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Attorneys for Plaintiffs ENRIQUE DEL RIVERO, ANA DEL RIVERO, GREG ESTES, and CHERIE ESTES, on behalf of themselves and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE – CIVIL COMPLEX CENTER

ENRIQUE DEL RIVERO, an individual; ANA DEL RIVERO, an individual; GREG ESTES, an individual; CHERIE ESTES, an individual; on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

CENTEX HOMES OF CALIFORNIA, LLC., a Limited Liability Company; CENTEX HOMES REALTY COMPANY, a Corporation; PULTE HOME CORPORATION, a Corporation; MUELLER INDUSTRIES, INC., a Corporation; and DOES 1-100,

Defendants.

AND RELATED CROSS-CLAIMS.

CASE NO. 30-2013-00649338-CU-CD-CXC
Assigned for all purposes to:
Judge Peter Wilson
Dept. CX-101

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

Hearing Date: March 2, 2023
[Specially Reserved by Courtroom]

Time: 2:00 p.m.
Dept.: CX-101

Complaint Filed: 5/9/13

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on **March 2**, **2023, at 2:00 p.m.**, or as soon thereafter as the matter may be heard in Department CX-101 of the above-entitled Court, located at 751 West Santa Ana Blvd., Santa Ana, California 92701, Plaintiffs and Class Representatives Enrique Del Rivero, Ana Del Rivero, Greg Estes and Cherie Estes ("Plaintiffs") hereby move this Court for an order, pursuant to Rule 3.769 of the California Rules of Court, as follows:

1. Granting preliminary approval of the class action settlement between Plaintiff/Class Representatives ("Plaintiffs") and Defendants Centex Homes of California, LLC, Centex Homes Realty Company, and Pulte Home Corporation ("Defendants");
2. Approving the proposed form and manner of notice to be provided to the settlement class and directing that notice be effectuated to the settlement class;
3. Requiring that Class Counsel provide the Class Administrator and Class Counsel with an electronic version of a Class Home List, identifying the homes and original owners of the homes to be included in the Settlement Class from whom the Class Administrator can determine individuals in the chain of title who may be a Settlement Class Member and should receive the Settlement and Class Notice (attached to the Settlement Agreement as Exhibit A thereto);
4. Approving ILYM Group Inc. as Class Administrator to administer the notice and claims procedures;
5. Setting a hearing for final review of the proposed settlement in Department CX-101 of the above-entitled Court.

Good cause exists for the granting of this Motion because the proposed settlement is fair, reasonable, and adequate. This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Declarations of Richard Kellner, Richard Bridgford, Patrick McNicholas, and Lisa Mullins, the Class Action Settlement Agreement (Exhibit A to the Kellner Declaration), and the attached exhibits thereto, files and documents filed with this Court, and upon such further oral and/or documentary

evidence and argument as may properly be presented to the Court at the time of the hearing on this matter.

Dated: February 3, 2023

KABATECK LLP
BRIDGFORD, GLEASON & ARTINIAN
McNICHOLAS & McNICHOLAS LLP

By: /s/ *Richard L. Kellner &*
/s/ *Michael H. Artinian*

Richard L. Kellner and Michael H. Artinian

Attorneys for the Certified Class

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MEMORANDUM OF POINTS AND AUTHORITIES

By this motion, Plaintiffs and Class Representatives Enrique Del Rivero, Ana Del Rivero, Greg Estes and Cherie Estes ("Plaintiffs") seek preliminary approval of a class action settlement entered between the certified class (by the class representatives) and Defendants Centex Homes of California, LLC, Centex Homes Realty Company, and Pulte Home Corporation ("Defendants").

This motion is being filed concurrently with two other motions seeking preliminary approval of class settlements involving the Centex/Pulte developers in these related actions for *Shah, et. al. v. Pulte Home Corporation*, Orange County Superior Court Case No. 30-2014-00731604; and *Smith v. Pulte Home Corporation*, Orange County Superior Court Case No. 30-2015-0080812. All three settlements were negotiated under the auspices of the Hon. Stephen J. Sundvold (ret.) of JAMS ADR. (Kellner Decl., ¶¶ 22-23.)

