

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2008-019063

08/16/2010

HON. EDWARD O. BURKE

CLERK OF THE COURT  
L. Owens/L. Nixon  
Deputy

MESA BANK

MICHAEL J FARRELL

v.

THOMAS ALEXANDER, et al.

THOMAS ALEXANDER  
12771 E LUPINE AVENUE  
SCOTTSDALE AZ 85259

ANDREW ABRAHAM  
MICHAEL PETER SALCIDO  
JILL B DAVENPORT

**RULING**

The court, having heard the evidence, including the videotaped testimony of witnesses Patricia McCoy, Eric Weight, Sandra Stevens, Bobbi Jo Johnson, and Tom Alexander, reviewed the exhibits, the proposed findings of fact and conclusions of law, the parties' legal memoranda, and having considered the arguments of counsel, enters the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. The court adopts the 637 Stipulations of Material Fact and Law in the parties' pretrial statement.
2. Mesa Bank was merged into Sunrise Bank of Arizona in December 2009.
3. Mesa Bank's business included a variety of loan packages and products. One was an interim construction loan program, which allowed borrowers to obtain interim financing to purchase a lot and construct a residence on it.

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4. After construction of the residence was completed, the borrower would typically secure permanent financing from a permanent lender, using the proceeds from the permanent loan to pay off the interim construction loan.

5. This case involves 238 residential interim construction loans made by Mesa Bank from December 10, 2001 through September 26, 2007. Mesa Bank closed and successfully sold 193 of the loans to permanent lenders (the "Other Loans"). Mesa Bank seeks to recover damages for 45 loans (the "Loans"), 38 of which were closed by Capital Title Agency, Inc. ("Capital Title") between 2004 and 2007, which were not taken out by permanent lenders and went into default (the "Capital Title Loans").

6. American Mortgage Specialists, Inc. ("AMS"), a licensed mortgage broker, employed defendant, Tom Alexander ("Alexander") as a mortgage broker from February 17, 2004, until March 31, 2006. (Exhibit 176). Alexander became a loan officer with American Mortgage Funding, Inc. ("AMF"), a licensed mortgage broker, on April 3, 2006 and transferred all his March, 2006, AMS files to AMF. (Exhibit 104). AMS and AMF originated all of the Loans for Mesa Bank.

7. 19 of the Loans appear to have been originated by Alexander while he was employed by AMS; i.e. Bryan Tran & Patricia Minh: File No. 0315011101; Joel and Melanie Newton: File No. 0315033103; Michael Bernier and Tanya Johnson Nies: File No. 0315083113; Marc and Marcie Lopeman: File No. 0315073119; Marc and Marcie Lopeman: File No. 0315103105; Calvin Sims: File No. 0315183103; Granville and Sandra Budlong: File No. 0315183104; George and Cheryl Bevans: File No. 0315183107, George and Cheryl Bevans: File No. 0315113016; Brent Habakangas: File No. 0315183117; Brad and Katherine Bishop: File No. 0315103109; Brad and Katherine Bishop: File No. 0316013104; Keith Miller: File No. 0315103115; Keith Miller: File No. 0316022804; Alejandro and Aurora Patino: File No. 0316013110; Isaac Wahlquist: File No. 0316013108; Damon and Laura Childers: File No. 0316013112; Lynn and Dixie Tawzer: File No. 0316013111; and Taft and Nichole Smithson: File No. 0316022801.

8. 26 of the Loans appear to have been originated by Alexander while he was employed by AMF.

9. AMF did not submit any loans to Mesa Bank until Alexander joined it, and Alexander was the only AMF loan officer that did business with Mesa Bank. Mesa Bank did not have a written correspondent or broker agreement with Alexander, AMS, or AMF. Mesa Bank was the only bank that did not require AMF to enter to such an agreement.

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10. Defendant Sandra Stevens (“Stevens”) was acting on behalf of Capital Title, and all her actions taken in connection with the subject transactions were within the course and scope of her employment with Capital Title. Capital Title held Stevens out to the public as a vice-president of Capital Title.

11. Defendant Bobbi Jo Johnson (“Johnson”) was acting on behalf of Capital Title, and all of her actions taken in connection with the subject transactions were within the course of and scope of her employment with Capital Title. Ms. Johnson filed for bankruptcy on July 1, 2010. Just prior to trial the bankruptcy stay was lifted.

12. Defendants Alexander, Stevens, and Johnson acted in concert to defraud Mesa Bank by inducing Mesa Bank to make residential lot loans, residential construction loans, and to refinance these loans under circumstances that would not have resulted in approval and/or funding of the loans had Mesa Bank known the truth regarding each transaction.

13. Alexander, on behalf of the potential borrowers, and, in the course and scope of his employment with defendants American Mortgage Specialists, Inc. (“AMS”) through March 31, 2006, and American Mortgage Funding, Ins. (“AMF”) from April 3, 2006, to April 8, 2008, prepared loan application packets for submission to Mesa Bank. Alexander had borrowers sign blank loan applications and filled them in himself, in violation of A.R.S. §6-909(A). The loan application packets typically included a materially false “Uniform Residential Loan Application;” “Uniform Underwriting and Transmittal Summary,” forged “Verification(s) of Deposit” (“VOD”), credit reports, and, in some instances, income verification documents, including W-2 forms and pay stubs.

14. The documents Alexander submitted to Mesa Bank materially misrepresented the qualifications of the borrowers, including borrowers’ monthly incomes, assets, deposits, credit history, and credit rating.

15. Alexander performed certain underwriting functions for Mesa Bank, including taking loan applications from the borrowers, selecting and hiring appraisers, obtaining credit data on the borrowers, including credit scores, obtaining and submitting verifications of income on certain of the Loans and Other Loans, and obtaining VODs confirming the borrowers’ funds on deposit.

16. Mesa Bank delegated the verification of funds on deposit to Alexander, who furnished VODs. The VODs Alexander provided were forged. Capital Title played no role regarding the forged VODs and was not responsible for them.

17. Alexander testified that he was not an agent of Mesa Bank. No Mesa Bank

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representative testified that Alexander was the bank's agent. Rita Leaf, Senior Vice President of Mesa Bank, ("Leaf") testified that Alexander was a mortgage broker who referred borrowers to Mesa Bank and that he was treated like every other mortgage broker Mesa Bank dealt with. Other than the fact that Alexander performed many underwriting activities for Mesa Bank in connection the Loans, the only evidence that would tend to show that he was Mesa Bank's agent came from borrower Keith Miller who testified that he thought Alexander was a "representative" of the bank. Alexander was not an agent of Mesa Bank.

18. About half of the Loans were known in the industry as "stated income verified asset loans" ("SIVA") in which no income verification was done. On the Loans for which income verification was done, Mesa Bank delegated to Alexander the responsibility to obtain a W-2 and one pay stub. Many of these documents were also forged or altered.

19. In addition to being a borrower on one of the Other Loans, Alexander was also the seller of the land on at least 14 of the 38 Loans through his company, Sea Rock, LLC which "flipped" the raw land to the borrowers at a profit. Mesa Bank was aware of Alexander's relationship with Sea Rock, LLC and the inflation of the land values by the "flips" before it approved the Loans.

20. In connection with the acquisition of the land, the builder, a third party, or in some cases Alexander, entered into a contract of sale to purchase the land from the original seller at its going price. For example, in connection with Mesa Bank's Loan to the Lopemans, on June 9, 2005, builder JP Custom Homes Supervisors, Inc. contracted with Real-Estate Investments Capital Title Opportunities to purchase a lot for \$274,000.00, and the parties signed an Affidavit of Property Value certifying the value of that lot to be \$274,000.00. On June 10, 2005, JP Custom Homes Supervisors, Inc. contracted with the Lopemans to sell the same lot to them for \$370,000.00, and filed an Affidavit of Property Value certifying the value of the lot to be \$370,000.00, an immediate increase of \$96,000.00. In underwriting the Loans, Mesa Bank's underwriters had documentation of these flips, or double escrows, prior to funding the land acquisition loan in the higher amount. Mesa Bank allowed the appraisal on which it made its Loan to be based on the higher price - \$375,000.00 - disregarding the first sale. This practice occurred on at least 33 of the 38 Loans.

21. Alexander originated the majority of Mesa Bank's total interim construction loan portfolio, which grew dramatically in 2005 and by 2007 constituted 40% of all of Mesa Bank's loans.

22. Many of the borrowers obtained multiple interim construction loans from Mesa Bank. Twelve of the borrowers on the Loans had previously been Mesa Bank borrowers on the Other Loans.

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23. Many of the borrowers on the Loans and Other Loans were interested parties, including Alexander, Alexander's son, employees of Alexander, employees of Mesa Bank, employees of Capital Title, the appraisers, the builders, and family members of the builders.

24. Each loan application packet Alexander submitted also contained materially false representations regarding the details of the transaction, including, but not limited to, a false amount of "cash from buyer" to be paid towards the purchase price.

25. The inflation in the land prices, which was approximately \$6,700,000, artificially increased the Loan balances by the same amount, thus increasing the deficiencies on the Loans claimed as damages by Mesa Bank in this lawsuit.

26. Alexander would transmit a Uniform Underwriting and Transmittal Summary, the signed loan application, credit reports, appraisals, and other documents to Mesa Bank's underwriters for consideration. Mesa Bank's underwriters had no contact with the borrowers and relied on Alexander.

27. On receipt of the documents from Alexander, Mesa Bank employees, Dan Laux, Terri Singleton, and Leaf would complete a loan presentation stating, among other things, the amount of the loan; the purpose of the loan (i.e., to provide financing for the purchase of a lot); repayment terms (i.e., monthly interest only, no payments during the loan's term, principal and interest due at maturity); and repayment sources (i.e., a construction loan by Mesa Bank, permanent loan by another lender, etc.). The loan Presentations were generally signed by Laux and Leaf. If a loan was over \$1,000,000, which virtually all the Loans were, it had to be approved by Mesa Bank's Board of Directors.

28. When Laux or Singleton approved a loan that closed, they would receive a bonus or commission. From 2003-2008, Laux received additional compensation or commissions on the Loans and Other Loans of \$64,500, and Singleton received \$15,750.

29. Mesa Bank paid Alexander broker fees on the Other Loans of \$1,275,000 and \$600,000 on the Loans which were added to the Loan balances.

30. After a loan was approved, Singleton would prepare the underlying loan documents (such as the note, deed of trust, etc.) and give them to Alexander, who would then take them to the borrowers and Capital Title.

31. Alexander would make arrangements for the Loan closings with Capital Title, and the borrowers would sign the Loan and closing documents.

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32. Johnson and/or Stevens ordered title evidence, issued a title insurance commitment, and prepared title documents and the preliminary or “pre-audit” HUD-1. A HUD-1 is a statement of all charges and payments by and to the borrower, seller, lender, mortgage broker, and title company. Information on the HUD-1 came from Mesa Bank, the contract of sale, and the closing instructions.

33. Line 303 of the HUD-1 is entitled “Cash From Borrowers,” which would show whether the borrower must provide a down payment at the closing and how much.

34. After the loan documents and HUD-1s were signed, Alexander would take them back to Mesa Bank and give them to Singleton, who would review and approve them before wiring the funds to Capital Title.

35. Alexander submitted the loan applications to Mesa Bank with the intent and knowledge that Mesa Bank would rely on the representations made therein when determining whether to fund each loan.

36. Mesa Bank was not aware of the falsity of the representations contained in the loan application packets submitted by Alexander. In reliance upon them, Mesa Bank approved numerous residential lot loans, residential construction loans, and the refinancing of them.

37. After Mesa Bank approved each loan, Alexander arranged for an escrow. Capital Title served as the escrow company for the loan closings with borrowers Bentz, Tran, Newton, Lopeman, Bevans, Bishop, Miller, Patino, Childers, Dana, Tawzer, Wahlquist, Smithson, Springer, Moore, Stevens, McKnight, Kulbeth, Coia, P. Alexander, Edwards, Johnson, Harris, D. Hunter, L. Hunter, Bodrero, Truong, Gustavson, Mason, Van, Nguyen, Crisci, Korenblitt, Knas, Barnes, Kennedy, Bucchi, and Hawkins. (the “Capital Title Loans”).

