

1 WILLIAM P. DONOVAN, JR., SBN 155881
william.donovan@dlapiper.com
2 BENJAMIN W. TURNER, SBN 256092
benjamin.turner@dlapiper.com
3 MATTHEW CAPLAN, SBN 246536
matthew.caplan@dlapiper.com
4 DLA PIPER LLP (US)
2000 Avenue of the Stars
5 North Tower - Suite 400
Los Angeles, CA 90067-4074
6 Telephone: 310.595.3000
Facsimile: 310.595.3300
7

8 Attorneys for Defendants
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
15 MASACHI, as individuals and on
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
STRIKE; 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 strike portions of the Class Action Second Amended Complaint of
8 plaintiffs Sylvester Maya and Ofer Masachi (collectively, “Plaintiffs”) pursuant to
9 Federal Rules of Civil Procedure 12(f) and 23(d)(1)(D).

10 Defendants move to strike the following allegations:

- 11 • Paragraphs 3, 4, 47-55, 68, 79, 87, 89, 95(f)-(h), 114, 122, 130, 139,
12 and 143-150: Plaintiffs lack standing to pursue any claims based on
13 their claimed diminished-value and diminished-desirability injuries.
- 14 • Paragraph 90-100, Prayer for Relief Paragraphs A and B, and any
15 other references regarding a class: Plaintiffs cannot maintain a viable
16 class action. In the alternative, Defendants request that the following
17 nationwide class allegations be stricken from the Second Amended
18 Complaint: Paragraph 90, Prayer for Relief Paragraph A and any other
19 references regarding a nationwide class.
- 20 • Prayer for Relief, Paragraph E: Defendants request that Plaintiffs’
21 request for punitive damages be stricken in its entirety.
- 22 • Prayer for Relief, Paragraph F.3: Defendants request that Plaintiffs’
23 request for injunctive relief at Prayer for Relief Paragraph F.3 be
24 stricken in its entirety.
- 25 • Prayer for Relief, Paragraph D.2: Defendants request that Plaintiffs’
26 request for rescission at Prayer for Relief Paragraph D.2 be stricken in
27 its entirety and that any other references to rescission be stricken from
28 the Second Amended Complaint.

1 Defendants bring this Motion on the grounds that: (1) the proposed class
 2 lacks standing under Article III of the United States Constitution; (2) California law
 3 cannot apply to all members of the proposed nationwide class without violating the
 4 Due Process and Full Faith and Credit Clauses of the United States Constitution;
 5 (3) Plaintiffs seek to give California’s Unfair Competition Law, Business &
 6 Professions Code § 17200, impermissible extraterritorial reach; (4) Plaintiffs cannot
 7 meet the requirement of Federal Rule of Civil Procedure 23 that there be questions
 8 of law and fact common to the class and that Plaintiffs’ claims be typical of those of
 9 the class; and (5) Plaintiffs’ prayer for relief contains improper remedies in that
 10 Plaintiffs seek rescission, punitive damages, and an order enjoining Defendants
 11 from providing mortgage services for any home Defendants sell.

12 This Motion is based on this Notice of Motion and Motion; the Memorandum
 13 of Points and Authorities filed in support thereof; the pleadings and documents on
 14 file with the Court, including without limitation the Motions and Memoranda of
 15 Points and Authorities filed by the other defendants in the Homebuilder Class
 16 Actions being heard by this Honorable Court; such matters as to which the Court
 17 may take judicial notice; and such other and further matters as may be presented at
 18 the hearing.

19 This Motion is made following conference of counsel pursuant to Local Rule
 20 7-3, which took place beginning on December 13, 2011.

21
 22 Dated: December 22, 2011

DLA PIPER LLP (US)

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

25 WILLIAM P. DONOVAN, JR.
 26 Attorneys for Defendants
 27 CENTEX CORPORATION and CENTEX
 28 HOMES, a Nevada general partnership
 (erroneously sued as CENTEX HOMES
 CORPORATION)

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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, “Centex” or “Defendants”)¹ respectfully submit this Memorandum of Points and Authorities in Support of their Motion to Strike portions of the Class Action Second Amended Complaint (“SAC”) of Plaintiffs Sylvester Maya and Ofer Masachi (collectively, “Plaintiffs”).

I. INTRODUCTION

For the reasons stated in Defendants’ concurrently filed Motion to Dismiss, Plaintiffs’ claims are fatally flawed and should be dismissed in their entirety. Defendants submit this Motion to Strike in an abundance of caution in the event any of Plaintiffs’ claims survive the Motion to Dismiss. The SAC contains numerous impertinent and immaterial allegations which should be stricken if the SAC withstands dismissal in any respect.

As an initial matter, as set forth in Defendants’ Motion to Dismiss, the SAC still fails to establish that Defendants’ lending and sales practices necessarily caused the foreclosures at issue in this action. Thus, Plaintiffs cannot prove, for purpose of Article III standing, a plausible causal connection between Defendants’ conduct and Plaintiffs’ “decreased value” and “decreased desirability” claims. Accordingly, all allegations relating to those theories of loss are irrelevant and should be stricken.

In addition, Plaintiffs’ own allegations demonstrate that class treatment of this action is inappropriate. All but one of Plaintiffs’ claims is based on alleged misrepresentations. Misrepresentation claims are almost never amenable to class treatment, and this case is no exception. Plaintiffs purport to represent a class of homebuyers across the country, each of whom purchased a completely different

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

1 house based on a variety of unique factors in separate transactions. Different class
2 members may have relied on different representations. Moreover, some class
3 members may not have relied on – or have even been exposed to – any
4 representation at all. To prove a claim for fraud or negligent misrepresentation, an
5 individualized finding of reliance is therefore required. The necessity of such an
6 individualized inquiry renders class treatment inappropriate.

7 Even if class treatment were appropriate – and it is not – the class should at
8 least be downsized to California residents. Plaintiffs’ attempt to bring a nationwide
9 claim under California’s Unfair Competition Law (“UCL”) fails as a matter of law
10 because the UCL does not have the extraterritorial scope Plaintiffs seek to invoke
11 under the facts of this case. Further, application of the laws of every state in which
12 a putative class member purportedly purchased one of Defendants’ homes renders a
13 class action unmanageable. The substantive differences among each state’s
14 applicable laws would compound the disparities among class members and make
15 the suit unnecessarily complex, unwieldy, and inefficient to adjudicate as a class
16 action. Because the application of California law to out-of-state plaintiffs without
17 sufficient contacts to the forum state violates due process, Plaintiffs cannot cure this
18 defect by simply asking this Court to exclusively apply California law.

