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CENTEX CORPORATION and CENTEX HOMES, a
9 Nevada general partnership (erroneously sued as
CENTEX HOMES CORPORATION)

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 EASTERN DIVISION – RIVERSIDE

13
14 SYLVESTER MAYA, OFER
MASACHI, as individuals and on
15 behalf of all other similarly situated,

16 Plaintiffs,

17
18 v.

19 CENTEX CORPORATION;
20 CENTEX HOMES CORPORATION;
21 CENTEX HOMES, A NEVADA
GENERAL PARTNERSHIP; and
22 DOES 1 through 10, inclusive,

23 Defendants.
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CASE NO. EDCV 09-01671 VAP
(OPx)

**DEFENDANTS’ NOTICE OF
MOTION AND MOTION TO
DISMISS; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: January 30, 2011
Time: 2:00 p.m.
Courtroom: 2

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1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on January 30, 2012 at 2:00 p.m., or as soon
3 thereafter as the matter may be heard in Courtroom 2 of the above-entitled Court,
4 located at 3470 Twelfth Street, Riverside, CA 92501, defendants Centex
5 Corporation and Centex Homes, a Nevada General Partnership (erroneously sued as
6 Centex Homes Corporation) (collectively, “Defendants”) will and hereby do move
7 this Court to dismiss the Class Action Second Amended Complaint of plaintiffs
8 Sylvester Maya and Ofer Masachi (collectively, “Plaintiffs”) pursuant to Federal
9 Rules of Civil Procedure 9(b), 12(b)(1) and 12(b)(6).

10 Defendants bring this Motion on the grounds that: (1) Plaintiffs and the
11 putative class lack standing to assert their claims because they have not shown how
12 their decreased value and decreased desirability theories of injury are “fairly
13 traceable” to Defendants’ actions as required by Article III of the United States
14 Constitution; (2) Plaintiffs fail to state a claim for breach of the implied covenant of
15 good faith and fair dealing; (3) Plaintiffs fail to state an actionable
16 misrepresentation to support a claim for negligent misrepresentation or fraud; (4)
17 Plaintiffs’ fraud and negligent misrepresentation claims are time-barred; (5)
18 Plaintiffs have failed to adequately plead fraud with the requisite particularity; (6)
19 Plaintiffs fail to adequately plead an unlawful, fraudulent, or unfair business
20 practice under California’s Unfair Competition Law; and (7) Plaintiffs do not and
21 cannot plead an actionable claim under California’s False Advertising Law.

22 This Motion is based on this Notice of Motion, the Memorandum of Points
23 and Authorities below, the previously filed Request for Judicial Notice, and such
24 other and further papers and arguments as may be submitted to the Court.

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendants Centex Corporation and Centex Homes, a Nevada General Partnership (erroneously sued as Centex Homes Corporation) (collectively, “Defendants”)¹ respectfully submit this Memorandum of Points and Authorities in Support of their Motion to Dismiss the Class Action Second Amended Complaint (“SAC”) of Plaintiffs Sylvester Maya and Ofer Masachi (collectively, “Plaintiffs”).

I. INTRODUCTION

The SAC represents Plaintiffs’ third flawed attempt to make Defendants responsible for the global economic crisis. Plaintiffs, who purchased new homes in 2005 amid a boom producing rapid appreciation in home prices, assert that their apparent and unrealized reversal of fortune has nothing to do with the cyclical nature of the housing market, the worst economic crisis since the Great Depression, or the decisions of the government, Wall Street and countless other third parties not before this Court. Instead, Plaintiffs offer the unsupportable assertion that Defendants’ alleged failure to disclose that Defendants were selling homes to so-called “unqualified” borrowers is the legal cause of their purported claims. At bottom, the SAC is a baseless attempt to hold Defendants liable for failing to predict in the future the unprecedented global financial meltdown.

As the Ninth Circuit’s opinion in this case confirms, Plaintiffs face significant hurdles to establishing Article III standing for their “decreased value” and “decreased desirability” claims. *Maya v. Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011). During oral argument on their appeal, Plaintiffs represented to the Ninth Circuit Panel that, if given the opportunity, they would attach an expert report to their complaint to demonstrate how Defendants’ practices caused Plaintiffs’ alleged losses. Because any purported diminution in value or “desirability” would occur – if at all – only when neighboring homes entered foreclosure, the Panel concluded

¹ Named defendant “Centex Homes Corporation” does not exist.

1 that Plaintiffs must “establish[] how defendants’ actions *necessarily* result in
2 foreclosure.” *Id.* Accordingly, the Panel remanded this action with express
3 instructions that Plaintiffs “amend and include any expert testimony that could . . .
4 establish[] a sufficient causal connection between defendants’ actions and the
5 decreased value and desirability of their homes.” *Id.* at 1073.

6 Yet, after representing that they were prepared to attach an expert report to
7 their amended complaint, Plaintiffs filed the SAC without one. Instead, the SAC
8 merely paraphrases from inapposite studies about subprime lending in geographical
9 areas outside of Plaintiffs’ communities, involving homebuilders with no affiliation
10 to Defendants, and during time periods having nothing to do with this case.
11 Because these studies say *nothing* about Defendants or their conduct, they cannot
12 provide any basis to satisfy the causation and other requirements needed to state a
13 claim for relief. The Ninth Circuit’s directive to Plaintiffs was to establish that
14 Defendants’ sales and lending practices *necessarily* resulted in foreclosure. The
15 SAC wholly fails to meet this burden.

16 In addition to these continued standing deficiencies, multiple substantive
17 defects doom the allegations in the SAC. Although the centerpiece of Plaintiffs’
18 alleged scheme is Defendants’ purported practice of selling to subprime borrowers,
19 Plaintiffs fail to identify a single statement in which Defendants represented they
20 would only sell to “qualified” borrowers. Indeed, “qualified” is a term Plaintiffs
21 struggle to use consistently. While the First Amended Complaint (“FAC”) defined
22 “qualified” buyers as anyone who put at least 20% down, the SAC now expands
23 that definition to anyone who put down at least 10%. In other words, buyers who
24 were once “unqualified” and contributed to Plaintiffs’ alleged injuries are now a
25 part of Plaintiffs’ putative class.

