

1 SULLIVAN HILL LEWIN REZ & ENGEL, APLC
Jonathan S. Dabbieri (SBN 91963)
2 550 West C Street, Suite 1500
San Diego, CA 92101
3 Telephone: (619) 233-4100
Facsimile: (619) 231-4372

4 Attorneys for Plaintiffs Briarwood Capital, LLC,
5 Nicolas Marsch III, Colony Properties
International, LLC, and Colony Properties
6 International II

7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF SAN DIEGO**

10
11 BRIARWOOD CAPITAL, LLC, a)
Delaware limited liability corporation,)
12 individually and derivatively on behalf of)
KRMW REAL ESTATE INVESTMENT)
13 GROUP, LLC; and NICOLAS MARSCH)
III, an individual; COLONY PROPERTIES)
14 INTERNATIONAL, LLC, a California)
limited liability company; and COLONY)
15 PROPERTIES INTERNATIONAL II, a)
California limited liability company,)

16 Plaintiffs,

17 v.

18 KBR GROUP, LLC, a California limited)
liability company; KBR OPPORTUNITY)
19 FUND I, L.P., a California limited)
partnership; KBR OPPORTUNITY FUND)
20 II, L.P., a California limited partnership;)
SHAWN R. WAMSTAD, an individual;)
21 MICHEL KUCINSKI, an individual;)
RANDY RIVERA, an individual; and)
22 DOES 1-100,)

23 Defendants,

24 and

25 KRMW REAL ESTATE INVESTMENT)
26 GROUP, LLC, a California limited liability)
company,)

27 Nominal Defendant.)
28)

CASE NO.

COMPLAINT FOR:

- (1) BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
- (2) CONSPIRACY TO BREACH THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
- (3) BREACH OF CONTRACT
- (4) ANTICIPATORY BREACH OF CONTRACT
- (5) BREACH OF DUTY OF CONFIDENTIALITY
- (6) DECLARATORY RELIEF - ALTER EGO
- (7) DECLARATORY RELIEF - OPERATING AGREEMENT
- (8) DECLARATORY RELIEF - TERM LOAN AGREEMENT
- (9) RESCISSION
- (10) INJUNCTIVE RELIEF

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

Plaintiffs hereby allege as follows:

THE PARTIES

1. Plaintiff BRIARWOOD CAPITAL, LLC (“Briarwood”), is a Delaware limited liability company qualified to do business in the State of California and maintaining its principal place of business in the County of San Diego. Briarwood is primarily engaged in the business of real estate development, including the development of master-planned communities. Briarwood is wholly-owned by plaintiff NICOLAS MARSCH III. Briarwood currently is a member of KRMW REAL ESTATE INVESTMENT GROUP, LLC (“KRMW”), which membership Briarwood acquired when KRMW was first created on or about October 9, 2008.

2. Plaintiff NICOLAS MARSCH III (“Marsch”) is an individual who resided, at all relevant times, in La Jolla, California.

3. Plaintiff COLONY PROPERTIES INTERNATIONAL, LLC (“Colony I”) is a California limited liability company qualified to do business in the State of California and maintaining its principal place of business in the County of San Diego. Colony I is wholly-owned by plaintiff Marsch.

4. Plaintiff COLONY PROPERTIES INTERNATIONAL II, LLC (“Colony II”) is a California limited liability company qualified to do business in the State of California and maintaining its principal place of business in the County of San Diego. Colony II is wholly-owned by plaintiff Marsch.

5. Nominal Defendant KRMW is a California limited liability company doing business in the State of California and is, and at all times herein mentioned, was qualified to do business in the State of California.

6. Defendant KBR GROUP, LLC (“KBR Group”) is a California limited liability company, which at all times mentioned, was qualified to do business and was doing business in the State of California. KBR GROUP is headquartered in the County of San Diego.

7. Defendant KBR OPPORTUNITY FUND I, L.P. (“KBR Fund I”) is a California limited partnership, which at all times mentioned, was qualified to do business and was doing

1 business in the State of California. Plaintiffs are informed and believe and thereon allege that KBR
2 FUND I is a wholly-owned subsidiary of KBR GROUP.

3 8. Defendant KBR OPPORTUNITY FUND II, L.P. (“KBR Fund II”) is a California
4 limited partnership, which at all times mentioned, was qualified to do business and was doing
5 business in the State of California. Plaintiffs are informed and believe and thereon allege that KBR
6 FUND II is a wholly-owned subsidiary of KBR GROUP.