This case and the other related OC Copper Pipe cases have been hotly litigated for over 9 years. Class Counsel have achieved significant victories that are extremely favorable to the Class. These recent litigation events include: (a) the latest round of Orders from Judge Glenda Sanders certifying a number of the related actions as class actions (and rejecting *Sargon* attacks on Plaintiffs' primary expert witness); and (b) the Court of Appeal's rulings in August 2020 (in the *Brasch v. K. Hovnanian* and *Smith v. Pulte* appeals) held that the alleged SB 800 claims may proceed as class actions, consistent with *Kohler Co. v. Superior Court* (2018) 29 Cal.App.5th 55. Trial in the *Del Rivero* action was approaching, and Centex/Pulte stated an interest in a global resolution. Against this backdrop, the parties agreed to mediation.

The Parties engaged in arms-length negotiations before Stephen J. Sundvold (ret.) from JAMS ADR. As a result of this mediation, the parties were able to reach agreement on settlement. The terms of that negotiated settlement are reflected in this Agreement. (Kellner Decl., ¶¶ 22-24; Exh. A.)

Plaintiffs and Class Counsel submit that the proposed Class Settlement is extremely fair, reasonable and should be preliminarily approved. The proposed settlement provides as follows:

- The Settlement Fund is $1,371,348.00.
- The 145 participating settlement class members shall receive the Net Proceeds of the Settlement Fund on a *pro rata* basis, after payment of Court approved attorneys' fees/costs,

class administration fees/costs and class representative enhancements.

- The *pro rata* gross settlement for each class member is $9,457.57.

- The gross *pro rata* recovery for the Class represents a significant percentage of the damages that they could receive ***if*** they were to prevail at trial:
  - The *pro rata* gross settlement amount constitutes approximately 56.3% of the average costs for future replacements of the copper pipe systems with PEX (approximately $16,800.00 per home) based upon a bid provided by AMA Repiping – the contractor who provided the replacement of PEX piping in two other class actions settlements.
  - The average *pro rata* damages at trial would likely be less than $16,800.00 per home, since it is likely that the jury would consider the ***actual*** amount paid by class members who had replaced their copper pipes with PEX prior to trial.
    - In responses to questionnaires in this case, a number of class members stated that: (a) they have already paid for the replacement of their copper pipe systems; and (b) the individual costs for such PEX repiping was less than the present $16,800.00 per home bid provided by AMA Repiping.
  - Accordingly, the *pro rata* gross settlement amount likely constitutes more than 56.3% of the damages that could be obtained at trial.
- The proposed settlement is a "claims paid" settlement.

(Kellner Decl., ¶¶ 9-11; Exh. A.)

Subject to approval by this Court, Plaintiffs and Class Representatives Enrique Del Rivero, Ana Del Rivero, Greg Estes and Cherie Estes ("Plaintiffs") have agreed to and support the proposed settlement of this action in accordance with the terms and conditions set forth in the Settlement Agreement. (E. Del Rivero, A. Del Rivero, G. Estes and C. Estes Decls., ¶ 8.) As described herein and considering the strengths and weaknesses of the Class claims, and the time, expense and risks associated with litigation, the parties believe the settlement will result in benefits to the class members on terms that are fair, reasonable and adequate for the proposed settlement class. (*See Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801-02.) For these reasons, as discussed more fully below, the proposed class settlement merits preliminary approval pursuant to California Rule of Court 3.769I.

Accordingly, Plaintiffs request that the Court preliminarily approve this Settlement. A proposed Order for the Court's review and signature has been submitted as Exh. C to the Kellner Decl.

I. PROCEDURAL HISTORY

The original plaintiffs filed this action on May 9, 2013 on behalf on themselves and other similarly situated individuals who own homes in the class area (Ladera Ranch) that (i) were constructed by Defendants, (ii) contained copper pipes installed by the Defendants, and (iii) had purchase agreements signed by Defendants on or after January 1, 2003. The operative complaint alleges a cause of action against Defendants for violations of standards of residential construction (Civ. Code § 895 *et seq.*, including § 896(a)(14) and (15)). (Kellner Decl., ¶ 13.)

This case was related to a number of the other similar pinhole leak cases early in this action. Ultimately, a total of 15 Orange County Pipe Cases were deemed related before the same judge in the Orange County Superior Court – of which 10 cases have settled. (Kellner Decl., ¶16.)

Even though class certification was granted in this case over five years ago on August 7, 2017 by Judge Thierry Patrick Colaw (now retired), the litigation ensued in this and these related class actions. It was only upon the most recent rulings by Judge Sanders and the Court of Appeal that the remaining OC Pipe cases were ripe for meaningful settlement discussions. (Kellner Decl., ¶ 17.)

