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STANDARD PACIFIC CORP. dba STANDARD
8 PACIFIC HOMES

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

11 JAMES F. DODARO, as an individual
and on behalf of all other similarly
12 situated,

13 Plaintiff,

14 vs.

15 STANDARD PACIFIC CORP., d/b/a
"STANDARD PACIFIC HOMES;" and
16 DOES 1 through 10, inclusive,

17 Defendants.

) Case No. EDCV09-01666 VAP (OPx)

) JUDGE: Hon. Virginia A. Phillips
DEPT: 2

) **NOTICE OF MOTION AND
MOTION TO DISMISS
PLAINTIFF'S SECOND
AMENDED COMPLAINT;
MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
THEREOF**

) [Filed concurrently with Request for
Judicial Notice in support thereof]

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

) Original Complaint Filed: 09/03/09
FAC Filed: 12/21/09
SAC Filed: 12/02/11

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NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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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 before the Honorable Virginia A. Phillips in
 4 Department 2 of the above-referenced Court, located at 3470 12th Street, Riverside,
 5 California 92501, Defendant STANDARD PACIFIC CORP. dba STANDARD
 6 PACIFIC HOMES will, and hereby does, move to dismiss Plaintiff JAMES F.
 7 DODARO's Class Action Second Amended Complaint pursuant to Federal Rules of
 8 Civil Procedure 8(a), 9(b), 12(b)(1), and 12(b)(6).

9 This Motion is also based on this Notice of Motion, the attached Memorandum
 10 of Points and Authorities, the Request for Judicial Notice filed concurrently-
 11 herewith, all of the records and documents on file herein, and upon further evidence
 12 as may be presented at the time of the hearing.

13 This Motion is made following the conference of counsel pursuant to Local
 14 Rule 7-3 that took place on December 13, 2011.

15 Dated: December 22, 2011

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18 By: /s/ Robert L. Green, Esq.
 19 Robert L. Green
 20 Attorneys for Defendant
 STANDARD PACIFIC CORP. dba
 STANDARD PACIFIC HOMES

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MEMORANDUM OF POINTS AND AUTHORITIES

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I. INTRODUCTION

This matter involves Plaintiff James F. Dodaro (“Plaintiff”) and the builder involved in his home-purchase transaction, namely Defendant Standard Pacific Corp. dba Standard Pacific Homes (“SPC”). Plaintiff has filed a Class Action Second Amended Complaint (“SAC”) alleging that SPC has engaged in a fraudulent scheme to sell new homes to “unqualified” buyers, without disclosing the existence of these “unqualified” buyers to Plaintiff. Despite his third attempt to amend the complaint, Plaintiff still fails to define who exactly is an “unqualified” buyer. As further discussed herein, the SAC should be dismissed for: (1) lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure¹ 12(b)(1); and (2) failure to state any claim upon which relief can be granted under Rule 12(b)(6).

II. PROCEDURAL BACKGROUND

On September 3, 2009, Plaintiff filed the original Complaint suing SPC on behalf of himself and all other SPC purchasers who put at least 20% down towards the purchase of their houses at any time from 2004 through 2006. Plaintiff alleged causes of action for: (1) violation of California Business & Professional Section² 17200, *et seq.*; (2) violation of Section 17500, *et seq.*; (3) fraud; (4) negligent misrepresentation; and (5) breach of the implied covenant of good faith and fair dealing. The gravamen of Plaintiff’s claim was the novel theory that SPC somehow has a duty to disclose that it sold houses and would sell houses in the future to unqualified and high-foreclosure-risk buyers.

¹ All further references to Rules are to the Federal Rules of Civil Procedure.

² All further references to Sections are to the California Business & Professions Code.

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1 On November 2, 2009, SPC filed a Motion to Dismiss and a Motion to Strike
2 Plaintiff's original Complaint. SPC requested the dismissal of the Complaint in its
3 entirety pursuant to Rules 12(b)(1) and (12(b)(6).

4 On November 16, 2009, This Court accepted transfer of seven other
5 Homebuilder Class Action cases.

6 On December 21, 2009, Plaintiff filed his Class Action First Amended
7 Complaint ("FAC"). There, Plaintiff asserted the same causes of action as were in
8 the Complaint, and still put forth the same novel theory regarding SPC's alleged duty
9 to disclose. Accordingly, SPC filed a second Motion to Dismiss and Motion to
10 Strike, seeking dismissal of Plaintiff's FAC on several grounds including lack of
11 constitutional and statutory standing, failure to plead facts with sufficient
12 particularity, and failure to state a claim. On March 31, 2010, this Court dismissed
13 the FAC with prejudice for lack of constitutional standing, concluding that Plaintiff
14 had failed to adequately allege injury-in-fact and causation.

