

1 Richard D. McCune (#132124)  
rdm@mccunewright.com  
2 David C. Wright (#177468)  
dcw@mccunewright.com  
3 Jae (Eddie) K. Kim (#236805)  
jkk@mccunewright.com  
4 MCCUNEWRIGHT LLP  
5 2068 Orange Tree Lane, Suite 216  
Redlands, California 92374  
6 Ph: (909) 557-1250 / F: (909) 557-1275

7 Mitchell M. Breit (*Pro Hac Vice*)  
mbreit@hanlyconroy.com  
8 Andrea Bierstein (*Pro Hac Vice*)  
abierstein@hanlyconroy.com  
9 Jayne Conroy (*Pro Hac Vice*)  
jconroy@hanlyconroy.com  
10 HANLY CONROY BIERSTEIN  
11 SHERIDAN FISHER & HAYES LLP  
12 112 Madison Avenue  
New York, New York 10016-7416  
13 Ph: (212) 784-6400 / F: (212) 213-5949

Derek Y. Brandt (*Pro Hac Vice*)  
dbrandt@simmonsfirm.com  
SIMMONS BROWDER GIANARIS  
ANGELIDES & BARNERD LLC  
One Court Street  
Alton, Illinois 62002  
Ph: (618) 259-2222  
F: (618) 259-2251

14 Attorneys for Plaintiffs SOLOMON KELLY and JAMES MOLINA, and all others  
15 similarly situated,

16 UNITED STATES DISTRICT COURT  
17 CENTRAL DISTRICT OF CALIFORNIA

18 SOLOMON KELLY, JAMES MOLINA, as  
19 individuals and on behalf of all other  
similarly situated,

20 Plaintiffs,

21 v.

22 BEAZER HOMES USA, INC.; BEAZER  
HOMES HOLDINGS CORP.; and DOES 1  
23 through 10, inclusive,

24 Defendants.

Case No.: ED CV 09-1674 VAP (DTBx)  
Judge: Hon. Virginia A. Phillips

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO  
DEFENDANTS' MOTION TO STRIKE  
PORTIONS OF PLAINTIFFS' SECOND  
AMENDED COMPLAINT**

Date: January 30, 2012  
Time: 2:00 p.m.  
Courtroom: 2

Original Complaint Filed: 9/3/2009  
Second Amended Complaint Filed:  
12/2/2011

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

**TABLE OF CONTENTS**

|  | <i>Page</i> |
|--|-------------|
| TABLE OF AUTHORITIES.....  | II          |
| I. INTRODUCTION .....  | 1           |
| II. LEGAL STANDARD.....  | 2           |
| III. ARGUMENT .....  | 2           |
| A. DEFENDANTS’ MOTION TO STRIKE OR “NARROW” PRAYERS FOR<br>RELIEF SHOULD BE DENIED ..... | 2           |
| B. DEFENDANTS’ MOTION TO STRIKE PLAINTIFFS’ CLASS ALLEGATIONS<br>SHOULD BE DENIED .....  | 2           |
| C. PLAINTIFFS SHOULD BE GRANTED LEAVE TO AMEND IF NECESSARY ....                         | 3           |
| IV. CONCLUSION.....  | 3           |

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

**TABLE OF AUTHORITIES**

*Page*

**Cases**

*Collins v. Gamestop Corp.*,  
2010 WL 3077671 (N.D. Cal. Aug. 6, 2010) .....3

*Utility Consumers' Action Network v. Sprint Solutions, Inc.*,  
259 F.R.D. 484 (S.D. Cal.2009) .....3

1 Plaintiffs Solomon Kelly and James Molina, on behalf of themselves and all  
2 others similarly situated (“Plaintiffs”), submit this Memorandum of Points and  
3 Authorities in Opposition to Defendants’ Motion to Strike Nationwide Class  
4 Allegations from Plaintiffs’ Second Amended Complaint (“SAC”).

5 As further designated below, Plaintiffs in this action incorporate herein by  
6 reference certain sections, including arguments and authority, from the  
7 Memorandum of Points & Authorities in Opposition to Defendants’ Motion to  
8 Strike Portions of Plaintiffs’ Second Amended Complaint (“Opposition to Motion  
9 to Strike”) filed concurrently by the plaintiffs in *Stephens v. Lennar Corp.*, No. ED  
10 CV 09-1668 VAP (DTBx), also pending before this Court. Plaintiffs also  
11 incorporate herein by reference one section, including arguments and authority,  
12 from the Opposition to Motion to Strike filed concurrently in *Maya v. Centex*  
13 *Corporation*, No. ED CV 09-1671 VAP (DTBx), also pending before this Court.<sup>1</sup>

14 **I. INTRODUCTION**

15 Plaintiffs incorporate herein by reference the Introduction section of the  
16 Opposition to Motion to Strike filed concurrently in *Stephens v. Lennar Corp.*, No.  
17 ED CV 09-01668 VAP (DTBx), also pending before this Court.

18 The Beazer Defendants move to strike only Plaintiffs’ nationwide class  
19 allegations. The motion should be denied.<sup>2</sup>

20 <sup>1</sup> Where incorporated sections of the *Stephens v. Lennar*, *Maya v. Centex*, or *Oneto*  
21 *v. Ryland* Oppositions contain references or citations to the Second Amended  
22 Complaint in those cases, Plaintiffs incorporate by reference herein the  
23 corresponding and substantially similar allegations of their own Second Amended  
Complaint, the “*Kelly SAC*.” Should the Court prefer precise citations to  
paragraphs in the *Kelly SAC*, Plaintiffs can provide those citations.

