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12 HOMES OF CALIFORNIA, INC.

13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA

16 STELLA STEPHENS, TIMOTHY
17 YOUNG, as individuals and on behalf
18 of all others similarly situated,

18 Plaintiff,

19 v.

20 LENNAR CORPORATION;
21 LENNAR HOMES OF
22 CALIFORNIA, INC.; and DOES 1
23 through 10 inclusive,

23 Defendants.

Case No. ED CV 09-1668 VAP
(DTBx)

Assigned to Hon. Virginia A. Phillips

**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.
Courtroom: 2

LEAD DEFENSE BRIEF ON SIGNIFICANT COMMON ISSUES

[Defendants in the other homebuilder class cases may incorporate and reference portions of this brief and may make additional arguments on the same or other issues in their respective motions and briefs]

1 rescission be stricken from the Second Amended Complaint.

2 This Motion is made following the conference of counsel, pursuant to Central
3 District of California Local Rule 7-3, on December 13, 2011.

4 The Motion is based on this Notice; the accompanying Memorandum of
5 Points and Authorities in support thereof; the concurrently filed Request for
6 Judicial Notice; such matters which the Court may consider by way of judicial
7 notice; the pleadings and the records on file herein; and such further written and
8 oral evidence and argument as may be presented at the time of the hearing.

9
10 Dated: December 22, 2011 JONES DAY

11
12 By: s/ Richard S. Ruben
13 Richard S. Ruben
14 Attorneys for Defendants

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1 **I. INTRODUCTION**

2 Defendants Lennar Corporation and Lennar Homes of California, Inc.
3 (hereafter “Lennar”) bring this Motion to Strike simultaneously with their Motion
4 to Dismiss Plaintiffs’ Second Amended Complaint (“SAC”). If the Court grants
5 Lennar’s Motion to Dismiss, this Motion to Strike will be moot. If the Court does
6 not dismiss the entire SAC, then Lennar requests that the Court strike Plaintiffs’
7 class allegations (or, alternatively, their nationwide class allegations), superfluous
8 and immaterial allegations about the salary of Lennar’s CEO, and improper prayers
9 for forms of relief that cannot be recovered as a matter of law.

10 1. Plaintiffs’ attempt to bring this case as a class action is plagued by
11 numerous legal and factual defects. Because the deficiencies are apparent on the
12 face of the SAC, this Court should strike Plaintiffs’ class allegations now, rather
13 than wait for the class certification stage.

14 The SAC pleads common law tort and contract claims, all of which are based
15 on fraud and concealment theories. Fraud-based claims rarely are certified as class
16 actions because individual issues concerning reliance predominate. That is
17 certainly the case here. To adjudicate Plaintiffs’ claims as a class action, the Court
18 would have to engage in a plaintiff-by-plaintiff analysis to determine what alleged
19 representations were made by Lennar to each plaintiff during the sale process and
20 before close of escrow, whether each plaintiff heard, saw or otherwise received
21 each alleged representation, whether reliance was reasonable under the
22 circumstances of each transaction, and whether the plaintiff purchased her home for
23 reasons unrelated to Lennar’s allegedly unlawful conduct (such as because of the
24 home’s design, location, or amenities). As the class is estimated to be composed of
25 approximately 128,131 home buyers who purchased homes in scores of different
26 communities in seventeen states, these individualized inquiries would predominate
27 over any common issues.

28 Similar problems plague Plaintiffs’ statutory claims. Despite the fact that

1 actual reliance is not an element of a claim under California's unfair competition
2 laws, each absent class member would have to demonstrate reliance in order to
3 establish Article III standing to sue. As a court in this district recently held, that
4 individualized inquiry makes UCL claims based on purported fraud unsuitable
5 candidates for class treatment. *O'Shea v. Epson Am., Inc.*, No. 09-8063, 2011 WL
6 4352458 (C.D. Cal. Sept. 19, 2011).

7 2. Even if the Court does not strike the class allegations *in toto*, the proposed
8 class must at least be narrowed to California residents, and potentially to the
9 particular subdivisions in which Plaintiffs live since a broader class compels the
10 Court to engage in numerous individualized inquiries. Plaintiffs seek to represent a
11 class of homebuyers from seventeen states in which Lennar purportedly does
12 business. It would be entirely unmanageable, however, to adjudicate Plaintiffs'
13 various claims under seventeen different legal regimes. The maintenance of this
14 case as a nationwide class action involving non-California class members who
15 allegedly purchased homes from Lennar in other states would present complex
16 problems that will transform this case into a litigation behemoth that will be
17 extremely difficult to manage and control, and will require numerous, individual
18 mini-trials based on differences in the substantive law applicable to the claims. The
19 jury instructions alone would confuse the most sophisticated of jurors.

20 This problem cannot be cured by adjudicating all of the absent class
21 members' claims under California law. The Due Process Clause does not permit
22 claims from out-of-state plaintiffs to be adjudicated under the forum state's laws
23 where, as here, the laws of the forum state and other states materially differ, and
24 absent class members lack significant contacts with the forum state.

25 3. For the reasons set forth in Lennar's Motion to Dismiss, the Court should
26 strike all allegations in the SAC regarding Plaintiffs' purported diminished-value or
27 diminished-desirability injury. Plaintiffs lack standing to maintain any claim based
28 on a diminished-value or diminished-desirability injury; accordingly, all allegations

1 about that supposed injury are irrelevant.

2 4. Plaintiffs included Paragraph 55 in the SAC for the apparent sole purpose
3 of denouncing the allegedly “unconscionable compensation” paid to Lennar Corp.’s
4 CEO between 2004 and 2006. The allegations in that paragraph are a flagrant and
5 improper attempt to inflame passions over executive compensation in an effort to
6 prejudice Lennar. They have nothing to do with this case or with Plaintiffs’ claims
7 and should be stricken.

