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SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

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7 Attorneys for Plaintiffs KB HOME,
a Delaware corporation and
8 KB HOME MORTGAGE COMPANY,
a wholly owned subsidiary of KB HOME
9

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF LOS ANGELES

BC 48 4090

12 KB HOME, a Delaware corporation and KB
13 HOME MORTGAGE COMPANY, a wholly
owned subsidiary of KB Home,

CASE NO.

14 Plaintiffs,

COMPLAINT FOR COMPENSATORY
DAMAGES

15 vs.

(1) PROFESSIONAL NEGLIGENCE

16 K&L GATES, LLP (AKA KIRKPATRICK
17 & LOCKHART PRESTON GATES ELLIS
LLP), a Delaware limited liability
18 partnership, and MATTHEW BALL, ESQ.,
an individual; and DOES 1 through 100,
19 inclusive,

(2) BREACH OF CONTRACT

20 Defendants.

DEMAND FOR JURY TRIAL

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1 Plaintiffs KB Home and KB Home Mortgage Company (collectively “Plaintiffs” or
2 “KB Home”) complain of the Defendants, and each of them, and alleges as follows:

3 **PARTIES**

4 1. Plaintiff KB Home (“KB Home”) is a Delaware corporation registered to do
5 business in California, which has its principal place of business at 10990 Wilshire
6 Boulevard, Suite 700, Los Angeles, California 90024 and has maintained its national
7 headquarters in Los Angeles, California for over 30 years.

8 2. Plaintiff KB Home Mortgage Company (“KBHMC”) is a wholly owned
9 subsidiary corporation of KB Home registered to do business in California, which has its
10 principal place of business and headquarters in Los Angeles, California.

11 3. Plaintiffs are informed and believe and thereon allege that Defendant K&L
12 Gates LLP (AKA Kirkpatrick & Lockhart Preston Gates Ellis LLP) (“K&L Gates”) is, and
13 was at all times mentioned herein, a limited liability partnership engaged in the practice of
14 law, and is the successor firm to Kirkpatrick & Lockhart LLP and Kirkpatrick & Lockhart
15 Preston Gates Ellis LLP, and references herein to K&L Gates will refer to its predecessors,
16 and that K&L Gates was and now is authorized to engage and is engaged in the practice of
17 law in the State of California, that K&L Gates maintains offices in Los Angeles, California,
18 and that K&L Gates has regularly conducted business in the State of California, including
19 representation of KB Home in California and Los Angeles.

20 4. Plaintiffs are informed and believe, and thereon allege, that Defendant
21 Matthew Ball (“Ball”) is an attorney licensed to practice law in the State of California and at
22 all relevant times herein was a partner in Defendant K&L Gates and is a resident of
23 California, practicing law in the State of California, including in Los Angeles. Ball
24 represented KB Home on legal matters in California, including working with KB Home
25 personnel in Los Angeles.

26 5. All Defendants (collectively “Defendants” or “K&L Gates”) in paragraphs 3
27 through 4 represented Plaintiffs and provided legal services and advice and were in an
28 attorney client relationship with Plaintiffs at all relevant times to the events set forth in this

1 Complaint. Among other things as set forth, herein, each Defendant breached its duty to
2 Plaintiffs by failing to represent them according to the standard of care required of attorneys
3 and/or failing to supervise attorneys who failed to represent Plaintiffs according to the
4 standard of care and these breaches of duty caused Plaintiffs harm and damage.

5 6. The true names and capacities, whether individuals, legal corporations, or
6 otherwise, of Defendant DOES 1 through 100, inclusive, and each of them, are unknown to
7 Plaintiffs at this time and therefore Plaintiffs sue said Defendants by such fictitious names.
8 Plaintiffs will amend this Complaint to show the true names and capacities of the
9 fictitiously-named Defendants when they have been ascertained. Plaintiffs are informed and
10 believe, and thereon allege, that each fictitiously named Defendant is liable to Plaintiffs
11 respecting the events and damages referred to in this Complaint.

12 7. Plaintiffs are informed and believe, and thereon allege, that at all times
13 mentioned herein, each and all of the Defendants, including all DOE Defendants sued under
14 fictitious names, were the agents, employees, partners, shareholders, joint venturers,
15 officers, directors, owners, successors, predecessors, transferees and/or alter egos of every
16 other Defendant, and acting wholly within the course and scope of such agency,
17 employment, and/or other relationship in conducting the actions and activities set forth in
18 this Complaint, and generally or specifically approved the actions, activities or omissions of
19 each and every other Defendant in advance of their being taken, or generally or specifically
20 approved the failure to take necessary and appropriate actions and activities in advance,
21 and/or subsequently ratified each other and every Defendant's conduct. References made
22 herein to "Defendants" shall be deemed to mean the acts of Defendants acting individually,
23 collectively, jointly, and/or severally.

