaintiff first learned of problems with the loans, including that Defendants and their agents
3 owed monies to third parties and were unable to pay them despite Plaintiff and other
4 investors having advanced funds as requested. Over the course of the next several months,
5 Plaintiff conducted an investigation in an attempt to determine what had happened to
6 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
7 misrepresentations, concealment and malfeasance. With respect to the problems discovered
8 with the loans, Plaintiff contributed additional monies in order to complete the projects,
9 including paying outstanding bills, liens, legal and administration fees, modifying the terms
10 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
11 new contractors to complete the construction.

12 496. But for Defendants' misrepresentations and concealment as described above,
13 Plaintiff would not have continued to provide funds in response to draw requests from
14 Defendants or their agents for the projects, including the Antioch Bible Fellowship, Inc.
15 project, and would not have invested efforts, time and money creating a new program to take
16 over servicing of the loans, expand the Build to Minister program into various investment
17 funds, and market those funds to third parties.

18 497. As a result of Defendants' misrepresentations and concealments, Plaintiff has
19 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
20 \$34,487 and which will be proved at trial. Additionally, Plaintiff incurred legal and
21 administrative costs in addressing and mitigating the harm caused by Defendants'
22 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
23 funds expended in creating a new program to take over servicing of the loans, expand the
24 Build to Minister program into various investment funds, and market those funds to third
25 parties, which it would not have expended but for Defendants' misrepresentations and
26 concealments.

27 ///

28 ///

1 *Believers Fellowship of Jacksonville Loan*

2 Contract Terms

3 498. On April 24, 2008, Plaintiff Oak Stream entered into a Construction Note
4 Participation Agreement with Defendant BTM on a construction loan to Believers
5 Fellowship of Jacksonville (“Believers Participation Agreement” or “Participation
6 Agreement”). The Believers Participation Agreement provided that Plaintiff (designated
7 “Participant”) would have a participation interest of 16 and 2/3% in the construction note
8 amount of \$454,854, which Defendant BTM (designated “Seller”) would loan to the church,
9 Believers Fellowship of Jacksonville (designated “Borrower”). Under the Believers
10 Participation Agreement, Plaintiff committed to fund a total of \$75,824.16, to be advanced
11 to Defendant BTM in response to periodic draw requests from Defendant according to a
12 projected draw schedule. In consideration for Plaintiff’s advancing the funds, Plaintiff was
13 entitled to receive the return of the principal invested, as well as 10.5% interest on such
14 amount, and its pro rata portion (16 and 2/3%) of a Participation Fee (of \$6,822.81), with
15 interest and fees to be paid monthly, and the principal payable to Plaintiff at the issuance of
16 a Certificate of Occupancy for the Property or twelve (12) months from the date of Loan
17 Closing, whichever first occurs, as provided for in the Loan Agreement which was
18 specifically referenced by and incorporated into the Participation Agreement. The
19 Participation Agreement also provided that in the event Plaintiff had not received its return
20 of principal at the time specified, BTM was either to provide or to arrange additional
21 financing so that Plaintiff would receive all its funds.

22 499. Defendant BTM, for its part, agreed among other things, that:

- 23
- 24 • “In the event Seller [BTM] does not for any reason advance to Borrower
25 [church] the full amount of the contemplated advance [the draws of funds that
26 Defendants called for every month] on the date of receipt of such Purchase
27 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
28 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
to the amount of such contemplated advance not made.” (Participation
Agreement, Schedule 4, ¶2.)
 - “[T]he Seller [BTM] shall service and administer the Loan in accordance with
the terms of the Loan Documents and with this Agreement. Seller [BTM]
shall provide loan servicing in accordance with commercially acceptable loan

1 servicing practices and with the same degree of care that is customarily
2 employed and exercised by Seller [BTM] in the administration and servicing
of loans of a similar nature held by it for its own account (the "Servicing
Standard")." (Participation Agreement, Schedule 4, ¶9.)

- 3
- 4 • "The Seller [BTM] shall maintain appropriate records and books of account
5 reflecting interest accrued and interest received, interest rate changes, principal
6 payments and all other transactions or actions affecting the Loan, which
7 records shall be kept in accordance with accounting principles consistently
8 and customarily applied by Seller [BTM]." (Participation Agreement,
9 Schedule 4, ¶9.)
 - 10 • "Seller [BTM] further agrees that in performing its obligations hereunder,
11 Seller shall: (a) act in a custodial capacity on behalf of the Participant
12 [Plaintiff] with respect to its holding of any underlying instrument or collateral
13 and in holding any proceeds received for the Loan; (b) not commingle for any
14 significant period of time proceeds received on the Loan; (c) directly pass
15 through any proceeds received from the Loan to Participant [Plaintiff] as
16 provided in Section 4 of this Agreement, less any proceeds that represent
17 servicing or other compensation to Seller [BTM] or an interest in the Loan
18 retained by the Seller [BTM], all as more particularly provided for herein; and
19 (d) administer the Loan in accordance with the Servicing Standard as provided
20 herein." (Participation Agreement, Schedule 4, ¶ 9.)
 - 21 • "Seller represents and warrants to Participant that, as of the date hereof ... no
22 default in the payment of principal or interest on the Loan has occurred and
23 remains uncured under the Loan Documents." (Participation Agreement,
24 Schedule 4, ¶ 15.)
 - 25 • "[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
26 may take or omit to take any action under any of the Loan Documents which
27 would result in the following (each a "Material Change"): (a) reduce or
28 increase the amounts of principal or interest payments of the Loan, (b) reduce
or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
postpone any due date for payment of principal or interest in which Participant
[Plaintiff] shares, including, without limitation, the final maturity date of the
Loan, (d) except as expressly permitted under the Loan Documents, release or
subordinate any existing collateral described in the Loan Documents, (e)
release the liability of Borrower or any guarantor for the Loan, (f) consent to
the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
(ii) any direct or indirect interest in Borrower ... (g) make or consent to any
change in the principal amount of the Note; or (h) waive a default under the
Loan Documents arising from the failure to make payments as and when due
on the Loan. . . ." ((Participation Agreement, Schedule 4, ¶ 11.)
 - "Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
of any material default with respect to the Loan of which Seller [BTM] is
actually aware and of any other matters which, in Seller's judgment, materially
affect the interest of Participant [Plaintiff] with respect to the Loan
(collectively, a "Material Default")." (Participation Agreement, Schedule 4, ¶
11.)

27 ///

28 ///

1 BTM and its agents. Plaintiff Oak Stream advanced \$75,809 to BTM and its agents for the
2 Believers Fellowship of Jacksonville Loan between June 2008 and September 2008.

3 503. Defendant BTM breached the Participation Agreement by, among other things,
4 the following:

- 5 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
6 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
7 Ministries, Inc. (or to the servicers or contractors for authorized project
8 disbursements on the Borrower's behalf), and failing to return within five business
9 days to Plaintiff any funds not so advanced;
- 10 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
11 contractors, suppliers and other third parties as well as specific project-related
12 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
13 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
14 failing to get prior approval from Plaintiff for any material change to the budget or
15 plans;
- 16 • failing to maintain appropriate records and books of account reflecting interest
17 accrued and interest received, interest rate changes, principal payments and all other
18 transactions or actions affecting the Loan;
- 19 • not paying Plaintiff its return of principal at the earlier of the issuance of the
20 certificate of occupancy or within 12 months of the Loan Closing;
- 21 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
22 Closing and not providing or arranging additional financing to allow Plaintiff to
23 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
24 within 12 months of the Loan Closing;
- 25 • not paying Plaintiff its interest and fees on a monthly basis;
- 26 • failing to provide loan servicing and administration in accordance with the Loan
27 documents and with commercially acceptable loan servicing practices;

28 ///

- 1 • requiring additional payments by Plaintiff beyond what was due under the
- 2 Participation Agreement and the approved budget and plans incorporated therein;
- 3 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 4 holding any proceeds received for the Loan;
- 5 • commingling for significant periods of time proceeds received on the Loan with other
- 6 funds;
- 7 • failing to inform Plaintiff that as of the date of the Participation Agreement a default
- 8 in the payment of principal or interest on the Loan had occurred and remained
- 9 uncured;
- 10 • waiving a default under the Loan Documents arising from the failure to make
- 11 payments as and when due on the Loan without obtaining the consent of Plaintiff;
- 12 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
- 13 which Defendant was aware.

14 Contract Damages

15 504. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
16 as yet unascertained, but which Plaintiff believes is at least \$31,324 and which will be
17 proved at trial.

18 505. Additionally, Plaintiff incurred legal and administrative costs in addressing
19 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
20 have incurred.

21 Fraud – Defendants' Misrepresentations

22 506. On the periodic draw requests sent to Plaintiff beginning in June 2008, Smith's
23 and BTM's agents signed attestations that the monies advanced thus far by Plaintiff had
24 been spent on the Believers Fellowship of Jacksonville project, in accordance with the
25 approved plans and budget, as per the reports, forms, and spreadsheets submitted with the
26 draw requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
27 represented the value of the project to that point.

28 ///

1 507. Prior to Plaintiff's executing the Participation Agreement and making each
2 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
3 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
4 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
5 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
6 updates on projects, including the Believers Fellowship of Jacksonville project, and was told
7 that all funds previously advanced by Plaintiff to BTM and its agents on the Believers
8 Fellowship of Jacksonville loan had been put towards the project according to the budget
9 and plans submitted to, approved by and relied on by Plaintiff.

10 Fraud – True Facts

11 508. In fact, Defendants' representations to Plaintiff as described above were false.
12 The true facts were that:

- 13 • Plaintiff's funds had not been spent on the Believers Fellowship of Jacksonville
14 project in accordance with the approved plans and budget as per the reports, forms,
15 and spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning
16 in June 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
17 accurately represent the value of the project to that point;
- 18 • all funds previously advanced by Plaintiff to BTM and its agents on the Believers
19 Fellowship of Jacksonville loan had not been put towards the project according to the
20 budget and plans submitted to, approved by and relied on by Plaintiff;

21 Fraud - Concealment

22 509. Defendants David Smith and BTM, including through their agents, concealed
23 from and failed to disclose to Plaintiff the following:

- 24 • the true financial and operational status of the loans and projects, including the
25 Believers Fellowship of Jacksonville project;
- 26 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
27 projects, including the Believers Fellowship of Jacksonville project, and were not

28 ///

- 1 being applied only to project-related costs, according to the plans and budgets
2 submitted to, approved by and relied on by Plaintiff;
- 3 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
4 including payments made to unrelated third parties - friends of David Smith and
5 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
6 Lachman Lane Property;
 - 7 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
8 to Randy Barton and for "sales commissions" to Carmen Copple Smith;
 - 9 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
10 and its investments in overseeing the management, servicing and administration of
11 the loans and projects;
 - 12 • that Smith and BTM were commingling for significant periods of time proceeds
13 received on the Loan with other funds;
 - 14 • that Smith and BTM did not intend to immediately advance the full amount of
15 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
16 or else return the funds to Plaintiff, and established money market accounts to hold
17 such funds longer than five business days;
 - 18 • that Smith and BTM were not maintaining appropriate records and books of account
19 reflecting interest accrued and interest received, interest rate changes, principal
20 payments and all other transactions or actions affecting the Loan.

21 Fraud – Reliance, Discovery and Damage

22 510. Plaintiff continued to fund the Believers Fellowship of Jacksonville loan and
23 project in response to periodic draw requests from Defendants, based on continued
24 assurances and representations of Defendants Smith and BTM, including through their
25 agents at Arks and Noah, that Plaintiff's funds advanced thus far had gone towards the
26 projects according to the plans and budget reviewed, approved and relied upon by Plaintiff,
27 and based on Defendants' failure to disclose that Plaintiff's funds were being commingled
28 with other funds and diverted to non-project related costs and payments. In or about

1 February 2009, Plaintiff began working on a new program to take over the servicing and
2 administration of the loans, expand the Build to Minister church loan program into various
3 investment funds, and market those funds to third parties.

4 511. On or about July 31, 2009, during this effort to expand the loan program,
5 Plaintiff first learned of problems with the loans, including that Defendants and their agents
6 owed monies to third parties and were unable to pay them despite Plaintiff and other
7 investors having advanced funds as requested. Over the course of the next several months,
8 Plaintiff conducted an investigation in an attempt to determine what had happened to
9 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
10 misrepresentations, concealment and malfeasance. With respect to the problems discovered
11 with the loans, Plaintiff contributed additional monies in order to complete the projects,
12 including paying outstanding bills, liens, legal and administration fees, modifying the terms
13 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
14 new contractors to complete the construction.

15 512. But for Defendants' misrepresentations and concealment as described above,
16 Plaintiff would not have continued to provide funds in response to draw requests from
17 Defendants or their agents for the projects, including the Believers Fellowship of
18 Jacksonville project, and would not have invested efforts, time and money creating a new
19 program to take over servicing of the loans, expand the Build to Minister program into
20 various investment funds, and market those funds to third parties.

21 513. As a result of Defendants' misrepresentations and concealments, Plaintiff has
22 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
23 \$31,324 and which will be proved at trial. Additionally, Plaintiff incurred legal and
24 administrative costs in addressing and mitigating the harm caused by Defendants'
25 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
26 funds expended in creating a new program to take over servicing of the loans, expand the
27 Build to Minister program into various investment funds, and market those funds to third

28 ///

1 parties, which it would not have expended but for Defendants' misrepresentations and
2 concealments.

3 *Family Fellowship Worship Center Loan*

4 Contract Terms

5 514. On February 27, 2008, Plaintiff Oak Stream entered into a Construction Note
6 Participation Agreement with Defendant BTM on a construction loan to Family Fellowship
7 Worship Center ("Family Fellowship Participation Agreement" or "Participation
8 Agreement"). The Family Fellowship Participation Agreement provided that Plaintiff
9 (designated "Participant") would have a participation interest of 16 and 2/3% in the
10 construction note amount of \$1,071,900, which Defendant BTM (designated "Seller") would
11 loan to the church, Family Fellowship Worship Center (designated "Borrower"). Under the
12 Family Fellowship Participation Agreement, Plaintiff committed to fund a total of
13 \$178,685.73, to be advanced to Defendant BTM in response to periodic draw requests from
14 Defendant according to a projected draw schedule. In consideration for Plaintiff's
15 advancing the funds, Plaintiff was entitled to receive the return of the principal invested, as
16 well as 10.5% interest on such amount, and its pro rata portion (16 and 2/3%) of a
17 Participation Fee (of \$16,078.50), with interest and fees to be paid monthly, and the
18 principal payable to Plaintiff at the issuance of a Certificate of Occupancy for the Property
19 or twelve (12) months from the date of Loan Closing, whichever first occurs, as provided for
20 in the Loan Agreement which was specifically referenced by and incorporated into the
21 Participation Agreement. The Participation Agreement also provided that in the event
22 Plaintiff had not received its return of principal at the time specified, BTM was either to
23 provide or to arrange additional financing so that Plaintiff would receive all its funds.

24 515. Defendant BTM, for its part, agreed among other things, that:

- 25
- 26 • "In the event Seller [BTM] does not for any reason advance to Borrower
27 [church] the full amount of the contemplated advance [the draws of funds that
28 Defendants called for every month] on the date of receipt of such Purchase
Payment, Seller [BTM] shall within five (5) Business Days thereafter return
the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
to the amount of such contemplated advance not made." (Participation
Agreement, Schedule 4, ¶2.)

- 1 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
2 the terms of the Loan Documents and with this Agreement. Seller [BTM]
3 shall provide loan servicing in accordance with commercially acceptable loan
4 servicing practices and with the same degree of care that is customarily
5 employed and exercised by Seller [BTM] in the administration and servicing
6 of loans of a similar nature held by it for its own account (the “Servicing
7 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 8 • “The Seller [BTM] shall maintain appropriate records and books of account
9 reflecting interest accrued and interest received, interest rate changes, principal
10 payments and all other transactions or actions affecting the Loan, which
11 records shall be keep in accordance with accounting principles consistently
12 and customarily applied by Seller [BTM].” (Participation Agreement,
13 Schedule 4, ¶9.)
- 14 • “Seller [BTM] further agrees that in performing its obligations hereunder,
15 Seller shall: (a) act in a custodial capacity on behalf of the Participant
16 [Plaintiff] with respect to its holding of any underlying instrument or collateral
17 and in holding any proceeds received for the Loan; (b) not commingle for any
18 significant period of time proceeds received on the Loan; (c) directly pass
19 through any proceeds received from the Loan to Participant [Plaintiff] as
20 provided in Section 4 of this Agreement, less any proceeds that represent
21 servicing or other compensation to Seller [BTM] or an interest in the Loan
22 retained by the Seller [BTM], all as more particularly provided for herein; and
23 (d) administer the Loan in accordance with the Servicing Standard as provided
24 herein.” (Participation Agreement, Schedule 4, ¶ 9.)

15 516. The parties agreed that the Plaintiff would advance funds to BTM, as called
16 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
17 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
18 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
19 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
20 (the Church), to service the loan and advance the funds towards the construction project,
21 according to the budget and plans approved and relied upon by the Plaintiff in entering into
22 the Participation Agreement. Upon information and belief, BTM had an agreement with
23 Arks whereby Arks took over the servicing and administration of the Loan to Family
24 Fellowship Worship Center. The Participation Agreement specifically references and
25 incorporates the Loan Agreement, which is between Arks “and its affiliate BTM Funding,
26 Inc.” and the Borrower (the Church), and which provides that “the Loan proceeds are to be
27 used by Church solely for the construction of a church, church-related improvements, and/or

28 ///

1 costs related thereto (the "Project") upon the land described in the Security Instrument (the
2 "Property") in accordance with the plans and specifications approved by ARKS."

3 517. Plaintiff agreed to advance the funds in response to periodic draws based on
4 the project plans and budget which were attached to the Participation Agreement and/or the
5 Loan Agreement that was incorporated into the Participation Agreement, and which had
6 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
7 committing to the Participation Agreement for the Family Fellowship Worship Center Loan.
8 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
9 contractors, suppliers and other third parties as well as specific project-related servicing fees
10 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
11 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
12 approval from Plaintiff for any material change to the budget or plans.

13 Contract Performance and Breach

14 518. Upon execution of the Participation Agreement, Plaintiff began funding draw
15 requests for the Family Fellowship Worship Center project based on draw requests by BTM
16 and its agents. Plaintiff Oak Stream advanced \$178,650 to BTM and its agents for the
17 Family Fellowship Worship Center Loan between February 2008 and August 2008.

18 519. Defendant BTM breached the Participation Agreement by, among other things,
19 the following:

- 20 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
21 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
22 Ministries, Inc. (or to the servicers or contractors for authorized project
23 disbursements on the Borrower's behalf), and failing to return within five business
24 days to Plaintiff any funds not so advanced;
- 25 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
26 contractors, suppliers and other third parties as well as specific project-related
27 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
28 to and approved by Plaintiffs and incorporated into the Participation Agreement, and

- 1 failing to get prior approval from Plaintiff for any material change to the budget or
2 plans;
- 3 • failing to maintain appropriate records and books of account reflecting interest
4 accrued and interest received, interest rate changes, principal payments and all other
5 transactions or actions affecting the Loan;
 - 6 • not paying Plaintiff its return of principal at the earlier of the issuance of the
7 certificate of occupancy or within 12 months of the Loan Closing;
 - 8 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
9 Closing and not providing or arranging additional financing to allow Plaintiff to
10 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
11 within 12 months of the Loan Closing;
 - 12 • not paying Plaintiff its interest and fees on a monthly basis;
 - 13 • failing to provide loan servicing and administration in accordance with the Loan
14 documents and with commercially acceptable loan servicing practices;
 - 15 • requiring additional payments by Plaintiff beyond what was due under the
16 Participation Agreement and the approved budget and plans incorporated therein;
 - 17 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
18 holding any proceeds received for the Loan;
 - 19 • commingling for significant periods of time proceeds received on the Loan with other
20 funds.

21 Contract Damages

22 520. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
23 as yet unascertained, but which Plaintiff believes is at least \$23,514 and which will be
24 proved at trial.

25 521. Additionally, Plaintiff incurred legal and administrative costs in addressing
26 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
27 have incurred.

28 ///

1 Fraud – Defendants’ Misrepresentations

2 522. On the periodic draw requests sent to Plaintiff beginning in February 2008,
3 Smith’s and BTM’s agents signed attestations that the monies advanced thus far by Plaintiff
4 had been spent on the Family Fellowship Worship Center project, in accordance with the
5 approved plans and budget, as per the reports, forms, and spreadsheets submitted with the
6 draw requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
7 represented the value of the project to that point.

8 523. Prior to Plaintiff’s executing the Participation Agreement and making each
9 subsequent advance, Plaintiff’s agent Darren Maloney called periodically (approximately
10 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
11 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
12 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
13 updates on projects, including the Family Fellowship Worship Center project, and was told
14 that all funds previously advanced by Plaintiff to BTM and its agents on the Family
15 Fellowship Worship Center loan had been put towards the project according to the budget
16 and plans submitted to, approved by and relied on by Plaintiff.

17 Fraud – True Facts

18 524. In fact, Defendants’ representations to Plaintiff as described above were false.
19 The true facts were that:

- 20 • Plaintiff’s funds had not been spent on the Family Fellowship Worship Center project
21 in accordance with the approved plans and budget as per the reports, forms, and
22 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
23 February 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
24 accurately represent the value of the project to that point;
- 25 • all funds previously advanced by Plaintiff to BTM and its agents on the Family
26 Fellowship Worship Center loan had not been put towards the project according to
27 the budget and plans submitted to, approved by and relied on by Plaintiff;

28 ///

Fraud - Concealment

1
2 525. Defendants David Smith and BTM, including through their agents, concealed
3 from and failed to disclose to Plaintiff the following:

- 4 • the true financial and operational status of the loans and projects, including the
5 Family Fellowship Worship Center project;
- 6 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
7 projects, including the Family Fellowship Worship Center project, and were not being
8 applied only to project-related costs, according to the plans and budgets submitted to,
9 approved by and relied on by Plaintiff;
- 10 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
11 including payments made to unrelated third parties - friends of David Smith and
12 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
13 Lachman Lane Property;
- 14 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
15 to Randy Barton and for "sales commissions" to Carmen Copple Smith;
- 16 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
17 and its investments in overseeing the management, servicing and administration of
18 the loans and projects;
- 19 • that Smith and BTM were commingling for significant periods of time proceeds
20 received on the Loan with other funds;
- 21 • that Smith and BTM did not intend to immediately advance the full amount of
22 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
23 or else return the funds to Plaintiff, and established money market accounts to hold
24 such funds longer than five business days;
- 25 • that Smith and BTM were not maintaining appropriate records and books of account
26 reflecting interest accrued and interest received, interest rate changes, principal
27 payments and all other transactions or actions affecting the Loan.

28 ///

Fraud – Reliance, Discovery and Damage

1
2 526. Plaintiff continued to fund the Family Fellowship Worship Center loan and
3 project in response to periodic draw requests from Defendants, based on continued
4 assurances and representations of Defendants Smith and BTM, including through their
5 agents at Arks and Noah, that Plaintiff's funds advanced thus far had gone towards the
6 projects according to the plans and budget reviewed, approved and relied upon by Plaintiff,
7 and based on Defendants' failure to disclose that Plaintiff's funds were being commingled
8 with other funds and diverted to non-project related costs and payments. In or about
9 February 2009, Plaintiff began working on a new program to take over the servicing and
10 administration of the loans, expand the Build to Minister church loan program into various
11 investment funds, and market those funds to third parties.

12 527. On or about July 31, 2009, during this effort to expand the loan program,
13 Plaintiff first learned of problems with the loans, including that Defendants and their agents
14 owed monies to third parties and were unable to pay them despite Plaintiff and other
15 investors having advanced funds as requested. Over the course of the next several months,
16 Plaintiff conducted an investigation in an attempt to determine what had happened to
17 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
18 misrepresentations, concealment and malfeasance. With respect to the problems discovered
19 with the loans, Plaintiff contributed additional monies in order to complete the projects,
20 including paying outstanding bills, liens, legal and administration fees, modifying the terms
21 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
22 new contractors to complete the construction.

23 528. But for Defendants' misrepresentations and concealment as described above,
24 Plaintiff would not have continued to provide funds in response to draw requests from
25 Defendants or their agents for the projects, including the Family Fellowship Worship Center
26 project, and would not have invested efforts, time and money creating a new program to take
27 over servicing of the loans, expand the Build to Minister program into various investment
28 funds, and market those funds to third parties.

1 Plaintiff had not received its return of principal at the time specified, BTM was either to
2 provide or to arrange additional financing so that Plaintiff would receive all its funds.

3 531. Defendant BTM, for its part, agreed among other things, that:

- 4 • “In the event Seller [BTM] does not for any reason advance to Borrower
5 [church] the full amount of the contemplated advance [the draws of funds that
6 Defendants called for every month] on the date of receipt of such Purchase
7 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
8 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
9 to the amount of such contemplated advance not made.” (Participation
10 Agreement, Schedule 4, ¶2.)
- 11 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
12 the terms of the Loan Documents and with this Agreement. Seller [BTM]
13 shall provide loan servicing in accordance with commercially acceptable loan
14 servicing practices and with the same degree of care that is customarily
15 employed and exercised by Seller [BTM] in the administration and servicing
16 of loans of a similar nature held by it for its own account (the “Servicing
17 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 18 • “The Seller [BTM] shall maintain appropriate records and books of account
19 reflecting interest accrued and interest received, interest rate changes, principal
20 payments and all other transactions or actions affecting the Loan, which
21 records shall be kept in accordance with accounting principles consistently
22 and customarily applied by Seller [BTM].” (Participation Agreement,
23 Schedule 4, ¶9.)
- 24 • “Seller [BTM] further agrees that in performing its obligations hereunder,
25 Seller shall: (a) act in a custodial capacity on behalf of the Participant
26 [Plaintiff] with respect to its holding of any underlying instrument or collateral
27 and in holding any proceeds received for the Loan; (b) not commingle for any
28 significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)
- “Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
of any material default with respect to the Loan of which Seller [BTM] is
actually aware and of any other matters which, in Seller’s judgment, materially
affect the interest of Participant [Plaintiff] with respect to the Loan
(collectively, a “Material Default”).” (Participation Agreement, Schedule 4, ¶
11.)

25 532. The parties agreed that the Plaintiff would advance funds to BTM, as called
26 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
27 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
28 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate

1 Arks and/or Arks' wholly owned subsidiary Noah Construction, on behalf of the Borrower
2 (the Church), to service the loan and advance the funds towards the construction project,
3 according to the budget and plans approved and relied upon by the Plaintiff in entering into
4 the Participation Agreement. Upon information and belief, BTM had an agreement with
5 Arks whereby Arks took over the servicing and administration of the Loan to First Baptist
6 Church of Texas City. The Participation Agreement specifically references and incorporates
7 the Loan Agreement, which is between Arks "and its affiliate BTM Funding, Inc." and the
8 Borrower (the Church), and which provides that "the Loan proceeds are to be used by
9 Church solely for the construction of a church, church-related improvements, and/or costs
10 related thereto (the "Project") upon the land described in the Security Instrument (the
11 "Property") in accordance with the plans and specifications approved by ARKS."

12 533. Plaintiff agreed to advance the funds in response to periodic draws based on
13 the project plans and budget which were attached to the Participation Agreement and/or the
14 Loan Agreement that was incorporated into the Participation Agreement, and which had
15 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
16 committing to the Participation Agreement for the First Baptist Church of Texas City Loan.
17 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
18 contractors, suppliers and other third parties as well as specific project-related servicing fees
19 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
20 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
21 approval from Plaintiff for any material change to the budget or plans.

22 Contract Performance and Breach

23 534. Upon execution of the Participation Agreement, Plaintiff began funding draw
24 requests for the First Baptist Church of Texas City project based on draw requests by BTM
25 and its agents. Plaintiff Oak Stream advanced \$129,069 to BTM and its agents for the First
26 Baptist Church of Texas City Loan between October 2008 and June 2009.

27 535. Defendant BTM breached the Participation Agreement by, among other things,
28 the following:

- 1 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
2 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
3 Ministries, Inc. (or to the servicers or contractors for authorized project
4 disbursements on the Borrower's behalf), and failing to return within five business
5 days to Plaintiff any funds not so advanced;
- 6 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
7 contractors, suppliers and other third parties as well as specific project-related
8 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
9 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
10 failing to get prior approval from Plaintiff for any material change to the budget or
11 plans;
- 12 • failing to maintain appropriate records and books of account reflecting interest
13 accrued and interest received, interest rate changes, principal payments and all other
14 transactions or actions affecting the Loan;
- 15 • not paying Plaintiff its return of principal at the earlier of the issuance of the
16 certificate of occupancy or within 12 months of the Loan Closing;
- 17 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
18 Closing and not providing or arranging additional financing to allow Plaintiff to
19 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
20 within 12 months of the Loan Closing;
- 21 • not paying Plaintiff its interest and fees on a monthly basis;
- 22 • failing to provide loan servicing and administration in accordance with the Loan
23 documents and with commercially acceptable loan servicing practices;
- 24 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
25 holding any proceeds received for the Loan;
- 26 • commingling for significant periods of time proceeds received on the Loan with other
27 funds;

28 ///

1 Fraud – True Facts

2 540. In fact, Defendants' representations to Plaintiff as described above were false.

3 The true facts were that:

- 4 • Plaintiff's funds had not been spent on the First Baptist Church of Texas City project
5 in accordance with the approved plans and budget as per the reports, forms, and
6 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
7 October 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
8 accurately represent the value of the project to that point;
- 9 • all funds previously advanced by Plaintiff to BTM and its agents on the First Baptist
10 Church of Texas City loan had not been put towards the project according to the
11 budget and plans submitted to, approved by and relied on by Plaintiff;

12 Fraud - Concealment

13 541. Defendants David Smith and BTM, including through their agents, concealed
14 from and failed to disclose to Plaintiff the following:

- 15 • the true financial and operational status of the loans and projects, including the First
16 Baptist Church of Texas City project;
- 17 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
18 projects, including the First Baptist Church of Texas City project, and were not being
19 applied only to project-related costs, according to the plans and budgets submitted to,
20 approved by and relied on by Plaintiff;
- 21 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
22 including payments made to unrelated third parties - friends of David Smith and
23 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
24 Lachman Lane Property;
- 25 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
26 and its investments in overseeing the management, servicing and administration of
27 the loans and projects;

28 ///

- 1 • that Smith and BTM were commingling for significant periods of time proceeds
2 received on the Loan with other funds;
- 3 • that Smith and BTM did not intend to immediately advance the full amount of
4 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
5 or else return the funds to Plaintiff, and established money market accounts to hold
6 such funds longer than five business days;
- 7 • that Smith and BTM were not maintaining appropriate records and books of account
8 reflecting interest accrued and interest received, interest rate changes, principal
9 payments and all other transactions or actions affecting the Loan.

10 Fraud – Reliance, Discovery and Damage

11 542. Plaintiff continued to fund the First Baptist Church of Texas City loan and
12 project in response to periodic draw requests from Defendants, based on continued
13 assurances and representations of Defendants Smith and BTM, including through their
14 agents at Arks and Noah, that Plaintiff's funds advanced thus far had gone towards the
15 projects according to the plans and budget reviewed, approved and relied upon by Plaintiff,
16 and based on Defendants' failure to disclose that Plaintiff's funds were being commingled
17 with other funds and diverted to non-project related costs and payments. In or about
18 February 2009, Plaintiff began working on a new program to take over the servicing and
19 administration of the loans, expand the Build to Minister church loan program into various
20 investment funds, and market those funds to third parties.

21 543. On or about July 31, 2009, during this effort to expand the loan program,
22 Plaintiff first learned of problems with the loans, including that Defendants and their agents
23 owed monies to third parties and were unable to pay them despite Plaintiff and other
24 investors having advanced funds as requested. Over the course of the next several months,
25 Plaintiff conducted an investigation in an attempt to determine what had happened to
26 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
27 misrepresentations, concealment and malfeasance. With respect to the problems discovered
28 with the loans, Plaintiff contributed additional monies in order to complete the projects,

1 including paying outstanding bills, liens, legal and administration fees, modifying the terms
2 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
3 new contractors to complete the construction.

4 544. But for Defendants' misrepresentations and concealment as described above,
5 Plaintiff would not have continued to provide funds in response to draw requests from
6 Defendants or their agents for the projects, including the First Baptist Church of Texas City
7 project, and would not have invested efforts, time and money creating a new program to take
8 over servicing of the loans, expand the Build to Minister program into various investment
9 funds, and market those funds to third parties.

10 545. As a result of Defendants' misrepresentations and concealments, Plaintiff has
11 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
12 \$151,499 and which will be proved at trial. Additionally, Plaintiff incurred legal and
13 administrative costs in addressing and mitigating the harm caused by Defendants'
14 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
15 funds expended in creating a new program to take over servicing of the loans, expand the
16 Build to Minister program into various investment funds, and market those funds to third
17 parties, which it would not have expended but for Defendants' misrepresentations and
18 concealments.

19 *Kingdom Church Loan*

20 Contract Terms

21 546. On March 27, 2008, Plaintiff Oak Stream entered into a Construction Note
22 Participation Agreement with Defendant BTM on a construction loan to Kingdom Church
23 ("Kingdom Church Participation Agreement" or "Participation Agreement"). The Kingdom
24 Church Participation Agreement provided that Plaintiff (designated "Participant") would
25 have a participation interest of 16 and 2/3% in the construction note amount of \$2,179,674,
26 which Defendant BTM (designated "Seller") would loan to the church, Kingdom Church
27 (designated "Borrower"). Under the Kingdom Church Participation Agreement, Plaintiff
28 committed to fund a total of \$363,351.65, to be advanced to Defendant BTM in response to

1 periodic draw requests from Defendant according to a projected draw schedule. In
2 consideration for Plaintiff's advancing the funds, Plaintiff was entitled to receive the return
3 of the principal invested, as well as 10.5% interest on such amount, and its pro rata portion
4 (16 and 2/3%) of a Participation Fee (of \$32,695.11), with interest and fees to be paid
5 monthly, and the principal payable to Plaintiff at the issuance of a Certificate of Occupancy
6 for the Property or twelve (12) months from the date of Loan Closing, whichever first
7 occurs, as provided for in the Loan Agreement which was specifically referenced by and
8 incorporated into the Participation Agreement. The Participation Agreement also provided
9 that in the event Plaintiff had not received its return of principal at the time specified, BTM
10 was either to provide or to arrange additional financing so that Plaintiff would receive all its
11 funds.

12 547. Defendant BTM, for its part, agreed among other things, that:

- 13 • "In the event Seller [BTM] does not for any reason advance to Borrower
14 [church] the full amount of the contemplated advance [the draws of funds that
15 Defendants called for every month] on the date of receipt of such Purchase
16 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
17 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
18 to the amount of such contemplated advance not made." (Participation
19 Agreement, Schedule 4, ¶2.)
- 20 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
21 the terms of the Loan Documents and with this Agreement. Seller [BTM]
22 shall provide loan servicing in accordance with commercially acceptable loan
23 servicing practices and with the same degree of care that is customarily
24 employed and exercised by Seller [BTM] in the administration and servicing
25 of loans of a similar nature held by it for its own account (the "Servicing
26 Standard")." (Participation Agreement, Schedule 4, ¶9.)
- 27 • "The Seller [BTM] shall maintain appropriate records and books of account
28 reflecting interest accrued and interest received, interest rate changes, principal
payments and all other transactions or actions affecting the Loan, which
records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)
- "Seller [BTM] further agrees that in performing its obligations hereunder,
Seller shall: (a) act in a custodial capacity on behalf of the Participant
[Plaintiff] with respect to its holding of any underlying instrument or collateral
and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan

1 retained by the Seller [BTM], all as more particularly provided for herein; and
2 (d) administer the Loan in accordance with the Servicing Standard as provided
3 herein.” (Participation Agreement, Schedule 4, ¶ 9.)

- 4 • “Seller represents and warrants to Participant that, as of the date hereof ... no
5 default in the payment of principal or interest on the Loan has occurred and
6 remains uncured under the Loan Documents.” (Participation Agreement,
7 Schedule 4, ¶ 15.)
- 8 • “[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
9 may take or omit to take any action under any of the Loan Documents which
10 would result in the following (each a “Material Change”): (a) reduce or
11 increase the amounts of principal or interest payments of the Loan, (b) reduce
12 or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
13 postpone any due date for payment of principal or interest in which Participant
14 [Plaintiff] shares, including, without limitation, the final maturity date of the
15 Loan, (d) except as expressly permitted under the Loan Documents, release or
16 subordinate any existing collateral described in the Loan Documents, (e)
17 release the liability of Borrower or any guarantor for the Loan, (f) consent to
18 the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
19 (ii) any direct or indirect interest in Borrower ... (g) make or consent to any
20 change in the principal amount of the Note; or (h) waive a default under the
21 Loan Documents arising from the failure to make payments as and when due
22 on the Loan. . . .” ((Participation Agreement, Schedule 4, ¶ 11.)
- 23 • “Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
24 of any material default with respect to the Loan of which Seller [BTM] is
25 actually aware and of any other matters which, in Seller’s judgment, materially
26 affect the interest of Participant [Plaintiff] with respect to the Loan
27 (collectively, a “Material Default”).” (Participation Agreement, Schedule 4, ¶
28 11.)

17 548. The parties agreed that the Plaintiff would advance funds to BTM, as called
18 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
19 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
20 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
21 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
22 (the Church), to service the loan and advance the funds towards the construction project,
23 according to the budget and plans approved and relied upon by the Plaintiff in entering into
24 the Participation Agreement. Upon information and belief, BTM had an agreement with
25 Arks whereby Arks took over the servicing and administration of the Loan to Kingdom
26 Church. The Participation Agreement specifically references and incorporates the Loan
27 Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower
28 (the Church), and which provides that “the Loan proceeds are to be used by Church solely

1 for the construction of a church, church-related improvements, and/or costs related thereto
2 (the "Project") upon the land described in the Security Instrument (the "Property") in
3 accordance with the plans and specifications approved by ARKS."

4 549. Plaintiff agreed to advance the funds in response to periodic draws based on
5 the project plans and budget which were attached to the Participation Agreement and/or the
6 Loan Agreement that was incorporated into the Participation Agreement, and which had
7 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
8 committing to the Participation Agreement for the Kingdom Church Loan. Defendant BTM
9 agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors,
10 suppliers and other third parties as well as specific project-related servicing fees to itself,
11 Arks and Noah, according to the budget and plans submitted to and approved by Plaintiffs
12 and incorporated into the Participation Agreement, and agreed to get prior approval from
13 Plaintiff for any material change to the budget or plans.

14 Contract Performance and Breach

15 550. Upon execution of the Participation Agreement, Plaintiff began funding draw
16 requests for the Kingdom Church project based on draw requests by BTM and its agents.
17 Plaintiff Oak Stream advanced \$177,446 to BTM and its agents for the Kingdom Church
18 Loan between July 2008 and October 2008.

19 551. Defendant BTM breached the Participation Agreement by, among other things,
20 the following:

- 21 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
22 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
23 Ministries, Inc. (or to the servicers or contractors for authorized project
24 disbursements on the Borrower's behalf), and failing to return within five business
25 days to Plaintiff any funds not so advanced;
- 26 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
27 contractors, suppliers and other third parties as well as specific project-related
28 servicing fees to itself, Arks and Noah, according to the budget and plans submitted

1 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
2 failing to get prior approval from Plaintiff for any material change to the budget or
3 plans;

- 4 • failing to maintain appropriate records and books of account reflecting interest
5 accrued and interest received, interest rate changes, principal payments and all other
6 transactions or actions affecting the Loan;
- 7 • accepting a \$1.8 million payoff from the secondary lender for \$2.3 million owed by
8 the Borrower and canceling the notes without informing or obtaining the consent of
9 Plaintiff;
- 10 • failing to provide loan servicing and administration in accordance with the Loan
11 documents and with commercially acceptable loan servicing practices;
- 12 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
13 holding any proceeds received for the Loan;
- 14 • commingling for significant periods of time proceeds received on the Loan with other
15 funds;
- 16 • failing to inform Plaintiff that as of the date of the Participation Agreement a default
17 in the payment of principal or interest on the Loan had occurred and remained
18 uncured;
- 19 • reducing or increasing the amounts of principal or interest payments of the Loan
20 without obtaining the consent of Plaintiff;
- 21 • postponing due dates for payment of principal or interest in which Plaintiff shared
22 without obtaining the consent of Plaintiff;
- 23 • releasing or subordinating existing collateral described in the Loan Documents
24 without obtaining the consent of Plaintiff;
- 25 • releasing the liability of Borrower or any guarantor for the Loan without obtaining the
26 consent of Plaintiff;

27 ///
28 ///

- 1 • consenting to the further sale, transfer, pledge, mortgage or assignment of the
- 2 Property or any direct or indirect interest in Borrower without obtaining the consent
- 3 of Plaintiff;
- 4 • waiving a default under the Loan Documents arising from the failure to make
- 5 payments as and when due on the Loan without obtaining the consent of Plaintiff;
- 6 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
- 7 which Defendant was aware, including Defendants' knowledge prior to closing that
- 8 Borrower had supplied inaccurate financial statements but allowed the loan to close
- 9 anyway without disclosure to Plaintiff;
- 10 • failing to require Borrower to pay the equity down payment as required by the Loan
- 11 Documents.

12 Contract Damages

13 552. Plaintiff has incurred legal and administrative costs in addressing and

14 mitigating the harm caused by Defendants' breaches which costs Plaintiff should not have

15 incurred, in an amount as yet unascertained and which will be proved at trial.

16 Fraud – Defendants' Misrepresentations

17 553. On the periodic draw requests sent to Plaintiff beginning in July 2008, Smith's

18 and BTM's agents signed attestations that the monies advanced thus far by Plaintiff had

19 been spent on the Kingdom Church project, in accordance with the approved plans and

20 budget, as per the reports, forms, and spreadsheets submitted with the draw requests, and

21 that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the

22 value of the project to that point.

23 554. Prior to Plaintiff's executing the Participation Agreement and making each

24 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately

25 monthly) in response to draw requests and spoke to agents of Smith and BTM, including

26 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks

27 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status

28 updates on projects, including the Kingdom Church project, and was told that all funds

1 previously advanced by Plaintiff to BTM and its agents on the Kingdom Church loan had
2 been put towards the project according to the budget and plans submitted to, approved by
3 and relied on by Plaintiff.

4 Fraud – True Facts

5 555. In fact, Defendants' representations to Plaintiff as described above were false.
6 The true facts were that:

- 7 • Plaintiff's funds had not been spent on the Kingdom Church project in accordance
8 with the approved plans and budget as per the reports, forms, and spreadsheets
9 submitted with the periodic draw requests sent to Plaintiff beginning in July 2008,
10 and the reports, forms, and spreadsheets submitted to Plaintiff did not accurately
11 represent the value of the project to that point;
- 12 • all funds previously advanced by Plaintiff to BTM and its agents on the Kingdom
13 Church loan had not been put towards the project according to the budget and plans
14 submitted to, approved by and relied on by Plaintiff;

15 Fraud - Concealment

16 556. Defendants David Smith and BTM, including through their agents, concealed
17 from and failed to disclose to Plaintiff the following:

- 18 • the true financial and operational status of the loans and projects, including the
19 Kingdom Church project;
- 20 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
21 projects, including the Kingdom Church project, and were not being applied only to
22 project-related costs, according to the plans and budgets submitted to, approved by
23 and relied on by Plaintiff;
- 24 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
25 including payments made to unrelated third parties - friends of David Smith and
26 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
27 Lachman Lane Property;

28 ///

- 1 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
- 2 and its investments in overseeing the management, servicing and administration of
- 3 the loans and projects;
- 4 • that Smith and BTM were commingling for significant periods of time proceeds
- 5 received on the Loan with other funds;
- 6 • that Smith and BTM knew prior to closing that Borrower had supplied inaccurate
- 7 financial statements, but allowed the loan to close anyway without disclosure to
- 8 Plaintiff;
- 9 • that Smith and BTM did not intend to immediately advance the full amount of
- 10 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
- 11 or else return the funds to Plaintiff, and established money market accounts to hold
- 12 such funds longer than five business days;
- 13 • that Smith and BTM were not maintaining appropriate records and books of account
- 14 reflecting interest accrued and interest received, interest rate changes, principal
- 15 payments and all other transactions or actions affecting the Loan.

16 Fraud – Reliance, Discovery and Damage

17 557. Plaintiff continued to fund the Kingdom Church loan and project in response
18 to periodic draw requests from Defendants, based on continued assurances and
19 representations of Defendants Smith and BTM, including through their agents at Arks and
20 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
21 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
22 failure to disclose that Plaintiff's funds were being commingled with other funds and
23 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
24 began working on a new program to take over the servicing and administration of the loans,
25 expand the Build to Minister church loan program into various investment funds, and market
26 those funds to third parties.

27 558. On or about July 31, 2009, during this effort to expand the loan program,
28 Plaintiff first learned of problems with the loans, including that Defendants and their agents

1 owed monies to third parties and were unable to pay them despite Plaintiff and other
2 investors having advanced funds as requested. Over the course of the next several months,
3 Plaintiff conducted an investigation in an attempt to determine what had happened to
4 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
5 misrepresentations, concealment and malfeasance. With respect to the problems discovered
6 with the loans, Plaintiff contributed additional monies in order to complete the projects,
7 including paying outstanding bills, liens, legal and administration fees, modifying the terms
8 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
9 new contractors to complete the construction.

10 559. But for Defendants' misrepresentations and concealment as described above,
11 Plaintiff would not have continued to provide funds in response to draw requests from
12 Defendants or their agents for the projects, including the Kingdom Church project, and
13 would not have invested efforts, time and money creating a new program to take over
14 servicing of the loans, expand the Build to Minister program into various investment funds,
15 and market those funds to third parties.

16 560. Plaintiff incurred legal and administrative costs in addressing and mitigating
17 the harm caused by Defendants' misrepresentations and concealments, in an amount as yet
18 unascertained and which will be proved at trial. Further, Plaintiff lost the value of its time,
19 efforts and funds expended in creating a new program to take over servicing of the loans,
20 expand the Build to Minister program into various investment funds, and market those funds
21 to third parties, which it would not have expended but for Defendants' misrepresentations
22 and concealments.

23 *Insoul Fellowship Church Loan*

24 Contract Terms

25 561. On June 23, 2008, Plaintiff Oak Stream entered into a Construction Note
26 Participation Agreement with Defendant BTM on a construction loan to Insoul Fellowship
27 Church ("Insoul Participation Agreement" or "Participation Agreement"). The Insoul
28 Participation Agreement provided that Plaintiff (designated "Participant") would have a

1 participation interest of 16 and 2/3% in the construction note amount of \$1,341,250, which
2 Defendant BTM (designated "Seller") would loan to the church, Insoul Fellowship Church
3 (designated "Borrower"). Under the Insoul Participation Agreement, Plaintiff committed to
4 fund a total of \$223,586.38, to be advanced to Defendant BTM in response to periodic draw
5 requests from Defendant according to a projected draw schedule. In consideration for
6 Plaintiff's advancing the funds, Plaintiff was entitled to receive the return of the principal
7 invested, as well as 10.5% interest on such amount, and its pro rata portion (16 and 2/3%) of
8 a Participation Fee (of \$20,118.75), with interest and fees to be paid monthly, and the
9 principal payable to Plaintiff at the issuance of a Certificate of Occupancy for the Property
10 or twelve (12) months from the date of Loan Closing, whichever first occurs, as provided for
11 in the Loan Agreement which was specifically referenced by and incorporated into the
12 Participation Agreement. The Participation Agreement also provided that in the event
13 Plaintiff had not received its return of principal at the time specified, BTM was either to
14 provide or to arrange additional financing so that Plaintiff would receive all its funds.