7 9. Plaintiffs are informed and believe and thereon allege that defendant SHAWN R.
8 WAMSTEAD (“Wamstead”) is an individual who, at all relevant times, resided in San Diego
9 County, California.

10 10. Plaintiffs are informed and believe and thereon allege that defendant MICHEL
11 KUCINSKI (“Kucinski”) is an individual who, at all relevant times, resided in San Diego County,
12 California. Plaintiffs are further informed and believe that defendant Kucinski is a principal in, and
13 Chairman and President of, defendant KBR Group.

14 11. Plaintiffs are informed and believe and thereon allege that defendant RANDY
15 RIVERA (“Rivera”) is an individual who, at all relevant times, resided in San Diego County,
16 California. Plaintiffs are further informed and believe that defendant Rivera is a principal in, and
17 Chief Operating Officer of, defendant KBR Group.

18 12. Plaintiffs are informed and believe and thereon allege that defendants KBR Group,
19 KBR Fund I, KBR Fund II, Wamstad, Kucinski and Rivera conducted their affairs and business in
20 such a way as to create a unity of interest and ownership, causing each to be the alter ego of the
21 other. KBR Group, KBR Fund I, KBR Fund II, Wamstad, Kucinski and Rivera are sometimes
22 referred to collectively hereinafter as “KBR.”

23 13. Plaintiffs are unaware of the true names and capacities of defendants sued herein as
24 DOES 1 through 100, and therefore sue these Defendants by such fictitious names. Plaintiffs will
25 amend this complaint to allege their true names and capacities when ascertained. Plaintiffs are
26 informed and believe and thereon allege that each of the fictitiously named DOE defendants is
27 responsible in some manner for the allegations herein.

1 19. Equally successful, the private golf course was designed by the Robert Trent Jones II
2 Group. In 2003, 2004 and 2005, The Bridges hosted the *Battle at the Bridges*, a nationally televised,
3 prestigious best ball team match featuring players such as Tiger Woods, John Daly, and Phil
4 Mickelson.

5 20. The tremendous market success of The Bridges created a unique opportunity for
6 Briarwood and Lennar's affiliates to capitalize on the goodwill developed by the market success of
7 The Bridges project by working together on other potential master-planned communities in the
8 Rancho Santa Fe area. Briarwood and Lennar therefore jointly acquired, through an entity known as
9 Lennar Bridges, LLC ("Lennar Bridges"), an adjacent parcel of approximately 80 net acres, initially
10 known as Santa Fe Creek, which was ultimately incorporated into The Bridges development.
11 Briarwood and Lennar developed the Santa Fe Creek site into 40 building sites, including 32
12 examples of the award-winning Cortile Collection of homes with finished prices of approximately
13 \$3 million per home.

14 21. In addition, the parties pursued another nearby property, commonly known as
15 McCrink Ranch, which consisted of approximately 542 developable acres. The McCrink family had
16 controlled the property for approximately 30 years and had worked to obtain government
17 entitlements in order to allow the McCrink Ranch property to be developed into a high-end master-
18 planned residential community.

19 22. Commencing before 1998, Marsch had begun to actively pursue the acquisition of the
20 McCrink Ranch property. Briarwood and Marsch recognized that the McCrink Ranch project could
21 benefit from the "halo effect" of the market success of The Bridges if it could be marketed as being
22 "brought to you by the builders of The Bridges." For this reason and others, including strong
23 feelings of trust and loyalty established during The Bridges development process, Briarwood
24 determined to invite Lennar to jointly pursue the McCrink Ranch development opportunity in
25 partnership with Briarwood.

26 23. Lennar agreed to pursue the McCrink Ranch real estate development opportunity
27 jointly with Briarwood. From 1998 through early 2006, plaintiff Briarwood expended considerable
28 services, including time, effort and funds, in furtherance of the parties' anticipated purchase of

1 McCrink Ranch. Notwithstanding these efforts, Lennar's long-standing fiduciary relationship with
2 Briarwood, and the express agreement to jointly pursue the property with Briarwood, Lennar joined
3 with another entity to squeeze out Briarwood and usurp from it the McCrink Ranch opportunity.

