

Hunton & Williams LLP
550 South Hope Street, Suite 2000
Los Angeles, California 90071-2627

1 Phillip J. Eskenazi, Esq. (SBN 158976)
Email: peskenazi@hunton.com
2 Kirk A. Hornbeck, Esq. (SBN 241708)
Email: khornbeck@hunton.com
3 **HUNTON & WILLIAMS LLP**
4 550 South Hope Street, Suite 2000
Los Angeles, California 90071-2627
5 Telephone: (213) 532-2000
Facsimile: (213) 532-2020

6 Lawrence J. Bracken, II (*Admitted Pro Hac Vice*)
Email: lbracken@hunton.com
7 **HUNTON & WILLIAMS LLP**
8 Bank of America Plaza, Suite 4100
600 Peachtree Street, NE
Atlanta, Georgia 30308
9 Telephone: (404) 888-4000
10 Facsimile: (404) 888-4190

11 Attorneys for Defendants
12 BEAZER HOMES USA, INC. and
BEAZER HOMES HOLDINGS CORP.

13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15
16 SOLOMON KELLY and JAMES
MOLINA, as individuals and on behalf
17 of all others similarly situated,

18 Plaintiffs,

19 v.

20
21 BEAZER HOMES USA, INC.;
22 BEAZER HOMES HOLDINGS
CORP.; and DOES 1 through 10,
inclusive,

23 Defendants.
24
25

CASE NO.: ED CV 09-01674 VAP (DTBx)

**DEFENDANTS BEAZER HOMES USA,
INC. AND BEAZER HOMES
HOLDINGS CORP.'S NOTICE OF
MOTION AND MOTION TO STRIKE
NATIONWIDE CLASS
ALLEGATIONS; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

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

Action Filed: September 3, 2009

Hunton & Williams LLP
550 South Hope Street, Suite 2000
Los Angeles, California 90071-2627

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TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Monday, January 30, 2012, at 2:00 p.m., or as soon thereafter as the matter may be heard in Department 2 of the above-referenced Court, located at 3470 12th Street, Riverside, California 92501, Defendants Beazer Homes USA, Inc. and Beazer Homes Holdings Corp. (collectively, “the Beazer Defendants”) will, and hereby do, move to strike portions of Plaintiffs’ Second Amended Complaint (“SAC”) regarding nationwide class allegations pursuant to Federal Rule of Civil Procedure 12(f).

Specifically, the Beazer Defendants request that the following allegations be stricken from the SAC:

Paragraph 85:

“Plaintiffs bring their claims on behalf of a nationwide class of similarly-situated homebuyers. The [n]ationwide class is defined as follows:

All persons who purchased a new home from any Beazer entity from January 1, 2004, through December 31, 2006, and borrowed or financed less than 90% of the purchase price of the house.”

Paragraph 99:

“On information and belief, most states where Defendants sold houses had similar disclosure requirements.”

Paragraph 113:

“. . . and other similar state unfair competition and unlawful business practices statutes.”

Prayer for Relief, Paragraph A:

“A. certifying the Nationwide Class and appointing Plaintiffs and their counsel to represent the Class[.]”

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Los Angeles, California 90071-2627

1 The Beazer Defendants’ Motion is based on the following grounds: *First*,
2 maintaining a nationwide class and applying California law to transactions between
3 non-California parties that occurred outside California would violate the Fourteenth
4 Amendment’s Due Process Clause. *Second*, it would run afoul of the Commerce
5 Clause. *Third*, it would not comport with the Full Faith and Credit Clause.
6 Accordingly, this Court should strike the nationwide class allegations in Plaintiffs’
7 SAC.

8 This Motion is based upon this Notice of Motion and Motion, the attached
9 Memorandum of Points and Authorities, the pleadings and papers on file, and upon
10 such oral argument as may be made at the hearing on the Motion.¹

11 This Motion is made following the conference of counsel pursuant to Local
12 Rule 7-3 that took place on December 16, 2011.

14 Dated: December 22, 2011

HUNTON & WILLIAMS LLP

17 By /s/ Phillip J. Eskenazi
18 Phillip J. Eskenazi
19 Attorneys for Defendants
20 BEAZER HOMES USA, INC., and
21 BEAZER HOMES HOLDINGS CORP.

25 _____
26 ¹ Plaintiffs’ nationwide class allegations should also be stricken for the reason that they cannot
27 satisfy the elements of Federal Rule of Civil Procedure 23. On this point, the Beazer Defendants
28 incorporate herein by reference the arguments advanced by the Lennar Defendants in their motion to
strike. The Beazer Defendants also incorporate herein by reference the arguments, including the
arguments that Plaintiffs’ prayer for punitive damages should be stricken, advanced by The Ryland
Group Defendants.