15 562. Defendant BTM, for its part, agreed among other things, that:

- 16 • "In the event Seller [BTM] does not for any reason advance to Borrower
17 [church] the full amount of the contemplated advance [the draws of funds that
18 Defendants called for every month] on the date of receipt of such Purchase
19 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
20 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
21 to the amount of such contemplated advance not made." (Participation
22 Agreement, Schedule 4, ¶2.)
- 23 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
24 the terms of the Loan Documents and with this Agreement. Seller [BTM]
25 shall provide loan servicing in accordance with commercially acceptable loan
26 servicing practices and with the same degree of care that is customarily
27 employed and exercised by Seller [BTM] in the administration and servicing
28 of loans of a similar nature held by it for its own account (the "Servicing
Standard")." (Participation Agreement, Schedule 4, ¶9.)
- "The Seller [BTM] shall maintain appropriate records and books of account
reflecting interest accrued and interest received, interest rate changes, principal
payments and all other transactions or actions affecting the Loan, which
records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)

///

- 1 • “Seller [BTM] further agrees that in performing its obligations hereunder,
2 Seller shall: (a) act in a custodial capacity on behalf of the Participant
3 [Plaintiff] with respect to its holding of any underlying instrument or collateral
4 and in holding any proceeds received for the Loan; (b) not commingle for any
5 significant period of time proceeds received on the Loan; (c) directly pass
6 through any proceeds received from the Loan to Participant [Plaintiff] as
7 provided in Section 4 of this Agreement, less any proceeds that represent
8 servicing or other compensation to Seller [BTM] or an interest in the Loan
9 retained by the Seller [BTM], all as more particularly provided for herein; and
10 (d) administer the Loan in accordance with the Servicing Standard as provided
11 herein.” (Participation Agreement, Schedule 4, ¶ 9.)
- 12 • “[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
13 may take or omit to take any action under any of the Loan Documents which
14 would result in the following (each a “Material Change”): (a) reduce or
15 increase the amounts of principal or interest payments of the Loan, (b) reduce
16 or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
17 postpone any due date for payment of principal or interest in which Participant
18 [Plaintiff] shares, including, without limitation, the final maturity date of the
19 Loan, (d) except as expressly permitted under the Loan Documents, release or
20 subordinate any existing collateral described in the Loan Documents, (e)
21 release the liability of Borrower or any guarantor for the Loan, (f) consent to
22 the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
23 (ii) any direct or indirect interest in Borrower ... (g) make or consent to any
24 change in the principal amount of the Note; or (h) waive a default under the
25 Loan Documents arising from the failure to make payments as and when due
26 on the Loan. . . .” ((Participation Agreement, Schedule 4, ¶ 11.)
- 27 • “Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
28 of any material default with respect to the Loan of which Seller [BTM] is
actually aware and of any other matters which, in Seller’s judgment, materially
affect the interest of Participant [Plaintiff] with respect to the Loan
(collectively, a “Material Default”).” (Participation Agreement, Schedule 4, ¶
11.)

19 563. The parties agreed that the Plaintiff would advance funds to BTM, as called
20 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
21 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
22 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
23 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
24 (the Church), to service the loan and advance the funds towards the construction project,
25 according to the budget and plans approved and relied upon by the Plaintiff in entering into
26 the Participation Agreement. Upon information and belief, BTM had an agreement with
27 Arks whereby Arks took over the servicing and administration of the Loan to Insoul
28 Fellowship Church. The Participation Agreement specifically references and incorporates

1 the Loan Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the
2 Borrower (the Church), and which provides that “the Loan proceeds are to be used by
3 Church solely for the construction of a church, church-related improvements, and/or costs
4 related thereto (the “Project”) upon the land described in the Security Instrument (the
5 “Property”) in accordance with the plans and specifications approved by ARKS.”

6 564. Plaintiff agreed to advance the funds in response to periodic draws based on
7 the project plans and budget which were attached to the Participation Agreement and/or the
8 Loan Agreement that was incorporated into the Participation Agreement, and which had
9 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
10 committing to the Participation Agreement for the Insoul Fellowship Church Loan.
11 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
12 contractors, suppliers and other third parties as well as specific project-related servicing fees
13 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
14 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
15 approval from Plaintiff for any material change to the budget or plans.

16 Contract Performance and Breach

17 565. Upon execution of the Participation Agreement, Plaintiff began funding draw
18 requests for the Insoul Fellowship Church project based on draw requests by BTM and its
19 agents. Plaintiff Oak Stream advanced \$204,029 to BTM and its agents for the Insoul
20 Fellowship Church Loan between October 2008 and June 2009.

21 566. Defendant BTM breached the Participation Agreement by, among other things,
22 the following:

- 23 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
24 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
25 Ministries, Inc. (or to the servicers or contractors for authorized project
26 disbursements on the Borrower’s behalf), and failing to return within five business
27 days to Plaintiff any funds not so advanced;

28 ///

- 1 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
2 contractors, suppliers and other third parties as well as specific project-related
3 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
4 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
5 failing to get prior approval from Plaintiff for any material change to the budget or
6 plans;
- 7 • failing to maintain appropriate records and books of account reflecting interest
8 accrued and interest received, interest rate changes, principal payments and all other
9 transactions or actions affecting the Loan;
- 10 • not paying Plaintiff its return of principal at the earlier of the issuance of the
11 certificate of occupancy or within 12 months of the Loan Closing;
- 12 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
13 Closing and not providing or arranging additional financing to allow Plaintiff to
14 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
15 within 12 months of the Loan Closing;
- 16 • not paying Plaintiff its interest and fees on a monthly basis;
- 17 • failing to provide loan servicing and administration in accordance with the Loan
18 documents and with commercially acceptable loan servicing practices;
- 19 • requiring additional payments by Plaintiff beyond what was due under the
20 Participation Agreement and the approved budget and plans incorporated therein;
- 21 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
22 holding any proceeds received for the Loan;
- 23 • commingling for significant periods of time proceeds received on the Loan with other
24 funds;
- 25 • postponing due dates for payment of principal or interest in which Plaintiff shared
26 without obtaining the consent of Plaintiff;
- 27 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
28 which Defendant was aware;

- 1 • failing to require Borrower to pay the equity down payment as required by the Loan
2 Documents.

3 Contract Damages

4 567. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
5 as yet unascertained, but which Plaintiff believes is at least \$163,766 and which will be
6 proved at trial.

7 568. Additionally, Plaintiff incurred legal and administrative costs in addressing
8 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
9 have incurred.

10 Fraud – Defendants' Misrepresentations

11 569. On the periodic draw requests sent to Plaintiff beginning in October 2008,
12 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
13 had been spent on the Insoul Fellowship Church project, in accordance with the approved
14 plans and budget, as per the reports, forms, and spreadsheets submitted with the draw
15 requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
16 represented the value of the project to that point.

17 570. Prior to Plaintiff's executing the Participation Agreement and making each
18 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
19 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
20 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
21 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
22 updates on projects, including the Insoul Fellowship Church project, and was told that all
23 funds previously advanced by Plaintiff to BTM and its agents on the Insoul Fellowship
24 Church loan had been put towards the project according to the budget and plans submitted
25 to, approved by and relied on by Plaintiff.

26 Fraud – True Facts

27 571. In fact, Defendants' representations to Plaintiff as described above were false.
28 The true facts were that:

- 1 • Plaintiff's funds had not been spent on the Insoul Fellowship Church project in
2 accordance with the approved plans and budget as per the reports, forms, and
3 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
4 October 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
5 accurately represent the value of the project to that point;
- 6 • all funds previously advanced by Plaintiff to BTM and its agents on the Insoul
7 Fellowship Church loan had not been put towards the project according to the budget
8 and plans submitted to, approved by and relied on by Plaintiff;

9 Fraud - Concealment

10 572. Defendants David Smith and BTM, including through their agents, concealed
11 from and failed to disclose to Plaintiff the following:

- 12 • the true financial and operational status of the loans and projects, including the Insoul
13 Fellowship Church project;
- 14 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
15 projects, including the Insoul Fellowship Church project, and were not being applied
16 only to project-related costs, according to the plans and budgets submitted to,
17 approved by and relied on by Plaintiff;
- 18 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
19 including payments made to unrelated third parties - friends of David Smith and
20 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
21 Lachman Lane Property;
- 22 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
23 and its investments in overseeing the management, servicing and administration of
24 the loans and projects;
- 25 • that Smith and BTM were commingling for significant periods of time proceeds
26 received on the Loan with other funds;
- 27 • that Smith and BTM did not intend to immediately advance the full amount of
28 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf

1 or else return the funds to Plaintiff, and established money market accounts to hold
2 such funds longer than five business days;

- 3 • that Smith and BTM were not maintaining appropriate records and books of account
4 reflecting interest accrued and interest received, interest rate changes, principal
5 payments and all other transactions or actions affecting the Loan.

6 Fraud – Reliance, Discovery and Damage

7 573. Plaintiff continued to fund the Insoul Fellowship Church loan and project in
8 response to periodic draw requests from Defendants, based on continued assurances and
9 representations of Defendants Smith and BTM, including through their agents at Arks and
10 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
11 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
12 failure to disclose that Plaintiff's funds were being commingled with other funds and
13 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
14 began working on a new program to take over the servicing and administration of the loans,
15 expand the Build to Minister church loan program into various investment funds, and market
16 those funds to third parties.

17 574. On or about July 31, 2009, during this effort to expand the loan program,
18 Plaintiff first learned of problems with the loans, including that Defendants and their agents
19 owed monies to third parties and were unable to pay them despite Plaintiff and other
20 investors having advanced funds as requested. Over the course of the next several months,
21 Plaintiff conducted an investigation in an attempt to determine what had happened to
22 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
23 misrepresentations, concealment and malfeasance. With respect to the problems discovered
24 with the loans, Plaintiff contributed additional monies in order to complete the projects,
25 including paying outstanding bills, liens, legal and administration fees, modifying the terms
26 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
27 new contractors to complete the construction.

28 ///

1 575. But for Defendants' misrepresentations and concealment as described above,
2 Plaintiff would not have continued to provide funds in response to draw requests from
3 Defendants or their agents for the projects, including the Insoul Fellowship Church project,
4 and would not have invested efforts, time and money creating a new program to take over
5 servicing of the loans, expand the Build to Minister program into various investment funds,
6 and market those funds to third parties.

7 576. As a result of Defendants' misrepresentations and concealments, Plaintiff has
8 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
9 \$163,766 and which will be proved at trial. Additionally, Plaintiff incurred legal and
10 administrative costs in addressing and mitigating the harm caused by Defendants'
11 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
12 funds expended in creating a new program to take over servicing of the loans, expand the
13 Build to Minister program into various investment funds, and market those funds to third
14 parties, which it would not have expended but for Defendants' misrepresentations and
15 concealments.

16 *New Creation Church Loan*

17 Contract Terms

18 577. On December 16, 2008, Plaintiff Oak Stream entered into a Construction Note
19 Participation Agreement with Defendant BTM on a construction loan to New Creation
20 Church ("New Creation Participation Agreement" or "Participation Agreement"). The New
21 Creation Participation Agreement provided that Plaintiff (designated "Participant") would
22 have a participation interest of 16 and 2/3% in the construction note amount of \$825,496,
23 which Defendant BTM (designated "Seller") would loan to the church, New Creation
24 Church (designated "Borrower"). Under the New Creation Participation Agreement,
25 Plaintiff committed to fund a total of \$137,610.18, to be advanced to Defendant BTM in
26 response to periodic draw requests from Defendant according to a projected draw schedule.
27 In consideration for Plaintiff's advancing the funds, Plaintiff was entitled to receive the
28 return of the principal invested, as well as 10.5% interest on such amount, and its pro rata

1 portion (16 and 2/3%) of a Participation Fee (of \$12,382.44), with interest and fees to be
2 paid monthly, and the principal payable to Plaintiff at the issuance of a Certificate of
3 Occupancy for the Property or twelve (12) months from the date of Loan Closing, whichever
4 first occurs, as provided for in the Loan Agreement which was specifically referenced by
5 and incorporated into the Participation Agreement. The Participation Agreement also
6 provided that in the event Plaintiff had not received its return of principal at the time
7 specified, BTM was either to provide or to arrange additional financing so that Plaintiff
8 would receive all its funds.

9 578. Defendant BTM, for its part, agreed among other things, that:

- 10 • “In the event Seller [BTM] does not for any reason advance to Borrower
11 [church] the full amount of the contemplated advance [the draws of funds that
12 Defendants called for every month] on the date of receipt of such Purchase
13 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
14 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
15 to the amount of such contemplated advance not made.” (Participation
16 Agreement, Schedule 4, ¶2.)
- 17 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
18 the terms of the Loan Documents and with this Agreement. Seller [BTM]
19 shall provide loan servicing in accordance with commercially acceptable loan
20 servicing practices and with the same degree of care that is customarily
21 employed and exercised by Seller [BTM] in the administration and servicing
22 of loans of a similar nature held by it for its own account (the “Servicing
23 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 24 • “The Seller [BTM] shall maintain appropriate records and books of account
25 reflecting interest accrued and interest received, interest rate changes, principal
26 payments and all other transactions or actions affecting the Loan, which
27 records shall be kept in accordance with accounting principles consistently
28 and customarily applied by Seller [BTM].” (Participation Agreement,
Schedule 4, ¶9.)
- “Seller [BTM] further agrees that in performing its obligations hereunder,
Seller shall: (a) act in a custodial capacity on behalf of the Participant
[Plaintiff] with respect to its holding of any underlying instrument or collateral
and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)

///

1 agents. Plaintiff Oak Stream advanced \$106,269 to BTM and its agents for the New
2 Creation Church Loan between November 2008 and March 2009.

3 582. Defendant BTM breached the Participation Agreement by, among other things,
4 the following:

- 5 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
6 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
7 Ministries, Inc. (or to the servicers or contractors for authorized project
8 disbursements on the Borrower's behalf), and failing to return within five business
9 days to Plaintiff any funds not so advanced;
- 10 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
11 contractors, suppliers and other third parties as well as specific project-related
12 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
13 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
14 failing to get prior approval from Plaintiff for any material change to the budget or
15 plans;
- 16 • failing to maintain appropriate records and books of account reflecting interest
17 accrued and interest received, interest rate changes, principal payments and all other
18 transactions or actions affecting the Loan;
- 19 • not paying Plaintiff its return of principal at the earlier of the issuance of the
20 certificate of occupancy or within 12 months of the Loan Closing;
- 21 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
22 Closing and not providing or arranging additional financing to allow Plaintiff to
23 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
24 within 12 months of the Loan Closing;
- 25 • not paying Plaintiff its interest and fees on a monthly basis;
- 26 • failing to provide loan servicing and administration in accordance with the Loan
27 documents and with commercially acceptable loan servicing practices;

28 ///

- 1 • requiring additional payments by Plaintiff beyond what was due under the
- 2 Participation Agreement and the approved budget and plans incorporated therein;
- 3 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 4 holding any proceeds received for the Loan;
- 5 • commingling for significant periods of time proceeds received on the Loan with other
- 6 funds.

7 Contract Damages

8 583. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
9 as yet unascertained, but which Plaintiff believes is at least \$132,720 and which will be
10 proved at trial.

11 584. Additionally, Plaintiff incurred legal and administrative costs in addressing
12 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
13 have incurred.

14 Fraud – Defendants' Misrepresentations

15 585. On the periodic draw requests sent to Plaintiff beginning in November 2008,
16 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
17 had been spent on the New Creation Church project, in accordance with the approved plans
18 and budget, as per the reports, forms, and spreadsheets submitted with the draw requests,
19 and that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
20 value of the project to that point.

21 586. Prior to Plaintiff's executing the Participation Agreement and making each
22 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
23 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
24 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
25 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
26 updates on projects, including the New Creation Church project, and was told that all funds
27 previously advanced by Plaintiff to BTM and its agents on the New Creation Church loan

28 ///

1 had been put towards the project according to the budget and plans submitted to, approved
2 by and relied on by Plaintiff.

3 Fraud – True Facts

4 587. In fact, Defendants' representations to Plaintiff as described above were false.

5 The true facts were that:

- 6 • Plaintiff's funds had not been spent on the New Creation Church project in
7 accordance with the approved plans and budget as per the reports, forms, and
8 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
9 November 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did
10 not accurately represent the value of the project to that point;
- 11 • all funds previously advanced by Plaintiff to BTM and its agents on the New Creation
12 Church loan had not been put towards the project according to the budget and plans
13 submitted to, approved by and relied on by Plaintiff;

14 Fraud - Concealment

15 588. Defendants David Smith and BTM, including through their agents, concealed
16 from and failed to disclose to Plaintiff the following:

- 17 • the true financial and operational status of the loans and projects, including the New
18 Creation Church project;
- 19 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
20 projects, including the New Creation Church project, and were not being applied only
21 to project-related costs, according to the plans and budgets submitted to, approved by
22 and relied on by Plaintiff;
- 23 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
24 including payments made to unrelated third parties - friends of David Smith and
25 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
26 Lachman Lane Property;

27 ///

28 ///

- 1 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
- 2 and its investments in overseeing the management, servicing and administration of
- 3 the loans and projects;
- 4 • that Smith and BTM were commingling for significant periods of time proceeds
- 5 received on the Loan with other funds;
- 6 • that Smith and BTM did not intend to immediately advance the full amount of
- 7 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
- 8 or else return the funds to Plaintiff, and established money market accounts to hold
- 9 such funds longer than five business days;
- 10 • that Smith and BTM were not maintaining appropriate records and books of account
- 11 reflecting interest accrued and interest received, interest rate changes, principal
- 12 payments and all other transactions or actions affecting the Loan.

13 Fraud – Reliance, Discovery and Damage

14 589. Plaintiff continued to fund the New Creation Church loan and project in
15 response to periodic draw requests from Defendants, based on continued assurances and
16 representations of Defendants Smith and BTM, including through their agents at Arks and
17 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
18 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
19 failure to disclose that Plaintiff's funds were being commingled with other funds and
20 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
21 began working on a new program to take over the servicing and administration of the loans,
22 expand the Build to Minister church loan program into various investment funds, and market
23 those funds to third parties.

24 590. On or about July 31, 2009, during this effort to expand the loan program,
25 Plaintiff first learned of problems with the loans, including that Defendants and their agents
26 owed monies to third parties and were unable to pay them despite Plaintiff and other
27 investors having advanced funds as requested. Over the course of the next several months,
28 Plaintiff conducted an investigation in an attempt to determine what had happened to

1 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
2 misrepresentations, concealment and malfeasance. With respect to the problems discovered
3 with the loans, Plaintiff contributed additional monies in order to complete the projects,
4 including paying outstanding bills, liens, legal and administration fees, modifying the terms
5 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
6 new contractors to complete the construction.

7 591. But for Defendants' misrepresentations and concealment as described above,
8 Plaintiff would not have continued to provide funds in response to draw requests from
9 Defendants or their agents for the projects, including the New Creation Church project, and
10 would not have invested efforts, time and money creating a new program to take over
11 servicing of the loans, expand the Build to Minister program into various investment funds,
12 and market those funds to third parties.

13 592. As a result of Defendants' misrepresentations and concealments, Plaintiff has
14 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
15 \$132,720 and which will be proved at trial. Additionally, Plaintiff incurred legal and
16 administrative costs in addressing and mitigating the harm caused by Defendants'
17 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts
18 and funds expended in creating a new program to take over servicing of the loans, expand
19 the Build to Minister program into various investment funds, and market those funds to third
20 parties, which it would not have expended but for Defendants' misrepresentations and
21 concealments.

22 *Peace Baptist Church Loan*

23 Contract Terms

24 593. On September 26, 2008, Plaintiff Oak Stream entered into a Construction Note
25 Participation Agreement with Defendant BTM on a construction loan to Peace Baptist
26 Church ("Peace Participation Agreement" or "Participation Agreement"). The Peace
27 Participation Agreement provided that Plaintiff (designated "Participant") would have a
28 participation interest of 16 and 2/3% in the construction note amount of \$515,562, which

1 Defendant BTM (designated "Seller") would loan to the church, Peace Baptist Church
2 (designated "Borrower"). Under the Peace Participation Agreement, Plaintiff committed to
3 fund a total of \$85,944.19, to be advanced to Defendant BTM in response to periodic draw
4 requests from Defendant according to a projected draw schedule. In consideration for
5 Plaintiff's advancing the funds, Plaintiff was entitled to receive the return of the principal
6 invested, as well as 10.5% interest on such amount, and its pro rata portion (16 and 2/3%) of
7 a Participation Fee (of \$7,733.43), with interest and fees to be paid monthly, and the
8 principal payable to Plaintiff at the issuance of a Certificate of Occupancy for the Property
9 or twelve (12) months from the date of Loan Closing, whichever first occurs, as provided for
10 in the Loan Agreement which was specifically referenced by and incorporated into the
11 Participation Agreement. The Participation Agreement also provided that in the event
12 Plaintiff had not received its return of principal at the time specified, BTM was either to
13 provide or to arrange additional financing so that Plaintiff would receive all its funds.

14 594. Defendant BTM, for its part, agreed among other things, that:

- 15 • "In the event Seller [BTM] does not for any reason advance to Borrower
16 [church] the full amount of the contemplated advance [the draws of funds that
17 Defendants called for every month] on the date of receipt of such Purchase
18 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
19 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
20 to the amount of such contemplated advance not made." (Participation
21 Agreement, Schedule 4, ¶2.)
- 22 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
23 the terms of the Loan Documents and with this Agreement. Seller [BTM]
24 shall provide loan servicing in accordance with commercially acceptable loan
25 servicing practices and with the same degree of care that is customarily
26 employed and exercised by Seller [BTM] in the administration and servicing
27 of loans of a similar nature held by it for its own account (the "Servicing
28 Standard")." (Participation Agreement, Schedule 4, ¶9.)
- "The Seller [BTM] shall maintain appropriate records and books of account
reflecting interest accrued and interest received, interest rate changes, principal
payments and all other transactions or actions affecting the Loan, which
records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)
- "Seller [BTM] further agrees that in performing its obligations hereunder,
Seller shall: (a) act in a custodial capacity on behalf of the Participant
[Plaintiff] with respect to its holding of any underlying instrument or collateral

1 and in holding any proceeds received for the Loan; (b) not commingle for any
2 significant period of time proceeds received on the Loan; (c) directly pass
3 through any proceeds received from the Loan to Participant [Plaintiff] as
4 provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)

- 5 • “Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
6 of any material default with respect to the Loan of which Seller [BTM] is
7 actually aware and of any other matters which, in Seller’s judgment, materially
8 affect the interest of Participant [Plaintiff] with respect to the Loan
(collectively, a “Material Default”).” (Participation Agreement, Schedule 4, ¶
11.)

9 595. The parties agreed that the Plaintiff would advance funds to BTM, as called
10 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
11 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
12 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
13 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
14 (the Church), to service the loan and advance the funds towards the construction project,
15 according to the budget and plans approved and relied upon by the Plaintiff in entering into
16 the Participation Agreement. Upon information and belief, BTM had an agreement with
17 Arks whereby Arks took over the servicing and administration of the Loan to Peace Baptist
18 Church. The Participation Agreement specifically references and incorporates the Loan
19 Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower
20 (the Church), and which provides that “the Loan proceeds are to be used by Church solely
21 for the construction of a church, church-related improvements, and/or costs related thereto
22 (the “Project”) upon the land described in the Security Instrument (the “Property”) in
23 accordance with the plans and specifications approved by ARKS.”

24 596. Plaintiff agreed to advance the funds in response to periodic draws based on
25 the project plans and budget which were attached to the Participation Agreement and/or the
26 Loan Agreement that was incorporated into the Participation Agreement, and which had
27 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
28

///

1 committing to the Participation Agreement for the Peace Baptist Church Loan. Defendant
2 BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors,
3 suppliers and other third parties as well as specific project-related servicing fees to itself,
4 Arks and Noah, according to the budget and plans submitted to and approved by Plaintiffs
5 and incorporated into the Participation Agreement, and agreed to get prior approval from
6 Plaintiff for any material change to the budget or plans.

7 Contract Performance and Breach

8 597. Upon execution of the Participation Agreement, Plaintiff began funding draw
9 requests for the Peace Baptist Church project based on draw requests by BTM and its agents.
10 Plaintiff Oak Stream advanced \$33,207 to BTM and its agents for the Peace Baptist Church
11 Loan between March 2009 and June 2009.

12 598. Defendant BTM breached the Participation Agreement by, among other things,
13 the following:

- 14 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
15 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
16 Ministries, Inc. (or to the servicers or contractors for authorized project
17 disbursements on the Borrower's behalf), and failing to return within five business
18 days to Plaintiff any funds not so advanced;
- 19 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
20 contractors, suppliers and other third parties as well as specific project-related
21 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
22 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
23 failing to get prior approval from Plaintiff for any material change to the budget or
24 plans;
- 25 • failing to maintain appropriate records and books of account reflecting interest
26 accrued and interest received, interest rate changes, principal payments and all other
27 transactions or actions affecting the Loan;

28 ///

- 1 • not paying Plaintiff its return of principal at the earlier of the issuance of the
2 certificate of occupancy or within 12 months of the Loan Closing;
- 3 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
4 Closing and not providing or arranging additional financing to allow Plaintiff to
5 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
6 within 12 months of the Loan Closing;
- 7 • not paying Plaintiff its interest and fees on a monthly basis;
- 8 • failing to provide loan servicing and administration in accordance with the Loan
9 documents and with commercially acceptable loan servicing practices;
- 10 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
11 holding any proceeds received for the Loan;
- 12 • commingling for significant periods of time proceeds received on the Loan with other
13 funds;
- 14 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
15 which Defendant was aware;
- 16 • failing to require Borrower to pay the equity down payment as required by the Loan
17 Documents.

18 Contract Damages

19 599. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
20 as yet unascertained, but which Plaintiff believes is at least \$52,409 and which will be
21 proved at trial.

22 600. Additionally, Plaintiff incurred legal and administrative costs in addressing
23 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
24 have incurred.

25 Fraud – Defendants' Misrepresentations

26 601. On the periodic draw requests sent to Plaintiff beginning in March 2009,
27 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
28 had been spent on the Peace Baptist Church project, in accordance with the approved plans

1 and budget, as per the reports, forms, and spreadsheets submitted with the draw requests,
2 and that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
3 value of the project to that point.

4 602. Prior to Plaintiff's executing the Participation Agreement and making each
5 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
6 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
7 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
8 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
9 updates on projects, including the Peace Baptist Church project, and was told that all funds
10 previously advanced by Plaintiff to BTM and its agents on the Peace Baptist Church loan
11 had been put towards the project according to the budget and plans submitted to, approved
12 by and relied on by Plaintiff.

13 Fraud – True Facts

14 603. In fact, Defendants' representations to Plaintiff as described above were false.
15 The true facts were that:

- 16 • Plaintiff's funds had not been spent on the Peace Baptist Church project in
17 accordance with the approved plans and budget as per the reports, forms, and
18 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
19 March 2009, and the reports, forms, and spreadsheets submitted to Plaintiff did not
20 accurately represent the value of the project to that point;
- 21 • all funds previously advanced by Plaintiff to BTM and its agents on the Peace Baptist
22 Church loan had not been put towards the project according to the budget and plans
23 submitted to, approved by and relied on by Plaintiff;

24 Fraud - Concealment

25 604. Defendants David Smith and BTM, including through their agents, concealed
26 from and failed to disclose to Plaintiff the following:

- 27 • the true financial and operational status of the loans and projects, including the Peace
28 Baptist Church project;

- 1 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
2 projects, including the Peace Baptist Church project, and were not being applied only
3 to project-related costs, according to the plans and budgets submitted to, approved by
4 and relied on by Plaintiff;
- 5 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
6 including payments made to unrelated third parties - friends of David Smith and
7 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
8 Lachman Lane Property;
- 9 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
10 and its investments in overseeing the management, servicing and administration of
11 the loans and projects;
- 12 • that Smith and BTM were commingling for significant periods of time proceeds
13 received on the Loan with other funds;
- 14 • that Smith and BTM did not intend to immediately advance the full amount of
15 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
16 or else return the funds to Plaintiff, and established money market accounts to hold
17 such funds longer than five business days;
- 18 • that Smith and BTM were not maintaining appropriate records and books of account
19 reflecting interest accrued and interest received, interest rate changes, principal
20 payments and all other transactions or actions affecting the Loan.

21 Fraud – Reliance, Discovery and Damage

22 605. Plaintiff continued to fund the Peace Baptist Church loan and project in
23 response to periodic draw requests from Defendants, based on continued assurances and
24 representations of Defendants Smith and BTM, including through their agents at Arks and
25 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
26 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
27 failure to disclose that Plaintiff's funds were being commingled with other funds and
28 diverted to non-project related costs and payments. In or about February 2009, Plaintiff

1 began working on a new program to take over the servicing and administration of the loans,
2 expand the Build to Minister church loan program into various investment funds, and market
3 those funds to third parties.

4 606. On or about July 31, 2009, during this effort to expand the loan program,
5 Plaintiff first learned of problems with the loans, including that Defendants and their agents
6 owed monies to third parties and were unable to pay them despite Plaintiff and other
7 investors having advanced funds as requested. Over the course of the next several months,
8 Plaintiff conducted an investigation in an attempt to determine what had happened to
9 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
10 misrepresentations, concealment and malfeasance. With respect to the problems discovered
11 with the loans, Plaintiff contributed additional monies in order to complete the projects,
12 including paying outstanding bills, liens, legal and administration fees, modifying the terms
13 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
14 new contractors to complete the construction.

15 607. But for Defendants' misrepresentations and concealment as described above,
16 Plaintiff would not have continued to provide funds in response to draw requests from
17 Defendants or their agents for the projects, including the Peace Baptist Church project, and
18 would not have invested efforts, time and money creating a new program to take over
19 servicing of the loans, expand the Build to Minister program into various investment funds,
20 and market those funds to third parties.

21 608. As a result of Defendants' misrepresentations and concealments, Plaintiff has
22 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
23 \$52,409 and which will be proved at trial. Additionally, Plaintiff incurred legal and
24 administrative costs in addressing and mitigating the harm caused by Defendants'
25 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
26 funds expended in creating a new program to take over servicing of the loans, expand the
27 Build to Minister program into various investment funds, and market those funds to third

28 ///

1 parties, which it would not have expended but for Defendants' misrepresentations and
2 concealments.

3 *Rush AME Zion Church Loan*

4 Contract Terms

5 609. On April 28, 2008, Plaintiff Oak Stream entered into a Construction Note
6 Participation Agreement with Defendant BTM on a construction loan to Rush AME Zion
7 Church ("Rush Participation Agreement" or "Participation Agreement"). The Rush
8 Participation Agreement provided that Plaintiff (designated "Participant") would have a
9 participation interest of 16 and 2/3% in the construction note amount of \$788,366, which
10 Defendant BTM (designated "Seller") would loan to the church, Rush AME Zion Church
11 (designated "Borrower"). Under the Rush Participation Agreement, Plaintiff committed to
12 fund a total of \$131,420.61, to be advanced to Defendant BTM in response to periodic draw
13 requests from Defendant according to a projected draw schedule. In consideration for
14 Plaintiff's advancing the funds, Plaintiff was entitled to receive the return of the principal
15 invested, as well as 10.5% interest on such amount, and its pro rata portion (16 and 2/3%) of
16 a Participation Fee (of \$11,825.49), with interest and fees to be paid monthly, and the
17 principal payable to Plaintiff at the issuance of a Certificate of Occupancy for the Property
18 or twelve (12) months from the date of Loan Closing, whichever first occurs, as provided for
19 in the Loan Agreement which was specifically referenced by and incorporated into the
20 Participation Agreement. The Participation Agreement also provided that in the event
21 Plaintiff had not received its return of principal at the time specified, BTM was either to
22 provide or to arrange additional financing so that Plaintiff would receive all its funds.

23 610. Defendant BTM, for its part, agreed among other things, that:

- 24 • "In the event Seller [BTM] does not for any reason advance to Borrower
25 [church] the full amount of the contemplated advance [the draws of funds that
26 Defendants called for every month] on the date of receipt of such Purchase
27 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
28 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
to the amount of such contemplated advance not made." (Participation
Agreement, Schedule 4, ¶2.)

28 ///

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- “[T]he Seller [BTM] shall service and administer the Loan in accordance with the terms of the Loan Documents and with this Agreement. Seller [BTM] shall provide loan servicing in accordance with commercially acceptable loan servicing practices and with the same degree of care that is customarily employed and exercised by Seller [BTM] in the administration and servicing of loans of a similar nature held by it for its own account (the “Servicing Standard”).” (Participation Agreement, Schedule 4, ¶9.)
 - “The Seller [BTM] shall maintain appropriate records and books of account reflecting interest accrued and interest received, interest rate changes, principal payments and all other transactions or actions affecting the Loan, which records shall be kept in accordance with accounting principles consistently and customarily applied by Seller [BTM].” (Participation Agreement, Schedule 4, ¶9.)
 - “Seller [BTM] further agrees that in performing its obligations hereunder, Seller shall: (a) act in a custodial capacity on behalf of the Participant [Plaintiff] with respect to its holding of any underlying instrument or collateral and in holding any proceeds received for the Loan; (b) not commingle for any significant period of time proceeds received on the Loan; (c) directly pass through any proceeds received from the Loan to Participant [Plaintiff] as provided in Section 4 of this Agreement, less any proceeds that represent servicing or other compensation to Seller [BTM] or an interest in the Loan retained by the Seller [BTM], all as more particularly provided for herein; and (d) administer the Loan in accordance with the Servicing Standard as provided herein.” (Participation Agreement, Schedule 4, ¶ 9.)
 - “[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM] may take or omit to take any action under any of the Loan Documents which would result in the following (each a “Material Change”): (a) reduce or increase the amounts of principal or interest payments of the Loan, (b) reduce or increase any Loan interest rate in which Participant [Plaintiff] shares, (c) postpone any due date for payment of principal or interest in which Participant [Plaintiff] shares, including, without limitation, the final maturity date of the Loan, (d) except as expressly permitted under the Loan Documents, release or subordinate any existing collateral described in the Loan Documents, (e) release the liability of Borrower or any guarantor for the Loan, (f) consent to the further sale, transfer, pledge, mortgage or assignment of (i) the Property or (ii) any direct or indirect interest in Borrower ... (g) make or consent to any change in the principal amount of the Note; or (h) waive a default under the Loan Documents arising from the failure to make payments as and when due on the Loan. . . .” ((Participation Agreement, Schedule 4, ¶ 11.)

24 611. The parties agreed that the Plaintiff would advance funds to BTM, as called
25 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
26 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
27 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
28 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower

1 (the Church), to service the loan and advance the funds towards the construction project,
2 according to the budget and plans approved and relied upon by the Plaintiff in entering into
3 the Participation Agreement. Upon information and belief, BTM had an agreement with
4 Arks whereby Arks took over the servicing and administration of the Loan to Rush AME
5 Zion Church. The Participation Agreement specifically references and incorporates the
6 Loan Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the
7 Borrower (the Church), and which provides that “the Loan proceeds are to be used by
8 Church solely for the construction of a church, church-related improvements, and/or costs
9 related thereto (the “Project”) upon the land described in the Security Instrument (the
10 “Property”) in accordance with the plans and specifications approved by ARKS.”

11 612. Plaintiff agreed to advance the funds in response to periodic draws based on
12 the project plans and budget which were attached to the Participation Agreement and/or the
13 Loan Agreement that was incorporated into the Participation Agreement, and which had
14 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
15 committing to the Participation Agreement for the Rush AME Zion Church Loan.
16 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
17 contractors, suppliers and other third parties as well as specific project-related servicing fees
18 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
19 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
20 approval from Plaintiff for any material change to the budget or plans.

21 Contract Performance and Breach

22 613. Upon execution of the Participation Agreement, Plaintiff began funding draw
23 requests for the Rush AME Zion Church project based on draw requests by BTM and its
24 agents. Plaintiff Oak Stream advanced \$129,909 to BTM and its agents for the Rush AME
25 Zion Church Loan between October 2008 and June 2009.

26 614. Defendant BTM breached the Participation Agreement by, among other things,
27 the following:

28 ///

- 1 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
2 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
3 Ministries, Inc. (or to the servicers or contractors for authorized project
4 disbursements on the Borrower's behalf), and failing to return within five business
5 days to Plaintiff any funds not so advanced;
- 6 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
7 contractors, suppliers and other third parties as well as specific project-related
8 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
9 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
10 failing to get prior approval from Plaintiff for any material change to the budget or
11 plans;
- 12 • failing to maintain appropriate records and books of account reflecting interest
13 accrued and interest received, interest rate changes, principal payments and all other
14 transactions or actions affecting the Loan;
- 15 • not paying Plaintiff its return of principal at the earlier of the issuance of the
16 certificate of occupancy or within 12 months of the Loan Closing;
- 17 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
18 Closing and not providing or arranging additional financing to allow Plaintiff to
19 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
20 within 12 months of the Loan Closing;
- 21 • not paying Plaintiff its interest and fees on a monthly basis;
- 22 • failing to provide loan servicing and administration in accordance with the Loan
23 documents and with commercially acceptable loan servicing practices;
- 24 • requiring additional payments by Plaintiff beyond what was due under the
25 Participation Agreement and the approved budget and plans incorporated therein;
- 26 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
27 holding any proceeds received for the Loan;

28 ///

- 1 • commingling for significant periods of time proceeds received on the Loan with other
2 funds;
3 • postponing due dates for payment of principal or interest in which Plaintiff shared
4 without obtaining the consent of Plaintiff.

5 Contract Damages

6 615. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
7 as yet unascertained, but which Plaintiff believes is at least \$86,794 and which will be
8 proved at trial.

9 616. Additionally, Plaintiff incurred legal and administrative costs in addressing
10 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
11 have incurred.

12 Fraud – Defendants' Misrepresentations

13 617. On the periodic draw requests sent to Plaintiff beginning in October 2008,
14 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
15 had been spent on the Rush AME Zion Church project, in accordance with the approved
16 plans and budget, as per the reports, forms, and spreadsheets submitted with the draw
17 requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
18 represented the value of the project to that point.

19 618. Prior to Plaintiff's executing the Participation Agreement and making each
20 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
21 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
22 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
23 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
24 updates on projects, including the Rush AME Zion Church project, and was told that all
25 funds previously advanced by Plaintiff to BTM and its agents on the Rush AME Zion
26 Church loan had been put towards the project according to the budget and plans submitted
27 to, approved by and relied on by Plaintiff.

28 ///

1 Fraud – True Facts

2 619. In fact, Defendants' representations to Plaintiff as described above were false.

3 The true facts were that:

- 4 • Plaintiff's funds had not been spent on the Rush AME Zion Church project in
5 accordance with the approved plans and budget as per the reports, forms, and
6 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
7 October 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
8 accurately represent the value of the project to that point;
- 9 • all funds previously advanced by Plaintiff to BTM and its agents on the Rush AME
10 Zion Church loan had not been put towards the project according to the budget and
11 plans submitted to, approved by and relied on by Plaintiff;

12 Fraud - Concealment

13 620. Defendants David Smith and BTM, including through their agents, concealed
14 from and failed to disclose to Plaintiff the following:

- 15 • the true financial and operational status of the loans and projects, including the Rush
16 AME Zion Church project;
- 17 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
18 projects, including the Rush AME Zion Church project, and were not being applied
19 only to project-related costs, according to the plans and budgets submitted to,
20 approved by and relied on by Plaintiff;
- 21 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
22 including payments made to unrelated third parties - friends of David Smith and
23 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
24 Lachman Lane Property;
- 25 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
26 to Randy Barton and for "sales commissions" to Carmen Copple Smith;

27 ///

28 ///

1 that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
2 and its investments in overseeing the management, servicing and administration of
3 the loans and projects;

- 4 • that Smith and BTM were commingling for significant periods of time proceeds
5 received on the Loan with other funds;
- 6 • that Smith and BTM did not intend to immediately advance the full amount of
7 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
8 or else return the funds to Plaintiff, and established money market accounts to hold
9 such funds longer than five business days;
- 10 • that Smith and BTM were not maintaining appropriate records and books of account
11 reflecting interest accrued and interest received, interest rate changes, principal
12 payments and all other transactions or actions affecting the Loan.

13 Fraud – Reliance, Discovery and Damage

14 621. Plaintiff continued to fund the Rush AME Zion Church loan and project in
15 response to periodic draw requests from Defendants, based on continued assurances and
16 representations of Defendants Smith and BTM, including through their agents at Arks and
17 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
18 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
19 failure to disclose that Plaintiff's funds were being commingled with other funds and
20 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
21 began working on a new program to take over the servicing and administration of the loans,
22 expand the Build to Minister church loan program into various investment funds, and market
23 those funds to third parties.

24 622. On or about July 31, 2009, during this effort to expand the loan program,
25 Plaintiff first learned of problems with the loans, including that Defendants and their agents
26 owed monies to third parties and were unable to pay them despite Plaintiff and other
27 investors having advanced funds as requested. Over the course of the next several months,
28 Plaintiff conducted an investigation in an attempt to determine what had happened to

1 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
2 misrepresentations, concealment and malfeasance. With respect to the problems discovered
3 with the loans, Plaintiff contributed additional monies in order to complete the projects,
4 including paying outstanding bills, liens, legal and administration fees, modifying the terms
5 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
6 new contractors to complete the construction.

7 623. But for Defendants' misrepresentations and concealment as described above,
8 Plaintiff would not have continued to provide funds in response to draw requests from
9 Defendants or their agents for the projects, including the Rush AME Zion Church project,
10 and would not have invested efforts, time and money creating a new program to take over
11 servicing of the loans, expand the Build to Minister program into various investment funds,
12 and market those funds to third parties.

13 624. As a result of Defendants' misrepresentations and concealments, Plaintiff has
14 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
15 \$86,794 and which will be proved at trial. Additionally, Plaintiff incurred legal and
16 administrative costs in addressing and mitigating the harm caused by Defendants'
17 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
18 funds expended in creating a new program to take over servicing of the loans, expand the
19 Build to Minister program into various investment funds, and market those funds to third
20 parties, which it would not have expended but for Defendants' misrepresentations and
21 concealments.

22 ***Brook Community Church Loan***

23 Contract Terms

24 625. On February 28, 2008, Plaintiff Oak Stream entered into a Construction Note
25 Participation Agreement with Defendant BTM on a construction loan to Brook Community
26 Church ("Brook Participation Agreement" or "Participation Agreement"). The Brook
27 Participation Agreement provided that Plaintiff (designated "Participant") would have a
28 participation interest of 16 and 2/3% in the construction note amount of \$1,122,745, which

1 Defendant BTM (designated "Seller") would loan to the church, Brook Community Church
2 (designated "Borrower"). Under the Brook Participation Agreement, Plaintiff committed to
3 fund a total of \$187,161.59, to be advanced to Defendant BTM in response to periodic draw
4 requests from Defendant according to a projected draw schedule. In consideration for
5 Plaintiff's advancing the funds, Plaintiff was entitled to receive the return of the principal
6 invested, as well as 10.5% interest on such amount, and (16 and 2/3%) of a Participation Fee
7 (of \$16,841.17), with interest and fees to be paid monthly, and the principal payable to
8 Plaintiff at the issuance of a Certificate of Occupancy for the Property or twelve (12) months
9 from the date of Loan Closing, whichever first occurs, as provided for in the Loan
10 Agreement which was specifically referenced by and incorporated into the Participation
11 Agreement. The Participation Agreement also provided that in the event
12 Plaintiff had not received its return of principal at the time specified, BTM was either to
13 provide or to arrange additional financing so that Plaintiff would receive all its funds.

14 626. Defendant BTM, for its part, agreed among other things, that:

- 15 • "In the event Seller [BTM] does not for any reason advance to Borrower
16 [church] the full amount of the contemplated advance [the draws of funds that
17 Defendants called for every month] on the date of receipt of such Purchase
18 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
19 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
20 to the amount of such contemplated advance not made." (Participation
21 Agreement, Schedule 4, ¶2.)
- 22 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
23 the terms of the Loan Documents and with this Agreement. Seller [BTM]
24 shall provide loan servicing in accordance with commercially acceptable loan
25 servicing practices and with the same degree of care that is customarily
26 employed and exercised by Seller [BTM] in the administration and servicing
27 of loans of a similar nature held by it for its own account (the "Servicing
28 Standard")." (Participation Agreement, Schedule 4, ¶9.)
- "The Seller [BTM] shall maintain appropriate records and books of account
reflecting interest accrued and interest received, interest rate changes, principal
payments and all other transactions or actions affecting the Loan, which
records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)
- "Seller [BTM] further agrees that in performing its obligations hereunder,
Seller shall: (a) act in a custodial capacity on behalf of the Participant
[Plaintiff] with respect to its holding of any underlying instrument or collateral
and in holding any proceeds received for the Loan; (b) not commingle for any

1 significant period of time proceeds received on the Loan; (c) directly pass
2 through any proceeds received from the Loan to Participant [Plaintiff] as
3 provided in Section 4 of this Agreement, less any proceeds that represent
4 servicing or other compensation to Seller [BTM] or an interest in the Loan
5 retained by the Seller [BTM], all as more particularly provided for herein; and
6 (d) administer the Loan in accordance with the Servicing Standard as provided
7 herein.” (Participation Agreement, Schedule 4, ¶ 9.)

6 627. The parties agreed that the Plaintiff would advance funds to BTM, as called
7 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
8 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
9 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
10 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
11 (the Church), to service the loan and advance the funds towards the construction project,
12 according to the budget and plans approved and relied upon by the Plaintiff in entering into
13 the Participation Agreement. Upon information and belief, BTM had an agreement with
14 Arks whereby Arks took over the servicing and administration of the Loan to Brook
15 Community Church. The Participation Agreement specifically references and incorporates
16 the Loan Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the
17 Borrower (the Church), and which provides that “the Loan proceeds are to be used by
18 Church solely for the construction of a church, church-related improvements, and/or costs
19 related thereto (the “Project”) upon the land described in the Security Instrument (the
20 “Property”) in accordance with the plans and specifications approved by ARKS.”

21 628. Plaintiff agreed to advance the funds in response to periodic draws based on
22 the project plans and budget which were attached to the Participation Agreement and/or the
23 Loan Agreement that was incorporated into the Participation Agreement, and which had
24 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
25 committing to the Participation Agreement for the Brook Community Church Loan.
26 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
27 contractors, suppliers and other third parties as well as specific project-related servicing fees
28 to itself, Arks and Noah, according to the budget and plans submitted to and approved by

1 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
2 approval from Plaintiff for any material change to the budget or plans.

3 Contract Performance and Breach

4 629. Upon execution of the Participation Agreement, Plaintiff began funding draw
5 requests for the Brook Community Church project based on draw requests by BTM and its
6 agents. Plaintiff Oak Stream advanced \$187,124 to BTM and its agents for the Brook
7 Community Church Loan between February 2008 and October 2008.

8 630. Defendant BTM breached the Participation Agreement by, among other things,
9 the following:

- 10 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
11 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
12 Ministries, Inc. (or to the servicers or contractors for authorized project
13 disbursements on the Borrower's behalf), and failing to return within five business
14 days to Plaintiff any funds not so advanced;
- 15 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
16 contractors, suppliers and other third parties as well as specific project-related
17 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
18 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
19 failing to get prior approval from Plaintiff for any material change to the budget or
20 plans;
- 21 • failing to maintain appropriate records and books of account reflecting interest
22 accrued and interest received, interest rate changes, principal payments and all other
23 transactions or actions affecting the Loan;
- 24 • not paying Plaintiff its return of principal at the earlier of the issuance of the
25 certificate of occupancy or within 12 months of the Loan Closing;
- 26 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
27 Closing and not providing or arranging additional financing to allow Plaintiff to

28 ///

- 1 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
2 within 12 months of the Loan Closing;
- 3 • not paying Plaintiff its interest and fees on a monthly basis;
 - 4 • failing to provide loan servicing and administration in accordance with the Loan
5 documents and with commercially acceptable loan servicing practices;
 - 6 • requiring additional payments by Plaintiff beyond what was due under the
7 Participation Agreement and the approved budget and plans incorporated therein;
 - 8 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
9 holding any proceeds received for the Loan;
 - 10 • commingling for significant periods of time proceeds received on the Loan with other
11 funds.

12 Contract Damages

13 631. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
14 as yet unascertained, but which Plaintiff believes is at least \$37,173 and which will be
15 proved at trial.

16 632. Additionally, Plaintiff incurred legal and administrative costs in addressing
17 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
18 have incurred.

19 Fraud – Defendants' Misrepresentations

20 633. On the periodic draw requests sent to Plaintiff beginning in February 2008,
21 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
22 had been spent on the Brook Community Church project, in accordance with the approved
23 plans and budget, as per the reports, forms, and spreadsheets submitted with the draw
24 requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
25 represented the value of the project to that point.

26 634. Prior to Plaintiff's executing the Participation Agreement and making each
27 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
28 monthly) in response to draw requests and spoke to agents of Smith and BTM, including

1 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
2 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
3 updates on projects, including the Brook Community Church project, and was told that all
4 funds previously advanced by Plaintiff to BTM and its agents on the Brook Community
5 Church loan had been put towards the project according to the budget and plans submitted
6 to, approved by and relied on by Plaintiff.

7 Fraud – True Facts

8 635. In fact, Defendants' representations to Plaintiff as described above were false.

