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7 Attorneys for Defendant, NATIONAL CREDIT
UNION ADMINISTRATION, acting as liquidating
8 agent for KAIPERM FEDERAL CREDIT UNION

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

12 625 3RD STREET ASSOCIATES, LP, a
California limited partnership,

13 Plaintiff,

14 v.

15 THE BOARD OF THE NATIONAL
16 CREDIT UNION ADMINISTRATION, as
Liquidating Agent for KAIPERM
17 FEDERAL CREDIT UNION, a federally
chartered credit union, and KAIPERM
18 FEDERAL CREDIT UNION, a federal
credit union, principally located in
19 Oakland, California,

20 Defendants.

Case No. C 09-03820 WHA

(Related to Case No. C 09-0564 WHA)

**STIPULATION FOR DEFENDANT
NATIONAL CREDIT UNION
ADMINISTRATION TO FILE AMENDED
ANSWER TO PLAINTIFF'S AMENDED
COMPLAINT**

21
22 Defendant desires to add the following two affirmative defenses to its Answer to the First
23 Amended Complaint:

24 **TWENTIETH AFFIRMATIVE DEFENSE**

25 70. Plaintiff is equitably estopped from maintaining one
26 or more of the causes of action alleged in the complaint by the
D'Oench Duhme doctrine, which limits the types of evidence that
27 may be offered in support of a claim against the Liquidating Agent.
See D'Oench Duhme & Co. v. Federal Deposit Ins. Corp. 315 U.S.
28 447 (1942).

1 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

2 71. Plaintiff's complaint is barred by 12 U.S.C.
3 §1787(p)(2), and similar provisions of the Federal Credit Union
4 Act, which, in effect, codify the *D'Oench Duhme* doctrine.

5 Plaintiff believes these two affirmative defenses have no application to this action.
6 However, plaintiff agrees to allow defendant to file an amended answer to state the above-
7 described affirmative defenses upon the understanding that by so agreeing, plaintiff is doing so
8 only as a procedural matter. By signing this Stipulation plaintiff is neither waiving any
9 substantive or procedural rights nor making any representations or certifications regarding the
10 content of the Amended Answer.

11 THEREFORE, IT IS HEREBY STIPULATED BY AND BETWEEN THE PARTIES
12 THAT:

13 Defendant NATIONAL CREDIT UNION ADMINISTRATION, acting as liquidating
14 agent for KAIPERM FEDERAL CREDIT UNION may file an Amended Answer to Plaintiff's
15 Amended Complaint in the form of its [Proposed] Amended Answer to Plaintiff's Amended
16 Complaint attached hereto as **Exhibit A**.

17 Dated: December 9, 2009

LAW OFFICES OF ANDREW R. WIENER

18 By: /s/ Andrew R. Wiener

19 ANDREW R. WIENER
20 Attorneys for Plaintiff 625 3rd Street
Associates, LP

21 Dated: December 9, 2009

LOMBARDI, LOPER & CONANT, LLP

22 By: /s/ Leora R. Ragonas

23 LEORA R. RAGONES
24 Attorneys for Defendant, National Credit
25 Union Administration Board, acting as
26 liquidating agent for Kaiperm Federal Credit
27 Union

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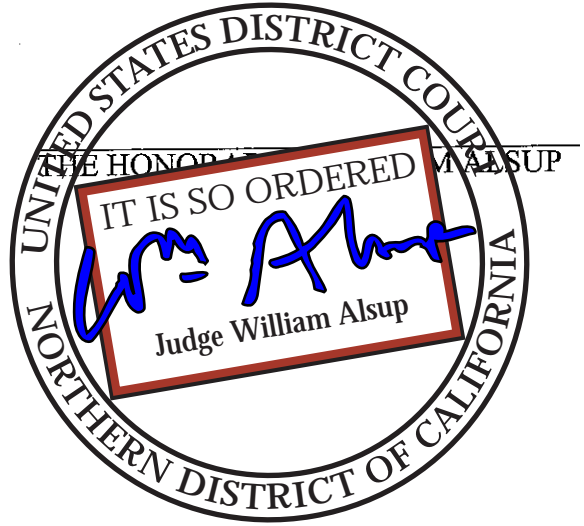
Dated: December 9, 2009

MATHENY SEARS LINKERT & JAIME
LLP

By: /s/ Michael A. Bishop
MICHAEL A. BISHOP
Attorneys for Defendant, Stanley Abrams

IT IS SO ORDERED.

