

1 Daniel A. Berman (State Bar No. 161696)
dberman@wshblaw.com
2 Jason C. Gless (State Bar No. 187899)
jgless@wshblaw.com
3 Keith E. Smith (State Bar No. 244505)
kesmith@wshblaw.com
4 **WOOD, SMITH, HENNING & BERMAN LLP**
3880 Lemon Street, Suite 420
5 Riverside, California 92501-3255
Phone: 951 779 5000 ♦ Fax: 951 755 1650

6 Attorneys for Defendants Richmond American Homes Corporation, a Colorado
7 corporation, M.D.C. Holdings, Inc., erroneously sued as M.D.C. Holdings, Inc.
(d/b/a "Richmond American"); Richmond American Homes of Maryland, Inc., a
8 Maryland corporation, successor by merger to Richmond American Homes of
California, Inc., a Colorado corporation
9

10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

13 EDILBERTO LUMALU, BRIAN
14 DIETZ, BRENDA DIETZ, CANDICE
15 MCDONALD, as individuals and on
behalf of all other similarly situated,

16 Plaintiffs,

17 v.

18 RICHMOND AMERICAN HOMES
CORPORATION; M.D.C.
19 HOLDINGS, INC. (D/B/A/
"RICHMOND AMERICAN");
20 RICHMOND AMERICAN HOMES
OF MARYLAND, INC. (SUCCESSOR
21 TO RICHMOND AMERICAN
HOMES OF CALIFORNIA, INC.); and
22 DOES 1 THROUGH 10, inclusive,

23 Defendants.
24

CASE NO. ED CV 09-1669 VAP

**NOTICE OF MOTION AND
MOTION FOR AN ORDER TO
STRIKE IN WHOLE OR IN PART,
PLAINTIFFS' SECOND
COMPLAINT**

Assigned to Hon. Virginia A. Phillips

Original Complaint Filed: 09/03/2009

DATE: January 30, 2012
TIME: 2:00 p.m.
DEPT.: 2

25 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

26 PLEASE TAKE NOTICE that Defendants Richmond American Homes
27 Corporation, M.D.C. Holdings, Inc., erroneously sued as M.D.C. Holdings, Inc.
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1 (d/b/a "Richmond American") and Richmond American Homes of Maryland, Inc.,
2 successor by merger to Richmond American Homes of California, Inc., pursuant to
3 Rules 12(f) and 23(d)(1)(D) of the Federal Rules of Civil Procedure ("FRCP") will
4 and hereby do, for an order striking, in whole or in part, Plaintiffs' Second Amended
5 Complaint in this action. The motion will come before the Court on January 30,
6 2012, at 2:00 p.m., or as soon thereafter as the parties may be heard in Department 2
7 of this Court located at 3470 12th Street, Riverside, California 92501.

8 Defendants request as follows:

9 A. Plaintiffs cannot maintain a viable class action. Accordingly,
10 Defendants request that the following class allegations be stricken from the Second
11 Amended Complaint ("SAC"): Paragraphs 95 – 105, Prayer for Relief Paragraphs A
12 and B, and all other references to a purported class at Paragraphs C – F.

13 B. In the alternative, Defendants request the nationwide class allegations
14 be stricken from the SAC: Paragraph 95, Prayer for Relief Paragraph A and all other
15 references regarding a nationwide class.

16 C. Because Plaintiffs lack standing to pursue any claims based on their
17 purported diminished-value and diminished desirability injury, Defendants request
18 the following paragraphs be stricken from the SAC:

19 D. The allegations regarding the compensation of M.D.C. Holdings
20 officers are immaterial and impertinent. Paragraph 59 should be stricken.

21 E. Defendants request that Plaintiffs' request for injunctive relief at Prayer
22 for Relief Paragraph F 3 be stricken in its entirety.

23 F. Defendants request that Plaintiffs' request for rescission at Prayer for
24 Relief Paragraph D 2 be stricken in its entirety and that any other references to
25 rescission be stricken from the SAC.

26 This Motion is made following the conference of counsel, pursuant to Central
27 District of California Local Rule 7-3, on December 12, 2011.

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1 The Motion is based on this Notice, the accompanying Memorandum of
2 Points and Authorities in support thereof, the Points and Authorities filed in the lead
3 brief in the *Stephens v. Lennar Corporation* matter; the concurrently filed Request
4 for Judicial Notice and any other such matters which the Court may consider by way
5 of judicial notice; the pleadings and the records on file herein; and such further
6 written and oral evidence and argument as may be presented at the time of the
7 hearing.