4 24. Meanwhile, despite the accomplishments of The Bridges, Lennar was reporting a
5 substantial negative net cash flow in project accountings, allegedly due to increased project costs, all
6 of which are controlled by Lennar. Moreover, an accounting provided by Lennar in late 2007 (after
7 Briarwood had filed suit, as alleged below) demonstrated continued unjustifiable increases in costs
8 and consequent reductions to net cash flow. The result is that Lennar projected zero profits to
9 Briarwood for its 50% membership interest and substantial contributions to HCC, despite over \$500
10 million in revenues.

11 THE LENNAR LITIGATION

12 25. As a result of Lennar's actions with respect to The Bridges and McCrink Ranch, in
13 late 2006, Briarwood instituted two lawsuits against Lennar in San Diego Superior Court. Initially,
14 on November 13, 2006, Briarwood filed *Briarwood Capital, LLC v. Lennar Homes of California,*
15 *Inc., et al.*, Case No. GIC 875457 (the "McCrink Ranch Action"), for the purpose of recovering
16 losses associated with Lennar's usurpation of the McCrink Ranch opportunity. On December 22,
17 2006, Briarwood filed *Briarwood Capital, LLC v. Lennar Land Partners II, et al.*, Case No. GIC
18 877446 (the "Bridges Action"), to recover damages caused by Lennar's mismanagement (or worse)
19 of The Bridges development.

20 26. Briarwood's filing of the McCrink Ranch Action and the Bridges Action spawned
21 additional litigation between the parties. Specifically, Lennar filed *Lennar Homes of California, Inc.*
22 *v. DLA Piper US LLP, et al.*, Case No. 37-2008-00076811, on January 28, 2008, and *Lennar Homes*
23 *of California, Inc. v. DLA Piper US LLP, et al.*, Case No. 37-2008-00092842, on September 30,
24 2008. Marsch was named as an individual in both actions, which allege that, with respect to The
25 Bridges and McCrink Ranch, Marsch improperly interfered with Lennar's relationship with its
26 counsel and aided and abetted that counsel's breach of duty to Lennar. In addition, Lennar initiated a
27 Florida lawsuit relating to these same facts. In *Lennar v. Briarwood Capital, LLC and Nicolas*
28 *Marsch, III*, Case No. 08-55741 CA 10, filed in the Circuit Court of the 11th Judicial Circuit In and

1 For Miami-Dade County, Florida, Lennar alleges threatening, extortionate and wrongful conduct in
2 connection with the Bridges and McCrink residential communities and intentional interference with
3 Lennar's business.

4 27. The five lawsuits discussed in the above paragraphs are hereafter collectively referred
5 to as the "Lennar litigation."

6 **THE RELATIONSHIP BETWEEN KBR AND BRIARWOOD, MARSCH AND COLONY**

7 28. The cost of the Lennar litigation, combined with Lennar wrongfully having withheld
8 millions of dollars in fees and distributions that were due to Briarwood, had caused plaintiffs
9 Briarwood, Marsch, Colony I and Colony II significant cash flow problems.

10 29. In or about April 2008, plaintiffs Briarwood and Marsch held discussions with Cove
11 Partners, LLC, for the purpose of having Cove Partners assist plaintiffs in finding financing for a
12 development in San Jacinto, California. On or about May 10, 2008, plaintiffs formally engaged
13 Cove Partners, whose role was expanded to include assisting plaintiffs with their broader need for
14 capital.

15 30. Cove Partners thereafter approached, among others, defendant KBR concerning the
16 San Jacinto development. While a transaction with respect to San Jacinto was never consummated,
17 Cove Partners also began discussing with KBR, in or about June 2008, the possibility of KBR
18 extending a loan to plaintiffs to assist plaintiffs with their overall liquidity needs.

19 31. Such discussions were productive. On or about June 24, 2008, the parties executed a
20 loan agreement. The agreement called for defendant KBR Fund I to loan the principle sum of
21 \$4,900,000 jointly to plaintiffs Colony I and Colony II. The loan (hereafter the "Colony Loan") was
22 secured by the borrowers' rights to certain properties in Mexico and provided a right of first refusal
23 to KBR to participate in the Lennar litigation. A true and correct copy of the June 24, 2008 Term
24 Loan Agreement is attached hereto as Exhibit 1.

25 32. Plaintiffs thereafter determined that the Colony Loan would not be sufficient to
26 satisfy plaintiffs' ongoing liquidity needs, particularly in light of the substantial costs associated with
27 the Lennar litigation. Therefore, in or about July 2008, plaintiffs and KBR, pursuant to KBR's right
28

1 of first refusal to participate in the Lennar litigation, opened negotiations concerning KBR's
2 potential investment in the Lennar litigation.