19 Finally, the SAC’s prayer for relief seeks remedies that are not available to
20 Plaintiffs. Plaintiffs seek punitive damages on a class-wide basis, but such relief is
21 an individualized form of relief. As the Supreme Court recently held, plaintiffs
22 may not seek any type of individualized monetary relief on a class basis. The SAC
23 also impermissibly seeks an order enjoining Defendants from providing mortgage
24 services for any home it sells. Yet Plaintiffs do not even name any of Defendants’
25 mortgage subsidiaries as defendants in the SAC, or allege that such subsidiaries
26 violated a specific law. Further, such relief is inappropriate because Plaintiffs do
27 not, and cannot, allege that it is unlawful for a mortgage company to finance any
28 home sold by an intra-corporate subsidiary. Plaintiffs also impermissibly request

1 the option to rescind their purchase contracts. But rescission is not a remedy that
 2 can be sought on a class-wide basis. Accordingly, unless the class allegations are
 3 stricken, the prayer for rescission must be excised from the SAC.

4 **II. PROCEDURAL AND FACTUAL BACKGROUND**

5 Plaintiffs, who allege they bought new houses in San Bernardino, California
 6 from Defendants, purport to bring a nationwide class action on behalf of thousands
 7 of homebuyers – in multiple states – who purchased homes from Defendants.
 8 (SAC ¶¶ 9, 10, 37-38.)² Defendants are the third largest residential homebuilder in
 9 the United States and “conduct substantial business” in both California “as well as
 10 in other states.” (*Id.* ¶ 18.) In other words, Defendants are alleged to have sold tens
 11 of thousands of homes across the country. Neither Defendant is a California
 12 corporation. Both Defendants are Nevada corporations headquartered in Dallas,
 13 Texas and do business in a number of states. (SAC ¶¶ 9-10). Plaintiffs seek to hold
 14 Defendants liable for a purported scheme to defraud “qualified” homebuyers by
 15 selling homes to both “qualified” and “unqualified” buyers. Plaintiffs contend that
 16 Defendants marketed their neighborhoods as “stable and desirable” but failed to
 17 disclose to “qualified” buyers that Defendants also sold to “unqualified” buyers.
 18 (*Id.* ¶¶ 30-31.) The SAC reveals on its face that no amount of discovery would
 19 permit Plaintiffs to establish that common issues of law or fact predominate. The
 20 nature of the alleged “misrepresentations” at issue, including the unique details of
 21 each putative class member’s home, the specific characteristics of the
 22 neighborhood, and the terms of the financing involved, necessitate an inherently
 23 individualized inquiry. Accordingly, class treatment of Plaintiffs’ claims is
 24 inappropriate.

27 ² A more detailed summary of Plaintiffs’ allegations is set forth in Defendants’
 28 concurrently filed Motion to Dismiss.

1 Nonetheless, Plaintiffs seek to represent a broadly defined nationwide class
2 of homebuyers who purchased homes all over the country from Defendants
3 between 2004 and 2006 and who paid 10% or more in down payment (a criterion
4 Plaintiffs apparently believe makes them “qualified” buyers). (*Id.* ¶ 51.) Although
5 the meaning of the term “qualified buyer” is central to Plaintiffs’ claims, Plaintiffs
6 have been unable to use that term consistently. In Plaintiffs’ First Amended
7 Complaint (“FAC”), Plaintiffs defined that term as any buyer who made a down
8 payment of at least 20%. (FAC ¶ 51.) Now Plaintiffs define the term more broadly
9 to encompass any buyer who made a down payment of at least 10%. Plaintiffs do
10 not differentiate between purchasers who sold their houses within this period (for
11 profit or otherwise) (*id.*), or whether Plaintiffs ever lived in the houses (or were
12 merely investors, another admitted group of “unqualified” buyers) (*see* SAC ¶¶ 43-
13 45). Each putative class member is asserting claims for alleged
14 “misrepresentations” specific to his or her transaction. (*Id.* ¶¶ 45.)

15 Each putative class member seeks individualized damages for the “material
16 decrease in the values of the houses purchased” and resulting “loss of quality of
17 life.” (*Id.* ¶ 95(g), (h).) In addition to these individualized damage claims, the SAC
18 also seeks an order enjoining Defendants from providing mortgage services for any
19 home it sells, even though the SAC does not, and cannot, allege that it is unlawful
20 for a mortgage company to finance any home sold by an intra-corporate subsidiary.
21 (*Id.*, Prayer for Relief ¶ F.3.) The SAC also seeks punitive damages (*id.*, Prayer for
22 Relief ¶ E) and requests the option to rescind their purchase contracts,
23 notwithstanding the fact that rescission is unavailable on a class-wide basis. (*Id.*,
24 Prayer for Relief ¶ D.2.)

25 **III. LEGAL STANDARD**

26 A defendant may move to strike from a complaint “any redundant,
27 immaterial, or impertinent and scandalous matter.” Fed. R. Civ. P. 12(f). The
28 function of striking allegations “is to avoid the expenditure of time and money that

1 must arise from litigating spurious issues by dispensing with those issues prior to
 2 trial.” *Sidney Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). The
 3 Federal Rules provide a mechanism for excising defective class allegations before
 4 discovery. A defendant may move to strike class allegations at the pleadings stage
 5 where the complaint demonstrates that the class action cannot be maintained on the
 6 facts alleged. *Sanders v. Apple, Inc.*, No. C 08-1713, 2009 WL 150950, at *9 (N.D.
 7 Cal. Jan. 21, 2009) (striking nationwide class allegations at the pleading stage);
 8 *Stearns v. Select Comfort Retail Corp.*, No. 08-2746, 2009 WL 1635931, at *19
 9 (N.D. Cal. June 5, 2009) (same); *In re Graphics Processing Units Antitrust Litig.*,
 10 527 F. Supp. 2d 1011, 1027-28 (N.D. Cal. 2007) (same).

11 **IV. ARGUMENT**

12 **A. Plaintiffs’ Diminished-Value And Diminished-Desirability** 13 **Allegations Should Be Stricken**

14 As set forth in Defendants’ concurrently filed Motion to Dismiss, the SAC
 15 fails to establish standing sufficient to maintain any claim based on Plaintiffs’
 16 purported diminished-value or diminished-desirability injuries. A series of
 17 speculative causal inferences must be drawn to reach the conclusion that first,
 18 Defendants engaged in lending and selling practices to “unqualified” and “high-
 19 foreclosure-risk” buyers causing “a number of foreclosures and short sales,” and
 20 second, that these foreclosures and short sales resulted in “a substantial loss of
 21 value to the surrounding homes[,]” additional loss of homes and foreclosures, and,
 22 for those who sold their homes, the sale of homes at a loss. (SAC. ¶ 64.) *See*
 23 *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 96 S. Ct. 1917 (1976)
 24 (concluding that if speculative inferences are necessary to connect plaintiffs’ injury
 25 to the challenged actions, then plaintiffs lack standing). For this reason, the Ninth
 26 Circuit instructed Plaintiffs to attach an expert declaration or expert report to their
 27 complaint to “establish[] how defendants’ actions *necessarily* result in foreclosure.”
 28 *Maya v. Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011).