9 The true facts were that:

- 10 • Plaintiff's funds had not been spent on the Brook Community Church project in
11 accordance with the approved plans and budget as per the reports, forms, and
12 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
13 February 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
14 accurately represent the value of the project to that point;
- 15 • all funds previously advanced by Plaintiff to BTM and its agents on the Brook
16 Community Church loan had not been put towards the project according to the budget
17 and plans submitted to, approved by and relied on by Plaintiff;

18 Fraud - Concealment

19 636. Defendants David Smith and BTM, including through their agents, concealed
20 from and failed to disclose to Plaintiff the following:

- 21 • the true financial and operational status of the loans and projects, including the Brook
22 Community Church project;
- 23 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
24 projects, including the Brook Community Church project, and were not being applied
25 only to project-related costs, according to the plans and budgets submitted to,
26 approved by and relied on by Plaintiff;
- 27 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
28 including payments made to unrelated third parties - friends of David Smith and

- 1 David Smith's wife, Carmen Cople Smith, and payments of the mortgage on the
2 Lachman Lane Property;
- 3 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
4 to Randy Barton and for "sales commissions" to Carmen Cople Smith;
 - 5 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
6 and its investments in overseeing the management, servicing and administration of
7 the loans and projects;
 - 8 • that Smith and BTM were commingling for significant periods of time proceeds
9 received on the Loan with other funds;
 - 10 • that Smith and BTM did not intend to immediately advance the full amount of
11 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
12 or else return the funds to Plaintiff, and established money market accounts to hold
13 such funds longer than five business days;
 - 14 • that Smith and BTM were not maintaining appropriate records and books of account
15 reflecting interest accrued and interest received, interest rate changes, principal
16 payments and all other transactions or actions affecting the Loan.

17 Fraud – Reliance, Discovery and Damage

18 637. Plaintiff continued to fund the Brook Community Church loan and project in
19 response to periodic draw requests from Defendants, based on continued assurances and
20 representations of Defendants Smith and BTM, including through their agents at Arks and
21 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
22 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
23 failure to disclose that Plaintiff's funds were being commingled with other funds and
24 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
25 began working on a new program to take over the servicing and administration of the loans,
26 expand the Build to Minister church loan program into various investment funds, and market
27 those funds to third parties.

28 ///

1 638. On or about July 31, 2009, during this effort to expand the loan program,
2 Plaintiff first learned of problems with the loans, including that Defendants and their agents
3 owed monies to third parties and were unable to pay them despite Plaintiff and other
4 investors having advanced funds as requested. Over the course of the next several months,
5 Plaintiff conducted an investigation in an attempt to determine what had happened to
6 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
7 misrepresentations, concealment and malfeasance. With respect to the problems discovered
8 with the loans, Plaintiff contributed additional monies in order to complete the projects,
9 including paying outstanding bills, liens, legal and administration fees, modifying the terms
10 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
11 new contractors to complete the construction.

12 639. But for Defendants' misrepresentations and concealment as described above,
13 Plaintiff would not have continued to provide funds in response to draw requests from
14 Defendants or their agents for the projects, including the Brook Community Church project,
15 and would not have invested efforts, time and money creating a new program to take over
16 servicing of the loans, expand the Build to Minister program into various investment funds,
17 and market those funds to third parties.

18 640. As a result of Defendants' misrepresentations and concealments, Plaintiff has
19 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
20 \$37,173 and which will be proved at trial. Additionally, Plaintiff incurred legal and
21 administrative costs in addressing and mitigating the harm caused by Defendants'
22 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
23 funds expended in creating a new program to take over servicing of the loans, expand the
24 Build to Minister program into various investment funds, and market those funds to third
25 parties, which it would not have expended but for Defendants' misrepresentations and
26 concealments.

27 ///

28 ///

1 *True Way Church of God in Christ, Inc. Loan*

2 Contract Terms

3 641. On February 28, 2008, Plaintiff Oak Stream entered into a Construction Note
4 Participation Agreement with Defendant BTM on a construction loan to True Way Church
5 of God in Christ, Inc. ("True Way Participation Agreement" or "Participation Agreement").
6 The True Way Participation Agreement provided that Plaintiff (designated "Participant")
7 would have a participation interest of 16 and 2/3% in the construction note amount of
8 \$267,100, which Defendant BTM (designated "Seller") would loan to the church, True Way
9 Church of God in Christ, Inc. ("True Way") (designated "Borrower"). Under the True Way
10 Participation Agreement, Plaintiff committed to fund a total of \$44,525.57, to be advanced
11 to Defendant BTM in response to periodic draw requests from Defendant according to a
12 projected draw schedule. In consideration for Plaintiff's advancing the funds, Plaintiff was
13 entitled to receive the return of the principal invested, as well as 10.5% interest on such
14 amount, and its pro rata portion (16 and 2/3%) of a Participation Fee (of \$4,006.50), with
15 interest and fees to be paid monthly, and the principal payable to Plaintiff at the issuance of
16 a Certificate of Occupancy for the Property or twelve (12) months from the date of Loan
17 Closing, whichever first occurs, as provided for in the Loan Agreement which was
18 specifically referenced by and incorporated into the Participation Agreement. The
19 Participation Agreement also provided that in the event Plaintiff had not received its return
20 of principal at the time specified, BTM was either to provide or to arrange additional
21 financing so that Plaintiff would receive all its funds.

22 642. Defendant BTM, for its part, agreed among other things, that:

- 23
- 24 • "In the event Seller [BTM] does not for any reason advance to Borrower
25 [church] the full amount of the contemplated advance [the draws of funds that
26 Defendants called for every month] on the date of receipt of such Purchase
27 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
28 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
to the amount of such contemplated advance not made." (Participation
Agreement, Schedule 4, ¶2.)
 - "[T]he Seller [BTM] shall service and administer the Loan in accordance with
the terms of the Loan Documents and with this Agreement. Seller [BTM]
shall provide loan servicing in accordance with commercially acceptable loan

1 servicing practices and with the same degree of care that is customarily
2 employed and exercised by Seller [BTM] in the administration and servicing
3 of loans of a similar nature held by it for its own account (the "Servicing
4 Standard")." (Participation Agreement, Schedule 4, ¶9.)

- 4 • "The Seller [BTM] shall maintain appropriate records and books of account
5 reflecting interest accrued and interest received, interest rate changes, principal
6 payments and all other transactions or actions affecting the Loan, which
7 records shall be kept in accordance with accounting principles consistently
8 and customarily applied by Seller [BTM]." (Participation Agreement,
9 Schedule 4, ¶9.)
- 7 • "Seller [BTM] further agrees that in performing its obligations hereunder,
8 Seller shall: (a) act in a custodial capacity on behalf of the Participant
9 [Plaintiff] with respect to its holding of any underlying instrument or collateral
10 and in holding any proceeds received for the Loan; (b) not commingle for any
11 significant period of time proceeds received on the Loan; (c) directly pass
12 through any proceeds received from the Loan to Participant [Plaintiff] as
13 provided in Section 4 of this Agreement, less any proceeds that represent
14 servicing or other compensation to Seller [BTM] or an interest in the Loan
15 retained by the Seller [BTM], all as more particularly provided for herein; and
16 (d) administer the Loan in accordance with the Servicing Standard as provided
17 herein." (Participation Agreement, Schedule 4, ¶ 9.)

13 643. The parties agreed that the Plaintiff would advance funds to BTM, as called
14 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
15 including BTMI LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM's
16 consent, and that BTM or its agents would thereupon transmit the funds to BTM's affiliate
17 Arks and/or Arks' wholly owned subsidiary Noah Construction, on behalf of the Borrower
18 (the Church), to service the loan and advance the funds towards the construction project,
19 according to the budget and plans approved and relied upon by the Plaintiff in entering into
20 the Participation Agreement. Upon information and belief, BTM had an agreement with
21 Arks whereby Arks took over the servicing and administration of the Loan to True Way.
22 The Participation Agreement specifically references and incorporates the Loan Agreement,
23 which is between Arks "and its affiliate BTM Funding, Inc." and the Borrower (the Church),
24 and which provides that "the Loan proceeds are to be used by Church solely for the
25 construction of a church, church-related improvements, and/or costs related thereto (the
26 "Project") upon the land described in the Security Instrument (the "Property") in accordance
27 with the plans and specifications approved by ARKS."

28 ///

- 1 • failing to maintain appropriate records and books of account reflecting interest
2 accrued and interest received, interest rate changes, principal payments and all other
3 transactions or actions affecting the Loan;
- 4 • not paying Plaintiff its return of principal at the earlier of the issuance of the
5 certificate of occupancy or within 12 months of the Loan Closing;
- 6 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
7 Closing and not providing or arranging additional financing to allow Plaintiff to
8 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
9 within 12 months of the Loan Closing;
- 10 • not paying Plaintiff its interest and fees on a monthly basis;
- 11 • failing to provide loan servicing and administration in accordance with the Loan
12 documents and with commercially acceptable loan servicing practices;
- 13 • requiring additional payments by Plaintiff beyond what was due under the
14 Participation Agreement and the approved budget and plans incorporated therein;
- 15 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
16 holding any proceeds received for the Loan;
- 17 • commingling for significant periods of time proceeds received on the Loan with other
18 funds.

19 Contract Damages

20 647. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
21 as yet unascertained, but which Plaintiff believes is at least \$17,415 and which will be
22 proved at trial.

23 648. Additionally, Plaintiff incurred legal and administrative costs in addressing
24 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
25 have incurred.

26 Fraud – Defendants' Misrepresentations

27 649. On the periodic draw requests sent to Plaintiff beginning in February 2008,
28 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff

1 had been spent on the True Way project, in accordance with the approved plans and budget,
2 as per the reports, forms, and spreadsheets submitted with the draw requests, and that the
3 reports, forms, and spreadsheets provided to Plaintiff accurately represented the value of the
4 project to that point.

5 650. Prior to Plaintiff's executing the Participation Agreement and making each
6 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
7 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
8 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
9 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
10 updates on projects, including the True Way project, and was told that all funds previously
11 advanced by Plaintiff to BTM and its agents on the True Way loan had been put towards the
12 project according to the budget and plans submitted to, approved by and relied on by
13 Plaintiff.

14 Fraud – True Facts

15 651. In fact, Defendants' representations to Plaintiff as described above were false.
16 The true facts were that:

- 17 • Plaintiff's funds had not been spent on the True Way project in accordance with the
18 approved plans and budget as per the reports, forms, and spreadsheets submitted with
19 the periodic draw requests sent to Plaintiff beginning in February 2008, and the
20 reports, forms, and spreadsheets submitted to Plaintiff did not accurately represent the
21 value of the project to that point;
- 22 • all funds previously advanced by Plaintiff to BTM and its agents on the True Way
23 loan had not been put towards the project according to the budget and plans submitted
24 to, approved by and relied on by Plaintiff;

25 Fraud - Concealment

26 652. Defendants David Smith and BTM, including through their agents, concealed
27 from and failed to disclose to Plaintiff the following:

28 ///

- 1 • the true financial and operational status of the loans and projects, including the True
2 Way project;
- 3 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
4 projects, including the True Way project, and were not being applied only to project-
5 related costs, according to the plans and budgets submitted to, approved by and relied
6 on by Plaintiff;
- 7 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
8 including payments made to unrelated third parties - friends of David Smith and
9 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
10 Lachman Lane Property;
- 11 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
12 and its investments in overseeing the management, servicing and administration of
13 the loans and projects;
- 14 • that Smith and BTM were commingling for significant periods of time proceeds
15 received on the Loan with other funds;
- 16 • that Smith and BTM did not intend to immediately advance the full amount of
17 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
18 or else return the funds to Plaintiff, and established money market accounts to hold
19 such funds longer than five business days;
- 20 • that Smith and BTM were not maintaining appropriate records and books of account
21 reflecting interest accrued and interest received, interest rate changes, principal
22 payments and all other transactions or actions affecting the Loan.

23 Fraud – Reliance, Discovery and Damage

24 653. Plaintiff continued to fund the True Way loan and project in response to
25 periodic draw requests from Defendants, based on continued assurances and representations
26 of Defendants Smith and BTM, including through their agents at Arks and Noah, that
27 Plaintiff's funds advanced thus far had gone towards the projects according to the plans and
28 budget reviewed, approved and relied upon by Plaintiff, and based on Defendants' failure to

1 disclose that Plaintiff's funds were being commingled with other funds and diverted to non-
2 project related costs and payments. In or about February 2009, Plaintiff began working on a
3 new program to take over the servicing and administration of the loans, expand the Build to
4 Minister church loan program into various investment funds, and market those funds to third
5 parties.

6 654. On or about July 31, 2009, during this effort to expand the loan program,
7 Plaintiff first learned of problems with the loans, including that Defendants and their agents
8 owed monies to third parties and were unable to pay them despite Plaintiff and other
9 investors having advanced funds as requested. Over the course of the next several months,
10 Plaintiff conducted an investigation in an attempt to determine what had happened to
11 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
12 misrepresentations, concealment and malfeasance. With respect to the problems discovered
13 with the loans, Plaintiff contributed additional monies in order to complete the projects,
14 including paying outstanding bills, liens, legal and administration fees, modifying the terms
15 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
16 new contractors to complete the construction.

17 655. But for Defendants' misrepresentations and concealment as described above,
18 Plaintiff would not have continued to provide funds in response to draw requests from
19 Defendants or their agents for the projects, including the True Way project, and would not
20 have invested efforts, time and money creating a new program to take over servicing of the
21 loans, expand the Build to Minister program into various investment funds, and market those
22 funds to third parties.

23 656. As a result of Defendants' misrepresentations and concealments, Plaintiff has
24 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
25 \$17,415 and which will be proved at trial. Additionally, Plaintiff incurred legal and
26 administrative costs in addressing and mitigating the harm caused by Defendants'
27 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
28 funds expended in creating a new program to take over servicing of the loans, expand the

1 Build to Minister program into various investment funds, and market those funds to third
2 parties, which it would not have expended but for Defendants' misrepresentations and
3 concealments.

4 *Delaware Valley Baptist Church Loan*

5 Contract Terms

6 657. On February 23, 2009, Plaintiff Oak Stream entered into a Construction Note
7 Participation Agreement with Defendant BTM on a construction loan to Delaware Valley
8 Baptist Church ("Delaware Valley Participation Agreement" or "Participation Agreement").
9 The Delaware Valley Participation Agreement provided that Plaintiff (designated
10 "Participant") would have a participation interest of 16 and 2/3% in the construction note
11 amount of \$1,323,129, which Defendant BTM (designated "Seller") would loan to the
12 church, Delaware Valley Baptist Church (designated "Borrower"). Under the Delaware
13 Valley Participation Agreement, Plaintiff committed to fund a total of \$220,565.60, to be
14 advanced to Defendant BTM in response to periodic draw requests from Defendant
15 according to a projected draw schedule. In consideration for Plaintiff's advancing the funds,
16 Plaintiff was entitled to receive the return of the principal invested, as well as 10.5% interest
17 on such amount, and its pro rata portion (16 and 2/3%) of a Participation Fee (of
18 \$19,846.93), with interest and fees to be paid monthly, and the principal payable to Plaintiff
19 at the issuance of a Certificate of Occupancy for the Property or twelve (12) months from
20 the date of Loan Closing, whichever first occurs, as provided for in the Loan Agreement
21 which was specifically referenced by and incorporated into the Participation Agreement.
22 The Participation Agreement also provided that in the event Plaintiff had not received its
23 return of principal at the time specified, BTM was either to provide or to arrange additional
24 financing so that Plaintiff would receive all its funds.

25 658. Defendant BTM, for its part, agreed among other things, that:

- 26 • "In the event Seller [BTM] does not for any reason advance to Borrower
27 [church] the full amount of the contemplated advance [the draws of funds that
28 Defendants called for every month] on the date of receipt of such Purchase
Payment, Seller [BTM] shall within five (5) Business Days thereafter return
the portion of such Purchase Payment to Participant [Plaintiff] as corresponds

1 to the amount of such contemplated advance not made.” (Participation
2 Agreement, Schedule 4, ¶2.)

- 3 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
4 the terms of the Loan Documents and with this Agreement. Seller [BTM]
5 shall provide loan servicing in accordance with commercially acceptable loan
6 servicing practices and with the same degree of care that is customarily
7 employed and exercised by Seller [BTM] in the administration and servicing
8 of loans of a similar nature held by it for its own account (the “Servicing
9 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 10 • “The Seller [BTM] shall maintain appropriate records and books of account
11 reflecting interest accrued and interest received, interest rate changes, principal
12 payments and all other transactions or actions affecting the Loan, which
13 records shall be kept in accordance with accounting principles consistently
14 and customarily applied by Seller [BTM].” (Participation Agreement,
15 Schedule 4, ¶9.)
- 16 • “Seller [BTM] further agrees that in performing its obligations hereunder,
17 Seller shall: (a) act in a custodial capacity on behalf of the Participant
18 [Plaintiff] with respect to its holding of any underlying instrument or collateral
19 and in holding any proceeds received for the Loan; (b) not commingle for any
20 significant period of time proceeds received on the Loan; (c) directly pass
21 through any proceeds received from the Loan to Participant [Plaintiff] as
22 provided in Section 4 of this Agreement, less any proceeds that represent
23 servicing or other compensation to Seller [BTM] or an interest in the Loan
24 retained by the Seller [BTM], all as more particularly provided for herein; and
25 (d) administer the Loan in accordance with the Servicing Standard as provided
26 herein.” (Participation Agreement, Schedule 4, ¶ 9.)

27 659. The parties agreed that the Plaintiff would advance funds to BTM, as called
28 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
(the Church), to service the loan and advance the funds towards the construction project,
according to the budget and plans approved and relied upon by the Plaintiff in entering into
the Participation Agreement. Upon information and belief, BTM had an agreement with
Arks whereby Arks took over the servicing and administration of the Loan to Delaware
Valley Baptist Church. The Participation Agreement specifically references and
incorporates the Loan Agreement, which is between Arks “and its affiliate BTM Funding,
Inc.” and the Borrower (the Church), and which provides that “the Loan proceeds are to be
used by Church solely for the construction of a church, church-related improvements, and/or

1 costs related thereto (the "Project") upon the land described in the Security Instrument (the
2 "Property") in accordance with the plans and specifications approved by ARKS."

3 660. Plaintiff agreed to advance the funds in response to periodic draws based on
4 the project plans and budget which were attached to the Participation Agreement and/or the
5 Loan Agreement that was incorporated into the Participation Agreement, and which had
6 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
7 committing to the Participation Agreement for the Delaware Valley Baptist Church Loan.
8 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
9 contractors, suppliers and other third parties as well as specific project-related servicing fees
10 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
11 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
12 approval from Plaintiff for any material change to the budget or plans.

13 Contract Performance and Breach

14 661. Upon execution of the Participation Agreement, Plaintiff began funding draw
15 requests for the Delaware Valley Baptist Church project based on draw requests by BTM
16 and its agents. Plaintiff Oak Stream advanced \$58,865 to BTM and its agents for the
17 Delaware Valley Baptist Church Loan between February 2009 and June 2009.

18 662. Defendant BTM breached the Participation Agreement by, among other things,
19 the following:

- 20 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
21 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
22 Ministries, Inc. (or to the servicers or contractors for authorized project
23 disbursements on the Borrower's behalf), and failing to return within five business
24 days to Plaintiff any funds not so advanced;
- 25 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
26 contractors, suppliers and other third parties as well as specific project-related
27 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
28 to and approved by Plaintiffs and incorporated into the Participation Agreement, and

- 1 failing to get prior approval from Plaintiff for any material change to the budget or
2 plans;
- 3 • failing to maintain appropriate records and books of account reflecting interest
4 accrued and interest received, interest rate changes, principal payments and all other
5 transactions or actions affecting the Loan;
 - 6 • not paying Plaintiff its interest and fees on a monthly basis;
 - 7 • failing to provide loan servicing and administration in accordance with the Loan
8 documents and with commercially acceptable loan servicing practices;
 - 9 • requiring additional payments by Plaintiff beyond what was due under the
10 Participation Agreement and the approved budget and plans incorporated therein;
 - 11 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
12 holding any proceeds received for the Loan;
 - 13 • commingling for significant periods of time proceeds received on the Loan with other
14 funds.

15 Contract Damages

16 663. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
17 as yet unascertained, but which Plaintiff believes is at least \$94,543 and which will be
18 proved at trial.

19 664. Additionally, Plaintiff incurred legal and administrative costs in addressing
20 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
21 have incurred.

22 Fraud – Defendants' Misrepresentations

23 665. On the periodic draw requests sent to Plaintiff beginning in February 2009,
24 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
25 had been spent on the Delaware Valley Baptist Church project, in accordance with the
26 approved plans and budget, as per the reports, forms, and spreadsheets submitted with the
27 draw requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
28 represented the value of the project to that point.

- 1 applied only to project-related costs, according to the plans and budgets submitted to,
2 approved by and relied on by Plaintiff;
- 3 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
4 including payments made to unrelated third parties - friends of David Smith and
5 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
6 Lachman Lane Property;
 - 7 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
8 and its investments in overseeing the management, servicing and administration of
9 the loans and projects;
 - 10 • that Smith and BTM were commingling for significant periods of time proceeds
11 received on the Loan with other funds;
 - 12 • that Smith and BTM did not intend to immediately advance the full amount of
13 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
14 or else return the funds to Plaintiff, and established money market accounts to hold
15 such funds longer than five business days;
 - 16 • that Smith and BTM were not maintaining appropriate records and books of account
17 reflecting interest accrued and interest received, interest rate changes, principal
18 payments and all other transactions or actions affecting the Loan.

19 Fraud – Reliance, Discovery and Damage

20 669. Plaintiff continued to fund the Delaware Valley Baptist Church loan and
21 project in response to periodic draw requests from Defendants, based on continued
22 assurances and representations of Defendants Smith and BTM, including through their
23 agents at Arks and Noah, that Plaintiff's funds advanced thus far had gone towards the
24 projects according to the plans and budget reviewed, approved and relied upon by Plaintiff,
25 and based on Defendants' failure to disclose that Plaintiff's funds were being commingled
26 with other funds and diverted to non-project related costs and payments. In or about
27 February 2009, Plaintiff began working on a new program to take over the servicing and

28 ///

1 administration of the loans, expand the Build to Minister church loan program into various
2 investment funds, and market those funds to third parties.

3 670. On or about July 31, 2009, during this effort to expand the loan program,
4 Plaintiff first learned of problems with the loans, including that Defendants and their agents
5 owed monies to third parties and were unable to pay them despite Plaintiff and other
6 investors having advanced funds as requested. Over the course of the next several months,
7 Plaintiff conducted an investigation in an attempt to determine what had happened to
8 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
9 misrepresentations, concealment and malfeasance. With respect to the problems discovered
10 with the loans, Plaintiff contributed additional monies in order to complete the projects,
11 including paying outstanding bills, liens, legal and administration fees, modifying the terms
12 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
13 new contractors to complete the construction.

14 671. But for Defendants' misrepresentations and concealment as described above,
15 Plaintiff would not have continued to provide funds in response to draw requests from
16 Defendants or their agents for the projects, including the Delaware Valley Baptist Church
17 project, and would not have invested efforts, time and money creating a new program to take
18 over servicing of the loans, expand the Build to Minister program into various investment
19 funds, and market those funds to third parties.

20 672. As a result of Defendants' misrepresentations and concealments, Plaintiff has
21 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
22 \$94,543 and which will be proved at trial. Additionally, Plaintiff incurred legal and
23 administrative costs in addressing and mitigating the harm caused by Defendants'
24 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
25 funds expended in creating a new program to take over servicing of the loans, expand the
26 Build to Minister program into various investment funds, and market those funds to third
27 parties, which it would not have expended but for Defendants' misrepresentations and
28 concealments.

1 Plaintiff JRM Interim Investors

2 *Victory City Church Loan*

3 Contract Terms

4 673. On May 27, 2009, Plaintiff JRM Interim Investors entered into a Construction
5 Note Participation Agreement with Defendant BTM on a construction loan to Victory City
6 Church ("Victory City Participation Agreement" or "Participation Agreement"). The
7 Victory City Participation Agreement provided that Plaintiff (designated "Participant")
8 would have a participation interest of 50% in the construction note amount of \$1,497,091,
9 which Defendant BTM (designated "Seller") would loan to the church, Victory City Church
10 (designated "Borrower"). Under the Victory City Participation Agreement, Plaintiff
11 committed to fund a total of \$748,545.50, to be advanced to Defendant BTM in response to
12 periodic draw requests from Defendant according to a projected draw schedule. In
13 consideration for Plaintiff's advancing the funds, Plaintiff was entitled to receive the return
14 of the principal invested, as well as 10.5% interest on such amount, and its pro rata portion
15 (50%) of a Participation Fee (of \$22,456.36), with interest and fees to be paid monthly, and
16 the principal payable to Plaintiff at the issuance of a Certificate of Occupancy for the
17 Property or twelve (12) months from the date of Loan Closing, whichever first occurs, as
18 provided for in the Loan Agreement which was specifically referenced by and incorporated
19 into the Participation Agreement. The Participation Agreement also provided that in the
20 event Plaintiff had not received its return of principal at the time specified, BTM was either
21 to provide or to arrange additional financing so that Plaintiff would receive all its funds.

22 674. Defendant BTM, for its part, agreed among other things, that:

- 23
- 24 • "In the event Seller [BTM] does not for any reason advance to Borrower
25 [church] the full amount of the contemplated advance [the draws of funds that
26 Defendants called for every month] on the date of receipt of such Purchase
27 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
28 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
to the amount of such contemplated advance not made." (Participation
Agreement, Schedule 4, ¶2.)
 - "[T]he Seller [BTM] shall service and administer the Loan in accordance with
the terms of the Loan Documents and with this Agreement. Seller [BTM]
shall provide loan servicing in accordance with commercially acceptable loan

1 servicing practices and with the same degree of care that is customarily
2 employed and exercised by Seller [BTM] in the administration and servicing
3 of loans of a similar nature held by it for its own account (the "Servicing
4 Standard")." (Participation Agreement, Schedule 4, ¶9.)

- 4 • "The Seller [BTM] shall maintain appropriate records and books of account
5 reflecting interest accrued and interest received, interest rate changes, principal
6 payments and all other transactions or actions affecting the Loan, which
7 records shall be kept in accordance with accounting principles consistently
8 and customarily applied by Seller [BTM]." (Participation Agreement,
9 Schedule 4, ¶9.)
- 7 • "Seller [BTM] further agrees that in performing its obligations hereunder,
8 Seller shall: (a) act in a custodial capacity on behalf of the Participant
9 [Plaintiff] with respect to its holding of any underlying instrument or collateral
10 and in holding any proceeds received for the Loan; (b) not commingle for any
11 significant period of time proceeds received on the Loan; (c) directly pass
12 through any proceeds received from the Loan to Participant [Plaintiff] as
13 provided in Section 4 of this Agreement, less any proceeds that represent
14 servicing or other compensation to Seller [BTM] or an interest in the Loan
15 retained by the Seller [BTM], all as more particularly provided for herein; and
16 (d) administer the Loan in accordance with the Servicing Standard as provided
17 herein." (Participation Agreement, Schedule 4, ¶ 9.)
- 13 • "Seller represents and warrants to Participant that, as of the date hereof ... no
14 default in the payment of principal or interest on the Loan has occurred and
15 remains uncured under the Loan Documents." (Participation Agreement,
16 Schedule 4, ¶ 15.)
- 16 • "[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
17 may take or omit to take any action under any of the Loan Documents which
18 would result in the following (each a "Material Change"): (a) reduce or
19 increase the amounts of principal or interest payments of the Loan, (b) reduce
20 or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
21 postpone any due date for payment of principal or interest in which Participant
22 [Plaintiff] shares, including, without limitation, the final maturity date of the
23 Loan, (d) except as expressly permitted under the Loan Documents, release or
24 subordinate any existing collateral described in the Loan Documents, (e)
25 release the liability of Borrower or any guarantor for the Loan, (f) consent to
26 the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
27 (ii) any direct or indirect interest in Borrower ... (g) make or consent to any
28 change in the principal amount of the Note; or (h) waive a default under the
Loan Documents arising from the failure to make payments as and when due
on the Loan. . . ." ((Participation Agreement, Schedule 4, ¶ 11.)
- "Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
of any material default with respect to the Loan of which Seller [BTM] is
actually aware and of any other matters which, in Seller's judgment, materially
affect the interest of Participant [Plaintiff] with respect to the Loan
(collectively, a "Material Default")." (Participation Agreement, Schedule 4, ¶
11.)

27 ///

28 ///

1 Plaintiff JRM Interim Investors advanced \$80,549 to BTM and its agents for the Victory
2 City Church Loan in May 2009.

3 678. Defendant BTM breached the Participation Agreement by, among other things,
4 the following:

- 5 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
6 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
7 Ministries, Inc. (or to the servicers or contractors for authorized project
8 disbursements on the Borrower's behalf), and failing to return within five business
9 days to Plaintiff any funds not so advanced;
- 10 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
11 contractors, suppliers and other third parties as well as specific project-related
12 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
13 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
14 failing to get prior approval from Plaintiff for any material change to the budget or
15 plans;
- 16 • failing to maintain appropriate records and books of account reflecting interest
17 accrued and interest received, interest rate changes, principal payments and all other
18 transactions or actions affecting the Loan;
- 19 • not paying Plaintiff its return of principal at the earlier of the issuance of the
20 certificate of occupancy or within 12 months of the Loan Closing;
- 21 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
22 Closing and not providing or arranging additional financing to allow Plaintiff to
23 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
24 within 12 months of the Loan Closing;
- 25 • not paying Plaintiff its interest and fees on a monthly basis;
- 26 • failing to provide loan servicing and administration in accordance with the Loan
27 documents and with commercially acceptable loan servicing practices;

28 ///

- 1 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
2 holding any proceeds received for the Loan;
- 3 • commingling for significant periods of time proceeds received on the Loan with other
4 funds;
- 5 • failing to inform Plaintiff that as of the date of the Participation Agreement a default
6 in the payment of principal or interest on the Loan had occurred and remained
7 uncured;
- 8 • waiving a default under the Loan Documents arising from the failure to make
9 payments as and when due on the Loan without obtaining the consent of Plaintiff;
- 10 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
11 which Defendant was aware;
- 12 • failing to require Borrower to pay the equity down payment as required by the Loan
13 Documents;
- 14 • failing to pay Plaintiff its pro rata part of any and all principal and interest payments
15 made by the Borrower (church) to BTM under the Loan.

16 Contract Damages

17 679. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
18 as yet unascertained, but which Plaintiff believes is at least \$91,939 and which will be
19 proved at trial.

20 680. Additionally, Plaintiff incurred legal and administrative costs in addressing
21 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
22 have incurred.

23 Fraud – Defendants' Misrepresentations

24 681. On the periodic draw requests sent to Plaintiff beginning in May 2009, Smith's
25 and BTM's agents signed attestations that the monies advanced thus far by Plaintiff had
26 been spent on the Victory City Church project, in accordance with the approved plans and
27 budget, as per the reports, forms, and spreadsheets submitted with the draw requests, and

28 ///

1 that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
2 value of the project to that point.

3 682. Prior to Plaintiff's executing the Participation Agreement and making each
4 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
5 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
6 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
7 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
8 updates on projects, including the Victory City Church project, and was told that all funds
9 previously advanced by Plaintiff to BTM and its agents on the Victory City Church loan had
10 been put towards the project according to the budget and plans submitted to, approved by
11 and relied on by Plaintiff.

12 Fraud – True Facts

13 683. In fact, Defendants' representations to Plaintiff as described above were false.
14 The true facts were that:

- 15 • Plaintiff's funds had not been spent on the Victory City Church project in accordance
16 with the approved plans and budget as per the reports, forms, and spreadsheets
17 submitted with the periodic draw requests sent to Plaintiff beginning in May 2009,
18 and the reports, forms, and spreadsheets submitted to Plaintiff did not accurately
19 represent the value of the project to that point;
- 20 • all funds previously advanced by Plaintiff to BTM and its agents on the Victory City
21 Church loan had not been put towards the project according to the budget and plans
22 submitted to, approved by and relied on by Plaintiff;

23 Fraud - Concealment

24 684. Defendants David Smith and BTM, including through their agents, concealed
25 from and failed to disclose to Plaintiff the following:

- 26 • the true financial and operational status of the loans and projects, including the
27 Victory City Church project;

28 ///

- 1 • that estimates for work on the project received prior to closing were substantially
2 higher than the amounts allocated for such work in the budgets submitted to,
3 approved by and relied on by Plaintiff;
- 4 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
5 projects, including the Victory City Church project, and were not being applied only
6 to project-related costs, according to the plans and budgets submitted to, approved by
7 and relied on by Plaintiff;
- 8 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
9 including payments made to unrelated third parties - friends of David Smith and
10 David Smith's wife, Carmen Cople Smith, and payments of the mortgage on the
11 Lachman Lane Property;
- 12 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
13 and its investments in overseeing the management, servicing and administration of
14 the loans and projects;
- 15 • that Smith and BTM were commingling for significant periods of time proceeds
16 received on the Loan with other funds;
- 17 • that Smith and BTM did not intend to immediately advance the full amount of
18 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
19 or else return the funds to Plaintiff, and established money market accounts to hold
20 such funds longer than five business days;
- 21 • that Smith and BTM were not maintaining appropriate records and books of account
22 reflecting interest accrued and interest received, interest rate changes, principal
23 payments and all other transactions or actions affecting the Loan;
- 24 • postponing due dates for payment of principal or interest in which Plaintiff shared
25 without obtaining the consent of Plaintiff;

26 Fraud – Reliance, Discovery and Damage

27 685. Plaintiff continued to fund the Victory City Church loan and project in
28 response to periodic draw requests from Defendants, based on continued assurances and

1 representations of Defendants Smith and BTM, including through their agents at Arks and
2 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
3 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
4 failure to disclose that Plaintiff's funds were being commingled with other funds and
5 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
6 began working on a new program to take over the servicing and administration of the loans,
7 expand the Build to Minister church loan program into various investment funds, and market
8 those funds to third parties.

9 686. On or about July 31, 2009, during this effort to expand the loan program,
10 Plaintiff first learned of problems with the loans, including that Defendants and their agents
11 owed monies to third parties and were unable to pay them despite Plaintiff and other
12 investors having advanced funds as requested. Over the course of the next several months,
13 Plaintiff conducted an investigation in an attempt to determine what had happened to
14 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
15 misrepresentations, concealment and malfeasance. With respect to the problems discovered
16 with the loans, Plaintiff contributed additional monies in order to complete the projects,
17 including paying outstanding bills, liens, legal and administration fees, modifying the terms
18 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
19 new contractors to complete the construction.

20 687. But for Defendants' misrepresentations and concealment as described above,
21 Plaintiff would not have continued to provide funds in response to draw requests from
22 Defendants or their agents for the projects, including the Victory City Church project, and
23 would not have invested efforts, time and money creating a new program to take over
24 servicing of the loans, expand the Build to Minister program into various investment funds,
25 and market those funds to third parties.

26 688. As a result of Defendants' misrepresentations and concealments, Plaintiff has
27 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
28 \$91,939 and which will be proved at trial. Additionally, Plaintiff incurred legal and

1 administrative costs in addressing and mitigating the harm caused by Defendants'
2 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
3 funds expended in creating a new program to take over servicing of the loans, expand the
4 Build to Minister program into various investment funds, and market those funds to third
5 parties, which it would not have expended but for Defendants' misrepresentations and
6 concealments.

7 *Delaware Valley Baptist Church Loan*

8 Contract Terms

9 689. On February 27, 2009, Plaintiff JRM Interim Investors entered into a
10 Construction Note Participation Agreement with Defendant BTM on a construction loan to
11 Delaware Valley Baptist Church ("Delaware Valley Participation Agreement" or
12 "Participation Agreement"). The Delaware Valley Participation Agreement provided that
13 Plaintiff (designated "Participant") would have a participation interest of 33 and 1/3% in the
14 construction note amount of \$1,323,129, which Defendant BTM (designated "Seller") would
15 loan to the church, Delaware Valley Baptist Church (designated "Borrower"). Under the
16 Delaware Valley Participation Agreement, Plaintiff committed to fund a total of
17 \$440,998.90, to be advanced to Defendant BTM in response to periodic draw requests from
18 Defendant according to a projected draw schedule. In consideration for Plaintiff's
19 advancing the funds, Plaintiff was entitled to receive the return of the principal invested, as
20 well as 10.5% interest on such amount, and its pro rata portion (33 and 1/3%) of a
21 Participation Fee (of \$19,846.93), with interest and fees to be paid monthly, and the
22 principal payable to Plaintiff at the issuance of a Certificate of Occupancy for the Property
23 or twelve (12) months from the date of Loan Closing, whichever first occurs, as provided for
24 in the Loan Agreement which was specifically referenced by and incorporated into the
25 Participation Agreement. The Participation Agreement also provided that in the event
26 Plaintiff had not received its return of principal at the time specified, BTM was either to
27 provide or to arrange additional financing so that Plaintiff would receive all its funds.

28 690. Defendant BTM, for its part, agreed among other things, that:

- 1 • “In the event Seller [BTM] does not for any reason advance to Borrower
2 [church] the full amount of the contemplated advance [the draws of funds that
3 Defendants called for every month] on the date of receipt of such Purchase
4 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
5 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
6 to the amount of such contemplated advance not made.” (Participation
7 Agreement, Schedule 4, ¶2.)
- 8 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
9 the terms of the Loan Documents and with this Agreement. Seller [BTM]
10 shall provide loan servicing in accordance with commercially acceptable loan
11 servicing practices and with the same degree of care that is customarily
12 employed and exercised by Seller [BTM] in the administration and servicing
13 of loans of a similar nature held by it for its own account (the “Servicing
14 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 15 • “The Seller [BTM] shall maintain appropriate records and books of account
16 reflecting interest accrued and interest received, interest rate changes, principal
17 payments and all other transactions or actions affecting the Loan, which
18 records shall be kept in accordance with accounting principles consistently
19 and customarily applied by Seller [BTM].” (Participation Agreement,
20 Schedule 4, ¶9.)
- 21 • “Seller [BTM] further agrees that in performing its obligations hereunder,
22 Seller shall: (a) act in a custodial capacity on behalf of the Participant
23 [Plaintiff] with respect to its holding of any underlying instrument or collateral
24 and in holding any proceeds received for the Loan; (b) not commingle for any
25 significant period of time proceeds received on the Loan; (c) directly pass
26 through any proceeds received from the Loan to Participant [Plaintiff] as
27 provided in Section 4 of this Agreement, less any proceeds that represent
28 servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)

691. The parties agreed that the Plaintiff would advance funds to BTM, as called for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents, including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower (the Church), to service the loan and advance the funds towards the construction project, according to the budget and plans approved and relied upon by the Plaintiff in entering into the Participation Agreement. Upon information and belief, BTM had an agreement with Arks whereby Arks took over the servicing and administration of the Loan to Delaware

///

///

1 Valley Baptist Church. The Participation Agreement specifically references and
2 incorporates the Loan Agreement, which is between Arks “and its affiliate BTM Funding,
3 Inc.” and the Borrower (the Church), and which provides that “the Loan proceeds are to be
4 used by Church solely for the construction of a church, church-related improvements, and/or
5 costs related thereto (the “Project”) upon the land described in the Security Instrument (the
6 “Property”) in accordance with the plans and specifications approved by ARKS.”

7 692. Plaintiff agreed to advance the funds in response to periodic draws based on
8 the project plans and budget which were attached to the Participation Agreement and/or the
9 Loan Agreement that was incorporated into the Participation Agreement, and which had
10 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
11 committing to the Participation Agreement for the Delaware Valley Baptist Church Loan.
12 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
13 contractors, suppliers and other third parties as well as specific project-related servicing fees
14 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
15 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
16 approval from Plaintiff for any material change to the budget or plans.

17 Contract Performance and Breach

18 693. Upon execution of the Participation Agreement, Plaintiff began funding draw
19 requests for the Delaware Valley Baptist Church project based on draw requests by BTM
20 and its agents. Plaintiff JRM Interim Investors advanced \$117,730 to BTM and its agents
21 for the Delaware Valley Baptist Church Loan between February 2009 and June 2009.

22 694. Defendant BTM breached the Participation Agreement by, among other things,
23 the following:

- 24 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
25 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
26 Ministries, Inc. (or to the servicers or contractors for authorized project
27 disbursements on the Borrower’s behalf), and failing to return within five business
28 days to Plaintiff any funds not so advanced;

- 1 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
2 contractors, suppliers and other third parties as well as specific project-related
3 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
4 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
5 failing to get prior approval from Plaintiff for any material change to the budget or
6 plans;
- 7 • failing to maintain appropriate records and books of account reflecting interest
8 accrued and interest received, interest rate changes, principal payments and all other
9 transactions or actions affecting the Loan;
- 10 • not paying Plaintiff its interest and fees on a monthly basis;
- 11 • failing to provide loan servicing and administration in accordance with the Loan
12 documents and with commercially acceptable loan servicing practices;
- 13 • requiring additional payments by Plaintiff beyond what was due under the
14 Participation Agreement and the approved budget and plans incorporated therein;
- 15 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
16 holding any proceeds received for the Loan;
- 17 • commingling for significant periods of time proceeds received on the Loan with other
18 funds.

19 Contract Damages

20 695. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
21 as yet unascertained, but which Plaintiff believes is at least \$189,085 and which will be
22 proved at trial.

23 696. Additionally, Plaintiff incurred legal and administrative costs in addressing
24 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
25 have incurred.

26 Fraud – Defendants' Misrepresentations

27 697. On the periodic draw requests sent to Plaintiff beginning in February 2009,
28 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff

1 had been spent on the Delaware Valley Baptist Church project, in accordance with the
2 approved plans and budget, as per the reports, forms, and spreadsheets submitted with the
3 draw requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
4 represented the value of the project to that point.

5 698. Prior to Plaintiff's executing the Participation Agreement and making each
6 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
7 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
8 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
9 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
10 updates on projects, including the Delaware Valley Baptist Church project, and was told that
11 all funds previously advanced by Plaintiff to BTM and its agents on the Delaware Valley
12 Baptist Church loan had been put towards the project according to the budget and plans
13 submitted to, approved by and relied on by Plaintiff.

14 Fraud – True Facts

15 699. In fact, Defendants' representations to Plaintiff as described above were false.
16 The true facts were that:

- 17 • Plaintiff's funds had not been spent on the Delaware Valley Baptist Church project in
18 accordance with the approved plans and budget as per the reports, forms, and
19 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
20 February 2009, and the reports, forms, and spreadsheets submitted to Plaintiff did not
21 accurately represent the value of the project to that point;
- 22 • all funds previously advanced by Plaintiff to BTM and its agents on the Delaware
23 Valley Baptist Church loan had not been put towards the project according to the
24 budget and plans submitted to, approved by and relied on by Plaintiff;

25 Fraud - Concealment

26 700. Defendants David Smith and BTM, including through their agents, concealed
27 from and failed to disclose to Plaintiff the following:

28 ///

- 1 • the true financial and operational status of the loans and projects, including the
2 Delaware Valley Baptist Church project;
- 3 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
4 projects, including the Delaware Valley Baptist Church project, and were not being
5 applied only to project-related costs, according to the plans and budgets submitted to,
6 approved by and relied on by Plaintiff;
- 7 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
8 including payments made to unrelated third parties - friends of David Smith and
9 David Smith's wife, Carmen Cople Smith, and payments of the mortgage on the
10 Lachman Lane Property;
- 11 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
12 and its investments in overseeing the management, servicing and administration of
13 the loans and projects;
- 14 • that Smith and BTM were commingling for significant periods of time proceeds
15 received on the Loan with other funds;
- 16 • that Smith and BTM did not intend to immediately advance the full amount of
17 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
18 or else return the funds to Plaintiff, and established money market accounts to hold
19 such funds longer than five business days;
- 20 • that Smith and BTM were not maintaining appropriate records and books of account
21 reflecting interest accrued and interest received, interest rate changes, principal
22 payments and all other transactions or actions affecting the Loan.

23 Fraud – Reliance, Discovery and Damage

24 701. Plaintiff continued to fund the Delaware Valley Baptist Church loan and
25 project in response to periodic draw requests from Defendants, based on continued
26 assurances and representations of Defendants Smith and BTM, including through their
27 agents at Arks and Noah, that Plaintiff's funds advanced thus far had gone towards the
28 projects according to the plans and budget reviewed, approved and relied upon by Plaintiff,

1 and based on Defendants' failure to disclose that Plaintiff's funds were being commingled
2 with other funds and diverted to non-project related costs and payments. In or about
3 February 2009, Plaintiff began working on a new program to take over the servicing and
4 administration of the loans, expand the Build to Minister church loan program into various
5 investment funds, and market those funds to third parties.

6 702. On or about July 31, 2009, during this effort to expand the loan program,
7 Plaintiff first learned of problems with the loans, including that Defendants and their agents
8 owed monies to third parties and were unable to pay them despite Plaintiff and other
9 investors having advanced funds as requested. Over the course of the next several months,
10 Plaintiff conducted an investigation in an attempt to determine what had happened to
11 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
12 misrepresentations, concealment and malfeasance. With respect to the problems discovered
13 with the loans, Plaintiff contributed additional monies in order to complete the projects,
14 including paying outstanding bills, liens, legal and administration fees, modifying the terms
15 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
16 new contractors to complete the construction.

17 703. But for Defendants' misrepresentations and concealment as described above,
18 Plaintiff would not have continued to provide funds in response to draw requests from
19 Defendants or their agents for the projects, including the Delaware Valley Baptist Church
20 project, and would not have invested efforts, time and money creating a new program to take
21 over servicing of the loans, expand the Build to Minister program into various investment
22 funds, and market those funds to third parties.

23 704. As a result of Defendants' misrepresentations and concealments, Plaintiff has
24 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
25 \$189,085 and which will be proved at trial. Additionally, Plaintiff incurred legal and
26 administrative costs in addressing and mitigating the harm caused by Defendants'
27 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
28 funds expended in creating a new program to take over servicing of the loans, expand the

1 Build to Minister program into various investment funds, and market those funds to third
2 parties, which it would not have expended but for Defendants' misrepresentations and
3 concealments.

4 **Plaintiff Holbrook**

5 ***Truth Tabernacle Ministries, Inc. Loan***

6 **Contract Terms**

7 705. On April 29, 2008, Plaintiff Holbrook entered into a Construction Note
8 Participation Agreement with Defendant BTM on a construction loan to Truth Tabernacle
9 Ministries, Inc. ("TTM Participation Agreement" or "Participation Agreement"). The TTM
10 Participation Agreement provided that Plaintiff (designated "Participant") would have a
11 participation interest of 50% in the construction note amount of \$2,210,736, which
12 Defendant BTM (designated "Seller") would loan to the church, Truth Tabernacle
13 Ministries, Inc., (designated "Borrower"). The Participation Agreement was amended on
14 June 3, 2009 so that Holbrook had a 34.9213%. Under the TTM Participation Agreement
15 as amended, Plaintiff committed to fund a total of \$772,017.75, to be advanced to Defendant
16 BTM in response to periodic draw requests from Defendant according to a projected draw
17 schedule. In consideration for Plaintiff's advancing the funds, Plaintiff was entitled to
18 receive the return of the principal invested, as well as 10.5% interest on such amount, and its
19 pro rata portion (34.9213%) of a Participation Fee (of \$33,161.04), with interest and fees to
20 be paid monthly, and the principal payable to Plaintiff at the issuance of a Certificate of
21 Occupancy for the Property or twelve (12) months from the date of Loan Closing, whichever
22 first occurs, as provided for in the Loan Agreement which was specifically referenced by
23 and incorporated into the Participation Agreement. The Participation Agreement also
24 provided that in the event Plaintiff had not received its return of principal at the time
25 specified, BTM was either to provide or to arrange additional financing so that Plaintiff
26 would receive all its funds.