38. Stevens and/or Johnson served as the escrow officer for these thirty-eight borrowers.

39. Mesa Bank attempted to take precautions to ensure that each borrower would not walk away from the loan. One precaution was to require that each borrower make a substantial down payment at close of escrow so that the borrower would have significant equity in the property and be less likely to default.

40. Mesa Bank relied on Capital Title to collect the down payment from the borrowers.

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41. The amount of each borrower's supposed investment in the transaction was a material factor considered by Mesa Bank prior to funding each and every loan.

42. The borrowers were required to make the following down payments:

<u>Borrower</u>	<u>Escrow #</u>	<u>Down Payment Required</u>
Alexander	11060610-011	\$109,645.52
Barnes	11070165-011	\$109,791.40
Bentz	11041382-011	\$70,000
Bevans	11051306-011	\$120,338.79
	11051990-011	\$1,321.41
Bishop	11051796-011	\$89,186.48
	11052158-011	\$27,920.60
Bodrero	11060953-011	\$110,811.37
Bucchi	11070316-011	\$336,832.75
Childers	11052127-011	\$122,366.88
Coia	11060475-011	\$136,914.24
Crisci	11061181-011	\$115,059.65
Dana	11052124-011	\$126,013.44
Edwards	11060609-011	\$105,466.31
Gustavson	11060990-011	\$104,072.24
Harris	11060589-011	\$156,852.31
Hawkins	11070666-011	\$246,358.23
Hunter, D	11060914-011	\$104,786.76
Hunter, L	11060915-011	\$89,412.20
Johnson	11060611-011	\$110,355.05
Kennedy	11070319-011	\$300,000
Knas	11070106-011	\$110,857.77
Korenblitt	11070034-011	\$214,336.69
Kulbeth	11060621-011	\$99,976.74
Lopeman	11051061-011	\$82,399.99
	11051655-011	\$16,381.05
Mason	11060951-011	\$106,703.88
McKnight	11060570-011	\$126,500.37
Miller	11051794-011	\$106,250

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	11060012-011	\$2,617.11
Moore	11060301-011	\$118,858.23
Newton	11050298-011	\$130,265.62
	11060549-011	\$49,876.50
Nguyen	11061150-011	\$102,928.58
Patino	11052123-011	\$116,925.85
	11061125-011	\$3,120.58
Smithson	11051955-011	\$188,162.70
Springer	11060193-011	\$110,332.28
	11061129-011	\$370.52
Stevens	11060304-011	\$120,000
Tawzer	11052126-011	\$125,731.71
Tran	11041804-011	\$142,964.90
Truong	11060782-011	\$109,202.88
Van	11060780-011	\$108,517.64
Wahlquist	11052128-011	\$115,660.52

43. Mesa Bank prepared and delivered escrow instructions to Capital Title that were to be strictly followed by Capital Title's escrow agents. Each of Mesa Bank's instructions involving the escrows listed in paragraph 28 contained a line stating: "FUNDS REQUIRED FROM BORROWER: \$\_\_\_\_\_ " on which the amount set forth in paragraph 28 for each loan was stated.

44. The escrow instructions stated the exact amount of money that Capital Title was required to collect from the borrowers before the escrow could close. See exhibits 59, 60, and 61.

45. Between 2004 and 2005, a large number of HUD-1s submitted by Capital Title to Mesa Bank prior to funding disclosed on Line 303 that the down payments were being made by seller credits (meaning the seller would give a credit from its proceeds to pay the borrower's down payment), rather than cash from the borrowers, which would have informed a careful and prudent underwriter that the borrowers were not making the down payments.

46. Beginning in July 2005, the escrow instructions that were provided to Capital Title by Mesa Bank specifically stated, in bold, that: "**If cash is required at close of escrow, please provide Mesa Bank with a copy of those funds deposited. Do not close this transaction unless the funds are received directly from borrower.**"

47. Another key underwriting requirement was a loan commitment from a permanent

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lender when the construction was completed. Alexander represented to Mesa Bank that he had permanent loan commitments for each Loan.

48. In the majority of the Capital Title Loans, Stevens and/or Johnson confirmed in writing to Mesa Bank that Capital Title had received the necessary down payment from the borrowers. The letter stated that "All conditions/requirements have been met. All funds and documents needed are in our possession. We are in a position to record upon receipt of bank funds."

49. In certain transactions, Stevens and Johnson circumvented Mesa Bank's escrow instruction that required Capital Title to provide a copy of the funds being deposited by the borrower by instructing the borrower to execute a personal check in the amount required by Mesa Bank.

50. Stevens and Johnson prepared an "Escrow Receipt" reflecting that the required funds from the borrower(s) had been deposited into escrow, and made a photocopy of the front of the checks. The escrow receipt and copies of the checks were delivered to Mesa Bank. The checks, however, were never deposited by Capital Title.

51. None of the borrowers in the 38 transactions closed by Capital Title made the requisite down payment. Capital Title admits that no down payment was collected in 30 of these transactions. The "down payments" for 8 of the other borrowers came from Alexander's "recycled funds."

52. In reliance on the false representation that the borrower(s) had made the necessary down payment, Mesa Bank transferred the loan funds into escrow.

53. Capital Title disbursed Mesa Bank's funds despite having express escrow instructions stating that it was not permitted to close escrow unless the borrower made the necessary down payment from the borrower's own funds.

54. Capital Title actually allowed Alexander to conduct the "closings" of many of the loans in a conference room at Capital Title with no Capital Title escrow agent present.

55. As a result of Alexander, Stevens and Johnson's fraudulent scheme, Mesa Bank approved loans to borrowers who would not have otherwise qualified for the loans, and subsequently funded those loans under circumstances and conditions that would not have otherwise resulted in funding.

56. The transactions with several of the borrowers included an initial loan, followed

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by a subsequent loan that was either a construction loan that paid off the initial lot loan or was a refinance of the initial construction loan.

57. When Mesa Bank approved, and ultimately funded, the loans that paid off the initial loans made to the borrower(s), Mesa Bank was under impression that a substantial down payment had been made by the borrower(s) at the closing on the initial loan.

58. Alexander and Capital Title's escrow officers' fraud allowed escrows to close without the borrowers making the required down payment.

59. Capital Title's former Senior Vice President, Mark Walker, described some of the Capital Title escrow agents' fraudulent acts as "discrepancies."

60. Mesa Bank's belief that the borrower(s) made a down payment at the closing for the initial loans was a material factor in Mesa Bank's decision to fund the subsequent loans.

61. If Mesa Bank had known that the borrowers had not made the down payments that Alexander, Stevens and Johnson fraudulently represented had been made at the closing on the initial Loans, Mesa Bank would not have approved the subsequent loans to the borrower.

62. Capital Title returned a closed loan package to Mesa Bank, which frequently included the final HUD-1 showing the same seller credit. Laux was responsible for reviewing the post-closing package. Laux never objected to the seller credit HUD-1s before or after closing.

63. When a loan closed, Mesa Bank sent payment to AMF which withheld its fee of \$200 per loan and sent the balance to Alexander.

64. On each of the Other Loans and Loans, Mesa Bank set up interest reserves so the borrowers did not have to pay any interest (or principal) during the term of the loans, thereby increasing the loan balances. Mesa Bank loaned the money for the interest reserve which was deposited in an account from which Mesa Bank paid itself interest each month. When each Loan was paid off by a subsequent refinance loan, the interest reserve would be rolled into the loan balance, and a new interest reserve would be created.

65. From 2001 to October 2005, Mesa Bank's closing instructions to Capital Title did not include a requirement that the borrower provide a check for the down payment. In October, 2005, Mesa Bank learned from an outside source it had a reputation for making lot loans with no down payment or, in other words, 100% financing or "no money down" loans. Mesa Bank did not review the 70 seller credit HUD-1s from the prior Loans and Other Loans to determine whether a cash down payment had actually been made. Instead of immediately reviewing the

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files and terminating any further loans originated by Alexander, Mesa Bank simply changed the closing instructions to add this new requirement: "If cash is required at close of escrow, please provide Mesa Bank with a copy of those funds deposited. Do not close this transaction unless the funds are received directly from borrower."

66. Mesa Bank admits it had concerns about its interim construction loan portfolio in general and Alexander specifically as early as October 2005 and began tightening its documentation standards. In addition to the new closing instruction requiring a copy of the cash down payments made, Mesa Bank began requiring a new certification of occupancy from the borrowers certifying they were not investors.

67. After the revised closing instruction was instituted in January, 2006, Alexander started bringing personal (not certified) checks from the borrowers to Capital Title. He requested Johnson to make a photocopy of those checks and return the original check to him, which she did. Johnson did not deposit the check into Capital Title's escrow account. Johnson then gave Alexander a package containing the signed loan documents along with a HUD showing the borrower's down payment at line 303; an escrow receipt; and a representation that all conditions have been met. This practice occurred on the initial loans for the 25 loans closed between January 26, 2006 and December 26, 2006. ("the 25 Loans")

68. For 8 of the initial loans (Bishop, Miller, Korenblitt, Knas, Barnes, Kennedy, Bucchi, and Hawkins), the down payments were actually paid by cashier's checks, showing the borrowers as the remitter and deposited in Capital Title's escrow account. However, 4 of these 8 borrowers did not deposit their own funds.

69. Johnson and Stevens made misrepresentations to Mesa Bank on the initial transaction for the 25 Loans. Subsequent to Mesa Bank's approval and funding of each loan, the borrowers failed to meet their obligations to Mesa Bank.

70. On May 6, 2007, a former employee of one of the builders notified Mesa Bank of the fraud infecting the Other Loans and Loans. On May 31, 2007, a different former employee of the same builder separately notified Mesa Bank that fraud infected the Loans. Mesa Bank nevertheless made three more of the Loans (Kennedy, Bucchi, and Hawkins) and continued to fund significant sums in excess of \$10M on properties where either construction had not even started or was less than 20% complete. In January, 2008, Mesa Bank was told by a borrower that he had not made a down payment. Mesa Bank claims this was the first time it learned of the fraud infecting the Loans and Other Loans, but a prudent lender would have discovered this information by October 2005, or no later than May 6, 2007, based on the 70 seller credit HUD-1s, the 2005 fraud report, the 2007 fraud reports, and numerous red flags in the underwriting files.

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71. On or about April 7, 2008, AMF's president, Matthew Kelley, received a call from Ashley Crisci, a former AMF employee. Crisci told Kelley that Alexander had placed her and her friend in loans that they could not afford. She said she was worried about her credit being ruined.

72. Crisci also told Kelley that Kara Edwards (an AMF loan processor who worked for Alexander) forged loan documents, and that Capital Title was involved in similarly fraudulent practices.

73. Kelley reviewed the loan files for Crisci and her friend, and determined that Alexander had violated AMF policies and procedures.

74. The next day AMF terminated Alexander, his sons John and Paul, and Kara Edwards, and ordered them to immediately cease all activity on behalf of AMF.

75. Before Crisci informed AMF of the improprieties, none of the borrowers described in Mesa Bank's complaints informed AMF that their loan documents or borrower files contained any false or misleading statements and none complained about Alexander.

76. AMF was not aware of any false or misleading statements contained in loan applications submitted by Alexander to Mesa Bank until after their submission, and did nothing to authorize or ratify such actions.

77. Alexander's actions violated AMF's policies and procedures. Alexander concealed his acts by, among other things, making mortgage payments on certain loans, which prevented AMF from discovering them.

78. Mesa Bank declared each of the 45 borrowers in default and commenced trustee's sales of the subject properties.

79. At the trustee's sales Mesa Bank made credit bids. Mesa Bank's credit bids were the highest bids at the trustee's sales and Mesa Bank acquired title to the 45 properties. Mesa Bank has sold 19 of these 45 properties.

80. The total amount owed on the Loans as of the date of the trustee's sales was \$47,207,677, of which \$5,148,255 was interest.

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81. Mesa Bank's total expenses as of the date of the trustee's sale for each property were \$499,863. These costs were incurred by Mesa Bank in connection with taking possession of each property and to mitigate its damages.