1 Plaintiffs ignored the Ninth Circuit’s directive. Instead, the SAC references
2 an unnamed “economist’s” analysis which does not study Defendants’ business
3 practices or the alleged misrepresentations but merely purports to show that
4 foreclosures negatively impact the prices of neighboring homes. (SAC ¶¶ 48-50.)
5 The SAC also references two general housing studies that likewise do not analyze
6 Defendants’ homebuilding and lending business, the alleged misrepresentations at
7 issue, or whether Defendants’ alleged conduct has any link to Plaintiffs’ alleged
8 losses. As such, these studies add nothing to Plaintiffs’ flawed standing allegations.

9 In addition, Plaintiffs make a critical admission in the SAC. The SAC
10 alleges that one of the Disclosure Documents provided that “[a]n original Owner,
11 after a period of one (1) year from the close of escrow of the Lot, as well as
12 subsequent Owners, shall be entitled to rent the Owner’s entire Residence. . . .”
13 (SAC ¶¶ 62.) Plaintiffs admit that they purchased their homes in 2005. (*Id.* ¶¶ 58,
14 69.) Plaintiffs also previously asserted that their “decreased value” and “decreased
15 desirability” losses coincided with the market crash in 2008, an admission Plaintiffs
16 cannot disclaim. As such, Plaintiffs had no reasonable expectation that their
17 neighborhood would remain “owner occupied,” “stable,” or free of “investors,” and
18 were on notice, well before 2008, of the potential for a possible decrease in their
19 homes’ value or their neighborhoods’ “desirability.”

20 Plaintiffs’ breach of the implied covenant of good faith claim (SAC ¶¶ 139-
21 146) must be stricken in its entirety because that claim is based only on Plaintiffs’
22 alleged reduced-desirability and reduced-value injury. An implied covenant claim
23 can only be predicated on conduct that occurs after formation of a contract. *See*
24 *Singh v. Wells Fargo Bank, N.A.*, No. C-09-2035, 2008 WL 2365881, at *5 (N.D.
25 Cal. July 30, 2009). Plaintiffs’ claim therefore cannot possibly be based on their
26 alleged overpayment injury, which occurred at the time of sale.

1 **B. Plaintiffs Cannot Maintain A Viable Class Action**

2 When “a party sues as a representative of a class, the court must – at an early
3 practicable time – determine by order whether to certify the action as a class
4 action.” *Fournier v. Creditors Interchange Receivable Mgm’t, LLC*, 2011 WL
5 976383, at *1 (C.D. Cal. Mar. 16, 2011) (quoting Federal Rule of Civil Procedure
6 23(c)(1)(A)). Consistent with this requirement, under Federal Rules of Civil
7 Procedure 12(f) and 23(d)(1)(D), courts may “strike class allegations prior to
8 discovery if the complaint demonstrates that a class action cannot be maintained.”
9 *Hovsepian v. Apple, Inc.*, No. 08-5788 JF, 2009 WL 5069144, *2 (N.D. Cal. Dec.
10 17, 2009) (striking class allegations at pleading stage); *Kamm v. Cal. City Dev. Co.*,
11 509 F.2d 205, 212 (9th Cir. 1975); *Sanders*, 672 F. Supp. 2d at 990 (striking class
12 claims pursuant to Rule 12(f) motion). In this action, “the issues are plain enough
13 from the pleadings to determine” that class certification is inappropriate. *Gen. Tel.*
14 *Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982).

15 Federal Rule of Civil Procedure 23 requires a plaintiff seeking class
16 certification to establish all the requirements of Rule 23(a) and at least one of the
17 three requirements of Rule 23(b). Fed. R. Civ. P. 23; *Edwards v. City of Long*
18 *Beach*, 467 F. Supp. 2d 986, 991 (C.D. Cal. 2006). Under Rule 23(b)(3), Plaintiffs
19 must establish that “questions of law or fact common to the class members
20 predominate over any questions affecting only individual members” and that the
21 proposed class action is the superior method of adjudication.” Fed. R. Civ. P.
22 23(b)(3). The SAC reveals on its face that no amount of discovery would permit
23 Plaintiffs to establish that common issues of law or fact predominate. As such, the
24 Court should strike all class action allegations. *See Kamm*, 509 F.2d at 210
25 (striking class actions at the pleading stage and where discovery was not required to
26 determine the propriety of a class action).

1 **1. This Action Is Not Suitable For Class Treatment Because**
 2 **Individual Issues Predominate Plaintiffs' Fraud-Based**
 3 **Claims**

4 Even a cursory review of the SAC makes clear that common factual issues do
 5 not predominate Plaintiffs' fraud and misrepresentation claims. An essential
 6 element of any such claim is actual reliance. *Martin v. Dahlberg, Inc.*, 156 F.R.D.
 7 207, 217 (N.D. Cal. 1994) ("The common law claims of fraud and negligent
 8 misrepresentation ... require proof of reliance."); CACI No. 1900 (intentional
 9 misrepresentation); CACI No. 1903 (negligent misrepresentation). This
 10 requirement means that Plaintiffs would not have purchased their homes but for
 11 their reliance on Defendants' alleged misrepresentations. (*See* SAC ¶¶ 107, 133.)
 12 "[A] fraud class action cannot be certified when individual reliance is an issue."
 13 *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996). If Defendants did
 14 not make any misrepresentation to a particular class member, if that member did
 15 not hear, read or otherwise receive the representation, if the purported
 16 misrepresentations were not material to the absent class member, or if the buyer did
 17 not reasonably rely, then that class member's fraud and negligent misrepresentation
 18 claims fail as a matter of law. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1481 (9th
 19 Cir. 1997) (noting that the "class had to establish that they relied on
 20 misrepresentations in buying their insurance policies, and that these
 21 misrepresentations caused them a concrete financial loss").

22 Pleading fraudulent concealment and negligent misrepresentation requires
 23 "specific allegations that the plaintiff would not have acted as he did if he had
 24 known of the concealed or suppressed fact." *Sanders*, 2009 WL 150950, at *10.
 25 "This requirement inquires into the specific facts surrounding each buyer's
 26 transaction ... [and] what caused the member to make the purchase." *Id*; *see also*
 27 *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 668-69, 22 Cal. Rptr. 2d 419
 28 (1993) (denying class certification where plaintiffs' claims were based on varying
 misrepresentations regarding quality of orange juice). As such, fraud claims "are

1 difficult to maintain on a nationwide basis and rarely are certified.” *Sanders*, 672 F.
2 Supp. 2d at 991. Federal courts around the country thus routinely reject class-wide
3 treatment of such claims where the issue of reliance is highly individualized. *See*,
4 *e.g.*, *Nagel v. ADM Investor Servs., Inc.*, 217 F.3d 436, 443 (7th Cir. 2000)
5 (recognizing that fraud is “plaintiff-specific” so that “issues common to all the class
6 members [are] not likely to predominate over issues peculiar to specific members”);
7 *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 341 (4th Cir.
8 1998) (reliance element of fraud and negligent misrepresentation claims not
9 susceptible to class-wide proof because the “claims turn on whether each franchisee
10 reasonably relied on Meineke’s representations” and “proof of reasonable reliance
11 would depend upon a fact-intensive inquiry into what information each franchisee
12 actually had”). Indeed, the advisory committee’s notes to Rule 23(b)(3) explain
13 that fraud cases are not suited to class treatment if there was variation in the
14 “degrees of reliance by the persons to whom [misrepresentations] were addressed.”