8 5. Plaintiffs seek an order enjoining Lennar from providing mortgage
9 services for any home it sells. Yet Plaintiffs do not, and cannot, allege that it is per
10 se unlawful for a mortgage company to finance any home sold by an intra-corporate
11 subsidiary. The requested order would ban lawful conduct not related to the
12 allegations in this case and is vastly overbroad. Moreover, neither of the Lennar
13 entities named as a defendant in the SAC is a mortgage lender and Plaintiffs do not
14 allege that either defendant engages in any lending activity. Accordingly, the
15 requested relief is unnecessary and inapplicable.

16 Plaintiffs also request the option to rescind their purchase contracts. But
17 rescission is not a remedy that can be sought on a class-wide basis. Accordingly,
18 unless the class allegations are stricken, the prayer for rescission must be excised
19 from the SAC.

20 **II. FACTUAL ALLEGATIONS**

21 Plaintiffs Stella Stephens and Timothy Young allege that they suffered two
22 injuries as a result of Lennar’s alleged home sales to “high-foreclosure risk
23 purchasers, including speculators and buyers whom the Defendants knew were poor
24 credit risks.” (Second Am. Compl. ¶ 1, ECF No. 68.) First, Plaintiffs allege that
25 they paid more for their homes at the time of sale because of Lennar’s purported
26 misrepresentations; had they known about Lennar’s sales practices, Plaintiffs allege
27 they would either not have purchased their homes or would not have paid the same
28 purchase price. (*Id.* ¶ 85.) Second, Plaintiffs allege that after the sale, their homes

1 decreased in economic value and desirability as places to live because of
2 foreclosures in their neighborhoods. (*Id.* ¶ 86.) Based on these injuries, Plaintiffs
3 assert three common law claims (fraud, negligent misrepresentation, and breach of
4 the implied covenant of good faith and fair dealing), and two California statutory
5 claims (False Advertising Law and Unfair Competition Law). Plaintiffs do not
6 assert any federal claims against Lennar.

7 Lennar is alleged to be one of the nation’s largest homebuilding companies.
8 (ECF No. 68 ¶ 16.) Plaintiffs allege that Lennar builds and sells homes in
9 seventeen different states: Arizona, California, Colorado, Delaware, Florida,
10 Illinois, Maryland, Maine, Minnesota, Nevada, New Jersey, North Carolina,
11 Pennsylvania, South Carolina, Texas, and Virginia. (ECF No. 68 ¶ 16.) According
12 to the SAC, Lennar closed 128,131 home sales between 2004 and 2006. (*Id.*)
13 Plaintiffs allege 32,229 homes were sold in California and Nevada during that time;
14 the SAC does not distinguish between homes sold in California vs. Nevada, a state
15 that saw explosive growth in home developments between 2004-2006. (*Id.*) Thus,
16 according to the SAC, at least 74.8% of all Lennar closings between 2004 and 2006
17 were outside California, a number that is grossly understated since it assumes no
18 houses were sold in Nevada during that time.

19 Plaintiffs seek to maintain this action on behalf of a nationwide class of
20 “[a]ll persons who purchased a new home from any Lennar entity from January 1,
21 2004, through December 31, 2006, and borrowed or financed less than 90% of the
22 purchase price of the house.” (ECF No. 68 ¶ 87.) In the alternative, Plaintiffs
23 request certification “of a California Class defined as all persons who purchased a
24 new home located in California from any Lennar entity from January 1, 2004
25 through December 31, 2006, and borrowed or financed less than 90% of the
26 purchase price of the house.” (*Id.* ¶ 89.) Plaintiffs seek to maintain this lawsuit as a
27 class action pursuant to Federal Rule of Civil Procedure 23(b)(3) based on the
28 erroneous conclusory allegation that “questions of law and fact common to the

1 Classes predominate over the questions affecting only individual members of the
2 Classes and a class action is superior to other available means for the fair and
3 efficient adjudication of this dispute.” (*Id.* ¶ 95.)

4 **III. LEGAL STANDARD**

5 Federal Rule of Civil Procedure 12(f) provides that “[t]he court may strike
6 from a pleading an insufficient defense or any redundant, immaterial, impertinent,
7 or scandalous matter.” Motions to strike are “well taken” where they “may have
8 the effect of making the trial of the action less complicated, or have the effect of
9 otherwise streamlining the ultimate resolution of the action.” *State of California v.*
10 *United States*, 512 F. Supp. 36, 38 (N.D. Cal. 1981).

11 **IV. ARGUMENT**

12 **A. PLAINTIFFS CANNOT MAINTAIN A VIABLE CLASS** 13 **ACTION**

14 To maintain a class action, a plaintiff must satisfy all the prerequisites of
15 Rule 23(a) and at least one of the three requirements of Rule 23(b). *See Edwards v.*
16 *City of Long Beach*, 467 F. Supp. 2d 986, 991 (C.D. Cal. 2006). Plaintiffs must
17 satisfy this standard at the pleading stage. *See Kamm v. Cal. City Dev. Co.*, 509
18 F.2d 205, 212 (9th Cir. 1975) (affirming district court’s order granting the
19 defendant’s motion to strike class allegations from the plaintiff’s complaint because
20 of failure to satisfy Rule 23(b)(3)).

21 Where “the complaint demonstrates that a class action cannot be maintained
22 on the facts alleged, a defendant may move to strike class allegations prior to
23 discovery.” *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009).
24 “[C]ourts may decide the issue of certification based on a review of the complaint
25 prior to a party’s motion to certify the proposed class. Indeed Rule 23(c)(1)
26 encourages courts to ‘at an early practicable time determine by order whether to
27 certify the action as a class action.’ *Glewwe v. Eastman Kodak Co.*, Case No. 05-
28 6462, 2006 WL 1455476, at *2 (W.D.N.Y. May 25, 2006).