15 Plaintiff appealed to the Ninth Circuit Court of Appeals, which reversed and
16 remanded. *See Maya v. Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011). On December
17 2, 2011, Plaintiff filed his Second Amended Complaint ("SAC"). Plaintiff continues
18 to allege the same claims for fraud, violation of Unfair Business Practices Act,
19 negligent misrepresentation, and breach of implied covenant of good faith and fair
20 dealing. This Motion to Dismiss follows.

21 **III. FACTUAL ALLEGATIONS IN THE SAC**

22 Plaintiff alleges that on or about July 24, 2005, he bought a new home from
23 SPC. (SAC ¶ 56). He further alleges that he made a down payment on the house of
24 about 60% and financed the remainder of the purchase price through Family Lending
25 Services (now known as Standard Pacific Mortgage).³ *Id.* Plaintiff alleges that since

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27 ³ In the original Complaint and the FAC, Plaintiff had named Standard Pacific
28 Mortgage as a Defendant. In the SAC, Plaintiff does not include Standard Pacific
Mortgage as a Defendant, and does not assert any claims against it.

1 the time that he purchased the property, there have been a number of rentals, short
 2 sales, and foreclosures in his neighborhood. *Id.* at 65. He now seeks to maintain a
 3 class action on behalf of himself and a national class including “[a]ll persons who
 4 purchased a new home from any Standard Pacific entity from January 1, 2004,
 5 through December 31, 2006, and borrowed or financed less than 90% of the purchase
 6 price of the house.” *Id.* at ¶ 76.

7 Further, Plaintiff alleges that SPC “directed its subsidiaries to implement a
 8 scheme to increase the number of houses sold and to increase the amount of profit
 9 per sale.” *Id.* at ¶ 22. To accomplish this purported “scheme,” SPC allegedly
 10 “financed unqualified buyers who posed an abnormally high risk of foreclosure” and
 11 sold to “investors.” *Id.* at ¶ 23. According to Plaintiff, SPC’s alleged scheme was
 12 also dependent on “the existence of loan securitization . . . and its mortgage company
 13 subsidiary Standard Pacific Mortgage[‘s]” inability to absorb the foreclosures of
 14 unqualified buyers. *Id.* at ¶ 28. However, no defendant in the SAC is a lending
 15 entity. As such, SPC’s alleged lending practices cannot possibly support Plaintiff’s
 16 recovery here.

17 **IV. THE SAC SHOULD BE DISMISSED FOR LACK OF SUBJECT**
 18 **MATTER JURISIDCTION UNDER RULE 12(b)(1)**

19 **A. Rule 12(b)(1) Legal Standard**

20 Federal Courts presume a lack of jurisdiction, and the party seeking to invoke
 21 it bears the burden of proving that subject matter jurisdiction exists. *See Kokkonen v.*
 22 *Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed.
 23 2d 391 (1994). When subject matter jurisdiction is challenged under Rule 12(b)(1),
 24 “the plaintiff has the burden of proving jurisdiction in order to survive the motion.”
 25 *Tosco Corp. v. Communities for a Better Env’t*, 236 F.3d 495, 499 (9th Cir. 2001). A
 26 plaintiff must show in the pleading “affirmatively and distinctly, the existence of
 27 whatever is essential to federal jurisdiction.” *Id.* If a plaintiff is unable to do so, “the
 28

1 court, on having the defect called to its attention or on discovering same, must
2 dismiss the case, unless the defect [can] be corrected by amendment.” *Id.*

3 **B. Plaintiff Lacks Standing To Pursue His Decreased Value And**
4 **Desirability Claims**

5 As a preliminary matter, one of the seven other Homebuilder Class Action
6 cases transferred to this Court is *Stephens, et al. v. Lennar Corp., et al.*, Case No
7 ED09-CV1668-VAP (DTBx), against Defendants Lennar Corporation and Lennar
8 Homes of California, Inc. (collectively “Lennar”). Lennar is filing a Motion to
9 Dismiss Plaintiffs’ Second Amended Complaint, raising the same jurisdictional
10 challenges as SPC does so here. Therefore in the interest of brevity, SPC hereby
11 incorporates by reference and adopts Lennar’s arguments at Part V(E) of its Motion
12 as to standing as if fully set forth herein.