82. Mesa Bank's underwriters and officers, Laux, Singleton, and Leaf did not act as reasonably prudent bank officers and employees in underwriting, reviewing, and recommending the Loans for approval and funding by Mesa Bank, notwithstanding the fact that many of them were "stated income" loans. In particular, they failed to analyze the "land flips/double escrows" involved in many of the loans, failed to apply common sense to, or even question, the grossly overstated personal income figures stated for many of the borrowers, failed to make one telephone call to double-check even one of the verifications of deposit, allowed the borrowers to use the same appraiser for most of the Loans, and did not examine any of the HUD-1 statements sent by Capital Title before or after each closing.

83. An example of Mesa Bank's negligence occurred on January 26, 2006. Mesa Bank was advised in an application packet that borrower, Michael Dove's down payment was going to be made by a check drawn on his checking account at Mesa Bank. Terri Singleton telephoned Capital Title to advise them that Dove did not have funds in his account to cover the check and she was advised that the check would be replaced by a check drawn on another bank. Without waiting for a replacement check, Singleton wired the funds to Capital Title for closing.

84. Another example is that Rita Leaf testified that Dan Laux should have reviewed the pre-audit HUD-1s from Capital Title before funding the Loans. She also testified that he should never have allowed a loan to close when the borrowers' down payment showed as being from a seller credit.

85. After the defaults were declared, Mesa Bank acted prudently and in a manner designed to mitigate its damages, including implementing a procedure for foreclosing on the properties, hiring contractors to maintain the properties to prevent degradation, and marketing the properties.

86. Mesa Bank's credit bids were based on a reasonable procedure that used the most recent independent appraisal and made standard and uniform deductions to arrive at the credit bid.

87. Mesa Bank has marketed the properties in a commercially reasonable manner.

88. Mesa Bank incurred expenses of \$427,604.57 after the date of the trustee's sales of the properties.

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89. The total principal due on the forty-five Loans that are the subject of this lawsuit upon default was \$42,059,422.

90. The total interest incurred on the Loans before the borrowers defaulted was \$3,626,923.

91. The interest incurred from date the borrowers defaulted on the Loans until the date of the trustee's sale is \$1,518,332.

92. Mesa Bank's credit bids on the subject properties totaled \$31,735,235.

93. Both Dan Laux and Rita Leaf testified that a cause of Mesa Bank's losses was the inflated appraisals.

94. Mesa Bank's normal loss on residential construction loans was ten percent (10%).

95. For comparative fault purposes, Alexander was 50% at fault, Mesa Bank was 20% at fault, and Capital Title was 30% at fault.

96. Mesa Bank has settled its claims against one appraiser for \$1,000,000.00.

**CONCLUSIONS OF LAW**

**MESA BANK'S CLAIMS**

**COUNT ONE**

**(Fraud and Deceit Against Alexander, AMF and AMS)**

1. The nine elements of fraud a plaintiff must prove by clear and convincing evidence under Arizona law are: (1) a representation; (2) its falsity, (3) its materiality, (4) the maker knew the representation was false, (5) the maker intended that the recipient would act upon the representation in the manner reasonably contemplated by the maker, (6) the recipient did not know that the representation was false, (7) the recipient relied on the truth of the representation, (8) the recipient's reliance was reasonable and justified under the circumstances; and (9) the recipient was damaged. Echols v. Beauty Built Homes, Inc., 132 Ariz. 498, 647 P.2d 629 (1982).

2. Alexander, in the course and scope of his employment with AMS and AMF, made material misrepresentations and/or omissions to Mesa Bank in regard to each of the Loans Mesa Bank approved and funded in this case.

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3. Alexander knew that the material misrepresentations and/or omissions were false at the times he made them. AMS and AMF, as licensed mortgage brokers are liable for the damages caused by Alexander on the loans he originated while he was employed by each of them. A.R.S. §6-903(P).

4. AMS and AMF are also vicariously liable for Alexander's negligent and tortious acts and the damage he caused while acting in the course and scope of his employment with each of them. Conduct is within the scope of employment if it is the kind the employee was employed to perform and it furthers the employer's business, even if the conduct is expressly forbidden. Baker v. Stewart Title & Trust of Phoenix, Inc., 197 Ariz. 535, 540, 5 P.3d 249 (App. 2000).

5. The material misrepresentations and/or omissions were made by Alexander to induce Mesa Bank to enter into and fund the Loans the borrowers applied for.

6. The material misrepresentations and/or omissions made by AMS, AMF, and Alexander were material to Mesa Bank's decision to enter into and fund the Loans the borrowers had applied for.

7. Mesa Bank was ignorant of the falsity of each such material misrepresentation and/or omission.

8. In deciding to enter into and fund the Loans that the borrowers had applied for, Mesa Bank relied on the material misrepresentations and/or omissions made by AMS, AMF and Alexander.

9. Mesa Bank had a right to rely on the material misrepresentations and/or omissions made by AMS, AMF, and Alexander. Because of Alexander, AMS, and AMF's fiduciary relationship with Mesa Bank it was entitled to rely on their representations without investigating them. Mister Donut of America, Inc. v. Harris, 150 Ariz. 321, 324, 723 P.2d 670 (1976).

10. Mesa Bank's justifiable reliance on each material misrepresentation and/or omission made by AMS, AMF and Alexander proximately caused damage to Mesa Bank.

11. AMS and AMF did not act in concert with each other and the interests of justice would not be served by finding them jointly and severally liable to Mesa Bank.

12. Mesa Bank's negligence in the underwriting process would justify the court in finding that Mesa Bank's comparative fault in this action is 20% of the total fault. But, Arizona

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does not allow an intentional tortfeasor to compare his or her fault with the victim's conduct. Strawberry Water Company v. Paulsen, 220 Ariz. 401, 207 P.3d 654 (App. 2008).

13. The court will credit the defendants with Mesa Bank's \$1,000,000.00 settlement with the appraiser on this count. Hutcherson v. City of Phoenix (1998) 192 Ariz. 51, 53-55, 961 P.2d 449 (1998). Gemstar Limited v. Ernst & Young, 185 Ariz. 493, 507-508, 917 P.2d 222 (1996).

COUNT TWO

(Fraud and Deceit Against Capital Title and Stevens)

1. Stevens, acting in the course and scope of her employment with Capital Title, made material misrepresentations and/or omissions to Mesa Bank in connection with Loans closed by Stevens for the following borrowers: Joel and Melanie Newton; Joseph and Dorothy Coia; Paul and Kristen Alexander; Jacob Bodrero; Mylynn Truong; Michael and Natalie Mason; Sung Van; Tri Nguyen; Ashley Crisci; Kevin Johnson; Justin Korenblitt; Jennifer Knas; Kristin Barnes; David and Rhonda Kennedy; Albert Bucchi; Larry and Vada Hunter; Jason Hawkins; Dustin and Shalice Hunter; Anna Marie Gustavson; and Kara Edwards.

2. Stevens knew that the material misrepresentations and/or omissions were false at the times she made them. Capital Title is vicariously liable for Steven's negligent and tortious acts and the damage she caused while acting in the course and scope of her employment. Conduct is within the scope of employment if it is the kind the employee was employed to perform and it furthers the employer's business, even if the conduct is expressly forbidden. Baker v. Stewart Title & Trust of Phoenix, Inc., 197 Ariz. 535, 540, 5 P.3d 249 (App. 2000).

3. The misrepresentations and/or omissions were made to induce Mesa Bank to fund the Loans that the borrowers had applied for.

4. The misrepresentations and/or omissions were material to Mesa Bank's decision to fund the Loans that the borrowers had applied for.

5. Mesa Bank was ignorant of the falsity of each misrepresentation and/or omission.

6. In deciding to fund the Loans that the borrowers had applied for, Mesa Bank relied on each such misrepresentation and/or omission.

7. Mesa Bank had a right to rely on each such statement and/or representation. Because Capital Title and Stevens had a fiduciary relationship with Mesa Bank the bank was

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entitled to rely on Capital Title's representations without investigating them. Mister Donut of America, Inc. v. Harris, 150 Ariz. 321, 324, 723 P.2d 670 (1976).

8. Mesa Bank's justifiable reliance on each such statement and/or representation by Capital Title and Stevens has caused and proximately caused Mesa Bank's damages.

9. Stevens and Johnson acted in concert and are jointly and severally liable with Capital Title for Mesa Bank's damages.

10. Mesa Bank's negligence in the underwriting process would justify the court in finding that Mesa Bank's comparative fault in this action is 20% of the total fault. But, Arizona does not allow an intentional tortfeasor to compare his or her fault with the victim's conduct. Strawberry Water Company v. Paulsen, 220 Ariz. 401, 207 P.3d 654 (App. 2008).

11. The court will credit the defendants with Mesa Bank's \$1,000,000.00 settlement with the appraiser on this count. Hutcherson v. City of Phoenix (1998) 192 Ariz. 51, 53-55, 961 P.2d 449 (1998). Gemstar Limited v. Ernst & Young, 185 Ariz. 493, 507-508, 917 P.2d 222 (1996).

COUNT THREE

(Fraud and Deceit Against Capital Title and Johnson)

1. Johnson, acting in the course and scope of her employment with Capital Title, made misrepresentations and/or omissions to Mesa Bank in connection with Loans to the following borrowers: Deland and Carrie Bentz; Joel and Melanie Newton; Bryan Tran and Patricia Minh; Marc and Marcie Lopeman; Brad and Kathryn Bishop; Keith Miller; Alejandro and Aurora Patino; Michael and Bennie Dana; Isaac Wahlquist; Damon and Laura Childers; Lynn and Dixie Tawzer; Taft and Nicole Smithson; Patrick Springer; Kenneth and Janice Moore; Sandra Stevens; Timothy McKnight; Joseph and Dorothy Coia; Kimberly Kulbeth; Michael Harris; and George and Cheryl Bevans.

2. Johnson knew that the misrepresentations and/or omissions were false at the times she made them. Capital Title is vicariously liable for Johnson's negligent and tortious acts and the damage she caused while acting in the course and scope of her employment. Conduct is within the scope of employment if it is the kind the employee was employed to perform and it furthers the employer's business, even if the conduct is expressly forbidden. Baker v. Stewart Title & Trust of Phoenix, Inc., 197 Ariz. 535, 540, 5 P.3d 249 (App. 2000).

3. The misrepresentations and/or omissions were made to induce Mesa Bank to fund

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the Loans.

4. The misrepresentations and/or omissions were material to Mesa Bank's decision to fund the Loans the borrowers had applied for.

5. Mesa Bank was ignorant of the falsity of each misrepresentations and/or omissions.

6. In deciding to fund the Loans the borrowers had applied for, Mesa Bank relied on each such misrepresentation and/or omission.

7. Mesa Bank had a right to rely on each such statement and/or representation. Because Capital Title and Johnson had a fiduciary relationship with Mesa Bank the bank was entitled to rely on Capital Title's representations without investigating them. Mister Donut of America, Inc. v. Harris, 150 Ariz. 321, 324, 723 P.2d 670 (1976).

8. Mesa Bank's justifiable reliance on each such statement and/or representation made by Capital Title and Johnson has caused and proximately caused Mesa Bank's damages.

9. Stevens and Johnson acted in concert and are jointly and severally liable with Capital Title for Mesa Bank's damages.

10. Mesa Bank's negligence in the underwriting process would justify the court in finding that Mesa Bank's comparative fault in this action is 20% of the total fault. But, Arizona does not allow an intentional tortfeasor to compare his or her fault with the victim's conduct. Strawberry Water Company v. Paulsen, 220 Ariz. 401, 207 P.3d 654 (App. 2008).

11. The court will credit the defendants with Mesa Bank's \$1,000,000.00 settlement with the appraiser on this count. Hutcherson v. City of Phoenix (1998) 192 Ariz. 51, 53-55, 961 P.2d 449 (1998). Gemstar Limited v. Ernst & Young, 185 Ariz. 493, 507-508, 917 P.2d 222 (1996).

COUNT FOUR

(Negligent Misrepresentation Against Alexander, AMS and AMF)

1. The tort of negligent misrepresentation is defined as:

“One who, in the course of his business, profession or

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employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating information.” St. Joseph’s Hospital and Medical Center v. Reserve Life Ins. Co., 154 Ariz. 307, 313, 742 P.2d 808 (1987) (citing Restatement (Second) of Torts § 552).