3 33. As a result of those negotiations, on or about November 5, 2008, plaintiffs and
4 defendant KBR entered into an operating agreement, by which nominal defendant KRMW was
5 formed ("Operating Agreement"). A true and correct copy of the November 5, 2008 Operating
6 Agreement is attached hereto as Exhibit 2.

7 34. Pursuant to the terms of the Operating Agreement, each party was required to make
8 certain capital contributions to KRMW. Specifically, plaintiffs Briarwood and Marsch agreed to
9 contribute to KRMW (a) all proceeds from their claims against Lennar in both the Bridges Action
10 and the McCrink Ranch Action; (b) their ownership interest in both HCC and Lennar Bridges
11 (except for certain specifically defined "Retained Benefits"), and (c) an assumption of the obligation
12 to pay litigation costs associated with the Lennar litigation. Defendant KBR Fund was obligated to
13 contribute up to \$4,190,000 in cash, with the sum of \$3,000,000 to be immediately contributed.

14 35. Consistent with these obligations, the parties executed, on November 5, 2008, several
15 assignments, as follows:

16 a. Assignment of Claims (assigning the Lennar litigation claims to KRMW)
17 (attached hereto as Exhibit 3);

18 b. Assignment of Membership Interest (assigning plaintiff Briarwood's interest
19 in HCC to KRMW) (attached hereto as Exhibit 4);

20 c. Assignment of Membership Interest (assigning plaintiff Marsch's interest in
21 HCC to KRMW) (attached hereto as Exhibit 5);

22 d. Assignment of Membership Interest (assigning plaintiff Briarwood's interest
23 in Lennar Bridges to KRMW) (attached hereto as Exhibit 6); and

24 e. Assignment of Membership Interest (assigning plaintiff Marsch's interest in
25 Lennar Bridges to KRMW) (attached hereto as Exhibit 7).

26 In addition, the parties executed a Security Agreement, by which plaintiffs' claims in the
27 Bridges Action and the McCrink Ranch Action were pledged as collateral to secure performance of
28 Briarwood's obligations under the Operating Agreement. A true and correct copy of the Security

1 Agreement is attached hereto as Exhibit 8. Defendants KBR made its required \$3,000,000 cash
2 contribution on or about November 5, 2008.

3 36. Although the Operating Agreement required plaintiffs to assign, and plaintiffs did
4 assign, their interests in the Lennar litigation to KRMW, the Assignment of Claims expressly
5 allowed plaintiffs Briarwood and Marsch to prosecute the Bridges Action and the Lennar Action “in
6 their own name but as agent and nominee of [KRMW].” In addition, Article 4 of the Operating
7 Agreement names plaintiff Marsch as the sole Manager of KRMW and provides him with power to
8 carry out the business of KRMW, including management of the Lennar litigation.

9 37. On or about November 6, 2008, the day after the Operating Agreement and
10 assignments were executed, the parties reached a further letter agreement (“Letter Agreement”) by
11 which they promised to “cooperate together toward the acquisition of the interests in HCC not held
12 by Briarwood for the benefit of KRMW.” The November 6, 2008 Letter Agreement further provided
13 “that neither of us will circumvent these efforts to acquire such interests for the benefit of KRMW
14 and will not acquire such interests for either of our own benefit or the benefit of our affiliates to the
15 exclusion of KRMW without the written approval of each of us.” A true and correct copy of the
16 November 6, 2008 Letter Agreement is attached hereto as Exhibit 9.

17 38. At all times since the Operating Agreement and the November 6, 2008 Letter
18 Agreement were executed, plaintiffs have complied with all obligations, duties and responsibilities
19 required of them pursuant to these agreements. Further, at various times, plaintiffs and their
20 litigation counsel provided KBR with detailed information concerning the status and strategies
21 involved in the Lennar litigation, including attorney-client privileged information.

22 **KBR BREACHES THE AGREEMENTS AND ITS DUTY OF CONFIDENTIALITY**

23 39. On November 6, 2008, the Hon. William R. Nevitt, Jr. of the San Diego Superior
24 Court granted defendant Lennar’s Motion for Judgment on the Pleadings in the McCrink Ranch
25 Action. Motions for reconsideration and a new trial were denied by Judge Nevitt on or about
26 January 16, 2009. Plaintiff Briarwood filed a Notice of Appeal on March 18, 2009. The appeal
27 remains pending as of the filing of this Complaint.