13 **V. PLAINTIFF FAILS TO STATE ANY CLAIM UPON WHICH RELIEF**
14 **MAY BE GRANTED UNDER RULE 12(b)(6)**

15 **A. The Rule 12(b)(6) Legal Standard**

16 Under Rule 12(b)(6), a party may bring a motion to dismiss for “failure to
17 state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6). “As a
18 general matter, the Federal Rules require only that a plaintiff provide ‘a short and
19 plain statement of the claim’ that will give the defendant fair notice of what the
20 plaintiff’s claim is and the grounds upon which it rests.” *Alfaro v. Mortg. Electronic*
21 *Registration Sys.*, No. EDCV09-1382-VAP (VBKx), 2009 WL 2985450, at *2 (C.D.
22 Cal., Sept. 15, 2009) (citing *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed.
23 2d 80 (1957); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955,
24 167 L. Ed. 2d 929 (2007); and FED. R. CIV. P. 8(a)(2)) (quotations omitted). “In
25 addition, the Court must accept all material allegations in the complaint – as well as
26 any reasonable inferences to be drawn from them – as true.” *Alfaro*, 2009 WL
27 2985450, at *2 (citing *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005) and
28 *ARC Ecology v. U.S. Dep’t of Air Forces*, 411 F.3d 1092, 1099 (9th Cir. 2005)).

1 Even though “the pleading standard Rule 8 announces does not require
 2 ‘detailed factual allegations’” it still “demands more than an unadorned, the-
 3 defendant-unlawfully-harmed-me accusations.” *Ashcroft v. Iqbal*, 556 U.S. ___, 129
 4 S. Ct. 1937, 1949, 173 L. Ed. 2d 868, 884 (2009)) (citation omitted). In addition, “a
 5 plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires
 6 more than labels and conclusions, and a formulaic recitation of the elements of a
 7 cause of action will not do.” *Bell Atlantic Corp.*, 550 U.S. at 555 (citations omitted).
 8 “Rather, the allegations in the complaint ‘must be enough to raise a right to relief
 9 above the speculative level.’” *Alfaro*, 2009 WL 2985450, at *2 (citing *Bell Atlantic*
 10 *Corp.*, 550 U.S. at 555).

11 **B. Plaintiff Fails To State Any Viable Claim**

12 SPC incorporates by reference Lennar’s arguments in its Motion, specifically
 13 as to the following arguments: (1) all of the fraud-based claims fail for lack of
 14 specificity [*see* Part V(A) of Lennar’s Motion]; (2) Plaintiff fails to state a claim for
 15 fraud and negligent misrepresentation [*see* Part V(B) of Lennar’s Motion]; and (3)
 16 Plaintiff’s statutory claims fall with the common law claims [*see* Part V(D) of
 17 Lennar’s Motion]. Accordingly, SPC hereby adopts these arguments, and asserts
 18 additional arguments as follows.

19 **C. The SAC Fails To Allege A Breach Of The Implied Covenant Of**
 20 **Good Faith And Fair Dealing**

21 “To establish a breach of [the] implied covenant of good faith and fair dealing,
 22 a plaintiff must establish the existence of a contractual obligation, along with conduct
 23 that frustrates the other party’s rights to benefit from the contract.” *See Hutson v.*
 24 *American Home Mortg. Servicing, Inc.*, No. C09-1951 PJH, 2009 WL 3353312 at
 25 *11 (N.D. Cal., Oct. 16, 2009) (citation omitted). Here in Count Five, Plaintiff
 26 alleges that the Purchase and Sale Agreement that SPC entered into with Plaintiff
 27 obligated SPC: (1) to build and sell to Plaintiff “a home in the community identified
 28 in the agreement,” (SAC ¶ 129); and (2) “to deliver not only the house contracted for,

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1 but also the community in which [SPC] represented that house would be located.”
2 (SAC ¶ 130). Plaintiff alleges that SPC breached the covenant of good faith by
3 “selling houses to subprime borrowers and investors. (SAC ¶ 131). Plaintiff,
4 however, has failed to cite or attach a copy of the Purchase and Sale Agreement to
5 show that any provision confers such obligations to SPC. That is because nothing
6 could be further from the truth.