2. The provider of information is bound to exercise care when the provider is “aware of the intended use of the information” and “intended to supply it for that purpose.” Murray Management Corp. v. Founders Title Co., 169 Ariz. 417, 819 P.2d 1003 (App. 1991).

3. Alexander, acting in the course and scope of his employment with AMS and AMF, made misstatements, misrepresentations, and omissions to Mesa Bank for the purpose of guiding Mesa Bank’s conduct in connection with each Loan approved and funded by Mesa Bank.

4. Alexander had a pecuniary interest in the Loan transactions as did AMS and AMF during the periods that Alexander was employed by each of them.

5. The misstatements, misrepresentations, and omissions of AMS, AMF and Alexander were made negligently, and without Alexander having any reasonable basis to believe that such statements and representations were true.

6. The misstatements, misrepresentations, and omissions were made for the purpose of guiding Mesa Bank’s conduct in connection with the Loan transactions.

7. AMS, AMF and Alexander had a legal duty to disclose the true facts relating to the Loan transactions, a duty to determine the truth or falsity of the representations to Mesa Bank, and to determine whether the statements and representations to Mesa Bank were well-grounded in fact.

8. AMS, AMF and Alexander breached their duties to Mesa Bank by failing to conduct any reasonable inquiry as to the truth or falsity of the representations and/or statements made to Mesa Bank, and by failing to take reasonable steps to ensure that the representations/statements made by AMS, AMF and Alexander to Mesa Bank were well-grounded in fact.

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9. Mesa Bank was ignorant of the falsity of each such statement and/or representation made by AMS, AMF and Alexander.

10. Each misstatement, misrepresentation, and omission made by AMS, AMF and Alexander was material to Mesa Bank's decision to enter into and fund the loan(s) that the borrower(s) had applied for.

11. In deciding to make and fund the Loans the borrowers had applied for, Mesa Bank relied on the misstatements, misrepresentations, and omissions made by AMS, AMF and Alexander.

12. Mesa Bank had a right to rely on each such statement and/or representation.

13. Mesa Bank's justifiable reliance on the misstatements, misrepresentations, and omissions of AMS, AMF and Alexander has proximately caused damage to Mesa Bank.

14. Alexander is liable for all Mesa Bank's damages arising out of the Loans identified herein.

15. AMS and AMF are liable only for Mesa Bank's damages which arise out of the Loans each originated for Mesa Bank (19 for AMS and 26 for AMF).

16. The court finds that Mesa Bank's negligence in the underwriting process constitutes 20%, Capital title's negligence constitutes 30%, and Alexander's conduct constitutes 50% of the total fault for each negligent misrepresentation claim.

17. The court will credit the defendants with Mesa Bank's \$1,000,000.00 settlement with the appraiser on this count. Hutcherson v. City of Phoenix (1998) 192 Ariz. 51, 53-55, 961 P.2d 449 (1998). Gemstar Limited v. Ernst & Young, 185 Ariz. 493, 507-508, 917 P.2d 222 (1996).

COUNT FIVE

(Negligent Misrepresentation Against Capital Title and Stevens)

1. Stevens, acting in the course and scope of her employment with Capital Title, made misstatements, misrepresentations, and omissions to Mesa Bank for the purpose of guiding Mesa Bank's conduct in connection with each Loan closed by Capital Title and Stevens.

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2. Capital Title and Stevens had a pecuniary interest in the Loan transactions that Stevens closed.

3. The misstatements, misrepresentations, and omissions of Capital Title and Stevens were made negligently, and without Capital Title and Stevens having any reasonable basis to believe that such statements and representations were true.

4. The misstatements, misrepresentations, and omissions were made for the purpose of guiding Mesa Bank's conduct in relation to Loans to the following borrowers: Joel and Melanie Newton; Joseph and Dorothy Coia; Paul and Kristen Alexander; Jacob Bodrero; Mylynn Truong; Michael and Natalie Mason; Sung Van; Tri Nguyen; Ashley Crisci; Kevin Johnson; Justin Korenblitt; Jennifer Knas; Kristin Barnes; David and Rhonda Kennedy; Albert Bucchi; Larry and Vada Hunter, Jason Hawkins, Dustin and Shalice Hunter; Anna Marie Gustavson; and Kara Edwards.

5. Capital Title and Stevens had a legal duty to disclose the true facts relating to the above Loan transactions and had a further duty to determine the truth or falsity of the representations to Mesa Bank and to determine whether the statements and representations to Mesa Bank were well-grounded in fact.

6. Capital Title and Stevens breached their duties to Mesa Bank by failing to conduct any reasonable inquiry as to the truth or falsity of the representations and/or statements made to Mesa Bank, and by failing to take reasonable steps to ensure that the representations/statements made by them to Mesa Bank were well-grounded in fact. Burkons v. Ticor Title Ins. Co. of California, 168 P.2d 345, 353, 813 P.2d 710, 716 (1991).

7. Mesa Bank was ignorant of the falsity of each such statement and/or representation made by Capital Title and Stevens.

8. Each misstatement, misrepresentation, and omission made by Capital Title and Stevens was material to Mesa Bank's decision to fund the Loans the borrowers had applied for.

9. In deciding to make the Loans the borrowers had applied for, Mesa Bank relied on the misstatements, misrepresentations, and omissions made by Capital Title and Stevens.

10. Mesa Bank had a right to rely on each such statement and/or representation.

11. Mesa Bank's justifiable reliance on each misstatement, misrepresentation, and omission by Capital Title and Stevens has proximately caused damage to Mesa Bank.

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12. Stevens and Johnson acted in concert and are jointly and severally liable with Capital Title for Mesa Bank's damages in connection with the Capital Title Loans.

13. The court finds that Mesa Bank's negligence in the underwriting process constitutes 20%, Capital title's negligence constitutes 30%, and Alexander's conduct constitutes 50% of the total fault for each negligent misrepresentation claim.

14. The court will credit the defendants with Mesa Bank's \$1,000,000.00 settlement with the appraiser on this count. Hutcherson v. City of Phoenix (1998) 192 Ariz. 51, 53-55, 961 P.2d 449 (1998). Gemstar Limited v. Ernst & Young, 185 Ariz. 493, 507-508, 917 P.2d 222 (1996).

COUNT SIX

(Negligent Misrepresentation Against Capital Title and Johnson)

1. Johnson, acting in the course and scope of her employment, made misstatements, misrepresentations, and omissions to Mesa Bank for the purpose of guiding Mesa Bank's conduct in connection with each Loan closed by Capital Title and Johnson.

2. Capital Title and Johnson had a pecuniary interest in the Loan transactions that Johnson closed.

3. The misstatements, misrepresentations, and omissions of Capital Title and Johnson were made negligently, and without Capital Title and Johnson having any reasonable basis to believe that such statements and representations were true.

4. The misstatements, misrepresentations, and omissions were made for the purpose of guiding Mesa Bank's conduct in relation to loans to the following borrowers: Deland and Carrie Bentz; Joel and Melanie Newton; Bryan Tran and Patricia Minh; Marc and Marcie Lopeman; Brad and Kathryn Bishop; Keith Miller; Alejandro and Aurora Patino; Michael and Bennie Dana; Isaac Wahlquist; Damon and Laura Childers; Lynn and Dixie Tawzer; Taft and Nicole Smithson; Patrick Springer; Kenneth and Janice Moore; Sandra Stevens; Timothy McKnight; Joseph and Dorothy Coia; Kimberly Kulbeth, Michael Harris; and George and Cheryl Bevans.

5. Capital Title and Johnson knew that the statements and/or representations were false at the times she made them.

6. Capital Title and Johnson had a legal duty to disclose the true facts relating to the

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loan transactions and had a further duty to determine the truth or falsity of the representations to Mesa Bank, and to determine whether the statements and representations to Mesa Bank were well-grounded in fact.

7. Capital Title and Johnson breached their duties owed to Mesa Bank by failing to conduct any reasonable inquiry as to the truth or falsity of the representations and/or statements made to Mesa Bank, and by failing to take reasonable steps to ensure that the representations/statements made by Capital Title and Johnson to Mesa Bank were well-grounded in fact.

8. Mesa Bank was ignorant of the falsity of each such statement and/or representation made by Capital Title and Johnson.

9. Each misstatement, misrepresentation, and omission made by Capital Title and Johnson was material to Mesa Bank's decision to enter into and fund the Loans that the borrowers had applied for.

10. In deciding to make and fund the Loans the borrowers had applied for, Mesa Bank relied on the misstatements, misrepresentations, and omissions made by Capital Title and Johnson.

11. In doing so, Mesa Bank had a right to rely on each such statement and/or representation.

12. Mesa Bank's justifiable reliance on each misstatements, misrepresentations, and omissions by Capital Title and Johnson has caused and proximately caused damage to Mesa Bank.

13. Stevens and Johnson acted in concert and are jointly and severally liable with Capital Title for Mesa Bank's damages in connection with the Capital Title Loans.

14. The court finds that Mesa Bank's negligence in the underwriting process constitutes 20%, Capital title's negligence constitutes 30%, and Alexander's conduct constitutes 50% of the total fault for each negligent misrepresentation claim.

15. The court will credit the defendants with Mesa Bank's \$1,000,000.00 settlement with the appraiser on this count. Hutcherson v. City of Phoenix, 192 Ariz. 51, 53-55, 961 P.2d 449 (1998). Gemstar Limited v. Ernst & Young, 185 Ariz. 493, 507-508, 917 P.2d 222 (1996).

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COUNT SEVEN  
(Breach of Contract Against Capital Title)

1. A contractual relationship exists between an escrow agent and its principal. Burkons v. Ticor Title Ins. Co. of California, 168 P.2d 345, 813 P.2d 710, 716 (1991).

2. To prove a breach of contract under Arizona law, plaintiff must prove the existence of a contract, its breach and resulting damage. Coleman v. Watts, 87 F. Supp. 2d 944 (D. Ariz. 1998).

3. An escrow agent which fails to follow the escrow instructions breaches its contract and is liable for “all damages resulting from any deviation from the escrow instructions.” Burkons v. Ticor Title Ins. Co. of California, 168 Ariz. 345, 353, 813 P.2d 710, 716 (1991). The escrow agent must be aware of the documents in the escrow and has a “duty to call its principal[s] for clarification” if there is a significant variance. *Id.*

4. A contractual relationship existed between Mesa Bank and Capital Title concerning the Loans to the following borrowers: Deland and Carrie Bentz; Joel and Melanie Newton; Joseph and Dorothy Coia; Paul and Kristen Alexander; Jacob Bodrero; Mylynn Truong; Michael and Natalie Mason; Sung Van; Tri Nguyen; Ashley Crisci; Kevin Johnson; Justin Korenblitt; Jennifer Knas; Kristin Barnes; David and Rhonda Kennedy; Albert Bucchi; Larry and Vada Hunter; and Jason Hawkins; Dustin and Shalice Hunter; Anna Marie Gustavson; Kara Edwards; Bryan Tran and Patricia Minh; Marc and Marcie Lopeman; Brad and Kathryn Bishop; Keith Miller; Alejandro and Aurora Patino; Michael and Bennie Dana; Isaac Wahlquist; Damon and Laura Childers; Lynn and Dixie Tawzer; Taft and Nicole Smithson; Patrick Springer; Kenneth and Janice Moore; Sandra Stevens; Timothy McKnight; Kimberly Kulbeth; Michael Harris; and George and Cheryl Bevans.