December 10, 2009



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EXHIBIT A

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7 Attorneys for Defendant
National Credit Union Administration Board, acting
8 as liquidating agent for Kaiperm Federal Credit
Union

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11
12 625 3RD STREET ASSOCIATES, LP, a
13 California limited partnership,

14 Plaintiff,

15 v.

16 THE BOARD OF THE NATIONAL
17 CREDIT UNION ADMINISTRATION, as
Liquidating Agent for KAIPERM
18 FEDERAL CREDIT UNION, a federally
chartered credit union, and KAIPERM
19 FEDERAL CREDIT UNION, a federal
credit union, principally located in
20 Oakland, California,

21 Defendants.

Case No. C 09-03820 WHA

(Related to Case No. C 09-00564 WHA)

**DEFENDANT NATIONAL CREDIT
UNION ADMINISTRATION BOARD'S
[PROPOSED] AMENDED ANSWER TO
FIRST AMENDED COMPLAINT;
DEMAND FOR JURY TRIAL**

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1 Defendant National Credit Union Administration Board, acting as liquidating agent for
2 Kaiperm Federal Credit Union (“Liquidating Agent”), hereby responds to the First Amended
3 Complaint for damages and equitable relief as follows:

4 I.

5 THE PARTIES

6 1. Answering paragraph 1, the Liquidating Agent has insufficient information and
7 belief to admit or deny these allegations and, on that basis, denies each and every allegation in
8 this paragraph.

9 2. Answering paragraph 2, the Liquidating Agent admits that Kaiperm Federal Credit
10 Union (“Kaiperm”) was a federally chartered credit union before it was placed into involuntary
11 liquidation by the National Credit Union Administration on September 26, 2008, pursuant to the
12 authority of 12 U.S.C. §1787(1)(A). Liquidating Agent further admits it is the successor in
13 interest to Kaiperm, which ceased to exist on September 26, 2008 by operation of law. Answering
14 the last sentence of this paragraph, the Liquidating Agent has insufficient information and belief
15 to know Plaintiff’s awareness of the liquidation process, and therefore denies this allegation on
16 information and belief; in any event, Liquidating Agent denies it has not acted in accordance with
17 law. Except as admitted above, the Liquidating Agent denies each and every remaining
18 allegation in this paragraph, if any.

19 3. Answering paragraph 3, the Liquidating Agent admits that it is the appointed
20 liquidating agent for Kaiperm, and in that capacity possesses the authority granted to the
21 liquidating agent pursuant to 12 U.S.C. §1766 and other applicable statutes. The Liquidating
22 Agent further admits that it is empowered to receive and make an initial determination of merit of
23 any and all creditor’s claims filed against Kaiperm and that it is sued herein solely in its capacity
24 as the liquidating agent of Kaiperm. Except as admitted above, the Liquidating Agent denies
25 each and every remaining allegation in this paragraph, if any.

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II.

JURISDICTION AND VENUE

4. Answering paragraph 4, the Liquidating Agent admits that plaintiff filed a creditor's claim dated December 29, 2008. Except as admitted above, the Liquidating Agent denies each and every remaining allegation in this paragraph.

5. Answering paragraph 5, the Liquidating Agent admits that it served a notice of denial of all plaintiff's creditor's claims by letter dated June 22, 2009. The Liquidating Agent further admits that 12 C.F.R. §709.7 provides that a claimant may pursue claims that it previously made as a creditor claim in an appropriate United States District Court having jurisdiction over the place where the credit union's principal place of business is located. The Liquidating Agent further admits that Kaiperm's principal place of business was located in Oakland, California. Except as admitted above, the Liquidating Agent denies each and every remaining allegation in this paragraph.

6. Answering paragraph 6, the Liquidating Agent admits that Kaiperm's principal place of business was located in Oakland, California and that the damages claimed by plaintiff are in excess of the minimum jurisdiction of the United States District Court. Except as admitted above, the Liquidating Agent denies each and every remaining allegation in this paragraph.

