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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SYLVESTER MAYA, OFER MASACHI, as individuals and on behalf of all others similarly situated,

Plaintiffs,

v.

CENTEX CORPORATION; CENTEX HOMES CORPORATION; CENTEX HOMES, A NEVADA GENERAL PARTNERSHIP; and DOES 1 through 10 inclusive.

Defendants.

Case No.: ED CV 09-1671 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

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Plaintiffs Sylvester Maya and Ofer Masachi, on behalf of themselves and all others similarly situated ("Plaintiffs"), submit this Memorandum of Points and Authorities in Opposition to Defendants' Motion to Strike Portions of Plaintiffs' Second Amended Complaint ("SAC"). This is the lead brief among similar oppositions filed concurrently by the plaintiffs in *Nielsen v. Shea Homes, Inc.*, No. ED CV 09-1673 VAP (DTBx), *Martinez v. D.R. Horton, Inc.*, No. ED CV 09-1672 VAP (DTBx) *Oneto v. The Ryland Group, Inc.*, No. ED CV 09-1670 VAP (DTBx), and *Kelly v. Beazer Homes USA, Inc.*, No. ED CV 09-01674 VAP (DTBx) on the argument made by the defendants in those cases that the Court should strike Plaintiffs' prayer for punitive damages. Plaintiffs in those actions incorporate by reference the argument and authority cited herein at Section III.A., as specifically designated.

As further designated below, Plaintiffs in this action incorporate herein by reference certain sections, including arguments and authority, from the Memorandum of Points & Authorities in Opposition to Defendants' Motion to Strike Portions of Plaintiffs' Second Amended Complaint ("Opposition to Motion to Strike") filed concurrently by the plaintiffs in *Stephens v. Lennar Corp.*, No. ED CV 09-1668 VAP (DTBx), also pending before this Court.[1]

I. INTRODUCTION

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

[1] Where incorporated sections of the *Stephens v. Lennar* Opposition contain references or citations to the Second Amended Complaint in that case, Plaintiffs incorporate by reference herein the corresponding and substantially similar allegations of their own Second Amended Complaint, the "*Maya SAC*." Should the Court prefer precise citations to paragraphs in the *Maya SAC*, Plaintiffs can provide those citations.

II. LEGAL STANDARD

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

III. ARGUMENT

A. DEFENDANTS' MOTION TO STRIKE OR "NARROW" PRAYERS FOR RELIEF SHOULD BE DENIED

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

Based on a hodge-podge of cases, the significance of which is barely explained (or simply misrepresented), several defendants, including Centex, also move to strike Plaintiffs' prayer for punitive damages. But the disparate pieces Defendants have collected do not add up to an argument. To begin with, even if Defendants were correct that punitive damages cannot be recovered on a class-wide basis (and they are not), it would be improper for this Court to strike Plaintiffs' prayer for such damages. Even assuming that this Court denies Defendants' motions to strike class allegations (as it should), there is no certainty that a class will ever be certified. Certainly Defendants would not agree that the failure to strike the class allegations now is equivalent to certification of an actual class. If no class is ultimately certified, the individual plaintiffs will have a right to seek punitive damages on their own behalf; they cannot be deprived of that right at this time merely because they are also attempting to represent a class. Indeed, even if a class *is* ultimately certified, the Court might well certify only particular issues (such as issues pertaining solely to Defendants' liability), *see* Fed. R .Civ. P. 23(c)(4) (authorizing certification of particular issues), so that the individual Plaintiffs would still be entitled to seek individual awards of punitive damages. It is simply

1 too early in these cases for this Court to determine that punitive damages will never
2 be appropriate.
3 Moreover, Defendants' fundamental point is simply wrong: neither the
4 Supreme Court nor the Ninth Circuit (nor any other federal Court of Appeals of
5 which Plaintiffs are aware) has held that punitive damages can never be awarded in
6 a class action. Indeed, in *Exxon Shipping Co. v. Baker*, ___ U.S. ___, 554 U.S. 471
7 (2008), the Supreme Court *approved* a class-wide punitive damage award (although
8 it reduced the size of the award). The cases cited by Defendants do not hold
9 otherwise. Neither *Philip Morris USA v. Williams,* 549 U.S. 346, 127 S. Ct. 1057
10 (2007) nor *BMW of North American, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589
11 (1996) nor *AT& T Mobility LLC v. Concepcion*, ___ U.S. ___, 131 S. Ct. 1740
12 (2011) address the issue of punitive damages in a class action at all. Defendants'
13 claim that the Supreme Court in *Concepcion* "defined punitive damages as one
14 'form of individual relief'" is a stark example of a literally true, but fundamentally
15 misleading, statement: in describing individual remedies available to a plaintiff, the
16 Supreme Court included punitive damages as one of the available forms of relief,
17 but never suggested that punitive damages are *only* available as individual relief.
18 Indeed, the sentence to which Defendants refer actually says "the arbitrator may
19 award any form of individual relief, including injunctions and presumably punitive
20 damages." *Concepcion*, 131 S. Ct. 1740, 1744. Following Defendants' logic,
21 injunctive relief would also be unavailable on a class-wide basis because the
22 Supreme Court defined it, too, as a form of individual relief. But that is simply not
23 what the Supreme Court said and certainly not what Rule 23 says.
24 Nor is *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541 (2011),
25 of any help to Defendants. In *Wal-Mart Stores*, as Defendants concede, the Court
26 held that plaintiffs may not seek individualized monetary damages in a class
27 certified pursuant to Fed. R. Civ. P. 23(b), which authorizes class action treatment
28 when "the party opposing the class has acted or refused to act on grounds that apply