1
2 **1. Individualized Issues Predominate Adjudication of**
3 **Plaintiffs' Fraud-Based Claims**

4 In the SAC, Plaintiffs assert common law claims for fraud and negligent
5 misrepresentation. To prevail on either claim, Plaintiffs bear the burden of proving
6 that they actually relied on Lennar's purported misrepresentations. *See Martin v.*
7 *Dahlberg, Inc.*, 156 F.R.D. 207, 217 (N.D. Cal. 1994) ("The common law claims of
8 fraud and negligent misrepresentation ... require proof of reliance."); CACI No.
9 1900 (intentional misrepresentation); CACI No. 1903 (negligent
10 misrepresentation). Plaintiffs' fraud claim is based, in part, on purported
11 omissions. But "[a]ctual reliance is also an element of fraud claims based on
12 omission." *OCM Principal Opportunities Fund v. CIBC World Mkts. Corp.*, 157
13 Cal.App.4th 835, 864 (2007).

14 In the context of this case, Plaintiffs will have to show that they purchased
15 their homes in reliance on Lennar's alleged fraud. (*See* ECF No. 68 ¶¶ 107, 133.)
16 If Lennar did not make any misrepresentation to a particular class member, if that
17 member did not hear, read or otherwise receive the representation, if the purported
18 misrepresentations were not material to the absent class member, or if the buyer did
19 not reasonably rely, then that class member would have no fraud-based claim
20 against Lennar.

21 "Courts routinely hold that ... fraud ... claims are difficult to maintain on a
22 nationwide basis and rarely are certified." *Sanders*, 672 F. Supp. 2d at 991. There
23 is extensive case law holding that common-law fraud claims are not suitable to
24 class action treatment because the issue of reliance is highly individualized. *See,*
25 *e.g., Nagel v. ADM Investor Servs., Inc.*, 217 F.3d 436, 443 (7th Cir. 2000)
26 (recognizing that fraud is "plaintiff-specific" so that "issues common to all the class
27 members [are] not likely to predominate over issues peculiar to specific members");
28 *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) ("a fraud class

1 action cannot be certified when individual reliance will be an issue”); *Broussard v.*
2 *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 341 (4th Cir. 1998) (reliance
3 element of fraud and negligent misrepresentation claims not susceptible to class-
4 wide proof because the “claims turn on whether each franchisee reasonably relied
5 on Meineke’s representations” and “proof of reasonable reliance would depend
6 upon a fact-intensive inquiry into what information each franchisee actually had”);
7 *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996) (reversing
8 class certification because “plaintiffs would still have to show, on an individual
9 basis, that they relied on the misrepresentations”). Indeed, the advisory
10 committee’s notes to Rule 23(b)(3) explain that fraud cases are not suited to class
11 treatment if there was variation in the “degrees of reliance by the persons to whom
12 [misrepresentations] were addressed.”

13 In *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651 (D. Nev. 2009), for
14 example, the plaintiffs filed a class action alleging a scheme among defendants to
15 sell Ol’ Roy brand pet food to consumers as “Made in the USA” when in fact
16 components were manufactured outside of the United States. The court proceeded
17 to apply Rule 12(b)(6) to evaluate the motion. *Id.* at 655 (“[W]hen a party moves to
18 deny class certification prior to any discovery, the Court construes it under the legal
19 standards for a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss.”).
20 Applying this standard, the court concluded dismissal was appropriate as
21 “individualized issues as to reliance” would predominate. *Id.* at 659. It noted that
22 many consumers may not have seen the “Made in the USA” label, and thus would
23 not be able to establish reliance; even those who did see the label may have
24 purchased the food for a variety of factors unrelated to its origin, “such as price,
25 convenience, or a pet's preference for the product.” *Id.* at 658.

26 Plaintiffs contend they bought their homes in reliance on various marketing
27 materials, homebuyer disclosure statements, and contract provisions specific to
28 their particular home-buying transaction in their community. Given that Plaintiffs

1 allege a variety of misrepresentations by Lennar, “different class members may
2 have relied on different representations. Moreover, some class members may not
3 have relied on-or have even been exposed to-any representation.” *Gartin v. S & M*
4 *NuTec LLC*, 245 F.R.D. 429, 437 (C.D. Cal. 2007). Certain class members surely
5 were not exposed to any of the representations upon which Plaintiffs rely, other
6 class members were exposed to some representations and not others, and still other
7 class members may have been exposed to Lennar’s alleged misrepresentations but
8 bought their home for reasons other than Lennar’s Anti-Speculation Agreement or
9 landscaping requirements, such as the home’s superior location, design, amenities,
10 or price. There would be differences from one transaction to another, or between
11 homes purchased by other homebuyers in different communities. The amount of
12 down payment put down by Plaintiffs’ neighbors may have been an utterly
13 immaterial consideration for many class members. *See Sanchez v. Wal-Mart*
14 *Stores, Inc.*, Case No. 06-02573, 2009 WL 1514435, at *3 (E.D. Cal. May 28,
15 2009) (denying certification of class action alleging that plaintiffs relied on
16 misrepresentation that stroller was safe because, in light of the “innumerable
17 variations in the experiences and information possessed by consumers, in the
18 factors that influence consumers’ purchasing decisions, and in the manner by which
19 consumers react to product warnings and the disclosure of safety information,” the
20 class necessarily would include “persons who knew about the alleged hazard, yet
21 purchased the product anyway; people, like Plaintiff, who bought the Stroller
22 because of its price, size, and other characteristics; and many others for whom the
23 ‘warning’ would have made no difference in their purchase decision”).

24 The problem, of course, is that to determine whether recovery is warranted,
25 the Court and the parties will have to inquire of the 128,131 individuals and
26 families who purchased a Lennar home between 2004 and 2006 whether they
27 received and actually relied on the same marketing materials and contractual
28 provisions that allegedly motivated Plaintiffs Stephens and Young to purchase. As

1 the *Sanders* court noted, “[i]f the proposed class were to be certified, the Court
2 would be forced to engage in individual inquiries of each class member with respect
3 to materiality of the statement, whether the member saw Apple’s advertisements or
4 visited Apple’s website, and what caused the member to make the purchase.”
5 *Sanders*, 672 F. Supp. 2d at 991. Those individualized issues will not just
6 predominate, but dominate, the entire action.