7. Answering paragraph 7, the Liquidating Agent denies each and every allegation in this paragraph.

III.

JURY DEMAND

8. Answering paragraph 8, the Liquidating Agent admits the Lease (but not the Purchase Sale Agreement) contains a waiver of jury trial as to certain claims thereunder, but that the plaintiff demands a trial by jury all causes of action, except as to the cause of action for rescission. The Liquidating Agent further admits that it demands trial by jury on all claims alleged, to the extent not waived by the Lease and permitted by law. Except admitted above, the Liquidating Agent denies each and every remaining allegation in this paragraph; to the extent second sentence of this paragraph contains factual allegations, they are denied, though they

1 appear to contain solely legal argument, which the defendant is not required to admit or deny.

2 IV.

3 **FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

4 9. Answering paragraph 9, the Liquidating Agent admits that Kaiperm was formed in
5 1957 and was a federally chartered credit union prior to the time of its liquidation on
6 September 26, 2008. The Liquidating Agent further admits that Kaiperm was the former owner
7 of the property located at 2101 Broadway, Oakland, California (the "Property"). Except as
8 admitted above, the Liquidating Agent denies each and every remaining allegation in this
9 paragraph.

10 10. Answering paragraph 10, the Liquidating Agent admits upon information and
11 belief that plaintiff met with a broker to discuss purchase of the Property and a leaseback by
12 Kaiperm. Except as admitted above, the Liquidating Agent denies each and every allegation in
13 this paragraph.

14 11. Answering paragraph 11, the Liquidating Agent admits that plaintiff and Kaiperm
15 executed a letter of intent (LOI) regarding plaintiff's purchase of the Property for eight million
16 dollars (\$8,000,000.00). The Liquidating Agent further admits that the LOI set forth the materials
17 plaintiff sought to receive as part of its exercise of due diligence. The Liquidating Agent further
18 admits that the LOI contained a leaseback provision. Except as admitted above, the Liquidating
19 Agent denies each and every allegation in this paragraph.

20 12. Answering paragraph 12, the Liquidating Agent admits that Kaiperm directed
21 plaintiff to the NCUA website to review the financial information then available online
22 concerning Kaiperm. The Liquidating Agent further admits that Kaiperm's financial statements
23 available online for the calendar year ending 2006 revealed that Kaiperm lost approximately
24 \$2,287,128.00 and that it lost another \$1,411,308 for the first six months of 2007 ending in June
25 2007. The Liquidating Agent further admits that Kaiperm's financial statements available online
26 also revealed that Kaiperm then met NCUA's standard for being "adequately capitalized". The
27 Liquidating Agent admits that prior to the close of escrow, Kaiperm believed it was then viable
28 and expected to meet its present and future obligations under the Lease. Except as admitted

1 above, Kaiperm denies subparagraphs (A) and subparagraph (D), as specifically worded. Except
2 as admitted above, the Liquidating Agent denies each and every remaining allegation in this
3 paragraph.

4 13. Answering paragraph 13, the Liquidating Agent admits that the purchase
5 transaction closed escrow sometime in August 2007. Except as admitted above, the Liquidating
6 Agent has no information or belief sufficient to admit or deny the remaining allegations in this
7 paragraph and, on that basis, denies each and every allegation therein.

8 14. Answering paragraph 14, the Liquidating Agent admits that after the close of
9 escrow, Kaiperm became the tenant of the Property under the 15-year lease, at which time
10 Kaiperm occupied the property as its principal place of business. Except as admitted above, the
11 Liquidating Agent denies each and every remaining allegation in this paragraph.

12 15. Answering paragraph 15, the Liquidating Agent admits that between September
13 2007 and May 2008 (and thereafter until the liquidation date), Kaiperm met all of its monetary
14 obligations under the lease. Except as admitted above, the Liquidating Agent denies each and
15 every remaining allegation in this paragraph.

16 16. Answering paragraph 16, the Liquidating Agent admits that in May 2008, counsel
17 for Kaiperm discussed Kaiperm's financial condition with plaintiff. Except as admitted above,
18 the Liquidating Agent denies each and every remaining allegation in this paragraph.