24 <sup>2</sup> As indicated in the body of this opposition and in response to Beazer’s specific  
25 arguments, Plaintiffs incorporate herein portions of the oppositions to motions to  
26 strike filed concurrently in *Stephens v. Lennar Corp.*, No. ED CV 09-1668 VAP  
27 (DTBx) and in *Maya v. Centex Corporation*, No. 09-CV-1671. Footnote 1 of  
28 Beazer’s Notice of Motion indicates that Beazer also incorporates the argument of  
the Lennar Defendants on the motion to strike class allegations, as well as,  
apparently, all arguments of the Ryland Defendants including the arguments that  
Plaintiffs’ prayer for punitive damages should be stricken. As this is somewhat  
ambiguous, Plaintiffs, in an abundance of caution, incorporate herein in response to  
this both the Opposition to Motion to Strike concurrently filed in *Stephens*, and the

1 **II. LEGAL STANDARD**

2 Plaintiffs incorporate herein by reference the Legal Standard section of the  
3 Opposition to Motion to Strike filed concurrently in *Stephens v. Lennar Corp.*, No.  
4 ED CV 09-01668 VAP (DTBx), also pending before this Court.

5 **III. ARGUMENT**

6 **A. DEFENDANTS’ MOTION TO STRIKE OR “NARROW” PRAYERS FOR**  
7 **RELIEF SHOULD BE DENIED**

8 Plaintiffs incorporate herein by reference Argument Section III.A. of the  
9 Opposition to Motion to Strike filed concurrently in *Stephens v. Lennar Corp.*, No.  
10 ED CV 09-01668 VAP (DTBx), also pending before this Court.

11 Plaintiffs also incorporate herein by reference Argument Section III.A. of the  
12 Opposition to Motion to Strike filed concurrently in *Maya v. Centex Corporation*,  
13 No. ED CV 09-1671 VAP (DTBx), also pending before this Court. The *Maya*  
14 opposition contains the lead opposition to the motion by several defendants,  
15 including Centex, Ryland (and, by incorporation, Beazer), to strike Plaintiffs’  
16 prayer for punitive damages.

17 **B. DEFENDANTS’ MOTION TO STRIKE PLAINTIFFS’ CLASS ALLEGATIONS**  
18 **SHOULD BE DENIED**

19 Plaintiffs incorporate herein by reference Argument Section III.C. of the  
20 Opposition to Motion to Strike filed concurrently in *Stephens v. Lennar Corp.*, No.  
21 ED CV 09-01668 VAP (DTBx), also pending before this Court.

22 Just as Defendants cannot establish at the current juncture that no class may  
23 ever be certified consistent with the Due Process Clause, nor can they demonstrate  
24 that no class can survive under the Commerce Clause and Full Faith and Credit  
25 Clause. As discussed in detail in the *Stephens v. Lennar Corp.* brief, Plaintiffs have  
26 pled claims alternatively under California law as well as other states’ laws. (*Kelly*

27 *Opposition to Motion to Strike* concurrently filed in *Oneto v. The Ryland Group,*  
28 *Inc.*, No. ED CV 09-1670 VAP (DTBx).

1 SAC at ¶ 113.) Discovery is necessary to determine the extent to which other  
2 states' laws come into play for purposes of class certification as well as to examine,  
3 for instance, whether the factual record will support certification of class(es) in  
4 groupings or under multi-state law. Therefore, Defendants' challenges under the  
5 Commerce Clause and Full Faith and Credit Clause are premature and may be  
6 rendered moot as a result of subsequent decisions in the direction of the case  
7 pursuant to the results of the appropriate discovery. In any event, these arguments  
8 do not compel the conclusion Defendants desire at the present posture and the  
9 motion should be denied.<sup>3</sup>

10 **C. PLAINTIFFS SHOULD BE GRANTED LEAVE TO AMEND IF NECESSARY**

11 Plaintiffs incorporate by reference herein Argument Section III.E. of the  
12 Opposition to Motion to Strike filed concurrently in *Stephens v. Lennar Corp.*, No.  
13 ED CV 09-01668 VAP (DTBx), also pending before this Court.

14 **IV. CONCLUSION**

15 For the foregoing reasons, Defendants' motion to strike should be denied in  
16 its entirety.

17 Dated: January 9, 2012.

SIMMONS BROWDER GIANARIS ANGELIDES &  
BARNERD LLC

19 By: /s/ Derek Y. Brandt  
20 Derek Y. Brandt (*pro hac vice*)  
21 Attorneys for Plaintiffs

22 <sup>3</sup> Defendants also cite *Utility Consumers' Action Network v. Sprint Solutions, Inc.*,  
23 259 F.R.D. 484 (S.D. Cal. 2009) for the proposition that a nationwide class based  
24 on California law would violate the due process rights of nonresident members.  
25 However, in that case, the plaintiffs sought class certification of a nationwide class  
26 solely under California law, 259 F.R.D. at 487, whereas in the case at hand,  
27 Plaintiffs have pled other or multiple states' laws in the alternative. The same  
28 reasoning was applied by the court in *Collins v. Gamestop Corp.*, 2010 WL  
3077671 (N.D. Cal. Aug. 6, 2010), with respect to certification of the plaintiff's  
UCL claim. However, the court there refused to strike nationwide class allegations  
for the plaintiff's common law fraud claims as those claims were based on  
omissions, thus giving rise to a presumption of reliance and defeating arguments  
that certifying a nationwide fraud class is too individualized. 2010 WL 3077671, at  
\*3.