26 Further, contrary to Defendants making any promise that they would sell
27 only to “qualified” buyers, Defendants expressly disclosed that they had discretion
28 to sell homes on whatever financing terms they so chose. Indeed, no law prohibits

1 the sale of homes to buyers who make down payments of less than 10% and, in
 2 fact, certain federal laws expressly authorize such financing arrangements. Further,
 3 no law mandates that Defendants disclose the intimate, personal financial details of
 4 Plaintiffs' neighbors such that Plaintiffs can determine the extent to which their
 5 neighbors are high-foreclosure risks. Thus, as a matter of law, Plaintiffs cannot
 6 assert a claim premised on any representation to "qualified" or "unqualified"
 7 buyers.

8 Straining to identify a misrepresentation, Plaintiffs also draw unreasonable
 9 inferences from a Declaration of Covenants, Conditions, and Restrictions
 10 ("CC&Rs") and provisions in Plaintiffs' purchase and sale agreements ("Purchase
 11 Agreements," and collectively with CC&Rs, "Disclosure Documents"). The
 12 Disclosure Documents contain no representations whatsoever about anyone's
 13 ability to afford a mortgage. For example, one of the Disclosure Documents
 14 Plaintiffs cite explicitly authorizes buyers to rent out their homes one year after
 15 purchase: "An original Owner, after a period of one (1) year from the close of
 16 escrow of the Lot, as well as subsequent Owners, shall be entitled to rent the
 17 Owner's entire Residence" Yet Plaintiffs purchased their homes in 2005 and
 18 had previously admitted that the decline in home values did not begin until 2008.
 19 Plaintiffs admit away their claims by conceding they were on notice that any
 20 "stability" would last for one year, when the downturn occurred years later.
 21 Accordingly, by their own admission, Plaintiffs cannot survive a motion to dismiss.

22 For all these reasons, and others explained in more detail below, the Court
 23 should dismiss the SAC in its entirety, with prejudice.

24 **II. PROCEDURAL AND FACTUAL BACKGROUND**

25 **A. After Riding The Housing Boom, Plaintiffs File Suit, Seeking To** 26 **Hold The Centex Defendants Accountable For The Global** 27 **Recession**

28 Plaintiffs, who allegedly purchased their homes in June 2005, filed this
 putative class action on September 3, 2009, purporting to allege a scheme to

1 defraud “qualified” home buyers. (Dkt. No. 1, Class Action Complaint ¶¶ 11-26).
 2 The alleged scheme involved unspecified and undefined “neighborhood[s]” in
 3 which the homebuilder defendants marketed new homes to both “qualified” and
 4 “unqualified” buyers. (*Id.* ¶¶ 13–15, 18.) Though Defendants allegedly marketed
 5 homes to both types of buyers, Defendants were, allegedly, only able to sell to self-
 6 professed “qualified” buyers by not disclosing Defendants’ sales to “unqualified”
 7 buyers. (*Id.* ¶¶ 24-25, 31.) By allegedly selling to “unqualified” buyers,
 8 Defendants also allegedly caused the value of Plaintiffs’ homes to decline (*id.* ¶ 26)
 9 – at exactly the same time as the worst housing meltdown in decades. By order
 10 dated March 31, 2010, this Court dismissed Plaintiffs’ action for lack of standing.
 11 On September 21, 2011, the Ninth Circuit issued an opinion reversing in part the
 12 Court’s dismissal order.²

13 **B. Plaintiffs Ignore the Ninth Circuit’s Directive**

14 On remand, Plaintiffs represented to this Court that they would need 45 days
 15 to prepare an amended complaint that would include “attaching an expert report.”
 16 (Dkt. No. 57, Joint Status Report and Case Management Report at 12.)
 17 Notwithstanding their representations to this Court and the Ninth Circuit, Plaintiffs
 18 filed a Second Amended Complaint on December 2, 2012 that failed to attach any
 19 expert declaration or expert report.

20 **C. The SAC’s Factual Allegations**

21 Plaintiffs allege that in June 2005 they contracted with Centex to purchase
 22 homes. (SAC ¶¶ 58, 69.) Plaintiffs allege that both sales were completed in or
 23 about November 2005. (*Id.*) The SAC does not allege the purchase price of their
 24 homes or the specific neighborhood in which their homes are found. Rather,
 25 Plaintiffs assert only that they purchased new housing stock in San Bernardino

26 _____
 27 ² A decision from the Ninth Circuit on an appeal in another homebuilder action,
 28 *Kaing v. Pulte Homes, Inc.*, Case No. 09-5057 SC, argued the same day and heard
 by the same Panel as this action, remains pending.

1 County, (*id.* ¶¶ 7-8), which, with an area of more than 20,000 square miles, is the
2 largest county in the contiguous United States. Plaintiffs apparently continue to
3 reside in their homes.

4 The SAC purports to allege a scheme to defraud “qualified” homebuyers,
5 which Plaintiffs now define as anyone who made a down payment of at least 10%.
6 The SAC alleges that Defendants marketed and sold homes to both “qualified” and
7 “unqualified” buyers, the latter of which are not parties to this lawsuit. (*Id.* ¶¶ 2-3,
8 15, 19-20, 31, 90) The SAC alleges that Defendants marketed and sold homes to
9 these “unqualified” buyers, as well as to “investors,” to create a “buying frenzy”
10 that “artificially increased demand and house prices.” (*Id.* ¶ 27.) Plaintiffs,
11 apparently disclaiming any actual knowledge that, in 2005, “unqualified” buyers
12 and “investors” were buying into new construction neighborhoods in San
13 Bernardino County, complain that Defendants should have disclosed that they were
14 selling homes to such “unqualified” consumers. (*Id.* ¶ 34.) Plaintiffs further allege
15 that this purported scheme caused their homes to decline in value and “desirability”
16 – coincidentally at around the same time the world economy plunged into recession.
17 (*Id.* ¶¶ 40-45.)

18 As originally framed in the FAC, “qualified” homebuyers were those who
19 purchased homes from the Centex Defendants with a down payment of at least
20 20%. (FAC ¶ 51.) In the FAC, Plaintiffs purported to represent a nationwide class
21 of all homebuyers who purchased houses from Centex Homes between 2004 and
22 2006 and who paid 20% or more in down payment (a criteria Plaintiffs now deem
23 appropriate for “qualified” buyers). (*Id.* ¶¶ 37, 51.) Now Plaintiffs purport to
24 expand their putative class of “qualified” buyers to anyone who purchased a home
25 from Defendants with a down payment of at least 10%, rather than 20%. (SAC ¶
26 90.) In other words, Plaintiffs purport to be representatives of a class of buyers
27 who were obviously aware that Defendants were selling to people exactly like them
28 – “unqualified” borrowers, as defined by the FAC.