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 550 South Hope Street, Suite 2000
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550 South Hope Street, Suite 2000
Los Angeles, California 90071-2627

MEMORANDUM OF POINTS AND AUTHORITIES

In the event this Court does not grant their concurrently filed motion to dismiss, Defendants Beazer Homes USA, Inc. and Beazer Homes Holdings Corp. (collectively, “the Beazer Defendants”) move to strike Plaintiffs’ nationwide class allegations, pursuant to Federal Rule of Civil Procedure 12(f). The Beazer Defendants do not challenge Plaintiffs’ ability to pursue their claims on behalf of a California class at this time.

I. INTRODUCTION

Plaintiffs Solomon Kelly and James Molina (collectively, “Plaintiffs”) allege they purchased new homes from the Beazer Defendants, which Plaintiffs allege are non-California entities that construct and sell homes throughout the United States. Plaintiffs purport to bring a nationwide class action. Simply put, Plaintiffs’ Second Amended Complaint (“SAC”), like the previous complaints, improperly attempts to assert California claims against non-California defendants, largely on behalf of non-California residents, for transactions that occurred largely outside of California. Plaintiffs, however, do not attempt to allege facts that would make an extraterritorial application of California law comport with the Constitution of the United States. Nor does Plaintiffs’ SAC make any attempt to cure the constitutional defects that made the prior Complaints’ nationwide class allegations defective. In fact, in an apparent concession regarding the overreaching and improper scope of their purported class, Plaintiffs plead an alternative California class. Regardless, Plaintiffs’ proposed nationwide class remains unconstitutional, and thus untenable, for the following reasons:

First, maintaining a nationwide class would violate the Fourteenth Amendment’s Due Process Clause because: (1) state laws governing Plaintiffs’ asserted claims substantively conflict; (2) California lacks sufficient contacts with each non-resident’s claims; and (3) an extraterritorial application of California law would preclude the non-residents from availing themselves of the laws of their

1 respective states. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-24, 105 S. Ct.
2 2965 (1985).

3 *Second*, maintaining a nationwide class would violate the Commerce Clause
4 because an extraterritorial application of California law to the non-residents' claims
5 would impermissibly regulate out-of-state activity and impinge on other states'
6 sovereignty. *Healy v. Beer Inst.*, 491 U.S. 324, 336-37, 109 S. Ct. 2491 (1989).

7 *Third*, maintaining a nationwide class would not comport with the Full Faith
8 and Credit Clause for the same reasons that maintaining the proposed nationwide class
9 would violate due process. *Shutts*, 472 U.S. at 822.

10 The impropriety of Plaintiffs' proposed nationwide class is evident on the face
11 of the SAC. It would be manifestly inequitable under these circumstances to allow
12 these defective allegations to stand and to require the Beazer Defendants to undergo
13 discovery on a nationwide basis. Indeed, as detailed herein, numerous courts have
14 stricken nationwide class allegations at the outset of litigation, where, as here, their
15 unconstitutionality is clear. Accordingly, this Court should strike Plaintiffs'
16 nationwide class allegations.

17 **II. FACTUAL ALLEGATIONS**

18 Plaintiffs seek to represent a nationwide class defined as: "All persons who
19 purchased a new home from any Beazer entity from January 1, 2004, through
20 December 31, 2006, and borrowed or financed less than 90% of the purchase price of
21 the house." SAC ¶ 85. In the alternative, however, if "the Court determines that a
22 nationwide class is not warranted," Plaintiffs seek to represent a class of home buyers
23 "who purchased a new home located in California from any Beazer entity from
24 January 1, 2004 through December 31, 2006, and borrowed or financed less than 90%
25 of the purchase price of the house." SAC ¶ 87.

26 Plaintiffs assert five causes of action under California state law: (1) fraud;
27 (2) violation of California Business & Professions Code Section 17200, *et seq.*
28 ("Section 17200"); (3) violation of California Business & Professions Code Section

1 17500, *et seq.* (“Section 17500”); (4) negligent misrepresentation; and (5) breach of
 2 the implied covenant of good faith and fair dealing. The gravamen of Plaintiffs’ SAC
 3 is that the Beazer Defendants induced Plaintiffs and the putative class members to
 4 purchase houses through alleged misrepresentations and omissions about the
 5 neighborhoods’ stability and desirability. *See, e.g.*, SAC ¶¶ 1, 24-25, 32-33 (alleging
 6 a “scheme” “to increase the number of houses sold”).

7 **III. ARGUMENT**

8 **A. Legal Standard On Motion To Strike**

9 A defendant may move to strike from a complaint “any redundant, immaterial,
 10 or impertinent and scandalous matter.” Fed. R. Civ. P. 12(f). The function of a
 11 motion to strike “is to avoid the expenditure of time and money that must arise from
 12 litigating spurious issues by dispensing with those issues prior to trial.”
 13 *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). Under Rule
 14 12(f), a defendant may move to strike class allegations prior to discovery where the
 15 complaint demonstrates that a class action cannot be maintained on the facts alleged.
 16 *Sanders v. Apple Inc.*, No. C 08-1713, 2009 WL 150950, at *9 (N.D. Cal. Jan. 21,
 17 2009); *see Stearns v. Select Comfort Retail Corp.*, No. 08-2746, 2008 WL 4542967, at
 18 *8 (N.D. Cal. Oct. 1, 2008) (striking nationwide class allegations at the pleading
 19 stage); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011,
 20 1027-28 (N.D. Cal. 2007) (same); *Util. Consumers’ Action Network v. Powernet*
 21 *Global Commc’n*, Case No. 06-CV1773, 2006 U.S. Dist LEXIS 78546, at *18 (S.D.
 22 Cal. Oct. 20, 2006) (same).