15 Individual issues dominate Plaintiffs’ alleged reliance. The nature of the
16 alleged “misrepresentations” to each putative class member’s specific transaction,
17 including the unique details of their home, the specific characteristics of the
18 neighborhood, and the terms of the financing involved, necessitates an inherently
19 individualized inquiry. *See Edwards*, 251 F.R.D. at 458 (where a class action
20 would require proof at trial whether each class member “was affirmatively
21 influenced by [defendant’s] actions[,]” this proof “would involve direct and cross-
22 examination of each class member”). Yet Plaintiffs do not allege a single specific
23 class-wide misrepresentation. Instead, Plaintiffs vaguely assert that they relied on
24 various “marketing materials” depicting Plaintiffs’ neighborhoods as “stable,” and
25 Disclosure Documents that do not make any representations whatsoever, but which
26 Plaintiffs subjectively (and unreasonably) interpret as implying Defendants would
27 only sell to “qualified” buyers. On top of these varied “misrepresentations,”
28 purchasing a home is a highly personal decision and no two homes are precisely

1 alike. As such, “different class members may have relied on different
2 representations. Moreover, some class members may not have relied on-or have
3 even been exposed to-any representation.” *Gartin v. S & M NuTec LLC*, 245
4 F.R.D. 429, 437 (C.D. Cal. 2007); *Osborne v. Subaru of Am. Inc.*, 198 Cal. App. 3d
5 646, 660-61 (1998) (stating that an inference of class wide reliance cannot be made
6 where there is no showing that representations were made uniformly to all members
7 of the class). Plaintiffs also allege that the effects of Defendants’ conduct became
8 apparent in the communities over time. (SAC ¶ 46.) Accordingly, “the nature of
9 justifiable reliance is very different for an earlier purchaser than a much later
10 purchaser.” *Id.*; *see also In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D.
11 214, 221 (E.D. La. 1998) (denying class certification partly because increasing
12 media attention regarding the subject of the action would seriously affect proof of
13 reliance for many-but not all-class members).

14 Plaintiffs do not and cannot plausibly allege that every putative class member
15 relied upon, or even read, the “marketing materials” or interpreted the Disclosure
16 Documents in the unreasonable manner Plaintiffs did. Other putative class
17 members may have read the alleged “marketing materials” but bought their home
18 regardless because they were indifferent to whether their neighborhood was
19 “owner-occupied.” Others may have purchased their homes precisely because the
20 Disclosure Documents permitted homeowners to rent out their homes as investment
21 properties. Given the strength of the housing market at the time and the prevalence
22 of subprime lending, homebuyers may have been largely indifferent to whether
23 their neighbors were “qualified,” but instead were focused on factors related to the
24 home’s potential for appreciation, such as location, design, amenities, or price.
25 Thus, this is “not a context in which [the court] can assume that potential class
26 members are always similarly situated” because putative class members “do not
27 share a common universe of knowledge and expectations – one motivation does not
28 ‘fit all.’” *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 665-66 (9th Cir. 2004).

1 In short, there are simply too many differences from one transaction to
2 another, between homes purchased by other homebuyers in different communities.
3 The amount of down payment made by Plaintiffs' neighbors may have been an
4 immaterial consideration for many class members. *See Sanchez v. Wal-Mart*
5 *Stores, Inc.*, Case No. 06-02573, 2009 WL 1514435, at *3 (E.D. Cal. May 28,
6 2009) (denying certification of class action alleging that plaintiffs relied on
7 misrepresentation that stroller was safe because, in light of the "innumerable
8 variations in the experiences and information possessed by consumers, in the
9 factors that influence consumers' purchasing decisions, and in the manner by which
10 consumers react to product warnings and the disclosure of safety information," the
11 class necessarily would include "persons who knew about the alleged hazard, yet
12 purchased the product anyway; people, like Plaintiff, who bought the Stroller
13 because of its price, size, and other characteristics; and many others for whom the
14 'warning' would have made no difference in their purchase decision").

15 To determine whether recovery is warranted, the Court and the parties will
16 have to inquire of the tens of thousands of individuals and families who purchased a
17 home from Defendants between 2004 and 2006 and whether these homebuyers
18 received and actually relied on the same marketing materials and contractual
19 provisions that allegedly motivated Plaintiffs Maya and Masachi to purchase.
20 *Pfizer v. Super. Ct.*, 182 Cal. App. 4th 622, 631-32 (2010) (overturning lower
21 court's certification of UCL claims where there was no evidence that majority of
22 putative class saw alleged misrepresentation or based purchasing decision on it);
23 *Caro*, 18 Cal. App. 4th at 668 (individual issues predominated on claim that
24 defendant misrepresented that its orange juice was "fresh" because the court would
25 need to determine whether each class member read label and what he or she
26 believed). As the *Sanders* court noted, "[i]f the proposed class were to be certified,
27 the Court would be forced to engage in individual inquiries of each class member
28 with respect to materiality of the statement, whether the member saw [Defendants']

1 advertisements . . . and what caused the member to make the purchase.” *Sanders*,
2 672 F. Supp. 2d at 991. Those individualized issues will not just predominate, but
3 dominate, the entire action.

4 **2. Individual Issues Predominate The Calculation Of Any** 5 **Damages**

6 Individualized proof as to damages will dominate and make the class action
7 unmanageable. *See Edwards*, 251 F.R.D. at 458. Plaintiffs seek damages for the
8 alleged diminution in value to their homes. (*Id.* ¶ 50.) An individualized analysis
9 would need to be performed for each class member – including, as examples,
10 evaluation of specific factors such as design, square footage, location, comparable
11 sales, timing, market conditions, maintenance, and upkeep. Courts have repeatedly
12 declined to certify classes seeking damages for a decline in property values because
13 “the scheme is incompatible with the maxim that each parcel of property is unique.”
14 *Testwuide v. United States*, 56 Fed. Cl. 755, 762 (2003) (court rejected class
15 certification for nine residential property owners alleging a taking by the United
16 States due to aircraft operations over and near neighborhood causing noise and
17 vibrations). Even if the challenged conduct may be consistent and common as to
18 homeowner plaintiffs (which is plainly not true in this case) the “*impact* upon the
19 divergent parcels of land for which broad class action status is sought has not been
20 shown to be sufficiently similar to support a class certification.” *Id.* at 761
21 (emphasis added); *see also City of San Jose v. Superior Court of Santa Clara*, 12
22 Cal. 3d 447, 465, 115 Cal. Rptr. 797 (1974) (relied upon in *Testwuide* and refusing
23 to certify class seeking diminution in real estate values); *Plummer v. Farmers*
24 *Group, Inc.*, 388 F. Supp. 2d 1310, 1316 (E.D. Okla. 2005) (even though plaintiffs
25 were common in that they purchased from defendants, filed claims, and were
26 allegedly victims of low-balling techniques, they all had “separate contracts, for
27 separate property, with differing monetary value” and therefore “the facts related to
28

1 each individual's claim [were] unique to each Plaintiff" and "Plaintiffs [did] not
2 share an identity of interest.").