1 Unable to identify a single representation by Defendants that they would only
 2 sell to “qualified” buyers, the SAC fails to substantiate the particulars of the alleged
 3 scheme. The SAC vaguely refers to unspecified “marketing materials” that
 4 allegedly depicted Plaintiffs’ new community – a community that Plaintiffs
 5 concede “did not yet exist” – as a “stable, family-based neighborhood.” (SAC ¶
 6 70.) Such vague references do not come close to establishing an actionable
 7 representation and have nothing do with whether a buyer was “qualified” or not.

8 Straining to identify a purported misrepresentation, the SAC presses
 9 unreasonable interpretations of the Disclosure Documents. (*Id.* ¶¶ 71-78.) But the
 10 Disclosure Documents do not say what Plaintiffs claim, and in fact make no
 11 representation whatsoever as to “qualified” buyers. In fact, the Disclosure
 12 Documents flatly contradict Plaintiffs’ allegations. As part of their Purchase
 13 Agreements, both Plaintiffs executed an addendum to the Purchase Agreement and
 14 Escrow Instructions (the “Disclosure Statement;” true and correct copies of
 15 Plaintiffs’ are attached hereto as Exhibits A and B).³ (*See* SAC ¶ 71.) The
 16 Disclosure Statement makes clear the numerous risks inherent in purchasing the
 17 homes, contrary to Plaintiffs’ assertion that they were somehow misled to believe
 18 that their homes’ values were immune to economic downturns. Under the
 19 Disclosure Statement, Plaintiffs agreed:

20 61. **Prices.** Due to changing market conditions, Seller
 21 makes no representation . . . whether prices, terms or
 conditions of sales in the current or future phases will not

22
 23 ³ When ruling on a Rule 12(b)(6) motion to dismiss, in addition to considering the
 24 complaint, the court may also “consider certain materials – documents attached to
 25 the complaint, documents incorporated by reference in the complaint, or matters of
 26 judicial notice.” *United States v. Ritchie*, 342 F.3d 903, 908 (2003). “If a
 27 document is not attached to a complaint, it may be incorporated by reference into a
 28 complaint if the plaintiff refers extensively to the document or the document forms
 the basis of the plaintiff’s claim.” *Id.* (citations omitted).

1 change. ... Buyer understands and acknowledges that the
2 California real estate market reacts to economic and other
3 conditions that may cause the price of housing to
4 fluctuate. Similar to any other investment, the purchase
5 price of housing may increase or decrease depending
6 upon current market conditions, which conditions are
7 beyond the control of Seller. ... Buyer shall not hold
8 Seller responsible for any fluctuations in the purchase
9 price of homes within the development. In consideration
10 of Seller's agreement to sell the property to Buyer, Buyer
11 agrees that Buyer shall have no claims against Seller for
12 any possible damage (decrease or increase) in the
13 purchase price of homes within the Development or any
14 other terms of purchase, including upgrades or other
15 concessions or incentives offered by Seller to other
16 purchasers of homes within the Development....

(Exs. A & B, ¶ 61.) Similarly, Plaintiffs agreed:

79. **Benefit of Home Ownership.** Although the purchase of a new home has traditionally been considered a wise decision, Seller has made no representations, guarantees, or warranties to you with respect to the tax benefits, investment or other benefits of home ownership, or regarding appreciation or depreciation in the value or equity accrual in your new home, or future price adjustments.

(*Id.* ¶ 79.) Significantly, Plaintiffs also expressly disclaimed reliance on any representations not set forth in the Disclosure Statement. The Disclosure Statement expressly states that it is the "entire disclosure" between the parties:

ENTIRE DISCLOSURE; NO OTHER REPRESENTATIONS

No sales representative, employee or agent has the authority to make any representation to Buyer which contradicts or modifies the matters and information set forth in this Disclosure Statement, the Contract or any other written disclosure provided by Seller in connection with the Development (collectively, the "Disclosure Documents"). Buyer acknowledges that no representations have been made to Buyer by such persons other than as set forth in the Disclosure Documents and upon which Buyer has relied in connection with the purchase of the Residence.

(*Id.* at ¶ 29.) Plaintiffs were given the opportunity to indicate in writing in the Disclosure Statement if any representations had been made which contradicted or modified information in the Disclosure Documents. (*Id.*) They did not do so. (*Id.*

1 at ¶ 30.) Accordingly, Plaintiffs’ purported reliance on alleged representations not
2 set forth in the Disclosure Documents is unreasonable as a matter of law.

3 Contrary to Plaintiffs’ claims that they were misled into believing their
4 community would be comprised of “owner occupied” homes and not investors, one
5 of the Disclosure Documents expressly put Plaintiffs on notice that homeowners
6 could rent out their homes one year after purchase. As set forth in the SAC, one of
7 the Disclosure Documents provided: “An original Owner, after a period of one (1)
8 year from the close of escrow of the Lot, as well as subsequent Owners, shall be
9 entitled to rent the Owner’s entire Residence. . . .” (SAC ¶ 61.) Thus, Plaintiffs
10 were on notice that the purported “desirability” and character of their community
11 could change dramatically. In their opposition to the Motions to Dismiss the First
12 Amended Complaint, Plaintiffs argue that their injuries coincided with the
13 “financial crisis of 2008.” (ED CV 09-1670, Dkt. No. 39 at 10). In short, Plaintiffs
14 were fully aware that the alleged “material negative effect on the value and
15 desirability of the house and neighborhood” (SAC ¶ 44) could exist well before the
16 alleged harm ever materialized.

17 Relying on inapposite housing studies, the SAC also struggles to tie
18 Plaintiffs’ claimed injuries to Defendants’ conduct for purposes of Article III
19 standing. While the Ninth Circuit emphasized that Plaintiffs must establish that
20 Defendants’ practices “necessarily” resulted in foreclosures in Plaintiffs’
21 neighborhoods, Plaintiffs instead reference generalized studies that do not involve
22 Plaintiffs’ communities, Defendants’ business and lending practices, or the relevant
23 time period at issue in this litigation. (SAC ¶¶ 49-55.) To reiterate, these articles
24 do not discuss Defendants’ conduct at all. At the heart of all these claimed injuries
25 is Plaintiffs’ unsubstantiated assertion that they purchased homes in undefined
26 “communities” or “neighborhoods” with a greater proportion of “subprime”
27 borrowers. The SAC relies on an “analysis” by an unnamed “economist”
28 demonstrating only that foreclosures negatively impact the prices of neighboring

1 homes. (*Id.* ¶ 48-50.) The SAC also references two general housing studies that
 2 similarly do not analyze Defendants’ homebuilding and lending practices. (*Id.* ¶
 3 52-54.) Because there is nothing in any of these studies that discusses Defendants’
 4 specific practices, let alone whether alleged misrepresentations regarding
 5 “unqualified” buyers could have any effect on Plaintiffs’ claimed losses, they are of
 6 no probative value to this Court. As such, these studies add nothing to Plaintiffs’
 7 flawed standing allegations. *See Maya*, 658 F.3d at 1073 (directing Plaintiffs to
 8 establish that Defendants’ conduct “*necessarily*” had a causal connection with
 9 Plaintiffs’ claimed losses).