27 706. Defendant BTM, for its part, agreed among other things, that:

28 ///

- 1 • “In the event Seller [BTM] does not for any reason advance to Borrower
2 [church] the full amount of the contemplated advance [the draws of funds that
3 Defendants called for every month] on the date of receipt of such Purchase
4 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
5 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
6 to the amount of such contemplated advance not made.” (Participation
7 Agreement, Schedule 4, ¶2.)
- 8 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
9 the terms of the Loan Documents and with this Agreement. Seller [BTM]
10 shall provide loan servicing in accordance with commercially acceptable loan
11 servicing practices and with the same degree of care that is customarily
12 employed and exercised by Seller [BTM] in the administration and servicing
13 of loans of a similar nature held by it for its own account (the “Servicing
14 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 15 • “The Seller [BTM] shall maintain appropriate records and books of account
16 reflecting interest accrued and interest received, interest rate changes, principal
17 payments and all other transactions or actions affecting the Loan, which
18 records shall be kept in accordance with accounting principles consistently
19 and customarily applied by Seller [BTM].” (Participation Agreement,
20 Schedule 4, ¶9.)
- 21 • “Seller [BTM] further agrees that in performing its obligations hereunder,
22 Seller shall: (a) act in a custodial capacity on behalf of the Participant
23 [Plaintiff] with respect to its holding of any underlying instrument or collateral
24 and in holding any proceeds received for the Loan; (b) not commingle for any
25 significant period of time proceeds received on the Loan; (c) directly pass
26 through any proceeds received from the Loan to Participant [Plaintiff] as
27 provided in Section 4 of this Agreement, less any proceeds that represent
28 servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)
- “Seller [BTM] represents and warrants to Participant [Plaintiff] that, as of the
date hereof ... no default in the payment of principal or interest on the Loan
has occurred and remains uncured under the Loan Documents.” (Participation
Agreement, Schedule 4, ¶ 15.)
- “[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
may take or omit to take any action under any of the Loan Documents which
would result in the following (each a “Material Change”): (a) reduce or
increase the amounts of principal or interest payments of the Loan, (b) reduce
or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
postpone any due date for payment of principal or interest in which Participant
[Plaintiff] shares, including, without limitation, the final maturity date of the
Loan, (d) except as expressly permitted under the Loan Documents, release or
subordinate any existing collateral described in the Loan Documents, (e)
release the liability of Borrower or any guarantor for the Loan, (f) consent to
the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
(ii) any direct or indirect interest in Borrower ... (g) make or consent to any
change in the principal amount of the Note; or (h) waive a default under the
Loan Documents arising from the failure to make payments as and when due
on the Loan. . . .” (Participation Agreement, Schedule 4, ¶ 11.)

- “Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff] of any material default with respect to the Loan of which Seller [BTM] is actually aware and of any other matters which, in Seller’s judgment, materially affect the interest of Participant [Plaintiff] with respect to the Loan (collectively, a “Material Default”).” (Participation Agreement, Schedule 4, ¶ 11.)

707. The parties agreed that the Plaintiff would advance funds to BTM, as called for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents, including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower (the Church), to service the loan and advance the funds towards the construction project, according to the budget and plans approved and relied upon by the Plaintiff in entering into the Participation Agreement. Upon information and belief, BTM had an agreement with Arks whereby Arks took over the servicing and administration of the Loan to Truth Tabernacle Ministries, Inc. The Participation Agreement specifically references and incorporates the Loan Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower (the Church), and which provides that “the Loan proceeds are to be used by Church solely for the construction of a church, church-related improvements, and/or costs related thereto (the “Project”) upon the land described in the Security Instrument (the “Property”) in accordance with the plans and specifications approved by ARKS.” *See* Build to Minister Loan Agreement (Truth Tabernacle Ministries, Inc.), dated May 15, 2008.

708. Plaintiff agreed to advance the funds in response to periodic draws based on the project plans and budget which were attached to the Participation Agreement and/or the Loan Agreement that was incorporated into the Participation Agreement, and which had been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in committing to the Participation Agreement for the Truth Tabernacle Ministries, Inc. Loan. Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors, suppliers and other third parties as well as specific project-related servicing fees to itself, Arks and Noah, according to the budget and plans submitted to and approved by

///

1 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
2 approval from Plaintiff for any material change to the budget or plans.

3 Contract Performance and Breach

4 709. Upon execution of the Participation Agreement, Plaintiff began funding draw
5 requests for the Truth Tabernacle Ministries, Inc. project based on draw requests by BTM
6 and its agents. Plaintiff Holbrook advanced \$772,017 to BTM and its agents for the Truth
7 Tabernacle Ministries, Inc. Loan between April 2008 and December 2008.

8 710. Defendant BTM breached the Participation Agreement by, among other things,
9 the following:

- 10 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
11 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
12 Ministries, Inc. (or to the servicers or contractors for authorized project
13 disbursements on the Borrower's behalf), and failing to return within five business
14 days to Plaintiff any funds not so advanced;
- 15 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
16 contractors, suppliers and other third parties as well as specific project-related
17 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
18 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
19 failing to get prior approval from Plaintiff for any material change to the budget or
20 plans;
- 21 • failing to maintain appropriate records and books of account reflecting interest
22 accrued and interest received, interest rate changes, principal payments and all other
23 transactions or actions affecting the Loan;
- 24 • not paying Plaintiff its return of principal at the earlier of the issuance of the
25 certificate of occupancy or within 12 months of the Loan Closing;
- 26 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
27 Closing and not providing or arranging additional financing to allow Plaintiff to

28 ///

- 1 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
2 within 12 months of the Loan Closing;
- 3 • not paying Plaintiff its interest and fees on a monthly basis;
 - 4 • failing to provide loan servicing and administration in accordance with the Loan
5 documents and with commercially acceptable loan servicing practices;
 - 6 • requiring additional payments by Plaintiff beyond what was due under the
7 Participation Agreement and the approved budget and plans incorporated therein;
 - 8 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
9 holding any proceeds received for the Loan;
 - 10 • commingling for significant periods of time proceeds received on the Loan with other
11 funds;
 - 12 • failing to inform Plaintiff that as of the date of the Participation Agreement a default
13 in the payment of principal or interest on the Loan had occurred and remained
14 uncured;
 - 15 • waiving a default under the Loan Documents arising from the failure to make
16 payments as and when due on the Loan without obtaining the consent of Plaintiff;
 - 17 • postponing due dates for payment of principal or interest in which Plaintiff shared
18 without obtaining the consent of Plaintiff;
 - 19 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
20 which Defendant was aware.

21 Contract Damages

22 711. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
23 as yet unascertained, but which Plaintiff believes is at least \$390,171 and which will be
24 proved at trial.

25 712. Additionally, Plaintiff incurred legal and administrative costs in addressing
26 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
27 have incurred.

28 ///

1 Fraud – Defendants’ Misrepresentations

2 713. On the periodic draw requests sent to Plaintiff beginning in April 2008,
3 Smith’s and BTM’s agents signed attestations that the monies advanced thus far by Plaintiff
4 had been spent on the Truth Tabernacle project, in accordance with the approved plans and
5 budget, as per the reports, forms, and spreadsheets submitted with the draw requests, and
6 that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
7 value of the project to that point.

8 714. Prior to Plaintiff’s executing the Participation Agreement and making each
9 subsequent advance, Plaintiff’s agent Darren Maloney called periodically (approximately
10 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
11 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
12 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
13 updates on projects, including the Truth Tabernacle Ministries, Inc. project, and was told
14 that all funds previously advanced by Plaintiff to BTM and its agents on the Truth
15 Tabernacle loan had been put towards the project according to the budget and plans
16 submitted to, approved by and relied on by Plaintiff.

17 Fraud – True Facts

18 715. In fact, Defendants’ representations to Plaintiff as described above were false.
19 The true facts were that:

- 20 • Plaintiff’s funds had not been spent on the Truth Tabernacle project in accordance
21 with the approved plans and budget as per the reports, forms, and spreadsheets
22 submitted with the periodic draw requests sent to Plaintiff beginning in April 2008,
23 and the reports, forms, and spreadsheets submitted to Plaintiff did not accurately
24 represent the value of the project to that point;
- 25 • all funds previously advanced by Plaintiff to BTM and its agents on the Truth
26 Tabernacle loan had not been put towards the project according to the budget and
27 plans submitted to, approved by and relied on by Plaintiff;

28 ///

Fraud - Concealment

1
2 716. Defendants David Smith and BTM, including through their agents, concealed
3 from and failed to disclose to Plaintiff the following:

- 4 • the true financial and operational status of the loans and projects, including the Truth
5 Tabernacle project;
- 6 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
7 projects, including the Truth Tabernacle project, and were not being applied only to
8 project-related costs, according to the plans and budgets submitted to, approved by
9 and relied on by Plaintiff;
- 10 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
11 including payments made to unrelated third parties - friends of David Smith and
12 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
13 Lachman Lane Property;
- 14 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
15 to Randy Barton and for "sales commissions" to Carmen Copple Smith;
- 16 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
17 and its investments in overseeing the management, servicing and administration of
18 the loans and projects;
- 19 • that Smith and BTM were commingling for significant periods of time proceeds
20 received on the Loan with other funds;
- 21 • that Smith and BTM did not intend to immediately advance the full amount of
22 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
23 or else return the funds to Plaintiff, and established money market accounts to hold
24 such funds longer than five business days;
- 25 • that Smith and BTM were not maintaining appropriate records and books of account
26 reflecting interest accrued and interest received, interest rate changes, principal
27 payments and all other transactions or actions affecting the Loan.

28 ///

Fraud – Reliance, Discovery and Damage

1
2 717. Plaintiff continued to fund the Truth Tabernacle loan and project in response
3 to periodic draw requests from Defendants, based on continued assurances and
4 representations of Defendants Smith and BTM, including through their agents at Arks and
5 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
6 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
7 failure to disclose that Plaintiff's funds were being commingled with other funds and
8 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
9 began working on a new program to take over the servicing and administration of the loans,
10 expand the Build to Minister church loan program into various investment funds, and market
11 those funds to third parties.

12 718. On or about July 31, 2009, during this effort to expand the loan program,
13 Plaintiff first learned of problems with the loans, including that Defendants and their agents
14 owed monies to third parties and were unable to pay them despite Plaintiff and other
15 investors having advanced funds as requested. Over the course of the next several months,
16 Plaintiff conducted an investigation in an attempt to determine what had happened to
17 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
18 misrepresentations, concealment and malfeasance. With respect to the problems discovered
19 with the loans, Plaintiff contributed additional monies in order to complete the projects,
20 including paying outstanding bills, liens, legal and administration fees, modifying the terms
21 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
22 new contractors to complete the construction.

23 719. But for Defendants' misrepresentations and concealment as described above,
24 Plaintiff would not have continued to provide funds in response to draw requests from
25 Defendants or their agents for the projects, including the Truth Tabernacle project, and
26 would not have invested efforts, time and money creating a new program to take over
27 servicing of the loans, expand the Build to Minister program into various investment funds,
28 and market those funds to third parties.

1 Plaintiff had not received its return of principal at the time specified, BTM was either to
2 provide or to arrange additional financing so that Plaintiff would receive all its funds.

3 722. Defendant BTM, for its part, agreed among other things, that:

- 4
- 5 • “In the event Seller [BTM] does not for any reason advance to Borrower
6 [church] the full amount of the contemplated advance [the draws of funds that
7 Defendants called for every month] on the date of receipt of such Purchase
8 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
9 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
10 to the amount of such contemplated advance not made.” (Participation
11 Agreement, Schedule 4, ¶2.)
- 12 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
13 the terms of the Loan Documents and with this Agreement. Seller [BTM]
14 shall provide loan servicing in accordance with commercially acceptable loan
15 servicing practices and with the same degree of care that is customarily
16 employed and exercised by Seller [BTM] in the administration and servicing
17 of loans of a similar nature held by it for its own account (the “Servicing
18 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 19 • “The Seller [BTM] shall maintain appropriate records and books of account
20 reflecting interest accrued and interest received, interest rate changes, principal
21 payments and all other transactions or actions affecting the Loan, which
22 records shall be kept in accordance with accounting principles consistently
23 and customarily applied by Seller [BTM].” (Participation Agreement,
24 Schedule 4, ¶9.)
- 25 • “Seller [BTM] further agrees that in performing its obligations hereunder,
26 Seller shall: (a) act in a custodial capacity on behalf of the Participant
27 [Plaintiff] with respect to its holding of any underlying instrument or collateral
28 and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶9.)

22 723. The parties agreed that the Plaintiff would advance funds to BTM, as called
23 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
24 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
25 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
26 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
27 (the Church), to service the loan and advance the funds towards the construction project,
28 according to the budget and plans approved and relied upon by the Plaintiff in entering into

1 the Participation Agreement. Upon information and belief, BTM had an agreement with
2 Arks whereby Arks took over the servicing and administration of the Loan to Antioch Bible
3 Fellowship, Inc. The Participation Agreement specifically references and incorporates the
4 Loan Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the
5 Borrower (the Church), and which provides that “the Loan proceeds are to be used by
6 Church solely for the construction of a church, church-related improvements, and/or costs
7 related thereto (the “Project”) upon the land described in the Security Instrument (the
8 “Property”) in accordance with the plans and specifications approved by ARKS.”

9 724. Plaintiff agreed to advance the funds in response to periodic draws based on
10 the project plans and budget which were attached to the Participation Agreement and/or the
11 Loan Agreement that was incorporated into the Participation Agreement, and which had
12 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
13 committing to the Participation Agreement for the Antioch Bible Fellowship, Inc. Loan.
14 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
15 contractors, suppliers and other third parties as well as specific project-related servicing fees
16 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
17 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
18 approval from Plaintiff for any material change to the budget or plans.

19 Contract Performance and Breach

20 725. Upon execution of the Participation Agreement, Plaintiff began funding draw
21 requests for the Antioch Bible Fellowship, Inc. project based on draw requests by BTM and
22 its agents. Plaintiff Holbrook advanced \$476,976 to BTM and its agents for the Antioch
23 Bible Fellowship, Inc. Loan between February 2008 and December 2008.

24 726. Defendant BTM breached the Participation Agreement by, among other things,
25 the following:

- 26 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
27 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
28 Ministries, Inc. (or to the servicers or contractors for authorized project

- 1 disbursements on the Borrower's behalf), and failing to return within five business
2 days to Plaintiff any funds not so advanced;
- 3 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
4 contractors, suppliers and other third parties as well as specific project-related
5 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
6 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
7 failing to get prior approval from Plaintiff for any material change to the budget or
8 plans;
 - 9 • failing to maintain appropriate records and books of account reflecting interest
10 accrued and interest received, interest rate changes, principal payments and all other
11 transactions or actions affecting the Loan;
 - 12 • not paying Plaintiff its return of principal at the earlier of the issuance of the
13 certificate of occupancy or within 12 months of the Loan Closing;
 - 14 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
15 Closing and not providing or arranging additional financing to allow Plaintiff to
16 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
17 within 12 months of the Loan Closing;
 - 18 • not paying Plaintiff its interest and fees on a monthly basis;
 - 19 • failing to provide loan servicing and administration in accordance with the Loan
20 documents and with commercially acceptable loan servicing practices;
 - 21 • requiring additional payments by Plaintiff beyond what was due under the
22 Participation Agreement and the approved budget and plans incorporated therein;
 - 23 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
24 holding any proceeds received for the Loan;
 - 25 • commingling for significant periods of time proceeds received on the Loan with other
26 funds.

27 ///

28 ///

1 Contract Damages

2 727. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
3 as yet unascertained, but which Plaintiff believes is at least \$155,593 and which will be
4 proved at trial.

5 728. Additionally, Plaintiff incurred legal and administrative costs in addressing
6 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
7 have incurred.

8 Fraud – Defendants' Misrepresentations

9 729. On the periodic draw requests sent to Plaintiff beginning in February 2008,
10 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
11 had been spent on the Antioch Bible Fellowship, Inc. project, in accordance with the
12 approved plans and budget, as per the reports, forms, and spreadsheets submitted with the
13 draw requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
14 represented the value of the project to that point.

15 730. Prior to Plaintiff's executing the Participation Agreement and making each
16 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
17 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
18 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
19 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
20 updates on projects, including the Antioch Bible Fellowship, Inc. project, and was told that
21 all funds previously advanced by Plaintiff to BTM and its agents on the Antioch Bible
22 Fellowship, Inc. loan had been put towards the project according to the budget and plans
23 submitted to, approved by and relied on by Plaintiff.

24 Fraud – True Facts

25 731. In fact, Defendants' representations to Plaintiff as described above were false.
26 The true facts were that:

- 27 • Plaintiff's funds had not been spent on the Antioch Bible Fellowship, Inc. project in
28 accordance with the approved plans and budget as per the reports, forms, and

1 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
2 February 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
3 accurately represent the value of the project to that point;

- 4 • all funds previously advanced by Plaintiff to BTM and its agents on the Antioch
5 Bible Fellowship, Inc. loan had not been put towards the project according to the
6 budget and plans submitted to, approved by and relied on by Plaintiff;

7 Fraud - Concealment

8 732. Defendants David Smith and BTM, including through their agents, concealed
9 from and failed to disclose to Plaintiff the following:

- 10 • the true financial and operational status of the loans and projects, including the
11 Antioch Bible Fellowship, Inc. project;
- 12 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
13 projects, including the Antioch Bible Fellowship, Inc. project, and were not being
14 applied only to project-related costs, according to the plans and budgets submitted to,
15 approved by and relied on by Plaintiff;
- 16 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
17 including payments made to unrelated third parties - friends of David Smith and
18 David Smith's wife, Carmen Cople Smith, and payments of the mortgage on the
19 Lachman Lane Property;
- 20 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
21 to Randy Barton and for "sales commissions" to Carmen Cople Smith;
- 22 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
23 and its investments in overseeing the management, servicing and administration of
24 the loans and projects;
- 25 • that Smith and BTM were commingling for significant periods of time proceeds
26 received on the Loan with other funds;
- 27 • that Smith and BTM did not intend to immediately advance the full amount of
28 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf

1 or else return the funds to Plaintiff, and established money market accounts to hold
2 such funds longer than five business days;

3 • that Smith and BTM were not maintaining appropriate records and books of account
4 reflecting interest accrued and interest received, interest rate changes, principal
5 payments and all other transactions or actions affecting the Loan.

6 Fraud – Reliance, Discovery and Damage

7 733. Plaintiff continued to fund the Antioch Bible Fellowship, Inc. loan and project
8 in response to periodic draw requests from Defendants, based on continued assurances and
9 representations of Defendants Smith and BTM, including through their agents at Arks and
10 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
11 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
12 failure to disclose that Plaintiff's funds were being commingled with other funds and
13 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
14 began working on a new program to take over the servicing and administration of the loans,
15 expand the Build to Minister church loan program into various investment funds, and market
16 those funds to third parties.

17 734. On or about July 31, 2009, during this effort to expand the loan program,
18 Plaintiff first learned of problems with the loans, including that Defendants and their agents
19 owed monies to third parties and were unable to pay them despite Plaintiff and other
20 investors having advanced funds as requested. Over the course of the next several months,
21 Plaintiff conducted an investigation in an attempt to determine what had happened to
22 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
23 misrepresentations, concealment and malfeasance. With respect to the problems discovered
24 with the loans, Plaintiff contributed additional monies in order to complete the projects,
25 including paying outstanding bills, liens, legal and administration fees, modifying the terms
26 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
27 new contractors to complete the construction.

28 ///

1 735. But for Defendants' misrepresentations and concealment as described above,
2 Plaintiff would not have continued to provide funds in response to draw requests from
3 Defendants or their agents for the projects, including the Antioch Bible Fellowship, Inc.
4 project, and would not have invested efforts, time and money creating a new program to take
5 over servicing of the loans, expand the Build to Minister program into various investment
6 funds, and market those funds to third parties.

7 736. As a result of Defendants' misrepresentations and concealments, Plaintiff has
8 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
9 \$155,593 and which will be proved at trial. Additionally, Plaintiff incurred legal and
10 administrative costs in addressing and mitigating the harm caused by Defendants'
11 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
12 funds expended in creating a new program to take over servicing of the loans, expand the
13 Build to Minister program into various investment funds, and market those funds to third
14 parties, which it would not have expended but for Defendants' misrepresentations and
15 concealments.

16 *Family Fellowship Worship Center Loan*

17 Contract Terms

18 737. On March 28, 2008, Plaintiff Holbrook entered into a Construction Note
19 Participation Agreement with Defendant BTM on a construction loan to Family Fellowship
20 Worship Center ("Family Fellowship Participation Agreement" or "Participation
21 Agreement"). The Family Fellowship Participation Agreement provided that Plaintiff
22 (designated "Participant") would have a participation interest of 50% in the construction
23 note amount of \$1,071,900, which Defendant BTM (designated "Seller") would loan to the
24 church, Family Fellowship Worship Center (designated "Borrower"). Under the Family
25 Fellowship Participation Agreement, Plaintiff committed to fund a total of \$535,950, to be
26 advanced to Defendant BTM in response to periodic draw requests from Defendant
27 according to a projected draw schedule. In consideration for Plaintiff's advancing the funds,
28 Plaintiff was entitled to receive the return of the principal invested, as well as 10.5% interest

1 on such amount, and its pro rata portion (50%) of a Participation Fee (of \$16,078.50), with
2 interest and fees to be paid monthly, and the principal payable to Plaintiff at the issuance of
3 a Certificate of Occupancy for the Property or twelve (12) months from the date of Loan
4 Closing, whichever first occurs, as provided for in the Loan Agreement which was
5 specifically referenced by and incorporated into the Participation Agreement. The
6 Participation Agreement also provided that in the event Plaintiff had not received its return
7 of principal at the time specified, BTM was either to provide or to arrange additional
8 financing so that Plaintiff would receive all its funds.

9 738. Defendant BTM, for its part, agreed among other things, that:

- 10 • “In the event Seller [BTM] does not for any reason advance to Borrower
11 [church] the full amount of the contemplated advance [the draws of funds that
12 Defendants called for every month] on the date of receipt of such Purchase
13 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
14 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
15 to the amount of such contemplated advance not made.” (Participation
16 Agreement, Schedule 4, ¶2.)
- 17 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
18 the terms of the Loan Documents and with this Agreement. Seller [BTM]
19 shall provide loan servicing in accordance with commercially acceptable loan
20 servicing practices and with the same degree of care that is customarily
21 employed and exercised by Seller [BTM] in the administration and servicing
22 of loans of a similar nature held by it for its own account (the “Servicing
23 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 24 • “The Seller [BTM] shall maintain appropriate records and books of account
25 reflecting interest accrued and interest received, interest rate changes, principal
26 payments and all other transactions or actions affecting the Loan, which
27 records shall be kept in accordance with accounting principles consistently
28 and customarily applied by Seller [BTM].” (Participation Agreement,
Schedule 4, ¶9.)
- “Seller [BTM] further agrees that in performing its obligations hereunder,
Seller shall: (a) act in a custodial capacity on behalf of the Participant
[Plaintiff] with respect to its holding of any underlying instrument or collateral
and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)

///

1 and its agents. Plaintiff Holbrook advanced \$535,951 to BTM and its agents for the Family
2 Fellowship Worship Center Loan between February 2008 and August 2008.

3 742. Defendant BTM breached the Participation Agreement by, among other things,
4 the following:

- 5 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
6 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
7 Ministries, Inc. (or to the servicers or contractors for authorized project
8 disbursements on the Borrower's behalf), and failing to return within five business
9 days to Plaintiff any funds not so advanced;
- 10 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
11 contractors, suppliers and other third parties as well as specific project-related
12 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
13 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
14 failing to get prior approval from Plaintiff for any material change to the budget or
15 plans;
- 16 • failing to maintain appropriate records and books of account reflecting interest
17 accrued and interest received, interest rate changes, principal payments and all other
18 transactions or actions affecting the Loan;
- 19 • not paying Plaintiff its return of principal at the earlier of the issuance of the
20 certificate of occupancy or within 12 months of the Loan Closing;
- 21 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
22 Closing and not providing or arranging additional financing to allow Plaintiff to
23 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
24 within 12 months of the Loan Closing;
- 25 • not paying Plaintiff its interest and fees on a monthly basis;
- 26 • failing to provide loan servicing and administration in accordance with the Loan
27 documents and with commercially acceptable loan servicing practices;

28 ///

- 1 • requiring additional payments by Plaintiff beyond what was due under the
2 Participation Agreement and the approved budget and plans incorporated therein;
3 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
4 holding any proceeds received for the Loan;
5 • commingling for significant periods of time proceeds received on the Loan with other
6 funds.

7 Contract Damages

8 743. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
9 as yet unascertained, but which Plaintiff believes is at least \$144,489 and which will be
10 proved at trial.

11 744. Additionally, Plaintiff incurred legal and administrative costs in addressing
12 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
13 have incurred.

14 Fraud – Defendants' Misrepresentations

15 745. On the periodic draw requests sent to Plaintiff beginning in February 2008,
16 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
17 had been spent on the Family Fellowship Worship Center project, in accordance with the
18 approved plans and budget, as per the reports, forms, and spreadsheets submitted with the
19 draw requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
20 represented the value of the project to that point.

21 746. Prior to Plaintiff's executing the Participation Agreement and making each
22 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
23 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
24 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
25 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
26 updates on projects, including the Family Fellowship Worship Center project, and was told
27 that all funds previously advanced by Plaintiff to BTM and its agents on the Family

28 ///

1 Fellowship Worship Center loan had been put towards the project according to the budget
2 and plans submitted to, approved by and relied on by Plaintiff.

3 Fraud – True Facts

4 747. In fact, Defendants’ representations to Plaintiff as described above were false.

5 The true facts were that:

- 6 • Plaintiff’s funds had not been spent on the Family Fellowship Worship Center project
7 in accordance with the approved plans and budget as per the reports, forms, and
8 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
9 February 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
10 accurately represent the value of the project to that point;
- 11 • all funds previously advanced by Plaintiff to BTM and its agents on the Family
12 Fellowship Worship Center loan had not been put towards the project according to
13 the budget and plans submitted to, approved by and relied on by Plaintiff;

14 Fraud - Concealment

15 748. Defendants David Smith and BTM, including through their agents, concealed
16 from and failed to disclose to Plaintiff the following:

- 17 • the true financial and operational status of the loans and projects, including the
18 Family Fellowship Worship Center project;
- 19 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
20 projects, including the Family Fellowship Worship Center project, and were not being
21 applied only to project-related costs, according to the plans and budgets submitted to,
22 approved by and relied on by Plaintiff;
- 23 • that Smith and BTM were diverting Plaintiff’s funds for non-project related purposes,
24 including payments made to unrelated third parties - friends of David Smith and
25 David Smith’s wife, Carmen Copple Smith, and payments of the mortgage on the
26 Lachman Lane Property;
- 27 • that Smith and BTM were making undisclosed, unapproved payments for “legal fees”
28 to Randy Barton and for “sales commissions” to Carmen Copple Smith;

- 1 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
2 and its investments in overseeing the management, servicing and administration of
3 the loans and projects;
- 4 • that Smith and BTM were commingling for significant periods of time proceeds
5 received on the Loan with other funds;
- 6 • that Smith and BTM did not intend to immediately advance the full amount of
7 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
8 or else return the funds to Plaintiff, and established money market accounts to hold
9 such funds longer than five business days;
- 10 • that Smith and BTM were not maintaining appropriate records and books of account
11 reflecting interest accrued and interest received, interest rate changes, principal
12 payments and all other transactions or actions affecting the Loan.

13 Fraud – Reliance, Discovery and Damage

14 749. Plaintiff continued to fund the Family Fellowship Worship Center loan and
15 project in response to periodic draw requests from Defendants, based on continued
16 assurances and representations of Defendants Smith and BTM, including through their
17 agents at Arks and Noah, that Plaintiff's funds advanced thus far had gone towards the
18 projects according to the plans and budget reviewed, approved and relied upon by Plaintiff,
19 and based on Defendants' failure to disclose that Plaintiff's funds were being commingled
20 with other funds and diverted to non-project related costs and payments. In or about
21 February 2009, Plaintiff began working on a new program to take over the servicing and
22 administration of the loans, expand the Build to Minister church loan program into various
23 investment funds, and market those funds to third parties.

24 750. On or about July 31, 2009, during this effort to expand the loan program,
25 Plaintiff first learned of problems with the loans, including that Defendants and their agents
26 owed monies to third parties and were unable to pay them despite Plaintiff and other
27 investors having advanced funds as requested. Over the course of the next several months,
28 Plaintiff conducted an investigation in an attempt to determine what had happened to

1 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
2 misrepresentations, concealment and malfeasance. With respect to the problems discovered
3 with the loans, Plaintiff contributed additional monies in order to complete the projects,
4 including paying outstanding bills, liens, legal and administration fees, modifying the terms
5 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
6 new contractors to complete the construction.

7 751. But for Defendants' misrepresentations and concealment as described above,
8 Plaintiff would not have continued to provide funds in response to draw requests from
9 Defendants or their agents for the projects, including the Family Fellowship Worship Center
10 project, and would not have invested efforts, time and money creating a new program to take
11 over servicing of the loans, expand the Build to Minister program into various investment
12 funds, and market those funds to third parties.

13 752. As a result of Defendants' misrepresentations and concealments, Plaintiff has
14 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
15 \$144,489 and which will be proved at trial. Additionally, Plaintiff incurred legal and
16 administrative costs in addressing and mitigating the harm caused by Defendants'
17 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
18 funds expended in creating a new program to take over servicing of the loans, expand the
19 Build to Minister program into various investment funds, and market those funds to third
20 parties, which it would not have expended but for Defendants' misrepresentations and
21 concealments.

22 *First Baptist Church of Texas City Loan*

23 Contract Terms

24 753. On August 18, 2008, Plaintiff Holbrook entered into a Construction Note
25 Participation Agreement with Defendant BTM on a construction loan to First Baptist Church
26 of Texas City ("First Baptist Texas City Participation Agreement" or "Participation
27 Agreement"). The First Baptist Texas City Participation Agreement provided that Plaintiff
28 (designated "Participant") would have a participation interest of 50% in the construction

1 note amount of \$931,845, which Defendant BTM (designated "Seller") would loan to the
2 church, First Baptist Church of Texas City (designated "Borrower"). Under the First Baptist
3 Texas City Participation Agreement, Plaintiff committed to fund a total of \$465,922.50, to
4 be advanced to Defendant BTM in response to periodic draw requests from Defendant
5 according to a projected draw schedule. In consideration for Plaintiff's advancing the funds,
6 Plaintiff was entitled to receive the return of the principal invested, as well as 10.5% interest
7 on such amount, and its pro rata portion (50%) of a Participation Fee (of \$13,977.67), with
8 interest and fees to be paid monthly, and the principal payable to Plaintiff at the issuance of
9 a Certificate of Occupancy for the Property or twelve (12) months from the date of Loan
10 Closing, whichever first occurs, as provided for in the Loan Agreement which was
11 specifically referenced by and incorporated into the Participation Agreement. The
12 Participation Agreement also provided that in the event Plaintiff had not received its return
13 of principal at the time specified, BTM was either to provide or to arrange additional
14 financing so that Plaintiff would receive all its funds.

15 754. Defendant BTM, for its part, agreed among other things, that:

- 16 • "In the event Seller [BTM] does not for any reason advance to Borrower
17 [church] the full amount of the contemplated advance [the draws of funds that
18 Defendants called for every month] on the date of receipt of such Purchase
19 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
20 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
21 to the amount of such contemplated advance not made." (Participation
22 Agreement, Schedule 4, ¶2.)
- 23 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
24 the terms of the Loan Documents and with this Agreement. Seller [BTM]
25 shall provide loan servicing in accordance with commercially acceptable loan
26 servicing practices and with the same degree of care that is customarily
27 employed and exercised by Seller [BTM] in the administration and servicing
28 of loans of a similar nature held by it for its own account (the "Servicing
Standard")." (Participation Agreement, Schedule 4, ¶9.)
- "The Seller [BTM] shall maintain appropriate records and books of account
reflecting interest accrued and interest received, interest rate changes, principal
payments and all other transactions or actions affecting the Loan, which
records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)
- "Seller [BTM] further agrees that in performing its obligations hereunder,
Seller shall: (a) act in a custodial capacity on behalf of the Participant

1 [Plaintiff] with respect to its holding of any underlying instrument or collateral
2 and in holding any proceeds received for the Loan; (b) not commingle for any
3 significant period of time proceeds received on the Loan; (c) directly pass
4 through any proceeds received from the Loan to Participant [Plaintiff] as
5 provided in Section 4 of this Agreement, less any proceeds that represent
6 servicing or other compensation to Seller [BTM] or an interest in the Loan
7 retained by the Seller [BTM], all as more particularly provided for herein; and
8 (d) administer the Loan in accordance with the Servicing Standard as provided
9 herein.” (Participation Agreement, Schedule 4, ¶ 9.)

- 10 • “Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
11 of any material default with respect to the Loan of which Seller [BTM] is
12 actually aware and of any other matters which, in Seller’s judgment, materially
13 affect the interest of Participant [Plaintiff] with respect to the Loan
14 (collectively, a “Material Default”).” (Participation Agreement, Schedule 4, ¶
15 11.)

16 755. The parties agreed that the Plaintiff would advance funds to BTM, as called
17 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
18 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
19 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
20 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
21 (the Church), to service the loan and advance the funds towards the construction project,
22 according to the budget and plans approved and relied upon by the Plaintiff in entering into
23 the Participation Agreement. Upon information and belief, BTM had an agreement with
24 Arks whereby Arks took over the servicing and administration of the Loan to First Baptist
25 Church of Texas City. The Participation Agreement specifically references and incorporates
26 the Loan Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the
27 Borrower (the Church), and which provides that “the Loan proceeds are to be used by
28 Church solely for the construction of a church, church-related improvements, and/or costs
related thereto (the “Project”) upon the land described in the Security Instrument (the
“Property”) in accordance with the plans and specifications approved by ARKS.”

756. Plaintiff agreed to advance the funds in response to periodic draws based on
the project plans and budget which were attached to the Participation Agreement and/or the
Loan Agreement that was incorporated into the Participation Agreement, and which had
been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
committing to the Participation Agreement for the First Baptist Church of Texas City Loan.

1 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
2 contractors, suppliers and other third parties as well as specific project-related servicing fees
3 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
4 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
5 approval from Plaintiff for any material change to the budget or plans.

6 Contract Performance and Breach

7 757. Upon execution of the Participation Agreement, Plaintiff began funding draw
8 requests for the First Baptist Church of Texas City project based on draw requests by BTM
9 and its agents. Plaintiff Holbrook advanced \$393,782 to BTM and its agents for the First
10 Baptist Church of Texas City Loan between July 2008 and July 2009.

11 758. Defendant BTM breached the Participation Agreement by, among other things,
12 the following:

- 13 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
14 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
15 Ministries, Inc. (or to the servicers or contractors for authorized project
16 disbursements on the Borrower's behalf), and failing to return within five business
17 days to Plaintiff any funds not so advanced;
- 18 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
19 contractors, suppliers and other third parties as well as specific project-related
20 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
21 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
22 failing to get prior approval from Plaintiff for any material change to the budget or
23 plans;
- 24 • failing to maintain appropriate records and books of account reflecting interest
25 accrued and interest received, interest rate changes, principal payments and all other
26 transactions or actions affecting the Loan;
- 27 • not paying Plaintiff its return of principal at the earlier of the issuance of the
28 certificate of occupancy or within 12 months of the Loan Closing;

- 1 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
- 2 Closing and not providing or arranging additional financing to allow Plaintiff to
- 3 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
- 4 within 12 months of the Loan Closing;
- 5 • not paying Plaintiff its interest and fees on a monthly basis;
- 6 • failing to provide loan servicing and administration in accordance with the Loan
- 7 documents and with commercially acceptable loan servicing practices;
- 8 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 9 holding any proceeds received for the Loan;
- 10 • commingling for significant periods of time proceeds received on the Loan with other
- 11 funds;
- 12 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
- 13 which Defendant was aware;
- 14 • failing to require Borrower to pay the equity down payment as required by the Loan
- 15 Documents.

16 Contract Damages

17 759. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
18 as yet unascertained, but which Plaintiff believes is at least \$462,274 and which will be
19 proved at trial.

20 760. Additionally, Plaintiff incurred legal and administrative costs in addressing
21 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
22 have incurred.

23 Fraud – Defendants' Misrepresentations

24 761. On the periodic draw requests sent to Plaintiff beginning in July 2008, Smith's
25 and BTM's agents signed attestations that the monies advanced thus far by Plaintiff had
26 been spent on the First Baptist Church of Texas City project, in accordance with the
27 approved plans and budget, as per the reports, forms, and spreadsheets submitted with the

28 ///

1 draw requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
2 represented the value of the project to that point.

3 762. Prior to Plaintiff's executing the Participation Agreement and making each
4 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
5 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
6 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
7 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
8 updates on projects, including the First Baptist Church of Texas City project, and was told
9 that all funds previously advanced by Plaintiff to BTM and its agents on the First Baptist
10 Church of Texas City loan had been put towards the project according to the budget and
11 plans submitted to, approved by and relied on by Plaintiff.

12 Fraud – True Facts

13 763. In fact, Defendants' representations to Plaintiff as described above were false.
14 The true facts were that:

- 15 • Plaintiff's funds had not been spent on the First Baptist Church of Texas City project
16 in accordance with the approved plans and budget as per the reports, forms, and
17 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
18 July 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
19 accurately represent the value of the project to that point;
- 20 • all funds previously advanced by Plaintiff to BTM and its agents on the First Baptist
21 Church of Texas City loan had not been put towards the project according to the
22 budget and plans submitted to, approved by and relied on by Plaintiff;

23 Fraud - Concealment

24 764. Defendants David Smith and BTM, including through their agents, concealed
25 from and failed to disclose to Plaintiff the following:

- 26 • the true financial and operational status of the loans and projects, including the First
27 Baptist Church of Texas City project;

28 ///

- 1 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
2 projects, including the First Baptist Church of Texas City project, and were not being
3 applied only to project-related costs, according to the plans and budgets submitted to,
4 approved by and relied on by Plaintiff;
- 5 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
6 including payments made to unrelated third parties - friends of David Smith and
7 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
8 Lachman Lane Property;
- 9 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
10 and its investments in overseeing the management, servicing and administration of
11 the loans and projects;
- 12 • that Smith and BTM were commingling for significant periods of time proceeds
13 received on the Loan with other funds;
- 14 • that Smith and BTM did not intend to immediately advance the full amount of
15 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
16 or else return the funds to Plaintiff, and established money market accounts to hold
17 such funds longer than five business days;
- 18 • that Smith and BTM were not maintaining appropriate records and books of account
19 reflecting interest accrued and interest received, interest rate changes, principal
20 payments and all other transactions or actions affecting the Loan.

21 Fraud – Reliance, Discovery and Damage

22 765. Plaintiff continued to fund the First Baptist Church of Texas City loan and
23 project in response to periodic draw requests from Defendants, based on continued
24 assurances and representations of Defendants Smith and BTM, including through their
25 agents at Arks and Noah, that Plaintiff's funds advanced thus far had gone towards the
26 projects according to the plans and budget reviewed, approved and relied upon by Plaintiff,
27 and based on Defendants' failure to disclose that Plaintiff's funds were being commingled
28 with other funds and diverted to non-project related costs and payments. In or about

1 February 2009, Plaintiff began working on a new program to take over the servicing and
2 administration of the loans, expand the Build to Minister church loan program into various
3 investment funds, and market those funds to third parties.

4 766. On or about July 31, 2009, during this effort to expand the loan program,
5 Plaintiff first learned of problems with the loans, including that Defendants and their agents
6 owed monies to third parties and were unable to pay them despite Plaintiff and other
7 investors having advanced funds as requested. Over the course of the next several months,
8 Plaintiff conducted an investigation in an attempt to determine what had happened to
9 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
10 misrepresentations, concealment and malfeasance. With respect to the problems discovered
11 with the loans, Plaintiff contributed additional monies in order to complete the projects,
12 including paying outstanding bills, liens, legal and administration fees, modifying the terms
13 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
14 new contractors to complete the construction.

15 767. But for Defendants' misrepresentations and concealment as described above,
16 Plaintiff would not have continued to provide funds in response to draw requests from
17 Defendants or their agents for the projects, including the First Baptist Church of Texas City
18 project, and would not have invested efforts, time and money creating a new program to take
19 over servicing of the loans, expand the Build to Minister program into various investment
20 funds, and market those funds to third parties.

21 768. As a result of Defendants' misrepresentations and concealments, Plaintiff has
22 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
23 \$462,274 and which will be proved at trial. Additionally, Plaintiff incurred legal and
24 administrative costs in addressing and mitigating the harm caused by Defendants'
25 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
26 funds expended in creating a new program to take over servicing of the loans, expand the
27 Build to Minister program into various investment funds, and market those funds to third

28 ///

1 parties, which it would not have expended but for Defendants' misrepresentations and
2 concealments.

3 *New Creation Church Loan*

4 Contract Terms

5 769. On June 11, 2008, Plaintiff Holbrook entered into a Construction Note
6 Participation Agreement with Defendant BTM on a construction loan to New Creation
7 Church ("New Creation Participation Agreement" or "Participation Agreement"). The New
8 Creation Participation Agreement provided that Plaintiff (designated "Participant") would
9 have a participation interest of 50% in the construction note amount of \$825,496, which
10 Defendant BTM (designated "Seller") would loan to the church, New Creation Church
11 (designated "Borrower"). The Participation Agreement was modified in or about December
12 2008, by written or oral agreement or by the conduct of the parties, so that Holbrook had a
13 10.9380%. Under the New Creation Participation Agreement as amended, Plaintiff
14 committed to fund a total of \$90,292.75, to be advanced to Defendant BTM in response to
15 periodic draw requests from Defendant according to a projected draw schedule. In
16 consideration for Plaintiff's advancing the funds, Plaintiff was entitled to receive the return
17 of the principal invested, as well as 10.5% interest on such amount, and its pro rata portion
18 (10.9380%) of a Participation Fee (of \$12,382.44), with interest and fees to be paid monthly,
19 and the principal payable to Plaintiff at the issuance of a Certificate of Occupancy for the
20 Property or twelve (12) months from the date of Loan Closing, whichever first occurs, as
21 provided for in the Loan Agreement which was specifically referenced by and incorporated
22 into the Participation Agreement. The Participation Agreement also provided that in the
23 event Plaintiff had not received its return of principal at the time specified, BTM was either
24 to provide or to arrange additional financing so that Plaintiff would receive all its funds.

25 770. Defendant BTM, for its part, agreed among other things, that:

- 26
- 27 • "In the event Seller [BTM] does not for any reason advance to Borrower
28 [church] the full amount of the contemplated advance [the draws of funds that
Defendants called for every month] on the date of receipt of such Purchase
Payment, Seller [BTM] shall within five (5) Business Days thereafter return
the portion of such Purchase Payment to Participant [Plaintiff] as corresponds

1 to the amount of such contemplated advance not made.” (Participation
2 Agreement, Schedule 4, ¶2.)

- 3 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
4 the terms of the Loan Documents and with this Agreement. Seller [BTM]
5 shall provide loan servicing in accordance with commercially acceptable loan
6 servicing practices and with the same degree of care that is customarily
7 employed and exercised by Seller [BTM] in the administration and servicing
8 of loans of a similar nature held by it for its own account (the “Servicing
9 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 10 • “The Seller [BTM] shall maintain appropriate records and books of account
11 reflecting interest accrued and interest received, interest rate changes, principal
12 payments and all other transactions or actions affecting the Loan, which
13 records shall be keep in accordance with accounting principles consistently
14 and customarily applied by Seller [BTM].” (Participation Agreement,
15 Schedule 4, ¶9.)
- 16 • “Seller [BTM] further agrees that in performing its obligations hereunder,
17 Seller shall: (a) act in a custodial capacity on behalf of the Participant
18 [Plaintiff] with respect to its holding of any underlying instrument or collateral
19 and in holding any proceeds received for the Loan; (b) not commingle for any
20 significant period of time proceeds received on the Loan; (c) directly pass
21 through any proceeds received from the Loan to Participant [Plaintiff] as
22 provided in Section 4 of this Agreement, less any proceeds that represent
23 servicing or other compensation to Seller [BTM] or an interest in the Loan
24 retained by the Seller [BTM], all as more particularly provided for herein; and
25 (d) administer the Loan in accordance with the Servicing Standard as provided
26 herein.” (Participation Agreement, Schedule 4, ¶ 9.)

16 771. The parties agreed that the Plaintiff would advance funds to BTM, as called
17 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
18 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
19 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
20 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
21 (the Church), to service the loan and advance the funds towards the construction project,
22 according to the budget and plans approved and relied upon by the Plaintiff in entering into
23 the Participation Agreement. Upon information and belief, BTM had an agreement with
24 Arks whereby Arks took over the servicing and administration of the Loan to New Creation
25 Church. The Participation Agreement specifically references and incorporates the Loan
26 Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower
27 (the Church), and which provides that “the Loan proceeds are to be used by Church solely

28 ///

1 for the construction of a church, church-related improvements, and/or costs related thereto
2 (the "Project") upon the land described in the Security Instrument (the "Property") in
3 accordance with the plans and specifications approved by ARKS."

4 772. Plaintiff agreed to advance the funds in response to periodic draws based on
5 the project plans and budget which were attached to the Participation Agreement and/or the
6 Loan Agreement that was incorporated into the Participation Agreement, and which had
7 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
8 committing to the Participation Agreement for the New Creation Church Loan. Defendant
9 BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors,
10 suppliers and other third parties as well as specific project-related servicing fees to itself,
11 Arks and Noah, according to the budget and plans submitted to and approved by Plaintiffs
12 and incorporated into the Participation Agreement, and agreed to get prior approval from
13 Plaintiff for any material change to the budget or plans.

14 Contract Performance and Breach

15 773. Upon execution of the Participation Agreement, Plaintiff began funding draw
16 requests for the New Creation Church project based on draw requests by BTM and its
17 agents. Plaintiff Holbrook advanced \$90,293 to BTM and its agents for the New Creation
18 Church Loan between May 2008 and April 2009.

19 774. Defendant BTM breached the Participation Agreement by, among other things,
20 the following:

- 21 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
22 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
23 Ministries, Inc. (or to the servicers or contractors for authorized project
24 disbursements on the Borrower's behalf), and failing to return within five business
25 days to Plaintiff any funds not so advanced;
- 26 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
27 contractors, suppliers and other third parties as well as specific project-related
28 servicing fees to itself, Arks and Noah, according to the budget and plans submitted

1 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
2 failing to get prior approval from Plaintiff for any material change to the budget or
3 plans;

- 4 • failing to maintain appropriate records and books of account reflecting interest
5 accrued and interest received, interest rate changes, principal payments and all other
6 transactions or actions affecting the Loan;
- 7 • not paying Plaintiff its return of principal at the earlier of the issuance of the
8 certificate of occupancy or within 12 months of the Loan Closing;
- 9 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
10 Closing and not providing or arranging additional financing to allow Plaintiff to
11 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
12 within 12 months of the Loan Closing;
- 13 • not paying Plaintiff its interest and fees on a monthly basis;
- 14 • failing to provide loan servicing and administration in accordance with the Loan
15 documents and with commercially acceptable loan servicing practices;
- 16 • requiring additional payments by Plaintiff beyond what was due under the
17 Participation Agreement and the approved budget and plans incorporated therein;
- 18 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
19 holding any proceeds received for the Loan;
- 20 • commingling for significant periods of time proceeds received on the Loan with other
21 funds.

22 Contract Damages

23 775. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
24 as yet unascertained, but which Plaintiff believes is at least \$96,073 and which will be
25 proved at trial.

26 776. Additionally, Plaintiff incurred legal and administrative costs in addressing
27 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
28 have incurred.

1 Fraud – Defendants’ Misrepresentations

2 777. On the periodic draw requests sent to Plaintiff beginning in November 2008,
3 Smith’s and BTM’s agents signed attestations that the monies advanced thus far by Plaintiff
4 had been spent on the New Creation Church project, in accordance with the approved plans
5 and budget, as per the reports, forms, and spreadsheets submitted with the draw requests,
6 and that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
7 value of the project to that point.

8 778. Prior to Plaintiff’s executing the Participation Agreement and making each
9 subsequent advance, Plaintiff’s agent Darren Maloney called periodically (approximately
10 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
11 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
12 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
13 updates on projects, including the New Creation Church project, and was told that all funds
14 previously advanced by Plaintiff to BTM and its agents on the New Creation Church loan
15 had been put towards the project according to the budget and plans submitted to, approved
16 by and relied on by Plaintiff.

17 Fraud – True Facts

18 779. In fact, Defendants’ representations to Plaintiff as described above were false.
19 The true facts were that:

- 20 • Plaintiff’s funds had not been spent on the New Creation Church project in
21 accordance with the approved plans and budget as per the reports, forms, and
22 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
23 May 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
24 accurately represent the value of the project to that point;
- 25 • all funds previously advanced by Plaintiff to BTM and its agents on the New Creation
26 Church loan had not been put towards the project according to the budget and plans
27 submitted to, approved by and relied on by Plaintiff;

28 ///

1 Fraud - Concealment

2 780. Defendants David Smith and BTM, including through their agents, concealed
3 from and failed to disclose to Plaintiff the following:

- 4 • the true financial and operational status of the loans and projects, including the New
5 Creation Church project;
- 6 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
7 projects, including the New Creation Church project, and were not being applied only
8 to project-related costs, according to the plans and budgets submitted to, approved by
9 and relied on by Plaintiff;
- 10 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
11 including payments made to unrelated third parties - friends of David Smith and
12 David Smith's wife, Carmen Cople Smith, and payments of the mortgage on the
13 Lachman Lane Property;
- 14 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
15 and its investments in overseeing the management, servicing and administration of
16 the loans and projects;
- 17 • that Smith and BTM were commingling for significant periods of time proceeds
18 received on the Loan with other funds;
- 19 • that Smith and BTM did not intend to immediately advance the full amount of
20 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
21 or else return the funds to Plaintiff, and established money market accounts to hold
22 such funds longer than five business days;
- 23 • that Smith and BTM were not maintaining appropriate records and books of account
24 reflecting interest accrued and interest received, interest rate changes, principal
25 payments and all other transactions or actions affecting the Loan.