3 3. Individualized Issues Predominate Plaintiffs' UCL Claim

4 Plaintiffs' own allegations also make clear that individualized issues
5 predominate Plaintiffs' Unfair Competition Law claim.³ To maintain their UCL
6 claim, absent class members would have to prove their standing to sue by
7 establishing injury-in-fact and causation. *Webb v. Carter's Inc.*, 272 F.R.D. 489,
8 497 (C.D. Cal. 2011) (citing authority). "[U]ninjured parties [cannot] be class
9 members in a class action brought in federal court" if they lack Article III standing.
10 *Id.* Thus, even though the UCL "do[es] not require proof of reliance, Article III
11 nonetheless requires some showing of injury and causation for a plaintiff to
12 recover." *O'Shea v. Epson Am., Inc.*, No. 09-8063, 2011 WL 4352458, at *10
13 (C.D. Cal. Sept. 19, 2011).

14 In *O'Shea*, the plaintiffs sought to certify a class of individuals who
15 purchased a particular Epson Stylus printer. 2011 WL 4352458, at *1. They
16 alleged that Epson included a statement on the printer box suggesting that
17 consumers needed to replace "only the color you need with individual ink
18 cartridges," when, in fact, the printer required the consumer to purchase all
19 cartridges simply to print black text. *Id.* In declining to certify the plaintiffs' suit
20 under the UCL and FAL pursuant to Rule 23(b)(3), the court held that whether
21 absent class members satisfied Article III's requirements raised individualized
22 issues that defeated certification, and that the action was predominated by the
23

24
25 ³ Plaintiffs have withdrawn their claim under Cal. Bus & Prof. Code § 17500 for
26 false advertising. While the cover page of the SAC lists a cause of action under §
27 17500, the body of the SAC pleads no such cause of action and the prayer for relief
28 seeks no recovery for an alleged violation of § 17500. In any event, individualized
issues would also predominate any FAL claim for the same reason such issues
predominate Plaintiffs' UCL claim. *O'Shea*, 2011 WL 4352458, at *10-11.

1 individualized question whether absent class members actually saw and relied on
2 the purported misrepresentation, thereby causing their injury. *Id.* at *10-11.

3 As in *O’Shea*, to establish standing, absent class members here would have to
4 show that their purported injuries were caused by Defendants’ alleged
5 representations and omissions. As already explained, ascertaining whether the tens
6 of thousands of individuals and families who purchased homes from Defendants
7 between 2004-2006 actually received and relied upon the same marketing materials
8 and contractual provisions as the named plaintiffs would require an individualized
9 inquiry of tremendous proportions. A class action is not the appropriate vehicle for
10 Plaintiffs’ statutory claims.

11 **C. In The Alternative The Class Should At Least Be Limited To**
12 **California Residents**

13 If the Court does not strike the class allegations entirely, at a minimum they
14 should be limited to plaintiffs whose homes are located in California. In similar
15 cases, courts have stricken nationwide class allegations at the pleading stage
16 because California law cannot apply to the claims of out-of-state class members and
17 because of manageability problems that would ensue from the application of
18 numerous states’ laws. *See, e.g., Stearns*, 2008 WL 4542967, at *8; *Graphics*
19 *Processing*, 527 F. Supp. 2d at 1027-28.

20 **1. Plaintiffs Seek To Give The UCL An Impermissible**
21 **Extraterritorial Reach**

22 Plaintiffs’ UCL claim improperly attempts to impose California’s regulatory
23 scheme on other states. This attempt fails as a matter of law because the UCL does
24 not have the extraterritorial scope Plaintiffs seek to invoke. That is, Plaintiffs
25 cannot bring a UCL claim on behalf of non-California residents for conduct that did
26 not take place in California and for alleged injuries that did not occur in California.
27 The UCL was not intended to apply to “injuries” occurring outside California. *See,*
28 *e.g., Churchill Vill., L.L.C. v. Gen. Elec. Co.*, 169 F. Supp. 2d 1119, 1126-27 (N.D.

1 Cal. 2000) (UCL does not apply to alleged misconduct and “injuries” occurring
 2 outside California). In this case, the bulk of relief sought is by non-California
 3 residents for purported injuries occurring outside of California. Accordingly, the
 4 Court should strike all allegations purporting to assert a UCL claim on behalf of
 5 non-California class members. *See Arabian v. Sony Elecs. Inc.*, No. 05-CV-1741,
 6 2007 WL 627977, at *9-10 (S.D. Cal. Feb. 22, 2007) (denying motion for
 7 certification of nationwide class action because plaintiffs failed to overcome the
 8 “presumption against California law being given extraterritorial effect when the
 9 wrongful act as well as the injury occurred outside California”); *Ice Cream*
 10 *Distrib. of Evansville, LLC v. Dreyer’s Grand Ice Cream, Inc.*, No. 09-5815, 2010
 11 WL 2198200, at *9-10 (N.D. Cal. May 28, 2010) (because alleged conduct “largely
 12 took place outside of California,” allegations of such conduct “cannot provide a
 13 basis for [plaintiff’s] UCL claim”); *Jones-Boyle v. Wash. Mut. Bank, FA*, No. 08-
 14 CV-02142, 2010 WL 2724287, at *10-11 (N.D. Cal. July 8, 2010) (UCL claim fails
 15 where plaintiff, a Maryland resident, “failed to identify any activity of [the
 16 defendant] in California that . . . caused her injury”).

17 2. California Law Cannot Govern The Claims Of Absent Class 18 Members Without Violating The Due Process Clause

19 Applying a forum state’s substantive law to a nationwide class when the
 20 alleged conduct has little, if any, connection to the forum violates the Due Process
 21 Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of
 22 Article IV, Section 1 of the United States Constitution. *Phillips Petroleum Co. v.*
 23 *Shutts*, 472 U.S. 797, 821-24, 105 S. Ct. 2965 (1985). This is because a state “may
 24 not abrogate the rights of parties beyond its borders having no relation to anything
 25 done or to be done within them.” *Id.* at 822. Under *Shutts*, a court must test the
 26 constitutionality of a nationwide class by determining: (1) whether the forum
 27 state’s law conflicts with the law of other jurisdictions that have an interest in the
 28 case; and (2) whether there is a sufficient nexus between the non-resident putative

1 class members and the forum state. *See id.* at 821-22; *Graphics Processing*, 527 F.
2 Supp. 2d at 1027.