19 17. Answering paragraph 17, the Liquidating Agent admits that the NCUA Board
20 revoked the charter of Kaiperm and ordered Kaiperm into involuntary liquidation on September
21 26, 2008, appointing itself as the Liquidating Agent.

22 18. Answering paragraph 19, the Liquidating Agent admits it sent a letter to plaintiff
23 advising it to file any creditor's claim by January 8, 2009, and enclosing the liquidation notice
24 published in local newspapers. Except as admitted above, the Liquidating Agent denies each and
25 every remaining allegation in this paragraph.

26 19. Answering paragraph 19, the Liquidating Agent admits that on October 23, 2008,
27 it sent a letter by facsimile to plaintiff repudiating the Lease between Kaiperm and plaintiff.
28 Except as admitted above, the Liquidating Agent denies each and every remaining allegation in

1 this paragraph.

2 20. Answering paragraph 20, the Liquidating Agent admits that it received
3 correspondence dated October 28, 2008 from counsel for plaintiff stating that it did not accept the
4 Liquidating Agent's repudiation of Lease and that it intended to assert alleged breaches of
5 warranties against Kaiperm. Except as admitted above, the Liquidating Agent denies each and
6 every remaining allegation in this paragraph.

7 21. Answering paragraph 21, the Liquidating Agent admits that it returned the keys to
8 the Property to plaintiff on or about October 23, 2008. The Liquidating Agent further admits that
9 a notice of belief of abandonment was served on it on or about November 28, 2008, however the
10 Lease had been repudiated previously, effective October 23, 2008. Except as admitted above, the
11 Liquidating Agent denies each and every remaining allegation in this paragraph.

12 22. Answering paragraph 22, the Liquidating Agent denies each and every allegation
13 of this paragraph, as the Lease had been repudiated by the Liquidating Agent, effective October
14 23, 2008 pursuant to 12 U.S.C. §1787(c); therefore, the Lease could not have been terminated
15 pursuant to its terms.

16 V.

17 **FIRST CAUSE OF ACTION**

18 **(Intentional misrepresentation)**

19 23. Answering paragraph 23, the Liquidating Agent refers to and incorporates by
20 reference its admissions and denials herein to paragraph 1 through 22 of the First Amended
21 Complaint.

22 24. Answering paragraph 24, the Liquidating Agent refers to its response to paragraph
23 12. Answering subparagraphs (B) and (C), the Liquidating Agent admits Kaiperm was being
24 monitored by Problem Case Officer Bruce Lum of the NCUA, and was expected to address
25 various issues in Examination Reports and Documents of Resolution created by the NCUA;
26 however, Kaiperm had no duty to disclose such reports or matters related to such reports, because
27 they were strictly confidential. Except as admitted above, the Liquidating Agent denies each and
28 every allegation in this paragraph.

1 42. Answering paragraph 42, the Liquidating Agent denies the allegations of this
2 paragraph accurately or completely quote the warranties contained in Section 3.1 and have taken
3 words out of their context. Further, the Liquidating Agent denies each and every remaining
4 allegation of this paragraph.

5 43. Answering paragraph 43, the Liquidating Agent denies that any warranties were
6 made to induce plaintiff to act in the manner alleged. The Liquidating Agent further refers to and
7 incorporates by reference its admissions and denials in paragraphs 12 and 24 herein. Except as
8 admitted above, the Liquidating Agent denies each and every remaining allegation in this
9 paragraph, if any.

10 44. Answering paragraph 44, the Liquidating Agent admits that Kaiperm was placed
11 in involuntary liquidation by the NCUA on September 26, 2006 and that the Liquidating Agent
12 repudiated the lease effective October 23, 2008. Except as admitted above, the Liquidating Agent
13 denies each and every remaining allegation in this paragraph.

14 45. Answering paragraph 45, the Liquidating Agent admits that Section 3.2 of the
15 Purchase and Sale Agreement ("PSA") sets forth the specific period of time for survival of
16 representations and warranties. Except as admitted above, the Liquidating Agent denies each and
17 every remaining allegation in this paragraph.