7 Even if the question of actual reliance were susceptible to class treatment,
8 which it is not, “determination of whether any reliance was *justifiable* will be
9 controlled by individual questions.” *Gartin*, 245 F.R.D. at 438. Plaintiffs allege
10 that Lennar marketed, *i.e.*, advertised, its practices to “unqualified” buyers. (ECF
11 No. 68 ¶ 25.) If so, then surely some of the purported class members were made
12 aware of Lennar’s sales practices, either from Lennar itself or through conversing
13 with potential new neighbors and friends. To determine if a particular class
14 member’s reliance was reasonable, the Court will have to delve into the particular
15 circumstances surrounding that plaintiff’s sale transaction.

16 Plaintiffs also allege that the effects of Lennar’s conduct became apparent in
17 the communities over time. (ECF No. 68 ¶ 46.) Accordingly, “the nature of
18 justifiable reliance is very different for an earlier purchaser than a much later
19 purchaser.” *Gartin*, 245 F.R.D. at 438; *see also In re Ford Motor Co. Vehicle Paint*
20 *Litig.*, 182 F.R.D. 214, 221 (E.D. La. 1998) (denying class certification partly
21 because increasing media attention regarding the subject of the action would
22 seriously affect proof of reliance for many-but not all-class members).

23 Finally, Plaintiffs’ complaint is based almost entirely on *implicit*
24 misrepresentations – inferences drawn by the plaintiffs from innocuous contract
25 provisions and disclosures. If the alleged meaning and falsity of Lennar’s
26 statements was implicit, then the Court will have to engage in an individualized
27 analysis to determine whether particular class members drew the same inference as
28 the named Plaintiffs at all. Moreover, the Court will have to inquire, from all of the

1 individual circumstances related to each class member’s transaction, whether the
2 inferences drawn by that plaintiff were reasonable. Because Plaintiffs’ fraud claims
3 involve a quagmire of tough factual questions which can only be resolved by
4 individual proof, certification would be inappropriate.

5 **2. Individualized Issues Predominate Adjudication of**
6 **Plaintiffs’ Statutory Claims**

7 Individualized issues also would predominate if Plaintiffs’ False Advertising
8 Law and Unfair Competition Law claims were adjudicated as a class action.
9 Accordingly, the class allegations should be stricken as to Plaintiffs’ statutory
10 claims as well.

11 The California Supreme Court recently held “that relief under the UCL is
12 available without individualized proof of deception, reliance and injury.” *Stearns v.*
13 *Ticketmaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. 2011) (quoting *In re Tobacco II*
14 *Cases*, 46 Cal.4th 298, 312 (2009)). In light of *Tobacco II*, class treatment is not
15 defeated on the ground that absent class members must establish actual reliance as
16 an element of their statutory claims. *Stearns*, 655 F.3d at 1020.

17 Nonetheless, to maintain their UCL and FAL claims, absent class members
18 still would have to demonstrate their standing to sue by establishing injury-in-fact
19 and causation. *See Webb v. Carter’s Inc.*, 272 F.R.D. 489, 497 (C.D. Cal. 2011)
20 (citing authority). The federal case law is clear that *Tobacco II* does nothing to
21 absolve absent class members of their obligation to prove injury-in-fact and
22 causation in order to maintain their claim in federal court. *See id.* at 498 (rejecting
23 notion that, after *Tobacco II*, “uninjured parties could be class members in a class
24 action brought in *federal* court, despite their lack of Article III standing”) (emphasis
25 in original). Thus, even though the UCL and FAL “do not require proof of reliance,
26 Article III nonetheless requires some showing of injury and causation for a plaintiff
27 to recover.” *O’Shea v. Epson Am., Inc.*, No. 09-8063, 2011 WL 4352458, at *10
28 (C.D. Cal. Sept. 19, 2011).

1 In *O’Shea*, the plaintiffs sought to certify a class of individuals who
2 purchased a particular Epson Stylus printer. 2011 WL 4352458, at *1. They
3 alleged that Epson included a statement on the printer box suggesting that
4 consumers needed to replace “only the color you need with individual ink
5 cartridges,” when, in fact, the printer required the consumer to purchase all
6 cartridges simply to print black text. *Id.* In declining to certify the plaintiffs’ suit
7 under the UCL and FAL pursuant to Rule 23(b)(3), the court held that whether
8 absent class members satisfied Article III’s requirements raised individualized
9 issues that defeated certification, and that the action was predominated by the
10 individualized question whether absent class members actually saw and relied on
11 the purported misrepresentation, thereby causing their injury. *Id.* at *10-11.

12 As in *O’Shea*, to establish standing, absent class members here would have to
13 show that their purported injuries were caused by Lennar’s alleged representations
14 and omissions. As already explained, ascertaining whether the 128,131 individuals
15 and families who purchased homes from Lennar between 2004-2006 actually
16 received and relied upon the same marketing materials and contractual provisions
17 as the named plaintiffs would require an individualized inquiry of tremendous
18 proportions. A class action is not the appropriate vehicle for Plaintiffs’ statutory
19 claims.

20 **B. AT A MINIMUM, THE CLASS MUST BE LIMITED TO**
21 **CALIFORNIA RESIDENTS**

22 If the Court does not strike the class allegations entirely, the proposed class
23 must be dramatically limited. The class with the least individualized issues, though
24 still numerous, would be a class of residents who live in the same subdivisions as
25 Plaintiffs. Anything broader compels the Court to confront individualized issues
26 resulting from the fact that class members in different subdivisions interacted with
27 different sales people (who presumably made different oral representations), were
28 exposed to different advertisements, and potentially signed contracts with varying

1 provisions.

2 At a minimum, the proposed class should be limited to plaintiffs whose
3 homes are located in California. In similar cases, courts have stricken nationwide
4 class allegations at the pleading stage because California law cannot apply to the
5 claims of out-of-state class members and because of manageability problems that
6 would ensue from the application of numerous states' laws. *See, e.g., Stearns v.*
7 *Select Comfort Retail Corp.*, Case No. 08-2746, 2008 WL 4542967, at *8 (N.D.
8 Cal. Oct. 1, 2008); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp.
9 2d 1011, 1027-28 (N.D. Cal. 2007).