1 40. On or about January 29, 2009, KBR’s counsel sent a letter to plaintiffs’ counsel
2 setting forth KBR’s belief that, as a result of Judge Nevitt’s rulings on Lennar’s Motion for
3 Judgment on the Pleadings (including the denial of the January 16, 2009 motions), the McCrink
4 Ranch Action had been “dismissed.” KBR concluded, therefore, that it had obtained a “Put Right”
5 pursuant to Sections 3.1.2.4 and 4.4(2) of the Operating Agreement. Such a “Put Right” arises under
6 Section 3.1.2.4, in part, upon the “Litigation Determination Date.” The “Litigation Determination
7 Date,” in turn, is defined by Section 4.4(2) to arise when either of the pending actions against Lennar
8 are “dismissed.” Defendant KBR adopted this position despite the fact that it was aware that
9 Briarwood intended to appeal Judge Nevitt’s decision. Although KBR’s January 29, 2009 letter set
10 forth it purported right to exercise its Put Right, KBR indicated that it was not, at that time,
11 exercising such rights.

12 41. On March 25, 2009, after the Notice of Appeal was filed, KBR served plaintiffs with
13 a certified letter, which purported to provide “formal notice” that KBR was electing to exercise its
14 Put Right, and thereby demanded payment of \$4,734,000, the first installment of which was said to
15 be due within sixty days. The purported right to exercise the Put Right was stated to be on the same
16 basis as had been set forth in the January 29, 2009 letter discussed above, i.e., the McCrink Ranch
17 Action had been “dismissed” as a result of Judge Nevitt’s actions.

18 42. Plaintiffs dispute that any Put Right has arisen under the terms of the Operating
19 Agreement, as there has been no dismissal of the McCrink Ranch Action, which is pending on
20 appeal, and no other basis for the Put Right has been asserted by KBR.

21 43. KBR was, apparently, unsatisfied with the mere assertion of its sham Put Right. On
22 or about April 3, 2009, KBR’s principals met with representatives of Lennar and its counsel.
23 Plaintiff is informed and believes and thereon alleges that during this 8-hour long meeting, KBR,
24 Lennar and Lennar’s counsel discussed working together to eliminate plaintiffs’ rights as to HCC
25 and The Bridges development, as well as to eliminate the collateral which secured the June 24, 2008
26 Term Loan. Neither plaintiffs nor their counsel were informed or otherwise aware of the April 3,
27 2009 meeting between KBR, Lennar and Lennar’s counsel until after the meeting had concluded.

1 44. Plaintiffs are informed and believe and thereon allege that the April 3, 2009 meeting
2 was held at the request of attorney Daniel Petrocelli of O'Melveny & Myers, counsel of record for
3 Lennar in the Lennar litigation. Mr. Petrocelli requested the meeting despite the fact that he was
4 aware (a) KBR owned an interest in KRMW, (b) KRMW, as assignee of Briarwood's claims, had a
5 protectable interest in the Lennar litigation, and (c) KBR had a confidential relationship with and
6 owed fiduciary duties to KRMW, its members, and each plaintiff herein, and Mr. Petrocelli, by his
7 conduct, was interfering with such relationship and inducing KBR to breach its fiduciary duties.

8 45. Plaintiffs are further informed and believe and thereon allege that, during the April 3,
9 2008 meeting, KBR's principals shared with Lennar and its counsel a substantial amount of private,
10 confidential, privileged and otherwise protected information concerning, among other things,
11 plaintiffs' financial circumstances and plaintiffs' litigation strategy in the Lennar litigation. Such
12 information was known to KBR solely because of its confidential relationship to plaintiffs in
13 connection with the Colony Loans, the establishment of KRMW and the assignments executed in
14 connection therewith, and the Lennar litigation.

15 46. Also during the April 3, 2009 meeting, KBR, Lennar and Lennar's counsel discussed
16 a secret deal designed to both enhance KBR's position with respect to The Bridges development and
17 to protect Lennar from the exposure it faced in the Lennar litigation. Specifically, Lennar and KBR
18 developed a scheme which would (a) result in KBR obtaining a 10% in the Bridges development for
19 itself, (b) require Marsch and Briarwood to relinquish all of their interest in HCC, The Bridges
20 development, and the Lennar litigation, and (c) relieve Lennar from any further liability to Marsch or
21 Briarwood. The same evening, KBR principal Michel Kucinski contacted Mr. Marsch by telephone
22 to set up a meeting for the following day.