26 Fraud – Reliance, Discovery and Damage

27 781. Plaintiff continued to fund the New Creation Church loan and project in
28 response to periodic draw requests from Defendants, based on continued assurances and

1 representations of Defendants Smith and BTM, including through their agents at Arks and
2 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
3 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
4 failure to disclose that Plaintiff's funds were being commingled with other funds and
5 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
6 began working on a new program to take over the servicing and administration of the loans,
7 expand the Build to Minister church loan program into various investment funds, and market
8 those funds to third parties.

9 782. On or about July 31, 2009, during this effort to expand the loan program,
10 Plaintiff first learned of problems with the loans, including that Defendants and their agents
11 owed monies to third parties and were unable to pay them despite Plaintiff and other
12 investors having advanced funds as requested. Over the course of the next several months,
13 Plaintiff conducted an investigation in an attempt to determine what had happened to
14 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
15 misrepresentations, concealment and malfeasance. With respect to the problems discovered
16 with the loans, Plaintiff contributed additional monies in order to complete the projects,
17 including paying outstanding bills, liens, legal and administration fees, modifying the terms
18 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
19 new contractors to complete the construction.

20 783. But for Defendants' misrepresentations and concealment as described above,
21 Plaintiff would not have continued to provide funds in response to draw requests from
22 Defendants or their agents for the projects, including the New Creation Church project, and
23 would not have invested efforts, time and money creating a new program to take over
24 servicing of the loans, expand the Build to Minister program into various investment funds,
25 and market those funds to third parties.

26 784. As a result of Defendants' misrepresentations and concealments, Plaintiff has
27 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
28 \$96,073 and which will be proved at trial. Additionally, Plaintiff incurred legal and

1 administrative costs in addressing and mitigating the harm caused by Defendants'
2 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
3 funds expended in creating a new program to take over servicing of the loans, expand the
4 Build to Minister program into various investment funds, and market those funds to third
5 parties, which it would not have expended but for Defendants' misrepresentations and
6 concealments.

7 *Peace Baptist Church Loan*

8 Contract Terms

9 785. On July 30, 2008, Plaintiff Holbrook entered into a Construction Note
10 Participation Agreement with Defendant BTM on a construction loan to Peace Baptist
11 Church ("Peace Participation Agreement" or "Participation Agreement"). The Peace
12 Participation Agreement provided that Plaintiff (designated "Participant") would have a
13 participation interest of 50% in the construction note amount of \$515,562, which Defendant
14 BTM (designated "Seller") would loan to the church, Peace Baptist Church (designated
15 "Borrower"). Under the Peace Participation Agreement, Plaintiff committed to fund a total
16 of \$257,781, to be advanced to Defendant BTM in response to periodic draw requests from
17 Defendant according to a projected draw schedule. In consideration for Plaintiff's
18 advancing the funds, Plaintiff was entitled to receive the return of the principal invested, as
19 well as 10.5% interest on such amount, and its pro rata portion (50%) of a Participation Fee
20 (of \$7,733.43), with interest and fees to be paid monthly, and the principal payable to
21 Plaintiff at the issuance of a Certificate of Occupancy for the Property or twelve (12) months
22 from the date of Loan Closing, whichever first occurs, as provided for in the Loan
23 Agreement which was specifically referenced by and incorporated into the Participation
24 Agreement. The Participation Agreement also provided that in the event Plaintiff had not
25 received its return of principal at the time specified, BTM was either to provide or to arrange
26 additional financing so that Plaintiff would receive all its funds.

27 786. Defendant BTM, for its part, agreed among other things, that:

28 ///

- 1 • “In the event Seller [BTM] does not for any reason advance to Borrower
2 [church] the full amount of the contemplated advance [the draws of funds that
3 Defendants called for every month] on the date of receipt of such Purchase
4 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
5 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
6 to the amount of such contemplated advance not made.” (Participation
7 Agreement, Schedule 4, ¶2.)
- 8 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
9 the terms of the Loan Documents and with this Agreement. Seller [BTM]
10 shall provide loan servicing in accordance with commercially acceptable loan
11 servicing practices and with the same degree of care that is customarily
12 employed and exercised by Seller [BTM] in the administration and servicing
13 of loans of a similar nature held by it for its own account (the “Servicing
14 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 15 • “The Seller [BTM] shall maintain appropriate records and books of account
16 reflecting interest accrued and interest received, interest rate changes, principal
17 payments and all other transactions or actions affecting the Loan, which
18 records shall be keep in accordance with accounting principles consistently
19 and customarily applied by Seller [BTM].” (Participation Agreement,
20 Schedule 4, ¶9.)
- 21 • “Seller [BTM] further agrees that in performing its obligations hereunder,
22 Seller shall: (a) act in a custodial capacity on behalf of the Participant
23 [Plaintiff] with respect to its holding of any underlying instrument or collateral
24 and in holding any proceeds received for the Loan; (b) not commingle for any
25 significant period of time proceeds received on the Loan; (c) directly pass
26 through any proceeds received from the Loan to Participant [Plaintiff] as
27 provided in Section 4 of this Agreement, less any proceeds that represent
28 servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)
- “Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
of any material default with respect to the Loan of which Seller [BTM] is
actually aware and of any other matters which, in Seller’s judgment, materially
affect the interest of Participant [Plaintiff] with respect to the Loan
(collectively, a “Material Default”).” (Participation Agreement, Schedule 4, ¶
11.)

787. The parties agreed that the Plaintiff would advance funds to BTM, as called
for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
(the Church), to service the loan and advance the funds towards the construction project,
according to the budget and plans approved and relied upon by the Plaintiff in entering into

1 the Participation Agreement. Upon information and belief, BTM had an agreement with
2 Arks whereby Arks took over the servicing and administration of the Loan to Peace Baptist
3 Church. The Participation Agreement specifically references and incorporates the Loan
4 Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower
5 (the Church), and which provides that “the Loan proceeds are to be used by Church solely
6 for the construction of a church, church-related improvements, and/or costs related thereto
7 (the “Project”) upon the land described in the Security Instrument (the “Property”) in
8 accordance with the plans and specifications approved by ARKS.”

9 788. Plaintiff agreed to advance the funds in response to periodic draws based on
10 the project plans and budget which were attached to the Participation Agreement and/or the
11 Loan Agreement that was incorporated into the Participation Agreement, and which had
12 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
13 committing to the Participation Agreement for the Peace Baptist Church Loan. Defendant
14 BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors,
15 suppliers and other third parties as well as specific project-related servicing fees to itself,
16 Arks and Noah, according to the budget and plans submitted to and approved by Plaintiffs
17 and incorporated into the Participation Agreement, and agreed to get prior approval from
18 Plaintiff for any material change to the budget or plans.

19 Contract Performance and Breach

20 789. Upon execution of the Participation Agreement, Plaintiff began funding draw
21 requests for the Peace Baptist Church project based on draw requests by BTM and its agents.
22 Plaintiff Holbrook advanced \$130,240 to BTM and its agents for the Peace Baptist Church
23 Loan between April 2009 and July 2009.

24 790. Defendant BTM breached the Participation Agreement by, among other things,
25 the following:

- 26 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
27 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
28 Ministries, Inc. (or to the servicers or contractors for authorized project

- 1 disbursements on the Borrower's behalf), and failing to return within five business
2 days to Plaintiff any funds not so advanced;
- 3 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
4 contractors, suppliers and other third parties as well as specific project-related
5 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
6 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
7 failing to get prior approval from Plaintiff for any material change to the budget or
8 plans;
 - 9 • failing to maintain appropriate records and books of account reflecting interest
10 accrued and interest received, interest rate changes, principal payments and all other
11 transactions or actions affecting the Loan;
 - 12 • not paying Plaintiff its return of principal at the earlier of the issuance of the
13 certificate of occupancy or within 12 months of the Loan Closing;
 - 14 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
15 Closing and not providing or arranging additional financing to allow Plaintiff to
16 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
17 within 12 months of the Loan Closing;
 - 18 • not paying Plaintiff its interest and fees on a monthly basis;
 - 19 • failing to provide loan servicing and administration in accordance with the Loan
20 documents and with commercially acceptable loan servicing practices;
 - 21 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
22 holding any proceeds received for the Loan;
 - 23 • commingling for significant periods of time proceeds received on the Loan with other
24 funds;
 - 25 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
26 which Defendant was aware;
 - 27 • failing to require Borrower to pay the equity down payment as required by the Loan
28 Documents.

1 Contract Damages

2 791. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
3 as yet unascertained, but which Plaintiff believes is at least \$136,395 and which will be
4 proved at trial.

5 792. Additionally, Plaintiff incurred legal and administrative costs in addressing
6 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
7 have incurred.

8 Fraud – Defendants' Misrepresentations

9 793. On the periodic draw requests sent to Plaintiff beginning in April 2009,
10 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
11 had been spent on the Peace Baptist Church project, in accordance with the approved plans
12 and budget, as per the reports, forms, and spreadsheets submitted with the draw requests,
13 and that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
14 value of the project to that point.

15 794. Prior to Plaintiff's executing the Participation Agreement and making each
16 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
17 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
18 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
19 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
20 updates on projects, including the Peace Baptist Church project, and was told that all funds
21 previously advanced by Plaintiff to BTM and its agents on the Peace Baptist Church loan
22 had been put towards the project according to the budget and plans submitted to, approved
23 by and relied on by Plaintiff.

24 Fraud – True Facts

25 795. In fact, Defendants' representations to Plaintiff as described above were false.
26 The true facts were that:

- 27 • Plaintiff's funds had not been spent on the Peace Baptist Church project in
28 accordance with the approved plans and budget as per the reports, forms, and

1 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
2 April 2009, and the reports, forms, and spreadsheets submitted to Plaintiff did not
3 accurately represent the value of the project to that point;

- 4 • all funds previously advanced by Plaintiff to BTM and its agents on the Peace Baptist
5 Church loan had not been put towards the project according to the budget and plans
6 submitted to, approved by and relied on by Plaintiff;

7 Fraud - Concealment

8 796. Defendants David Smith and BTM, including through their agents, concealed
9 from and failed to disclose to Plaintiff the following:

- 10 • the true financial and operational status of the loans and projects, including the Peace
11 Baptist Church project;
- 12 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
13 projects, including the Peace Baptist Church project, and were not being applied only
14 to project-related costs, according to the plans and budgets submitted to, approved by
15 and relied on by Plaintiff;
- 16 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
17 including payments made to unrelated third parties - friends of David Smith and
18 David Smith's wife, Carmen Cople Smith, and payments of the mortgage on the
19 Lachman Lane Property;
- 20 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
21 and its investments in overseeing the management, servicing and administration of
22 the loans and projects;
- 23 • that Smith and BTM were commingling for significant periods of time proceeds
24 received on the Loan with other funds;
- 25 • that Smith and BTM did not intend to immediately advance the full amount of
26 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
27 or else return the funds to Plaintiff, and established money market accounts to hold
28 such funds longer than five business days;

- 1 • that Smith and BTM were not maintaining appropriate records and books of account
2 reflecting interest accrued and interest received, interest rate changes, principal
3 payments and all other transactions or actions affecting the Loan.

4 Fraud – Reliance, Discovery and Damage

5 797. Plaintiff continued to fund the Peace Baptist Church loan and project in
6 response to periodic draw requests from Defendants, based on continued assurances and
7 representations of Defendants Smith and BTM, including through their agents at Arks and
8 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
9 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
10 failure to disclose that Plaintiff's funds were being commingled with other funds and
11 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
12 began working on a new program to take over the servicing and administration of the loans,
13 expand the Build to Minister church loan program into various investment funds, and market
14 those funds to third parties.

15 798. On or about July 31, 2009, during this effort to expand the loan program,
16 Plaintiff first learned of problems with the loans, including that Defendants and their agents
17 owed monies to third parties and were unable to pay them despite Plaintiff and other
18 investors having advanced funds as requested. Over the course of the next several months,
19 Plaintiff conducted an investigation in an attempt to determine what had happened to
20 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
21 misrepresentations, concealment and malfeasance. With respect to the problems discovered
22 with the loans, Plaintiff contributed additional monies in order to complete the projects,
23 including paying outstanding bills, liens, legal and administration fees, modifying the terms
24 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
25 new contractors to complete the construction.

26 799. But for Defendants' misrepresentations and concealment as described above,
27 Plaintiff would not have continued to provide funds in response to draw requests from
28 Defendants or their agents for the projects, including the Peace Baptist Church project, and

1 would not have invested efforts, time and money creating a new program to take over
2 servicing of the loans, expand the Build to Minister program into various investment funds,
3 and market those funds to third parties.

4 800. As a result of Defendants' misrepresentations and concealments, Plaintiff has
5 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
6 \$136,395 and which will be proved at trial. Additionally, Plaintiff incurred legal and
7 administrative costs in addressing and mitigating the harm caused by Defendants'
8 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
9 funds expended in creating a new program to take over servicing of the loans, expand the
10 Build to Minister program into various investment funds, and market those funds to third
11 parties, which it would not have expended but for Defendants' misrepresentations and
12 concealments.

13 *First Baptist Church of Woodbine Loan*

14 Contract Terms

15 801. On December 5, 2007, Plaintiff Holbrook entered into a Construction Note
16 Participation Agreement with Defendant BTM on a construction loan to First Baptist Church
17 of Woodbine ("First Baptist Woodbine Participation Agreement" or "Participation
18 Agreement"). The First Baptist Woodbine Participation Agreement provided that Plaintiff
19 (designated "Participant") would have a participation interest of 100% in the construction
20 note amount of \$828,080, which Defendant BTM (designated "Seller") would loan to the
21 church, First Baptist Church of Woodbine (designated "Borrower"). Under the First Baptist
22 Woodbine Participation Agreement, Plaintiff committed to fund a total of \$828,080, to be
23 advanced to Defendant BTM in response to periodic draw requests from Defendant
24 according to a projected draw schedule. In consideration for Plaintiff's advancing the funds,
25 Plaintiff was entitled to receive the return of the principal invested, as well as 10.5% interest
26 on such amount, and its pro rata portion (100%) of a Participation Fee (of \$12,421.20), with
27 interest and fees to be paid monthly, and the principal payable to Plaintiff at the issuance of
28 a Certificate of Occupancy for the Property or twelve (12) months from the date of Loan

1 Closing, whichever first occurs, as provided for in the Loan Agreement which was
2 specifically referenced by and incorporated into the Participation Agreement. The
3 Participation Agreement also provided that in the event Plaintiff had not received its return
4 of principal at the time specified, BTM was either to provide or to arrange additional
5 financing so that Plaintiff would receive all its funds.

6 802. Defendant BTM, for its part, agreed among other things, that:

- 7
- 8 • “In the event Seller [BTM] does not for any reason advance to Borrower
9 [church] the full amount of the contemplated advance [the draws of funds that
10 Defendants called for every month] on the date of receipt of such Purchase
11 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
12 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
13 to the amount of such contemplated advance not made.” (Participation
14 Agreement, Schedule 4, ¶2.)
- 15 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
16 the terms of the Loan Documents and with this Agreement. Seller [BTM]
17 shall provide loan servicing in accordance with commercially acceptable loan
18 servicing practices and with the same degree of care that is customarily
19 employed and exercised by Seller [BTM] in the administration and servicing
20 of loans of a similar nature held by it for its own account (the “Servicing
21 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 22 • “The Seller [BTM] shall maintain appropriate records and books of account
23 reflecting interest accrued and interest received, interest rate changes, principal
24 payments and all other transactions or actions affecting the Loan, which
25 records shall be keep in accordance with accounting principles consistently
26 and customarily applied by Seller [BTM].” (Participation Agreement,
27 Schedule 4, ¶9.)
- 28 • “Seller [BTM] further agrees that in performing its obligations hereunder,
29 Seller shall: (a) act in a custodial capacity on behalf of the Participant
30 [Plaintiff] with respect to its holding of any underlying instrument or collateral
31 and in holding any proceeds received for the Loan; (b) not commingle for any
32 significant period of time proceeds received on the Loan; (c) directly pass
33 through any proceeds received from the Loan to Participant [Plaintiff] as
34 provided in Section 4 of this Agreement, less any proceeds that represent
35 servicing or other compensation to Seller [BTM] or an interest in the Loan
36 retained by the Seller [BTM], all as more particularly provided for herein; and
37 (d) administer the Loan in accordance with the Servicing Standard as provided
38 herein.” (Participation Agreement, Schedule 4, ¶9.)

803. The parties agreed that the Plaintiff would advance funds to BTM, as called
for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate

1 Arks and/or Arks' wholly owned subsidiary Noah Construction, on behalf of the Borrower
2 (the Church), to service the loan and advance the funds towards the construction project,
3 according to the budget and plans approved and relied upon by the Plaintiff in entering into
4 the Participation Agreement. Upon information and belief, BTM had an agreement with
5 Arks whereby Arks took over the servicing and administration of the Loan to First Baptist
6 Church of Woodbine. The Participation Agreement specifically references and incorporates
7 the Loan Agreement, which is between Arks "and its affiliate BTM Funding, Inc." and the
8 Borrower (the Church), and which provides that "the Loan proceeds are to be used by
9 Church solely for the construction of a church, church-related improvements, and/or costs
10 related thereto (the "Project") upon the land described in the Security Instrument (the
11 "Property") in accordance with the plans and specifications approved by ARKS."

12 804. Plaintiff agreed to advance the funds in response to periodic draws based on
13 the project plans and budget which were attached to the Participation Agreement and/or the
14 Loan Agreement that was incorporated into the Participation Agreement, and which had
15 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
16 committing to the Participation Agreement for the First Baptist Church of Woodbine Loan.
17 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
18 contractors, suppliers and other third parties as well as specific project-related servicing fees
19 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
20 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
21 approval from Plaintiff for any material change to the budget or plans.

22 Contract Performance and Breach

23 805. Upon execution of the Participation Agreement, Plaintiff began funding draw
24 requests for the First Baptist Church of Woodbine project based on draw requests by BTM
25 and its agents. Plaintiff Holbrook advanced \$707,350 to BTM and its agents for the First
26 Baptist Church of Woodbine Loan between November 2007 and July 2009.

27 ///

28 ///

1 806. Defendant BTM breached the Participation Agreement by, among other things,
2 the following:

- 3 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
4 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
5 Ministries, Inc. (or to the servicers or contractors for authorized project
6 disbursements on the Borrower's behalf), and failing to return within five business
7 days to Plaintiff any funds not so advanced;
- 8 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
9 contractors, suppliers and other third parties as well as specific project-related
10 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
11 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
12 failing to get prior approval from Plaintiff for any material change to the budget or
13 plans;
- 14 • failing to maintain appropriate records and books of account reflecting interest
15 accrued and interest received, interest rate changes, principal payments and all other
16 transactions or actions affecting the Loan;
- 17 • not paying Plaintiff its return of principal at the earlier of the issuance of the
18 certificate of occupancy or within 12 months of the Loan Closing;
- 19 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
20 Closing and not providing or arranging additional financing to allow Plaintiff to
21 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
22 within 12 months of the Loan Closing;
- 23 • not paying Plaintiff its interest and fees on a monthly basis;
- 24 • failing to provide loan servicing and administration in accordance with the Loan
25 documents and with commercially acceptable loan servicing practices;
- 26 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
27 holding any proceeds received for the Loan;

28 ///

- 1 • Plaintiff's funds had not been spent on the First Baptist Church of Woodbine project
2 in accordance with the approved plans and budget as per the reports, forms, and
3 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
4 November 2007, and the reports, forms, and spreadsheets submitted to Plaintiff did
5 not accurately represent the value of the project to that point;
- 6 • all funds previously advanced by Plaintiff to BTM and its agents on the First Baptist
7 Church of Woodbine loan had not been put towards the project according to the
8 budget and plans submitted to, approved by and relied on by Plaintiff;

9 Fraud - Concealment

10 812. Defendants David Smith and BTM, including through their agents, concealed
11 from and failed to disclose to Plaintiff the following:

- 12 • the true financial and operational status of the loans and projects, including the First
13 Baptist Church of Woodbine project;
- 14 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
15 projects, including the First Baptist Church of Woodbine project, and were not being
16 applied only to project-related costs, according to the plans and budgets submitted to,
17 approved by and relied on by Plaintiff;
- 18 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
19 including payments made to unrelated third parties - friends of David Smith and
20 David Smith's wife, Carmen Cople Smith, and payments of the mortgage on the
21 Lachman Lane Property;
- 22 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
23 to Randy Barton and for "sales commissions" to Carmen Cople Smith;
- 24 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
25 and its investments in overseeing the management, servicing and administration of
26 the loans and projects;
- 27 • that Smith and BTM were commingling for significant periods of time proceeds
28 received on the Loan with other funds;

- 1 • that Smith and BTM did not intend to immediately advance the full amount of
- 2 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
- 3 or else return the funds to Plaintiff, and established money market accounts to hold
- 4 such funds longer than five business days;
- 5 • that Smith and BTM were not maintaining appropriate records and books of account
- 6 reflecting interest accrued and interest received, interest rate changes, principal
- 7 payments and all other transactions or actions affecting the Loan.

8 Fraud – Reliance, Discovery and Damage

9 813. Plaintiff continued to fund the First Baptist Church of Woodbine loan and

10 project in response to periodic draw requests from Defendants, based on continued

11 assurances and representations of Defendants Smith and BTM, including through their

12 agents at Arks and Noah, that Plaintiff's funds advanced thus far had gone towards the

13 projects according to the plans and budget reviewed, approved and relied upon by Plaintiff,

14 and based on Defendants' failure to disclose that Plaintiff's funds were being commingled

15 with other funds and diverted to non-project related costs and payments. In or about

16 February 2009, Plaintiff began working on a new program to take over the servicing and

17 administration of the loans, expand the Build to Minister church loan program into various

18 investment funds, and market those funds to third parties.

19 814. On or about July 31, 2009, during this effort to expand the loan program,

20 Plaintiff first learned of problems with the loans, including that Defendants and their agents

21 owed monies to third parties and were unable to pay them despite Plaintiff and other

22 investors having advanced funds as requested. Over the course of the next several months,

23 Plaintiff conducted an investigation in an attempt to determine what had happened to

24 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,

25 misrepresentations, concealment and malfeasance. With respect to the problems discovered

26 with the loans, Plaintiff contributed additional monies in order to complete the projects,

27 including paying outstanding bills, liens, legal and administration fees, modifying the terms

28 ///

1 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
2 new contractors to complete the construction.

3 815. But for Defendants' misrepresentations and concealment as described above,
4 Plaintiff would not have continued to provide funds in response to draw requests from
5 Defendants or their agents for the projects, including the First Baptist Church of Woodbine
6 project, and would not have invested efforts, time and money creating a new program to take
7 over servicing of the loans, expand the Build to Minister program into various investment
8 funds, and market those funds to third parties.

9 816. As a result of Defendants' misrepresentations and concealments, Plaintiff has
10 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
11 \$956,552 and which will be proved at trial. Additionally, Plaintiff incurred legal and
12 administrative costs in addressing and mitigating the harm caused by Defendants'
13 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
14 funds expended in creating a new program to take over servicing of the loans, expand the
15 Build to Minister program into various investment funds, and market those funds to third
16 parties, which it would not have expended but for Defendants' misrepresentations and
17 concealments.

18 *Victory Outreach Loan*

19 Contract Terms

20 817. On December 5, 2007, Plaintiff Holbrook entered into a Construction Note
21 Participation Agreement with Defendant BTM on a construction loan to Victory Outreach
22 ("Victory Outreach Participation Agreement" or "Participation Agreement"). The Victory
23 Outreach Participation Agreement provided that Plaintiff (designated "Participant") would
24 have a participation interest of 100% in the construction note amount of \$1,251,274, which
25 Defendant BTM (designated "Seller") would loan to the church, Victory Outreach
26 (designated "Borrower"). Under the Victory Outreach Participation Agreement, Plaintiff
27 committed to fund a total of \$1,251,274, to be advanced to Defendant BTM in response to
28 periodic draw requests from Defendant according to a projected draw schedule. In

1 consideration for Plaintiff's advancing the funds, Plaintiff was entitled to receive the return
2 of the principal invested, as well as 10.5% interest on such amount, and its pro rata portion
3 (100%) of a Participation Fee (of \$18,769.11), with interest and fees to be paid monthly, and
4 the principal payable to Plaintiff at the issuance of a Certificate of Occupancy for the
5 Property or twelve (12) months from the date of Loan Closing, whichever first occurs, as
6 provided for in the Loan Agreement which was specifically referenced by and incorporated
7 into the Participation Agreement. The Participation Agreement also provided that in the
8 event Plaintiff had not received its return of principal at the time specified, BTM was either
9 to provide or to arrange additional financing so that Plaintiff would receive all its funds.

10 818. Defendant BTM, for its part, agreed among other things, that:

- 11 • "In the event Seller [BTM] does not for any reason advance to Borrower
12 [church] the full amount of the contemplated advance [the draws of funds that
13 Defendants called for every month] on the date of receipt of such Purchase
14 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
15 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
16 to the amount of such contemplated advance not made." (Participation
17 Agreement, Schedule 4, ¶2.)
- 18 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
19 the terms of the Loan Documents and with this Agreement. Seller [BTM]
20 shall provide loan servicing in accordance with commercially acceptable loan
21 servicing practices and with the same degree of care that is customarily
22 employed and exercised by Seller [BTM] in the administration and servicing
23 of loans of a similar nature held by it for its own account (the "Servicing
24 Standard")." (Participation Agreement, Schedule 4, ¶9.)
- 25 • "The Seller [BTM] shall maintain appropriate records and books of account
26 reflecting interest accrued and interest received, interest rate changes, principal
27 payments and all other transactions or actions affecting the Loan, which
28 records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)
- "Seller [BTM] further agrees that in performing its obligations hereunder,
Seller shall: (a) act in a custodial capacity on behalf of the Participant
[Plaintiff] with respect to its holding of any underlying instrument or collateral
and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein." (Participation Agreement, Schedule 4, ¶ 9.)

- 1 • “[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
2 may take or omit to take any action under any of the Loan Documents which
3 would result in the following (each a “Material Change”): (a) reduce or
4 increase the amounts of principal or interest payments of the Loan, (b) reduce
5 or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
6 postpone any due date for payment of principal or interest in which Participant
7 [Plaintiff] shares, including, without limitation, the final maturity date of the
8 Loan, (d) except as expressly permitted under the Loan Documents, release or
9 subordinate any existing collateral described in the Loan Documents, (e)
10 release the liability of Borrower or any guarantor for the Loan, (f) consent to
11 the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
12 (ii) any direct or indirect interest in Borrower ... (g) make or consent to any
13 change in the principal amount of the Note; or (h) waive a default under the
14 Loan Documents arising from the failure to make payments as and when due
15 on the Loan. . . .” ((Participation Agreement, Schedule 4, ¶ 11.)
- 16 • “Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
17 of any material default with respect to the Loan of which Seller [BTM] is
18 actually aware and of any other matters which, in Seller’s judgment, materially
19 affect the interest of Participant [Plaintiff] with respect to the Loan
20 (collectively, a “Material Default”).” (Participation Agreement, Schedule 4, ¶
21 11.)

22 819. The parties agreed that the Plaintiff would advance funds to BTM, as called
23 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
24 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
25 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
26 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
27 (the Church), to service the loan and advance the funds towards the construction project,
28 according to the budget and plans approved and relied upon by the Plaintiff in entering into
the Participation Agreement. Upon information and belief, BTM had an agreement with
Arks whereby Arks took over the servicing and administration of the Loan to Victory
Outreach. The Participation Agreement specifically references and incorporates the Loan
Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower
(the Church), and which provides that “the Loan proceeds are to be used by Church solely
for the construction of a church, church-related improvements, and/or costs related thereto
(the “Project”) upon the land described in the Security Instrument (the “Property”) in
accordance with the plans and specifications approved by ARKS.”

///

1 820. Plaintiff agreed to advance the funds in response to periodic draws based on
2 the project plans and budget which were attached to the Participation Agreement and/or the
3 Loan Agreement that was incorporated into the Participation Agreement, and which had
4 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
5 committing to the Participation Agreement for the Victory Outreach Loan. Defendant BTM
6 agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors,
7 suppliers and other third parties as well as specific project-related servicing fees to itself,
8 Arks and Noah, according to the budget and plans submitted to and approved by Plaintiffs
9 and incorporated into the Participation Agreement, and agreed to get prior approval from
10 Plaintiff for any material change to the budget or plans.

11 Contract Performance and Breach

12 821. Upon execution of the Participation Agreement, Plaintiff began funding draw
13 requests for the Victory Outreach project based on draw requests by BTM and its agents.
14 Plaintiff Holbrook advanced \$1,251,274 to BTM and its agents for the Victory Outreach
15 Loan between November 2007 and May 2009.

16 822. Defendant BTM breached the Participation Agreement by, among other things,
17 the following:

- 18 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
19 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
20 Ministries, Inc. (or to the servicers or contractors for authorized project
21 disbursements on the Borrower's behalf), and failing to return within five business
22 days to Plaintiff any funds not so advanced;
- 23 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
24 contractors, suppliers and other third parties as well as specific project-related
25 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
26 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
27 failing to get prior approval from Plaintiff for any material change to the budget or
28 plans;

- 1 • failing to maintain appropriate records and books of account reflecting interest
2 accrued and interest received, interest rate changes, principal payments and all other
3 transactions or actions affecting the Loan;
- 4 • not paying Plaintiff its return of principal at the earlier of the issuance of the
5 certificate of occupancy or within 12 months of the Loan Closing;
- 6 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
7 Closing and not providing or arranging additional financing to allow Plaintiff to
8 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
9 within 12 months of the Loan Closing;
- 10 • not paying Plaintiff its interest and fees on a monthly basis;
- 11 • failing to provide loan servicing and administration in accordance with the Loan
12 documents and with commercially acceptable loan servicing practices;
- 13 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
14 holding any proceeds received for the Loan;
- 15 • commingling for significant periods of time proceeds received on the Loan with other
16 funds;
- 17 • diverting Plaintiff's funds for non-approved purposes, including purchase of property
18 owned by Defendants' relatives for well in excess of fair market value;
- 19 • requiring additional payments by Plaintiff beyond what was due under the
20 Participation Agreement and the approved budget and plans incorporated therein;
- 21 • postponing due dates for payment of principal or interest in which Plaintiff shared
22 without obtaining the consent of Plaintiff;
- 23 • reducing or increasing the amounts of principal or interest payments of the Loan
24 without obtaining the consent of Plaintiff;
- 25 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
26 which Defendant was aware, including Defendants' knowledge prior to closing of the
27 high likelihood of material problems with the permitting process but allowing the
28 loan to close anyway without disclosure to Plaintiff.

1 Contract Damages

2 823. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
3 as yet unascertained, but which Plaintiff believes is at least \$1,644,448 and which will be
4 proved at trial.

5 824. Additionally, Plaintiff incurred legal and administrative costs in addressing
6 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
7 have incurred.

8 Fraud – Defendants' Misrepresentations

9 825. On the periodic draw requests sent to Plaintiff beginning in November 2007,
10 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
11 had been spent on the Victory Outreach project, in accordance with the approved plans and
12 budget, as per the reports, forms, and spreadsheets submitted with the draw requests, and
13 that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
14 value of the project to that point.

15 826. Prior to Plaintiff's executing the Participation Agreement and making each
16 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
17 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
18 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
19 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
20 updates on projects, including the Victory Outreach project, and was told that all funds
21 previously advanced by Plaintiff to BTM and its agents on the Victory Outreach loan had
22 been put towards the project according to the budget and plans submitted to, approved by
23 and relied on by Plaintiff.

24 Fraud – True Facts

25 827. In fact, Defendants' representations to Plaintiff as described above were false.
26 The true facts were that:

- 27 • Plaintiff's funds had not been spent on the Victory Outreach project in accordance
28 with the approved plans and budget as per the reports, forms, and spreadsheets

1 submitted with the periodic draw requests sent to Plaintiff beginning in November
2 2007, and the reports, forms, and spreadsheets submitted to Plaintiff did not
3 accurately represent the value of the project to that point;

- 4 • all funds previously advanced by Plaintiff to BTM and its agents on the Victory
5 Outreach loan had not been put towards the project according to the budget and plans
6 submitted to, approved by and relied on by Plaintiff;

7 Fraud - Concealment

8 828. Defendants David Smith and BTM, including through their agents, concealed
9 from and failed to disclose to Plaintiff the following:

- 10 • the true financial and operational status of the loans and projects, including the
11 Victory Outreach project;
- 12 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
13 projects, including the Victory Outreach project, and were not being applied only to
14 project-related costs, according to the plans and budgets submitted to, approved by
15 and relied on by Plaintiff;
- 16 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
17 including payments made to unrelated third parties - friends of David Smith and
18 David Smith's wife, Carmen Copple Smith, payments of the mortgage on the
19 Lachman Lane Property, and purchase of property owned by Defendants' relatives for
20 well in excess of fair market value;
- 21 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
22 to Randy Barton and for "sales commissions" to Carmen Copple Smith;
- 23 • that Smith and BTM knew prior to closing there was a high likelihood of material
24 problems with the permitting process but allowed the loan to close anyway;
- 25 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
26 and its investments in overseeing the management, servicing and administration of
27 the loans and projects;

28 ///

- 1 • that Smith and BTM were commingling for significant periods of time proceeds
2 received on the Loan with other funds;
- 3 • that Smith and BTM did not intend to immediately advance the full amount of
4 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
5 or else return the funds to Plaintiff, and established money market accounts to hold
6 such funds longer than five business days;
- 7 • that Smith and BTM were not maintaining appropriate records and books of account
8 reflecting interest accrued and interest received, interest rate changes, principal
9 payments and all other transactions or actions affecting the Loan.

10 Fraud – Reliance, Discovery and Damage

11 829. Plaintiff continued to fund the Victory Outreach loan and project in response
12 to periodic draw requests from Defendants, based on continued assurances and
13 representations of Defendants Smith and BTM, including through their agents at Arks and
14 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
15 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
16 failure to disclose that Plaintiff's funds were being commingled with other funds and
17 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
18 began working on a new program to take over the servicing and administration of the loans,
19 expand the Build to Minister church loan program into various investment funds, and market
20 those funds to third parties.

21 830. On or about July 31, 2009, during this effort to expand the loan program,
22 Plaintiff first learned of problems with the loans, including that Defendants and their agents
23 owed monies to third parties and were unable to pay them despite Plaintiff and other
24 investors having advanced funds as requested. Over the course of the next several months,
25 Plaintiff conducted an investigation in an attempt to determine what had happened to
26 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
27 misrepresentations, concealment and malfeasance. With respect to the problems discovered
28 with the loans, Plaintiff contributed additional monies in order to complete the projects,

1 including paying outstanding bills, liens, legal and administration fees, modifying the terms
2 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
3 new contractors to complete the construction.

4 831. But for Defendants' misrepresentations and concealment as described above,
5 Plaintiff would not have continued to provide funds in response to draw requests from
6 Defendants or their agents for the projects, including the Victory Outreach project, and
7 would not have invested efforts, time and money creating a new program to take over
8 servicing of the loans, expand the Build to Minister program into various investment funds,
9 and market those funds to third parties.

10 832. As a result of Defendants' misrepresentations and concealments, Plaintiff has
11 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
12 \$1,644,448 and which will be proved at trial. Additionally, Plaintiff incurred legal and
13 administrative costs in addressing and mitigating the harm caused by Defendants'
14 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
15 funds expended in creating a new program to take over servicing of the loans, expand the
16 Build to Minister program into various investment funds, and market those funds to third
17 parties, which it would not have expended but for Defendants' misrepresentations and
18 concealments.

19 *Delaware Valley Baptist Church Loan*

20 Contract Terms

21 833. On November 3, 2008, Plaintiff Holbrook entered into a Construction Note
22 Participation Agreement with Defendant BTM on a construction loan to Delaware Valley
23 Baptist Church ("Delaware Valley Participation Agreement" or "Participation Agreement").
24 The Delaware Valley Participation Agreement provided that Plaintiff (designated
25 "Participant") would have a participation interest of 6.1217% in the construction note
26 amount of \$1,392,581, which Defendant BTM (designated "Seller") would loan to the
27 church, Delaware Valley Baptist Church (designated "Borrower"). Under the Delaware
28 Valley Participation Agreement, Plaintiff committed to fund a total of \$85,249.63, to be

1 advanced to Defendant BTM in response to periodic draw requests from Defendant
2 according to a projected draw schedule. In consideration for Plaintiff's advancing the funds,
3 Plaintiff was entitled to receive the return of the principal invested, as well as 10.5% interest
4 on such amount, and its pro rata portion (6.1217%) of a Participation Fee (of \$20,888.71),
5 with interest and fees to be paid monthly, and the principal payable to Plaintiff at the
6 issuance of a Certificate of Occupancy for the Property or twelve (12) months from the date
7 of Loan Closing, whichever first occurs, as provided for in the Loan Agreement which was
8 specifically referenced by and incorporated into the Participation Agreement. The
9 Participation Agreement also provided that in the event Plaintiff had not received its return
10 of principal at the time specified, BTM was either to provide or to arrange additional
11 financing so that Plaintiff would receive all its funds.

12 834. Defendant BTM, for its part, agreed among other things, that:

- 13 • "In the event Seller [BTM] does not for any reason advance to Borrower
14 [church] the full amount of the contemplated advance [the draws of funds that
15 Defendants called for every month] on the date of receipt of such Purchase
16 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
17 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
18 to the amount of such contemplated advance not made." (Participation
19 Agreement, Schedule 4, ¶2.)
- 20 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
21 the terms of the Loan Documents and with this Agreement. Seller [BTM]
22 shall provide loan servicing in accordance with commercially acceptable loan
23 servicing practices and with the same degree of care that is customarily
24 employed and exercised by Seller [BTM] in the administration and servicing
25 of loans of a similar nature held by it for its own account (the "Servicing
26 Standard")." (Participation Agreement, Schedule 4, ¶9.)
- 27 • "The Seller [BTM] shall maintain appropriate records and books of account
28 reflecting interest accrued and interest received, interest rate changes, principal
payments and all other transactions or actions affecting the Loan, which
records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)
- "Seller [BTM] further agrees that in performing its obligations hereunder,
Seller shall: (a) act in a custodial capacity on behalf of the Participant
[Plaintiff] with respect to its holding of any underlying instrument or collateral
and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan

1 retained by the Seller [BTM], all as more particularly provided for herein; and
2 (d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)

3 835. The parties agreed that the Plaintiff would advance funds to BTM, as called
4 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
5 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
6 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
7 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
8 (the Church), to service the loan and advance the funds towards the construction project,
9 according to the budget and plans approved and relied upon by the Plaintiff in entering into
10 the Participation Agreement. Upon information and belief, BTM had an agreement with
11 Arks whereby Arks took over the servicing and administration of the Loan to Delaware
12 Valley Baptist Church. The Participation Agreement specifically references and
13 incorporates the Loan Agreement, which is between Arks “and its affiliate BTM Funding,
14 Inc.” and the Borrower (the Church), and which provides that “the Loan proceeds are to be
15 used by Church solely for the construction of a church, church-related improvements, and/or
16 costs related thereto (the “Project”) upon the land described in the Security Instrument (the
17 “Property”) in accordance with the plans and specifications approved by ARKS.”

18 836. Plaintiff agreed to advance the funds in response to periodic draws based on
19 the project plans and budget which were attached to the Participation Agreement and/or the
20 Loan Agreement that was incorporated into the Participation Agreement, and which had
21 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
22 committing to the Participation Agreement for the Delaware Valley Baptist Church Loan.
23 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
24 contractors, suppliers and other third parties as well as specific project-related servicing fees
25 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
26 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
27 approval from Plaintiff for any material change to the budget or plans.

28 ///

Contract Performance and Breach

1
2 837. Upon execution of the Participation Agreement, Plaintiff began funding draw
3 requests for the Delaware Valley Baptist Church project based on draw requests by BTM
4 and its agents. Plaintiff Holbrook advanced \$85,250 to BTM and its agents for the Delaware
5 Valley Baptist Church Loan in August 2008.

6 838. Defendant BTM breached the Participation Agreement by, among other things,
7 the following:

- 8 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
9 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
10 Ministries, Inc. (or to the servicers or contractors for authorized project
11 disbursements on the Borrower's behalf), and failing to return within five business
12 days to Plaintiff any funds not so advanced;
- 13 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
14 contractors, suppliers and other third parties as well as specific project-related
15 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
16 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
17 failing to get prior approval from Plaintiff for any material change to the budget or
18 plans;
- 19 • failing to maintain appropriate records and books of account reflecting interest
20 accrued and interest received, interest rate changes, principal payments and all other
21 transactions or actions affecting the Loan;
- 22 • not paying Plaintiff its interest and fees on a monthly basis;
- 23 • failing to provide loan servicing and administration in accordance with the Loan
24 documents and with commercially acceptable loan servicing practices;
- 25 • requiring additional payments by Plaintiff beyond what was due under the
26 Participation Agreement and the approved budget and plans incorporated therein;
- 27 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
28 holding any proceeds received for the Loan;

- 1 • Plaintiff's funds had not been spent on the Delaware Valley Baptist Church project in
2 accordance with the approved plans and budget as per the reports, forms, and
3 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
4 August 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
5 accurately represent the value of the project to that point;
- 6 • all funds previously advanced by Plaintiff to BTM and its agents on the Delaware
7 Valley Baptist Church loan had not been put towards the project according to the
8 budget and plans submitted to, approved by and relied on by Plaintiff;

9 Fraud - Concealment

10 844. Defendants David Smith and BTM, including through their agents, concealed
11 from and failed to disclose to Plaintiff the following:

- 12 • the true financial and operational status of the loans and projects, including the
13 Delaware Valley Baptist Church project;
- 14 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
15 projects, including the Delaware Valley Baptist Church project, and were not being
16 applied only to project-related costs, according to the plans and budgets submitted to,
17 approved by and relied on by Plaintiff;
- 18 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
19 including payments made to unrelated third parties - friends of David Smith and
20 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
21 Lachman Lane Property;
- 22 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
23 and its investments in overseeing the management, servicing and administration of
24 the loans and projects;
- 25 • that Smith and BTM were commingling for significant periods of time proceeds
26 received on the Loan with other funds;
- 27 • that Smith and BTM did not intend to immediately advance the full amount of
28 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf

1 or else return the funds to Plaintiff, and established money market accounts to hold
2 such funds longer than five business days;

- 3 • that Smith and BTM were not maintaining appropriate records and books of account
4 reflecting interest accrued and interest received, interest rate changes, principal
5 payments and all other transactions or actions affecting the Loan.

6 Fraud – Reliance, Discovery and Damage

7 845. Plaintiff continued to fund the Delaware Valley Baptist Church loan and
8 project in response to periodic draw requests from Defendants, based on continued
9 assurances and representations of Defendants Smith and BTM, including through their
10 agents at Arks and Noah, that Plaintiff's funds advanced thus far had gone towards the
11 projects according to the plans and budget reviewed, approved and relied upon by Plaintiff,
12 and based on Defendants' failure to disclose that Plaintiff's funds were being commingled
13 with other funds and diverted to non-project related costs and payments. In or about
14 February 2009, Plaintiff began working on a new program to take over the servicing and
15 administration of the loans, expand the Build to Minister church loan program into various
16 investment funds, and market those funds to third parties.

17 846. On or about July 31, 2009, during this effort to expand the loan program,
18 Plaintiff first learned of problems with the loans, including that Defendants and their agents
19 owed monies to third parties and were unable to pay them despite Plaintiff and other
20 investors having advanced funds as requested. Over the course of the next several months,
21 Plaintiff conducted an investigation in an attempt to determine what had happened to
22 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
23 misrepresentations, concealment and malfeasance. With respect to the problems discovered
24 with the loans, Plaintiff contributed additional monies in order to complete the projects,
25 including paying outstanding bills, liens, legal and administration fees, modifying the terms
26 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
27 new contractors to complete the construction.

28 ///

1 847. But for Defendants' misrepresentations and concealment as described above,
2 Plaintiff would not have continued to provide funds in response to draw requests from
3 Defendants or their agents for the projects, including the Delaware Valley Baptist Church
4 project, and would not have invested efforts, time and money creating a new program to take
5 over servicing of the loans, expand the Build to Minister program into various investment
6 funds, and market those funds to third parties.

7 848. As a result of Defendants' misrepresentations and concealments, Plaintiff has
8 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
9 \$50,569 and which will be proved at trial. Additionally, Plaintiff incurred legal and
10 administrative costs in addressing and mitigating the harm caused by Defendants'
11 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
12 funds expended in creating a new program to take over servicing of the loans, expand the
13 Build to Minister program into various investment funds, and market those funds to third
14 parties, which it would not have expended but for Defendants' misrepresentations and
15 concealments.

16 **Plaintiff Strongback**

17 ***Believers Fellowship of Jacksonville Loan***

18 **Contract Terms**

19 849. On January 25, 2008, Plaintiff Strongback entered into a Construction Note
20 Participation Agreement with Defendant BTM on a construction loan to Believers
21 Fellowship of Jacksonville ("Believers Participation Agreement" or "Participation
22 Agreement"). The Believers Participation Agreement as amended provided that Plaintiff
23 (designated "Participant") would have a participation interest of 100% in the construction
24 note amount of \$588,547, which Defendant BTM (designated "Seller") would loan to the
25 church, Believers Fellowship of Jacksonville (designated "Borrower"). The Participation
26 Agreement was amended on May 19, 2008, so that the total construction note amount was
27 \$454,854 and Plaintiff had a 50% interest. Under the Believers Participation Agreement as
28 amended, Plaintiff committed to fund a total of \$227,427, to be advanced to Defendant BTM

1 in response to periodic draw requests from Defendant according to a projected draw
2 schedule. In consideration for Plaintiff's advancing the funds, Plaintiff was entitled to
3 receive the return of the principal invested, as well as 10.5% interest on such amount, and its
4 pro rata portion (50%) of a Participation Fee (of \$6,822.81), with interest and fees to be paid
5 monthly, and the principal payable to Plaintiff at the issuance of a Certificate of Occupancy
6 for the Property or twelve (12) months from the date of Loan Closing, whichever first
7 occurs, as provided for in the Loan Agreement which was specifically referenced by and
8 incorporated into the Participation Agreement. The Participation Agreement also provided
9 that in the event Plaintiff had not received its return of principal at the time specified, BTM
10 was either to provide or to arrange additional financing so that Plaintiff would receive all its
11 funds.

12 850. Defendant BTM, for its part, agreed among other things, that:

- 13 • "In the event Seller [BTM] does not for any reason advance to Borrower
14 [church] the full amount of the contemplated advance [the draws of funds that
15 Defendants called for every month] on the date of receipt of such Purchase
16 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
17 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
18 to the amount of such contemplated advance not made." (Participation
19 Agreement, Schedule 4, ¶2.)
- 20 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
21 the terms of the Loan Documents and with this Agreement. Seller [BTM]
22 shall provide loan servicing in accordance with commercially acceptable loan
23 servicing practices and with the same degree of care that is customarily
24 employed and exercised by Seller [BTM] in the administration and servicing
25 of loans of a similar nature held by it for its own account (the "Servicing
26 Standard")." (Participation Agreement, Schedule 4, ¶9.)
- 27 • "The Seller [BTM] shall maintain appropriate records and books of account
28 reflecting interest accrued and interest received, interest rate changes, principal
payments and all other transactions or actions affecting the Loan, which
records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)
- "Seller [BTM] further agrees that in performing its obligations hereunder,
Seller shall: (a) act in a custodial capacity on behalf of the Participant
[Plaintiff] with respect to its holding of any underlying instrument or collateral
and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan

1 retained by the Seller [BTM], all as more particularly provided for herein; and
2 (d) administer the Loan in accordance with the Servicing Standard as provided
3 herein.” (Participation Agreement, Schedule 4, ¶ 9.)