3 In *Shutts*, the United States Supreme Court held that application of Kansas
4 law to all plaintiffs' claims for interest nationwide violated the Due Process and
5 Full Faith and Credit Clauses because Kansas law conflicted with other states' laws
6 on interest and because many of the claims and investors had no connection to
7 Kansas. *Id.* at 821-23. Similarly, in *Graphics Processing*, the plaintiffs attempted
8 to bring a nationwide class action under California's Cartwright Act and Business
9 and Professions Code Section 17200. 527 F. Supp. 2d at 1027. Applying *Shutts*,
10 the court found a conflict among states' laws because some putative class members
11 would have a right of action and be allowed to recover damages under California
12 law that their own states did not allow. *Id.* The *Graphics Processing* court also
13 found an insufficient nexus between non-resident putative class members and
14 California because "not all plaintiffs ... alleged that they bought [the product at
15 issue] in California, or that defendants produced [the product] in California, or even
16 that the alleged [misconduct] took place in California." *Id.* at 1028. Thus, the court
17 granted defendants' motion and struck the nationwide class allegations. *Id.* Both
18 *Shutts* and *Graphics Processing* are controlling in the instant dispute.

19 3. California Law Directly Conflicts With The Laws Of Other 20 States

21 a. Unfair Competition Law

22 Plaintiffs' claim under Business and Professions Code Sections 17200
23 ("Unfair Competition Law" or "UCL") conflicts with other states' consumer
24 protection laws. *In re Charles Schwab Corp. Sec. Litig.*, No. C 08-01510 WHA,
25 2009 WL 2591389, at *7 (N.D. Cal. Aug. 21, 2009) (holding nationwide class for
26 UCL claim inappropriate where states' law "far from uniform") (citing *Tracker*
27 *Marine v. Ogle*, 108 S.W.3d 349, 352-55 (Tex. App. 2003). While every state has
28

1 consumer protection statutes, they “vary considerably, and courts must respect
2 these differences rather than apply one state’s law to sales in other states with
3 different rules.” *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir.
4 2002); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-69, 116 S. Ct.
5 1589 (1996) (noting state deceptive trade practices laws are not uniform).

6 In *Tracker Marine v. Ogle*, the Texas Court of Appeals identified and
7 summarized the variations among state consumer protection statutes. 108 S.W.3d
8 at 352-54; *see also In re Charles Schwab Corp. Sec. Litig.*, 2009 WL 2591389, at
9 *7 (citing *Tracker Marine*). As the Court of Appeals noted, states differ in whether
10 they: (1) prohibit or limit private rights of action; (2) prohibit or limit the
11 availability of class actions; (3) have shorter or longer statutes of limitation; and (4)
12 prohibit exemplary damages, among other differences. *Id.* Thus, there would be
13 substantive conflict between California’s and other states’ consumer protection
14 laws.

15 Further, the claims of nonresident class members cannot be adjudicated
16 under the UCL because neither law can be applied to claims of non-California
17 residents injured by conduct occurring beyond California’s borders. *See Standfacts*
18 *Credit Serv. Inc. v. Experian Info. Solutions*, 405 F. Supp. 2d 1141, 1148 (C.D. Cal.
19 2005); *Speyer v. Avis Rent a Car Sys.*, 415 F. Supp. 2d 1090, 1096 (S.D. Cal.
20 2005); *Churchill Village*, 169 F. Supp. 2d at 1126; *Norwest Mortgage, Inc. v.*
21 *Super. Ct.*, 72 Cal. App. 4th 214, 222-27 (1999). Put simply, the UCL has no
22 extraterritorial application.

23 *b. Fraud And Misrepresentation*

24 The law of misrepresentation is materially different from state to state. *Lewis*
25 *Tree Serv. v. Lucent Techs., Inc.*, 211 F.R.D. 228, 236 (S.D.N.Y. 2002) (“The
26 elements of fraud vary greatly from state to state, with respect to elements including
27 mitigation, causation, damages, reliance, and the duty to disclose.”); *Kaczmarek v.*
28

1 *IBM*, 186 F.R.D. 307, 312 (S.D.N.Y. 1999) (observing that the law of negligent
2 misrepresentation differs materially from state to state); *Castano v Am. Tobacco*
3 *Co.*, 84 F.3d 734, 743 n.15 (5th Cir. 1996) (fraud); *Simon v. Merrill Lynch, Pierce,*
4 *Fenner & Smith, Inc.*, 482 F.2d 880, 883 (5th Cir. 1973) (fraud). Indeed, “[c]ourts
5 routinely hold that ... fraud ... claims are difficult to maintain on a nationwide
6 basis and rarely are certified.” *Sanders*, 2009 WL 150950, at *11.

7 California fraud law in particular would conflict with other states’ laws. For
8 example, to state a claim for fraud in California, the plaintiff must establish an
9 “intent to deceive,” while other states do not have that requirement. *Compare*
10 *Mendoza v. Ruesga*, 169 Cal. App. 4th 270, 284, 86 Cal. Rptr. 3d 610 (2008), *with,*
11 *e.g., Foiles v. Midwest Street Rod Ass’n*, 578 N.W.2d 418, 422 (Neb. 1998); *Ware*
12 *v. Scott*, 257 S.E.2d 855, 857 n.2 (Va. 1979). Standards for determining materiality
13 differ as well. California applies an objective “reasonable person” test, while others
14 apply a subjective “but for” test that considers whether the alleged fraud actually
15 induced the plaintiff to act. *Compare In re Tobacco II Cases*, 46 Cal. 4th 298, 327,
16 93 Cal. Rptr. 3d 559 (2009) (“A misrepresentation is judged to be material if a
17 reasonable man would attach importance to its existence....”), *with, e.g., Fisher v.*
18 *Yates*, 953 S.W.2d 370, 378 (Tex. App. 1997) (“A representation is material if it
19 induces a party to act.”). The standards for failure to disclose also differ regarding
20 the knowledge a defendant must have had about the undisclosed information. In
21 California, a duty to disclose arises when a defendant has actual knowledge of
22 material facts, while other states consider whether the defendant should have
23 known. *Compare Shapiro v. Sutherland*, 64 Cal. App. 4th 1534, 1544, 76 Cal.
24 Rptr. 2d 101 (1998), *with Castillo v. Neeley’s TEA Dealer Supply*, 776 S.W.2d 290,
25 295-96 (Tex. App. 1989).