23 **B. Plaintiffs’ Proposed Nationwide Class Violates The Fourteenth** 24 **Amendment’s Due Process Clause**

25 The Fourteenth Amendment’s Due Process Clause provides that “[n]o State
 26 shall . . . deprive any person of life, liberty, or property, without due process of law.”
 27 U.S. Const. amend. XIV, § 1. The Supreme Court of the United States has held that
 28 applying a forum state’s substantive law to a nationwide class, when the alleged

1 conduct had little to do with the forum, violates due process. *See Shutts*, 472 U.S. at
2 821-24. Under the *Shutts* framework, courts test the constitutionality of a nationwide
3 class by determining: (1) whether the forum state’s law conflicts with the law of
4 another jurisdiction that has an interest in the case, and (2) whether there is a sufficient
5 nexus between the non-resident putative class members and the forum state. *Id.* at
6 816-819.

7 Federal district courts sitting in California have adopted and applied the *Shutts*
8 test to strike nationwide class allegations. *See, e.g., Graphics Processing*, 527 F.
9 Supp. 2d at 1027-28 (adopting *Shutts*’ analytical framework to strike nationwide class
10 allegations); *Util. Consumers’ Action*, 2006 U.S. Dist LEXIS 78546, at *17-18
11 (holding that “[a]pplying the forum state’s laws to parties located beyond the state’s
12 borders, who have no relationship with the forum state, would abrogate the parties’
13 rights under the Due Process and Full Faith and Credit [C]lauses.”) (citing *Shutts*, 472
14 U.S. at 822) (emphasis omitted).

15 In *Graphics Processing*, the plaintiffs attempted to bring claims on behalf of a
16 nationwide class under California’s Cartwright Act and Section 17200. 527 F. Supp.
17 2d 1011. The defendants moved to strike the plaintiffs’ nationwide class allegations
18 on the ground that an extraterritorial application of California law would violate the
19 Fourteenth Amendment’s Due Process Clause. *Id.* at 1027. The court rejected the
20 plaintiffs’ argument that the issue was “a mere choice-of-law issue under California
21 law,” and deemed the issue to be of a constitutional dimension. *Id.* The court
22 confirmed that the *Shutts* test “deals with whether the application of a certain state’s
23 law to a nationwide class violates due process and the full faith and credit clause.” *Id.*

24 Applying the *Shutts* framework, the court found a conflict among the states’
25 laws because some states had passed *Illinois Brick* repealer statutes, which expressly
26 permit indirect purchasers to recover damages for antitrust violations under state law,
27 while other states had not. *Id.* Thus, in some states indirect purchasers would be
28 permitted to recover damages, but not in others. *Id.* Under the second prong, the

1 *Graphics Processing* court found an insufficient nexus between California and the
 2 non-residents because “not all plaintiffs have alleged that they bought graphics cards
 3 in California, or that defendants produced graphics cards in California, or even that
 4 the alleged secret meetings between defendants’ representatives took place in
 5 California.” *Id.* In striking the nationwide class allegations, the court declined to
 6 have the other states’ laws “tossed overboard and their residents remitted to California
 7 law for transactions that, for individual consumers, are local in nature.” *Id.*

8 Following *Shutts* and *Graphics Processing*, it is clear that Plaintiffs’ proposed
 9 nationwide class herein would violate the parties’ due process rights because:
 10 (1) state laws governing Plaintiffs’ five causes of action conflict; (2) California lacks
 11 significant contacts with each non-resident’s claims; and (3) imposing California law
 12 on the non-residents would prevent them from availing themselves of their states’
 13 laws.

14 **1. California Law Substantively Conflicts With Other States’**
 15 **Laws On Plaintiffs’ Claims**

16 To analyze due process under *Shutts*, a court must first determine if the states’
 17 laws conflict. *Shutts*, 472 U.S. at 816; *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120
 18 (8th Cir. 2005) (interpreting *Shutts*); *Graphics Processing*, 527 F. Supp. 2d at 1027-28
 19 (finding a conflict between California’s antitrust laws and other states’ laws); *Util.*
 20 *Consumers’ Action*, 2006 U.S. Dist LEXIS 78546, at *18 (finding a conflict between
 21 various California laws and other states’ laws). This initial inquiry requires an
 22 individualized choice of law analysis for *each* class member to ensure constitutional
 23 compliance.² *In re St. Jude Med., Inc.*, 425 F.3d at 1120 (reversing certification
 24 because the trial court failed to conduct an individualized choice of law analysis for
 25

26 ² Due to obvious manageability concerns, the requisite individualized determinations provide an
 27 alternate basis for this Court to strike the nationwide class allegations. *See, e.g., Stearns*, 2008 WL
 28 4542967, at * 8 (granting a motion to dismiss or strike nationwide class allegations on ground that
 “the many differences in state laws, both fraud and warranty claims[,] are difficult to maintain on a
 nationwide basis.”).