7 It is well-settled that an implied covenant of good faith and fair dealing cannot
8 contradict the express terms of a written contract. *See Storek & Storek, Inc. v.*
9 *Citicorp Real Estate, Inc.*, 100 Cal. App. 4th 44, 55 (2002). Here, the Purchase And
10 Sale Agreement provides, in relevant part:

11 (d) Entire Agreement. This Contract contains the entire
12 agreement between the parties, and no addition or modification
13 of any term shall be effective unless set forth in writing and
14 signed by both parties. No sales person, employee or agent of
15 Seller has authority to modify the terms of this Contract, and
16 Buyer has not relied upon any promises, agreements or other
17 representations by any salesperson, employee or other
18 representative of Seller in deciding to enter this Contract
19 except as expressly set forth herein. All advertising material
20 and all prior representations or agreements, if any, whether
21 oral or written are hereby superseded, and Buyer has not relied
22 upon any of them in deciding to enter this Contract.

23 [RJN, Exhibit “A” (Purchase Contract And Escrow Instructions at section 15(d))].

24 As the Court will see, the Purchase Contract And Escrow Instruction
25 (“Purchase Contract”) does not identify any particular type of community that SPC
26 purportedly represented in which Plaintiff’s home would be built and sold, contrary
27 to Plaintiff’s allegations.

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1 In a weak effort to impose such an obligation upon SPC, Plaintiff alleges that
2 SPC represented in the “Use and Occupancy Addendum” that all the homes sold in
3 the community would be occupied by single families as their primary residence.
4 (SAC ¶¶ 59-60). Invariably, Plaintiff has conveniently failed to attach a copy of the
5 Use and Occupancy Addendum to the SAC. That is because again, Plaintiff’s
6 reliance is misplaced. The provisions of the Use and Occupancy Addendum relates
7 to Plaintiff’s representations, not SPC’s. [RFJ, Exhibit “B” (Use and Occupancy
8 Addendum). Specifically, the Use and Occupancy Addendum provides, in relevant
9 part that “to induce Seller to agree to sell the Property to Buyer, Buyer represents,
10 warrants and agrees” that Plaintiff was purchasing the property as his principal
11 residence for a period of one year. *Id.*

12 Further, Plaintiff alleges that SPC sold to subprime borrowers, which
13 “changed” the community in which Plaintiff purchased from those communities
14 “depicted in promotional materials.” (SAC ¶ 131). Plaintiff’s reliance on these
15 unidentified promotional materials is again misplaced. “Failures that affect the
16 formation of the contract, rather than its performance or enforcement, cannot be used
17 to state a claim for breach of the implied covenant of good faith and fair dealing.”
18 *Singh v. Wells Fargo Bank*, No. C-09-2035 SC, 2009 WL 2365881, at *5 (N.D. Cal.,
19 July 30, 2009). As such, Plaintiff cannot rely on SPC’s alleged misrepresentation
20 and failure to disclose based on these promotional materials, because they would
21 have occurred prior to the signing of the purchase agreements.

22 Thus, Plaintiff has not asserted a viable claim for breach of the implied
23 covenant of good faith and fair dealing against SPC and such claim should therefore
24 be dismissed.

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1 **VI. CONCLUSION**

2 For the foregoing reasons, Plaintiff's SAC should be dismissed with prejudice.

3 Dated: December 22, 2011

4 GREEN & HALL, A PROFESSIONAL
CORPORATION

6 By: /s/ Robert L. Green, Esq.

7 Robert L. Green
8 Attorneys for Defendant
STANDARD PACIFIC CORP. dba
STANDARD PACIFIC HOMES

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney of record, this 22nd day of December, 2011:

Richard D. McCune, Esq. David C. Wright, Esq. Jae K. Kim, Esq. McCune Wright, LLP 2068 Orange Tree Lane, Suite 216 Redlands, CA 92374 <i>Counsel for Plaintiffs</i>	Andrea Bierstein, Esq. Mitchell M. Breit, Esq. Jayne Conroy, Esq. Hanly Conroy Bierstein Fisher & Hayes, LLP 112 Madison Avenue New York, New York 10016-7416 <i>Counsel for Plaintiffs</i>
Derek Y. Brandt, Esq. Simmons Browder Gianaris Angelides & Barnerd, LLC 707 Berkshire Blvd. East Alton, IL 62024 <i>Counsel for Plaintiffs</i>	

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 22nd day of December, 2011, at Santa Ana, California.

/s/ Robert L. Green, Esq. _____
Robert L. Green, Esq.