- 4 • “Seller represents and warrants to Participant that, as of the date hereof ... no
5 default in the payment of principal or interest on the Loan has occurred and
6 remains uncured under the Loan Documents.” (Participation Agreement,
7 Schedule 4, ¶ 15.)
- 8 • “[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
9 may take or omit to take any action under any of the Loan Documents which
10 would result in the following (each a “Material Change”): (a) reduce or
11 increase the amounts of principal or interest payments of the Loan, (b) reduce
12 or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
13 postpone any due date for payment of principal or interest in which Participant
14 [Plaintiff] shares, including, without limitation, the final maturity date of the
15 Loan, (d) except as expressly permitted under the Loan Documents, release or
16 subordinate any existing collateral described in the Loan Documents, (e)
17 release the liability of Borrower or any guarantor for the Loan, (f) consent to
18 the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
19 (ii) any direct or indirect interest in Borrower ... (g) make or consent to any
20 change in the principal amount of the Note; or (h) waive a default under the
21 Loan Documents arising from the failure to make payments as and when due
22 on the Loan. . . .” ((Participation Agreement, Schedule 4, ¶ 11.)
- 23 • “Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
24 of any material default with respect to the Loan of which Seller [BTM] is
25 actually aware and of any other matters which, in Seller’s judgment, materially
26 affect the interest of Participant [Plaintiff] with respect to the Loan
27 (collectively, a “Material Default”).” (Participation Agreement, Schedule 4, ¶
28 11.)

851. The parties agreed that the Plaintiff would advance funds to BTM, as called
for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
(the Church), to service the loan and advance the funds towards the construction project,
according to the budget and plans approved and relied upon by the Plaintiff in entering into
the Participation Agreement. Upon information and belief, BTM had an agreement with
Arks whereby Arks took over the servicing and administration of the Loan to Believers
Fellowship of Jacksonville. The Participation Agreement specifically references and
incorporates the Loan Agreement, which is between Arks “and its affiliate BTM Funding,
Inc.” and the Borrower (the Church), and which provides that “the Loan proceeds are to be

1 used by Church solely for the construction of a church, church-related improvements, and/or
2 costs related thereto (the "Project") upon the land described in the Security Instrument (the
3 "Property") in accordance with the plans and specifications approved by ARKS."

4 852. Plaintiff agreed to advance the funds in response to periodic draws based on
5 the project plans and budget which were attached to the Participation Agreement and/or the
6 Loan Agreement that was incorporated into the Participation Agreement, and which had
7 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
8 committing to the Participation Agreement for the Believers Fellowship of Jacksonville
9 Loan. Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay
10 contractors, sub-contractors, suppliers and other third parties as well as specific project-
11 related servicing fees to itself, Arks and Noah, according to the budget and plans submitted
12 to and approved by Plaintiffs and incorporated into the Participation Agreement, and agreed
13 to get prior approval from Plaintiff for any material change to the budget or plans.

14 Contract Performance and Breach

15 853. Upon execution of the Participation Agreement, Plaintiff began funding draw
16 requests for the Believers Fellowship of Jacksonville project based on draw requests by
17 BTM and its agents. Plaintiff Strongback advanced \$227,428 to BTM and its agents for the
18 Believers Fellowship of Jacksonville Loan between January 2008 and September 2008.

19 854. Defendant BTM breached the Participation Agreement by, among other things,
20 the following:

- 21 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
22 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
23 Ministries, Inc. (or to the servicers or contractors for authorized project
24 disbursements on the Borrower's behalf), and failing to return within five business
25 days to Plaintiff any funds not so advanced;
- 26 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
27 contractors, suppliers and other third parties as well as specific project-related
28 servicing fees to itself, Arks and Noah, according to the budget and plans submitted

1 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
2 failing to get prior approval from Plaintiff for any material change to the budget or
3 plans;

- 4 • failing to maintain appropriate records and books of account reflecting interest
5 accrued and interest received, interest rate changes, principal payments and all other
6 transactions or actions affecting the Loan;
- 7 • not paying Plaintiff its return of principal at the earlier of the issuance of the
8 certificate of occupancy or within 12 months of the Loan Closing;
- 9 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
10 Closing and not providing or arranging additional financing to allow Plaintiff to
11 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
12 within 12 months of the Loan Closing;
- 13 • not paying Plaintiff its interest and fees on a monthly basis;
- 14 • failing to provide loan servicing and administration in accordance with the Loan
15 documents and with commercially acceptable loan servicing practices;
- 16 • requiring additional payments by Plaintiff beyond what was due under the
17 Participation Agreement and the approved budget and plans incorporated therein;
- 18 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
19 holding any proceeds received for the Loan;
- 20 • commingling for significant periods of time proceeds received on the Loan with other
21 funds;
- 22 • failing to inform Plaintiff that as of the date of the Participation Agreement a default
23 in the payment of principal or interest on the Loan had occurred and remained
24 uncured;
- 25 • waiving a default under the Loan Documents arising from the failure to make
26 payments as and when due on the Loan without obtaining the consent of Plaintiff;
- 27 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
28 which Defendant was aware.

1 and spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning
2 in January 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did
3 not accurately represent the value of the project to that point;

- 4 • all funds previously advanced by Plaintiff to BTM and its agents on the Believers
5 Fellowship of Jacksonville loan had not been put towards the project according to the
6 budget and plans submitted to, approved by and relied on by Plaintiff;

7 Fraud - Concealment

8 860. Defendants David Smith and BTM, including through their agents, concealed
9 from and failed to disclose to Plaintiff the following:

- 10 • the true financial and operational status of the loans and projects, including the
11 Believers Fellowship of Jacksonville project;
- 12 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
13 projects, including the Believers Fellowship of Jacksonville project, and were not
14 being applied only to project-related costs, according to the plans and budgets
15 submitted to, approved by and relied on by Plaintiff;
- 16 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
17 including payments made to unrelated third parties - friends of David Smith and
18 David Smith's wife, Carmen Cople Smith, and payments of the mortgage on the
19 Lachman Lane Property;
- 20 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
21 to Randy Barton and for "sales commissions" to Carmen Cople Smith;
- 22 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
23 and its investments in overseeing the management, servicing and administration of
24 the loans and projects;
- 25 • that Smith and BTM were commingling for significant periods of time proceeds
26 received on the Loan with other funds;
- 27 • that Smith and BTM did not intend to immediately advance the full amount of
28 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf

1 or else return the funds to Plaintiff, and established money market accounts to hold
2 such funds longer than five business days;
3 • that Smith and BTM were not maintaining appropriate records and books of account
4 reflecting interest accrued and interest received, interest rate changes, principal
5 payments and all other transactions or actions affecting the Loan.

6 Fraud – Reliance, Discovery and Damage

7 861. Plaintiff continued to fund the Believers Fellowship of Jacksonville loan and
8 project in response to periodic draw requests from Defendants, based on continued
9 assurances and representations of Defendants Smith and BTM, including through their
10 agents at Arks and Noah, that Plaintiff's funds advanced thus far had gone towards the
11 projects according to the plans and budget reviewed, approved and relied upon by Plaintiff,
12 and based on Defendants' failure to disclose that Plaintiff's funds were being commingled
13 with other funds and diverted to non-project related costs and payments. In or about
14 February 2009, Plaintiff began working on a new program to take over the servicing and
15 administration of the loans, expand the Build to Minister church loan program into various
16 investment funds, and market those funds to third parties.

17 862. On or about July 31, 2009, during this effort to expand the loan program,
18 Plaintiff first learned of problems with the loans, including that Defendants and their agents
19 owed monies to third parties and were unable to pay them despite Plaintiff and other
20 investors having advanced funds as requested. Over the course of the next several months,
21 Plaintiff conducted an investigation in an attempt to determine what had happened to
22 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
23 misrepresentations, concealment and malfeasance. With respect to the problems discovered
24 with the loans, Plaintiff contributed additional monies in order to complete the projects,
25 including paying outstanding bills, liens, legal and administration fees, modifying the terms
26 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
27 new contractors to complete the construction.

28 ///

1 (50%) of a Participation Fee (of \$32,695.11), with interest and fees to be paid monthly, and
2 the principal payable to Plaintiff at the issuance of a Certificate of Occupancy for the
3 Property or twelve (12) months from the date of Loan Closing, whichever first occurs, as
4 provided for in the Loan Agreement which was specifically referenced by and incorporated
5 into the Participation Agreement. The Participation Agreement also provided that in the
6 event Plaintiff had not received its return of principal at the time specified, BTM was either
7 to provide or to arrange additional financing so that Plaintiff would receive all its funds.

8 866. Defendant BTM, for its part, agreed among other things, that:

- 9
- 10 • “In the event Seller [BTM] does not for any reason advance to Borrower
11 [church] the full amount of the contemplated advance [the draws of funds that
12 Defendants called for every month] on the date of receipt of such Purchase
13 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
14 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
15 to the amount of such contemplated advance not made.” (Participation
16 Agreement, Schedule 4, ¶2.)
 - 17 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
18 the terms of the Loan Documents and with this Agreement. Seller [BTM]
19 shall provide loan servicing in accordance with commercially acceptable loan
20 servicing practices and with the same degree of care that is customarily
21 employed and exercised by Seller [BTM] in the administration and servicing
22 of loans of a similar nature held by it for its own account (the “Servicing
23 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
 - 24 • “The Seller [BTM] shall maintain appropriate records and books of account
25 reflecting interest accrued and interest received, interest rate changes, principal
26 payments and all other transactions or actions affecting the Loan, which
27 records shall be kept in accordance with accounting principles consistently
28 and customarily applied by Seller [BTM].” (Participation Agreement,
Schedule 4, ¶9.)
 - “Seller [BTM] further agrees that in performing its obligations hereunder,
Seller shall: (a) act in a custodial capacity on behalf of the Participant
[Plaintiff] with respect to its holding of any underlying instrument or collateral
and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)
 - “Seller represents and warrants to Participant that, as of the date hereof ... no
default in the payment of principal or interest on the Loan has occurred and
remains uncured under the Loan Documents.” (Participation Agreement,
Schedule 4, ¶ 15.)

- 1 • “[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
2 may take or omit to take any action under any of the Loan Documents which
3 would result in the following (each a “Material Change”): (a) reduce or
4 increase the amounts of principal or interest payments of the Loan, (b) reduce
5 or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
6 postpone any due date for payment of principal or interest in which Participant
7 [Plaintiff] shares, including, without limitation, the final maturity date of the
8 Loan, (d) except as expressly permitted under the Loan Documents, release or
9 subordinate any existing collateral described in the Loan Documents, (e)
10 release the liability of Borrower or any guarantor for the Loan, (f) consent to
11 the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
12 (ii) any direct or indirect interest in Borrower ... (g) make or consent to any
13 change in the principal amount of the Note; or (h) waive a default under the
14 Loan Documents arising from the failure to make payments as and when due
15 on the Loan. . . .” ((Participation Agreement, Schedule 4, ¶ 11.)
- 16 • “Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
17 of any material default with respect to the Loan of which Seller [BTM] is
18 actually aware and of any other matters which, in Seller’s judgment, materially
19 affect the interest of Participant [Plaintiff] with respect to the Loan
20 (collectively, a “Material Default”).” (Participation Agreement, Schedule 4, ¶
21 11.)

22 867. The parties agreed that the Plaintiff would advance funds to BTM, as called
23 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
24 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
25 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
26 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
27 (the Church), to service the loan and advance the funds towards the construction project,
28 according to the budget and plans approved and relied upon by the Plaintiff in entering into
the Participation Agreement. Upon information and belief, BTM had an agreement with
Arks whereby Arks took over the servicing and administration of the Loan to Kingdom
Church. The Participation Agreement specifically references and incorporates the Loan
Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower
(the Church), and which provides that “the Loan proceeds are to be used by Church solely
for the construction of a church, church-related improvements, and/or costs related thereto
(the “Project”) upon the land described in the Security Instrument (the “Property”) in
accordance with the plans and specifications approved by ARKS.”

27 ///

28 ///

1 868. Plaintiff agreed to advance the funds in response to periodic draws based on
2 the project plans and budget which were attached to the Participation Agreement and/or the
3 Loan Agreement that was incorporated into the Participation Agreement, and which had
4 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
5 committing to the Participation Agreement for the Kingdom Church Loan. Defendant BTM
6 agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors,
7 suppliers and other third parties as well as specific project-related servicing fees to itself,
8 Arks and Noah, according to the budget and plans submitted to and approved by Plaintiffs
9 and incorporated into the Participation Agreement, and agreed to get prior approval from
10 Plaintiff for any material change to the budget or plans.

11 Contract Performance and Breach

12 869. Upon execution of the Participation Agreement, Plaintiff began funding draw
13 requests for the Kingdom Church project based on draw requests by BTM and its agents.
14 Plaintiff Strongback advanced \$532,337 to BTM and its agents for the Kingdom Church
15 Loan between January 2008 and October 2008.

16 870. Defendant BTM breached the Participation Agreement by, among other things,
17 the following:

- 18 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
19 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
20 Ministries, Inc. (or to the servicers or contractors for authorized project
21 disbursements on the Borrower's behalf), and failing to return within five business
22 days to Plaintiff any funds not so advanced;
- 23 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
24 contractors, suppliers and other third parties as well as specific project-related
25 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
26 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
27 failing to get prior approval from Plaintiff for any material change to the budget or
28 plans;

- 1 • failing to maintain appropriate records and books of account reflecting interest
- 2 accrued and interest received, interest rate changes, principal payments and all other
- 3 transactions or actions affecting the Loan;
- 4 • failing to pay Plaintiff its pro rata part of any and all principal and interest payments
- 5 made by the Borrower (church) to BTM under the Loan, including funds paid on
- 6 behalf of Borrower to BTM by secondary lender at escrow/title closing;
- 7 • accepting a \$1.8 million payoff from the secondary lender for \$2.3 million owed by
- 8 the Borrower and canceling the notes without informing or obtaining the consent of
- 9 Plaintiff;
- 10 • not paying Plaintiff its interest and fees on a monthly basis;
- 11 • failing to provide loan servicing and administration in accordance with the Loan
- 12 documents and with commercially acceptable loan servicing practices;
- 13 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 14 holding any proceeds received for the Loan;
- 15 • commingling for significant periods of time proceeds received on the Loan with other
- 16 funds;
- 17 • failing to inform Plaintiff that as of the date of the Participation Agreement a default
- 18 in the payment of principal or interest on the Loan had occurred and remained
- 19 uncured;
- 20 • reducing or increasing the amounts of principal or interest payments of the Loan
- 21 without obtaining the consent of Plaintiff;
- 22 • postponing due dates for payment of principal or interest in which Plaintiff shared
- 23 without obtaining the consent of Plaintiff;
- 24 • releasing or subordinating existing collateral described in the Loan Documents
- 25 without obtaining the consent of Plaintiff;
- 26 • releasing the liability of Borrower or any guarantor for the Loan without obtaining the
- 27 consent of Plaintiff;

28 ///

- 1 • consenting to the further sale, transfer, pledge, mortgage or assignment of the
- 2 Property or any direct or indirect interest in Borrower without obtaining the consent
- 3 of Plaintiff;
- 4 • waiving a default under the Loan Documents arising from the failure to make
- 5 payments as and when due on the Loan without obtaining the consent of Plaintiff;
- 6 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
- 7 which Defendant was aware, including Defendants' knowledge prior to closing that
- 8 Borrower had supplied inaccurate financial statements but allowed the loan to close
- 9 anyway without disclosure to Plaintiff;
- 10 • failing to require Borrower to pay the equity down payment as required by the Loan
- 11 Documents.

12 Contract Damages

13 871. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
14 as yet unascertained, but which Plaintiff believes is at least \$690,306 and which will be
15 proved at trial.

16 872. Additionally, Plaintiff incurred legal and administrative costs in addressing
17 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
18 have incurred.

19 Fraud – Defendants' Misrepresentations

20 873. On the periodic draw requests sent to Plaintiff beginning in January 2008,
21 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
22 had been spent on the Kingdom Church project, in accordance with the approved plans and
23 budget, as per the reports, forms, and spreadsheets submitted with the draw requests, and
24 that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
25 value of the project to that point.

26 874. Prior to Plaintiff's executing the Participation Agreement and making each
27 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
28 monthly) in response to draw requests and spoke to agents of Smith and BTM, including

1 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
2 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
3 updates on projects, including the Kingdom Church project, and was told that all funds
4 previously advanced by Plaintiff to BTM and its agents on the Kingdom Church loan had
5 been put towards the project according to the budget and plans submitted to, approved by
6 and relied on by Plaintiff.

7 Fraud – True Facts

8 875. In fact, Defendants' representations to Plaintiff as described above were false.

9 The true facts were that:

- 10 • Plaintiff's funds had not been spent on the Kingdom Church project in accordance
11 with the approved plans and budget as per the reports, forms, and spreadsheets
12 submitted with the periodic draw requests sent to Plaintiff beginning in January 2008,
13 and the reports, forms, and spreadsheets submitted to Plaintiff did not accurately
14 represent the value of the project to that point;
- 15 • all funds previously advanced by Plaintiff to BTM and its agents on the Kingdom
16 Church loan had not been put towards the project according to the budget and plans
17 submitted to, approved by and relied on by Plaintiff;

18 Fraud - Concealment

19 876. Defendants David Smith and BTM, including through their agents, concealed
20 from and failed to disclose to Plaintiff the following:

- 21 • the true financial and operational status of the loans and projects, including the
22 Kingdom Church project;
- 23 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
24 projects, including the Kingdom Church project, and were not being applied only to
25 project-related costs, according to the plans and budgets submitted to, approved by
26 and relied on by Plaintiff;
- 27 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
28 including payments made to unrelated third parties - friends of David Smith and

- 1 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
2 Lachman Lane Property;
- 3 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
4 and its investments in overseeing the management, servicing and administration of
5 the loans and projects;
 - 6 • that Smith and BTM were commingling for significant periods of time proceeds
7 received on the Loan with other funds;
 - 8 • that Smith and BTM knew prior to closing that Borrower had supplied inaccurate
9 financial statements, but allowed the loan to close anyway without disclosure to
10 Plaintiff;
 - 11 • that Smith and BTM did not intend to immediately advance the full amount of
12 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
13 or else return the funds to Plaintiff, and established money market accounts to hold
14 such funds longer than five business days;
 - 15 • that Smith and BTM were not maintaining appropriate records and books of account
16 reflecting interest accrued and interest received, interest rate changes, principal
17 payments and all other transactions or actions affecting the Loan.

18 Fraud – Reliance, Discovery and Damage

19 877. Plaintiff continued to fund the Kingdom Church loan and project in response
20 to periodic draw requests from Defendants, based on continued assurances and
21 representations of Defendants Smith and BTM, including through their agents at Arks and
22 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
23 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
24 failure to disclose that Plaintiff's funds were being commingled with other funds and
25 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
26 began working on a new program to take over the servicing and administration of the loans,
27 expand the Build to Minister church loan program into various investment funds, and market
28 those funds to third parties.

1 878. On or about July 31, 2009, during this effort to expand the loan program,
2 Plaintiff first learned of problems with the loans, including that Defendants and their agents
3 owed monies to third parties and were unable to pay them despite Plaintiff and other
4 investors having advanced funds as requested. Over the course of the next several months,
5 Plaintiff conducted an investigation in an attempt to determine what had happened to
6 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
7 misrepresentations, concealment and malfeasance. With respect to the problems discovered
8 with the loans, Plaintiff contributed additional monies in order to complete the projects,
9 including paying outstanding bills, liens, legal and administration fees, modifying the terms
10 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
11 new contractors to complete the construction.

12 879. But for Defendants' misrepresentations and concealment as described above,
13 Plaintiff would not have continued to provide funds in response to draw requests from
14 Defendants or their agents for the projects, including the Kingdom Church project, and
15 would not have invested efforts, time and money creating a new program to take over
16 servicing of the loans, expand the Build to Minister program into various investment funds,
17 and market those funds to third parties.

18 880. As a result of Defendants' misrepresentations and concealments, Plaintiff has
19 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
20 \$690,306 and which will be proved at trial. Additionally, Plaintiff incurred legal and
21 administrative costs in addressing and mitigating the harm caused by Defendants'
22 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
23 funds expended in creating a new program to take over servicing of the loans, expand the
24 Build to Minister program into various investment funds, and market those funds to third
25 parties, which it would not have expended but for Defendants' misrepresentations and
26 concealments.

27 ///

28 ///

1 *Insoul Fellowship Church Loan*

2 Contract Terms

3 881. On June 2, 2008, Plaintiff Strongback entered into a Construction Note
4 Participation Agreement with Defendant BTM on a construction loan to Insoul Fellowship
5 Church ("Insoul Participation Agreement" or "Participation Agreement"). The Insoul
6 Participation Agreement provided that Plaintiff (designated "Participant") would have a
7 participation interest of 50% in the construction note amount of \$1,341,250, which
8 Defendant BTM (designated "Seller") would loan to the church, Insoul Fellowship Church
9 (designated "Borrower"). Under the Insoul Participation Agreement, Plaintiff committed to
10 fund a total of \$670,625, to be advanced to Defendant BTM in response to periodic draw
11 requests from Defendant according to a projected draw schedule. In consideration for
12 Plaintiff's advancing the funds, Plaintiff was entitled to receive the return of the principal
13 invested, as well as 10.5% interest on such amount, and its pro rata portion (50%) of a
14 Participation Fee (of \$20,118.75), with interest and fees to be paid monthly, and the
15 principal payable to Plaintiff at the issuance of a Certificate of Occupancy for the Property
16 or twelve (12) months from the date of Loan Closing, whichever first occurs, as provided for
17 in the Loan Agreement which was specifically referenced by and incorporated into the
18 Participation Agreement. The Participation Agreement also provided that in the event
19 Plaintiff had not received its return of principal at the time specified, BTM was either to
20 provide or to arrange additional financing so that Plaintiff would receive all its funds.

21 882. Defendant BTM, for its part, agreed among other things, that:

- 22
- 23 • "In the event Seller [BTM] does not for any reason advance to Borrower
24 [church] the full amount of the contemplated advance [the draws of funds that
25 Defendants called for every month] on the date of receipt of such Purchase
26 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
27 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
28 to the amount of such contemplated advance not made." (Participation
Agreement, Schedule 4, ¶2.)
 - "[T]he Seller [BTM] shall service and administer the Loan in accordance with
the terms of the Loan Documents and with this Agreement. Seller [BTM]
shall provide loan servicing in accordance with commercially acceptable loan
servicing practices and with the same degree of care that is customarily
employed and exercised by Seller [BTM] in the administration and servicing

1 of loans of a similar nature held by it for its own account (the "Servicing
Standard")." (Participation Agreement, Schedule 4, ¶9.)

- 2
- 3 • "The Seller [BTM] shall maintain appropriate records and books of account
4 reflecting interest accrued and interest received, interest rate changes, principal
5 payments and all other transactions or actions affecting the Loan, which
6 records shall be kept in accordance with accounting principles consistently
7 and customarily applied by Seller [BTM]." (Participation Agreement,
8 Schedule 4, ¶9.)
- 9
- 10 • "Seller [BTM] further agrees that in performing its obligations hereunder,
11 Seller shall: (a) act in a custodial capacity on behalf of the Participant
12 [Plaintiff] with respect to its holding of any underlying instrument or collateral
13 and in holding any proceeds received for the Loan; (b) not commingle for any
14 significant period of time proceeds received on the Loan; (c) directly pass
15 through any proceeds received from the Loan to Participant [Plaintiff] as
16 provided in Section 4 of this Agreement, less any proceeds that represent
17 servicing or other compensation to Seller [BTM] or an interest in the Loan
18 retained by the Seller [BTM], all as more particularly provided for herein; and
19 (d) administer the Loan in accordance with the Servicing Standard as provided
20 herein." (Participation Agreement, Schedule 4, ¶ 9.)
- 21
- 22 • "[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
23 may take or omit to take any action under any of the Loan Documents which
24 would result in the following (each a "Material Change"): (a) reduce or
25 increase the amounts of principal or interest payments of the Loan, (b) reduce
26 or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
27 postpone any due date for payment of principal or interest in which Participant
28 [Plaintiff] shares, including, without limitation, the final maturity date of the
Loan, (d) except as expressly permitted under the Loan Documents, release or
subordinate any existing collateral described in the Loan Documents, (e)
release the liability of Borrower or any guarantor for the Loan, (f) consent to
the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
(ii) any direct or indirect interest in Borrower ... (g) make or consent to any
change in the principal amount of the Note; or (h) waive a default under the
Loan Documents arising from the failure to make payments as and when due
on the Loan. . . ." ((Participation Agreement, Schedule 4, ¶ 11.)
- 20
- 21 • "Seller [BTM] will, with reasonable promptness, notify Participant [Plaintiff]
22 of any material default with respect to the Loan of which Seller [BTM] is
23 actually aware and of any other matters which, in Seller's judgment, materially
24 affect the interest of Participant [Plaintiff] with respect to the Loan
25 (collectively, a "Material Default")." (Participation Agreement, Schedule 4, ¶
26 11.)

24 883. The parties agreed that the Plaintiff would advance funds to BTM, as called
25 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
26 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM's
27 consent, and that BTM or its agents would thereupon transmit the funds to BTM's affiliate
28 Arks and/or Arks' wholly owned subsidiary Noah Construction, on behalf of the Borrower

1 (the Church), to service the loan and advance the funds towards the construction project,
2 according to the budget and plans approved and relied upon by the Plaintiff in entering into
3 the Participation Agreement. Upon information and belief, BTM had an agreement with
4 Arks whereby Arks took over the servicing and administration of the Loan to Insoul
5 Fellowship Church. The Participation Agreement specifically references and incorporates
6 the Loan Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the
7 Borrower (the Church), and which provides that “the Loan proceeds are to be used by
8 Church solely for the construction of a church, church-related improvements, and/or costs
9 related thereto (the “Project”) upon the land described in the Security Instrument (the
10 “Property”) in accordance with the plans and specifications approved by ARKS.”

11 884. Plaintiff agreed to advance the funds in response to periodic draws based on
12 the project plans and budget which were attached to the Participation Agreement and/or the
13 Loan Agreement that was incorporated into the Participation Agreement, and which had
14 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
15 committing to the Participation Agreement for the Insoul Fellowship Church Loan.
16 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
17 contractors, suppliers and other third parties as well as specific project-related servicing fees
18 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
19 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
20 approval from Plaintiff for any material change to the budget or plans.

21 Contract Performance and Breach

22 885. Upon execution of the Participation Agreement, Plaintiff began funding draw
23 requests for the Insoul Fellowship Church project based on draw requests by BTM and its
24 agents. Plaintiff Strongback advanced \$670,625 to BTM and its agents for the Insoul
25 Fellowship Church Loan between May 2008 and June 2009.

26 886. Defendant BTM breached the Participation Agreement by, among other things,
27 the following:

28 ///

- 1 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
2 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
3 Ministries, Inc. (or to the servicers or contractors for authorized project
4 disbursements on the Borrower's behalf), and failing to return within five business
5 days to Plaintiff any funds not so advanced;
- 6 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
7 contractors, suppliers and other third parties as well as specific project-related
8 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
9 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
10 failing to get prior approval from Plaintiff for any material change to the budget or
11 plans;
- 12 • failing to maintain appropriate records and books of account reflecting interest
13 accrued and interest received, interest rate changes, principal payments and all other
14 transactions or actions affecting the Loan;
- 15 • not paying Plaintiff its return of principal at the earlier of the issuance of the
16 certificate of occupancy or within 12 months of the Loan Closing;
- 17 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
18 Closing and not providing or arranging additional financing to allow Plaintiff to
19 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
20 within 12 months of the Loan Closing;
- 21 • not paying Plaintiff its interest and fees on a monthly basis;
- 22 • failing to provide loan servicing and administration in accordance with the Loan
23 documents and with commercially acceptable loan servicing practices;
- 24 • requiring additional payments by Plaintiff beyond what was due under the
25 Participation Agreement and the approved budget and plans incorporated therein;
- 26 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
27 holding any proceeds received for the Loan;

28 ///

- 1 • commingling for significant periods of time proceeds received on the Loan with other
- 2 funds;
- 3 • postponing due dates for payment of principal or interest in which Plaintiff shared
- 4 without obtaining the consent of Plaintiff;
- 5 • failing to promptly notify Plaintiff of material defaults with respect to the Loan of
- 6 which Defendant was aware;
- 7 • failing to require Borrower to pay the equity down payment as required by the Loan
- 8 Documents.

9 Contract Damages

10 887. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
11 as yet unascertained, but which Plaintiff believes is at least \$531,918 and which will be
12 proved at trial.

13 888. Additionally, Plaintiff incurred legal and administrative costs in addressing
14 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
15 have incurred.

16 Fraud – Defendants' Misrepresentations

17 889. On the periodic draw requests sent to Plaintiff beginning in May 2008, Smith's
18 and BTM's agents signed attestations that the monies advanced thus far by Plaintiff had
19 been spent on the Insoul Fellowship Church project, in accordance with the approved plans
20 and budget, as per the reports, forms, and spreadsheets submitted with the draw requests,
21 and that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
22 value of the project to that point.

23 890. Prior to Plaintiff's executing the Participation Agreement and making each
24 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
25 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
26 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
27 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
28 updates on projects, including the Insoul Fellowship Church project, and was told that all

1 funds previously advanced by Plaintiff to BTM and its agents on the Insoul Fellowship
2 Church loan had been put towards the project according to the budget and plans submitted
3 to, approved by and relied on by Plaintiff.

4 Fraud – True Facts

5 891. In fact, Defendants' representations to Plaintiff as described above were false.
6 The true facts were that:

- 7 • Plaintiff's funds had not been spent on the Insoul Fellowship Church project in
8 accordance with the approved plans and budget as per the reports, forms, and
9 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
10 May 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
11 accurately represent the value of the project to that point;
- 12 • all funds previously advanced by Plaintiff to BTM and its agents on the Insoul
13 Fellowship Church loan had not been put towards the project according to the budget
14 and plans submitted to, approved by and relied on by Plaintiff;

15 Fraud - Concealment

16 892. Defendants David Smith and BTM, including through their agents, concealed
17 from and failed to disclose to Plaintiff the following:

- 18 • the true financial and operational status of the loans and projects, including the Insoul
19 Fellowship Church project;
- 20 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
21 projects, including the Insoul Fellowship Church project, and were not being applied
22 only to project-related costs, according to the plans and budgets submitted to,
23 approved by and relied on by Plaintiff;
- 24 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
25 including payments made to unrelated third parties - friends of David Smith and
26 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
27 Lachman Lane Property;

28 ///

- 1 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
2 and its investments in overseeing the management, servicing and administration of
3 the loans and projects;
- 4 • that Smith and BTM were commingling for significant periods of time proceeds
5 received on the Loan with other funds;
- 6 • that Smith and BTM did not intend to immediately advance the full amount of
7 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
8 or else return the funds to Plaintiff, and established money market accounts to hold
9 such funds longer than five business days;
- 10 • that Smith and BTM were not maintaining appropriate records and books of account
11 reflecting interest accrued and interest received, interest rate changes, principal
12 payments and all other transactions or actions affecting the Loan.

13 Fraud – Reliance, Discovery and Damage

14 893. Plaintiff continued to fund the Insoul Fellowship Church loan and project in
15 response to periodic draw requests from Defendants, based on continued assurances and
16 representations of Defendants Smith and BTM, including through their agents at Arks and
17 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
18 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
19 failure to disclose that Plaintiff's funds were being commingled with other funds and
20 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
21 began working on a new program to take over the servicing and administration of the loans,
22 expand the Build to Minister church loan program into various investment funds, and market
23 those funds to third parties.

24 894. On or about July 31, 2009, during this effort to expand the loan program,
25 Plaintiff first learned of problems with the loans, including that Defendants and their agents
26 owed monies to third parties and were unable to pay them despite Plaintiff and other
27 investors having advanced funds as requested. Over the course of the next several months,
28 Plaintiff conducted an investigation in an attempt to determine what had happened to

1 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
2 misrepresentations, concealment and malfeasance. With respect to the problems discovered
3 with the loans, Plaintiff contributed additional monies in order to complete the projects,
4 including paying outstanding bills, liens, legal and administration fees, modifying the terms
5 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
6 new contractors to complete the construction.

7 895. But for Defendants' misrepresentations and concealment as described above,
8 Plaintiff would not have continued to provide funds in response to draw requests from
9 Defendants or their agents for the projects, including the Insoul Fellowship Church project,
10 and would not have invested efforts, time and money creating a new program to take over
11 servicing of the loans, expand the Build to Minister program into various investment funds,
12 and market those funds to third parties.

13 896. As a result of Defendants' misrepresentations and concealments, Plaintiff has
14 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
15 \$531,918 and which will be proved at trial. Additionally, Plaintiff incurred legal and
16 administrative costs in addressing and mitigating the harm caused by Defendants'
17 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
18 funds expended in creating a new program to take over servicing of the loans, expand the
19 Build to Minister program into various investment funds, and market those funds to third
20 parties, which it would not have expended but for Defendants' misrepresentations and
21 concealments.

22 *New Creation Church Loan*

23 Contract Terms

24 897. On December 8, 2008, Plaintiff Strongback entered into a Construction Note
25 Participation Agreement with Defendant BTM on a construction loan to New Creation
26 Church ("New Creation Participation Agreement" or "Participation Agreement"). The New
27 Creation Participation Agreement provided that Plaintiff (designated "Participant") would
28 have a participation interest of 39.0620% in the construction note amount of \$825,496,

1 | which Defendant BTM (designated "Seller") would loan to the church, New Creation
2 | Church (designated "Borrower"). Under the New Creation Participation Agreement,
3 | Plaintiff committed to fund a total of \$322,455.25, to be advanced to Defendant BTM in
4 | response to periodic draw requests from Defendant according to a projected draw schedule.
5 | In consideration for Plaintiff's advancing the funds, Plaintiff was entitled to receive the
6 | return of the principal invested, as well as 10.5% interest on such amount, and its pro rata
7 | portion (39.0620%) of a Participation Fee (of \$12,382.44), with interest and fees to be paid
8 | monthly, and the principal payable to Plaintiff at the issuance of a Certificate of Occupancy
9 | for the Property or twelve (12) months from the date of Loan Closing, whichever first
10 | occurs, as provided for in the Loan Agreement which was specifically referenced by and
11 | incorporated into the Participation Agreement. The Participation Agreement also provided
12 | that in the event Plaintiff had not received its return of principal at the time specified, BTM
13 | was either to provide or to arrange additional financing so that Plaintiff would receive all its
14 | funds.

15 | 898. Defendant BTM, for its part, agreed among other things, that:

- 16 | • "In the event Seller [BTM] does not for any reason advance to Borrower
17 | [church] the full amount of the contemplated advance [the draws of funds that
18 | Defendants called for every month] on the date of receipt of such Purchase
19 | Payment, Seller [BTM] shall within five (5) Business Days thereafter return
20 | the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
21 | to the amount of such contemplated advance not made." (Participation
22 | Agreement, Schedule 4, ¶2.)
- 23 | • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
24 | the terms of the Loan Documents and with this Agreement. Seller [BTM]
25 | shall provide loan servicing in accordance with commercially acceptable loan
26 | servicing practices and with the same degree of care that is customarily
27 | employed and exercised by Seller [BTM] in the administration and servicing
28 | of loans of a similar nature held by it for its own account (the "Servicing
Standard")." (Participation Agreement, Schedule 4, ¶9.)
- "The Seller [BTM] shall maintain appropriate records and books of account
reflecting interest accrued and interest received, interest rate changes, principal
payments and all other transactions or actions affecting the Loan, which
records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)

28 | ///

- 1 • “Seller [BTM] further agrees that in performing its obligations hereunder,
2 Seller shall: (a) act in a custodial capacity on behalf of the Participant
3 [Plaintiff] with respect to its holding of any underlying instrument or collateral
4 and in holding any proceeds received for the Loan; (b) not commingle for any
5 significant period of time proceeds received on the Loan; (c) directly pass
6 through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)

7 899. The parties agreed that the Plaintiff would advance funds to BTM, as called
8 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
9 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
10 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
11 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
12 (the Church), to service the loan and advance the funds towards the construction project,
13 according to the budget and plans approved and relied upon by the Plaintiff in entering into
14 the Participation Agreement. Upon information and belief, BTM had an agreement with
15 Arks whereby Arks took over the servicing and administration of the Loan to New Creation
16 Church. The Participation Agreement specifically references and incorporates the Loan
17 Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower
18 (the Church), and which provides that “the Loan proceeds are to be used by Church solely
19 for the construction of a church, church-related improvements, and/or costs related thereto
20 (the “Project”) upon the land described in the Security Instrument (the “Property”) in
21 accordance with the plans and specifications approved by ARKS.”

22 900. Plaintiff agreed to advance the funds in response to periodic draws based on
23 the project plans and budget which were attached to the Participation Agreement and/or the
24 Loan Agreement that was incorporated into the Participation Agreement, and which had
25 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
26 committing to the Participation Agreement for the New Creation Church Loan. Defendant
27 BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors,
28 suppliers and other third parties as well as specific project-related servicing fees to itself,

1 Arks and Noah, according to the budget and plans submitted to and approved by Plaintiffs
2 and incorporated into the Participation Agreement, and agreed to get prior approval from
3 Plaintiff for any material change to the budget or plans.

4 Contract Performance and Breach

5 901. Upon execution of the Participation Agreement, Plaintiff began funding draw
6 requests for the New Creation Church project based on draw requests by BTM and its
7 agents. Plaintiff Strongback advanced \$322,455 to BTM and its agents for the New
8 Creation Church Loan between January 2009 and March 2009.

9 902. Defendant BTM breached the Participation Agreement by, among other things,
10 the following:

- 11 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
12 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
13 Ministries, Inc. (or to the servicers or contractors for authorized project
14 disbursements on the Borrower's behalf), and failing to return within five business
15 days to Plaintiff any funds not so advanced;
- 16 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
17 contractors, suppliers and other third parties as well as specific project-related
18 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
19 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
20 failing to get prior approval from Plaintiff for any material change to the budget or
21 plans;
- 22 • failing to maintain appropriate records and books of account reflecting interest
23 accrued and interest received, interest rate changes, principal payments and all other
24 transactions or actions affecting the Loan;
- 25 • not paying Plaintiff its return of principal at the earlier of the issuance of the
26 certificate of occupancy or within 12 months of the Loan Closing;
- 27 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
28 Closing and not providing or arranging additional financing to allow Plaintiff to

- 1 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
2 within 12 months of the Loan Closing;
- 3 • not paying Plaintiff its interest and fees on a monthly basis;
 - 4 • failing to provide loan servicing and administration in accordance with the Loan
5 documents and with commercially acceptable loan servicing practices;
 - 6 • requiring additional payments by Plaintiff beyond what was due under the
7 Participation Agreement and the approved budget and plans incorporated therein;
 - 8 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
9 holding any proceeds received for the Loan;
 - 10 • commingling for significant periods of time proceeds received on the Loan with other
11 funds.

12 Contract Damages

13 903. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
14 as yet unascertained, but which Plaintiff believes is at least \$334,557 and which will be
15 proved at trial.

16 904. Additionally, Plaintiff incurred legal and administrative costs in addressing
17 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
18 have incurred.

19 Fraud – Defendants' Misrepresentations

20 905. On the periodic draw requests sent to Plaintiff beginning in January 2009,
21 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
22 had been spent on the New Creation Church project, in accordance with the approved plans
23 and budget, as per the reports, forms, and spreadsheets submitted with the draw requests,
24 and that the reports, forms, and spreadsheets provided to Plaintiff accurately represented the
25 value of the project to that point.

26 906. Prior to Plaintiff's executing the Participation Agreement and making each
27 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
28 monthly) in response to draw requests and spoke to agents of Smith and BTM, including

1 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
2 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
3 updates on projects, including the New Creation Church project, and was told that all funds
4 previously advanced by Plaintiff to BTM and its agents on the New Creation Church loan
5 had been put towards the project according to the budget and plans submitted to, approved
6 by and relied on by Plaintiff.

7 Fraud – True Facts

8 907. In fact, Defendants' representations to Plaintiff as described above were false.

9 The true facts were that:

- 10 • Plaintiff's funds had not been spent on the New Creation Church project in
11 accordance with the approved plans and budget as per the reports, forms, and
12 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
13 January 2009, and the reports, forms, and spreadsheets submitted to Plaintiff did not
14 accurately represent the value of the project to that point;
- 15 • all funds previously advanced by Plaintiff to BTM and its agents on the New Creation
16 Church loan had not been put towards the project according to the budget and plans
17 submitted to, approved by and relied on by Plaintiff;

18 Fraud - Concealment

19 908. Defendants David Smith and BTM, including through their agents, concealed
20 from and failed to disclose to Plaintiff the following:

- 21 • the true financial and operational status of the loans and projects, including the New
22 Creation Church project;
- 23 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
24 projects, including the New Creation Church project, and were not being applied only
25 to project-related costs, according to the plans and budgets submitted to, approved by
26 and relied on by Plaintiff;
- 27 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
28 including payments made to unrelated third parties - friends of David Smith and

1 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
2 Lachman Lane Property;

- 3 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
4 and its investments in overseeing the management, servicing and administration of
5 the loans and projects;
- 6 • that Smith and BTM were commingling for significant periods of time proceeds
7 received on the Loan with other funds;
- 8 • that Smith and BTM did not intend to immediately advance the full amount of
9 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
10 or else return the funds to Plaintiff, and established money market accounts to hold
11 such funds longer than five business days;
- 12 • that Smith and BTM were not maintaining appropriate records and books of account
13 reflecting interest accrued and interest received, interest rate changes, principal
14 payments and all other transactions or actions affecting the Loan.

15 Fraud – Reliance, Discovery and Damage

16 909. Plaintiff continued to fund the New Creation Church loan and project in
17 response to periodic draw requests from Defendants, based on continued assurances and
18 representations of Defendants Smith and BTM, including through their agents at Arks and
19 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
20 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
21 failure to disclose that Plaintiff's funds were being commingled with other funds and
22 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
23 began working on a new program to take over the servicing and administration of the loans,
24 expand the Build to Minister church loan program into various investment funds, and market
25 those funds to third parties.

26 910. On or about July 31, 2009, during this effort to expand the loan program,
27 Plaintiff first learned of problems with the loans, including that Defendants and their agents
28 owed monies to third parties and were unable to pay them despite Plaintiff and other

1 investors having advanced funds as requested. Over the course of the next several months,
2 Plaintiff conducted an investigation in an attempt to determine what had happened to
3 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
4 misrepresentations, concealment and malfeasance. With respect to the problems discovered
5 with the loans, Plaintiff contributed additional monies in order to complete the projects,
6 including paying outstanding bills, liens, legal and administration fees, modifying the terms
7 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
8 new contractors to complete the construction.

9 911. But for Defendants' misrepresentations and concealment as described above,
10 Plaintiff would not have continued to provide funds in response to draw requests from
11 Defendants or their agents for the projects, including the New Creation Church project, and
12 would not have invested efforts, time and money creating a new program to take over
13 servicing of the loans, expand the Build to Minister program into various investment funds,
14 and market those funds to third parties.

15 912. As a result of Defendants' misrepresentations and concealments, Plaintiff has
16 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
17 \$334,557 and which will be proved at trial. Additionally, Plaintiff incurred legal and
18 administrative costs in addressing and mitigating the harm caused by Defendants'
19 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
20 funds expended in creating a new program to take over servicing of the loans, expand the
21 Build to Minister program into various investment funds, and market those funds to third
22 parties, which it would not have expended but for Defendants' misrepresentations and
23 concealments.

24 *Rush AME Zion Church Loan*

25 Contract Terms

26 913. On January 25, 2008, Plaintiff Strongback entered into a Construction Note
27 Participation Agreement with Defendant BTM on a construction loan to Rush AME Zion
28 Church ("Rush Participation Agreement" or "Participation Agreement"). The Rush

1 Participation Agreement provided that Plaintiff (designated "Participant") would have a
2 participation interest of 50% in the construction note amount of \$1,166,282, which
3 Defendant BTM (designated "Seller") would loan to the church, Rush AME Zion Church
4 (designated "Borrower"). The Participation Agreement was amended on May 19, 2008 so
5 that the construction note amount was reduced to \$788,366. Under the Rush Participation
6 Agreement as amended, Plaintiff committed to fund a total of \$394,183, to be advanced to
7 Defendant BTM in response to periodic draw requests from Defendant according to a
8 projected draw schedule. In consideration for Plaintiff's advancing the funds, Plaintiff was
9 entitled to receive the return of the principal invested, as well as 10.5% interest on such
10 amount, and its pro rata portion (50%) of a Participation Fee (of \$17,494.23), with interest
11 and fees to be paid monthly, and the principal payable to Plaintiff at the issuance of a
12 Certificate of Occupancy for the Property or twelve (12) months from the date of Loan
13 Closing, whichever first occurs, as provided for in the Loan Agreement which was
14 specifically referenced by and incorporated into the Participation Agreement. The
15 Participation Agreement also provided that in the event Plaintiff had not received its return
16 of principal at the time specified, BTM was either to provide or to arrange additional
17 financing so that Plaintiff would receive all its funds.

18 914. Defendant BTM, for its part, agreed among other things, that:

- 19 • "In the event Seller [BTM] does not for any reason advance to Borrower
20 [church] the full amount of the contemplated advance [the draws of funds that
21 Defendants called for every month] on the date of receipt of such Purchase
22 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
23 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
24 to the amount of such contemplated advance not made." (Participation
25 Agreement, Schedule 4, ¶2.)
- 26 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
27 the terms of the Loan Documents and with this Agreement. Seller [BTM]
28 shall provide loan servicing in accordance with commercially acceptable loan
servicing practices and with the same degree of care that is customarily
employed and exercised by Seller [BTM] in the administration and servicing
of loans of a similar nature held by it for its own account (the "Servicing
Standard")." (Participation Agreement, Schedule 4, ¶9.)
- "The Seller [BTM] shall maintain appropriate records and books of account
reflecting interest accrued and interest received, interest rate changes, principal
payments and all other transactions or actions affecting the Loan, which

1 records shall be kept in accordance with accounting principles consistently
2 and customarily applied by Seller [BTM].” (Participation Agreement,
Schedule 4, ¶9.)

- 3 • “Seller [BTM] further agrees that in performing its obligations hereunder,
4 Seller shall: (a) act in a custodial capacity on behalf of the Participant
5 [Plaintiff] with respect to its holding of any underlying instrument or collateral
6 and in holding any proceeds received for the Loan; (b) not commingle for any
7 significant period of time proceeds received on the Loan; (c) directly pass
8 through any proceeds received from the Loan to Participant [Plaintiff] as
9 provided in Section 4 of this Agreement, less any proceeds that represent
10 servicing or other compensation to Seller [BTM] or an interest in the Loan
11 retained by the Seller [BTM], all as more particularly provided for herein; and
12 (d) administer the Loan in accordance with the Servicing Standard as provided
13 herein.” (Participation Agreement, Schedule 4, ¶ 9.)
- 14 • “[T]he consent of Participant [Plaintiff] shall be required before Seller [BTM]
15 may take or omit to take any action under any of the Loan Documents which
16 would result in the following (each a “Material Change”): (a) reduce or
17 increase the amounts of principal or interest payments of the Loan, (b) reduce
18 or increase any Loan interest rate in which Participant [Plaintiff] shares, (c)
19 postpone any due date for payment of principal or interest in which Participant
20 [Plaintiff] shares, including, without limitation, the final maturity date of the
21 Loan, (d) except as expressly permitted under the Loan Documents, release or
22 subordinate any existing collateral described in the Loan Documents, (e)
23 release the liability of Borrower or any guarantor for the Loan, (f) consent to
24 the further sale, transfer, pledge, mortgage or assignment of (i) the Property or
25 (ii) any direct or indirect interest in Borrower ... (g) make or consent to any
26 change in the principal amount of the Note; or (h) waive a default under the
27 Loan Documents arising from the failure to make payments as and when due
28 on the Loan. . . .” ((Participation Agreement, Schedule 4, ¶ 11.)

17 915. The parties agreed that the Plaintiff would advance funds to BTM, as called
18 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
19 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
20 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
21 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
22 (the Church), to service the loan and advance the funds towards the construction project,
23 according to the budget and plans approved and relied upon by the Plaintiff in entering into
24 the Participation Agreement. Upon information and belief, BTM had an agreement with
25 Arks whereby Arks took over the servicing and administration of the Loan to Rush AME
26 Zion Church. The Participation Agreement specifically references and incorporates the
27 Loan Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the
28 Borrower (the Church), and which provides that “the Loan proceeds are to be used by

1 Church solely for the construction of a church, church-related improvements, and/or costs
2 related thereto (the "Project") upon the land described in the Security Instrument (the
3 "Property") in accordance with the plans and specifications approved by ARKS."