1 each class member). Here, Plaintiffs' proposed nationwide class would violate due
 2 process because the California laws that Plaintiffs rely on substantively conflict with
 3 other states' laws.

4 **2. California's Common Law Of Fraud Conflicts With The**
 5 **Common Law In Other States**

6 Common law fraud materially varies from state to state. *Simon v. Merrill*
 7 *Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 883 (5th Cir. 1973) (observing
 8 that states have "various . . . standards" regarding fraud claims); *Lewis Tree Serv., Inc.*
 9 *v. Lucent Techs. Inc.*, 211 F.R.D. 228, 236 (S.D.N.Y. 2002) ("The elements of
 10 [common law] fraud vary greatly from state to state, with respect to elements
 11 including mitigation, causation, damages, reliance, and the duty to disclose.");
 12 *Zandman v. Joseph*, 102 F.R.D. 924, 929 (N.D. Ind. 1984) (stating that "fraud law
 13 among the states can differ significantly").

14 Moreover, fraud in California materially conflicts with the law of fraud in other
 15 states. *Rivera v. Bio Engineered Supplements & Nutrition, Inc.*, No. SACV 07-1306,
 16 2008 U.S. Dist. LEXIS 95083, at *5 (C.D. Cal. Nov. 13, 2008) (holding that "that
 17 there are material conflicts between the California law of . . . fraud and the laws of the
 18 other states."). For example, to state a claim for fraud under California law, the
 19 plaintiff must establish an "intent to deceive,"³ while other states do not have a similar
 20 requirement.⁴ Additionally, the standards for determining materiality differ: Like
 21 some other states, California applies an objective "reasonable person" test,⁵ while
 22 others apply a subjective "but for" test that considers whether the alleged fraud
 23 actually induced the plaintiff to act.⁶ Moreover, in omissions cases, standards differ

24 ³ *Mendoza v. Ruesga*, 169 Cal. App. 4th 270, 284 (2008).

25 ⁴ *See, e.g., Foiles v. Midwest Street Rod Ass'n*, 578 N.W.2d 418, 422 (Neb. 1998); *Ware v. Scott*,
 257 S.E.2d 855, 857 n.2 (Va. 1979).

26 ⁵ *In re Tobacco II Cases*, 46 Cal. 4th 298, 327 (2009) ("A misrepresentation is judged to be material
 27 if a reasonable man would attach importance to its existence . . ."); *Koch v. Koch Indus.*, 203 F.3d
 1202, 1230 (10th Cir. 2000); *Spitale v. Smith*, 721 So. 2d 341, 345 (Fla. App. 1998); 2 *Fifth Ave.*
 28 *Tenants Ass'n v. Abrams*, 583 N.Y.S.2d 466, 467 (App. Div. 1992).

⁶ *See, e.g., Fisher v. Yates*, 953 S.W.2d 370, 378 (Tex. App. 1997).

1 regarding the knowledge the defendant must have had about the undisclosed
 2 information. In California, a common law duty to disclose arises when the seller
 3 knows of facts materially affecting the value or desirability of the property when such
 4 facts are not known to, or within the reach of, the buyer,⁷ while others consider
 5 whether the defendant should have known.⁸ In sum, the law on fraud materially varies
 6 across California and other states.

7 **3. Sections 17200 And 17500 Conflict With The Consumer**
 8 **Protection Statutes In Other States**

9 Section 17200 and Section 17500, as well as the other sections of the Business
 10 and Professions Code, constitute California's "Little FTC Act."⁹ *Myers v. Merrill*
 11 *Lynch & Co., Inc.*, No. C-98-3532, 1999 WL 696082, at *6 (N.D. Cal. Aug. 23,
 12 1999). While every state has a "Little FTC Act," these consumer protection statutes
 13 vary considerably from state to state. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S.
 14 559, 568-69, 16 S. Ct. 1589 (1996) (noting that state deceptive trade practices laws are
 15 not uniform); *In re Charles Schwab Corp. Sec. Litig.*, 264 F.R.D. 531, 538 (N.D. Cal.
 16 2009) (holding nationwide class for Section 17200 claims inappropriate because, *inter*
 17 *alia*, "[s]tate 'Little FTC Acts' are far from uniform.") (citing *Tracker Marine. v.*
 18 *Ogle*, 108 S.W.3d 349, 352-55 (Tex. App. 2003)).

19 The *Tracker* court, for example, identified and summarized variations among
 20 these statutes. 108 S.W.3d at 352-54. Unlike California, some states: (1) prohibit or
 21 limit private rights of action,¹⁰ (2) prohibit or limit the availability of class actions,¹¹

22 _____
 23 ⁷ *Shapiro v. Sutherland*, 64 Cal. App. 4th 1534, 1544 (1998); *see also Wedig v. Brinster*, 469 A.2d
 783, 788 (Conn. App. 1983); *Frazier v. Southwest S&L*, 653 P.2d 362, 367 (Ariz. App. 1982).