26 California’s law of negligent misrepresentation also conflicts with the law of
27 other states. Some states do not even recognize a claim for negligent
28 misrepresentation, while some that do will not allow a claim for negligent failure to

1 disclose. *See, e.g., Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674 (7th Cir.
 2 2001) (vacating order certifying nationwide class and observing that not all states
 3 recognize negligent misrepresentation); *Evan F. v. Hughson United Methodist*
 4 *Church*, 8 Cal. App. 4th 828, 840-41, 10 Cal. Rptr. 2d 748 (1992) (“The tort of
 5 negligent misrepresentation requires a ‘positive assertion’ and does not apply to the
 6 implied misrepresentations.”).

7 *c. Covenant Of Good Faith And Fair Dealing*

8 California recognizes an independent cause of action for breach of the
 9 implied covenant of good faith and fair dealing, while others do not. *Compare*
 10 *Sutherland v. Barclays American/Mortgage Corp.*, 53 Cal. App. 4th 299, 314, 61
 11 Cal. Rptr. 2d 614 (1997), *with LSI Title Agency, Inc. v. Eval. Servs.*, 951 A.2d 384,
 12 391 (Pa. Super. Ct. 2008). Similarly, California does not require breach of an
 13 express term of the underlying contract to state a claim for breach of the implied
 14 covenant, while other states do. *Compare Carma Developers, Inc. v. Marathon*
 15 *Dev. of Cal., Inc.*, 2 Cal. 4th 342, 373, 6 Cal. Rptr. 2d 467 (1992), *with Griffith v.*
 16 *Levi Strauss & Co.*, 85 F.3d 185, 186 (5th Cir. 1996) (applying Texas law).
 17 Finally, California does not permit an award of punitive damages for a breach of the
 18 implied covenant, while other states do. *Compare Spinks v. Equity Residential*
 19 *Briarwood Apartments*, 171 Cal. App. 4th 1004, 1055, 90 Cal. Rptr. 3d 453 (2009),
 20 *with Gates v. Life of Montana Ins. Co.*, 688 P.2d 213, 215 (Mont. 1983).

21 **4. Defendants And The Absent Class Members Lack**
 22 **Significant Contacts With California**

23 Not only do the laws at issue conflict, but under *Shutts* and *Graphics*
 24 *Processing*, California law cannot be applied extraterritorially to regulate
 25 Defendants in their dealings with out-of-state putative class members. Defendants
 26 admittedly are not California residents, being incorporated in other states and
 27 headquartered in Dallas, Texas. (FAC ¶¶ 5-8). Where California law conflicts with
 28

1 that of other states, California “must have ‘a significant contact or significant
 2 aggregation of contacts’ to the claims of each member of the plaintiff class ... to
 3 ensure that the choice of [its] law is not arbitrary or unfair.” *Shutts*, 472 U.S. at
 4 821-22 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13, 101 S. Ct. 633
 5 (1981)). In this case, the claims of non-resident class members lack sufficient
 6 contacts because their home purchases: (1) occurred outside California; (2) concern
 7 property located outside California; and (3) are between non-California residents.
 8 *See Norwest Mortgage*, 72 Cal. App. 4th at 224-25 (certification of nationwide
 9 class improper under state law where alleged “injuries [were] suffered by non-
 10 California residents, caused by conduct occurring outside of California’s borders,
 11 by defendants whose headquarters and principal places of operations are outside
 12 California”).

13 **5. A Class Action Involving The Law Of Several States** 14 **Would Be Unmanageable**

15 Because application of California law to all class members’ claims would
 16 violate the Due Process Clause, each Plaintiff’s claims would have to be
 17 adjudicated under the law of the state in which he or she allegedly purchased the
 18 home. That would require conducting a trial on five claims, under several different
 19 legal regimes. In essence, the parties, the Court, and the jury would be expected to
 20 grapple with dozens of different causes of action.

21 A class action is not the “superior” method of adjudication, as required by
 22 Rule 23(b)(3), when the Court must apply the laws of numerous jurisdictions. *See*
 23 *Rivera v. Bio Engineered Supplements & Nutrition, Inc.*, No. 07-1306, 2008 WL
 24 4906433, at *3-4 (C.D. Cal. Nov. 13, 2008). Indeed, when more than a few state
 25 laws differ, courts are faced with the “impossible task” of instructing the jury on the
 26 relevant law. *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1189 (9th
 27 Cir. 2001) (citation omitted). As explained above, the laws of all the states in
 28 which Defendants sold homes do materially differ, as to each of Plaintiffs’ claims.

1 Accordingly, this is the type of case where “[t]he application of several state laws to
2 one action” makes “the trial exceedingly complex.” *Utility Consumers’ Action*
3 *Network v. Sprint Solutions, Inc.*, 259 F.R.D. 484, 487-88 (S.D. Cal. 2009).

4 Certifying a nationwide class in this situation would not be a superior method of
5 adjudicating Plaintiffs’ claims.

6 **D. PLAINTIFFS’ PRAYER FOR RELIEF MUST BE NARROWED**

7 Under Rule 12(f), the Court may strike “a prayer for relief which is not
8 available as a matter of law.” *Shein v. Canon, U.S.A.*, No. 08-7323, 2009 WL
9 3109721, at *3 (C.D. Cal. Sept. 22, 2009). Even if Plaintiffs prevailed on their
10 claims, they are precluded, as a matter of law, from obtaining rescission of their
11 purchase contracts and enjoining Defendants from providing mortgage services.
12 Accordingly, both prayers for relief should be stricken from the SAC.

13 **1. Plaintiffs Are Barred From Obtaining Punitive Damages On**
14 **A Class Wide Basis**

15 Plaintiffs improperly seek punitive damages on a class-wide basis. (SAC,
16 Prayer, ¶ E.) Punitive damages awards must be linked to the harm suffered by each
17 individual plaintiff. *Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007);
18 *BMW*, 517 U.S. at 574-75. In fact, the Supreme Court in *AT&T Mobility LLC v.*
19 *Concepcion*, 131 S. Ct. 1740, 1744 (2011), defined punitive damages as one “form
20 of individual relief.” In the recent decision of *Wal-Mart Stores, Inc. v. Dukes*, 131
21 S. Ct. 2541 (2011), the Supreme Court confirmed that plaintiffs may not seek any
22 type of individualized monetary relief on a class basis pursuant to FRCP 23(b)(2).
23 Courts also have expressly held that punitive damages claims that require
24 individualized proof and determinations brought under FRCP 23(b)(3), like those
25 here, similarly fail. *See, e.g., Allison v. CITGO Petroleum Corp.*, 151 F.3d 402,
26 418-420 (5th Cir. 1998) (explaining that punitive damages do not qualify for class
27 treatment under FRCP 23(b)(3), especially where, as here, plaintiffs do not allege
28 that “broad policies and practices” affected every putative class member in the

1 same way, because they cannot satisfy predominance); *In re Baycol Products Litig.*,
 2 218 F.R.D. 197, 215-216 (D. Minn. 2003) (holding that plaintiffs failed to
 3 demonstrate that a punitive damages class could be certified, in part, because of due
 4 process concerns and the differences among the various states' laws).