10 **1. California Law Cannot Govern the Claims of Absent Class**
11 **Members Without Violating the Due Process Clause**

12 The Due Process Clause of the United States Constitution places limits on the
13 ability of a forum state to apply its laws to the claims of nonresident plaintiffs in a
14 nationwide class action. In this case, the claims of nonresident class members—
15 who make up well over 75% of the proposed class—cannot be adjudicated under
16 California law unless California has a “significant contact or aggregation of
17 contacts to the claims asserted by each member of the plaintiff class, contacts
18 creating state interests in order to ensure that the choice of [forum] law is not
19 arbitrary or unfair.” *Clothesrigger, Inc. v. GTE Corp.*, 191 Cal.App.3d 605, 612
20 (1987) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985)).

21 In *Shutts*, the Supreme Court declined to apply Kansas law to the claims of
22 non-residents because courts in the forum state “may not abrogate the rights of
23 parties beyond its borders having no relation to anything done or to be done within”
24 the state.” 472 U.S. at 822. Pursuant to *Shutts*, a nationwide class action cannot be
25 adjudicated under the law of the forum state unless that state’s law both: (1) does
26 “not conflict with the law of another jurisdiction that has an interest in the case”;
27 and (2) has “a significant contact or significant aggregation of contacts to claims
28 asserted by each member of the plaintiff class to insure that the choice of the forum

1 state's law is not arbitrary or unfair." *In re Graphics Processing Units Antitrust*
2 *Litig.*, 527 F. Supp. 2d at 1127 (citing *Shutts*, 472 U.S. at 821-22). California law
3 cannot be applied to all absent class members' claims because it fails both prongs
4 of the *Shutts* test.

5 (a) **California Law Conflicts with the Laws of Other**
6 **Interested Jurisdictions in Several Material Respects**

7 There are numerous, material differences between California law and the law
8 of other jurisdictions, such that California law cannot be applied extraterritorially to
9 govern the claims of nonresident class members without violating the Due Process
10 Clause.

11 Plaintiffs' first cause of action is for fraud. The common law of fraud is
12 materially different from one state to another. *Lewis Tree Serv. v. Lucent Techs.,*
13 *Inc.*, 211 F.R.D. 228, 236 (S.D.N.Y. 2002); *see also Rivera v. Bio Engineered*
14 *Supplements & Nutrition, Inc.*, No. 07-1306, 2008 WL 4906433, at *2 (C.D. Cal.
15 Nov. 13, 2008) ("there are material conflicts between the California law of ... fraud
16 and the laws of the other states"). In particular, the elements of fraud vary greatly
17 from state to state with respect to mitigation, causation, damages, reliance, and the
18 duty to disclose. *Lewis Tree*, 211 F.R.D. at 236; *see also In re*
19 *Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002) (collecting cases);
20 *Castano*, 84 F.3d at 743; *Stephenson v. Bell Atl. Corp.*, 177 F.R.D. 279, 293-94
21 (D.N.J. 1997). Not only is the law on fraud different among the states, there are
22 myriad individualized factual inquiries necessary to adjudicate fraud-based claims,
23 including the facts surrounding each buyer's transaction, materiality of the
24 statements, whether the member saw and visited any advertisements, websites and
25 brochures of the Defendants, and what factors and considerations caused them to
26 make their home purchase. *Lewis Tree*, 211 F.R.D. at 236. "This variation and lack
27 of uniformity indicate a uniform substantive law of fraud cannot be applied to the
28 claims of this purported nationwide class." *Id.*

1 Plaintiffs' second and third causes of action are under the California Unfair
2 Competition Law and False Advertising Law. The claims of nonresident class
3 members cannot possibly be adjudicated under the UCL and FAL because neither
4 law can be applied to claims of non-California residents injured by conduct
5 occurring beyond California's borders. *See Standfacts Credit Serv. Inc. v. Experian*
6 *Info. Solutions*, 405 F. Supp. 2d 1141, 1148 (C.D. Cal. 2005); *Speyer v. Avis Rent a*
7 *Car System*, 415 F. Supp. 2d 1090, 1096 (S.D. Cal. 2005); *Churchill Village, LLC*
8 *v. Gen. Elec. Co.*, 169 F. Supp. 2d 1119, 1126 (N.D. Cal. 2000); *Norwest*
9 *Mortgage, Inc. v. Super. Ct.*, 72 Cal.App.4th 214, 222-27 (1999). Put simply, the
10 UCL and FAL have no extraterritorial application. Indeed, Section 17500 on its
11 face has no extraterritorial application. See Cal. Bus. & Prof. Code § 17500
12 (prohibiting statements made "before the public in this state") (emphasis added).

13 To maintain UCL and FAL claims on behalf of non-California residents,
14 Plaintiffs would have to allege and prove either that the putative class members
15 were injured in California or that the wrongful conduct occurred in California. *See*
16 *Tidenberg v. Bidz.com, Inc.*, No. 08-5533, 2009 WL 605249, at *4-5 (C.D. Cal.
17 Mar. 4, 2009). Plaintiffs do not allege that putative non-California class members
18 were injured in California. Likewise, the SAC contains no allegation that the
19 allegedly harmful conduct occurred in California. Indeed, the SAC alleges that
20 both Lennar defendants are headquartered in Miami, Florida, suggesting that any
21 corporate-wide conduct likely emanated from there. (ECF No. 68 ¶¶ 9-10). This
22 Court cannot simply presume "that any false and misleading statements emanated
23 from California." *Tidenberg*, 2009 WL 605249, at *4-5.

24 Even if they could be applied extraterritorially, application of California's
25 UCL and FAL to claims of nonresident class members would violate the Due
26 Process Clause because California's consumer protection statutes are materially
27 different from those of other states. A few examples illustrate the problem.