1 generally to the class, so that final injunctive relief or corresponding declaratory
2 relief is appropriate respecting the class as a whole." *Wal-Mart*, 131 S. Ct. at 2557.
3 But *Wal-Mart Stores* says nothing about punitive damages in the context of a class
4 certified pursuant to Fed. R. Civ. P. 23(b)(3). Here, of course, Plaintiffs seek
5 injunctive relief as well as relief in the form of damages and/or disgorgement; they
6 have, accordingly, pleaded their class claims pursuant to Rule 23(b)(2) *and* Rule
7 23(b)(3). (*See Maya* SAC at ¶ 100.) That punitive damages may not be available
8 in a Rule 23(b)(2) class is thus of no concern here; Plaintiffs may seek them in
9 connection with certification pursuant to Rule 23(b)(3).
10 Finally, Defendants' reliance on *Allison v. CITGO Petroleum Corp.*, 151
11 F.3d 402 (5th Cir. 1998) and *In re Baycol Products Litig.*, 218 F.R.D. 197 (D.
12 Minn. 2003), is mis-placed. Neither case holds that punitive damage claims in
13 classes certified under Rule 23(b)(3) inevitably fail. In each of these cases, the
14 court found that, in the particular context before it, individual issues, including
15 individualized issues pertaining to punitive damages, predominated over class-wide
16 issues, so that certification could not be had in those cases. But the determination
17 whether individual or common issues predominate cannot be made by examining a
18 single issue in a vacuum; rather in order to determine whether issues that require
19 individualized treatment will predominate over common issues, the Court must
20 consider all the issues together in context. *See Kelley v. Microsoft Corp.*, 395 F.
21 App'x 431, 432 (9th Cir. 2010) (because "[t]he main concern in the predominance
22 inquiry is the balance between individual and common issues," it was error for the
23 district court to "rely on one factor to the near exclusion of other factors relevant to
24 the predominance inquiry" (*quoting In re Wells Fargo Home Mortg. Overtime Pay*
25 *Litig.*, 571 F.3d 953, 957 (9th Cir. 2009))); *see also In re TFT-LCD (Flat Panel)*
26 *Antitrust Litig.*, 267 F.R.D. 583, 600 (N.D. Cal. 2010) *amended in part on other*
27 *grounds*, 2011 WL 3268649 (N.D. Cal. July 28, 2011) ("To determine whether the
28 predominance requirement is satisfied, the Court must identify the issues involved

in the case, and determine which are subject to common proof and which are subject to individualized proof."). This analysis simply cannot be made at the pleading stage, especially in light of long-standing Ninth Circuit precedent, never over-ruled, that individualized issues of damages do not preclude class certification. *See Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) ("The amount of damages is invariably an individual question and does not defeat class action treatment."); *see also Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010) ("In this circuit, however, damage calculations alone cannot defeat certification.").

B. DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' DIMINISHED-VALUE AND DIMINISHED-DESIRABILITY ALLEGATIONS SHOULD BE DENIED

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

Centex makes two additional arguments on this point in its motion to strike. Although neither additional point bears on this Rule 12(f) motion in any manner beyond the bases which Centex argues in its motion to dismiss, Plaintiffs respond. First, Centex argues, Centex Br. at 5-6, that the Ninth Circuit issued an "instruction" or a "directive" ordering Plaintiffs to attach an expert declaration or report to the SAC. This is wrong for the reasons discussed in Plaintiffs' opposition to Centex's Motion to Dismiss, which is being filed concurrently. Further, this argument has no bearing on the instant motion to strike beyond whatever bearing (none) it has on the motion to dismiss.

Centex also argues that the fact that the one-year owner-occupancy requirement in Plaintiffs' disclosure documents had expired by the time the diminished value losses occurred reflects a "critical admission" from the SAC. (Centex Br. at 6.) First, this has no bearing on Centex's motion to strike beyond whatever bearing (none) it has on the motion to dismiss. Second, though, this is

just wrong. Centex seeks to turn the fact that it represented to Plaintiffs that an owner-occupancy requirement was in place is somehow suggestive of a *reduced* stability neighborhood. But the Court is required to draw all inferences in the light most favorable to Plaintiffs on this motion. *Tellabs, Inc. v. Makor Issues and Rights Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499 (2007). The most favorable inference to be drawn is that owner-occupancy requirements of any type and of any duration *dissuade* purchases by investors for the reason that investors are not likely to let the property sit idle for *any* period of time before they can use it as investment property. The fact that there is an end-date to the owner-occupancy requirement does not encourage investors; it discourages them.[2]

C. DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' CLASS ALLEGATIONS SHOULD BE DENIED

Plaintiffs incorporate herein by reference Argument Section III.C. of the Opposition to Motion to Strike filed concurrently in *Stephens v. Lennar Corp.*, No. ED CV 09-01668 VAP (DTBx), also pending before this Court.[3]

Centex is also incorrect in arguing that no class may ever be certified because individualized issues predominate the calculation of any damages, Centex Br. at 12. *See Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) ("The amount of

[2] Put another way, Centex's argument in effect compares the existence of a one-year owner-occupancy requirement to a mythical *longer* owner-occupancy requirement – a longer requirement which is not alleged in the SAC – in order to make the actual requirement sound investor-friendly. But this is an inference the Court may not draw on this motion; the only inference the Court may draw is that a one-year owner-occupancy requirement is more onerous, and thus less friendly to, investors than is a purchase encumbered by *no* owner-occupancy requirement.

[3] Although Centex (alone) makes reference in its argument to Fed. R. Civ. P. 23(d)(1)(D), (Centex Br. at 7), its motion to strike is no more brought pursuant to that rule than is Lennar's. Either way, the authorities cited in the Opposition to Motion to Strike in *Stephens v. Lennar* support the same result here. *See, e.g.*, *Clark v. Sprint Spectrum L.P.*, No. 10-9702, 2011 WL 835487, at *3 (C.D. Cal. March 7, 2011) (denying as premature motion, pursuant to both Rule 12(f) and Rule 23(d)(1)(D), to strike nationwide class allegations at pleading stage). To the extent Centex moves under Rule 23, its motion even more directly contravenes this Court's deferrals of Rule 23 issues. (*See* Opposition to Motion to Strike in *Stephens v. Lennar* at Point III.C.1.(a).)

damages is invariably an individual question and does not defeat class action treatment."); *see also Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010) ("In this circuit, however, damage calculations alone cannot defeat certification."). Neither do the specific cases Centex cites demonstrate that Plaintiffs will never be able to certify a class. Centex cites *Testwuide v. U.S.*, 56 Fed. Cl. 755 (2003) and *City of San Jose v. Sup. Ct.*, 12 Cal. 3d 447, 115 Cal. Rptr. 797 (1974). As a threshold matter, these cases both involve class certification inquiries made by courts upon developed records after the opportunity for at least some discovery to take place; they do not present the Rule 12(f) review implicated here.[4] Nor does *Plummer v. Farmers Group, Inc.*, 388 F. Supp. 2d 1310 (E.D. Okla. 2005), present a Rule 12(f) – or even a class certification – issue. The question in *Plummer* of whether the plaintiffs shared "an identity of interest" or presented unique claims, (Centex Br., at 15), related not to the individuality of any particular proofs or claims, but to whether or not the claims related back in time, under Rule 15(c), for purposes of deciding whether the action was subject to the Class Action Fairness Act. *Plummer,* 388 F.Supp.2d at 1316-17.[5]

[4] Further, *Testwuide* involved the Fifth Amendment's "takings" clause as it related to the impact of certain aircraft flight patterns. This implicated specific and unique circumstances dealing with varying flying heights, proximity to navigable waters, and other factors. Proofs related to five separate sub-classes rendered the matter inappropriate for certification. *Testwuide,* 56 Fed. Cl. at 765. In *City of San Jose*, the court specifically contrasted the putative class' difficult-to-calculate injury against a more appropriate class action scenario where "[l]iability to the class could be established by evidence the defendant engaged in an illegal scheme to cheat or overcharge patrons. . . ." 12 Cal. 3d at 460. Plaintiffs here allege that the effects of Defendants' conduct can be disaggregated from general economic conditions and calculated as such. (*Maya* SAC ¶¶ 49-54.) Plaintiffs here also allege a uniform scheme to overcharge homebuyers and to fraudulently inflate home prices. (*Id.* at ¶¶ 26-45.) Ultimately, class certification was overturned in *City of San Jose* due to the representative plaintiffs' inability to represent the class as they failed to raise claims that certain class members reasonably would be expected to assert. 12 Cal.3d at 464.

[5] The *Maya* SAC erroneously includes Plaintiffs' claim for fraud twice (as the first and third claims for relief), but omits the claim under Cal. Bus. & Prof. Code § 17500 (false advertising). As Centex points out, (*see* Centex Br. at 13 n.3), however, the cover page includes the claim under § 17500, as do the other seven complaints. (Centex says that the prayer for relief does not reference the § 17500

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D. PLAINTIFFS SHOULD BE GRANTED LEAVE TO AMEND IF NECESSARY

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

IV. CONCLUSION

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

Dated: January 9, 2012

SIMMONS BROWDER GIANARIS ANGELIDES & BARNERD LLC

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

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claim, but *Maya* SAC Prayer F.2. does, in fact, reference the claim.) This is an obvious copying error, which Plaintiffs intend to correct immediately with a Notice of Errata. (Centex's Memorandum of Points and Authorities presents argument on the claim anyway, so it is clear that Centex has not been prejudiced by this error. (*See* Centex Br. at 13 n.3.))