The first area of major litigation (common to all of these related actions) involved the developer defendants' attacks on the complaint and their assertion that individual issues prevented class treatment. The trial judge (Judge Steven L. Perk) issued rulings that dismissed the class allegations. Those orders were appealed in two cases – *Brasch v. K. Hovnanian, et al.* (Case No. 30-2013-00649417) and *Chiang v. D.R. Horton, et al.* (Case No. 30-2013-00649435) – and the Court of Appeal ultimately reversed Judge Perk's ruling that had dismissed the class allegations. (Kellner Decl., ¶ 18.)

The second area of major common litigation involved the defendant developers' contention that SB 800 did not permit litigation of class claims.

- At first, Judge Thierry Patrick Colaw (who replaced Judge Perk in these related cases), denied numerous motions to dismiss by the developer defendants based upon their claim that the language of SB 800 prohibited class actions. (Kellner Decl., ¶ 19(a).)
- Writs were filed by the developer defendants on these Orders – which were all ultimately

denied by the Court of Appeal. (Kellner Decl., ¶ 19(b).)

- Thereafter, similar motions to dismiss were filed by the developer defendants (some of whom claimed that there was a change in law) and those motions were denied by Judge Sanders (who had replaced Judge Colaw in these related cases). (Kellner Decl., ¶ 19(c).)
- Writs again were filed (on Judge Sanders' Orders) and – this time – the Court of Appeal issued an Order to Show Cause re dismissal based upon the subsequent ruling in the case entitled *Kohler Co. v. Superior Court* (2018) 29 Cal.App.5th 55. (Kellner Decl., ¶ 19(d).)
- The matter was remanded to Judge Sanders, who conducted extensive hearings and briefings on the issue. Judge Sanders issued Orders on February 7, 2019 dismissing the class allegations based upon perceived constraints of *Kohler* and the Court of Appeal's Order to Show Cause. (Kellner Decl., ¶ 19(e).)
- Plaintiffs then appealed that Order. Following full briefing and argument before the Court of Appeal on two of the related cases, the Court of Appeal reversed Judge Sanders' Order (largely consistent with Judge Sanders' prior orders denying Defendants' attempts to dismiss the class allegations), and ruled that class actions are permitted under SB 800 based on the allegations in the related cases. (Kellner Decl., ¶ 19(f).)

The third major area of litigation involved motions relating to expert testimony. The class claims in each of the related class actions were largely predicated upon the same underlying expert opinion – *i.e.*, that the combination of the common water in this area supplied by the Santa Margarita Water District and the copper pipes resulted in a common chemical reaction that resulted in corrosion that lessens the useful life of the pipes. As a result, tremendous discovery and motion practice revolved around this expert testimony. Multiple defendants filed motions to strike Plaintiffs' expert's opinions based upon *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 and its progeny. Ultimately, plaintiffs' counsel prevailed in such motions before BOTH Judge Colaw and Judge Sanders. (Kellner Decl., ¶ 20.)

The fourth major area of litigation involved substantive determination of motions for class certification. Again, there was extensive discovery and motion practice involving class certification – which was largely identical in each of the related Orange County Copper Pipe actions. Following

extensive rounds of briefing on multiple cases – as well as multiple hearings – Judge Colaw first granted class certification in this class action (*Del Rivero v. Centex*), and Judge Sanders later granted class certification 8 additional related class actions. (Kellner Decl., ¶ 21.)

A. Settlement Discussions in This Class Action.

As this matter approached trial, the Parties engaged in arms-length negotiations before Hon. Stephen Sundvold (ret.) from JAMS ADR. (Kellner Decl., ¶ 22.) The negotiations – albeit separate – were conducted at the same time for the two other related Centex/Pulte class actions - *Shah, et. al. v. Pulte Home Corporation*, Orange County Superior Court Case No. 30-2014-00731604; *Smith v. Pulte Home Corporation*, Orange County Superior Court Case No. 30-2015-0080812. As a result of this mediation, the parties were able to reach agreement on settlement. (Kellner Decl., ¶¶ 23-24.)

1. The Terms of the Proposed Settlement.

The terms of the negotiated class settlement are reflected in the attached Settlement Agreement, which Plaintiffs and their counsel contend are fair and reasonable under the circumstances.

The proposed settlement provides for the establishment of a $1,371,348.00 Settlement Fund, which equates on a *pro rata* basis to a total of $9,457.57 for each home. (Kellner Decl., ¶ 9.) This represents more than 56% of the gross damages that the class members could obtain at trial.

