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8 D.R. Horton, Inc.

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

11
12 REMEDIOS MARTINEZ,
13 Plaintiff,
14 vs.
15 D.R. HORTON, INC.; and DOES 1
through 10, inclusive,
16 Defendants.

Case No. ED CV 09-01672 VAP DTB(x)

**NOTICE OF MOTION AND
MOTION TO STRIKE PORTIONS
OF SECOND AMENDED
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: January 30, 2012
Time: 2:00 p.m.
Dept: 2
Judge: Hon. Virginia A. Phillips

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23 PLEASE TAKE NOTICE that defendant D.R. Horton, Inc. ("D.R. Horton"),
24 appearing for itself and no other defendant, hereby moves the Court, pursuant to
25 Rules 12(f) and 23(d)(1)(D) of the Federal Rules of Civil Procedure ("FRCP"), for
26 an order striking portions of plaintiff's second amended complaint ("SAC") in this
27 action. The motion will come before the Court on January 30, 2012, at 2:00 p.m., or
28 as soon thereafter as the parties may be heard, in Department 2 of this Court, located

1 at 3470 12th Street, Riverside, California 92501. Specifically, D.R. Horton moves
2 to strike the following portions of the SAC:

3 A. D.R. Horton requests that the following allegations regarding decreased
4 value and desirability be stricken from the SAC:

5 Paragraphs 3, 44, 45, 46, 47, 48, 49, 50, 51, 72, 81, 106, 114, 122,
6 130, and 134 through 141, in their entirety.

7 Paragraph 4, as follows:

8 "4. Plaintiff brings this action on her own behalf and on
9 behalf of other creditworthy homebuyers like her who were similarly
10 defrauded by Defendant for the harm of *lost value in the homes*
11 *attributable to Defendant's conduct, for the harm of living in*
12 *neighborhoods that are less desirable than what had been represented,*
13 *and for the harm of having paid more than the homes were worth,*
14 *given the true character of the neighborhoods." [Strike italicized*
15 *portion.]*

16 Paragraph 87, subsections (f), (g), and (h).

17 Prayer for Relief, Paragraphs D.3. and D.4., in their entirety.

18 B. D.R. Horton requests that the following class allegations be stricken
19 from the SAC:

20 Paragraphs 82 through 92, in their entirety, including all subparts.

21 Prayer for Relief, Paragraphs A and B, in their entirety.

22 All references to "Class" and/or "Class Members," *passim*.

23 C. In the alternative, D.R. Horton requests that the following nationwide
24 class allegations be stricken from the SAC:

25 Paragraphs 82 and 83, in their entirety.

26 Paragraph 96, in its entirety.

27 Paragraph 110, as follows:

28 "110. Defendant's acts and practices as described
herein constitute unlawful, fraudulent, and unfair
business acts and practices in violation of California
Business & Professions Code § 17200 et seq., *and other*
similar state unfair competition and unlawful business
practices statutes." [Strike italicized portion.]

Prayer for Relief, Paragraph A, in its entirety.

1 D. D.R. Horton requests that Paragraph 53, in its entirety, be stricken from
2 the SAC.

3 E. D.R. Horton requests that Prayer for Relief, Paragraph F.3., in its
4 entirety, be stricken from the SAC.

5 F. Unless all class allegations are stricken, D.R. Horton requests that the
6 following remedies alleged by the Prayer for Relief be stricken from the SAC:

7 Prayer for Relief, Paragraph D.2., in its entirety.

8 Prayer for Relief, Paragraph E, in its entirety.

9 This motion is based on the following grounds:

10 A. For the reasons set forth in D.R. Horton's concurrently filed motion to
11 dismiss, plaintiff lacks standing under Article III of the United States Constitution to
12 bring claims based upon decreased value or desirability, due to her failure to
13 establish a causal connection between her alleged injury and D.R. Horton's conduct.

14 B. Plaintiff's claims are based on theories of fraud and concealment, which
15 are subject to individualized issues, including concerning reliance, and which
16 require individualized showings of proof. As a result, class treatment is not
17 appropriate.

18 C. Plaintiff's nationwide class allegations should be stricken because
19 California law cannot apply to the claims of all members of the proposed nationwide
20 class and because of the numerous manageability problems that will arise from
21 application of numerous states' laws to the claims asserted by the putative class
22 members.

23 D. The allegations of Paragraph 53 of the SAC consist of redundant,
24 immaterial, impertinent or scandalous matters which should be stricken pursuant to
25 Rule 12(f).