5 As these cases confirm, punitive damage awards must be tied to the
 6 *individual* harm suffered by each plaintiff, which renders this form of relief
 7 inappropriate for class treatment. Moreover, it is not clear that any monetary claims
 8 ever can be certified pursuant to FRCP 23(b)(2), where the class must primarily
 9 seek declaratory and injunctive relief. *See Wal-Mart*, 131 S. Ct. at 2557 (explaining
 10 that "one possible reading" FRCP 23(b)(2) is that it "does not authorize the class
 11 certification of monetary claims at all"). Because Plaintiffs here seek punitive
 12 damages on a class-wide basis, which is relief that is inherently individualized and
 13 improper for class treatment under FRCP 23(b), the Court should strike Plaintiffs'
 14 class-wide punitive damages allegations.

15 **2. The Request To Enjoin Defendants From Providing** 16 **Mortgage Services Must Be Stricken**

17 Plaintiffs request an order enjoining Defendants "from engaging in providing
 18 mortgage services for homes sold by Defendants." (SAC Prayer for Relief ¶ F.3.)
 19 The continuing inclusion of this Prayer for Relief must be an oversight because
 20 Plaintiffs have now dismissed all mortgage defendants from the case. Since Centex
 21 Corporation and Centex Homes do not provide mortgage services, they should not
 22 be enjoined from doing so in the future without some allegation that the threat of
 23 future injury exists. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)
 24 (holding that plaintiff's standing to seek injunctive relief "depended on whether he
 25 was likely to suffer future injury from the use of the chokeholds by police
 26 officers").

27 What is more, Plaintiffs' request is overbroad on its face and legally
 28 unsustainable. Because the request cannot be lawfully granted, it is immaterial and

1 should be stricken. Case law and Federal Rule of Civil Procedure 65(d) require that
2 injunctions be narrowly tailored to remedy the specific harms shown or alleged by
3 plaintiffs. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009);
4 *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 728 (9th Cir. 1983). It is imperative that
5 injunctive relief “not impose unnecessary burdens on lawful activity.” *Brooks v.*
6 *Giuliani*, 84 F.3d 1454, 1467 (2d Cir. 1996) (citation and quotation omitted). For
7 that reason, “[a] court must limit the conduct it enjoins to that which is found to
8 have been ‘pursued [or] persuasively to be related to the proven unlawful
9 conduct.’” *Nelson v. Int’l Bhd. of Elec. Workers, Local Union No. 46*, 899 F.2d
10 1557, 1564 (9th Cir. 1990) (quoting *NLRB v. Express Pub. Co.*, 312 U.S. 426, 433
11 (1941)), *disapproved on other grounds by Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d
12 449 (9th Cir. 1994) (*en banc*). If a court enjoins lawful behavior, the order “must
13 be carefully limited in time and scope to avoid an unreasonably punitive or
14 nonremedial effect.” *United States v. Holtzman*, 762 F.2d 720, 726 (9th Cir. 1985).

15 The mortgage industry is highly regulated by specific guidelines imposed by
16 both federal and state regulators. Yet Plaintiffs do not allege that any of
17 Defendants’ mortgage subsidiaries violated the law when they provided mortgage
18 services for homes sold by Defendants. No authority suggests it is illegal for one
19 corporate subsidiary to finance the mortgage on a home built by another subsidiary
20 of the corporation. If the Court were to prohibit Centex from financing its home
21 sales, that injunction would indisputably ban lawful conduct with no nexus to the
22 allegations in this case. And it would do so without any limit in time or scope.
23 Plaintiffs’ requested injunction would thrust the Court into the role of mortgage-
24 industry regulator, one not bound by the complex and thoughtfully-developed rules
25 that now guide the mortgage industry. As a matter of logic and law, the requested
26 injunction would be improper.

1 **3. Unless The Class Allegations Are Stricken, Plaintiffs’**
2 **Request For Rescission Must Be Excised From The**
3 **Complaint**

4 If the Court strikes Plaintiffs’ class allegations as requested by this Motion,
5 then Defendants’ motion to strike Plaintiffs’ request for rescission is moot. If,
6 however, the Court does not strike the class allegations, then Plaintiffs’ prayer for
7 rescission (SAC Prayer for Relief ¶ D.2) must be stricken because “[c]ourts are in
8 uniform agreement that rescission may not be sought on a class-wide basis.”
9 *Amparan v. Plaza Homes Mortg., Inc.*, No. 07-4498, 2008 WL 5245497, at *15
10 (N.D. Cal. Dec. 17, 2008).

11 As the Seventh Circuit explained in *Andrews v. Chevy Chase Bank*, 656 F.3d
12 570 (7th Cir. 2008), rescission is “procedurally and substantively incompatible with
13 the class-action device.” *Id.* at 574. In *Andrews*, the plaintiffs filed a class action
14 under the Truth In Lending Act (“TILA”) seeking rescission of refinance
15 mortgages. The district court certified a class and granted summary judgment to
16 the plaintiffs, holding that all class members could rescind their mortgage contracts.
17 *Id.* at 572-73. The Seventh Circuit reversed, holding as a matter of law that a class
18 action for rescission cannot be maintained. *Id.* at 578. The court explained that
19 “[r]escission is a highly individualized remedy as a general matter,” and
20 acknowledged that “[t]he variations in the transactional ‘unwinding’ process that
21 may arise from one rescission to the next make it an extremely poor fit for the
22 class-action mechanism.” *Id.* at 574. Some class members would elect not to
23 rescind, and “[i]ndividual controversies would erupt” for those that did. *Id.* “Using
24 a class action to resolve a multitude of individual, varied rescission claims is neither
25 ‘economical’ nor ‘efficient’ in any sense of those terms.” *Id.* at 577; *see also*
26 *Schramm v. JPMorgan Chase Bank, N.A.*, No. 09-9442, 2011 WL 5034663, at *12
27 (C.D. Cal. Oct. 19, 2011) (class action not appropriate vehicle for rescission claim,
28 which “requires inquiries into each individual borrower’s situation because it

1 generally includes the return of all interest, fees, finance charges, and commissions
2 paid in connection with the loan”).

3 Rescission is inconsistent with the class action mechanism under the
4 circumstances alleged here. The Court would have to engage in an individualized
5 analysis of each plaintiff’s claim since many class members will opt against
6 rescission, as doing so would require plaintiffs to give up their homes. As to those
7 class members who would accept rescission, the Court would be dragged into
8 highly-individualized “unwinding” procedures that will vary by plaintiff based on,
9 among other things, the purchase price, lender, type of financing, geographic
10 location, and housing community. For these reasons, the Court should strike
11 Plaintiffs’ prayer for rescission.

12 **IV. CONCLUSION**

13 For the foregoing reasons, Defendants’ Motion to Strike should be granted.

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DLA PIPER LLP (US)

By /s/ William P. Donovan, Jr.

WILLIAM P. DONOVAN, JR.

Attorneys for Defendants

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