5. Capital Title breached its contractual obligations to Mesa Bank.

6. Mesa Bank performed all of its contractual duties and obligations that it was required to perform.

7. Capital Title’s material breaches of its contractual obligations proximately caused damage to Mesa Bank.

8. Capital Title is entitled to a credit of the \$1,000,000 Mesa Bank received in its settlement with the appraiser.

9. Mesa Bank is entitled to its costs and attorneys fees under A.R.S. § 12-341.01.

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COUNT EIGHT

(Breach of the Covenant of Good Faith and Fair Dealing Against Capital Title)

1. A covenant of good faith and fair dealing is implied in every contract under Arizona law. The good faith and fair dealing obligation assures “that neither party will act to impair the right of the other to receive the benefits which flow from,” or that they have “the right to expect” from, their contractual relationship. Rawlings v. Apodaca, 151 Ariz. 149, 153-54, 726 P.2d 565, 569-70 (1986). Good faith is defined as “honesty of purpose” and the “absence of intent to defraud.” Geomet Exploration v. Lucky McUranium Corp., 124 Ariz. 55, 59, 601 P.2d 1339, 1343 (1979). The covenant also prohibits “[a] variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness.” Restatement (Second) of Contracts, § 205 cmt. A (1979).

2. Given the “nature of the contractual relationship between an escrow agent and its principal, the covenant of good faith and fair dealing recognizes a fiduciary relationship and requires the escrow agent to act with the utmost honesty and fairness.” Burkons v. Ticor Title Ins. Co. of California, 168 P.2d 345, 355, 813 P.2d 710, 720 (1991).

3. A contractual relationship existed between Mesa Bank and Capital Title concerning the following Loans: Deland and Carrie Bentz loans; Joel and Melanie Newton loans; Joseph and Dorothy Coia loan; Paul and Kristen Alexander loan; Jacob Bodrero loans; Mylynn Truong loan; Michael and Natalie Mason loan; Sung Van loan; Tri Nguyen loan; Ashley Crisci loan; Kevin Johnson loan; Justin Korenblitt loans; Jennifer Knas loan; Kristin Barnes loan; David and Rhonda Kennedy loan; Albert Bucchi loan; Larry and Vada Hunter loan; and Jason Hawkins loan; Dustin and Shalice Hunter loan; Anna Marie Gustavson loan; Kara Edwards loan; Bryan Tran and Patricia Minh loans; Marc and Marcie Lopeman loans; Brad and Kathryn Bishop loans; Keith Miller loans; Alejandro and Aurora Patino loans; Michael and Bennie Dana loans; Isaac Wahlquist loans; Damon and Laura Childers loans; Lynn and Dixie Tawzer loans; Taft and Nicole Smithson loans; Patrick Springer loans; Kenneth and Janice Moore loans; Sandra Stevens loans; Timothy McKnight loans; Kimberly Kulbeth loan; Michael Harris loan; and George and Cheryl Bevans loan.

4. Capital Title breached the covenant of good faith and fair dealing owed to Mesa Bank.

5. Mesa Bank performed all of its contractual duties and obligations that it was required to perform.

6. Capital Title’s material breaches of the covenant of good faith and fair dealing proximately caused damage to Mesa Bank.

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7. Capital Title is entitled to a credit of the \$1,000,000 Mesa Bank received in its settlement with the appraiser

8. Mesa Bank is entitled to its costs and attorneys fees under A.R.S. § 12-341.01.

COUNT NINE

(Breach of Fiduciary Duty Against Capital Title and Stevens)

1. As an escrow agent, Capital Title and Stevens owed a fiduciary duty to Mesa Bank. Berry v. McLeod, 124 Ariz. 346, 352, 604 P.2d 610, 616 (1979); This duty required that Capital Title and Stevens conduct the transaction with scrupulous care, honesty, and diligence. Burkons v. Ticor Title Ins. Co. of California, 168 Ariz. 345, 353, 813 P.2d 710 (1991)..

2. An escrow agent has a duty to disclose to its principal “facts and circumstances that a reasonable escrow agent would perceive as evidence of fraud.” The escrow officer “cannot close its eyes in the face of known facts and console itself with the thought that no one has yet confessed fraud.” Burkons v. Ticor Title Ins. Co. of California, 168 Ariz. 345, 353, 813 P.2d 710, 718 (1991).

3. Capital Title and Stevens owed a fiduciary duty to Mesa Bank in relation to the escrow for the following Loans: Joel and Melanie Newton loans; Joseph and Dorothy Coia loan; Paul and Kristen Alexander loan; Jacob Bodrero loans; Mylynn Truong loan; Michael and Natalie Mason loan; Sung Van loan; Tri Nguyen loan; Ashley Crisci loan; Kevin Johnson loan; Justin Korenblitt loans; Jennifer Knas loan; Kristin Barnes loan; David and Rhonda Kennedy loan; Albert Bucchi loan; Larry and Vada Hunter loan, Jason Hawkins loan, Dustin and Shalice Hunter loan; Anna Marie Gustavson loan; and Kara Edwards loan.

4. Capital Title and Stevens knowingly and substantially breached their fiduciary duties to Mesa Bank.

5. These breaches were a proximate cause of Mesa Bank’s damages.

COUNT TEN

(Breach of Fiduciary Duty Against Capital Title and Johnson)

1. Capital Title and Johnson owed a fiduciary duty to Mesa Bank in relation to the following Loans: Deland and Carrie Bentz loans; Joel and Melanie Newton loans; Bryan Tran

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and Patricia Minh loans; Marc and Marcie Lopeman loans; Brad and Kathryn Bishop loans; Keith Miller loans; Alejandro and Aurora Patino loans; Michael and Bennie Dana loans; Isaac Wahlquist loans; Damon and Laura Childers loans; Lynn and Dixie Tawzer loans; Taft and Nicole Smithson loans; Patrick Springer loans; Kenneth and Janice Moore loans; Sandra Stevens loans; Timothy McKnight loans; Joseph and Dorothy Coia loan; Kimberly Kulbeth loan, Michael Harris loan; and George and Cheryl Bevans loan.

2. Capital Title and Johnson knowingly and substantially breached their fiduciary duties to Mesa Bank.

3. These breaches were a proximate cause of Mesa Bank's damages.

COUNT ELEVEN  
(Unjust Enrichment Against All Defendants)

1. To prevail on a claim of unjust enrichment, Mesa Bank must establish that: (1) Defendants were enriched, (2) Mesa Bank was impoverished, (3) a connection between the enrichment and the impoverishment, (4) the absence of justification for the enrichment and impoverishment, and (5) the absence of a remedy provided by law. City of Sierra Vista v. Cochise Enterprise, Inc., 144 Ariz. 375, 381, 697 P.2d 1125, 1131 (App. 1984).

2. Defendants were enriched when they received benefits that they should not have retained.

3. The benefits retained by defendants were at the impoverishment of Mesa Bank without justification.

4. Mesa Bank has made demand upon defendants for payment of such sums, but defendants have failed and refused to pay.

5. Defendants have been and will be unjustly enriched at Mesa Bank's expense, unless they are ordered to repay Mesa Bank all the amounts improperly received by them.

MESA BANK'S DAMAGES

A. Calculation of Damages.

1. Recovery of damages for a fraud claim is generally governed by the "Benefit of

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the Bargain Rule.” Consequential damages are a proper measure of damages in a fraud action. Ashley v. Kramer, 8 Ariz. App. 27, 30-31, 442 P.2d 564 (App. 1968). Consequential damages are “those that are not produced by the concurrence of some other event attributable to the same origin or cause; such damage, loss, or injury does not flow directly and immediately from the act of the party, but only from the consequences or results of such act.” In re William L., 211 Ariz. 236, 240 (footnote 4), 119 P.3d 1039, 1043 (App. 2005).

2. Alexander, Stevens and Johnson are liable for the damages that were proximately and consequentially caused by their fraud. Capital Title, AMS, AMF, are liable for the damages their employees caused Mesa Bank during the periods of their employment.

3. in its section on damages for negligent misrepresentation the Restatement (Second) Section 552B states: (1) The damages recoverable “... are those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is a legal cause, including (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and (b) pecuniary loss suffered otherwise as a consequent of plaintiff’s reliance upon the misrepresentation.” Standard Chartered PLC v. Price Waterhouse, 190 Ariz. 6, 35, 945 P.2d 317 (App. 1996). Thus, consequential damages are also recoverable in a negligent misrepresentation claim.

4. Capital Title, AMS, and AMF, Alexander, Stevens and Johnson are liable for the damages that were proximately and consequentially caused by their negligence.

5. The damages recoverable against Capital Title for breach of contract are measured by the actual loss sustained, provided such loss is what would naturally result as the ordinary consequence of the breach, or as a consequence which may, under the circumstances, be presumed to have been in the contemplation of the parties as the probable result of a breach. Higgins v. Arizona Sav. & Loan Ass’n., 90 Ariz. 55, 365 P.2d 476 (1961); McFadden v. Shanley, 16 Ariz. 91, 141 P. 732 (1914).

6. The damages recoverable against Capital Title for breach of the covenant of good faith and fair dealing are measured by the actual loss sustained, provided such loss is what would naturally result as the ordinary consequence of the breach, or as a consequence which may, under the circumstances, be presumed to have been in the contemplation of the parties as the probable result of a breach. Higgins v. Arizona Sav. & Loan Ass’n., 90 Ariz. 55, 365 P.2d 476 (1961); McFadden v. Shanley, 16 Ariz. 91, 141 P. 732 (1914).

7. Mesa Bank is entitled to recover the full amount of money that will reasonably and fairly compensate it for any of the following elements of damage resulting from Capital Title, Stevens, and Johnson’s breaches of their fiduciary duty: (1) loss of money or other

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property by Mesa Bank; (2) the profit or proceeds that plaintiff would have received had Capital Title, Stevens and Johnson performed their duties; and any (3) money that is unjust for Capital Title, Stevens, Johnson to keep. Restatement (Second) of Torts, §§ 874 and 924; Restatement Second of Agency §§ 403, 404, 404A.

8. “Quantum meruit,” which literally means “as much as he deserves,” Murdock-Bryant Const., Inc., v. Pearson, 146 Ariz. 48, 703 P.2d 1197 (1985), is the measure of damages imposed when a party prevails on the equitable claim of unjust enrichment. Landi v. Arkules, 172 Ariz. 126, 835 P.2d 458 (App. 1992). In an equity case, the court “adapts its relief and molds its decrees to satisfy the requirements of the case and to conserve the equities of the parties litigant. The court has such plenary power since its purpose is the accomplishment of justice amid all of the vicissitudes and intricacies of life...” Mason v. Ellison, 63 Ariz. 196, 160 P.2d 326 (1945).

9. Capital Title is liable to Mesa Bank for damages sustained by Mesa Bank arising out of the Capital Title Loans.

10. Alexander is liable to Mesa Bank for all damages sustained by Mesa Bank.

11. Stevens is liable to Mesa Bank for all damages sustained by Mesa Bank arising out of the Capital Title Loans.

12. Johnson is liable to Mesa Bank for all damages sustained by Mesa Bank arising out of the Capital Title Loans.

13. AMS is liable to Mesa Bank for all damages sustained by Mesa Bank arising out of the 19 Loans originated by Alexander while he was an AMS agent.

14. AMF is liable to Mesa Bank for all damages sustained by Mesa Bank arising out of the 26 Loans originated by Alexander while he was an AMF agent.

15. Mesa Bank’s damages that were proximately caused by defendants’ fraud, negligent misrepresentations, breach of contract, and breach of fiduciary duty are calculated by subtracting the total amount due on each Loan at the time of trustee’s sale (plus expenses incurred to that date), less the value of the properties on the day of the trustee’s sale.

16. The value of the properties on the date of the trustee’s sale is the amount credit bids by Mesa Bank at the trustee’s sales. No other evidence was introduced to controvert these values.