24 JURISDICTION AND VENUE

25 8. Jurisdiction is proper in Los Angeles, California and the Los Angeles County
26 Superior Court because Plaintiffs have their principal places of business and national
27 headquarters in Los Angeles and are therefore residents of California; Defendant K&L
28 Gates is authorized to engage and is engaged in the practice of law in the City of Los

1 Angeles; Defendant K&L Gates maintains offices in Los Angeles, California, among other
2 California offices; partners of Defendant K&L Gates live within the City and County of Los
3 Angeles; Defendant K&L Gates is a corporate resident of Los Angeles; Defendants have
4 regularly conducted business in the City of Los Angeles, including representation of KB
5 Home in Los Angeles, California. Defendant Matthew Ball is a partner of K&L Gates, a
6 resident of California, and represented KB Home, working with co-counsel Munger Tolles
7 & Olsen, located in Los Angeles; Defendant Ball is admitted to the United States District
8 Court for the Central District located in Los Angeles. This action is based on claims made
9 under California state law regarding legal representation that was provided in California to
10 California-based entities and damage to Plaintiff occurred in Los Angeles, California.
11 Venue is also proper in Los Angeles County Superior Court because K&L Gates is a
12 resident of Los Angeles County. K&L Gates is a limited liability partnership, and partners
13 of K&L Gates are residents of Los Angeles County, working in the Los Angeles office of
14 K&L Gates, and therefore K&L Gates is a resident of Los Angeles County.

15 BACKGROUND

16 **The *Bates* Litigation**

17 9. KB Home is a real estate development company that, among other things,
18 builds residential homes in California. In 2006, KB Home operated a subsidiary, Homesafe
19 Escrow Company (“Homesafe”) (no longer in operation) which assisted the escrow agent in
20 sales contracts for KB Home homebuyers by providing “contract coordination services”
21 which included, among other things, copying documents, receiving emails from KB Home
22 regarding cancellations, lot transfers, insufficient funds and stop payments, and receiving
23 and depositing earnest money checks into a HomeSafe account.

24 10. On or about April 19, 2006, Angela Bates executed a residential purchase
25 agreement with KB Home for a total price of \$578,656 and paid a \$16,000 deposit to
26 Homesafe. Bates closed her home purchase on or about January 24, 2007, and at that time,
27 among other costs, was charged a \$275 fee for “contract coordination services” by

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1 Homesafe. Bates and other class members received credits from KB Home that eliminated
2 or reduced any contract coordination services charges.

3 11. On April 30, 2008, Bates filed suit against KB Home and Homesafe, among
4 others, in the Superior Court of California, Alameda County. The complaint alleged a class
5 action on behalf of all purchasers of homes from KB Home in California and two sub-
6 classes. The main class was defined by a member's purchase of a home and payment of a
7 deposit. One sub-class was defined as persons who were promised interest on their deposits
8 ("Interest Sub Class") and the second sub-class was defined as persons who paid the \$275
9 contract services coordinate fee ("Coordination Fee Sub Class"). The complaint alleged in
10 summary that the KB Home Defendants had unlawfully provided and charged for escrow
11 services to the class in violation of Section 2995 of the California Civil Code (prohibiting
12 homebuilders from requiring home buyers to utilize an escrow entity in which it has a
13 financial interest) and California Business & Professions Code Section 17200 *et seq* (the
14 Unfair Competition Law -- "UCL"), based on a claimed violation of the federal Real Estate
15 Settlement Procedures Act ("RESPA") 12 U.S.C.A. §§ 2607-08 (prohibiting homebuilders
16 from "accepting or giving a kickback of 'thing of value' in exchange for a referral of any
17 part of a real estate settlement services to another company; and requiring the use of a
18 particular title company as a condition to selling property").

19 12. The main class had no actual damages alleged on its behalf, the Interest Sub
20 Class claimed an amount equal to the value of interest on the deposits, and the Coordination
21 Fee Sub Class claimed actual damages of \$275 per person. A similar class action suit was
22 filed in federal district court for the Northern District of California entitled *Zaldana v. KB*
23 *Home, et al.*, Case No. 08-CV-3399, on July 15, 2008.