10 The SAC, which lacks the specific factual detail necessary to establish an
 11 actual scheme to defraud “qualified” buyers, asserts the following causes of action:
 12 (1) violation of California’s Unfair Business Practices Act, California Business &
 13 Professions Code Section 17200 *et seq.*; (2) two counts of fraud; (3) negligent
 14 misrepresentation; and (4) breach of the implied covenant of good faith and fair
 15 dealing. In the SAC, Plaintiffs no longer assert a claim under Cal. Bus & Prof.
 16 Code § 17500 for false advertising, and instead replace that claim with a second
 17 claim for fraud.⁴ (SAC ¶¶ 124-131.)

18 **III. LEGAL STANDARD**

19 “To survive a motion to dismiss, a complaint must contain sufficient factual
 20 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
 21 *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic*
 22 *Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955 (2007)). This “demands
 23 more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.*
 24

25 ⁴ While the cover page of the SAC lists a cause of action under § 17500, the body
 26 of the SAC pleads no such cause of action and the prayer for relief seeks no
 27 recovery for an alleged violation of § 17500. In any event, as set forth below, the
 28 alleged advertisements amount to no more than classic puffery, and thus a claim
 under the FAL would necessarily fail. *Oestreicher v. Alienware Corp.*, 544 F.
 Supp. 2d 964, 973 (N.D. Cal. 2008).

1 **IV. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED**

2 **A. Plaintiffs Failed To Substantiate Their "Decreased Value" And**
 3 **"Decreased Desirability" Theories Of Article III Standing**

4 Plaintiffs lack standing to assert causes of action premised on any purported
 5 diminution in value or "desirability" in their homes because such allegations of
 6 harm attributable to Defendants are impermissibly speculative. To establish
 7 standing, Plaintiffs bear the burden of demonstrating, *inter alia*, a sufficient causal
 8 connection between their claimed injury and Defendants' alleged misdeeds. *Lujan*
 9 *v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A plaintiff fails to establish
 10 this requisite causal connection if "[s]peculative inferences are necessary to connect
 11 [plaintiff's claimed] injury to the challenged actions of [defendants]," or where the
 12 claimed injury "results from the independent action of some third party not before
 13 the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, 45-46 (1976).
 14 Nor is there standing if "[e]ach of the inferential steps to show causation . . .
 15 depends on premises as to which there remains considerable doubt." *Ariz.*
 16 *Christian School Tuition Org. v. Winn*, 131 S.Ct. 1436, 1444 (2011).

17 The causal theory put forward by Plaintiffs hinges on the intervening,
 18 independent actions of multiple third parties not before the Court. That is,
 19 Plaintiffs are attempting to blame Defendants for economic distress flowing from
 20 the decisions of Wall Street, commercial and investment banks, the federal
 21 regulatory environment, the monetary and fiscal policies of governments across the
 22 world, and all the other forces that played a role in the current economic crisis. But
 23 as the Ninth Circuit explained, Plaintiffs' alleged injuries occurred only if
 24 Defendants' practices caused widespread foreclosure.

25 In light of these independent factors, Plaintiffs were required to amend their
 26 complaint to show "how defendants' actions *necessarily* result in foreclosure."
 27 Absent such a showing, "[t]he links in the chain of causation between the
 28 challenged . . . conduct and the asserted injury are far too weak for the chain as a

1 whole to sustain [plaintiffs'] standing.” *Allen v. Wright*, 468 U.S. 747, 759 (1984);
2 *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 339-44 (2006) (taxpayers lacked
3 standing to challenge tax exemption that allegedly depleted public funds because
4 economic effects of exemption depended on government policy decisions); *San*
5 *Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121 (9th Cir. 1996)
6 (plaintiffs lacked standing to challenge federal law that allegedly increased gun
7 prices by restricting supply of assault weapons because economic effect of law
8 depended on the independent decisions of gun dealers and manufacturers).

9 The SAC fails to make this showing. If pleadings “are no more than
10 conclusions, [they] are not entitled to the assumption of truth.” *Iqbal*, 129 S. Ct. at
11 1950. The SAC simply assumes that the alleged foreclosures were the result of
12 Defendants’ sales practices, and makes no effort to account for the myriad of other
13 forces involved. Ignoring the Ninth Circuit’s directive to attach an expert
14 declaration or expert report to their complaint, Plaintiffs instead briefly reference an
15 unidentified analysis by an unnamed “economist” that purports to show how prime
16 borrowers who purchased into Riverside County neighborhoods with a “high
17 percentage” of subprime borrowers suffered “disproportionate losses” when the
18 housing market collapsed. (SAC ¶ 50.) Because this analysis involves a
19 completely different county than Plaintiffs’, a completely different homebuilder
20 than Defendants, and a completely different time period than that at issue in this
21 case, the analysis adds nothing to the standing inquiry.

22 Plaintiffs’ references to other generalized studies of the housing market are
23 likewise unavailing. These studies do not analyze Defendants’ lending and
24 homebuilding practices or the alleged misrepresentations at issue, and do not even
25 purport to address whether Defendants’ alleged conduct had any bearing on
26 Plaintiffs’ claimed losses. As such, these studies do nothing to substantiate the
27 hypothetical, tenuous links in Plaintiffs’ alleged causal chain. Rather, the central
28 purpose of each of these studies is to model the effect of foreclosures on

1 neighboring housing prices. That foreclosures drive neighboring home prices down
 2 has no bearing on Plaintiffs’ standing. The Ninth Circuit remanded this action so
 3 that Plaintiffs could establish that, even putting aside independent market forces
 4 and the third parties not before the Court, Defendants’ sale practices “*necessarily*”
 5 resulted in foreclosures in Plaintiffs’ communities. These studies have nothing to
 6 do with what allegedly caused the purported foreclosures at issue – let alone blame
 7 Defendants – and thus provide no basis for Plaintiffs’ claims.