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17. Mesa Bank's damages on the forty-five Loans originated by Alexander are calculated as follows:

<u>Borrower</u>	<u>Principal</u>	<u>Total Interest</u>	<u>Costs</u>	<u>Total Amount Due</u>	<u>Mesa Bank's Credit Bid</u>	<u>Damages</u>
Alexander	\$401,405	\$71,906	\$2,747	\$476,058	\$107,755	\$368,303
Barnes	\$906,050	\$77,768	\$4,166	\$987,984	\$805,300	\$182,684
Beal	\$1,473,690	\$159,303	\$4,502	\$1,637,495	\$1,695,000	\$0
Bentz	\$200,515	\$52,625	\$1,865	\$255,005	\$219,670	\$35,335
Bernier	\$1,798,870	\$175,189	\$6,166	\$1,980,225	\$2,241,800	\$0
Bevans	\$1,074,359	\$117,362	\$5,537	\$1,197,258	\$1,030,864	\$166,394
Bishop	\$995,734	\$159,196	\$4,383	\$1,159,313	\$664,925	\$494,388
Bodrero	\$936,793	\$82,120	\$8,553	\$1,027,466	\$732,572	\$294,894
Bucchi	\$1,260,207	\$87,385	\$127,753	\$1,475,345	\$694,429	\$780,916
Budlong	\$909,697	\$102,394	\$5,506	\$1,017,597	\$603,822	\$413,775
Childers	\$1,041,922	\$116,115	\$14,367	\$1,172,404	\$890,263	\$282,141
Coia	\$1,172,697	\$135,548	\$4,696	\$1,312,941	\$685,850	\$627,091
Crisci	\$883,917	\$78,788	\$5,249	\$967,954	\$378,600	\$589,354
Dana	\$1,046,284	\$162,119	\$3,921	\$1,212,324	\$890,675	\$321,649
Edwards	\$881,240	\$99,184	\$3,450	\$983,874	\$651,500	\$332,374
Gustavson	\$859,280	\$102,370	\$9,283	\$970,933	\$615,413	\$355,520
Habakangas	\$869,021	\$96,406	\$3,320	\$968,747	\$945,823	\$22,924
Harper	\$633,186	\$83,715	\$3,635	\$720,536	\$632,660	\$87,876
Harris	\$1,091,180	\$144,252	\$7,085	\$1,242,517	\$737,768	\$504,749
Hawkins	\$545,640	\$36,960	\$5,313	\$587,913	\$426,690	\$161,223
Hunter, D.	\$856,683	\$109,911	\$4,451	\$971,045	\$841,950	\$129,095
Hunter, L.	\$764,143	\$100,915	\$4,322	\$869,380	\$608,650	\$260,730
Johnson	\$406,078	\$73,076	\$2,075	\$481,229	\$159,820	\$321,409
Kennedy	\$883,190	\$70,188	\$148,289	\$1,101,667	\$727,630	\$374,037
Knas	\$842,795	\$66,290	\$3,809	\$912,894	\$376,918	\$535,976
Korenblitt	\$1,248,744	\$104,397	\$4,063	\$1,357,204	\$931,891	\$425,313
Kulbeth	\$862,648	\$109,702	\$12,513	\$984,863	\$906,000	\$78,863
Lopeman	\$868,611	\$109,121	\$3,775	\$981,507	\$907,300	\$74,207
Mason	\$848,025	\$98,991	\$3,784	\$950,800	\$554,127	\$396,673
McCormick	\$659,432	\$76,006	\$3,275	\$738,713	\$725,293	\$13,420
McKnight	\$486,770	\$96,508	\$2,912	\$586,190	\$163,700	\$422,490

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Miller	\$855,763	\$122,434	\$7,731	\$985,928	\$992,969	0
Moore	\$1,052,840	\$168,280	\$3,940	\$1,225,060	\$800,850	\$424,210
Newton	\$1,465,064	\$198,915	\$4,674	\$1,668,653	\$1,198,858	\$469,795
Nguyen	\$896,965	\$107,570	\$6,307	\$1,010,842	\$433,700	\$577,142
Patino	\$1,055,912	\$137,654	\$15,610	\$1,209,176	\$844,400	\$364,776
Sims	\$909,296	\$93,117	\$3,736	\$1,006,149	\$545,322	\$460,827
Smithson	\$1,232,200	\$172,784	\$6,753	\$1,411,737	\$904,504	\$507,233
Springer	\$497,968	\$107,450	\$2,651	\$608,069	\$156,522	\$451,547
Stevens	\$1,029,454	\$154,944	\$4,472	\$1,188,870	\$784,175	\$404,695
Tawzer	\$1,075,658	\$190,482	\$3,740	\$1,269,880	\$639,800	\$630,080
Tran	\$2,206,233	\$235,602	\$7,676	\$2,449,511	\$2,047,800	\$401,711
Truong	\$435,802	\$66,893	\$2,766	\$505,461	\$130,367	\$375,094
Van	\$579,630	\$68,842	\$3,072	\$651,544	\$140,383	\$511,161
Wahlquist	\$1,057,831	\$167,478	\$1,970	\$1,227,279	\$720,189	\$507,090
					Total Damages:	\$15,132,167

18. Mesa Bank's damages on the on the thirty-eight Capital Title Loans are calculated as follows:

<u>Borrower</u>	<u>Principal</u>	<u>Total Interest</u>	<u>Costs</u>	<u>Total Amount Due</u>	<u>Mesa Bank's Credit Bid</u>	<u>Damages</u>
Alexander	\$401,405	\$71,906	\$2,747	\$476,058	\$107,755	\$368,303
Barnes	\$906,050	\$77,768	\$4,166	\$987,984	\$805,300	\$182,684
Bentz	\$200,515	\$52,625	\$1,865	\$255,005	\$219,670	\$35,335
Bevans	\$1,074,359	\$117,362	\$5,537	\$1,197,258	\$1,030,864	\$166,394
Bishop	\$995,734	\$159,196	\$4,383	\$1,159,313	\$664,925	\$494,388
Bodrero	\$936,793	\$82,120	\$8,553	\$1,027,466	\$732,572	\$294,894
Bucchi	\$1,260,207	\$87,385	\$127,753	\$1,475,345	\$694,429	\$780,916
Childers	\$1,041,922	\$116,115	\$14,367	\$1,172,404	\$890,263	\$282,141
Coia	\$1,172,697	\$135,548	\$4,696	\$1,312,941	\$685,850	\$627,091
Crisci	\$883,917	\$78,788	\$5,249	\$967,954	\$378,600	\$589,354
Dana	\$1,046,284	\$162,119	\$3,921	\$1,212,324	\$890,675	\$321,649
Edwards	\$881,240	\$99,184	\$3,450	\$983,874	\$651,500	\$332,374
Gustavson	\$859,280	\$102,370	\$9,283	\$970,933	\$615,413	\$355,520
Harris	\$1,091,180	\$144,252	\$7,085	\$1,242,517	\$737,768	\$504,749
Hawkins	\$545,640	\$36,960	\$5,313	\$587,913	\$426,690	\$161,223
Hunter, D.	\$856,683	\$109,911	\$4,451	\$971,045	\$841,950	\$129,095

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Hunter, L.	\$764,143	\$100,915	\$4,322	\$869,380	\$608,650	\$260,730
Johnson	\$406,078	\$73,076	\$2,075	\$481,229	\$159,820	\$321,409
Kennedy	\$883,190	\$70,188	\$148,289	\$1,101,667	\$727,630	\$374,037
Knas	\$842,795	\$66,290	\$3,809	\$912,894	\$376,918	\$535,976
Korenblitt	\$1,248,744	\$104,397	\$4,063	\$1,357,204	\$931,891	\$425,313
Kulbeth	\$862,648	\$109,702	\$12,513	\$984,863	\$906,000	\$78,863
Lopeman	\$868,611	\$109,121	\$3,775	\$981,507	\$907,300	\$74,207
Mason	\$848,025	\$98,991	\$3,784	\$950,800	\$554,127	\$396,673
McKnight	\$486,770	\$96,508	\$2,912	\$586,190	\$163,700	\$422,490
Miller	\$855,763	\$122,434	\$7,731	\$985,928	\$992,969	\$0
Moore	\$1,052,840	\$168,280	\$3,940	\$1,225,060	\$800,850	\$424,210
Newton	\$1,465,064	\$198,915	\$4,674	\$1,668,653	\$1,198,858	\$469,795
Nguyen	\$896,965	\$107,570	\$6,307	\$1,010,842	\$433,700	\$577,142
Patino	\$1,055,912	\$137,654	\$15,610	\$1,209,176	\$844,400	\$364,776
Smithson	\$1,232,200	\$172,784	\$6,753	\$1,411,737	\$904,504	\$507,233
Springer	\$497,968	\$107,450	\$2,651	\$608,069	\$156,522	\$451,547
Stevens	\$1,029,454	\$154,944	\$4,472	\$1,188,870	\$784,175	\$404,695
Tawzer	\$1,075,658	\$190,482	\$3,740	\$1,269,880	\$639,800	\$630,080
Tran	\$2,206,233	\$235,602	\$7,676	\$2,449,511	\$2,047,800	\$401,711
Truong	\$435,802	\$66,893	\$2,766	\$505,461	\$130,367	\$375,094
Van	\$579,630	\$68,842	\$3,072	\$651,544	\$140,383	\$511,161
Wahlquist	\$1,057,831	\$167,478	\$1,970	\$1,227,279	\$720,189	\$507,090
					Total Damages:	\$14,140,344

**B. Post-Trustee's Sale Expenses.**

1. Mesa Bank is entitled to recover the expenses it has incurred since the date of the trustee's sale of each of the properties.

2. Mesa Bank acted prudently and in a manner that was designed to mitigate its damages, including implementing a procedure for foreclosing on the properties, hiring contractors to maintain the properties to prevent degradation, and marketing them.

3. The credit bid made by Mesa Bank was based on a procedure that used the most recent independent appraisal and made standard and uniform deductions to arrive at the credit bid value.

4. Mesa Bank has marketed the properties in a commercially reasonable manner.

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5. Mesa Bank's post-trustee's sale expenses are as follows:

	<u>Borrower</u>	<u>Expenses</u>
1	Bentz	\$4,219.00
2	Tran	\$17,636.43
3	Newton	\$33,276.49
4	Bernier	\$37,956.41
5	Lopeman	\$11,079.33
6	Sims	\$4,591.73
7	Budlong	\$7,010.94
8	Bevans	\$0.00
9	Habakangas	\$4,587.70
10	Bishop	\$10,084.43
11	Miller	\$13,941.97
12	Patino	\$7,444.89
13	Dana	\$10,034.83
14	Wahlquist	\$19,107.87
15	Childers	\$9,880.02
16	Tawzer	\$7,759.88
17	Smithson	\$29,648.33
18	Springer	\$4,526.22
19	Moore	\$6,548.49
20	Stevens	\$8,156.55
21	McKnight	\$8,337.40
22	Coia	\$0.00
23	Kulbeth	\$3,574.94
24	Harris	\$14,093.66
25	Edwards	\$4,396.77
26	Alexander	\$1,427.29
27	Hunter, Dustin	\$5,539.42
28	Hunter, Larry	\$7,963.71
29	Bodrero	\$8,703.11
30	Truong	\$2,756.42
31	Gustavson	\$12,279.57
32	Mason	\$13,352.61
33	Van	\$1,957.28
34	Nguyen	\$13,472.66

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35	Crisci	\$0.00
36	Johnson	\$1,146.77
37	Korenblitt	\$12,803.97
38	Harper	\$5,465.81
39	Knas	\$7,608.55
40	Beal	\$22,147.88
41	Barnes	\$9,803.05
42	Kennedy	\$6,532.29
43	McCormick	\$2,699.48
44	Bucchi	\$14,050.42
45	Hawkins	\$0.00
	Total Expenses:	\$427,604.57

C. Capital Title's Fees in Connection with the CTA Loans.

Because of its breach of the fiduciary duties owed to Mesa Bank, Capital Title is required to repay all fees received in connection with the following Capital Title Loans:

Borrower's Name	Escrow #	Capital Title Escrow Fees
Bentz	11041382-011	\$2,475.80
	11070242-011	\$2,803.87
Minh	11041804-011	\$3,198.25
	11070109-011	\$4,236.17
Newton	11050298-011	\$4,960.15
	11060549-011	\$3,212.30
Lopeman	11051061-011	\$2,272.80
	11051655-011	\$2,107.60
	11061166-011	\$2,318.35
Bevans	11051306-011	\$3,014.90
	11051990-011	\$2,432.03
	11060972-011	\$2,661.09
Bishop	11051796-011	\$2,524.70
	11052158-011	\$2,339.45
	11061217-011	\$2,499.53
Miller	11051794-011	\$2,545.50
	11060012-011	\$2,314.75
Patino	11052123-011	\$3,784.16
	11061125-011	\$2,802.00

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Dana	11052124-011	\$3,831.98
Wahlquist	11052128-011	\$3,780.64
	11070032-011	\$2,655.37
Childers	11052127-011	\$3,818.56
	11070009-011	\$2,670.24
Tawzer	11052126-011	\$3,835.37
	11070060-011	\$2,684.08
Smithson	11051955-011	\$3,923.27
	11070148-011	\$2,797.53
Springer	11060193-011	\$3,130.37
	11061129-011	\$2,650.60
Moore	11060301-011	\$3,891.05
	11070479-011	\$2,640.75
Stevens	11060304-011	\$1,606.00
	11070517-011	\$37.00
McKnight	11060570-011	\$4,089.00
Coia	11060475-011	\$4,092.31
Kulbeth	11060621-011	\$3,424.96
Harris	11060589-011	\$4,149.34
Edwards	11060609-011	\$2,792.00
Alexander	11060610-011	\$2,818.60
Hunter, D	11060914-011	\$1,709.10
Hunter, L	11060915-011	\$1,628.60
Bodrero	11060953-011	\$3,481.60
Truong	11060782-011	\$3,514.50
Gustavson	11060990-011	\$3,474.60
Mason	11060951-011	\$3,480.60
Van	11060780-011	\$3,501.50
Nguyen	11061150-011	\$3,511.40
Crisci	11061181-011	\$3,500.60
Johnson	11060611-011	\$3,487.75
Korenblitt	11070034-011	\$4,251.04
	11070613-011	\$2,930.78
Knas	11070106-011	\$4,021.10
Barnes	11070165-011	\$3,570.70
Kennedy	11070319-011	\$4,978.15
Bucchi	11070316-011	\$5,157.86
Hawkins	11070666-011	\$4,585.40
	Total Fees:	\$180,607.70

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D. AMF and AMS's Vicarious Liability for Damages for Alexander's Acts.