4 916. Plaintiff agreed to advance the funds in response to periodic draws based on
5 the project plans and budget which were attached to the Participation Agreement and/or the
6 Loan Agreement that was incorporated into the Participation Agreement, and which had
7 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
8 committing to the Participation Agreement for the Rush AME Zion Church Loan.
9 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
10 contractors, suppliers and other third parties as well as specific project-related servicing fees
11 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
12 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
13 approval from Plaintiff for any material change to the budget or plans.

14 Contract Performance and Breach

15 917. Upon execution of the Participation Agreement, Plaintiff began funding draw
16 requests for the Rush AME Zion Church project based on draw requests by BTM and its
17 agents. Plaintiff Strongback advanced \$394,183 to BTM and its agents for the Rush AME
18 Zion Church Loan between January 2008 and March 2009.

19 918. Defendant BTM breached the Participation Agreement by, among other things,
20 the following:

- 21 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
22 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
23 Ministries, Inc. (or to the servicers or contractors for authorized project
24 disbursements on the Borrower's behalf), and failing to return within five business
25 days to Plaintiff any funds not so advanced;
- 26 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
27 contractors, suppliers and other third parties as well as specific project-related
28 servicing fees to itself, Arks and Noah, according to the budget and plans submitted

1 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
2 failing to get prior approval from Plaintiff for any material change to the budget or
3 plans;

- 4 • failing to maintain appropriate records and books of account reflecting interest
5 accrued and interest received, interest rate changes, principal payments and all other
6 transactions or actions affecting the Loan;
- 7 • not paying Plaintiff its return of principal at the earlier of the issuance of the
8 certificate of occupancy or within 12 months of the Loan Closing;
- 9 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
10 Closing and not providing or arranging additional financing to allow Plaintiff to
11 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
12 within 12 months of the Loan Closing;
- 13 • not paying Plaintiff its interest and fees on a monthly basis;
- 14 • failing to provide loan servicing and administration in accordance with the Loan
15 documents and with commercially acceptable loan servicing practices;
- 16 • requiring additional payments by Plaintiff beyond what was due under the
17 Participation Agreement and the approved budget and plans incorporated therein;
- 18 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
19 holding any proceeds received for the Loan;
- 20 • commingling for significant periods of time proceeds received on the Loan with other
21 funds;
- 22 • postponing due dates for payment of principal or interest in which Plaintiff shared
23 without obtaining the consent of Plaintiff.

24 Contract Damages

25 919. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
26 as yet unascertained, but which Plaintiff believes is at least \$301,055 and which will be
27 proved at trial.

28 ///

1 920. Additionally, Plaintiff incurred legal and administrative costs in addressing
2 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
3 have incurred.

4 Fraud – Defendants' Misrepresentations

5 921. On the periodic draw requests sent to Plaintiff beginning in January 2008,
6 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
7 had been spent on the Rush AME Zion Church project, in accordance with the approved
8 plans and budget, as per the reports, forms, and spreadsheets submitted with the draw
9 requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
10 represented the value of the project to that point.

11 922. Prior to Plaintiff's executing the Participation Agreement and making each
12 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
13 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
14 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
15 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
16 updates on projects, including the Rush AME Zion Church project, and was told that all
17 funds previously advanced by Plaintiff to BTM and its agents on the Rush AME Zion
18 Church loan had been put towards the project according to the budget and plans submitted
19 to, approved by and relied on by Plaintiff.

20 Fraud – True Facts

21 923. In fact, Defendants' representations to Plaintiff as described above were false.
22 The true facts were that:

- 23 • Plaintiff's funds had not been spent on the Rush AME Zion Church project in
24 accordance with the approved plans and budget as per the reports, forms, and
25 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
26 January 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
27 accurately represent the value of the project to that point;

28 ///

- 1 • all funds previously advanced by Plaintiff to BTM and its agents on the Rush AME
2 Zion Church loan had not been put towards the project according to the budget and
3 plans submitted to, approved by and relied on by Plaintiff;

4 Fraud - Concealment

5 924. Defendants David Smith and BTM, including through their agents, concealed
6 from and failed to disclose to Plaintiff the following:

- 7 • the true financial and operational status of the loans and projects, including the Rush
8 AME Zion Church project;
- 9 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
10 projects, including the Rush AME Zion Church project, and were not being applied
11 only to project-related costs, according to the plans and budgets submitted to,
12 approved by and relied on by Plaintiff;
- 13 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
14 including payments made to unrelated third parties - friends of David Smith and
15 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
16 Lachman Lane Property;
- 17 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
18 to Randy Barton and for "sales commissions" to Carmen Copple Smith;
- 19 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
20 and its investments in overseeing the management, servicing and administration of
21 the loans and projects;
- 22 • that Smith and BTM were commingling for significant periods of time proceeds
23 received on the Loan with other funds;
- 24 • that Smith and BTM did not intend to immediately advance the full amount of
25 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
26 or else return the funds to Plaintiff, and established money market accounts to hold
27 such funds longer than five business days;

28 ///

- 1 • that Smith and BTM were not maintaining appropriate records and books of account
2 reflecting interest accrued and interest received, interest rate changes, principal
3 payments and all other transactions or actions affecting the Loan.

4 Fraud – Reliance, Discovery and Damage

5 925. Plaintiff continued to fund the Rush AME Zion Church loan and project in
6 response to periodic draw requests from Defendants, based on continued assurances and
7 representations of Defendants Smith and BTM, including through their agents at Arks and
8 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
9 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
10 failure to disclose that Plaintiff's funds were being commingled with other funds and
11 diverted to non-project related costs and payments. In or about February 2009, Plaintiff
12 began working on a new program to take over the servicing and administration of the loans,
13 expand the Build to Minister church loan program into various investment funds, and market
14 those funds to third parties.

15 926. On or about July 31, 2009, during this effort to expand the loan program,
16 Plaintiff first learned of problems with the loans, including that Defendants and their agents
17 owed monies to third parties and were unable to pay them despite Plaintiff and other
18 investors having advanced funds as requested. Over the course of the next several months,
19 Plaintiff conducted an investigation in an attempt to determine what had happened to
20 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
21 misrepresentations, concealment and malfeasance. With respect to the problems discovered
22 with the loans, Plaintiff contributed additional monies in order to complete the projects,
23 including paying outstanding bills, liens, legal and administration fees, modifying the terms
24 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
25 new contractors to complete the construction.

26 927. But for Defendants' misrepresentations and concealment as described above,
27 Plaintiff would not have continued to provide funds in response to draw requests from
28 Defendants or their agents for the projects, including the Rush AME Zion Church project,

1 and would not have invested efforts, time and money creating a new program to take over
2 servicing of the loans, expand the Build to Minister program into various investment funds,
3 and market those funds to third parties.

4 928. As a result of Defendants' misrepresentations and concealments, Plaintiff has
5 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
6 \$301,055 and which will be proved at trial. Additionally, Plaintiff incurred legal and
7 administrative costs in addressing and mitigating the harm caused by Defendants'
8 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
9 funds expended in creating a new program to take over servicing of the loans, expand the
10 Build to Minister program into various investment funds, and market those funds to third
11 parties, which it would not have expended but for Defendants' misrepresentations and
12 concealments.

13 *Brook Community Church Loan*

14 Contract Terms

15 929. On March 14, 2008, Plaintiff Strongback entered into a Construction Note
16 Participation Agreement with Defendant BTM on a construction loan to Brook Community
17 Church ("Brook Participation Agreement" or "Participation Agreement"). The Brook
18 Participation Agreement provided that Plaintiff (designated "Participant") would have a
19 participation interest of 50% in the construction note amount of \$1,122,745, which
20 Defendant BTM (designated "Seller") would loan to the church, Brook Community Church
21 (designated "Borrower"). Under the Brook Participation Agreement, Plaintiff committed to
22 fund a total of \$561,372.50, to be advanced to Defendant BTM in response to periodic draw
23 requests from Defendant according to a projected draw schedule. In consideration for
24 Plaintiff's advancing the funds, Plaintiff was entitled to receive the return of the principal
25 invested, as well as 10.5% interest on such amount, and its pro rata portion (50%) of a
26 Participation Fee (of \$16,841.17), with interest and fees to be paid monthly, and the
27 principal payable to Plaintiff at the issuance of a Certificate of Occupancy for the Property
28 or twelve (12) months from the date of Loan Closing, whichever first occurs, as provided for

1 in the Loan Agreement which was specifically referenced by and incorporated into the
2 Participation Agreement. The Participation Agreement also provided that in the event
3 Plaintiff had not received its return of principal at the time specified, BTM was either to
4 provide or to arrange additional financing so that Plaintiff would receive all its funds.

5 930. Defendant BTM, for its part, agreed among other things, that:

- 6 • “In the event Seller [BTM] does not for any reason advance to Borrower
7 [church] the full amount of the contemplated advance [the draws of funds that
8 Defendants called for every month] on the date of receipt of such Purchase
9 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
10 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
11 to the amount of such contemplated advance not made.” (Participation
12 Agreement, Schedule 4, ¶2.)
- 13 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
14 the terms of the Loan Documents and with this Agreement. Seller [BTM]
15 shall provide loan servicing in accordance with commercially acceptable loan
16 servicing practices and with the same degree of care that is customarily
17 employed and exercised by Seller [BTM] in the administration and servicing
18 of loans of a similar nature held by it for its own account (the “Servicing
19 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 20 • “The Seller [BTM] shall maintain appropriate records and books of account
21 reflecting interest accrued and interest received, interest rate changes, principal
22 payments and all other transactions or actions affecting the Loan, which
23 records shall be kept in accordance with accounting principles consistently
24 and customarily applied by Seller [BTM].” (Participation Agreement,
25 Schedule 4, ¶9.)
- 26 • “Seller [BTM] further agrees that in performing its obligations hereunder,
27 Seller shall: (a) act in a custodial capacity on behalf of the Participant
28 [Plaintiff] with respect to its holding of any underlying instrument or collateral
and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and
(d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)

24 931. The parties agreed that the Plaintiff would advance funds to BTM, as called
25 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
26 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
27 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
28 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower

1 (the Church), to service the loan and advance the funds towards the construction project,
2 according to the budget and plans approved and relied upon by the Plaintiff in entering into
3 the Participation Agreement. Upon information and belief, BTM had an agreement with
4 Arks whereby Arks took over the servicing and administration of the Loan to Brook
5 Community Church. The Participation Agreement specifically references and incorporates
6 the Loan Agreement, which is between Arks "and its affiliate BTM Funding, Inc." and the
7 Borrower (the Church), and which provides that "the Loan proceeds are to be used by
8 Church solely for the construction of a church, church-related improvements, and/or costs
9 related thereto (the "Project") upon the land described in the Security Instrument (the
10 "Property") in accordance with the plans and specifications approved by ARKS."

11 932. Plaintiff agreed to advance the funds in response to periodic draws based on
12 the project plans and budget which were attached to the Participation Agreement and/or the
13 Loan Agreement that was incorporated into the Participation Agreement, and which had
14 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
15 committing to the Participation Agreement for the Brook Community Church Loan.
16 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
17 contractors, suppliers and other third parties as well as specific project-related servicing fees
18 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
19 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
20 approval from Plaintiff for any material change to the budget or plans.

21 Contract Performance and Breach

22 933. Upon execution of the Participation Agreement, Plaintiff began funding draw
23 requests for the Brook Community Church project based on draw requests by BTM and its
24 agents. Plaintiff Strongback advanced \$561,374 to BTM and its agents for the Brook
25 Community Church Loan between April 2008 and October 2008.

26 934. Defendant BTM breached the Participation Agreement by, among other things,
27 the following:

28 ///

- 1 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
2 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
3 Ministries, Inc. (or to the servicers or contractors for authorized project
4 disbursements on the Borrower's behalf), and failing to return within five business
5 days to Plaintiff any funds not so advanced;
- 6 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
7 contractors, suppliers and other third parties as well as specific project-related
8 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
9 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
10 failing to get prior approval from Plaintiff for any material change to the budget or
11 plans;
- 12 • failing to maintain appropriate records and books of account reflecting interest
13 accrued and interest received, interest rate changes, principal payments and all other
14 transactions or actions affecting the Loan;
- 15 • not paying Plaintiff its return of principal at the earlier of the issuance of the
16 certificate of occupancy or within 12 months of the Loan Closing;
- 17 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
18 Closing and not providing or arranging additional financing to allow Plaintiff to
19 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
20 within 12 months of the Loan Closing;
- 21 • not paying Plaintiff its interest and fees on a monthly basis;
- 22 • failing to provide loan servicing and administration in accordance with the Loan
23 documents and with commercially acceptable loan servicing practices;
- 24 • requiring additional payments by Plaintiff beyond what was due under the
25 Participation Agreement and the approved budget and plans incorporated therein;
- 26 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
27 holding any proceeds received for the Loan;

28 ///

- 1 • commingling for significant periods of time proceeds received on the Loan with other
2 funds.

3 Contract Damages

4 935. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
5 as yet unascertained, but which Plaintiff believes is at least \$189,316 and which will be
6 proved at trial.

7 936. Additionally, Plaintiff incurred legal and administrative costs in addressing
8 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
9 have incurred.

10 Fraud – Defendants' Misrepresentations

11 937. On the periodic draw requests sent to Plaintiff beginning in April 2008,
12 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
13 had been spent on the Brook Community Church project, in accordance with the approved
14 plans and budget, as per the reports, forms, and spreadsheets submitted with the draw
15 requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
16 represented the value of the project to that point.

17 938. Prior to Plaintiff's executing the Participation Agreement and making each
18 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
19 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
20 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
21 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
22 updates on projects, including the Brook Community Church project, and was told that all
23 funds previously advanced by Plaintiff to BTM and its agents on the Brook Community
24 Church loan had been put towards the project according to the budget and plans submitted
25 to, approved by and relied on by Plaintiff.

26 Fraud – True Facts

27 939. In fact, Defendants' representations to Plaintiff as described above were false.
28 The true facts were that:

- 1 • Plaintiff's funds had not been spent on the Brook Community Church project in
2 accordance with the approved plans and budget as per the reports, forms, and
3 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
4 April 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
5 accurately represent the value of the project to that point;
- 6 • all funds previously advanced by Plaintiff to BTM and its agents on the Brook
7 Community Church loan had not been put towards the project according to the budget
8 and plans submitted to, approved by and relied on by Plaintiff.

9 Fraud - Concealment

10 940. Defendants David Smith and BTM, including through their agents, concealed
11 from and failed to disclose to Plaintiff the following:

- 12 • the true financial and operational status of the loans and projects, including the Brook
13 Community Church project;
- 14 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
15 projects, including the Brook Community Church project, and were not being applied
16 only to project-related costs, according to the plans and budgets submitted to,
17 approved by and relied on by Plaintiff;
- 18 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
19 including payments made to unrelated third parties - friends of David Smith and
20 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
21 Lachman Lane Property;
- 22 • that Smith and BTM were making undisclosed, unapproved payments for "legal fees"
23 to Randy Barton and for "sales commissions" to Carmen Copple Smith;
- 24 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
25 and its investments in overseeing the management, servicing and administration of
26 the loans and projects;
- 27 • that Smith and BTM were commingling for significant periods of time proceeds
28 received on the Loan with other funds;

1 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
2 new contractors to complete the construction.

3 943. But for Defendants' misrepresentations and concealment as described above,
4 Plaintiff would not have continued to provide funds in response to draw requests from
5 Defendants or their agents for the projects, including the Brook Community Church project,
6 and would not have invested efforts, time and money creating a new program to take over
7 servicing of the loans, expand the Build to Minister program into various investment funds,
8 and market those funds to third parties.

9 944. As a result of Defendants' misrepresentations and concealments, Plaintiff has
10 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
11 \$189,316 and which will be proved at trial. Additionally, Plaintiff incurred legal and
12 administrative costs in addressing and mitigating the harm caused by Defendants'
13 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
14 funds expended in creating a new program to take over servicing of the loans, expand the
15 Build to Minister program into various investment funds, and market those funds to third
16 parties, which it would not have expended but for Defendants' misrepresentations and
17 concealments.

18 *True Way Church of God in Christ, Inc. Loan*

19 Contract Terms

20 945. On March 14, 2008, Plaintiff Strongback entered into a Construction Note
21 Participation Agreement with Defendant BTM on a construction loan to True Way Church
22 of God in Christ, Inc. ("True Way Participation Agreement" or "Participation Agreement").
23 The True Way Participation Agreement provided that Plaintiff (designated "Participant")
24 would have a participation interest of 50% in the construction note amount of \$267,100,
25 which Defendant BTM (designated "Seller") would loan to the church, True Way Church of
26 God in Christ, Inc. ("True Way") (designated "Borrower"). Under the True Way
27 Participation Agreement, Plaintiff committed to fund a total of \$133,550, to be advanced to
28 Defendant BTM in response to periodic draw requests from Defendant according to a

1 projected draw schedule. In consideration for Plaintiff's advancing the funds, Plaintiff was
2 entitled to receive the return of the principal invested, as well as 10.5% interest on such
3 amount, and its pro rata portion (50%) of a Participation Fee (of \$4,006.50), with interest
4 and fees to be paid monthly, and the principal payable to Plaintiff at the issuance of a
5 Certificate of Occupancy for the Property or twelve (12) months from the date of Loan
6 Closing, whichever first occurs, as provided for in the Loan Agreement which was
7 specifically referenced by and incorporated into the Participation Agreement. The
8 Participation Agreement also provided that in the event Plaintiff had not received its return
9 of principal at the time specified, BTM was either to provide or to arrange additional
10 financing so that Plaintiff would receive all its funds.

11 946. Defendant BTM, for its part, agreed among other things, that:

- 12 • "In the event Seller [BTM] does not for any reason advance to Borrower
13 [church] the full amount of the contemplated advance [the draws of funds that
14 Defendants called for every month] on the date of receipt of such Purchase
15 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
16 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
17 to the amount of such contemplated advance not made." (Participation
18 Agreement, Schedule 4, ¶2.)
- 19 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
20 the terms of the Loan Documents and with this Agreement. Seller [BTM]
21 shall provide loan servicing in accordance with commercially acceptable loan
22 servicing practices and with the same degree of care that is customarily
23 employed and exercised by Seller [BTM] in the administration and servicing
24 of loans of a similar nature held by it for its own account (the "Servicing
25 Standard")." (Participation Agreement, Schedule 4, ¶9.)
- 26 • "The Seller [BTM] shall maintain appropriate records and books of account
27 reflecting interest accrued and interest received, interest rate changes, principal
28 payments and all other transactions or actions affecting the Loan, which
records shall be kept in accordance with accounting principles consistently
and customarily applied by Seller [BTM]." (Participation Agreement,
Schedule 4, ¶9.)
- "Seller [BTM] further agrees that in performing its obligations hereunder,
Seller shall: (a) act in a custodial capacity on behalf of the Participant
[Plaintiff] with respect to its holding of any underlying instrument or collateral
and in holding any proceeds received for the Loan; (b) not commingle for any
significant period of time proceeds received on the Loan; (c) directly pass
through any proceeds received from the Loan to Participant [Plaintiff] as
provided in Section 4 of this Agreement, less any proceeds that represent
servicing or other compensation to Seller [BTM] or an interest in the Loan
retained by the Seller [BTM], all as more particularly provided for herein; and

(d) administer the Loan in accordance with the Servicing Standard as provided herein.” (Participation Agreement, Schedule 4, ¶ 9.)

1
2 947. The parties agreed that the Plaintiff would advance funds to BTM, as called
3 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
4 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
5 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
6 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
7 (the Church), to service the loan and advance the funds towards the construction project,
8 according to the budget and plans approved and relied upon by the Plaintiff in entering into
9 the Participation Agreement. Upon information and belief, BTM had an agreement with
10 Arks whereby Arks took over the servicing and administration of the Loan to True Way.
11 The Participation Agreement specifically references and incorporates the Loan Agreement,
12 which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower (the Church),
13 and which provides that “the Loan proceeds are to be used by Church solely for the
14 construction of a church, church-related improvements, and/or costs related thereto (the
15 “Project”) upon the land described in the Security Instrument (the “Property”) in accordance
16 with the plans and specifications approved by ARKS.”

17 948. Plaintiff agreed to advance the funds in response to periodic draws based on
18 the project plans and budget which were attached to the Participation Agreement and/or the
19 Loan Agreement that was incorporated into the Participation Agreement, and which had
20 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
21 committing to the Participation Agreement for the True Way Loan. Defendant BTM agreed
22 to use 100% of funds advanced by Plaintiff to pay contractors, sub-contractors, suppliers and
23 other third parties as well as specific project-related servicing fees to itself, Arks and Noah,
24 according to the budget and plans submitted to and approved by Plaintiffs and incorporated
25 into the Participation Agreement, and agreed to get prior approval from Plaintiff for any
26 material change to the budget or plans.

27 ///

28 ///

Contract Performance and Breach

1
2 949. Upon execution of the Participation Agreement, Plaintiff began funding draw
3 requests for the True Way project based on draw requests by BTM and its agents. Plaintiff
4 Strongback advanced \$133,550 to BTM and its agents for the True Way Loan between April
5 2008 and December 2008.

6 950. Defendant BTM breached the Participation Agreement by, among other things,
7 the following:

- 8 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
9 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
10 Ministries, Inc. (or to the servicers or contractors for authorized project
11 disbursements on the Borrower's behalf), and failing to return within five business
12 days to Plaintiff any funds not so advanced;
- 13 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
14 contractors, suppliers and other third parties as well as specific project-related
15 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
16 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
17 failing to get prior approval from Plaintiff for any material change to the budget or
18 plans;
- 19 • failing to maintain appropriate records and books of account reflecting interest
20 accrued and interest received, interest rate changes, principal payments and all other
21 transactions or actions affecting the Loan;
- 22 • not paying Plaintiff its return of principal at the earlier of the issuance of the
23 certificate of occupancy or within 12 months of the Loan Closing;
- 24 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
25 Closing and not providing or arranging additional financing to allow Plaintiff to
26 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
27 within 12 months of the Loan Closing;
- 28 • not paying Plaintiff its interest and fees on a monthly basis;

- 1 • failing to provide loan servicing and administration in accordance with the Loan
- 2 documents and with commercially acceptable loan servicing practices;
- 3 • requiring additional payments by Plaintiff beyond what was due under the
- 4 Participation Agreement and the approved budget and plans incorporated therein;
- 5 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
- 6 holding any proceeds received for the Loan;
- 7 • commingling for significant periods of time proceeds received on the Loan with other
- 8 funds.

9 Contract Damages

10 951. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
11 as yet unascertained, but which Plaintiff believes is at least \$62,753 and which will be
12 proved at trial.

13 952. Additionally, Plaintiff incurred legal and administrative costs in addressing
14 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
15 have incurred.

16 Fraud – Defendants' Misrepresentations

17 953. On the periodic draw requests sent to Plaintiff beginning in April 2008,
18 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
19 had been spent on the True Way project, in accordance with the approved plans and budget,
20 as per the reports, forms, and spreadsheets submitted with the draw requests, and that the
21 reports, forms, and spreadsheets provided to Plaintiff accurately represented the value of the
22 project to that point.

23 954. Prior to Plaintiff's executing the Participation Agreement and making each
24 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
25 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
26 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
27 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
28 updates on projects, including the True Way project, and was told that all funds previously

1 advanced by Plaintiff to BTM and its agents on the True Way loan had been put towards the
2 project according to the budget and plans submitted to, approved by and relied on by
3 Plaintiff.

4 Fraud – True Facts

5 955. In fact, Defendants' representations to Plaintiff as described above were false.

6 The true facts were that:

- 7 • Plaintiff's funds had not been spent on the True Way project in accordance with the
8 approved plans and budget as per the reports, forms, and spreadsheets submitted with
9 the periodic draw requests sent to Plaintiff beginning in April 2008, and the reports,
10 forms, and spreadsheets submitted to Plaintiff did not accurately represent the value
11 of the project to that point;
- 12 • all funds previously advanced by Plaintiff to BTM and its agents on the True Way
13 loan had not been put towards the project according to the budget and plans submitted
14 to, approved by and relied on by Plaintiff;

15 Fraud - Concealment

16 956. Defendants David Smith and BTM, including through their agents, concealed
17 from and failed to disclose to Plaintiff the following:

- 18 • the true financial and operational status of the loans and projects, including the True
19 Way project;
- 20 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
21 projects, including the True Way project, and were not being applied only to project-
22 related costs, according to the plans and budgets submitted to, approved by and relied
23 on by Plaintiff;
- 24 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
25 including payments made to unrelated third parties - friends of David Smith and
26 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
27 Lachman Lane Property;

28 ///

- 1 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
2 and its investments in overseeing the management, servicing and administration of
3 the loans and projects;
- 4 • that Smith and BTM were commingling for significant periods of time proceeds
5 received on the Loan with other funds;
- 6 • that Smith and BTM did not intend to immediately advance the full amount of
7 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
8 or else return the funds to Plaintiff, and established money market accounts to hold
9 such funds longer than five business days;
- 10 • that Smith and BTM were not maintaining appropriate records and books of account
11 reflecting interest accrued and interest received, interest rate changes, principal
12 payments and all other transactions or actions affecting the Loan.

13 Fraud – Reliance, Discovery and Damage

14 957. Plaintiff continued to fund the True Way loan and project in response to
15 periodic draw requests from Defendants, based on continued assurances and representations
16 of Defendants Smith and BTM, including through their agents at Arks and Noah, that
17 Plaintiff's funds advanced thus far had gone towards the projects according to the plans and
18 budget reviewed, approved and relied upon by Plaintiff, and based on Defendants' failure to
19 disclose that Plaintiff's funds were being commingled with other funds and diverted to non-
20 project related costs and payments. In or about February 2009, Plaintiff began working on a
21 new program to take over the servicing and administration of the loans, expand the Build to
22 Minister church loan program into various investment funds, and market those funds to third
23 parties.

24 958. On or about July 31, 2009, during this effort to expand the loan program,
25 Plaintiff first learned of problems with the loans, including that Defendants and their agents
26 owed monies to third parties and were unable to pay them despite Plaintiff and other
27 investors having advanced funds as requested. Over the course of the next several months,
28 Plaintiff conducted an investigation in an attempt to determine what had happened to

1 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
2 misrepresentations, concealment and malfeasance. With respect to the problems discovered
3 with the loans, Plaintiff contributed additional monies in order to complete the projects,
4 including paying outstanding bills, liens, legal and administration fees, modifying the terms
5 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
6 new contractors to complete the construction.

7 959. But for Defendants' misrepresentations and concealment as described above,
8 Plaintiff would not have continued to provide funds in response to draw requests from
9 Defendants or their agents for the projects, including the True Way project, and would not
10 have invested efforts, time and money creating a new program to take over servicing of the
11 loans, expand the Build to Minister program into various investment funds, and market those
12 funds to third parties.

13 960. As a result of Defendants' misrepresentations and concealments, Plaintiff has
14 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
15 \$62,753 and which will be proved at trial. Additionally, Plaintiff incurred legal and
16 administrative costs in addressing and mitigating the harm caused by Defendants'
17 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
18 funds expended in creating a new program to take over servicing of the loans, expand the
19 Build to Minister program into various investment funds, and market those funds to third
20 parties, which it would not have expended but for Defendants' misrepresentations and
21 concealments.

22 **Plaintiff Wood Luxembourg**

23 ***Agape Word Church, Inc. Loan***

24 **Contract Terms**

25 961. On November 21, 2008, Plaintiff Wood Luxembourg entered into a
26 Construction Note Participation Agreement with Defendant BTM on a construction loan to
27 Agape Word Church, Inc. ("Agape Participation Agreement" or "Participation Agreement").
28 The Agape Participation Agreement provided that Plaintiff (designated "Participant") would

1 have a participation interest of 50% in the construction note amount of \$686,931, which
2 Defendant BTM (designated "Seller") would loan to the church, Agape Word Church, Inc.
3 (designated "Borrower"). The Participation Agreement was amended on October 12, 2009
4 so that Wood Luxembourg had a 25.7315% interest. Under the Agape Participation
5 Agreement as amended, Plaintiff committed to fund a total of \$176,757.65, to be advanced
6 to Defendant BTM in response to periodic draw requests from Defendant according to a
7 projected draw schedule. In consideration for Plaintiff's advancing the funds, Plaintiff was
8 entitled to receive the return of the principal invested, as well as 10.5% interest on such
9 amount, and its pro rata portion (25.7315%) of a Participation Fee (of \$10,303.96), with
10 interest and fees to be paid monthly, and the principal payable to Plaintiff at the issuance of
11 a Certificate of Occupancy for the Property or twelve (12) months from the date of Loan
12 Closing, whichever first occurs, as provided for in the Loan Agreement which was
13 specifically referenced by and incorporated into the Participation Agreement. The
14 Participation Agreement also provided that in the event Plaintiff had not received its return
15 of principal at the time specified, BTM was either to provide or to arrange additional
16 financing so that Plaintiff would receive all its funds.

17 962. Defendant BTM, for its part, agreed among other things, that:

- 18 • "In the event Seller [BTM] does not for any reason advance to Borrower
19 [church] the full amount of the contemplated advance [the draws of funds that
20 Defendants called for every month] on the date of receipt of such Purchase
21 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
22 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
23 to the amount of such contemplated advance not made." (Participation
24 Agreement, Schedule 4, ¶2.)
- 25 • "[T]he Seller [BTM] shall service and administer the Loan in accordance with
26 the terms of the Loan Documents and with this Agreement. Seller [BTM]
27 shall provide loan servicing in accordance with commercially acceptable loan
28 servicing practices and with the same degree of care that is customarily
employed and exercised by Seller [BTM] in the administration and servicing
of loans of a similar nature held by it for its own account (the "Servicing
Standard")." (Participation Agreement, Schedule 4, ¶9.)
- "The Seller [BTM] shall maintain appropriate records and books of account
reflecting interest accrued and interest received, interest rate changes, principal
payments and all other transactions or actions affecting the Loan, which
records shall be kept in accordance with accounting principles consistently

1 and customarily applied by Seller [BTM].” (Participation Agreement,
Schedule 4, ¶9.)

- 2 • “Seller [BTM] further agrees that in performing its obligations hereunder,
3 Seller shall: (a) act in a custodial capacity on behalf of the Participant
4 [Plaintiff] with respect to its holding of any underlying instrument or collateral
5 and in holding any proceeds received for the Loan; (b) not commingle for any
6 significant period of time proceeds received on the Loan; (c) directly pass
7 through any proceeds received from the Loan to Participant [Plaintiff] as
8 provided in Section 4 of this Agreement, less any proceeds that represent
9 servicing or other compensation to Seller [BTM] or an interest in the Loan
10 retained by the Seller [BTM], all as more particularly provided for herein; and
11 (d) administer the Loan in accordance with the Servicing Standard as provided
12 herein.” (Participation Agreement, Schedule 4, ¶ 9.)

13 963. The parties agreed that the Plaintiff would advance funds to BTM, as called
14 for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
15 including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
16 consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
17 Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
18 (the Church), to service the loan and advance the funds towards the construction project,
19 according to the budget and plans approved and relied upon by the Plaintiff in entering into
20 the Participation Agreement. Upon information and belief, BTM had an agreement with
21 Arks whereby Arks took over the servicing and administration of the Loan to Agape Word
22 Church, Inc. The Participation Agreement specifically references and incorporates the Loan
23 Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the Borrower
24 (the Church), and which provides that “the Loan proceeds are to be used by Church solely
25 for the construction of a church, church-related improvements, and/or costs related thereto
26 (the “Project”) upon the land described in the Security Instrument (the “Property”) in
27 accordance with the plans and specifications approved by ARKS.”

28 964. Plaintiff agreed to advance the funds in response to periodic draws based on
the project plans and budget which were attached to the Participation Agreement and/or the
Loan Agreement that was incorporated into the Participation Agreement, and which had
been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
committing to the Participation Agreement for the Agape Word Church, Inc. Loan.
Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-

1 contractors, suppliers and other third parties as well as specific project-related servicing fees
2 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
3 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
4 approval from Plaintiff for any material change to the budget or plans.

5 Contract Performance and Breach

6 965. Upon execution of the Participation Agreement, Plaintiff began funding draw
7 requests for the Agape Word Church, Inc. project based on draw requests by BTM and its
8 agents. Plaintiff Wood Luxembourg advanced \$176,758 to BTM and its agents for the
9 Agape Word Church, Inc. Loan between October 2008 and November 2008.

10 966. Defendant BTM breached the Participation Agreement by, among other things,
11 the following:

- 12 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
13 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
14 Ministries, Inc. (or to the servicers or contractors for authorized project
15 disbursements on the Borrower's behalf), and failing to return within five business
16 days to Plaintiff any funds not so advanced;
- 17 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
18 contractors, suppliers and other third parties as well as specific project-related
19 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
20 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
21 failing to get prior approval from Plaintiff for any material change to the budget or
22 plans;
- 23 • failing to maintain appropriate records and books of account reflecting interest
24 accrued and interest received, interest rate changes, principal payments and all other
25 transactions or actions affecting the Loan;
- 26 • not paying Plaintiff its return of principal at the earlier of the issuance of the
27 certificate of occupancy or within 12 months of the Loan Closing;

28 ///

- 1 • failing to ensure the certificate of occupancy issued within 12 months of the Loan
2 Closing and not providing or arranging additional financing to allow Plaintiff to
3 receive all of its funds at the earlier of the issuance of the certificate of occupancy or
4 within 12 months of the Loan Closing;
- 5 • not paying Plaintiff its interest and fees on a monthly basis;
- 6 • failing to provide loan servicing and administration in accordance with the Loan
7 documents and with commercially acceptable loan servicing practices;
- 8 • requiring additional payments by Plaintiff beyond what was due under the
9 Participation Agreement and the approved budget and plans incorporated therein;
- 10 • postponing due dates for payment of principal or interest in which Plaintiff shared
11 without obtaining the consent of Plaintiff;
- 12 • failing to require Borrower to pay the equity down payment at Closing as required by
13 the Loan Documents;
- 14 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
15 holding any proceeds received for the Loan;
- 16 • commingling for significant periods of time proceeds received on the Loan with other
17 funds.

18 Contract Damages

19 967. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
20 as yet unascertained, but which Plaintiff believes is at least \$167,045 and which will be
21 proved at trial.

22 968. Additionally, Plaintiff incurred legal and administrative costs in addressing
23 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
24 have incurred.

25 Fraud – Defendants' Misrepresentations

26 969. On the periodic draw requests sent to Plaintiff beginning in October 2008,
27 Smith's and BTM's agents signed attestations that the monies advanced thus far by Plaintiff
28 had been spent on the Agape Word Church, Inc. project, in accordance with the approved

1 plans and budget, as per the reports, forms, and spreadsheets submitted with the draw
2 requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
3 represented the value of the project to that point.

4 970. Prior to Plaintiff's executing the Participation Agreement and making each
5 subsequent advance, Plaintiff's agent Darren Maloney called periodically (approximately
6 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
7 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
8 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
9 updates on projects, including the Agape Word Church, Inc. project, and was told that all
10 funds previously advanced by Plaintiff to BTM and its agents on the Agape Word Church,
11 Inc. loan had been put towards the project according to the budget and plans submitted to,
12 approved by and relied on by Plaintiff.

13 Fraud – True Facts

14 971. In fact, Defendants' representations to Plaintiff as described above were false.
15 The true facts were that:

- 16 • Plaintiff's funds had not been spent on the Agape Word Church, Inc. project in
17 accordance with the approved plans and budget as per the reports, forms, and
18 spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning in
19 October 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did not
20 accurately represent the value of the project to that point;
- 21 • all funds previously advanced by Plaintiff to BTM and its agents on the Agape Word
22 Church, Inc. loan had not been put towards the project according to the budget and
23 plans submitted to, approved by and relied on by Plaintiff;

24 Fraud - Concealment

25 972. Defendants David Smith and BTM, including through their agents, concealed
26 from and failed to disclose to Plaintiff the following:

- 27 • the true financial and operational status of the loans and projects, including the Agape
28 Word Church, Inc. project;

- 1 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
2 projects, including the Agape Word Church, Inc. project, and were not being applied
3 only to project-related costs, according to the plans and budgets submitted to,
4 approved by and relied on by Plaintiff;
- 5 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
6 including payments made to unrelated third parties - friends of David Smith and
7 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
8 Lachman Lane Property;
- 9 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
10 and its investments in overseeing the management, servicing and administration of
11 the loans and projects;
- 12 • that Smith and BTM were commingling for significant periods of time proceeds
13 received on the Loan with other funds;
- 14 • that Smith and BTM did not intend to immediately advance the full amount of
15 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
16 or else return the funds to Plaintiff, and established money market accounts to hold
17 such funds longer than five business days;
- 18 • that Smith and BTM were not maintaining appropriate records and books of account
19 reflecting interest accrued and interest received, interest rate changes, principal
20 payments and all other transactions or actions affecting the Loan.

21 Fraud – Reliance, Discovery and Damage

22 973. Plaintiff continued to fund the Agape Word Church, Inc. loan and project in
23 response to periodic draw requests from Defendants, based on continued assurances and
24 representations of Defendants Smith and BTM, including through their agents at Arks and
25 Noah, that Plaintiff's funds advanced thus far had gone towards the projects according to the
26 plans and budget reviewed, approved and relied upon by Plaintiff, and based on Defendants'
27 failure to disclose that Plaintiff's funds were being commingled with other funds and
28 diverted to non-project related costs and payments. In or about February 2009, Plaintiff

1 began working on a new program to take over the servicing and administration of the loans,
2 expand the Build to Minister church loan program into various investment funds, and market
3 those funds to third parties.

4 974. On or about July 31, 2009, during this effort to expand the loan program,
5 Plaintiff first learned of problems with the loans, including that Defendants and their agents
6 owed monies to third parties and were unable to pay them despite Plaintiff and other
7 investors having advanced funds as requested. Over the course of the next several months,
8 Plaintiff conducted an investigation in an attempt to determine what had happened to
9 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
10 misrepresentations, concealment and malfeasance. With respect to the problems discovered
11 with the loans, Plaintiff contributed additional monies in order to complete the projects,
12 including paying outstanding bills, liens, legal and administration fees, modifying the terms
13 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
14 new contractors to complete the construction.

15 975. But for Defendants' misrepresentations and concealment as described above,
16 Plaintiff would not have continued to provide funds in response to draw requests from
17 Defendants or their agents for the projects, including the Agape Word Church, Inc. project,
18 and would not have invested efforts, time and money creating a new program to take over
19 servicing of the loans, expand the Build to Minister program into various investment funds,
20 and market those funds to third parties.

21 976. As a result of Defendants' misrepresentations and concealments, Plaintiff has
22 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
23 \$167,045 and which will be proved at trial. Additionally, Plaintiff incurred legal and
24 administrative costs in addressing and mitigating the harm caused by Defendants'
25 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
26 funds expended in creating a new program to take over servicing of the loans, expand the
27 Build to Minister program into various investment funds, and market those funds to third

28 ///

1 parties, which it would not have expended but for Defendants' misrepresentations and
2 concealments.

3 *Apostolic House of Deliverance Loan*

4 Contract Terms

5 977. On or about October 2008, Plaintiff Wood Luxembourg entered into a
6 Construction Note Participation Agreement with Defendant BTM on a construction loan to
7 Apostolic House of Deliverance ("Apostolic Participation Agreement" or "Participation
8 Agreement") which was written and/or oral and/or implied by the conduct of the parties;
9 David Smith signed a written Participation Agreement on behalf of BTM on February 23,
10 2009. The Apostolic Participation Agreement provided that Plaintiff (designated
11 "Participant") would have a participation interest of 50% in the construction note amount of
12 \$450,000, which Defendant BTM (designated "Seller") would loan to the church, Apostolic
13 House of Deliverance (designated "Borrower"). Under the Apostolic Participation
14 Agreement, Plaintiff committed to fund a total of \$225,000, to be advanced to Defendant
15 BTM in response to periodic draw requests from Defendant according to a projected draw
16 schedule. In consideration for Plaintiff's advancing the funds, Plaintiff was entitled to
17 receive the return of the principal invested, as well as 10.5% interest on such amount, and its
18 pro rata portion (50%) of a Participation Fee (of \$6,750), with interest and fees to be paid
19 monthly, and the principal payable to Plaintiff at the issuance of a Certificate of Occupancy
20 for the Property or twelve (12) months from the date of Loan Closing, whichever first
21 occurs, as provided for in the Loan Agreement which was specifically referenced by and
22 incorporated into the Participation Agreement. The Participation Agreement also provided
23 that in the event Plaintiff had not received its return of principal at the time specified, BTM
24 was either to provide or to arrange additional financing so that Plaintiff would receive all its
25 funds.

26 978. Defendant BTM, for its part, agreed among other things, that:

- 27
- 28 • "In the event Seller [BTM] does not for any reason advance to Borrower [church] the full amount of the contemplated advance [the draws of funds that

1 Defendants called for every month] on the date of receipt of such Purchase
2 Payment, Seller [BTM] shall within five (5) Business Days thereafter return
3 the portion of such Purchase Payment to Participant [Plaintiff] as corresponds
4 to the amount of such contemplated advance not made.” (Participation
5 Agreement, Schedule 4, ¶2.)

- 6 • “[T]he Seller [BTM] shall service and administer the Loan in accordance with
7 the terms of the Loan Documents and with this Agreement. Seller [BTM]
8 shall provide loan servicing in accordance with commercially acceptable loan
9 servicing practices and with the same degree of care that is customarily
10 employed and exercised by Seller [BTM] in the administration and servicing
11 of loans of a similar nature held by it for its own account (the “Servicing
12 Standard”).” (Participation Agreement, Schedule 4, ¶9.)
- 13 • “The Seller [BTM] shall maintain appropriate records and books of account
14 reflecting interest accrued and interest received, interest rate changes, principal
15 payments and all other transactions or actions affecting the Loan, which
16 records shall be keep in accordance with accounting principles consistently
17 and customarily applied by Seller [BTM].” (Participation Agreement,
18 Schedule 4, ¶9.)
- 19 • “Seller [BTM] further agrees that in performing its obligations hereunder,
20 Seller shall: (a) act in a custodial capacity on behalf of the Participant
21 [Plaintiff] with respect to its holding of any underlying instrument or collateral
22 and in holding any proceeds received for the Loan; (b) not commingle for any
23 significant period of time proceeds received on the Loan; (c) directly pass
24 through any proceeds received from the Loan to Participant [Plaintiff] as
25 provided in Section 4 of this Agreement, less any proceeds that represent
26 servicing or other compensation to Seller [BTM] or an interest in the Loan
27 retained by the Seller [BTM], all as more particularly provided for herein; and
28 (d) administer the Loan in accordance with the Servicing Standard as provided
herein.” (Participation Agreement, Schedule 4, ¶ 9.)
- A Construction Note will be executed by Borrower at closing, to the order of
Seller, in the final agreed Construction Note Amount, issued pursuant to a
Loan Agreement, secured by a 1st Mortgage/Deed of Trust encumbering the
Property

979. The parties agreed that the Plaintiff would advance funds to BTM, as called
for by the periodic draw requests, sometimes to BTM directly and sometimes to its agents,
including BTM1 LLC, Arks Funding, LLC, and Noah Construction, Inc., with BTM’s
consent, and that BTM or its agents would thereupon transmit the funds to BTM’s affiliate
Arks and/or Arks’ wholly owned subsidiary Noah Construction, on behalf of the Borrower
(the Church), to service the loan and advance the funds towards the construction project,
according to the budget and plans approved and relied upon by the Plaintiff in entering into
the Participation Agreement. Upon information and belief, BTM had an agreement with

///

1 Arks whereby Arks took over the servicing and administration of the Loan to Apostolic
2 House of Deliverance. The Participation Agreement specifically references and incorporates
3 the Loan Agreement, which is between Arks “and its affiliate BTM Funding, Inc.” and the
4 Borrower (the Church), and which provides that “the Loan proceeds are to be used by
5 Church solely for the construction of a church, church-related improvements, and/or costs
6 related thereto (the “Project”) upon the land described in the Security Instrument (the
7 “Property”) in accordance with the plans and specifications approved by ARKS.”

8 980. Plaintiff agreed to advance the funds in response to periodic draws based on
9 the project plans and budget which were attached to the Participation Agreement and/or the
10 Loan Agreement that was incorporated into the Participation Agreement, and which had
11 been provided to the Plaintiff by BTM as part of the package on which the Plaintiff relied in
12 committing to the Participation Agreement for the Apostolic House of Deliverance Loan.
13 Defendant BTM agreed to use 100% of funds advanced by Plaintiff to pay contractors, sub-
14 contractors, suppliers and other third parties as well as specific project-related servicing fees
15 to itself, Arks and Noah, according to the budget and plans submitted to and approved by
16 Plaintiffs and incorporated into the Participation Agreement, and agreed to get prior
17 approval from Plaintiff for any material change to the budget or plans.

18 Contract Performance and Breach

19 981. Pursuant to the Participation Agreement, Plaintiff began funding draw requests
20 for the Apostolic House of Deliverance project based on draw requests by BTM and its
21 agents. Plaintiff Wood Luxembourg advanced \$99,775 to BTM and its agents for the
22 Apostolic House of Deliverance Loan between October 2008 and November 2008.

23 982. Defendant BTM breached the Participation Agreement by, among other things,
24 the following:

- 25 • failing, immediately after receiving funds from Plaintiff in response to draw requests,
26 to advance the full amount of those funds directly to the Borrower, Truth Tabernacle
27 Ministries, Inc. (or to the servicers or contractors for authorized project

28 ///

- 1 disbursements on the Borrower's behalf), and failing to return within five business
2 days to Plaintiff any funds not so advanced;
- 3 • failing to use 100% of funds advanced by Plaintiff to pay contractors, sub-
4 contractors, suppliers and other third parties as well as specific project-related
5 servicing fees to itself, Arks and Noah, according to the budget and plans submitted
6 to and approved by Plaintiffs and incorporated into the Participation Agreement, and
7 failing to get prior approval from Plaintiff for any material change to the budget or
8 plans;
 - 9 • failing to maintain appropriate records and books of account reflecting interest
10 accrued and interest received, interest rate changes, principal payments and all other
11 transactions or actions affecting the Loan;
 - 12 • failing to obtain a Construction Note or other Loan Documents executed by the
13 Borrower;
 - 14 • failing to provide loan servicing and administration in accordance with the Loan
15 documents and with commercially acceptable loan servicing practices;
 - 16 • failing to act in a custodial capacity on behalf of the Plaintiff with respect to its
17 holding any proceeds received for the Loan;
 - 18 • commingling for significant periods of time proceeds received on the Loan with other
19 funds.

20 Contract Damages

21 983. As a result of Defendant's breaches, Plaintiff has been damaged in an amount
22 as yet unascertained, but which Plaintiff believes is at least \$124,857 and which will be
23 proved at trial.

24 984. Additionally, Plaintiff incurred legal and administrative costs in addressing
25 and mitigating the harm caused by Defendants' breaches which costs Plaintiff should not
26 have incurred.

27 ///

28 ///

1 Fraud – Defendants’ Misrepresentations

2 985. On the periodic draw requests sent to Plaintiff beginning in October 2008,
3 Smith’s and BTM’s agents signed attestations that the monies advanced thus far by Plaintiff
4 had been spent on the Apostolic House of Deliverance project, in accordance with the
5 approved plans and budget, as per the reports, forms, and spreadsheets submitted with the
6 draw requests, and that the reports, forms, and spreadsheets provided to Plaintiff accurately
7 represented the value of the project to that point.

8 986. Prior to Plaintiff’s executing the Participation Agreement and making each
9 subsequent advance, Plaintiff’s agent Darren Maloney called periodically (approximately
10 monthly) in response to draw requests and spoke to agents of Smith and BTM, including
11 John Ferguson, Director of Project Construction at Noah Construction, Sam Spatafore, Arks
12 Controller, Robert Stanley, Arks CFO, and Robert Knowles, President of Arks, for status
13 updates on projects, including the Apostolic House of Deliverance project, and was told that
14 all funds previously advanced by Plaintiff to BTM and its agents on the Apostolic House of
15 Deliverance loan had been put towards the project according to the budget and plans
16 submitted to, approved by and relied on by Plaintiff.