23 47. Marsch met with defendant Kucinski on or about April 5, 2009, at which time
24 Kucinski explained the self-serving arrangement that had been reached between KBR and Lennar
25 the prior day. During the meeting, defendant Kucinski, who was aware that plaintiffs were
26 continuing to incur substantial costs in the prosecution and defense of the Lennar litigation,
27 pressured Briarwood and Marsch to accept the deal, threatening that if plaintiffs did not do so, KBR
28

1 would “act to protect its interests.” Nevertheless, plaintiffs did not accept and have not accepted the
2 deal.

3 48. In addition to the actions described above, KBR has taken certain actions with respect
4 to the Colony Loan which constitute an anticipatory breach of the June 24, 2008 Term Loan
5 Agreement. That agreement, at section 2.5, provides that a “Loan Reserve Amount shall be applied
6 to interest payments” due under the note during the 7th, 9th, 11th and 12th months of the loan term.
7 Accordingly, the interest payment for the month of May 2009 is to be drawn from the Loan Reserve
8 Amount established under the agreement, and need not be made by the borrowers.

9 49. Nonetheless, on May 6, 2009, defendant KBR informed plaintiffs that KBR would
10 declare borrowers to be in default of the June 24, 2008 Term Loan Agreement if the May 2009
11 interest payment is not made by the borrowers. Such action constitutes an anticipatory breach of
12 contract.

13 **DERIVATIVE CLAIMS**

14 50. Plaintiffs bring this action on their own behalf as well as derivatively in the right and
15 for the benefit of KRMW to redress injuries suffered, and to be suffered, by KRMW as a direct result
16 of the actions of KBR as alleged herein. Plaintiffs will adequately and fairly represent the interests
17 of KRMW in enforcing and prosecuting its rights. At all times relevant to the wrongful conduct of
18 defendants, Briarwood and/or Marsch have been members of KRMW.

19 51. Plaintiffs have not made any demand of KRMW to institute this action because such
20 demand would be a futile, wasteful and useless act, particularly because defendants are 65% owners
21 of KRMW and have committed the acts complained of herein. As a result, defendants are not
22 disinterested or independent. Thus, defendants cannot exercise independent objective judgment in
23 deciding whether to bring an action or whether to vigorously prosecute an action because they are
24 interested personally in the outcome, thereby excusing demand.

25 **FIRST CAUSE OF ACTION**

26 **(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

27 52. Plaintiffs incorporate by reference as though set forth herein each and every
28 allegation of paragraphs 1 through 51 above.

1 exposure with respect to the Lennar litigation, and to terminate plaintiffs' rights with respect to HCC
2 and the Lennar litigation.

3 59. The actions of the conspiracy as alleged herein constitute a breach of the implied
4 covenant of good faith and fair dealing under the June 24, 2008 Term Loan Agreement, the
5 Operating Agreement, and the other agreements alleged herein.

6 60. As a proximate result of this conspiracy, plaintiffs have been damaged in an amount
7 not yet ascertained, subject to proof at trial.

8 **THIRD CAUSE OF ACTION**

9 **(Breach of Contract - Operating and Letter Agreements)**

10 61. Plaintiffs incorporate by reference as though set forth herein each and every
11 allegation of paragraphs 1 through 60 above.

12 62. Defendant KBR breached the Operating Agreement and November 6, 2008 Letter
13 Agreement by, without limitation, (1) attempting and negotiating to acquire an interest in HCC to the
14 exclusion of plaintiffs and in contravention of the November 6, 2008 Letter Agreement, and (2) by
15 falsely asserting Put Rights and demanding payment pursuant to Section 3.1.2.4 of the Operating
16 Agreement.

17 63. Plaintiffs Lennar and Marsch have performed all of their obligations under the
18 Operating Agreement and KBR's performance is not otherwise excused.

19 64. As a proximate result of defendant KBR's material breach of the Operating
20 Agreement and November 6, 2008 Letter Agreement, plaintiffs have been damaged in an amount not
21 yet ascertained, subject to proof at trial.

22 **FOURTH CAUSE OF ACTION**

23 **(Anticipatory Breach of Contract - Term Loan Agreement)**

24 65. Plaintiffs incorporate by reference as though set forth herein each and every
25 allegation of paragraphs 1 through 64 above.