26 E. Paragraph F.3. of the Prayer for Relief seeks an injunction prohibiting
27 D.R. Horton "from engaging in providing mortgage services for homes sold by
28 Defendant." This injunction is grossly overbroad, and would prohibit lawful

1 activity. Further, there exists no allegation of wrongful lending practices upon
2 which to base an injunction prohibiting the providing of mortgage services.

3 F. Paragraphs D.2. and E of the Prayer for Relief seek rescission and
4 punitive damages, which are remedies that cannot be obtained on a class-wide basis.

5 This motion is made following the conference of counsel, pursuant to Central
6 District of California Local Rule 7-3, which took place on December 14, 2011.

7 The motion is based on this Notice of Motion and Motion; the accompanying
8 Memorandum of Points and Authorities in support thereof; any such matters as the
9 Court may consider by way of judicial notice; the pleadings and the records on file
10 herein; and such further written and oral evidence and argument as may be
11 presented at or before the time of the hearing on this motion. Pursuant to the
12 Standing Order of this Court, a proposed order is filed herewith.

13
14 Dated: December 22, 2011

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

15
16 By: /s/ Valentine S. Hoy

17 VALENTINE S. HOY
18 CHARLES L. PERNICKA
19 Attorneys for Defendant
20 D.R. Horton, Inc.

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512 F. Supp. 36 (N.D. Cal. 1981)1

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1 **MEMORANDUM OF POINT AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This motion to strike is filed concurrently with D.R. Horton's motion to
4 dismiss plaintiff's second amended complaint ("SAC"). If the Court grants the
5 motion to dismiss, this motion will be moot. However, in the event the Court does
6 not grant the motion to dismiss in its entirety, D.R. Horton requests that the Court
7 strike: A) all allegations regarding claims for damages arising from alleged
8 decreased value and desirability of plaintiff's property; B) all class allegations; C) in
9 the alternative, all nationwide class allegations; D) immaterial and superfluous
10 allegations regarding D.R. Horton's executives' compensation; E) plaintiff's prayer
11 for overly broad injunctive relief seeking a blanket prohibition on lawful activities;
12 and F) if all class allegations are not stricken, plaintiff's prayer for remedies that are
13 not available on a class basis.

14 For the sake of brevity, D.R. Horton incorporates herein by reference all
15 applicable portions of its motion to dismiss, including its procedural history and
16 factual statements and all pertinent arguments and authority, rather than repeating
17 them in this memorandum.

18 **II. LEGAL STANDARD**

19 FRCP Rule 12(f) provides that "[t]he court may strike from a pleading an
20 insufficient defense or any redundant, immaterial, impertinent, or scandalous
21 matter." Motions to strike are "well taken" where they "may have the effect of
22 making the trial of the action less complicated, or have the effect of otherwise
23 streamlining the ultimate resolution of the action . . ." *State of California v. U.S.*,
24 512 F. Supp. 36, 38 (N.D. Cal. 1981). A function of a motion to strike is "to avoid
25 the expenditure of time and money that must arise from spurious issues by
26 dispensing with those issues prior to trial." *Fantasy, Inc. v. Fogerty*, 984 F. 2d
27 1524, 1527 (9th Cir. 1993) *rev'd on other grounds*, 510 U.S. 517, 534-35 (1994);
28 *Sidney-Vinsein v. A.H. Robins Co.*, 697 F. 2d 880, 885 (9th Cir. 1983). Motions to

1 strike are also appropriate for striking class action allegations that are meritless on
2 their face. *Shah v. Wilco Sys., Inc.*, 126 F. Supp. 2d 641, 656 (S.D.N.Y. 2000)
3 (entertaining motion to strike class allegations).

4 **III. ALL ALLEGATIONS REGARDING DAMAGES ARISING FROM**
5 **ALLEGED DECREASED VALUE AND DESIRABILITY OF**
6 **PLAINTIFF'S PROPERTY SHOULD BE STRICKEN**

7 As set forth in D.R. Horton's motion to dismiss, plaintiff lacks standing under
8 Article III of the United States Constitution to bring claims based upon decreased
9 value or desirability, due to her failure to establish a causal connection between her
10 alleged injury and D.R. Horton's conduct. As a result, to effect the dismissal of such
11 claims, all allegations in the SAC regarding damages arising from decreased value
12 or desirability should be stricken.