1. Alexander is liable to Mesa Bank for all damages sustained by Mesa Bank.

2. An employer is liable for injuries caused by an employee under the doctrine of respondeat superior. Santiago v. Phoenix Newspapers, Inc., 164 Ariz. 505, 794 P.2d 138 (1990). An employer is liable for the foreseeable acts committed by an employee acting within the scope of the employee's employment in furtherance of the employer's business. Pruitt v. Pavelin, 141 Ariz. 195, 685 P.2d 1347 (1984).

3. Prior to March 31, 2006, Alexander was acting on behalf of AMS, and all of his actions relevant to the 19 Loans in this lawsuit he originated while in AMS's employ were within the course and scope of his employment with AMS and in furtherance of AMS's business. Therefore, AMS is liable for the damages caused by Alexander while in AMS's employ; i.e. on the 19 specified Loans.

4. After March 31, 2006, Alexander was acting on behalf of AMF, and all of his actions relevant to each of 26 Loans originated after March 31, 2006, were within the course of and scope of his employment and agency with AMF and in furtherance of AMF's business. Therefore, AMF is liable for the damages caused by Alexander while in AMS's employ; i.e. on the 19 specified Loans.

5. Mesa Bank will have to specify the amount of the damages caused by Alexander on the 19 Loans he originated while at AMS and the 26 Loans he originated while he was at AMF in its form of judgment by specific reference to the record.

6. AMS is jointly and severally liable with Alexander for damages attributable to the 19 Loans.

7. AMF is jointly and severally liable with Alexander for damages attributable to the 26 Loans.

E. Capital Title's Vicarious Liability On Loans Closed By Stevens.

1. Stevens is liable to Mesa Bank for all damages sustained by Mesa Bank arising out of the Loans closed by Stevens, including: Joel and Melanie Newton loans; Joseph and Dorothy Coia loan; Paul and Kristen Alexander loan; Jacob Bodrero loans; Mylynn Truong loan; Michael and Natalie Mason loan; Sung Van loan; Tri Nguyen loan; Ashley Crisci loan; Kevin Johnson loan; Justin Korenblitt loans; Jennifer Knas loan; Kristin Barnes loan; David and Rhonda Kennedy loan; Albert Bucchi loan; Larry and Vada Hunter loan; Jason Hawkins loan;

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Dustin and Shalice Hunter loan; Anna Marie Gustavson loan; and Kara Edwards loan.

2. Stevens was acting on behalf of Capital Title and all of her actions described herein were within the course and scope of her employment and agency with Capital Title in furtherance of Capital Title's business.

3. Capital Title is vicariously liable for all damages sustained by Mesa Bank arising out of the Loans closed by Stevens.

4. Stevens, Johnson, and Capital Title are jointly and severally liable.

F. Capital Title's Vicarious Liability On Loans Closed By Johnson.

1. Johnson is liable to Mesa Bank for all damages sustained by Mesa Bank arising out of the Loans closed by Johnson, including Deland and Carrie Bentz loans; Joel and Melanie Newton loans; Bryan Tran and Patricia Minh loans; Marc and Marcie Lopeman loans; Brad and Kathryn Bishop loans; Keith Miller loans; Alejandro and Aurora Patino loans; Michael and Bennie Dana loans; Isaac Wahlquist loans; Damon and Laura Childers loans; Lynn and Dixie Tawzer loans; Taft and Nicole Smithson loans; Patrick Springer loans; Kenneth and Janice Moore loans; Sandra Stevens loans; Timothy McKnight loans; Joseph and Dorothy Coia loan; Kimberly Kulbeth loan; Michael Harris loan; and George and Cheryl Bevans loan.

2. Johnson was acting on behalf of Capital Title and all of her actions described herein were within the course and scope of her employment and agency with Capital Title in furtherance of Capital Title's business.

3. Capital Title is vicariously liable for all damages sustained by Mesa Bank arising out of the Loans closed by Johnson.

4. Johnson, Stevens, and Capital Title are jointly and severally liable.

G. Defendants Are Jointly and Several Liable For Damages on the Capital Title Loans.

1. Arizona has adopted the Uniform Contribution Among Tortfeasors Act ("UCATA"), A.R.S. §12-2501 et seq. Under the UCATA, the general rule is that fault is apportioned to each actor according to his or her own culpability and each actor is liable for only the percentage of the plaintiff's damages allocated to the actor based on the defendant's percentage of fault. Mein v. Cook, 219 Ariz. 96, 102-03, 193 P.3d 790, 796-97 (App. 2008).

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2. Specifically, A.R.S. § 12-2506(A) states:

In an action for personal injury, property damage or wrongful death, the liability of each defendant for damages is several only and is not joint, except as otherwise provided in this section. Each defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be entered against the defendant for that amount. To determine the amount of judgment to be entered against each defendant, the trier of fact shall multiply the total amount of damages recoverable by the plaintiff by the percentage of each defendant's fault, and that amount is the maximum recoverable against the defendant.

3. Defendants remain jointly and severally liable where: (1) the tortfeasors were "acting in concert," (2) where one tortfeasor can be charged with another person's fault because that person was acting as "an agent or servant" of the tortfeasor.

4. Multiple defendants are jointly liable under A.R.S. § 12-2506(D)(1), if they "are 'acting in concert' when the tort was committed." Mein v. Cook, 219 Ariz. 96, 99, 193 P.3d 790, 793 (App. 2008).

5. The Uniform Contribution Among Tortfeasors Act defines "acting in concert" as:

"Acting in concert" means entering into a conscious agreement to pursue a common plan or design to commit an intentional tort and actively taking part in that intentional tort. Acting in concert does not apply to any person whose conduct was negligent in any of its degrees rather than intentional. A person's conduct that provides substantial assistance to one committing an intentional tort does not constitute acting in concert if the person has not consciously agreed with the other to commit the intentional tort.

A.R.S. § 12-2506(F)(1).

6. A prima facie case under A.R.S. § 12-2506(D)(1) requires "proof supporting the conclusion that the parties made a conscious agreement to commit an intentional tort - not a tort that involves merely negligence 'in any of its degrees' - and actively took part in the intentional tort." The ordinary meaning of the term "conscious," is "having knowledge of something; aware." THE NEW OXFORD AMERICAN DICTIONARY 363 (2d ed.2005). Thus, to have a "conscious agreement" under A.R.S. § 12-2506(D)(1), "the parties must knowingly agree to commit the intentional tort." Mein v. Cook, 219 Ariz. 96, 99, 193 P.3d 790, 793 (App. 2008).

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7. A party acts with intention to injure another only if the defendant desired to hurt the plaintiff or if the defendant knew that such a consequence was certain, or substantially certain, to result from their conduct. Mein, 219 Ariz. at 102, 193 P.3d at 796. “Certain” means “known for sure; established beyond doubt.” Id.; (holding that defendants “consciously agreed” to participate in a drag race while intoxicated, but the conduct of the tortfeasors that caused injury to the passenger plaintiff was not an intentional tort within the scope of A.R.S. § 12-2506(D)(1)).

8. Plaintiff can offer circumstantial or inferential evidence to prove that parties were acting in concert. Mohave Electric Cooperative, Inc. v. Byers, 189 Ariz. 292, 306, 942 P.2d 451, 465 (App. 1997).

9. Any codefendant or third party acting as an agent or servant of a codefendant, renders the codefendant for whom he was acting jointly and severally liable for the agent or servant’s tortious behavior, including negligent behavior in all of its degrees. A.R.S. § 12-2506(D)(2). The negligence of an independent contractor in maintaining streets could render city vicariously liable for damages from contractor’s negligence pursuant to A.R.S. § 12-2506(D)(2). Wiggs v. City of Phoenix, 198 Ariz. 367, 10 P.3d 625 (2000).

10. A tortfeasor may be held jointly and severally liable for a breach of fiduciary duty if the plaintiff can show that the tortfeasor and another party “acted in concert.” Herstam v. Deloitte & Touche, LLP, 186 Ariz. 110, 114-15, 919 P.2d 1381, 1385-86 (App. 1996).

11. Capital Title, Alexander, Stevens, and Johnson acted in concert in connection with their scheme to defraud Mesa Bank and are jointly and severally liable for the damages sustained by Mesa Bank in connection with the Capital Title Loans, which include the Loans to: Bentz, Tran, Newton Lopeman, Bevans, Bishop, Miller, Patino, Childers, Dana, Tawzer, Wahlquist, Smithson, Springer, Moore, Stevens, McKnight, Kulbeth, Coia, P. Alexander, Edwards, Johnson, Harris, D. Hunter, L. Hunter, Bodrero, Truong, Gustavson, Mason, Van, Nguyen, Crisci, Korenblitt, Knas, Barnes, Kennedy, Bucchi, Hawkins.

12. It is not in the interests of justice to find that AMS and AMF are jointly and severally liable with Capital Title, Alexander, Stevens, and Johnson.

H. Defendants Are Not Entitled To An Apportionment of Fault On the Fraud, Breach of Fiduciary Duty, and Breach of Contract Claims.

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1. The law governing contributory negligence has been codified in Arizona at A.R.S. § 12-2506(A) of the Uniform Contribution Amongst Tortfeasors Act (“UCATA”), which states:

“In an action for personal injury, property damage or wrongful death, the liability of each defendant for damages is several only and is not joint, except as otherwise provided in this section. Each defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant’s percentage of fault, and a separate judgment shall be entered against the defendant for that amount. To determine the amount of judgment to be entered against each defendant, the trier of fact shall multiply the total amount of damages recoverable by the plaintiff by the percentage of each defendant’s fault, and that amount is the maximum recoverable against the defendant.”

2. Fault is defined pursuant to A.R.S. § 12-2506(F)(2) as:

“An actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all of its degrees, contributory negligence, [and] assumption of risk ....”

3. When a defendant’s actions are intentional, the defendant may not compare his fault with the conduct of the plaintiff. The court of appeals has held that the defendants who acted intentionally could not compare their fault to plaintiffs’ fault, stating: “We will not allow an intentional tortfeasor to compare his or her fault with the victim’s conduct. Doing so would condone a policy making a tortfeasor less liable for acts committed against a more vulnerable victim.” Strawberry Water Co. v. Paulsen, 220 Ariz. 401, 409-10, 207 P.3d 654, 662-63 (App. 2008).

4. Alexander’s actions were intentional acts committed for the specific purpose of defrauding Mesa Bank. Accordingly, Alexander, AMS, and AMF are not entitled to compare their fault with Mesa Bank’s conduct under A.R.S. § 12-2506(A).