18 46. Answering paragraph 46, the Liquidating Agent has no information or belief
19 sufficient to admit or deny the specific date of the close of escrow and, on that basis, denies the
20 first sentence of this paragraph. The Liquidating Agent further admits that it received a letter from
21 plaintiff dated October 28, 2008 that claimed to provide notice of a breach of warranty of
22 Sections 3.1(a), (d), (g) and (i) of the PSA by Kaiperm. Except as admitted above, the
23 Liquidating Agent denies each and every remaining allegation in this paragraph.

24 47. Answering paragraph 47, the Liquidating Agent denies any breach of warranty
25 occurred by Kaiperm that caused any of the alleged damages in (A-H, inclusive). The
26 Liquidating Agent admits (A) and (B) occurred, but denies (C) as there was no default because
27 the Lease was repudiated by the liquidating agent, as permitted by law. As to the remaining
28 allegations in (D) through (H), the Liquidating Agent has no information or belief sufficient to

1 admit or deny the allegations in this paragraph and, on that basis, denies each and every allegation
2 therein, but denies that Kaiperm caused such damages, if any exist.

3 48. Answering paragraph 48, the Liquidating Agent denies each and every allegation
4 in this paragraph.

5 49. Answering paragraph 49, the Liquidating Agent denies each and every allegation
6 in this paragraph.

7 50. Answering paragraph 50, the Liquidating Agent admits that Section 9.5 of the
8 Purchase and Sale Agreement between the parties contains an attorney's fees clause, as does
9 Section 31 of the Lease, the terms of which are contained in Exhibit 1 and 2, respectively. Except
10 as admitted above, the Liquidating Agent denies plaintiff is entitled to recover attorney's fees and
11 further denies each and every remaining allegation in this paragraph, if any.

12 **FIRST AFFIRMATIVE DEFENSE**

13 51. The complaint fails to state a claim against this defendant upon which relief can be
14 granted.

15 **SECOND AFFIRMATIVE DEFENSE**

16 52. Plaintiff, suing as a partnership, lacks standing to assert the claims alleged in the
17 complaint, or is not the real party or parties in interest.

18 **THIRD AFFIRMATIVE DEFENSE**

19 53. As alleged, plaintiff's fraud and concealment claims alleged are federally
20 preempted, as the alleged fraud or concealment arises from Kaiperm's alleged non-disclosure of
21 information concerning the NCUA's examination activities at Kaiperm, which it had no duty to
22 disclose, because it was exempt, confidential and privileged pursuant to federal law. (5 U.S.C.
23 §552 and 12 C.F.R. §§792.30, 792.40).

24 **FOURTH AFFIRMATIVE DEFENSE**

25 54. Plaintiff's claims are federally preempted by the Liquidating Agent's valid
26 repudiation of the lease, pursuant to statutory authority granted (12 U.S.C. §1787(c)),
27 extinguished any and all possible liability pursuant to the Lease or Purchase and Sale Agreement.

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1 **FIFTH AFFIRMATIVE DEFENSE**

2 55. Defendant had no duty to disclose those matters which it was not legally permitted
3 to disclose, specifically, the NCUA's examination activities, because such information was
4 exempt, confidential and privileged at the time. (5 U.S.C. §582 and 12 C.F.R. §§792.30, 792.40)

5 **SIXTH AFFIRMATIVE DEFENSE**

6 56. Plaintiff or its agents, or employees were careless, negligent or at fault concerning
7 the matters alleged in the complaint, and such carelessness, negligence or fault caused or
8 contributed to the plaintiff's alleged damages. Any verdict rendered in favor of plaintiffs must be
9 reduced by the percentage of plaintiff's carelessness, negligence or fault caused or contributed to
10 their injuries or damages, if any.

11 **SEVENTH AFFIRMATIVE DEFENSE**

12 57. Plaintiff has failed to mitigate their injuries or damages, if any exist at all.

13 **EIGHTH AFFIRMATIVE DEFENSE**

14 58. Plaintiff's claims resting upon breach of warranty provisions in the PSA are
15 unenforceable because the specific warranty provisions allegedly breached are vague and lacking
16 in specificity.

17 **NINTH AFFIRMATIVE DEFENSE**

18 59. Plaintiff's claim for damages is limited by the provisions of 12 U.S.C.
19 §1787(c)(3)(B), which provides that the liquidating agent cannot be held liable for damages
20 including lost profits, punitive damages, and attorneys fees relating to repudiation of a lease.