8 DATED: December 22, 2011 WOOD, SMITH, HENNING & BERMAN LLP

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By: 1st JASON C. GLESS
DANIEL A. BERMAN
JASON C. GLESS
KEITH E. SMITH
Attorneys for Defendants Richmond American
Homes Corporation Holdings, Inc. erroneously
sued as M.D.C. Holdings, Inc. (d/b/a "Richmond
American"); and Richmond American Homes of
Maryland, Inc., a Maryland corporation,
successor by merger to Richmond American
Homes of California, Inc., a Colorado
corporation

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendants Richmond American Homes Corporation (hereinafter "RAHC"), M.D.C. Holdings, Inc. erroneously sued as M.D.C. Holdings, Inc., dba Richmond American (hereinafter "MDC") and Richmond American Homes of Maryland, Inc. successor by merger to Richmond American Homes of California, Inc. (hereinafter "RAHM") (collectively "Defendants") respectfully submit the following memorandum of points and authorities in support of their motion to strike. Concurrently herewith, Defendants have also filed a motion to dismiss the Second Amended Complaint ("SAC").

I. INCORPORATION OF THE LENNAR MOTION TO DISMISS

Pursuant to the Court's direction and in an effort to avoid duplicative arguments and reduce the burden on the Court and on the parties in these eight separate actions, Defendants hereby incorporate by reference the introduction, legal authority and arguments set forth in Sections I, II, III and IV of the Motion to Strike filed by Defendants Lennar Corporation and Lennar Homes of California, Inc., in the case entitled *Stella Stephens, et al. v. Lennar Corporation, et al.*, Case No. ED CV 09-01668 VAP ("Lead Defense Brief.") By way of this Motion to Strike, Defendants set forth additional and particular facts and arguments directly applicable to them, further justifying why the Court should strike certain allegations of the SAC.

Specifically, this brief is intended to provide the Court with factual supplements specific to these Defendants which are not included in the Lead Defense Brief.

II. ARGUMENT

A. FACTUAL SUPPLEMENTS TO LEAD DEFENSE BRIEF.

Notably, the allegations in the underlying action are nearly identical to those asserted in the Lennar action. The first of the three factual supplements is that Plaintiffs, with respect to the underlying Defendants, allege Defendants closed sales

1 of 42,310 houses between January 1, 2004 and December 31, 2006. Of this amount,
2 Plaintiffs allege 6,326 were located in California. Thus, 85 percent¹ of the houses
3 purported to be in the nationwide class have absolutely no relationship to California.

4 Plaintiffs allege in paragraphs 10-12 of the SAC, that all of the named
5 defendants are incorporated and headquartered in the State of Colorado. This is not
6 the case. MDC is a Delaware Corporation and RAHM is a Maryland Corporation.
7 Whether one looks to the allegations of the SAC, or the actual state of incorporation,
8 what is apparent is that none of the Defendants are California corporations.

9 Thus, to allow the nationwide class allegations to survive this motion would
10 force the parties hereto to spend significant time and resources conducted discovery
11 on the purchase and sale of 35,984 houses wherein the buyers have no relationship
12 to California, the Defendants have no relationship to California and the properties in
13 question were located in states other than California. Simply put, the purported
14 class attempts create jurisdiction over 35,984 transactions with no relationship to
15 California whatsoever.

16 The second factual distinction is that Plaintiffs allege Defendants sold houses
17 in eleven states, which, in addition to California, include Arizona, Nevada,
18 Colorado, Utah, Florida, Virginia, Maryland, Delaware, Illinois and Texas (SAC
19 ¶18;) whereas the Lennar complaint alleges sales in 17 states.

20 Lastly, and as is similar to the Lennar defendants, Plaintiffs did not name
21 HomeAmerican Mortgage Corporation to the SAC. As such, the arguments at
22 section IV(E)(1) of the Lead Defense Brief remain applicable.

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¹ In the Lead Defense Brief, Lennar notes that a minimum of 75 percent of its houses were sold outside of California during the purported class period.