24 ⁸ *Castillo v. Neeley's TEA Dealer Supply*, 776 S.W.2d 290, 295-96 (Tex. App. 1989).

25 ⁹ California's "Little FTC Act" mirrors its federal counterpart, the Federal Trade Commission
 ("FTC") Act, 15 U.S.C. § 45, *et seq.* *Bowen v. Ziasun Tech., Inc.*, 116 Cal. App. 4th 777, 786
 (2004).

26 ¹⁰ *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 229 (Iowa 1998) (holding no
 private cause of action under Iowa consumer protection statute); Nev. Rev. Stat. § 598.0977
 (allowing private actions only by the elderly or disabled).

27 ¹¹ *See* Ala. Code § 8-19-10(f) (prohibiting class actions); Ga. Code Ann. § 10-1-399(a) (same); La.
 28 Rev. Stat. Ann. § 51:1409 (same); Miss. Code Ann. § 75-24-15(4) (same); Mont. Code Ann. § 30-

1 (3) have shorter or longer statutes of limitations,¹² and (4) prohibit exemplary
 2 damages,¹³ among other differences.¹⁴ Consumer protection laws in other states
 3 clearly differ materially from Section 17200 and Section 17500.

4 **4. California's Common Law Of Negligent Misrepresentation**
 5 **Conflicts With The Common Law In Other States**

6 Similarly, California's common law of negligent misrepresentation conflicts
 7 with other states' common law. Some states do not even recognize negligent
 8 misrepresentation as a distinct tort.¹⁵ In California and some other states that do
 9 recognize negligent misrepresentation as a distinct tort, a cause of action for negligent
 10 failure to disclose is not recognized.¹⁶ Other states, however, not only recognize this
 11 claim, but have varying standards for when a duty to disclose arises: some find a duty
 12 to disclose if it is "reasonably foreseeable" that harm will result from nondisclosure,¹⁷
 13 while others find no duty unless the parties are in a "fiduciary relationship."¹⁸ Some
 14 states consider whether a party had a "statutory duty" to disclose,¹⁹ while others look
 15 to whether the parties are in a "special relationship,"²⁰ and still others find a duty to

16
 17 14-133(1); S.C. Code Ann. § 39-5-140(a) (same); Kan. Stat. Ann. § 50-634(d) (limiting class actions
 18 to certain consumer claims).

19 ¹² Compare Cal. Bus. & Prof. Code § 17208 (four years), with La. Rev. Stat. Ann. § 51:1409(E) (one
 20 year); Or. Rev. Stat. § 646.638 (same); Tenn. Code Ann. § 47-18-110 (same); Wyo. Stat. Ann. § 40-
 21 12-109 (same); Mich. Comp. Laws § 445.911(7) (six years).

22 ¹³ *CitaraManis v. Hallowell*, 328 Md. 142, 613 A.2d 964, 970 (1992); *Wyman v. Terry Schulte*
 23 *Chevrolet, Inc.*, 584 N.W.2d 103, 107 (S.D. 1998).

24 ¹⁴ Among the several states, there are also variations in: (1) what constitutes a violation; (2) scienter
 25 requirements; and (3) reliance requirements.

26 ¹⁵ See, e.g., *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674 (7th Cir. 2001) (vacating order
 27 granting certification of nationwide class after observing, *inter alia*, that Connecticut law recognizes
 28 negligent misrepresentation as a distinct tort while Indiana does not).

¹⁶ *Evan F. v. Hughson United Methodist Church*, 8 Cal. App. 4th 828, 840-41 (1992) ("The tort of
 negligent misrepresentation requires a 'positive assertion' and does not apply to implied
 misrepresentations."); *Sundown, Inc. v. Pearson Real Estate Co.*, 8 P.3d 324, 332 (Wyo. 2000)
 ("Wyoming does not recognize a cause of action for negligent nondisclosure").

¹⁷ *Ramsden v. Farm Credit Servs.*, 590 N.W.2d 1, 5 (Wis. App. 1998).

¹⁸ *Wyner v. Athens Util. Bd.*, 821 S.W.2d 597, 599 (Tenn. App. 1991).

¹⁹ *Binette v. Dyer Library Ass'n*, 688 A.2d 898, 903 (Me. 1996).

²⁰ *Carson v. Gen. Motors Acceptance Corp.*, No. 40519-5-I, 1998 WL 62806, at *2 (Wash. App.
 Feb. 17, 1998).

1 disclose only when the defendant is “in the business of supplying information for the
2 guidance of others in business transactions.”²¹ Accordingly, California law is
3 materially different from other states regarding negligent misrepresentation.