24 **KB Home Retains K&L Gates for the *Bates* and *Zaldana* Litigation**

25 13. After receiving service of the *Bates* complaint, Mr. Dave Simons, Vice
26 President and Assistant General Counsel of KB Home contacted attorney Phil Schulman in
27 the K&L Gates Washington, D.C. office regarding defense of the KB Home Defendants.
28 K&L Gates and Mr. Schulman had represented KB Home previously on regulatory matters

1 including compliance with RESPA involving escrow issues. Mr. Schulman told Mr. Simons
2 that Defendant Matthew Ball, his partner in the San Francisco office, was a specialist in
3 class action defense litigation, including the homebuilding industry and actions filed in
4 California state court. Mr. Ball confirmed to Mr. Simons that he was a specialist in class
5 action defense litigation in California and that he was qualified to defend KB Home in the
6 *Bates* matter. K&L Gates did not send KB Home a fee agreement for this representation.

7 14. K&L Gates' website states that its "mortgage banking and consumer financial
8 products group is one of the leading practices in the field with a dominant position in many
9 related specialties, including regulatory compliance, government enforcement, class action
10 defense, and transactional work." The firm lists Class Action Litigation Defense as one of
11 its core areas of work, characterizing its work as "unparalleled" and noting that its lawyers
12 are "organized into teams specializing in particular areas of substantive law under which
13 actions are brought."

14 15. The firm also states on its website that Defendant Matthew Ball "concentrates
15 his practice on class action defense and strategic commercial litigation for the homebuilding
16 and financial services industries" and states that he "has extensive experience in all types of
17 legal problem-solving in federal and state courts, as well as alternative dispute resolution
18 settings." The website further represents of Matthew Ball that he co-edited a "50-state
19 treatise, *State Class Actions: Practice and Procedure*, with Todd L. Nunn and Irene C.
20 Freidel (Wolters Klawer 2009)" and it mentions specifically that Ball "[c]o-wrote the
21 California chapter of that treatise."

22 16. Based on K&L Gates representations of its expertise, KB Home retained K&L
23 Gates and Ball to defend it in the *Bates* and *Zaldana* class action cases.

24 17. Matthew Ball was the lead counsel for KB Home in the *Bates* matter.

25 18. Mr. Simons sent Ball the *Bates* and *Zaldana* complaints (*Zaldana* was filed by
26 the same plaintiffs' firm) on or around July 15, 2008. After reviewing the complaints and
27 receiving information from KB Home regarding the matter, Ball told Mr. Simons class

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1 certification should be defeated on all bases, excepting possibly the Interest Sub Class in
2 *Bates*.

3 19. In defending the *Bates* case and evaluating the case among other things, K&L
4 Gates and Ball told Dave Simons of KB Home that: (1) *Bates* plaintiffs' class action motion
5 was unlikely to be granted; and (2) KB Home was likely to prevail on a motion for summary
6 judgment in *Bates*, so the case would never come to trial. Mr. Simons told Mr. Ball and
7 K&L Gates that he was going to reserve \$250,000 for this case. Mr. Ball did not revise the
8 valuation of the case and inform KB Home at any time that its exposure on the case was
9 greater than the \$250,000 estimate. K&L Gates did not retain a damages expert and did not
10 conduct discovery on plaintiffs' class damages theory.

11 20. Contrary to K&L Gates' advice to KB Home, plaintiffs' motion for class
12 certification was granted almost in full¹ and KB Home's motion for summary judgment was
13 denied in full. The case was set for trial on February 14, 2011. After the summary
14 judgment was denied with a negative written opinion by the trial judge (who was to conduct
15 a bench trial), K&L Gates told KB Home that the case would go to trial, unless KB Home
16 settled.

17 21. Shortly thereafter, KB Home retained Munger Tolles & Olson ("MTO") to be
18 lead trial counsel. MTO discovered there was no damages expert designated for trial, no
19 offset for credits pled in the answer to the complaint, and no discovery on plaintiffs' class
20 damages theory. MTO arranged an emergency mediation conference on February 2, 2011,
21 before a preeminent national mediator. Based on the state of the K&L Gates *Bates* file, the
22 errors and omissions of K&L Gates, and the imminent trial date, KB Home was forced to
23 pay the class a highly inflated settlement value of \$7,100,000. Also, due to the errors and
24 omissions of K&L Gates, KB Home was required to pay MTO \$1,046,624 to avoid a likely

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27 ¹ The Court denied certification of the Interest Sub Class on numerosity grounds, because
28 Ms. Bates was the only class member whose purchase contract entitled her to interest.

1 catastrophe at trial.² This was in addition to \$1,228,829 that KB Home paid K&L Gates.
2 On March 1, 2011, KB Home terminated K&L Gates representation of KB Home.