5. Capital Title, Stevens, and Johnson’s actions that are the basis of Mesa Bank’s fraud and breach of fiduciary duty claims were intentional acts committed in violation of their fiduciary duties to Mesa Bank, for the specific purpose of defrauding Mesa Bank. Accordingly, Capital Title, Stevens, and Johnson are not entitled to compare their fault with Mesa Bank’s conduct under A.R.S. § 12-2506(A).

6. Mesa Bank’s claims for breach of contract and breach of the duty of good faith and fair dealing are not subject to comparative fault principles. “Fault” is the “breach of a legal

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duty,” as opposed to a “contractual duty.” A.R.S. § 12-2506(F)(2). Gemstar Ltd. v. Ernst & Young, 185 Ariz. 493, 507, 917 P.2d 222, 236 (1996)

7. Accordingly, Capital Title, Stevens, and Johnson are not entitled to compare their fault with Mesa Bank’s conduct on the breach of contract and breach of the duty of good faith and fair dealing claims.

I. Capital Title Is Required To Return All Fees Paid on the Capital Title Loans.

1. Mesa Bank is entitled to recover the full amount of money that will reasonably and fairly compensate Mesa Bank, including any of the following elements of damage resulting from Capital Title, Stevens and Johnson’s breaches of their fiduciary duty: (1) loss of money or other property by Mesa Bank; (2) the profit or proceeds that plaintiff would have received had Stevens and Johnson performed their duties; and any (3) money that is unjust for Stevens, Johnson, or Capital Title to keep. Restatement (Second) of Torts, §§ 874 and 924; Restatement Second of Agency §§ 403, 404, 404A.

2. The fees received by Capital Title in connection with the Capital Title Loans are \$180,607.70.

3. Mesa Bank is entitled to have the fees paid to Capital Title returned.

J. Mesa Bank Is Entitled To Prejudgment Interest.

1. Prejudgment interest is awarded as a matter of right on a liquidated claim. A claim is liquidated if the plaintiff provides a basis for reasonably calculating the amounts owed. Alta Vista Plaza, Ltd. v. Insulation Specialists Co., Inc., 186 Ariz. 81, 82, 919 P.2d 176, 177 (App. 1995) and Gemstar, Ltd. v. Ernst & Young, 185 Ariz. 493, 508, 917 P.2d 222, 237 (App. 1996). For a claim to be liquidated, the evidence must furnish data “which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion.” John C. Lincoln Hospital and Health Corp., v. Maricopa County, 208 Ariz. 532, 544, 96 P.3d 530, 544 (App. 2004).

2. Mesa Bank is entitled to prejudgment interest on the compensatory damages awarded from the date of the trustee’s sale for each property.

K. Comparative Fault on Mesa Bank’s Damages for Negligent Misrepresentation.

1. Mesa Bank’s comparative fault on its damage claims for negligent misrepresentation is 20% of the total fault of those found liable.

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2. Capital Title's comparative fault on Mesa Bank's damage claims for negligent misrepresentation is 30% of the total fault of those found liable.

3. Alexander's comparative fault on Mesa Bank's damage claims for negligent misrepresentation is 50% of the total fault of those found liable.

L. Mesa Bank is Entitled to Punitive Damages Against Some Defendants.

1. Punitive damages may be awarded when the facts establish that a defendant engaged in outrageous conduct and was guided by an evil mind. Rawlings v. Apadoca, 151 Ariz. 149, 162, 726 P.2d 565 (1986). The requisite "evil mind" exists when a defendant is "consciously aware of the evil of his actions, of the spitefulness of his motives or that his conduct is so outrageous, oppressive, or intolerable in that it creates a substantial risk of tremendous harm." Linthicum v. National Life Insurance Co., 150 Ariz. 326, 330, 723 P.2d 675, 679 (1986). The focus is on the mental state of the defendant. *Id.*

2. A wanton and grossly negligent servant may subject his master to punitive damages. Echols v. Beauty Built Homes, Inc., 132 Ariz. 498, 502, 647 P.2d 629, 633 (1982). Punitive damages can be awarded against an employer for acts of its employees as long as the acts are committed in the furtherance of the employer's business and within the scope of employment. Mendoza v. McDonald's Corp., 222 Ariz. 139,156, 213 P.3d 288, 305 (App. 2009). A plaintiff is not required to make "any showing of the principal's evil mind."

3. The acts, omissions, conduct and transactions of the Defendants Alexander, Stevens, and Johnson were aggravated, outrageous, guided by evil motives, and these defendants intended to injure Mesa Bank, or consciously pursued a course of conduct knowing that they created a substantial risk of harm to Mesa Bank.

4. Alexander's conduct that was aggravated, outrageous, and was guided by evil motives. The conduct was committed in furtherance of AMF's business and within the scope of his employment.

5. Stevens and Johnson's conduct was aggravated, outrageous, and guided by evil motives. The conduct was committed in furtherance of Capital Title's business and within the scope of their employment.

6. To dissuade the defendants from pursuing a similar course of conduct in the future and to discourage other persons from similar conduct in the future, punitive damages are awarded to Mesa Bank and against certain defendants.

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7. Neither, AMS or AMF engaged in any conduct that would entitle Mesa Bank to recover punitive damages against them because there was no evidence that AMS and AMS were aware of or adopted Alexander's conduct. Notwithstanding case law that allows the court to award punitive damages against an employer for acts of its employees, this court finds that such an award against AMS and AMF would not be in the interests of justice. No punitive damages are awarded to Mesa Bank against AMS or AMF.

M. Defendants Are Not Entitled to An Offset For The Profits Mesa Bank Earned on the Other Loans.

1. The "Loss Benefits Rule" does not apply to this case as the court does not find that University of Arizona Health Sciences Center v. Superior Court, 109 Ariz. 579, 667 P.2d 1294 (1983) is on all fours. First, the gains and losses did not stem from the same breach and tortious conduct. Second, the gain realized by Mesa Bank on the Other Loans was not the direct result of the defendants' actions, but, rather, was the result of the purchase of the Other Loans by permanent lenders who were not guilty of any misconduct. Finally, the breaches in this case were multiple violations of fiduciary duties. The defendants were not innocent wrongdoers. State v. Morgan Stanley & Co., 194 W. Va. 163, 459 S.E. 2d 906, 919-920 (W. Va. 1995).

N. The Decline in the Real Estate Market is Not an Intervening or Superseding Cause and Defendants are Not Entitled to a Deduction for the Normal 10% Loan Default Rate.

1. "The basic issue of intervening and superseding causes is whether a defendant is to be held liable for an injury to which he has in fact made a substantial contribution when it is brought about by a later cause of independent origin for which he is not responsible.

The policy of the law on questions intervening or superseding cause has evolved to the rule that the original actor is relieved from liability for the final result when, and only when, an intervening act of another was unforeseeable by a reasonable person in the position of the original actor and when, looking backward, after the event, the intervening act appears extraordinary." Ontiveros v. Borak, 136 Ariz. 500, 505-506, 667 P.2d 200 (1983).

The decline in the residential real estate market was neither unforeseeable nor extraordinary.

2. Perhaps the best evidence that the decline in the residential real estate market was not an intervening or superseding cause is that Mesa Bank anticipated a cyclical decline and required a substantial down payment to be made by each of the borrowers to protect against this very event. Had the defendants adhered to Mesa Bank's instructions many of the Loans would

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not have been made and those that were made with the required down payments likely would not have gone into default. This rationale also applies to defendants' argument that the damages should be reduced because Mesa Bank's normal default rate on residential loans is 10%. In this case, the default rate was 100% because of the defendant's fraud in putting unqualified buyers in loans that they had no way of repaying, notwithstanding Mesa Bank's explicit directions to the contrary. Defendants are not entitled to any benefit based on the normal default rate.

O. Alexander Was Not an Mesa Bank 's Agent.

Defendants had the burden of proving their claim that Alexander was Mesa Bank's agent. Agency is a question of intent and generally an agent must be working under the principal's control of the principal. Urias v. PCS Health Systems, Inc., 211 Ariz. 81, 88, 118 P.3d 29 (App. 2005). There is little proof that Alexander was Mesa Bank's agent and the bank had very little, if any, control over him.

Damage Awards

Mesa Bank is awarded the following damages;

1. Count One (Fraud and Deceit Against Alexander, AMF and AMS).

- A. Compensatory damages against Alexander of \$15,132,167 on the 45 Loans he originated.
- B. Compensatory damages against Alexander of \$427,604.57 for Mesa Bank's post-trustee's sale expenses.
- C. Compensatory damages against Alexander of \$1,285,000 for the mortgage broker fees paid to him.
- D. Punitive damages against Alexander of \$20,000,000. The court has not seen such intentional, outrageous and fraudulent conduct that did so much damage to a mortgage broker's client.
- E. Compensatory damages against AMS for Mesa Bank's damages incurred on the 19 Loans AMS originated.
- F. Compensatory damages against AMF for Mesa Bank's damages incurred on the 26 Loans AMF originated.

2. Counts Two and Three (Fraud and Deceit Against Capital Title, Stevens, and Johnson)

- A. Compensatory damages against Capital Title, Stevens, and Johnson of \$14,140,344 on the 38 Capital Title Loans.

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B. Compensatory damages against Capital Title of \$180,607.70 for fees received in connection with the Capital Title Loans.

C. Compensatory damages against Capital Title of \$427,604.57 for Mesa Bank's post-trustee's sale expenses.

D. Punitive damages against Capital Title of \$10,000,000. The court has never seen such intentional, outrageous, and fraudulent conduct by a fiduciary that did so much damage to its principal. However, there was no evidence that this conduct was committed or condoned at any level above vice-president of Capital Title.

E. Punitive damages against Stevens of \$5,000,000

F. Punitive damages against Johnson of \$5,000,000.

3. Count Four (Negligent Misrepresentation Against Alexander, AMS and AMF)

A. Compensatory damages against Alexander of \$15,132,167 on the 45 Loans he originated.

B. Compensatory damages against Alexander of \$427,604.57 for Mesa Bank's post-trustee's sale expenses.

C. Compensatory damages against AMS for Mesa Bank's damages incurred on the 19 Loans AMS originated.

D. Compensatory damages against AMF for Mesa Bank's damages incurred on the 26 Loans AMF originated.

4. Counts Five and Six (Negligent Misrepresentation Against Capital Title, Stevens, and Johnson).

A. Compensatory damages against Capital Title, Stevens, and Johnson of \$14,140,344.

B. Compensatory damages against Capital Title for fees received in connection with the Capital Title Loans of \$180,607.70.

C. Compensatory damages against Capital Title, Stevens, and Johnson of \$427,604.57 for Mesa Bank's post-trustees' sale expenses.

5. Counts Seven, Eight, Nine, and Ten (Breach of Contract Against Capital Title; Breach of the Covenant of Good Faith and Fair Dealing Against Capital Title; Breach of Fiduciary Duty Against Capital Title, Stevens, and Johnson).

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A. Compensatory damages against Capital Title, Stevens, and Johnson of \$14,140,344.

B. Compensatory damages against Capital Title for fees received in connection with the Capital Title Loans of \$180,607.70.

C. Compensatory damages against Capital Title, Stevens, and Johnson of \$427,604.57 for Mesa Bank's post-trustees' sale expenses.

6. Count Eleven (Unjust Enrichment Against All Defendants)

A. Compensatory damages against Alexander of \$1,285,000 for the fees paid to him.

B. Compensatory damages against Capital Title for fees received in connection with the Capital Title Loans of \$180,607.70.

C. Compensatory damages against AMF of \$5200 for fees it earned on the 26 Loans originated by Alexander.

Mesa Bank's form of judgment shall give credit to the appropriate defendants for the \$1,000,000 settlement against the appraiser on the counts to which it applies, the comparative fault allocations on the counts to which they apply, and properly apply the interest calculations. The judgments regarding the individual defendants on each of the eleven counts are not intended to be cumulative; i.e. Mesa Bank is only entitled to recover the total damages awarded against each defendant once.

Mesa Bank may apply for an award of its attorney's fees.