28 California's UCL is the *only* consumer protection statute in the country

1 patterned on § 5 of the FTC Act. *See* William L. Stern, California Business &
2 Professions Code § 17200 Ch. 2-F (2009). Some states in which Lennar allegedly
3 sells homes, including Florida, Illinois, Massachusetts, North Carolina, and South
4 Carolina have consumer protection statutes predicated on one alternative of the
5 model Unfair Trade Practices Act, while others including Maryland and
6 Pennsylvania have adopted language from a different alternative. *See id.* Yet other
7 states, including Colorado, Illinois, and Minnesota have derived their language
8 from the model Uniform Deceptive Trade Practices Act. *See id.* Finally, New
9 Jersey and Arizona use language modeled on the “Consumer Fraud Act.” *See id.*

10 Not surprisingly, in light of this varied pedigree, states’ consumer protection
11 statutes “are far from uniform.” *In re Charles Schwab Corp. Sec. Litig.*, 264 F.R.D.
12 531, 538 (N.D. Cal. 2009). For example, application of the UCL—which is limited
13 to restitution and injunctive relief—to plaintiffs in all of the states where Lennar
14 allegedly sells homes would deprive nonresident class members of potential
15 remedies available under their own state’s laws, including actual damages, punitive
16 damages, and/or attorney’s fees. *See e.g., Howell v. Midway Holdings, Inc.*, 362 F.
17 Supp. 2d 1158, 1165 (D. Ariz. 2005); *see also* Colo. Rev. Stat. § 6-1-113(2)(a); Fla.
18 Stat. Ann. § 501.211; Nev. Rev. Stat. § 598.0999(2), (3); N.J. Stat. Ann. § 56:8-
19 19(a); N.Y. Gen. Bus. Law. § 349(h); N.C. Gen. Stat. § 75-16; 73 Pa. Cons. Stat. §
20 201-9.2; Tex. Bus. & Com. Code § 17.50(b)(1).

21 Conversely, allowing nonresident class members to sue under California law
22 would give some plaintiffs greater remedies, such as injunctive relief, than currently
23 available under their own state’s law. *See, e.g.,* Colo. Rev. Stat. § 6-1-100
24 (injunctive relief available only in suits brought by attorney general); 815 Ill.
25 Comp. Stat. 505/7 (same). This would, after the fact, alter Lennar’s obligations to
26 over $\frac{3}{4}$ of the proposed class. Application of the California UCL and its four-year
27 statute of limitations would also prejudice Lennar by precluding it from dismissing
28 claims that would otherwise be untimely or not maintainable in a class action. *See,*

1 e.g., S.C. Code Ann. § 39-5-140(a) (no class actions); Colo. Rev. Stat. § 6-1-115
2 (three year statute of limitations); Tex. Bus. & Com. Code § 17.565 (two years).
3 And California law would permit recovery without proof of reliance, in
4 contravention of Texas, Illinois, and Pennsylvania law. *See* Tex. Bus. & Com.
5 Code § 17.50(a); *Barbara's Sales, Inc. v. Intel Corp.*, 79 N.E.2d 910, 919 (Ill.
6 2007) (“[P]laintiffs need not prove actual deception of the named plaintiffs under
7 California law as found in California’s Unfair Competition Law, as they would
8 under Illinois law as found in the Illinois Consumer Fraud Act.”); *Toy v.*
9 *Metropolitan Life Ins. Co.*, 863 A.2d 1, 11 (Pa. Super. 2004). Additionally, class
10 members from New Jersey, Illinois, and Pennsylvania would be relieved of their
11 obligation to prove scienter. *See* 815 Ill. Comp. Stat. 505/2; N.J. Stat. Ann. § 56:8-
12 2; *Gibbs v. Ernst*, 647 A.2d 882, 889 (Pa. 1994). These conflicts demonstrate that a
13 nationwide class cannot be permitted to maintain UCL and FAL claims without
14 violating the Due Process Clause.

15 In their fourth cause of action, Plaintiffs assert a claim for negligent
16 misrepresentation. The law on negligent misrepresentation also varies from state to
17 state, and in some states there is no such claim. *See Kaczmarek v. IBM*, 186 F.R.D.
18 307, 312 (S.D.N.Y. 1999) (stating that the law on negligent misrepresentation
19 differs materially from state to state); *see also Carpenter v. BMW of N. Am., Inc.*,
20 No. 99-214, 1999 WL 415390, at *6 (E.D. Pa. June 21, 1999) (“elements needed to
21 establish negligent misrepresentation will vary among the 50 states, with some
22 states not even recognizing such a claim”).

23 In their fifth cause of action, Plaintiffs assert a claim for breach of the
24 implied covenant of good faith and fair dealing, which also varies greatly from one
25 state to another. For example, Pennsylvania does not recognize an independent
26 cause of action for breach of the implied covenant of good faith and fair dealing,
27 while California recognizes such a claim. *Compare LSI Title Agency, Inc. v.*
28 *Evaluation Servs.*, 951 A.2d 384, 391 (Pa. Super. Ct. 2008) (holding that the claim

1 for breach of implied covenant of good faith and fair dealing is subsumed in a
2 breach of contract claim); *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal.2d 654,
3 658 (1958) (finding that there is an implied covenant of good faith and fair dealing
4 in every contract in California).

5 It cannot plausibly be argued that the due process implications of applying
6 California law to the claims of non-resident class members are absent because
7 California law is materially identical to the law of the seventeen other jurisdictions
8 where Plaintiffs allege Lennar sells homes. The law of California is materially
9 different from the law of states where nonresident class members reside; if
10 Plaintiffs want to maintain a nationwide class action, they will have to proceed
11 under the laws of seventeen different states.

12 (b) **The Absent Class Members Lack Significant Contacts**
13 **with California**

14 Even if California law were sufficiently similar to the laws of other states,
15 California law cannot be uniformly applied to the claims of absent class members
16 because they lack significant contacts with this State. In undertaking the due
17 process inquiry, the Court must examine “the contacts of the State, whose law [is to
18 be] applied, with the parties and with the occurrence or transaction giving rise to the
19 litigation.” *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981). Only if the state
20 has a “significant contact or significant aggregation of contacts, creating state
21 interests, with the parties and the occurrence or transaction” may the law of that
22 state be applied. *Id.*

23 Unlike in cases where courts have found application of California law
24 constitutional, Plaintiffs do not allege that the alleged misrepresentations that
25 harmed nonresident class members emanated from California, that any defendant is
26 headquartered in California, or even that a significant number of plaintiffs reside in
27 California. See *Badella v. Deniro Marketing LLC*, No. 10-3908, 2011 WL
28 5358400, at *9-12 (N.D. Cal. Nov. 4, 2011). To the contrary, the alleged

1 misrepresentations almost certainly emanated from the states where nonresident
2 class members purchased their homes; the Lennar defendants are headquartered in
3 Miami, Florida (ECF No. 68 ¶¶ 9-10); and only 25% of the Plaintiffs purchased
4 homes in California *and Nevada* between 2004-2006, many of which likely
5 purchased homes in Nevada, which experienced explosive home growth in the
6 relevant time period (*id.* ¶ 16).