4 **5. California’s Implied Covenant Of Good Faith And Fair**
5 **Dealing Conflicts With Implied Covenants In Other States**

6 The several states also materially vary in their treatment of the implied
7 covenant of good faith and fair dealing. In California, a plaintiff is not required to
8 make a showing that the defendant acted outside the range of accepted commercial
9 practices to state a claim for breach of the implied covenant, but, *e.g.*, Montana by
10 contrast requires such a showing by statute.²² States also vary in their treatment of
11 bad faith. Some states merely require a bad faith act by the defendant,²³ while other
12 states also require a bad motive.²⁴ Indeed, sometimes “bad faith” requires a showing
13 that the defendant’s actions are intentionally malicious,²⁵ but most states do not have a
14 similar requirement. Moreover, most states decline to find a breach of the implied
15 covenant absent breach of an express contractual term,²⁶ but other states allow a
16 plaintiff to recover for breach of the implied covenant even without a breach of a
17 specific contractual term.²⁷ Finally, some states, such as California, do not permit an
18 award of punitive damages for a breach of the implied covenant,²⁸ while certain other
19
20
21

22 ²¹ *Orix Credit Alliance v. Taylor Mach. Works*, 125 F.3d 468, 475 (7th Cir. 1997).

23 ²² Mont. Code Ann. § 28-1-211; *Mann Farms, Inc. v. Traders State Bank of Poplar, Mont.*, 245
24 Mont. 234, 801 P.2d 73 (1990).

25 ²³ *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275 (3d Cir. 2000) (applying New
26 Jersey law).

27 ²⁴ *Mullowney v. Data Gen. Corp.*, 143 F.3d 1081 (7th Cir. 1998).

28 ²⁵ *Am.’s Favorite Chicken Co. v. Cajun Enters., Inc.*, 130 F.3d 180 (5th Cir. 1997)

²⁶ *Griffith v. Levi Strauss & Co.*, 85 F.3d 185 (5th Cir. 1996) (applying Texas law).

²⁷ *Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932 (9th Cir. 1999) (applying California law).

²⁸ *Spinks v. Equity Residential Briarwood Apartments*, 171 Cal. App. 4th 1004, 1055 (2009); *Bishop v. Inacom, Inc.*, No. A. 99-664, 1999 WL 1416919, at *11 (D.N.J. Dec. 1, 1999) (dismissing punitive damages because breach of implied covenants not sufficient for punitive damages).

Hunton & Williams LLP
550 South Hope Street, Suite 2000
Los Angeles, California 90071-2627

1 states do.²⁹ Implied covenant claims are thus materially different among the states in
2 Plaintiffs’ proposed class.

3 **6. Insufficient Contacts Exist To Apply California Law To All**
4 **Claims Nationwide**

5 Nor can Plaintiffs establish that California has sufficient contacts with the
6 non-resident putative class members to permit an extraterritorial application of its
7 laws in a manner consistent with the Constitution. If other states’ laws are materially
8 different from California’s, then California “must have ‘a significant contact or
9 significant aggregation of contacts’ to the claims of *each member of the plaintiff class*
10 . . . to ensure that the choice of [its] law is not arbitrary or unfair.” *See Shutts*, 472
11 U.S. at 821-22 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13, 101 S. Ct.
12 633 (1981)) (emphasis added); *see also Util. Consumers’ Action*, 2006 U.S. Dist
13 LEXIS 78546 at *17 (striking nationwide class allegations where “many” putative
14 class members “have had no contact” with California). Here, the non-residents’
15 claims do not have sufficient contacts with California to satisfy due process.

16 *First*, as Plaintiffs expressly allege, the Beazer Defendants conduct business
17 across the United States. The majority of potential class members reside in other
18 states. This alone raises grave constitutional concerns. *See Graphics Processing*, 527
19 F. Supp. 2d at 1028 (finding insufficient contacts to warrant the application of
20 California law to other states where plaintiff did not allege all purchases occurred in
21 California or that the product was produced in California); *Sanders v. Robinson*
22 *Humphrey/Am. Express, Inc.*, Nos. C 85-172 A, C 85-1586 A & C 85-1891 A, 1986
23 WL 10096, at *8 (N.D. Ga. 1986) (sufficient contacts fail to exist even when a
24 defendant does business in California and plaintiffs are residents of California --
25 especially when many of the potential class members are not residents).

26
27
28 ²⁹ *Gates v. Life of Mont. Ins. Co.*, 205 Mont. 304, 307 (1983) (holding that breach of implied
covenant can support punitive damages).

1 *Second*, Plaintiffs do not (and cannot) allege that any of the Beazer Defendants
2 are residents of California. SAC ¶¶ 9-10 (alleging that the Beazer Defendants are
3 incorporated in the state of “Delaware and headquartered in Atlanta, Georgia.”).