26 66. Defendant KBR has anticipatorily breached the Term Loan Agreement by informing
27 plaintiffs Colony I and Colony II that, unless an interest payment is made by Colony I or Colony II
28 for the month of May 2009, KBR will consider the borrowers to be in default of the loan agreement

1 and will proceed accordingly. In fact, no such payment is due in light of the fact that, pursuant to
2 Section 2.5 of the June 24, 2008 Term Loan Agreement, such payment is to be withdrawn from the
3 Loan Reserve Amount.

4 67. Plaintiffs Colony I and Colony II have performed all of their obligations under the
5 Term Loan Agreement and KBR's performance is not otherwise excused.

6 68. As a proximate result of defendant KBR's anticipated material breach of the Term
7 Loan Agreement, plaintiffs Colony I and Colony II have been damaged in an amount not yet
8 ascertained, subject to proof at trial.

9 **FIFTH CAUSE OF ACTION**

10 **(Breach of Duty of Confidentiality)**

11 69. Plaintiffs incorporate by reference as though set forth herein each and every
12 allegation of paragraphs 1 through 68 above.

13 70. As a result of the Colony Loan, the creation of KRMW, and the Lennar litigation,
14 defendant KBR and DOES 1-100 obtained significant private and privileged information from and
15 about plaintiffs Marsch and Briarwood. Such information included, without limitation, plaintiffs'
16 private financial information and attorney-client communications concerning plaintiffs' strategies in
17 the Lennar litigation. Such information further included privileged attorney-client information
18 which belonged to KRMW as the real party in interest in the Lennar litigation.

19 71. By virtue of the parties' relationships, defendants owed a duty, including a fiduciary
20 duty, to maintain the confidentiality of all such information.

21 72. By defendants' actions in sharing the confidential information with Lennar and its
22 counsel in connection with the April 3, 2009 meeting alleged herein, defendants breached their duty
23 of confidentiality, including all fiduciary duties relating thereto.

24 73. As a direct and proximate result of such breach, plaintiffs and KRMW have been
25 damaged in an amount not yet ascertained, subject to proof at time of trial.

26 74. The above-described conduct of defendant KBR was willful and fraudulent, and was
27 intended to cause injury to the plaintiffs. KBR is therefore liable for exemplary or punitive damages.

28 ///

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

SIXTH CAUSE OF ACTION

(For Declaratory Relief – Alter Ego)

75. Plaintiffs incorporate by reference as though set forth herein each and every allegation of paragraphs 1 through 74 above.

76. Plaintiffs are informed and believe and based thereon allege that defendants Wamstad, Kucinski and Rivera dominated, influenced and controlled the business, property and affairs of KBR Group, KBR Fund I, KBR Fund II and DOES 1 through 20. Plaintiffs are further informed and believe and based thereon allege that defendant KBR Group dominated, influenced and controlled the business, property and affairs of KBR Fund I and KBR Fund II and DOES 1 through 20.

77. Plaintiffs are informed and believe and based thereon allege that at all times mentioned herein there existed and now exists such a unity of interest and ownership between Wamstad, Kucinski, Rivera, KBR Group, KBR Fund I, KBR Fund II, and DOES 1 through 20 that the claimed individuality and separateness of those individuals and entities no longer exists. Adherence of the fiction that defendants KBR Group, KBR Fund I, KBR Fund II, and DOES 1 through 20 are separate entities with legally distinct identities would sanction a fraud and promote injustice.

78. Plaintiffs are further informed and believe, and based thereon allege, that at all times mentioned herein KBR Group, KBR Fund I, KBR Fund II and DOES 1 through 20 have been mere shells which Wamstad, Kucinski and Rivera have used, in bad faith, as a conduit for their business, property and affairs. Alternatively, at all times mentioned herein KBR Fund I, KBR Fund II and DOES 1 through 20 have been mere shells which KBR Group has used, in bad faith, as a conduit for their business, property and affairs.

79. If the acts, obligations and liabilities of KBR Group, KBR Fund I, KBR Fund II and DOES 1 through 20 are treated as obligations and liabilities separate from those of Wamstad, Kucinski and Rivera, an inequitable result will follow. Alternatively, if the acts, obligations and liabilities of KBR Fund I, KBR Fund II and DOES 1 through 20 are treated as obligations and liabilities separate from those of KBR Group, an inequitable result will follow.