13 The paragraphs to be stricken are listed in the preceding notice of motion and
14 motion. Included among the paragraphs that should be stricken are all paragraphs in
15 plaintiff's fifth claim for relief, for breach of the implied covenant of good faith and
16 fair dealing. An implied covenant claim may only be based upon conduct or events
17 that occur after the formation of the contract. *See Singh v. Wells Fargo Bank, N.A.*,
18 2009 WL 2365881, *5 (N.D. Cal. 2009) (granting motion to dismiss claim for
19 breach of the implied covenant where plaintiff alleged failures in the formation of
20 the contract rather than its performance); *McClain v. Octagon Plaza, LLC*, 159 Cal.
21 App. 4th 784, 799 (2008); (affirming the sustaining of a demurrer without leave to
22 amend when the allegation of breach of the implied covenant was based upon
23 conduct during the negotiation of the agreement). As a result, the implied covenant
24 claim cannot concern an overpayment at the time of purchase; it necessarily
25 concerns alleged injury due to subsequent diminution in value.

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1 **IV. ALL CLASS ALLEGATIONS SHOULD BE STRICKEN**

2 Plaintiff's claims are based on theories of fraud and concealment, which are
3 subject to individualized issues, including concerning reliance, and which require
4 individualized showings of proof. As a result, class treatment is not appropriate.

5 D.R. Horton incorporates by reference the arguments and authority set forth
6 in the Motion to Strike Portions of Second Amended Complaint filed by defendants
7 in the lawsuit entitled *Stephens v. Lennar Corporation, et. al.*, Case No. ED CV 09-
8 01668 ("Lennar's Motion to Strike") in relation to this issue. Specifically, D.R.
9 Horton adopts the legal authority and arguments set forth at Section IV.A., including
10 subsections IV.A.1. and IV.A.2., of Lennar's Motion to Strike, which are equally
11 applicable to this action.

12 The paragraphs to be stricken are listed in the preceding notice of motion and
13 motion.

14 **V. IN THE ALTERNATIVE, ALL NATIONWIDE CLASS**
15 **ALLEGATIONS SHOULD BE STRICKEN**

16 In the alternative, if all class allegations are not stricken, plaintiff's nationwide
17 class allegations should be stricken. California law cannot apply to the claims of all
18 members of the proposed nationwide class, and numerous manageability problems
19 will arise from application of numerous states' laws to the claims asserted by the
20 putative class members.

21 D.R. Horton incorporates by reference the arguments and authority set forth at
22 Section IV.B., including subsections IV.B.1. and IV.B.2., of Lennar's Motion to
23 Strike, which are equally applicable to this action. The SAC alleges that D.R.
24 Horton, from 2004 through 2006, "closed a total of \$149,534 houses throughout
25 Delaware, Georgia, Illinois, Maryland, Minnesota, New Jersey, New York, North
26 Carolina, Pennsylvania, South Carolina, Virginia, Wisconsin, Alabama, Florida,
27 Louisiana, Oklahoma, Texas, Arizona, Colorado, New Mexico, Utah, California,
28 Nevada, Hawaii, Idaho, Oregon, and Washington." SAC, ECF No. 71, ¶ 14. As

1 explained in Lennar's Motion to Strike, applying California law to purchasers within
2 these many other states would violate the Due Process Clause of the United States
3 Constitution, due to material conflicts between the laws of California and the laws
4 of other states and a lack of contacts between the members of the asserted
5 nationwide class and California. Attempting to adjudicate the claims of the
6 members of a nationwide class under the separate laws applicable to each them
7 depending upon their respective states would be unmanageable.

8 The paragraphs to be stricken are listed in the preceding notice of motion and
9 motion.

10 **VI. THE ALLEGATIONS OF PARAGRAPH 53 SHOULD BE STRICKEN**
11 **AS SUPERFLUOUS, IMMATERIAL, IMPERTINENT AND**
12 **SCANDALOUS.**

13 FRCP Rule 12(f) permits a court to strike extraneous matters pleaded in a
14 complaint that are "redundant, immaterial, impertinent, or scandalous." The
15 allegations of Paragraph 53 consist of unnecessary and gratuitous statements related
16 to compensation and bonuses received by the CEO and Chairman of the Board of
17 D.R. Horton, Inc.:

18 While the scheme has had devastating effects on Plaintiff, the
19 Defendant, its shareholders and the executives and management of
20 Defendant individually benefitted from these practices. Primarily
21 relying on bonuses, Donald Tomnitz, the chief executive officer, and
22 Donald Horton, Chairman of the Board, for D.R. Horton, Inc., each
23 received more than \$34 million in compensation over the three year
24 class period of 2004-2006. Furthermore, Donald Horton owns more
25 than 9% of the stock in D.R. Horton, which doubled in value during the
26 period between January 1, 2003 and January 1, 2006. On information
27 and belief, the prospect of this excessive and unconscionable
28 compensation led to and contributed to, *inter alia*, decisions by such
executives which resulted in the actions complained of herein.