8 In addition to these failings, Plaintiffs make a critical admission in the SAC.
 9 The SAC alleges that one of the Disclosure Documents provided that “[a]n original
 10 Owner, after a period of one (1) year from the close of escrow of the Lot, as well as
 11 subsequent Owners, shall be entitled to rent the Owner’s entire Residence. . . .”
 12 (SAC ¶ 62.) Plaintiffs admit that they purchased their homes in 2005. (*Id.* ¶¶ 58,
 13 69.) Plaintiffs also previously asserted that their “decreased value” and “decreased
 14 desirability” losses coincided with the market crash in 2008, an admission Plaintiffs
 15 cannot disclaim. *Hockey v. Medhekar*, 30 F. Supp. 2d 1209, 1220-21 (N.D. Cal.
 16 1998) (dismissing contradictory allegations within the complaint). Accordingly,
 17 Plaintiffs had no reasonable expectation that their neighborhood would remain
 18 “owner occupied,” “stable,” or free of “investors,” and were on notice, well before
 19 2008, of the potential for a possible decrease in their homes’ value or their
 20 neighborhoods’ “desirability.”

21 **B. Plaintiffs Fail To Allege A Breach Of The Implied Covenant Of**
 22 **Good Faith And Fair Dealing (Count 5)**

23 In addition to their misrepresentation and UCL claims, Plaintiffs seek to rely
 24 on the implied covenant of good faith and fair dealing. (SAC ¶¶ 1921-26.) Thus,
 25 they contend that Defendants “directly frustrated the bargained-for benefits of the
 26 purchase contracts” by selling homes in Plaintiffs’ communities to “subprime”
 27 borrowers and “investors.” (SAC ¶ 147.) This claim necessarily fails as a matter of
 28 settled California law.

1 First, the implied covenant of good faith and fair dealing is limited to
2 ensuring the performance and enforcement of a contract; “it does not require parties
3 to negotiate in good faith prior to any agreement.” *McClain v. Octagon Plaza,*
4 *LLC*, 159 Cal. App. 4th 784, 799, 71 Cal. Rptr. 3d 885 (2008). “Failures that affect
5 the formation of the contract, rather than its performance or enforcement, cannot be
6 used to state a claim for breach of the implied covenant of good faith and fair
7 dealing.” *Singh v. Wells Fargo Bank, N.A.*, No. C-09-2035 SC, 2009 WL 2365881,
8 at *5 (N.D. Cal. July 30, 2009) (dismissing mortgage borrower’s claim for breach
9 of the covenant of good faith and fair dealing where plaintiff alleged that
10 defendants failed to make appropriate disclosures when entering into a loan
11 agreement with plaintiff). Plaintiffs fail to cite a specific provision of the parties’
12 contract that precludes Defendants from selling to “subprime” borrowers and
13 “investors,” and instead simply attempt to repackage their non-disclosure
14 allegations into a contract-based claim. As the court in *Singh* explained, purported
15 non-disclosures during formation of the contract cannot support a claim for breach
16 of the implied covenant.

17 Second, the implied covenant cannot impose extra-contractual duties.
18 *Benach v. County of Los Angeles*, 149 Cal. App. 4th 836, 855 n.12 (2007) (“The
19 covenant thus cannot be endowed with an existence independent of its contractual
20 underpinnings. It cannot impose substantive duties or limits on the contracting
21 parties beyond those incorporated in the specific terms of their agreement.”
22 (citations and internal quotation marks omitted)). “The actual terms of the
23 [purchase agreement] control [Plaintiffs’] attempts to characterize the
24 agreement. . . . [T]he covenant of good faith and fair dealing is limited to assuring
25 compliance with the express terms of the contract” *Pasadena Live, LLC v.*
26 *City of Pasadena*, 114 Cal. App. 4th 1089, 1094 (2004).

27 Plaintiffs’ allegations that Defendants could sell only to “qualified”
28 borrowers is not tethered to any actual provision of the purchase agreement. Even

1 more, the terms of the agreement contradict Plaintiffs' claim that Defendants had
 2 any such obligation. For instance, the Disclosure Statement provides that, "[a]t the
 3 sole discretion of the Seller, and without notice to Buyer, the purchase price, terms
 4 of purchase, . . . and other concessions . . . are subject to change" (Exhs. A &
 5 B, ¶ 61.) Further, while Plaintiffs' implied covenant claim seeks to hold
 6 Defendants liable for an alleged diminution in value, Plaintiffs previously
 7 acknowledged that "[d]ue to changing market conditions, Seller makes no
 8 representation . . . whether prices, terms or conditions of sales in the current or
 9 future phases will not change" and agreed "not [to] hold Seller responsible for any
 10 fluctuations in the purchase price of homes within the development." *Id.* In
 11 addition, as noted above, Plaintiffs also expressly disclaimed any representation not
 12 set forth in the Disclosure Statement.

13 **C. All Of Plaintiffs' Misrepresentation-Based Claims Fail Because**
 14 **Plaintiffs Expressly Disclaimed Reliance On Any Alleged**
 15 **Misrepresentations (Counts 1, 3 And 4)**

16 An essential element of any misrepresentation claim is reasonable reliance.
 17 *Century Surety Co. v. Crosby Ins. Inc.*, 124 Cal. App. 4th 116, 129, 21 Cal. Rptr.3d
 18 115 (2005); *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392-93 (9th Cir.
 19 1988). Plaintiffs cannot plausibly allege this element because, as set forth above,
 20 they expressly disclaimed any reliance on any alleged representations not set forth
 21 in the Disclosure Statement. Allegations in the complaint are not "plausible" if
 22 they contradict facts established by the documents underlying plaintiffs' claims.
 23 *Steckman v. Hart Brewing*, 143 F.3d 1293, 1295-96 (9th Cir. 1998) ("[W]e are not
 24 required to accept as true conclusory allegations which are contradicted by
 25 documents referred to in the complaint.").

26 Courts routinely hold that where plaintiffs execute contracts containing a
 27 disclaimer of reliance, any later claimed reliance on alleged misrepresentations is
 28 unreasonable as a matter of law. *See, e.g., Paracor Finance, Inc. v. General Elec.*
Capital Corp., 96 F.3d 1151, 1159 (9th Cir. 1996) (investors could not establish

1 reasonable reliance where purchase agreement provided that they “made [their]
 2 own investment decision with respect to the purchase . . . without relying on any
 3 other Person.”); *Bank of the West v. Valley Nat'l Bank of Ariz.*, 41 F.3d 471, 476
 4 (9th Cir. 1994) (holding, with respect to common-law fraud cause of action, that
 5 contractual language disclaiming any other representations “could and did control
 6 whether [plaintiffs’] reliance [on alleged misrepresentations] would be
 7 ‘justifiable’”); *Meehan v. United Consumers Club Franchising Corp.*, 312 F.3d
 8 909, 912 (8th Cir. 2002) (“it is simply unreasonable to continue to rely on
 9 representations after stating in writing that you are not so relying.”).