4 *Third*, the claims of each non-resident putative class member necessarily arose
5 outside of California because their respective home purchases: (1) occurred wholly
6 outside of California, (2) concern real estate located outside California, and (3) are
7 between parties who are not California residents. Accordingly, the non-residents’
8 claims indisputably lack significant contacts with California. *Norwest Mortg., Inc. v.*
9 *Superior Court*, 72 Cal. App. 4th 214, 224-25 (1999) (holding certification of
10 nationwide class improper where alleged “injuries [were] suffered by non-California
11 residents, caused by conduct occurring outside of California’s borders, by defendants
12 whose headquarters and principal places of operations are outside of California.”); *see*
13 *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 495, 123 S. Ct. 1683 (2003) (stating that
14 “[t]he State where the tort occurs certainly has a concern in the problems following in
15 the wake of the injury.”) (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)); *Pac.*
16 *Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 503, 59 S. Ct. 629 (1939)
17 (“Few matters could be deemed more appropriately the concern of the state in which
18 the injury occurs or more completely within its power.”). Accordingly, California
19 lacks significant contacts sufficient to overcome due process limitations.

20 **7. Applying California Law Denies Non-Residents The Option Of**
21 **Suing Under Their Respective States’ Laws**

22 Finally, a nationwide class applying California law to non-residents’ claims
23 denies non-residents the due process rights of availing themselves of their own states’
24 laws. *See In re Sch. Asbestos Litig.*, 977 F.2d 764, 797 (3d Cir. 1992) (interpreting
25 *Shutts* to require each plaintiff in a nationwide class as having the right to have his or
26 her claims judged by the law of his or her respective jurisdiction). Plaintiffs’ attempt
27 to force California law onto the non-resident class members’ claims would be unfair.
28

1 Accordingly, based on this and the other *Shutts* factors, the Court should strike
 2 Plaintiffs' nationwide class allegations, and limit the potential class to California
 3 residents.

4 **C. Plaintiffs' Proposed Nationwide Class Violates The Commerce Clause**

5 The Commerce Clause provides that "Congress shall have Power . . . [t]o
 6 regulate Commerce with foreign Nations, and among the several States." U.S. Const.
 7 art. I, § 8, cl. 3. The Supreme Court "long has recognized that this affirmative grant of
 8 authority to Congress also encompasses an implicit or 'dormant' limitation on the
 9 authority of the States to enact legislation affecting interstate commerce." *Healy*, 491
 10 U.S. at 325 n.1. The Constitution has a "special concern both with the maintenance of
 11 a national economic union unfettered by state-imposed limitations on interstate
 12 commerce and with the autonomy of the individual States within their respective
 13 spheres." *Id.* at 335-36; *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43, 102 S. Ct. 2629
 14 (1982).

15 This Court's application of California law to all claims in this case nationwide,
 16 and the resulting judgments, would fall under the type of state action limited by the
 17 dormant Commerce Clause. This is because a system of tort or statutory laws
 18 imposing liability is a form of regulation subject to Commerce Clause constraints.
 19 *See Gore*, 517 U.S. at 572 n.17 (holding the test is not the form in which state power
 20 has been applied but, whatever the form, whether such power has in fact been
 21 exercised); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S. Ct.
 22 773 (1959) ("The obligation to pay compensation can be . . . a potent method of
 23 governing conduct and controlling policy.").

24 Moreover, Commerce Clause jurisprudence concerning the extraterritorial
 25 effects of state economic regulation makes clear that the Constitution "precludes the
 26 application of a state statute to commerce that takes place wholly outside of the State's
 27 borders, whether or not the commerce has effects within the State[.]" *Healy*, 491
 28 U.S. at 336 (quoting *Edgar*, 457 U.S. at 642-43). Additionally, non-residents are

1 protected by their particular state’s laws, regulations, and common law regimes, and
 2 the Commerce Clause mandates that those policies be respected. *Healy*, 491 U.S. at
 3 336-37 (stating that a state statute’s effect must be evaluated by “considering how the
 4 challenged statute may interact with the legitimate regulatory regimes of other
 5 States”); *see Charles Schwab*, 264 F.R.D. at 538 (declining to certify a nationwide
 6 Section 17200 class because, *inter alia*, “[s]tates have an interest in deciding the
 7 contours of their own unfair-competition laws and whether they will be used to
 8 vindicate claims like this”). Accordingly, for the same reasons Plaintiffs’ nationwide
 9 class would violate the Due Process Clause, it would run afoul of the Commerce
 10 Clause by impermissibly regulating out-of-state activity. Plaintiffs’ nationwide class
 11 allegations, therefore, should be stricken.

12 **D. Plaintiffs’ Proposed Nationwide Class Violates The Full Faith And**
 13 **Credit Clause**

14 Applying California law to the non-resident putative class members’ claims
 15 also exceeds the constitutional constraints of the Full Faith and Credit Clause. The
 16 Full Faith and Credit Clause provides that “Full Faith and Credit shall be given in
 17 each State to the public Acts, Records, and judicial Proceedings of every other State.”
 18 U.S. Const., art. IV, § 1. Full faith and credit analysis has meaning outside the
 19 judgment-enforcing context. *See, e.g., Hyatt*, 538 U.S. at 494 (recognizing that the
 20 Clause has application to “choice of law” analysis). Outside the judgment-enforcing
 21 context, the concern is that a state will intrude on another state’s sovereignty by
 22 inappropriately applying the forum state’s law to an extraterritorial dispute. *See*
 23 *Shutts*, 472 U.S. at 821-23 (invalidating extraterritorial application of forum state’s
 24 substantive law on full faith and credit grounds); *Hague*, 449 U.S. at 312-13 (noting
 25 full faith and credit analysis can be implicated by choice-of-law issues).