1 **EIGHTH CAUSE OF ACTION**

2 **(Declaratory Relief - Term Loan Agreement)**

3 86. Plaintiffs incorporate by reference as though set forth herein each and every
4 allegation of paragraphs 1 through 85 above.

5 87. An actual controversy has now arisen between plaintiffs Colony I and Colony II, on
6 the one hand, and defendants KBR and DOES 1-100, on the other, concerning the parties' respective
7 rights and obligations with respect to the June 24, 2008 Term Loan Agreement.

8 88. Specifically, plaintiffs maintain that, pursuant to Section 2.5 of the agreement, the
9 interest payment due in May 2009 is to be withdrawn from the Loan Reserve Amount and that,
10 accordingly, borrowers have no obligation to make a separate interest payment in May 2009.
11 Plaintiffs are informed and believe and thereon allege that defendant KBR disagrees, and instead
12 maintains that the May 2009 interest payment to be made by borrowers under the Term Loan
13 Agreement is not to be made from the Reserve Loan Amount, but that borrowers must make such
14 payments themselves.

15 89. A judicial declaration resolving this dispute is necessary and appropriate.
16 Specifically, plaintiffs Colony I and Colony II request that this court declare that, pursuant to Section
17 2.5 of the Term Loan Agreement, the interest payment due in May 2009 is to be withdrawn from the
18 Loan Reserve Amount and that, accordingly, borrowers have no obligation to make a separate
19 interest payment in May 2009.

20 **NINTH CAUSE OF ACTION**

21 **(Rescission)**

22 90. Plaintiffs incorporate by reference as though set forth herein each and every
23 allegation of paragraphs 1 through 89 above.

24 91. Plaintiffs entered into the June 24, 2008 Term Loan Agreement (Exhibit 1), the
25 KRMW Operating Agreement (Exhibit 2), the associated assignments (Exhibits 3-7), the associated
26 Security Agreement (Exhibit 8), and the November 6, 2008 Letter Agreement (Exhibit 9) as the
27 result of fraud, mistake and duress. Specifically, defendants knew, at the time the agreements were
28

1 entered into, that plaintiffs were experiencing severe cash flow issues, and defendants, by duress,
2 caused plaintiff to enter into agreements which they otherwise would not have agreed to.

3 92. Plaintiffs are further informed and believe and thereon allege that defendant KBR
4 falsely represented, at the time it entered into the agreements, that it intended to meet all obligations
5 thereunder. To the contrary, at the time the agreements were executed, defendant KBR had already
6 determined that it would not comply with their obligations under the agreements, but would instead
7 seek to use its status as lender to plaintiffs, and its status as a member of KRMW, to obtain an
8 interest in HCC and/or The Bridges development for defendants' own benefit, to the exclusion of
9 plaintiffs.

10 93. Defendants' representations, as alleged above, were knowingly false and made with
11 the intent to deceive. Plaintiffs actually and reasonably relied upon the misrepresentations. Had
12 plaintiffs known the true facts, plaintiffs would not have entered into the aforementioned agreements
13 with KBR.

14 94. Plaintiffs have suffered and will continue to suffer substantial harm and injury if the
15 agreements attached hereto as Exhibits 1 through 9 are not rescinded.

16 **TENTH CAUSE OF ACTION**

17 **(Injunctive Relief)**

18 95. Plaintiffs incorporate by reference as though set forth herein each and every
19 allegation of paragraphs 1 through 94 above.

20 96. Plaintiffs will suffer immediate and irreparable harm unless this court immediately
21 enjoins defendant KBR from declaring Colony I and Colony II in default under the June 24, 2008
22 Term Loan Agreement. If injunctive relief is not granted, the collateral provided under such
23 agreement may be compromised and plaintiffs may be subjected to lawsuits or other legal action.
24 Plaintiffs have no adequate remedy at law for the injuries that are threatened.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, plaintiffs pray for judgment as follows:

- 27 1. For damages according to proof;
28 2. For exemplary damages;

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

- 3. For equitable relief;
- 4. For declaratory relief as set forth;
- 5. For rescission;
- 6. For injunctive relief;
- 7. For costs of suit incurred herein; and
- 8. For such other and further relief as the Court may deem just and proper.

Dated: May 22, 2009

SULLIVAN, HILL, LEWIN, REZ & ENGEL
A Professional Law Corporation

By: _____
Jonathan S. Dabbieri
Attorneys for Plaintiffs Briarwood
Capital, LLC, Nicolas Marsch III,
Colony Properties International, LLC,
and Colony Properties International II