21 **TENTH AFFIRMATIVE DEFENSE**

22 60. Plaintiff's claim for damages is barred or limited by the provisions of 12 U.S.C.
23 §1787(c)(4), which provides that the liquidating agent cannot be held liable for damages under
24 any acceleration clause or other penalty provision relating to repudiation of a lease.

25 **ELEVENTH AFFIRMATIVE DEFENSE**

26 61. Plaintiff's damages are speculative and not reasonably certain.

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TWELFTH AFFIRMATIVE DEFENSE

62. To the extent the complaint alleges fraud or concealment based upon (a) matters of opinion, not fact; (b) statement of the future financial performance of Kaiperm at indefinite future dates; or (c) other statements which are not factual in nature, the claims are meritless as a matter of law.

THIRTEENTH AFFIRMATIVE DEFENSE

63. Plaintiff has released or is otherwise contractually estopped from recovery on one or more claims alleged in the Purchase and Sale Agreement because of Paragraphs 3.3 and/or 3.5.

FOURTEENTH AFFIRMATIVE DEFENSE

64. Plaintiff's monetary damages are limited by all sums which it could reasonably receive as fair market value for sale of the Property, or which it has received, or could reasonably be expected to receive in rent.

FIFTEENTH AFFIRMATIVE DEFENSE

65. Restitution claim is barred by the doctrine of laches and/or undue delay, election of remedies and/or the doctrine of changed circumstances, by failing to timely pursue rescission and restitution before Kaiperm's liquidation.

SIXTEENTH AFFIRMATIVE DEFENSE

66. Plaintiff must elect between monetary damages and equitable rescission or restitution.

SEVENTEENTH AFFIRMATIVE DEFENSE

67. Plaintiff has failed to act reasonably or equitably, or otherwise failed to perform acts or conditions necessary to be entitled to rescission or restitution.

EIGHTEENTH AFFIRMATIVE DEFENSE

68. There is no evidence of clear and convincing evidence of intentional fraud or concealment justifying an award of punitive damages. *Civil Code* §3924.

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1 **NINETEENTH AFFIRMATIVE DEFENSE**

2 69. Any recovery of punitive damages must comply with U.S. and California
3 constitutional requirement of due process; further, as Kaiperm’s charter is revoked and it no
4 longer exists, no deterrent purpose would be accomplished by an award of punitive damages in
5 this case.

6 **TWENTIETH AFFIRMATIVE DEFENSE**

7 70. Plaintiff is equitably estopped from maintaining one or more of the causes of
8 action alleged in the complaint by the *D’Oench Duhme* doctrine, which limits the types of
9 evidence that may be offered in support of a claim against the Liquidating Agent. *See D’Oench*
10 *Duhme & Co. v. Federal Deposit Ins. Corp.* 315 U.S. 447 (1942)

11 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

12 71. Plaintiff’s complaint is barred by 12 U.S.C. §1787(p)(2), and similar provisions of
13 the Federal Credit Union Act, which, in effect, codify the *D’Oench Duhme* doctrine.

14 **PRAYER**

15 WHEREFORE, Liquidating Agent, prays as follows:

- 16 (a) That plaintiff takes nothing on its complaint and for judgment in favor of
- 17 defendant;
- 18 (b) For reasonable attorney’s fees and costs of the action, as permitted by contract, by
- 19 statute or other laws; and
- 20 (c) For such other and further relief as the court deems just and proper.

21 Dated: December __, 2009

22 LOMBARDI, LOPER & CONANT, LLP

23
24 By: UNSIGNED UNTIL APPROVED

25 PETER O. GLAESSNER
26 Attorneys for Defendant, National Credit
27 Union Administration Board, acting as
28 liquidating agent for Kaiperm Federal
Credit Union

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DEMAND FOR JURY TRIAL

Defendant The Board of the National Credit Union Administration, acting as liquidating agent for Kaiperm Federal Credit Union, demands jury trial on all claims alleged triable to a jury.

Dated: December __, 2009

LOMBARDI, LOPER & CONANT, LLP

By: UNSIGNED
PETER O. GLAESSNER
Attorneys for Defendant, National Credit Union Administration Board, acting as liquidating agent for Kaiperm Federal Credit Union

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