7 Lennar previously moved to strike the nationwide class allegations on the
8 ground that Plaintiffs failed to allege sufficient cause for applying California law to
9 non-resident class members. Well aware of their obligation to set forth the most
10 favorable allegations available to them, Plaintiffs still have not alleged that any of
11 the non-resident plaintiffs had meaningful contacts with the State of California. It
12 is apparent Plaintiffs cannot bear their burden, at the pleading stage, of alleging that
13 application of California law would not violate the due process rights of absent
14 class members. *See Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 589 (C.D.
15 Cal. 2008).

16 2. **A Class Action Involving the Law of Seventeen States Would**
17 **be Unmanageable**

18 Because application of California law to all class members' claims would
19 violate the Due Process Clause, each Plaintiffs' claims would have to be
20 adjudicated under the law of the state in which they conducted the allegedly
21 fraudulent transaction. That would require conducting a trial on five claims, under
22 seventeen different legal regimes. In essence, the parties, the Court, and the jury
23 would be expected to grapple with almost 100 different causes of action.

24 A class action is not the "superior" method of adjudication, as required by
25 Rule 23(b)(3), when the Court must apply the laws of numerous jurisdictions. *See*
26 *Rivera*, 2008 WL 4906433, at *3-4. Indeed, when more than a few state laws
27 differ, courts are faced with the "impossible task" of instructing the jury on the
28 relevant law. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir.

1 2001) (citation omitted). As explained above, the laws of the seventeen interested
2 jurisdictions do materially differ, as to each of Plaintiffs' claims. Simply
3 instructing the jury on a nationwide class action would be a monumental task. This
4 is the type of case where "[t]he application of several state laws to one action"
5 makes "the trial exceedingly complex." *Util. Consumers' Action Network v. Sprint*
6 *Solutions, Inc.*, 259 F.R.D. 484, 487-88 (S.D. Cal. 2009). Certifying a nationwide
7 class in this situation would **not** be a superior method of adjudicating Plaintiffs'
8 claims.

9 **C. PLAINTIFFS' DIMINISHED-VALUE AND DIMINISHED-**
10 **DESIRABILITY ALLEGATIONS SHOULD BE STRICKEN**

11 As explained in Lennar's motion to dismiss, Plaintiffs lack standing to
12 maintain any claim based on their purported diminished-value or diminished-
13 desirability injury. Accordingly, to effect dismissal of claims that Plaintiffs lack
14 standing to pursue, the Court should strike all paragraphs in the SAC related to
15 Plaintiffs' diminished-value and diminished-desirability injury: Paragraphs 3, 4,
16 46-53, 66, 76, 86, 92(f)-(h), 111, 119, 127, 135, and 139-146.

17 Plaintiffs' breach of the implied covenant of good faith claim (ECF No. 68 ¶¶
18 139-146) must be stricken in its entirety because that claim is based **only** on
19 Plaintiffs' alleged reduced-desirability and reduced-value injury. An implied
20 covenant claim can only be predicated on conduct that occurs after formation of a
21 contract. *See Singh v. Wells Fargo Bank, N.A.*, No. 09-2035, 2008 WL 2365881, at
22 *5 (N.D. Cal. July 30, 2009). Plaintiffs' claim therefore cannot possibly be based
23 on their alleged overpayment injury, which occurred at the time of sale.

24 **D. THE ALLEGATIONS IN PARAGRAPH 55 SHOULD BE**
25 **STRICKEN AS SUPERFLUOUS, IMMATERIAL,**
26 **IMPERTINENT AND SCANDALOUS**

27 Rule 12(f) permits a defendant to move to strike extraneous matters pleaded
28 in a complaint that are "redundant, immaterial, impertinent, or scandalous."

1 Paragraph 55 includes gratuitous allegations about the compensation and bonuses
2 received by Lennar Corp's CEO between 2004-2006:

3 While the scheme has had devastating effects on Plaintiffs, the
4 Defendants, their shareholders and the executives and management of
5 each Defendant individually benefited from these practices. Primarily
6 relying on bonuses, the chief executive officers of Lennar Corporation,
7 Stuart Miller, received over \$50 million in compensation over the three
8 year class period of 2004-2006. On information and belief, the
9 prospect of this excessive and unconscionable compensation led to and
10 contributed to, *inter alia*, decisions by such executives which resulted
11 in the actions complained of herein.

12 (ECF No. 68 ¶ 55).

13 These allegations are entirely unnecessary and immaterial to Plaintiffs'
14 claims. Stuart Miller is not a defendant in this case. Nor is this a case by investors
15 suing over alleged excessive executive compensation. None of the allegations in
16 Paragraph 55 assist Plaintiffs in proving their claims because there is no alleged
17 factual connection between compensation of a high-level executive, the alleged
18 misrepresentations made to Plaintiffs by Lennar employees about stable
19 neighborhoods, or the alleged non-disclosure about "unqualified" home buyers, and
20 Plaintiffs' alleged damages. Paragraph 55 is simply a banal allegation that Mr.
21 Miller sought to maximize Lennar's profits. If that allegation is relevant, then
22 virtually every case involving a corporate defendant would include issues about
23 executive compensation. Such time and resource consuming litigation is
24 unnecessary in this case because executive compensation has nothing to do with the
25 five causes of action or Plaintiffs' alleged damages. If the allegation is not stricken
26 now, Plaintiffs undoubtedly will seek discovery related to executive compensation
27 and seek to harass Lennar's executives with depositions and other abusive tactics,
28 and discovery motions would follow. These distractions should be avoided now.