1 **A. UNIQUE FACTS PERTAINING TO DEFENDANTS.**

2 The entire premise of the SAC is that Defendants, and each of them, acted in
3 a scheme to defraud the four named Plaintiffs by creating a closed universe whereby
4 Defendants constructed, sold and financed the subject houses. Plaintiffs allege
5 Defendants did the foregoing "thereby keeping all major aspects of the sale within
6 its control." (SAC ¶21.) However, Plaintiffs closed universe theory fails when the
7 facts associated with the Plaintiff residences are reviewed.

8 This court need look no further than three transactions involving the four
9 named Plaintiffs to see the uniqueness of each transaction. Plaintiffs Dietz and
10 Lumalu each used an outside lender, whereas McDonald did not. Thus, Plaintiffs
11 allegations that no one outside of Defendants' control was involved in any
12 transaction so as to drive up market prices is patently false. With respect to two of
13 the three transactions involving the class plaintiffs, an outside lender was consulted.
14 Further, each outside lender retained its own independent appraiser. Moreover,
15 Plaintiffs cannot establish a "closed universe" at either community.

16 Most revealing as to the flaws in Plaintiffs purported class is that plaintiff
17 Lumalu, who purports not to be a high foreclosure risk buyer went through
18 foreclosure in 2010 on another property he owned, and filed for bankruptcy in 2011.
19 As discussed in detail in Defendants' Motion to Dismiss, Lumalu is the high
20 foreclosure risk his neighbors, no matter what their respective down payments were,
21 should be concerned about.

22 In his bankruptcy petition, Lumalu asserts he is seeking to modify the loan on
23 his subject property, evidencing one's ability to avoid foreclosure is not solely
24 predicated on the amount of one's down payment, as Plaintiffs' would have the
25 Court believe.

26 As the facts associated with the three transactions involving the Plaintiffs lack
27 typicality, Plaintiffs cannot establish a class.

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1 **III. CONCLUSION**

2 In the event the Court does not grant Defendants' Motion to Dismiss,
3 concurrently filed herewith, it is respectfully requested this Court grant Defendants'
4 Motion to Strike in full or in part.

5 DATED: December 22, 2011 WOOD, SMITH, HENNING & BERMAN
6 LLP

7
8 By: 1st JASON C. GLESS

9 DANIEL A. BERMAN
10 JASON C. GLESS
11 KEITH E. SMITH

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am employed in the County of Riverside, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 3880 Lemon Street, Suite 420, Riverside, California 92501-3311.

On December 22, 2011, I served the following document(s) described as **NOTICE OF MOTION AND MOTION FOR AN ORDER TO STRIKE IN WHOLE OR IN PART, PLAINTIFFS' SECOND COMPLAINT** on the interested parties in this action as follows:

SEE ATTACHED LIST

BY ELECTRONIC SERVICE: Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the document(s) to be sent to the persons at the electronic notification address listed in the service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was not successful.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on December 22, 2011, at Riverside, California.

Jody Carlin

JODY CARLIN

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SERVICE LIST
Lumalu v. Richmond American Homes Corporation
Case No. ED CV 09-1669 VAP

Richard D. McCune, Esq.
David C. Wright, Esq.
Jae K. Kim, Esq.
McCune Wright LLP
2068 Orange Tree Lane
Suite 216
Redlands, CA 92374
rdm@mccunewright.com
dcw@mccunewright.com
ikk@mccunewright.com

Tel: (909) 557-1250/Fax: (909) 557-1275

Attorneys for Plaintiffs
EDILBERTO LUMALU, BRIAN
DIETZ, BRENDA DIETZ

ECF Filing Status - Active

Derek Y. Brandt, Esq.
Simmons, Browder, Gianaris
Angelides & Barnerd LLC
707 Berkshire Boulevard
East Alton, Illinois 62024
dbrandt@simmonsfirm.com

Tel: (618) 259-2222/Fax: (618) 259-2251

Attorneys for Plaintiffs
EDILBERTO LUMALU, BRIAN
DIETZ, BRENDA DIETZ

ECF Filing Status - Active

Mitchell M. Breit, Esq.
Andrea Bierstein, Esq.
Jayne Conroy, Esq.
Hanly, Conroy, Bierstein,
Sheridan, Fisher & Hayes LLP
112 Madison Avenue
New York, New York 10016-7416
mbreit@hanlyconroy.com
abierstein@hanlyconroy.com
jconroy@hanlyconroy.com

Tel: (212) 784-6400/Fax: (212) 213-5949

Attorneys for Plaintiffs
EDILBERTO LUMALU, BRIAN
DIETZ, BRENDA DIETZ

ECF Filing Status - Active