17 Fraud – True Facts

18 987. In fact, Defendants’ representations to Plaintiff as described above were false.
19 The true facts were that:

- 20 • Plaintiff’s funds had not been spent on the Apostolic House of Deliverance project at
21 all, nor in accordance with the approved plans and budget as per the reports, forms,
22 and spreadsheets submitted with the periodic draw requests sent to Plaintiff beginning
23 in October 2008, and the reports, forms, and spreadsheets submitted to Plaintiff did
24 not accurately represent the value of the project to that point;
- 25 • all funds previously advanced by Plaintiff to BTM and its agents on the Apostolic
26 House of Deliverance loan had not been put towards the project according to the
27 budget and plans submitted to, approved by and relied on by Plaintiff;

28 ///

Fraud - Concealment

1
2 988. Defendants David Smith and BTM, including through their agents, concealed
3 from and failed to disclose to Plaintiff the following:

- 4 • the true financial and operational status of the loans and projects, including the
5 Apostolic House of Deliverance project;
- 6 • that Defendants had failed to obtain a Construction Note or other Loan Documents
7 executed by the Borrower;
- 8 • that 100% of the funds advanced by Plaintiff to BTM were not going toward the
9 projects, including the Apostolic House of Deliverance project, and were not being
10 applied only to project-related costs, according to the plans and budgets submitted to,
11 approved by and relied on by Plaintiff;
- 12 • that Smith and BTM were diverting Plaintiff's funds for non-project related purposes,
13 including payments made to unrelated third parties - friends of David Smith and
14 David Smith's wife, Carmen Copple Smith, and payments of the mortgage on the
15 Lachman Lane Property;
- 16 • that Smith and BTM were not acting in a custodial capacity on behalf of the Plaintiff
17 and its investments in overseeing the management, servicing and administration of
18 the loans and projects;
- 19 • that Smith and BTM were commingling for significant periods of time proceeds
20 received on the Loan with other funds;
- 21 • that Smith and BTM did not intend to immediately advance the full amount of
22 Plaintiff's funds directly to the Borrower or to servicers or contractors on their behalf
23 or else return the funds to Plaintiff, and established money market accounts to hold
24 such funds longer than five business days;
- 25 • that Smith and BTM were not maintaining appropriate records and books of account
26 reflecting interest accrued and interest received, interest rate changes, principal
27 payments and all other transactions or actions affecting the Loan.

28 ///

1 Fraud – Reliance, Discovery and Damage

2 989. Plaintiff continued to fund the Apostolic House of Deliverance loan and
3 project in response to periodic draw requests from Defendants, based on continued
4 assurances and representations of Defendants Smith and BTM, including through their
5 agents at Arks and Noah, that Plaintiff's funds advanced thus far had gone towards the
6 projects according to the plans and budget reviewed, approved and relied upon by Plaintiff,
7 and based on Defendants' failure to disclose that Plaintiff's funds were being commingled
8 with other funds and diverted to non-project related costs and payments. In or about
9 February 2009, Plaintiff began working on a new program to take over the servicing and
10 administration of the loans, expand the Build to Minister church loan program into various
11 investment funds, and market those funds to third parties.

12 990. On or about July 31, 2009, during this effort to expand the loan program,
13 Plaintiff first learned of problems with the loans, including that Defendants and their agents
14 owed monies to third parties and were unable to pay them despite Plaintiff and other
15 investors having advanced funds as requested. Over the course of the next several months,
16 Plaintiff conducted an investigation in an attempt to determine what had happened to
17 Plaintiff's funds and determine the extent of the losses caused by Defendants' breaches,
18 misrepresentations, concealment and malfeasance. With respect to the problems discovered
19 with the loans, Plaintiff contributed additional monies in order to complete the projects,
20 including paying outstanding bills, liens, legal and administration fees, modifying the terms
21 of the loans with the borrowers as necessary, pursuing foreclosure proceedings, and hiring
22 new contractors to complete the construction.

23 991. But for Defendants' misrepresentations and concealment as described above,
24 Plaintiff would not have continued to provide funds in response to draw requests from
25 Defendants or their agents for the projects, including the Apostolic House of Deliverance
26 project, and would not have invested efforts, time and money creating a new program to take
27 over servicing of the loans, expand the Build to Minister program into various investment
28 funds, and market those funds to third parties.

1 992. As a result of Defendants' misrepresentations and concealments, Plaintiff has
2 been damaged in an amount as yet unascertained, but which Plaintiff believes is at least
3 \$124,857 and which will be proved at trial. Additionally, Plaintiff incurred legal and
4 administrative costs in addressing and mitigating the harm caused by Defendants'
5 misrepresentations and concealments. Further, Plaintiff lost the value of its time, efforts and
6 funds expended in creating a new program to take over servicing of the loans, expand the
7 Build to Minister program into various investment funds, and market those funds to third
8 parties, which it would not have expended but for Defendants' misrepresentations and
9 concealments.

10 **Wood Luxembourg – Fiduciary Relationship and Oral Contract**
11 **with David Smith and BTM**

12 993. In or about mid-2007, Defendants David Smith and BTM approached Plaintiff
13 Principal Scott Wood and his family's investment vehicle, Plaintiff Wood Luxembourg, and
14 solicited their investment in the Build to Minister program of construction loans to churches
15 that Smith and BTM were running together with their agents Arks and Noah. David Smith
16 had been a close, trusted and longtime family friend of Scott Wood and his family. Smith's
17 children had been close to Scott Wood's cousin and aunt, and the two families had grown
18 close over a period of years; Smith had also invested in real estate together with Scott Wood
19 previously. Because of his history and relationship with the Wood family, David Smith had
20 a special relationship of trust and confidence with Scott Wood and was able to exert a
21 unique influence over him.

22 994. Scott Wood was in charge of managing the Wood family investments on
23 behalf of himself and his two sisters through the family's limited partnership Wood
24 Investment Partners, L.P., which is the sole beneficial owner of Plaintiff Wood
25 Luxembourg. In 2004, based on this special relationship with Smith, Wood appointed Smith
26 as the manager of Wood Luxembourg, allowing Smith to enter into contracts and make and
27 supervise investments on Wood Luxembourg's behalf. In 2006, Smith told Wood that it
28 would be more convenient if, instead of having to go back to Wood each time a signature

1 was needed, Smith was given full authority to issue wire transfers from Wood
2 Luxembourg's account. Wood, who continued to repose his trust and confidence in Smith,
3 agreed and gave Smith full authority to issue wire transfers of funds from Wood
4 Luxembourg's account upon Smith's sole signature and without seeking individual
5 authorization from Scott Wood.

6 995. It was in this context in mid-2007 that David Smith and BTM solicited Scott
7 Wood to invest the Wood family funds with Defendants through the family's financial
8 vehicle Plaintiff Wood Luxembourg. Scott Wood was concerned about liquidity of
9 investments, particularly given his father's poor health, and David Smith was aware of this.
10 Smith and BTM represented to Wood and to Plaintiff that the Build to Minister Investment
11 program involved low risk loans to churches for construction and expansion projects.
12 Defendants told Wood that churches were low risk borrowers and that he, David Smith,
13 would be investing alongside him.

14 996. Smith and BTM represented to Plaintiff that the program involved two types
15 of loans, in which they were selling participations. One type had a six month term and an
16 expected rate of return of 12%; the other type had a three year term and an expected rate of
17 return in the "high teens", e.g., 15-18%. Scott Wood agreed to invest in the program and
18 told David Smith and BTM he wanted to do a 50/50 mix of the short-term (6 month) and
19 long-term (3 year) investments. David Smith told Wood the investment commitment would
20 be approximately \$250,000 at a time, and Wood told Smith that he would invest up to \$1.5
21 million in the program, in individual investments of roughly \$250,000 per loan, but no more
22 than \$1.5 million total. Wood told Smith to keep him informed on the status of the
23 investments.

24 997. By the third quarter of 2007, Smith had taken out approximately \$500,000
25 from the Wood Luxembourg account, which was consistent with the agreement between
26 Wood Luxembourg and Smith and BTM, and with Scott Wood's directions to Smith as
27 manager of Wood Luxembourg. Around this time, Wood and Smith spoke again, and Smith

28 ///

1 stated that as directed he was investing half of the funds in short term six month loans and
2 half in long term three year loans.

3 998. In the first and second quarters of 2008, Wood saw that his invested capital
4 had tripled from \$500,000 to approximately \$1,500,000. This was consistent with the
5 agreement and with his directions to Smith as his manager, and at that point Wood believed
6 they were at the limit and that no more of Plaintiff's funds would be invested.

7 999. Unbeknown to Wood and Plaintiff, however, Smith had established a capital
8 commitment on behalf of Plaintiff Wood Luxembourg of \$3.4 million pursuant to contracts
9 with BTM, Arks and others. Further, Smith and BTM had been investing the bulk of
10 Plaintiff's funds not in loans, as represented, but in limited liability companies. This was an
11 entirely different structure than what was discussed or agreed to; rather than having a six
12 month or even three year time horizon, the funds were locked up entirely until the project
13 was completed, and were much less liquid investments than Smith and BTM had represented
14 to Plaintiff when soliciting his agreement to invest.

15 1000. In late 2008, Smith wired an additional \$1.35 million out of Plaintiff's
16 account. Smith then told Wood that they needed more funds, and Wood went to his account
17 and saw that it had been completely drawn down, that approximately \$2.85 million total had
18 been taken out by Smith, almost double what he had authorized, and that the account was
19 down to almost nothing. Wood confronted Smith, who for the first time informed Wood
20 that Smith had committed Plaintiff Wood Luxembourg to capital commitments of up to \$3.4
21 million, obligating Wood Luxembourg to advance that amount of funds in response to draw
22 requests.

23 1001. In February 2009, Plaintiff sent a representative to North Carolina to a meeting
24 with Smith, BTM and Arks, noted other reporting problems and began requesting further
25 financial information. After July 31, 2009, when Darren Maloney discovered signs of
26 financial improprieties in the BTM and Arks loans and investments and then reported this to
27 the Plaintiff Principals and Plaintiffs' agents, Plaintiff Wood Luxembourg revoked David
28 Smith's manager status. Further investigation commenced and Plaintiff began learning the

1 extent of Defendants' malfeasance and the losses they had caused. As of July 2009,
2 Defendants had invested \$276,533 of Plaintiff's funds in loan participations sold by BTM,
3 \$657,373 of Plaintiff's funds in loan participations sold by Arks, and \$2,188,523 of
4 Plaintiff's funds in limited liability companies, for a total of \$3,122,428.

5 1002. Defendants Smith and BTM represented to Plaintiff and Wood, among other
6 things, the following:

- 7 • That Defendants would invest Plaintiff's funds in liquid investments, half in
8 loans with a six month term and half in loans with a three year term;
- 9 • That Defendant Smith would invest no more than \$1.5 million total;
- 10 • That the loans were safe, low risk investments;
- 11 • That Defendants would invest their own funds alongside Plaintiff's;
- 12 • That Defendants would use 100% of funds advanced by Plaintiff to pay
13 contractors, sub-contractors, suppliers and other third parties as well as
14 specific project-related servicing fees to BTM, Arks and Noah, according to
15 the approved budget and plans;
- 16 • That Defendants would act in a custodial capacity on behalf of the Plaintiff
17 with respect to the holding of proceeds invested in and received on the Loans;
- 18 • That Defendants would conduct due diligence on the loans in which they
19 invested Plaintiff's funds, including on the borrowers (the churches), the
20 proposed project plans and budgets, and the entities that would service and
21 administer the construction loans;
- 22 • That Defendant Smith would act in a fiduciary capacity in overseeing and
23 managing Plaintiff's funds.

24 1003. In fact, Defendants' representations to Plaintiff as described above were false.

25 The true facts were that:

- 26 • Defendants were investing the bulk of Plaintiff's funds in entirely different
27 structures – limited liability companies – that offered no liquidity, and

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Defendants intended to invest the funds in this structure at the time of the representations to Plaintiff;

- Defendant Smith intended to and did invest approximately \$3.1 million of Plaintiff's funds, twice the amount that Plaintiff had authorized;
- The loans were not safe, low risk investments;
- Defendants did not intend to and in fact did not invest their own funds alongside Plaintiff's, and in fact Defendant BTM sold its own interests in the limited liability companies to Plaintiff, without disclosing that Defendants were on both sides of the transactions;
- Defendants were not using 100% of funds advanced by Plaintiff to pay contractors, sub-contractors, suppliers and other third parties as well as specific project-related servicing fees to BTM, Arks and Noah, according to the approved budget and plans, but instead were commingling and diverting funds to non-project related purposes;
- Defendants did not conduct due diligence on the loans in which they invested Plaintiff's funds, including on the borrowers (the churches), the proposed project plans and budgets, or the entities that would service and administer the construction loans;
- Defendants did not intend to act in a custodial capacity on behalf of the Plaintiff with respect to the holding of proceeds invested in and received on the Loans, but instead intended to exploit the special relationship of trust and confidence to gain advantage over Plaintiff and use Plaintiff's funds for Defendants' own purposes;
- Defendant Smith did not intend to and in fact did not act in a fiduciary capacity in overseeing and managing Plaintiff's funds, but rather used his position as manager to take advantage of Plaintiff and Plaintiff's funds for his own benefit, where he stood on both sides of the transactions he entered into on behalf of Plaintiff.

1 1004. Defendants David Smith and BTM, including through their agents, concealed
2 from and failed to disclose to Plaintiff the following:

- 3 • The true financial and operational status of the loans and projects in which
4 Defendants had invested Plaintiff's funds;
- 5 • That Defendant Smith had withdrawn and invested approximately \$3.1 million
6 of Plaintiff's funds, twice the amount that Plaintiff had authorized;
- 7 • That Defendant Smith had committed Plaintiff Wood Luxembourg to capital
8 commitments of up to \$3.4 million, more than twice the amount that Plaintiff
9 had authorized;
- 10 • That 100% of the funds advanced by Plaintiff to BTM and its agents were not
11 going toward the loans, and were not being applied only to project-related
12 costs, according to the approved plans and budgets;
- 13 • That Smith and BTM were diverting Plaintiff's funds for non-project related
14 purposes, including payments made to unrelated third parties - friends of
15 David Smith and David Smith's wife, Carmen Copple Smith, and payments of
16 the mortgage on the Lachman Lane Property;
- 17 • That Smith and BTM were making undisclosed, unapproved payments for
18 "legal fees" to Randy Barton and for "sales commissions" to Carmen Copple
19 Smith;
- 20 • That Smith and BTM did not conduct due diligence on the loans for which
21 they sold Plaintiff a participation interest, including on the borrowers (the
22 churches), the proposed project plans and budgets, or the entities that would
23 service and administer the construction loans;
- 24 • That Smith and BTM were commingling for significant periods of time
25 proceeds received on the Loan with other funds;
- 26 • That Smith and BTM were not maintaining appropriate records and books of
27 account reflecting interest accrued and interest received, interest rate changes,
28 principal payments and all other transactions or actions affecting the Loan.

1 1005. Plaintiff relied on Defendants' assurances, misrepresentations and failure to
2 disclose the true facts by, among other things, agreeing to invest with Defendants in the
3 Build to Minister loans and to continue to allow Smith to act as manager for Wood
4 Luxembourg. Plaintiff continued to advance funds or allow Defendants to advance its funds
5 based on continued assurances and representations of Defendants Smith and BTM, including
6 through their agents at Arks and Noah, that Plaintiff's funds advanced thus far had gone
7 towards the projects according to the approved plans and budgets, and based on Defendants'
8 failure to disclose that Plaintiff's funds were being commingled with other funds and
9 diverted to non-project related costs and payments.

10 1006. Because of Defendants' breach of their oral agreement with Plaintiff,
11 mismanagement of Plaintiff's investments, misrepresentations, concealment, and Defendant
12 Smith's breach of fiduciary duties, Plaintiff has been harmed by having invested
13 approximately \$1.6 million more of its funds than it ever intended, agreed to or authorized,
14 by incurring losses on its investments, and by having to pay additional monies in order to
15 complete the projects, including paying outstanding bills, liens, legal and administration
16 fees, modifying the terms of the loans with the borrowers as necessary, pursuing foreclosure
17 proceedings, and hiring new contractors to complete the construction in order to mitigate the
18 harm caused by Defendants. As a result of Defendants' conduct, Plaintiff has been damaged
19 in an amount as yet unascertained, but which Plaintiff believes is at least \$1,944,222 and
20 which will be proved at trial. Additionally, Plaintiff incurred legal and administrative costs
21 in addressing and mitigating the harm caused by Defendants' conduct which costs Plaintiff
22 should not have incurred.

23 **The Lachman Lane Property –Fraudulent Transfers**

24 1007. On information and belief, in August 2008, Defendant BTM bought real
25 property at 1545 Lachman Lane, in Pacific Palisades, County of Los Angeles, California, for
26 approximately \$10,000,000. The real property is more specifically described as follows:

27 *Lot 9 of Tract No. 21601, in the City of Los Angeles, County of Los Angeles, State of*
28 *California, as per map recorded in Book 1011, Pages 34 to 39 inclusive of Maps, and*

1 a Certificate of Correction thereto recorded March 24, 1983 as Instrument No. 83-
327706, Official Records, in the Office of the County Recorder of said County.

2 Together with that portion of Lot 18 of said Tract No. 21601, described as follows:

3 Beginning at the Southeasterly corner of Lot 18; thence Southwesterly along the
4 Southerly line of said Lot 18, South 83 degrees 06' 35" West a distance of 9.03 feet;
5 thence Northwesterly, North 13 degrees 51' 06" West a distance of 98.79 feet; thence
6 North 10 degrees 37' 16" West a distance of 59.71 feet to a point on the Northerly
7 line of said Lot 18; thence Northeasterly along said Northerly line North 71 degrees
8 29' 28" East, a distance of 15.36 feet to the Northeasterly corner of said Lot 18;
9 thence Southeasterly along the Easterly line of said Lot 18, south 10 degrees 23' 45"
10 East a distance of 161.05 feet to the point of the beginning.

11 Excepting therefrom all oil, oil rights, natural gas rights, mineral rights, all other
12 hydrocarbon substances by whatsoever name known, and all water, claims or rights
13 to water, together with appurtenant rights thereto, without, however, any right to
14 enter upon the surface of said land nor any portion of the subsurface lying above a
15 depth of 500 feet, as excepted or reserved by deed recorded February 18, 1957 in
16 Book 53669, Page 228, Official Records.

17 (the "Lachman Lane Property").

18 1008. On November 3, 2008, BTM purported to transfer the title of the Lachman
19 Lane Property to David Smith, by way of a Quitclaim Deed, which was recorded in the Los
20 Angeles County Recorder's Office at Instrument No. 20091456838 on September 24, 2009.
21 On information and belief, the purported transfer was made for no consideration.

22 1009. Also on November 3, 2008, David Smith purported to transfer the title of the
23 Lachman Lane Property from himself to his wife, Carmen Copple Smith, by way of a
24 Quitclaim Deed, which was recorded in the Los Angeles County Recorder's Office at
25 Instrument No. 20091456839 on September 24, 2009. On information and belief, the
26 purported transfer was made for no consideration or for inadequate consideration.

27 1010. On September 25, 2009, Carmen Copple Smith purported to transfer title of
28 the Lachman Lane Property from herself as an individual to herself, Carmen Copple Silva,
as Trustee for the Carmen Copple Silva Revocable Living Trust, by way of a Quitclaim
Deed, which was recorded in the Los Angeles County Recorder's Office at Instrument No.
20091464107. On information and belief, the purported transfer was made for no
consideration.

1011. Each of the purported transfers was to an inextricably linked insider. Smith
was the 100% owner and alter ego of BTM; Copple was the wife of Smith, as well as his

1 business partner, as they are both shareholders in Arks (Smith 56.67% and Copple 10%); on
2 information and belief, Copple is the sole beneficiary of the Carmen Copple Silva Revocable
3 Living Trust, for which she is also the Trustee.

4 1012. Despite the purported transfer of the house out of BTM, the BTM December
5 31, 2008 Balance Sheet (printed as of February 23, 2009 by BTM's agents at Arks),
6 continued to list the Lachman Lane Property as a "Fixed Asset" of the company valued at
7 \$10,000,000. The total assets of BTM were listed as \$23,355,449.92, and total equity as
8 \$8,455,436.91.

9 1013. The BTM Funding Pro Forma Assets and Liabilities statement as of
10 September 30, 2009 (provided by BTM's agents at Arks in the fall of 2009), listed no fixed
11 asset for the Lachman Lane Property, and in fact listed no assets whatsoever other than the
12 Notes Receivable in the amount of \$9,193,604 from the Plaintiffs for the funds they had
13 committed to the Build to Minister Loans. BTM's liabilities were \$9,528,896, which was
14 \$334,718 more than its assets, for negative equity. The Summary Level Adjustments page
15 to the Pro Forma statement states "The Lachman Lane Property was an assets [sic] and
16 liability of BTM Funding through 11/03/08. On 11/03/08, the asset and the related
17 indebtedness were conveyed/transferred to a David Smith personal entity. As of October
18 2009, the asset and liabilities remain on BTM Funding to include mortgage loan payments
19 totaling \$119,814 from November 2008 through July 2009. A receivable will be established
20 with David Smith for repayment of the mortgage loan payments. \$119,814. Accounts
21 Receivable." Thus, between December 2008 (when the Lachman Lane Property was still
22 reflected as an asset on the BTM balance sheet worth \$10 million) and September 2009,
23 (when the purported transfer of the Lachman Lane Property out of BTM had been
24 acknowledged on the balance sheet), BTM's equity fell by \$8,790,154.91 to negative
25 \$334,718. The purported transfer was of substantially all of BTM's assets. Further, despite
26 the purported transfers of the Lachman Lane property, BTM did not transfer and Defendants
27 David Smith, Carmen Copple Smith, and Carmen Copple Silva, Trustee, did not assume the
28 mortgage debt on the property, which BTM continued to pay through at least July 2009. On

1 July 8, 2009, BTM executed a Deed of Trust on the Lachman Lane Property in order to
2 secure additional debt in favor of the lender, seven months after the purported transfer out of
3 BTM.

4 1014. On information and belief, at the time of the first purported transfer in
5 November 2008, BTM faced a lack of liquid capital sufficient to pay its creditors. David
6 Smith foresaw the lack of readily available capital, and purported to transfer the Lachman
7 Lane Property from BTM to himself, and then to his wife, in order to prevent the property
8 from being considered an asset of BTM and potentially available for satisfaction of debts
9 against BTM. The Defendants' intent in purporting to transfer the Lachman Lane Property
10 was to render their property judgment proof and to remove or conceal assets to make it more
11 difficult for their creditors, including Plaintiffs, to collect on their claims. The purported
12 transfers in November 2008 occurred both shortly before and shortly after a substantial debt
13 was being incurred by BTM and Smith on account of their commingling and diverting of
14 Plaintiffs' investment funds, as described above. The purported transfer in September 2009
15 occurred close to the time that Plaintiffs learned of the substantial debts that had been
16 incurred by Defendants BTM and Smith, and at that time Smith and BTM were aware that
17 Plaintiffs were beginning to uncover the extent of the debts caused by Defendants'
18 malfeasance.

19 1015. Upon information and belief, at all times from August 2008 through the
20 present, the Lachman Lane Property has been used as the personal residence of David Smith
21 and his wife Carmen Copple Smith, despite the purported transfers of title. Throughout this
22 time, David Smith and Carmen Copple Smith have maintained possession and control of the
23 Lachman Lane Property and continue to reside there. David Smith has also conducted BTM
24 business from the Lachman Lane Property, including with Plaintiffs, both before and after
25 the purported transfers.

26 **David Smith is the Alter Ego of BTM**

27 1016. At all times mentioned herein, Defendant BTM was the alter ego of Defendant
28 David Smith. At all times there was a unity of interest between BTM and David Smith, who

1 was the President and at all times was the 100% owner of BTM. David Smith was and is the
2 sole and dominating shareholder of Defendant BTM and as such is liable for the acts of
3 Defendant BTM as alleged in this complaint as BTM's alter ego. The separate personalities
4 of the corporation and the individual do not and never did in reality exist, and there would be
5 an inequitable result if the acts of the parties described above were treated as the acts of the
6 corporation alone and not of David Smith.

7 1017. Upon information and belief, David Smith commingled the funds and other
8 assets of BTM with his own personal funds for his own convenience and to assist in evading
9 payment of obligations, including by buying the Lachman Lane Property for his personal
10 residence in the name of BTM, and by using BTM funds to pay the mortgage payments on
11 the property, even after he had quitclaimed it to himself and then to his wife. Despite the
12 purported transfers of the Lachman Lane property, BTM did not transfer and David Smith
13 did not assume the mortgage debt on the property, which BTM continued to pay through at
14 least July 2009. Further, on July 8, 2009, BTM executed a Deed of Trust on the Lachman
15 Lane Property in order to secure additional debt in favor of the lender, seven months after
16 the purported transfer out of BTM. David Smith worked out of his home to conduct the
17 business of BTM and directed that Plaintiffs send documents to him at his home on behalf of
18 BTM and relating to BTM business.

19 1018. Upon information and belief, David Smith diverted funds and other assets of
20 BTM to other than corporate uses, including the payment of the mortgage on the Lachman
21 Lane Property, and payments made to third parties unrelated to the business of BTM,
22 including personal friends of David Smith and David Smith's wife, Carmen Copple Smith.
23 David Smith diverted assets from BTM to himself and others, including by purporting to
24 transfer the Lachman Lane Property as described above, to the detriment of creditors,
25 including Plaintiffs.

26 1019. Upon information and belief, David Smith contracted with Plaintiffs with
27 intent to avoid performance by use of the corporate entity of BTM as a shield against
28 personal liability.

1 1020. David Smith held out that he was liable for the debts of BTM. From the time
2 of Plaintiffs' earliest involvement, Smith represented that no problems had occurred with
3 prior deals of a similar nature to those contemplated by Plaintiffs, that such projects were
4 "money good" (i.e., no risk), and that if there were any problems that Smith would "step in"
5 to address the situation. Smith personally stated on at least one occasion to Holbrook
6 Properties in December 2007 at Smith's London office and on more than one occasion to
7 John Muse that Smith had made a \$10 million investment in the company, and thereby a
8 sufficient capitalization, and that he was investing in loans "side-by-side" with the Plaintiffs.
9 In December 2008 at a Dallas meeting that included John Muse and Robert Furst, Randy
10 Barton, BTM's president, and Robert Knowles, president of BTM's agent Arks, verbally
11 affirmed Smith's commitment to stand behind the transactions. In September 2009,
12 Knowles traveled to Dallas and disclosed to Plaintiffs that there were substantial liquidity
13 problems and acknowledged that substantial losses had been incurred on the projects, at no
14 fault of Borrowers or Plaintiffs. At that time, Smith stated that he wanted to "make things
15 right" and that he would "do everything within his power" to do so. In October 2009, Smith
16 told all Plaintiff Principals and Plaintiffs' agents during a phone call that he would
17 personally fund \$2 million in cash to cover losses estimated at that time and would "make
18 things right." By late 2009 when Plaintiffs' ongoing forensic investigations identified
19 further losses, Smith told John Muse on a phone call that he would personally fund a higher
20 \$5 million figure in cash to cover losses estimated at that time and yet again that he would
21 "make things right" for the Plaintiffs.

22 1021. Upon information and belief, BTM disregarded corporate formalities,
23 including failing to issue shares and failing to keep minutes and adequate corporate records,
24 and BTM failed to segregate corporate records from the personal business records of David
25 Smith.

26 1022. BTM was inadequately capitalized, and after it fraudulently transferred the
27 Lachman Lane Property for no consideration to David Smith and immediately thereafter to
28 his wife Carmen Copple, also for no consideration or for inadequate consideration, the only

1 assets of BTM were the notes receivable from the Plaintiffs pursuant to the Participation
2 Agreements, and BTM's liabilities exceeded its assets so that it had negative equity.
3 Essentially, David Smith used BTM Funding, Inc. as a mere shell, instrumentality and
4 conduit for his own personal affairs.

5 **FIRST CAUSE OF ACTION**

6 (Breach of Contract)

7 *(By All Plaintiffs against Defendants BTM and David Smith)*

8 1023. Plaintiffs hereby reassert and reallege paragraphs 1 through 1022, inclusive, as
9 though set forth in full herein.

10 1024. Plaintiff Investor Entities and Defendant BTM entered into a number of
11 written contracts ("Participation Agreements") as set forth in paragraphs 36-39, 52-55, 68-
12 71, 84-87, 100-103, 116-119, 132-135, 147-150, 163-166, 179-182, 195-198, 211-214, 227-
13 230, 243-246, 259-262, 275-278, 291-294, 307-310, 323-326, 339-342, 354-357, 370-373,
14 386-389, 402-405, 418-421, 450-453, 466-469, 482-485, 498-501, 514-517, 530-533, 546-
15 549, 561-564, 577-580, 593-596, 609-612, 625-628, 641-644, 657-660, 673-676, 689-692,
16 705-708, 721-724, 737-740, 753-756, 769-772, 785-788, 801-804, 817-820, 833-836, 849-
17 852, 865-868, 881-884, 897-900, 913-916, 929-932, 945-948, 961-964, and 977-980. In
18 addition, Plaintiff Wood Luxembourg entered into an oral agreement with Defendants BTM
19 and Smith as set forth in paragraphs 993-997 and 1002.

20 1025. Plaintiff Investor Entities assigned their rights and interests in the Loan
21 Participations that they held pursuant to certain of the Participation Agreements to Assignee
22 Plaintiffs as set forth in paragraphs 11 to 23.

23 1026. Plaintiffs did all, or substantially all, of the significant things that the contracts
24 required them to do, including advancing funds in response to draw requests made by
25 Defendants.

26 1027. Defendants breached the contracts in a number of ways as described above in
27 paragraphs 41, 57, 73, 89, 105, 121, 137, 152, 168, 184, 200, 216, 232, 248, 264, 280, 296,
28 312, 328, 344, 359, 375, 391, 407, 423, 439, 455, 471, 487, 503, 519, 535, 551, 566, 582,

1 598, 614, 630, 646, 662, 678, 694, 710, 726, 742, 758, 774, 790, 806, 822, 838, 854, 870,
2 886, 902, 918, 934, 950, 966, 982 and 999-1004.

3 1028. As a direct and proximate result of Defendants' conduct, Plaintiffs were
4 damaged in an amount as yet unascertained by Plaintiffs, which Plaintiffs believe is at least
5 \$1,270,891 as to Plaintiff Muse Family Enterprises, \$544,668 as to Plaintiff Muse
6 Children's GS Trust, \$281,024 as to Plaintiff JRM Interim Investors, \$1,002,322 as to
7 Plaintiff Oak Stream, \$1,944,222 as to Plaintiff Wood Luxembourg, \$4,036,563 as to
8 Plaintiff Holbrook, and \$2,241,200 as to Plaintiff Strongback, and which amount will be
9 proved at trial.

10 1029. As a result of Defendants' conduct, Plaintiffs have incurred attorneys' fees and
11 costs and are entitled to reimbursement of same as provided for in the Participation
12 Agreements, at Schedule 4, ¶ 20.

13 SECOND CAUSE OF ACTION

14 (Fraud – Intentional Misrepresentation)

15 *(By All Plaintiffs against Defendants BTM and David Smith)*

16 1030. Plaintiffs hereby reassert and reallege paragraphs 1 through 1029, inclusive, as
17 though set forth in full herein.

18 1031. Defendants David Smith and BTM made representations to Plaintiffs as
19 described in detail in paragraphs 44-45, 60-61, 76-77, 92-93, 108-109, 124-125, 140-141,
20 155-156, 171-172, 187-188, 203-204, 219-220, 235-236, 251-252, 267-268, 283-284, 299-
21 300, 315-316, 331-332, 347-348, 362-363, 378-379, 394-395, 410-411, 426-427, 442-443,
22 458-459, 474-475, 490-491, 506-507, 522-523, 538-539, 554-555, 569-570, 585-586, 601-
23 602, 617-618, 633-634, 649-650, 665-666, 681-682, 697-698, 713-714, 729-730, 745-746,
24 761-762, 777-778, 793-794, 809-810, 825-826, 841-842, 857-858, 873-874, 889-890, 905-
25 906, 921-922, 937-938, 953-954, 969-970, 985-986 and 1002 above.

26 1032. Defendants David Smith and BTM's representations to Plaintiffs were in fact
27 false.

28 ///

1 1033. Defendants David Smith and BTM knew that their representations were false
2 when they made them or they made the representations recklessly and without regard for the
3 truth.

4 1034. Defendants intended that Plaintiffs rely on their representations, and Plaintiffs
5 reasonably relied on Defendants' representations.

6 1035. Plaintiffs were harmed by Defendants' misrepresentations, and Plaintiffs'
7 reliance on Defendants representations was a substantial factor in causing Plaintiffs' harm.
8 The extent of Plaintiffs' damages are in amount to be proved at trial and are at least
9 \$1,270,891 as to Plaintiff Muse Family Enterprises, \$544,668 as to Plaintiff Muse
10 Children's GS Trust, \$281,024 as to Plaintiff JRM Interim Investors, \$1,002,322 as to
11 Plaintiff Oak Stream, \$1,944,222 as to Plaintiff Wood Luxembourg, \$4,036,563 as to
12 Plaintiff Holbrook, and \$2,241,200 as to Plaintiff Strongback.

13 1036. Plaintiffs further request punitive damages in that doing the acts herein
14 alleged, Defendants acted with oppression, fraud and malice, willfully and wantonly, and
15 Plaintiffs are entitled to punitive damages in an amount according to proof.

16 **THIRD CAUSE OF ACTION**

17 (Fraud – Concealment)

18 *(By All Plaintiffs against Defendants BTM and David Smith)*

19 1037. Plaintiffs hereby reassert and reallege paragraphs 1 through 1036, inclusive, as
20 though set forth in full herein.

21 1038. Defendants David Smith and BTM actively concealed and intentionally failed
22 to disclose important facts known only to Defendants and that Plaintiffs could not have
23 discovered, as described in paragraphs 47, 63, 79, 95, 111, 127, 143, 158, 174, 190, 206,
24 222, 238, 254, 270, 286, 302, 318, 334, 350, 365, 381, 397, 413, 429, 445, 461, 477, 493,
25 509, 525, 541, 557, 572, 588, 604, 620, 636, 652, 668, 684, 700, 716, 732, 748, 764, 780,
26 796, 812, 828, 844, 860, 876, 892, 908, 924, 940, 956, 972, 988 and 1003 above.

27 1039. Plaintiffs did not know of the above facts concealed by Defendants, and
28 Defendants intended to deceive Plaintiffs by concealing such facts.

1 1040. Plaintiffs reasonably relied on Defendants' deception and concealment.

2 1041. Plaintiffs were harmed by Defendants' deception and concealment, and
3 Plaintiffs' reliance on Defendants representations were a substantial factor in causing
4 Plaintiffs' harm. The extent of Plaintiffs' damages are in amount to be proved at trial and
5 are at least \$1,270,891 as to Plaintiff Muse Family Enterprises, \$544,668 as to Plaintiff
6 Muse Children's GS Trust, \$281,024 as to Plaintiff JRM Interim Investors, \$1,002,322 as to
7 Plaintiff Oak Stream, \$1,944,222 as to Plaintiff Wood Luxembourg, \$4,036,563 as to
8 Plaintiff Holbrook, and \$2,241,200 as to Plaintiff Strongback.

9 1042. Plaintiffs further request punitive damages in that doing the acts herein
10 alleged, Defendants acted with oppression, fraud and malice, willfully and wantonly, and
11 Plaintiffs are entitled to punitive damages in an amount according to proof.

12 **FOURTH CAUSE OF ACTION**

13 (Negligent Misrepresentation)

14 *(By All Plaintiffs against Defendants BTM and David Smith)*

15 1043. Plaintiffs hereby reassert and reallege paragraphs 1 through 1042, inclusive, as
16 though set forth in full herein.

17 1044. Defendants David Smith and BTM made representations to Plaintiffs as
18 described in detail in paragraphs 44-45, 60-61, 76-77, 92-93, 108-109, 124-125, 140-141,
19 155-156, 171-172, 187-188, 203-204, 219-220, 235-236, 251-252, 267-268, 283-284, 299-
20 300, 315-316, 331-332, 347-348, 362-363, 378-379, 394-395, 410-411, 426-427, 442-443,
21 458-459, 474-475, 490-491, 506-507, 522-523, 538-539, 554-555, 569-570, 585-586, 601-
22 602, 617-618, 633-634, 649-650, 665-666, 681-682, 697-698, 713-714, 729-730, 745-746,
23 761-762, 777-778, 793-794, 809-810, 825-826, 841-842, 857-858, 873-874, 889-890, 905-
24 906, 921-922, 937-938, 953-954, 969-970, 985-986 and 1002 above.

25 1045. Defendants David Smith and BTM's representations to Plaintiffs were false;

26 1046. Defendants David Smith and BTM had no reasonable grounds for believing
27 the representations were true when they made them;

28 ///

1 1047. Defendants intended that Plaintiffs rely on their representations, and Plaintiffs
2 reasonably relied on Defendants' representations.

3 1048. Plaintiffs were harmed by Defendants' misrepresentations, and Plaintiffs'
4 reliance on Defendants representations were a substantial factor in causing Plaintiffs' harm.
5 The extent of Plaintiffs' damages are in amount to be proved at trial and are at least
6 \$1,270,891 as to Plaintiff Muse Family Enterprises, \$544,668 as to Plaintiff Muse
7 Children's GS Trust, \$281,024 as to Plaintiff JRM Interim Investors, \$1,002,322 as to
8 Plaintiff Oak Stream, \$1,944,222 as to Plaintiff Wood Luxembourg, \$4,036,563 as to
9 Plaintiff Holbrook, and \$2,241,200 as to Plaintiff Strongback.

10 **FIFTH CAUSE OF ACTION**

11 (Breach of Fiduciary Duty)

12 *By Plaintiff Wood Luxembourg against Defendant David Smith*

13 1049. Plaintiff Wood Luxembourg hereby reasserts and realleges paragraphs 1
14 through 1048, inclusive, as though set forth in full herein.

15 1050. Defendant David Smith owes Plaintiff Wood Luxembourg fiduciary duties
16 based on the special relationship of trust and confidence he had with Plaintiff Wood
17 Luxembourg and Plaintiff Principal Scott Wood, and as the manager of Plaintiff Wood
18 Luxembourg, as set forth in detail in paragraphs 993-997 and 1002.

19 1051. Defendant, as a fiduciary, owed Plaintiff the following:

- 20 a. the highest duty of honesty, loyalty and fair dealing;
21 b. the duty to avoid conduct he knew would harm Plaintiff;
22 c. the obligation to act in the best interest of Plaintiff;
23 d. the duty to refrain from taking any action for the pure benefit of himself

24 and his own gain.

25 1052. Defendant breached his fiduciary duties to Plaintiff, as described in detail in
26 paragraphs 999-1004, including by failing to perform to the highest duty of honesty, loyalty
27 and fair dealing; failing to avoid conduct he knew would harm Plaintiff; failing to act in the

28 ///

1 best interest of Plaintiff; and failing to refrain from taking any actions for the pure benefit of
2 himself and his own gain.

3 1053. As a result of the trust and confidence reposed by Plaintiff in Defendant,
4 Defendant exercised domination and influence over Plaintiff, and took advantage of
5 Plaintiff, without Plaintiff's knowing consent.

6 1054. Said breaches of fiduciary duties have caused damage in an amount as yet
7 unascertained but which Plaintiff believes is in excess of \$1,944,222 and which will be
8 proved at time of trial.

9 1055. Plaintiff further requests punitive damages in that doing the acts herein
10 alleged, Defendant acted with oppression, fraud and malice, willfully and wantonly, and
11 Plaintiff is entitled to punitive damages in an amount according to proof.

12 **SIXTH CAUSE OF ACTION**

13 (For Order Setting Aside and Annulling Fraudulent Transfers)

14 *(By All Plaintiffs Against All Defendants)*

15 1056. Plaintiffs hereby reassert and reallege paragraphs 1 through 1055, inclusive, as
16 though set forth in full herein.

17 1057. As set forth more fully above, Plaintiffs are the holders of claims against
18 debtors BTM and David Smith for breach of contract, fraud, negligent misrepresentation and
19 breach of fiduciary duty. The acts and omissions of Defendants which gave rise to breach of
20 contract, fraud, negligent misrepresentation and breach of fiduciary duty claims directly and
21 proximately have resulted in damages in an amount to be proved at trial but which exceed
22 \$11,320,889, and Plaintiffs have a right to payment from BTM and David Smith for at least
23 that amount.

24 1058. On information and belief, since August 2008, BTM Funding, Inc. was the
25 legal owner and holder of title of the real property commonly described as 1545 Lachman
26 Lane, Pacific Palisades, 90272, California (the "Lachman Lane Property").

27 ///

28 ///

1 1059. On November 3, 2008, BTM purported to transfer the title of the Lachman
2 Lane Property to David Smith, by way of a Quitclaim Deed, which was recorded in the Los
3 Angeles County Recorder's Office at Instrument No. 20091456838 on September 24, 2009.

4 1060. Also on November 3, 2008, David Smith purported to transfer the title of the
5 Lachman Lane Property from himself to his wife, Carmen Copple Smith, by way of a
6 Quitclaim Deed, which was recorded in the Los Angeles County Recorder's Office at
7 Instrument No. 20091456839 on September 24, 2009.

8 1061. On September 25, 2009, Carmen Copple Smith purported to transfer title of
9 the Lachman Lane Property from herself as an individual to herself, Carmen Copple Silva,
10 as Trustee for the Carmen Copple Silva Revocable Living Trust, by way of a Quitclaim
11 Deed, which was recorded in the Los Angeles County Recorder's Office at Instrument No.
12 20091464107 on September 25, 2009.

13 1062. On information and belief, these were not good faith, arms length transactions
14 supported by adequate consideration, but rather fraudulent transfers under California Civil
15 Code section 3439.

16 1063. On information and belief, BTM transferred the Lachman Lane Property
17 property to David Smith with the intent to hinder, delay, or defraud one or more of BTM's
18 creditors, including Plaintiffs, in the collection of their claims.

19 1064. On information and belief, BTM did not receive a reasonably equivalent value
20 in exchange for the transfer. At the time of the purported transfer, BTM was in business
21 when its remaining assets were unreasonably small for the business and/or BTM intended to
22 incur debts beyond its ability to pay as they became due and/or BTM believed or reasonably
23 should have believed that it would incur debts beyond its ability to pay as they became due.

24 1065. On information and belief, David Smith transferred the Lachman Lane
25 Property to his wife Carmen Copple Smith with the intent to hinder, delay, or defraud one or
26 more of David Smith's creditors, including Plaintiffs, in the collection of their claims.

27 1066. On information and belief, David Smith did not receive a reasonably
28 equivalent value in exchange for the transfer. At the time of the purported transfer, David

1 Smith was in business when his remaining assets were unreasonably small for the business
2 and/or Smith intended to incur debts beyond his ability to pay as they became due and/or
3 Smith believed or reasonably should have believed that he would incur debts beyond his
4 ability to pay as they became due.

5 1067. On information and belief, Carmen Copple Smith transferred the Lachman
6 Lane Property to herself as Trustee for the Carmen Copple Silva Revocable Living Trust
7 with the intent to hinder, delay, or defraud one or more of BTM and/or David Smith's
8 creditors, as well as her own creditors (including by virtue of her acceptance of the
9 fraudulent transfer from David Smith), including Plaintiffs, in the collection of their claims.

10 1068. On information and belief, Carmen Copple Smith did not receive a reasonably
11 equivalent value in exchange for the transfer. At the time of the purported transfer, Copple
12 was in business when her remaining assets were unreasonably small for the business and/or
13 Copple intended to incur debts beyond her ability to pay as they became due and/or Copple
14 believed or reasonably should have believed that she would incur debts beyond her ability to
15 pay as they became due.

16 1069. On information and belief, David Smith, Carmen Copple Smith, and Carmen
17 Copple Silva as Trustee for the Carmen Copple Silva Revocable Living Trust, accepted the
18 purported transfers of the Lachman Lane Property with knowledge of the malfeasance of
19 David Smith and BTM and with the intent to hinder, delay, or defraud all creditors in the
20 collection of claims against BTM and David Smith, including Plaintiffs.

21 1070. Plaintiffs were harmed and the conduct of BTM, David Smith, and Carmen
22 Copple Smith in purporting to effect such fraudulent transfers was a substantial factor in
23 causing Plaintiffs' harm, where there is a risk that Defendants BTM and/or David Smith may
24 not have sufficient assets for Plaintiffs to collect on their claims.

25 1071. Plaintiffs have no plain, speedy or adequate remedy at law and will suffer
26 irreparable damage, injury and harm unless injunctive relief is granted. It is therefore
27 necessary that the Court temporarily, preliminarily and permanently enjoin and restrain

28 ///

1 Defendants and their agents and representatives from encumbering, conveying or disposing
2 of the Lachman Lane Property or any interest therein.

3 1072. Plaintiffs allege that the fraudulent transfers were willful and intended to cause
4 damage to Plaintiffs, and Plaintiffs are therefore entitled to an award of punitive damages
5 per California Civil Code section 3294.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiffs pray for judgment against Defendants, jointly and
8 severally, as follows:

9 **As to the First Cause of Action:**

10 1. For compensatory damages in such amount as shall be shown at time of trial,
11 but which Plaintiffs believe are at least \$1,270,891 as to Plaintiff Muse Family Enterprises,
12 \$544,668 as to Plaintiff Muse Children's GS Trust, \$281,024 as to Plaintiff JRM Interim
13 Investors, \$1,002,322 as to Plaintiff Oak Stream, \$1,944,222 as to Plaintiff Wood
14 Luxembourg, \$4,036,563 as to Plaintiff Holbrook, and \$2,241,200 as to Plaintiff
15 Strongback;

16 2. For attorneys' fees and costs as provided for by the contracts between the
17 parties;

18 **As to the Second and Third Causes of Action:**

19 1. For compensatory damages in such amount as shall be shown at time of trial,
20 but which Plaintiffs believe are at least \$1,270,891 as to Plaintiff Muse Family Enterprises,
21 \$544,668 as to Plaintiff Muse Children's GS Trust, \$281,024 as to Plaintiff JRM Interim
22 Investors, \$1,002,322 as to Plaintiff Oak Stream, \$1,944,222 as to Plaintiff Wood
23 Luxembourg, \$4,036,563 as to Plaintiff Holbrook, and \$2,241,200 as to Plaintiff
24 Strongback;

25 2. For exemplary and punitive damages in such amounts as shall be shown at
26 time of trial;

27 ///

28 ///

1 **As to the Fourth Cause of Action:**

2 1. For compensatory damages in such amount as shall be shown at time of trial,
3 but which Plaintiffs believe are at least \$1,270,891 as to Plaintiff Muse Family Enterprises,
4 \$544,668 as to Plaintiff Muse Children's GS Trust, \$281,024 as to Plaintiff JRM Interim
5 Investors, \$1,002,322 as to Plaintiff Oak Stream, \$1,944,222 as to Plaintiff Wood
6 Luxembourg, \$4,036,563 as to Plaintiff Holbrook, and \$2,241,200 as to Plaintiff
7 Strongback;

8 **As to the Fifth Cause of Action:**

9 1. For compensatory damages in such amount as shall be shown at time of trial,
10 but which Plaintiff Wood Luxembourg believes is at least \$1,944,222;

11 2. For exemplary and punitive damages in such amounts as shall be shown at
12 time of trial;

13 **As to the Sixth Cause of Action:**

14 1. For an order that the transfer of the Lachman Lane Property from BTM to
15 David Smith be annulled and declared void as to Plaintiffs to the extent necessary to satisfy
16 the claims alleged herein;

17 2. For an order that the transfer of the Lachman Lane Property from David Smith
18 to Carmen Copple Smith be annulled and declared void as to Plaintiffs to the extent
19 necessary to satisfy the claims alleged herein;

20 3. For an order that the transfer of the Lachman Lane Property from Carmen
21 Copple Smith to Carmen Copple Silva as Trustee for the Carmen Copple Silva Revocable
22 Trust be annulled and declared void as to Plaintiffs to the extent necessary to satisfy the
23 claims alleged herein;

24 4. For a temporary, preliminary and permanent injunction preventing Defendants
25 and their agents and representatives from encumbering, conveying or disposing of the
26 Lachman Lane Property or any interest therein;

27 5. For exemplary and punitive damages in such amounts as shall be shown at
28 time of trial.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

As to All Causes of Action:

- 1. For costs and interest as provided by law, including but not limited to
prejudgment interest as provided for by Cal. Civil Code sections 3288 and 3291; and
- 2. For such other and further relief as the Court may deem just, equitable and
proper.

Dated: September 14, 2010

HOWARTH & SMITH
DON HOWARTH
SUZELLE M. SMITH
DARCY R. HARRIS

By: Don Howarth
Don Howarth

Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury herein.

Dated: September 14, 2010

HOWARTH & SMITH
DON HOWARTH
SUZELLE M. SMITH
DARCY R. HARRIS

By: Don Howarth
Don Howarth

Attorneys for Plaintiffs