26 For the same reasons that it would violate due process to apply California law
 27 to the non-residents’ claims in this case, it would also violate the Full Faith and Credit
 28 Clause. The full faith and credit analysis mirrors the due process analysis. “Neither

1 the Due Process Clause nor the Full Faith and Credit Clause requires Kansas to
 2 substitute for its own [laws], applicable to persons and events within it, the conflicting
 3 statute of another state, . . . *but Kansas may not abrogate the rights of parties beyond*
 4 *its borders having no relation to anything done or to be done within them.” Shutts,*
 5 *472 U.S. at 822 (striking down extraterritorial application of Kansas law on both*
 6 *grounds) (internal citations and quotation marks omitted) (emphasis added); see also*
 7 *Hague, 449 U.S. at 308 n.10 (noting the similar approach in evaluating due process*
 8 *and full faith and credit concerns for constitutional choice-of law-issues). Applying*
 9 *California law to all claims, therefore, violates the Full Faith and Credit Clause.*
 10 Accordingly, this Court should strike Plaintiffs’ nationwide class allegations.

11 **E. This Court Should Strike Plaintiffs’ Nationwide Class Allegations At**
 12 **The Outset Of This Case**

13 Courts confronted with the question of *when* to strike nationwide class
 14 allegations have recognized the utility in acting promptly. In *Graphics Processing*,
 15 for example, the plaintiffs argued that the court should defer ruling on the propriety of
 16 the nationwide class allegations until a later stage in the litigation. 527 F. Supp. 2d at
 17 1028. The court refused, finding “merit in disposing of this issue at an early stage of
 18 the litigation, particularly where the issue of whether the different state’s laws conflict
 19 will not change significantly as this action progresses.” *Id.* The court’s reasoning
 20 applies with equal force here.

21 *Utility Consumers’ Action* is also instructive. 2006 U.S. Dist LEXIS 78546, at
 22 *1-2. There, the plaintiffs sued defendant telecommunications companies in state
 23 court for violations of: (1) Section 17200; (2) breach of contract; (3) violation of the
 24 California Consumer Remedies Act; (4) negligent misrepresentation; (5) violation of
 25 California Civil Code § 1709; and (6) unjust enrichment. *Id.* The defendants removed
 26 the action to the Southern District of California, then moved to dismiss under Rule
 27 12(b)(6) and to strike the nationwide class allegations under Rule 12(f). *Id.*

1 After performing a *Shutts* analysis at the pleading stage, the court found that a
2 nationwide class would violate due process because many of the non-resident putative
3 class members had no contact with California and the defendants themselves were
4 non-residents. *Id.* at *17-18 (holding that “application of California law to the entirety
5 of the claims of the proposed nationwide class would violate the class members’ due
6 process rights.”). The court also found no reason to defer the decision until a later
7 stage in the litigation because the defendants had “come forward with sufficient
8 information to demonstrate that the laws of California potentially materially conflict
9 with the laws of every other state, at least as to some of Plaintiffs’ claims.” *Id.* at *18.

10 This Court should follow the *Graphics Processing and Utility Consumers’*
11 *Action* courts and strike Plaintiffs’ unconstitutional nationwide class allegations
12 without delay. No subsequent developments in this action, including discovery, will
13 alter the fact that the laws of the several states at issue here are in material conflict.
14 Nor will any subsequent developments cure the constitutional deficiency in Plaintiffs’
15 SAC, which fails to allege a sufficient nexus between California and the non-residents
16 who purchased homes outside of California from entities that are not California
17 citizens. Plaintiffs, moreover, may still attempt to obtain certification of a California
18 class of home buyers.

19 Finally, deferring a decision on the propriety of the nationwide class allegations
20 would unfairly force the Beazer Defendants to withstand discovery about their
21 business practices in dozens of states, concerning untenable claims, which would
22 cause them to incur significant expenses needlessly -- all while the defect is obvious
23 on the face of the SAC. This is the precise result that Rule 12(f) is designed to
24 prevent. *Sidney-Vinstein*, 697 F.2d at 885 (stating that the function of a motion to
25 strike “is to avoid the expenditure of time and money that must arise from litigating
26 spurious issues”). The nationwide class allegations, therefore, should be stricken.

1 **IV. CONCLUSION**

2 For the reasons set forth above, this Court should strike the nationwide class
3 allegations in Plaintiffs' SAC.

4
5 Dated: December 22, 2011

HUNTON & WILLIAMS LLP

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7
8 By /s/ Phillip J. Eskenazi
9 Phillip J. Eskenazi
10 Attorneys for Defendants
11 BEAZER HOMES USA, INC. and
12 BEAZER HOMES HOLDINGS CORP.
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Hunton & Williams LLP
550 South Hope Street, Suite 2000
Los Angeles, California 90071-2627