SAC, ECF No. 71, ¶ 53.

These allegations are entirely unnecessary and immaterial to Plaintiff's
claims. Neither of the individuals referenced is a defendant in this action. This
action is not a claim by defendant's shareholders and does not involve any allegation

1 of improper pay to executives. There exists no relation between the alleged
2 compensation to D.R. Horton's executives and the injury alleged by Plaintiff. To the
3 extent plaintiff would argue that these allegations are somehow reflective of D.R.
4 Horton's "motives" in relation to the acts alleged, the allegations remain improper.
5 It is fitting to strike as unnecessary allegations related to financial compensation of
6 corporate officers as a motive. *See Neilson v. Union Bank of California, N.A.* (2003
7 C.D. Cal.) 290 F.Supp.2d 1101, 1153 (striking allegations of defendant Union
8 Bank's motive as "greed" where the allegations did "nothing to inform [defendant]
9 of the charges it must answer, but serve[] only to inflame").

10 **VII. PLAINTIFF'S REQUEST FOR A BLANKET INJUNCTION**
11 **PROHIBITING LAWFUL CONDUCT THAT IS NOT AT ISSUE IN**
12 **THIS ACTION SHOULD BE STRICKEN**

13 Paragraph F.3. of the Prayer for Relief requests judgment "enjoining
14 Defendant . . . 3. from engaging in providing mortgage services for homes sold by
15 Defendant." SAC, ECF No. 71. Such an injunction would be grossly overbroad,
16 and would prohibit lawful activity. Further, the SAC does not include any
17 allegation of wrongful lending practices. As a result, there exists no basis for an
18 injunction prohibiting the providing of mortgage services.

19 D.R. Horton incorporates by reference the arguments and authority set forth at
20 Section IV.E.1. of Lennar's Motion to Strike, which are equally applicable to this
21 action.

22 As a result, Paragraph F.3. of the Prayer for Relief should be stricken.

23 **VIII. UNLESS THE CLASS ACTION ALLEGATIONS ARE STRICKEN IN**
24 **THEIR ENTIRETY, THE RELIEF REQUESTED SHOULD BE**
25 **NARROWED**

26 **A. The Request for Rescission Should Be Stricken**

27 Paragraph D.2. of the Prayer for Relief requests judgment "awarding Plaintiff
28 and the Class . . . 2. The option to rescind the contract." SAC, ECF No. 71.

1 However, the remedy of rescission is an individualized relief that is not appropriate
2 for determination on a class basis.

3 D.R. Horton incorporates by reference the arguments and authority set forth at
4 Section IV.E.2. of Lennar's Motion to Strike, which are equally applicable to this
5 action.

6 As a result, unless all class allegations are stricken, Paragraph D.2. of the
7 Prayer for Relief should be stricken.

8 **B. The Request For Punitive Damages Should Be Stricken**

9 Paragraph E of the Prayer for Relief requests judgment "awarding Plaintiff
10 and the Class punitive damages as to the appropriate cause of action." SAC, ECF
11 No. 71. However, a punitive damage award must be linked to the harm suffered by
12 each individual plaintiff, and is therefore an individualized relief that is not
13 appropriate for determination on a class basis.

14 D.R. Horton incorporates by reference the arguments and authority set forth
15 in the Motion to Strike filed by defendants in the lawsuit entitled *Maya v. Centex*
16 *Corporation, et. al.*, Case No. ED CV 09-01671 ("Centex' Motion to Strike") in
17 relation to this issue. Specifically, D.R. Horton adopts the legal authority and
18 arguments set forth at Section IV.D.1. of Centex' Motion to Strike, which are
19 equally applicable to this action.

20 As a result, unless all class allegations are stricken, Paragraph E of the Prayer
21 for Relief should be stricken.

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1 **IX. CONCLUSION**

2 For the foregoing reasons, D.R. Horton's motion to strike should be granted.
3 The portions of the second amended complaint listed in the preceding notice of
4 motion and motion should be stricken.

5
6 Dated: December 22, 2011

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

7
8 By: /s/ Valentine S. Hoy
9 VALENTINE S. HOY
10 CHARLES L. PERNICKA
11 Attorneys for Defendant
12 D.R. Horton, Inc.
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