3 22. After being forced to pay the settlement amount which was much greater than
4 the true value of the case, on the advice of MTO, KB Home retained experts to review the
5 handing of the *Bates* case by Defendants. Professor William B. Rubenstein, the Civil
6 Procedure and Class Actions professor at Harvard Law School and civil litigator, Mr. Tom
7 Stolpman, former President of the California Bar, have analyzed Defendants handling of
8 *Bates*. Both Professor Rubenstein and Mr. Stolpman reviewed the *Bates* files, pleadings,
9 and court orders, among other things, including information regarding *Zaldana*. Professor
10 Rubenstein interviewed lawyers at MTO working on the cases.

11 23. Professor Rubenstein wrote a 56-page report summarizing his initial opinions
12 and the bases for them on this matter. Professor Rubenstein concludes that Defendants
13 “failed to meet this standard [of class action specialists] in two regards: first, the firm failed
14 to demur to the plaintiff’s standing to pursue her claims under California’s Unfair
15 Competition Law (“UCL”), despite the fact that this precise strategy prevailed in the parallel
16 *Zaldana* litigation...and second, the firm failed to file a strategic, pertinent, organized, and
17 focused opposition to the plaintiff’s motion for class certification” and “that each of these
18 breaches was a substantial factor in causing injury to KB Home.”

19 24. Professor Rubenstein also concluded that Defendants fell below the standard
20 of care in their opposition to the *Bates* plaintiffs’ motion for class certification for the
21 Coordination Fee Sub Class. Among other things Professor Rubenstein found that “KLG
22 failed to meet its specialist’s duty to KB Home in the handling of its response to the
23 plaintiff’s motion for class certification motion. The critical concern in this matter was the
24 CCF sub-class, certification of which...created the greatest financial exposure for KB Home.
25 The CCF sub-class therefore should have been the focus of the opposition to class
26 certification. [T]he CCF sub-class...was uniquely vulnerable to an attack on predominance
27

28 ² MTO also took over representation of Home in the *Zaldana* case. *Zaldana*, which was not facing a trial date, settled in September of 2011 without class certification.

1 grounds. KLG not only failed to identify and implement this key strategy, the brief it filed in
2 opposition to the motion for class certification was sub-standard on its own terms: it argued
3 the merits at the expense of arguing against certification; it did not marshal factual evidence
4 in opposition to certification; and it did not raise any concerns about a single class
5 representative representing the class and both subclasses. These failures were perpetuated
6 in KLG's argument at the class certification hearing. A class action specialist would have
7 identified the CCF sub-class as the key target at certification and would have mounted a
8 certification-based argument showing how individual factual issues so infected this subclass
9 that it could not meet class certification's predominance requirement. KLG's opposition to
10 class certification failed to meet this standard of care."

11 25. Mr. Stolpman wrote a 10-page report summarizing his initial opinions and the
12 bases for them, in addition to those he concurs with in Professor Rubenstein's report. Mr.
13 Stolpman concluded that "K&L Gates fell below the standard of care in the handling of the
14 responsive pleadings in *Bates*, by failing to demur, and in the handing of the defense to the
15 sub-class certification motion." In addition Mr. Stolpman's opinion is that "K&L Gates, fell
16 below the standard of care in the answer that it filed on behalf of KB Home" because
17 "[w]hile K&L Gates filed an answer containing 25 boilerplate affirmative defenses, it did
18 not plead the defense of set off to class damages. The facts demonstrate that KB Home did
19 not in fact charge a significant portion of the sub-class the full \$275 for contract services,
20 but gave credits on the closing payments which would eliminate or reduce that payment to
21 class members. The failure to plead the affirmative defense meant that KB Home most
22 likely would not have been able to present the set off to class damages at trial."

23 26. Additionally, Mr. Stolpman concluded that "[i]t fell below the standard of care
24 not to require plaintiffs' class to disclose their damages theory and proof pretrial, but to
25 'accept' that damages were a matter of multiplication of \$275 times the number of sub-class
26 members" and "not to retain at least one economist to analyze damages" because "[i]f
27 damages discovery had been conducted, if an expert on damages had been retained at the
28 outset, and if the affirmative defense of set off had been plead, then KB Home would more

1 likely than not, have been able to negotiate a much lower settlement pretrial and the failure
2 to take these steps caused KB Home injury.... Had K&L Gates retained an economist and
3 analyzed the impact of the credits given to the home buyers on any alleged class collective
4 damages early on...more likely than not *Bates* would have settled for a waiver of costs up to
5 \$250,000 at an early stage.”