10 Plaintiffs premise each of their misrepresentation-based claims on purported
 11 statements and omissions relating to the purchase of their homes. But, as set forth
 12 in the Disclosure Statement they signed to complete the purchase of their homes,
 13 they expressly disclaimed any reliance on such alleged misrepresentations. Thus,
 14 Plaintiffs cannot plausibly allege that they relied on any misrepresentations.

15 **D. Plaintiffs’ Misrepresentation-Based Claims Also Fail Because**
 16 **Plaintiffs Do Not And Cannot Allege Any Actionable**
 17 **Misrepresentations (Counts 1, 3 And 4)**

18 Though the SAC sprawls 150 paragraphs, Plaintiffs attempt to base their
 19 negligent misrepresentation (Count 4) and fraud claims (Counts 1 and 3) on just
 20 two alleged misrepresentations: (1) Defendants’ purported failure to disclose that
 21 Defendants were allegedly selling to “unqualified” buyers; and (2) Defendants’
 22 purported representations in “marketing materials” and provisions in CC&Rs
 23 implying that Plaintiffs’ homes were “stable and desirable.” Neither purported
 24 misrepresentation withstands scrutiny.

25 **1. Plaintiffs Do Not Identify An Affirmative Statement Of Fact**
 26 **To Support A Claim For Negligence Misrepresentation**

27 Plaintiffs’ negligent misrepresentation claim fails for two basic reasons.
 28 First, to state a negligent misrepresentation claim, “a positive assertion is required;
 an omission or an implied assertion or representation is not sufficient.” *Apollo*

1 *Capital Fund, LLC v. Roth Capital Partners, LLC*, 158 Cal. App. 4th 226, 243
2 (2007); *see also Yanase v. Auto. Club of S. Cal.*, 212 Cal. App. 3d 468, 473 (1989).
3 Accordingly, Plaintiffs’ attempt to base a negligent misrepresentation claim on
4 Defendants’ alleged omission regarding “unqualified” buyers is foreclosed as a
5 matter of law. Second, the only positive assertions alleged by Plaintiffs are: (a)
6 unreasonable inferences they attempt to draw from the CC&Rs; and (b) alleged
7 marketing materials purportedly advertising Plaintiffs’ communities as “stable,
8 family-based neighborhoods.” Neither alleged assertion is sufficient to support a
9 claim for negligent misrepresentation.

10 Plaintiffs’ strained efforts to tease out inferences from the CC&Rs are
11 unavailing. The CC&Rs obligate buyers to landscape their property and maintain it
12 in a neat and attractive condition. Plaintiffs purport to interpret this requirement as
13 a representation by Defendants that all of their neighbors were “qualified” buyers.
14 The CC&Rs also obligate buyers to live in their home for at least one year.
15 Plaintiffs purport to interpret this as a representation by Defendants that Plaintiffs’
16 neighborhoods would be “stable.” The Purchase Agreement requires buyers to
17 submit financial documentation to a Centex mortgage subsidiary. Plaintiffs purport
18 to interpret this as a representation that Defendants would only sell to “qualified”
19 buyers. As set forth in detail below, Plaintiffs’ subjective interpretations of these
20 documents as representing anything of the sort are unreasonable and cannot
21 constitute misrepresentations. But Plaintiffs’ reliance on such inferences fail for an
22 even simpler reason: implied assertions cannot support a claim for negligent
23 misrepresentation. *Wilson v. Century 21 Great W. Realty*, 15 Cal. App. 4th 298,
24 306 (1993).

25 Equally unavailing is Plaintiffs’ reliance on alleged depictions of their
26 neighborhoods as “stable” and “family-based.” An essential element of negligent
27 misrepresentation is an affirmative assertion of fact. *Southern Cal. Institute of Law*
28 *v. TCS Educ. System*, No. CV 10–8026, 2011 WL 1296602, at *6 n.11 (C.D. Cal.

1 2011). Such imprecise, subjective marketing terms are not actionable
 2 representations of fact but classic puffery, and cannot support a claim for negligent
 3 misrepresentation. *Stearns v. Select Comfort Retail Corp.*, No. 08-2746 JF, 2009
 4 WL 1635931, at *10-11 (N.D. Cal. 2009) (“vague, highly subjective” statements
 5 are puffery and cannot support a claim for negligent misrepresentation); *Coastal*
 6 *Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999).

7 A statement is considered puffery if the claim is extremely unlikely to induce
 8 the consumer. “Thus, a statement that is quantifiable, that makes a claim as to the
 9 specific or absolute characteristics of a product, may be an actionable statement of
 10 fact while a general, subjective claim about a product is non-actionable puffery.”
 11 *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1053 (9th Cir. 2008).
 12 Courts around the country consistently have found that subjective representations
 13 about the character of real estate constitute puffery. *See, e.g., In re Arnette*, 454
 14 B.R. 663, 682 (Bankr. N.D. Tex. 2011) (representation that property was the “nicest
 15 in the neighborhood” was too vague and subjective to be considered a statement of
 16 fact); *Honorable v. Easy Life Real Estate System, Inc.*, 182 F.R.D. 553, 564-65
 17 (N.D. Ill. 1998) (assertions that homes were “newly rehabbed” and “renovated”
 18 non-actionable because they were subjective and incapable of proof); *Glazer v.*
 19 *LoPreste*, 278 A.D.2d 198, 199 (N.Y. App. Div. 2000) (representation that home
 20 was good place to raise children was an expression of non-actionable opinion, even
 21 though a sex offender lived in the neighborhood).