E. PLAINTIFFS' PRAYER FOR RELIEF MUST BE NARROWED

Under Rule 12(f), the Court may strike "a prayer for relief which is not

1 available as a matter of law.” *Shein v. Canon, U.S.A.*, No. 08-7323, 2009 WL
2 3109721, at *3 (C.D. Cal. Sept. 22, 2009). Even if Plaintiffs prevailed on their
3 claims, they are precluded, as a matter of law, from obtaining rescission of their
4 purchase contracts and enjoining Lennar from providing mortgage services.
5 Accordingly, both prayers for relief should be stricken from the SAC.

6 **1. The Request to Enjoin Defendants from Providing Mortgage**
7 **Services Must be Stricken**

8 Plaintiffs request an order enjoining Lennar “from engaging in providing
9 mortgage services for homes sold by Defendants.” (ECF No. 68 Prayer for Relief ¶
10 F.3.) The continuing inclusion of this Prayer for Relief must be an oversight
11 because Plaintiffs have now dismissed all mortgage defendants from the case.
12 Since Lennar Corp. and Lennar Homes of California do not provide mortgage
13 services, they should not be enjoined from doing so in the future without some
14 allegation that the threat of future injury exists. *See City of Los Angeles v. Lyons*,
15 461 U.S. 95, 109 (1983) (holding that plaintiff’s standing to seek injunctive relief
16 “depended on whether he was likely to suffer future injury from the use of the
17 chokeholds by police officers”).

18 What is more, Plaintiffs’ request is overbroad on its face and legally
19 unsustainable. Because the request cannot be lawfully granted, it is immaterial and
20 should be stricken. Case law and Rule 65(d) require that injunctions be narrowly
21 tailored to remedy the specific harms shown or alleged by plaintiffs. *See Stormans,*
22 *Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009); *Zepeda v. U.S. I.N.S.*, 753
23 F.2d 719, 728 (9th Cir. 1983). It is imperative injunctive relief “not impose
24 unnecessary burdens on lawful activity.” *Brooks v. Giuliani*, 84 F.3d 1454, 1467
25 (2d Cir. 1996) (citation and quotation omitted). For that reason, “[a] court must
26 limit the conduct it enjoins to that which is found to have been ‘pursued [or]
27 persuasively to be related to the proven unlawful conduct.’” *Nelson v. Int’l Bhd. of*
28 *Elec. Workers, Local Union No. 46*, 899 F.2d 1557, 1564 (9th Cir. 1990) (quoting

1 *NLRB v. Express Pub. Co.*, 312 U.S. 426, 433 (1941)). If a court enjoins lawful
2 behavior, the order “must be carefully limited in time and scope to avoid an
3 unreasonably punitive or nonremedial effect.” *United States v. Holtzman*, 762 F.2d
4 720, 726 (9th Cir. 1985).

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

17 **2. Unless the Class Allegations are Stricken, Plaintiffs Request**
18 **for Rescission Must be Excised from the Complaint**

19 If the Court strikes Plaintiffs’ class allegations as requested by this Motion,
20 then Lennar’s motion to strike Plaintiffs’ request for rescission is moot. If,
21 however, the Court does not strike the class allegations, then Plaintiffs’ prayer for
22 rescission (ECF No. 68 Prayer for Relief ¶ D.2) must be stricken because “[c]ourts
23 are in uniform agreement that rescission may not be sought on a class-wide basis.”
24 *Amparan v. Plaza Homes Mortg., Inc.*, No. 07-4498, 2008 WL 5245497, at *15
25 (N.D. Cal. Dec. 17, 2008).

26 As the Seventh Circuit explained in *Andrews v. Chevy Chase Bank*, 656 F.3d
27 570 (7th Cir. 2008), rescission is “procedurally and substantively incompatible with
28 the class-action device.” *Id.* at 574. In *Andrews*, the plaintiffs filed a class action

1 under the Truth In Lending Act (“TILA”) seeking rescission of refinance
2 mortgages. The district court certified a class and granted summary judgment to
3 the plaintiffs, holding that all class members could rescind their mortgage contracts.
4 *Id.* at 572-73. The Seventh Circuit reversed, holding as a matter of law that a class
5 action for rescission cannot be maintained. *Id.* at 578. The court explained that
6 “[r]escission is a highly individualized remedy as a general matter,” and
7 acknowledged that “[t]he variations in the transactional ‘unwinding’ process that
8 may arise from one rescission to the next make it an extremely poor fit for the
9 class-action mechanism.” *Id.* at 574. Some class members would elect not to
10 rescind, and “[i]ndividual controversies would erupt” for those that did. *Id.* “Using
11 a class action to resolve a multitude of individual, varied rescission claims is neither
12 ‘economical’ nor ‘efficient’ in any sense of those terms.” *Id.* at 577; *see also*
13 *Schramm v. JPMorgan Chase Bank, N.A.*, No. 09-9442, 2011 WL 5034663, at *12
14 (C.D. Cal. Oct. 19, 2011) (class action not appropriate vehicle for rescission claim,
15 which “requires inquiries into each individual borrower’s situation because it
16 generally includes the return of all interest, fees, finance charges, and commissions
17 paid in connection with the loan”).

18 The remedy of rescission is anathema to the class action mechanism under
19 the circumstances alleged here. The Court would have to engage in an
20 individualized analysis of each plaintiffs’ claim since many class members will opt
21 against rescission, as it will mean giving up their homes. As to those class
22 members who would accept rescission, the Court would be dragged into highly-
23 individualized “unwinding” procedures that will vary by plaintiff based on, among
24 other things, the purchase price, lender, type of financing, geographic location, and
25 housing community. For these reasons, the Court should strike Plaintiffs’ prayer
26 for rescission.

27 **V. CONCLUSION**

28 For the foregoing reasons, Lennar’s motion to strike should be granted.

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Dated: December 22, 2011

JONES DAY

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