6 27. Mr. Stolpman additionally found that Defendants’ handling of the summary
7 judgment motion, which was denied by the trial court, fell below the standard of care as it
8 “was virtually certain to fail and increase the value of the plaintiffs’ case” because “[t]here
9 were without question disputed facts” as to material issues in the case. Mr. Stolpman and
10 Professor Rubenstein have opinions that Defendants’ representation of KB Home fell below
11 the standard of care, and that such conduct and omissions caused KB Home damages.

12 **Damages**

13 28. Plaintiffs herein have suffered damages from Defendants’ conduct below the
14 standard of care including the full value of the *Bates* settlement payment of \$7,100,000, the
15 charges of MTO to try and mitigate damages in the amount of \$1,046,624, and the fees of
16 K&L Gates of \$1,228,829, for a total amount not less than \$9,375,453, plus interest.

17 **FIRST CAUSE OF ACTION**

18 **(For Professional Negligence Against All Defendants)**

19 29. Plaintiffs hereby repeat and reallege the factual allegations contained in
20 paragraphs 1 through 28 above as though set forth in full herein.

21 30. Defendants represented Plaintiffs as attorneys and had an attorney client
22 relationship with Plaintiffs.

23 31. When Defendants handled Plaintiffs’ legal matters, Defendants had a legal
24 duty to exercise that degree of learning, and use the degree of care and skill, ordinarily
25 possessed by a reputable attorney or law firm, practicing under similar circumstances.
26 Defendants had a duty to use the skill, knowledge and care that a reasonably careful attorney
27 or law firm would have used in similar circumstances. Defendants owed all customary
28 professional and fiduciary duties to Plaintiffs and owed a duty of loyalty to Plaintiffs not to

1 act adversely to Plaintiffs' interests, and to refrain from taking any action or omitting to take
2 any action which was likely to result in loss, injury, damage, harm or detriment to Plaintiffs.

3 32. As a result of the actions, errors and omissions, set forth above, Defendants
4 have breached such legal duties, and have been professionally negligent.

5 33. But for Defendants' professional negligence in connection with the *Bates*
6 litigation, Plaintiffs would have obtained a far better result.

7 34. As a direct and proximate result of such professional negligence, Plaintiffs
8 have suffered damages as to items set forth in paragraph 27 in the amount not less than
9 \$9,375,453, together with interest thereon.

10 **SECOND CAUSE OF ACTION**

11 **(Breach of Contract Against All Defendants)**

12 35. Plaintiffs hereby repeat and reallege the factual allegations contained in
13 paragraphs 1 through 34 above as though set forth in full herein.

14 36. Defendants had oral and implied contracts to represent Plaintiffs competently
15 and within the standard of care of experts in the *Bates* case and did in fact undertake such
16 representation, billing Plaintiffs for time and expenses. Plaintiffs paid K&L Gates invoices.

17 37. As set forth above, Defendants breached the contracts by not performing their
18 obligations to competently defend Plaintiffs in the *Bates* action to the standard of class
19 action litigation specialists.

20 38. Plaintiffs performed all conditions, covenants and/or promises required on
21 their part to be performed and/or incurred the obligations required pursuant to the terms of
22 the contracts.

23 39. As a direct and proximate result of the breaches of contract, Plaintiffs have
24 suffered damages as to items set forth in paragraph 28 in the amount of not less than
25 \$9,375,453, together with interest thereon.

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1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiffs pray for judgment against Defendants and each of them,
3 jointly and severally as follows:

- 4 1. For compensatory damages, according to proof, in an amount not less than
- 5 \$9,375,453;
- 6 2. For interest pursuant to, but not limited to, Cal. Civil Code Section 3287 for
- 7 damages certain or capable of being made certain, and Sections 3288, 3289, and 3291; and
- 8 3. For such other and further relief as the Court may deem just, equitable and
- 9 proper.

10 Dated: May 4, 2012

Respectfully Submitted,

11 HOWARTH & SMITH
12 DON HOWARTH
13 SUZELLE M. SMITH
14 PADRAIC GLASPY

15 By: 

Suzelle M. Smith

16 Attorneys for Plaintiffs
17 KB HOME, a Delaware corporation and
18 KB HOME MORTGAGE COMPANY,
a wholly owned subsidiary of KB HOME

19 **DEMAND FOR JURY TRIAL**

20 Plaintiffs hereby demand a trial by jury.

21 Dated: May 4, 2012

Respectfully Submitted,

22 HOWARTH & SMITH
23 DON HOWARTH
24 SUZELLE M. SMITH
25 PADRAIC GLASPY

26 By: 

Suzelle M. Smith

27 Attorneys for Plaintiffs
28 KB HOME, a Delaware corporation and
KB HOME MORTGAGE COMPANY,
a wholly owned subsidiary of KB HOME