22 2. Plaintiffs Do Not Allege A Misrepresentation Of Material 23 Fact Sufficient To Support A Claim For Fraud

24 To state a claim for fraud, the alleged misrepresentation must be of a material
 25 fact. *South Tahoe Gas Co. v. Hoffman Land Improvement Co.*, 25 Cal. App. 3d 750
 26 (1972). As with their negligent misrepresentation claim, Plaintiffs’ efforts to
 27 identify an actionable misrepresentation of fact are unavailing.
 28

1 anticipated future events cannot support a claim for fraud. *Neu-Vision Sports, Inc.*
2 *v. Soren/McAdam/Bartells*, 86 Cal. App. 4th 303, 309-10 (2000) (“It is hornbook
3 law that an actionable misrepresentation must be made about past or existing facts;
4 statements regarding future events are merely deemed opinions.”); 5 Witkin,
5 Summary of Cal. Law Torts, § 774, at 1124 (10th ed. 2005) (“[P]redictions about
6 future events, or statements about future action by some third party, are deemed
7 opinions, and not actionable fraud.”); *Ronconi v. Larkin*, 253 F.3d 423, 437 (9th
8 Cir. 2001) (“Calling executives bad managers, or bad forecasters, does not plead
9 fraud.”). Further, Plaintiffs cannot predicate fraud claims on purported “marketing
10 materials” because, as explained above, statements that Plaintiffs’ neighborhoods
11 were “stable” and “family based” are non-actionable puffery. *See Cook, Perkiss &*
12 *Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 245 (9th Cir. 1990) (claim
13 for fraud based on non-actionable statements of opinion must be dismissed under
14 Rule 12(b)(6)).

15 Nor can Plaintiffs premise fraud claims on unreasonable, subjective
16 interpretations of the Disclosure Documents. As with their negligent
17 misrepresentation claim, Plaintiffs rely on the same unreasonable interpretations of
18 the Disclosure Documents. The provisions cited by Plaintiffs contained no
19 language whatsoever to suggest that Defendants only sold homes to buyers who
20 could afford a down payment of at least 10%. Nor would Plaintiffs’ reliance upon
21 such a representation, even if made, have been reasonable. Defendants did not
22 guarantee to any buyer that other buyers would comply with any covenants; that is
23 something that Plaintiffs’ and their neighbors’ Homeowner Association must
24 enforce. And, as noted above, if anything, the Disclosure Documents, by expressly
25 allowing buyers to rent their house after only one year, unequivocally put Plaintiffs
26 on notice that “investors” could buy into the neighborhood and that Plaintiffs’
27 community was not necessarily “owner-occupied.” Moreover, Defendants
28 expressly retained the right to change the terms of their sales at any time. (*See*

1 *supra* at p. 14). Thus, even assuming this primary residence provision could be
 2 interpreted as an assurance that only qualified buyers would be able to purchase
 3 Defendants' homes, Plaintiffs' purported reliance on that assertion was manifestly
 4 unreasonable. See *Broberg v. Guardian Life Ins. Co. of Am.*, 171 Cal. App. 4th
 5 912, 921-22 (2009).

6 **E. Plaintiffs' Negligent Misrepresentation, And Fraud Claims Are**
 7 **Time-Barred (Counts 1, 3 And 4)**

8 The statute of limitations for a fraud claim in California is three years. Cal.
 9 Code Civ. Proc. § 338(d). The limitation for a negligent misrepresentation claim is
 10 two years. Cal. Code Civ. Proc. § 339(d); *David K. Lindemuth Co. v. Shannon Fin.*
 11 *Corp.*, 660 F. Supp. 261, 264 (N.D. Cal. 1987). Plaintiffs allege Defendants made
 12 misrepresentations before entering into the purchase and sale agreements. (SAC ¶
 13 59.) Plaintiffs entered into those agreements in June 2005. (*Id.* ¶ 58, 69.) Based on
 14 Plaintiffs' own admissions, the period for bringing a fraud claim expired at the
 15 latest in June 2008, while the period for bringing a negligent misrepresentation
 16 claim expired a year earlier in June 2007. As Plaintiffs filed their Complaint on
 17 September 3, 2009, both claims are facially time-barred.

18 The SAC recognizes that Plaintiffs' claims are untimely but for the
 19 application of the "discovery" rule. See SAC ¶ 86 (alleging that Plaintiffs did not
 20 become aware of Defendants' sales to unqualified buyers until within two years
 21 prior to commencing the action). The discovery rule, however, only delays accrual
 22 until "the plaintiff suspects or should suspect that her injury was caused by
 23 wrongdoing, that someone has done something wrong to her." *Jolly*, 44 Cal. 3d at
 24 1110. As a default rule, "plaintiffs are charged with presumptive knowledge of an
 25 injury if they have information of circumstances to put [them] on inquiry or if they
 26 have the opportunity to obtain knowledge from sources open to [their]
 27 investigation." *Id.* at 1110. To rebut that presumption, plaintiffs "must specifically
 28 plead facts to show (1) the time and manner of discovery and (2) the inability to

1 have made earlier discovery despite reasonable diligence.” *Id.* at 808 (internal
2 quotation omitted). “In assessing the sufficiency of the allegations of delayed
3 discovery, the court places the burden on the plaintiff to show diligence.” *Grisham*
4 *v. Philip Morris U.S.A., Inc.*, 40 Cal. 4th 623, 638 (2007).

5 Plaintiffs’ one sentence allegation that they were unaware of alleged sales to
6 “unqualified” buyers, and could not have reasonably learned such information, does
7 not come close to satisfying this burden. The allegation is simply conclusory;
8 “conclusory allegations [invoking the discovery rule] will not withstand demurrer.”
9 *Grisham*, 40 Cal. 4th at 638. The SAC “fail[s] to state when and how each plaintiff
10 discovered his or her alleged injuries were caused by [Defendants’ alleged
11 misconduct].” *Anderson v. Select Comfort Retail Corp.*, 2010 WL 2635079, at *2
12 (E.D. Cal. 2010). A plaintiff who pleads “conclusory allegations” that “do not
13 allege what triggered discovery of [his] claims, or why [he] could not have filed
14 them earlier” and do not allege the plaintiff’s diligence fails to properly invoke the
15 discovery rule. *Parrish v. Nat’l Football League Players Ass’n*, 534 F. Supp. 2d
16 1081, 1089 (N.D. Cal. 2007).

17 Moreover, Plaintiffs fail to adequately allege “the inability to have made
18 earlier discovery despite reasonable diligence.” *Fox v. Ethicon Endo-Surgery*, 35
19 Cal. 4th 797, 808-09 (2005). To prove inability to make earlier discovery, the
20 plaintiff must show that a diligent investigation would not have revealed the cause
21 of their injuries because they lacked “the opportunity to obtain knowledge from
22 sources open to [their] investigation.” *Doe v. Roman Catholic Bishop of*
23 *Sacramento*, 189 Cal. App. 4th 1423, 1431 (2010). That is, Plaintiffs must show
24 that they could not have reasonably begun investigating their claimed injuries
25 despite the alleged facts that: (1) Defendants were openly marketing their homes to
26 “unqualified buyers” (SAC ¶ 27); (2) Plaintiffs’ neighborhood experienced multiple
27 foreclosures such that the neighborhood “show[ed] the signs of this distress” (*id.* ¶
28 68); (3) Plaintiffs were allegedly neighbors with these “unqualified” buyers (*id.*);

1 (4) and these neighbors left their yards “unkempt,” defaulted on their loans, and
 2 abandoned their homes or rented them out. (*Id.*) This Court is not required to
 3 accept such “unwarranted deductions of fact” and “unreasonable inferences.” *In re*
 4 *Gilead Sciences Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). By their own
 5 admission, the Disclosure Documents put Plaintiffs on notice that the character of
 6 the neighborhood could change after a year. As such, the discovery rule could not
 7 delay accrual of Plaintiffs’ claims any longer than that year.

8 **F. Plaintiffs’ Misrepresentation And Fraud Claims Also Fail**
 9 **Because Plaintiffs Do Not Plead Fraud With Particularity**
 10 **(Counts 1, 3 And 4)**

11 In all averments of fraud or mistake, the circumstances constituting fraud or
 12 mistake must be stated “with particularity.” Fed. R. Civ. Proc. 9(b); *Desaigoudar*
 13 *v. Meyercord*, 223 F.3d 1020, 1022-23 (9th Cir. 2000) (fraud must be pled “with a
 14 high degree of meticulousness”). The “particularity” requirement applies to both
 15 federal and state-law fraud claims in federal court. *Vess v. Ciba-Geigy Corp. USA*,
 16 317 F.3d 1097, 1102-03 (9th Cir. 2003). To satisfy Rule 9(b), “[a] plaintiff must
 17 set forth more than neutral facts necessary to identify the transaction.” *Id.* Such
 18 allegations “must be accompanied by the who, what, when, where, and how of the
 19 misconduct charged” (*id.*), and include “an account of the ‘time, place, and specific
 20 content of the false representations as well as the identities of the parties to the
 21 misrepresentations.’” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007)
 (citation omitted).

22 The SAC does not come close to satisfying these requirements. Plaintiffs
 23 allege that Defendants did not disclose sales to “unqualified” buyers, but Plaintiffs
 24 fail to specify who concealed information from them, when it was concealed, and
 25 what information regarding other buyers was concealed – whether it was their
 26 financial statements, their credit reports, their status as “unqualified” buyers, or just
 27 a suspicion that some other buyers might someday default on their mortgages.
 28 Plaintiffs also vaguely allege that they were provided with marketing materials that

1 depicted their communities as “stable” and “family-based.” (SAC 68 ¶¶ 60, 70.)
 2 But they do not allege what the materials specifically said that is false. The SAC
 3 also alleges that Plaintiffs were provided with allegedly fraudulent statements in
 4 their purchase documents – such as that buyers could be required to agree to live in
 5 the home for a period of at least one year. (SAC 68 ¶¶ 61-64, 71-74.) But
 6 Plaintiffs fail to allege what exactly was untruthful about these statements. *In re*
 7 *GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (*en banc*).

8 **G. Plaintiffs Fail To State A Claim Under The UCL (Count 2)**

9 California’s Unfair Competition Law (“UCL”) defines “unfair competition”
 10 to “include any unlawful, unfair or fraudulent business act or practice.” Cal. Bus.
 11 & Prof. Code § 17200. Plaintiffs cannot state a claim under any of the three prongs
 12 of the UCL.

13 To state a valid cause of action for unlawful conduct under the UCL,
 14 Plaintiffs must plead an illegal act. *Albillo v. Intermodal Container Servs., Inc.*,
 15 114 Cal. App. 4th 190, 206 (2003). Plaintiffs allege that Defendants’ conduct was
 16 “unlawful” because their acts violated California Civil Code Sections 1709 and
 17 1710. (SAC ¶ 119.) But sections 1709 and 1710 merely codify a claim for fraud,
 18 which Plaintiffs fail to allege for the reasons provided above.

19 Plaintiffs also allege that Defendants’ conduct was illegal because
 20 Defendants failed to disclose all facts materially affecting the value or desirability
 21 of their property. (SAC 68 ¶ 116.) Because Defendants had no duty to disclose the
 22 presence of “unqualified buyers” to Plaintiffs, however, Plaintiffs cannot use that
 23 purported common law violation as the predicate for their UCL claim. *Martinez v.*
 24 *Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 558 (9th Cir. 2010) (plaintiff fails to
 25 state claim under UCL’s unlawful prong if predicate conduct is not actionable).

26 Conduct is fraudulent under the UCL if members of the public “are likely to
 27 be deceived.” *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1267 (1992).
 28 To sustain a claim under § 17200’s fraudulent prong, Plaintiffs must show that the

1 fraudulent representations “were disseminated to the public.” *Express, LLC v.*
 2 *Fetish Group, Inc.*, 464 F. Supp. 2d 965, 980 (C.D. Cal. 2006). The only
 3 statements plausibly disseminated to the public were alleged “marketing materials,”
 4 which, as puffery, cannot support a claim under the UCL.

5 Plaintiffs’ “unfair” claim fails because any finding of “unfairness” must “be
 6 tethered to a constitutional or statutory provision or a regulation carrying out
 7 statutory policy.” *Gregory v. Albertson’s, Inc.*, 104 Cal. App. 4th 845, 854 (2002).
 8 Plaintiffs allege that Defendants’ practices were “unfair” because Defendants
 9 processed loans for buyers that falsified and inflated unverified income. (SAC ¶
 10 119.) But Plaintiffs cite to an inapposite regulation relating to verification of a
 11 borrower’s income when making home equity loans in order to better protect
 12 borrowers. This regulation provides no support for Plaintiffs’ claims.

13 **V. LEAVE TO AMEND SHOULD BE DENIED**

14 Plaintiffs’ repeated failure to plead valid claims warrants dismissal without
 15 yet another futile opportunity for amendment. “Where the plaintiff has previously
 16 filed an amended complaint . . . the district court’s discretion to deny leave to
 17 amend is particularly broad.” *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622
 18 (9th Cir. 2004) (citation and internal quotation marks omitted).

19 **VI. CONCLUSION**

20 For the foregoing reasons, Plaintiffs’ Second Amended Complaint should be
 21 dismissed with prejudice.

22 Dated: December 22, 2011

DLA PIPER LLP (US)

23 By /s/ William P. Donovan, Jr.

24 WILLIAM P. DONOVAN, JR.

25 Attorneys for Defendants

26 CENTEX CORPORATION and CENTEX
 27 HOMES, a Nevada general partnership
 (erroneously sued as CENTEX HOMES
 CORPORATION)