Prior to engaging in settlement negotiations, Class Counsel engaged in substantial "due diligence" to determine the actual damages that could be obtained a trial by:

- obtaining a bid from AMA Repiping – the company that engaged in the actual repiping of homes in classes that were settled in these related actions – for the prospective costs for replacing the copper pipe systems. The per home "bid" for such PEX repiping was $16,800.00 and based upon the size of the homes.
- reviewing the responses to Questionnaire surveys from homeowners regarding the actual costs already incurred by many in replacing the class home copper pipe systems with PEX.[1]
- obtaining an excel spreadsheet from the applicable government entity for the homes in

[1] A copy of JND Legal's summary of Homeowner Questionnaire responses that includes a summary of the replacement costs already incurred by these homeowners is attached to the Kellner Decl. as **Exh F**.)

Ladera Ranch that contain: (a) the plumbing permit history for each home in Ladera Ranch by address; and (b) the details of the plumbing work that was being permitted. Class Counsel then determined that approximately 50% of the homes in the Class Area had obtained permits for the replacement of copper pipes.

(Kellner Decl., ¶¶ 25-28.)

As a result, there were two damage models that Class Counsel considered in connection with the settlement negotiations. If only the AMA Repiping bid for all class homes was considered, the average actual "bid" for prospective repiping averaged approximately $16,800.00 per home.[2] The *pro rata* gross settlement of $9,457.57 for each home equates to 56.3% of the upper-end damages under this damage model. (Kellner Decl., ¶ 29.)

The second damage model (which is probably more realistic) incorporates the additional fact that class damages would also have to consider the costs ***actual incurred*** by class members who have already paid for PEX pipe replacements. From the responses to Class Questionnaires from a portion of the class members, Class Counsel determined that the average cost for the replacement of copper pipes was substantially less than AMA Repiping's prospective $16,800.00 per home bid. (Kellner Decl., ¶ 30.) Thus, if damages are calculated at trial by totaling: (a) the amount actually paid by class members for PEX pipe replacements; and (b) the AMA Repiping costs for PEX pipe replacement for those class homes that still have original copper pipes – the total class damages would be less than the first damage model based only on the $16,800.00 per home AMA Repiping bid. (Kellner Decl., ¶ 31.) As a result, the *pro rata* gross settlement of $9,457.57 for each home equates to substantially more than 56.3% of the upper-end damages under this second damage model. (Kellner Decl., ¶ 32.)

By any measure, the gross *pro rata* monetary relief is a good result for the class.

Once the size of the Settlement Fund and the settlement class definition was agreed upon by the parties, negotiations were conducted regarding the amount of attorneys' fees/costs, class administrator fees/costs and class representative enhancements for which Defendants will not provide any objections. (Kellner Decl., ¶ 34.) Class Counsel agreed to a 1/3 contingency fee calculation which – as will be

[2] Class Counsel also obtained AMA Repiping's contractual commitment to keep these prices for one year for each homeowner. (Kellner Decl., ¶ 26.)

demonstrated in the motion for approval of attorneys' fees – represents less than any apportionable lodestar for the actual legal work performed over 9+ years that benefitted the settlement class. (Kellner Decl., ¶ 35.)

Significantly, the settlement is a "claims-paid" settlement – and the only reason that payment would not be made from the Settlement Fund would be if a class member "opts-out" of the settlement. (Kellner Decl., ¶ 36.) The only potential "reversion" will be the net class member portion that would have been due to any opt-outs. (Kellner Decl., ¶ 37.)

Finally, the Settlement is conditioned on all of the related OC Pipe class actions being "final" – which should be concurrently determined by the concurrent filing (and hearing) of the motions for preliminary and final approval. (Kellner Decl., ¶ 38.)

The Plaintiffs and Class Representatives participated in the settlement negotiations, and fully support the settlement. (E. Del Rivero, A. Del Rivero, G. Estes and C. Estes Decls., ¶ 8).

2. Settlement Notice.

The Settlement Notice for this case (as well as for the *Smith* case) deals with a relatively unique situation in which the proposed settlement was negotiated ***after*** the cases had been certified and class notice was previously provided to the putative class. This is significant because the putative class members have already been provided with the opportunity to "opt-out" of this case or be bound by the results of the class action. (Kellner Decl., ¶ 41.)

As a result, two different sets of Settlement Notice were negotiated – the first for individuals who were provided with Class Notice and the opportunity to opt-out of the class; and the second for subsequent owners who necessarily did not receive the initial Class Notice 5 years ago and the opportunity to opt-out. For the latter, the Settlement Notice provides the distinct opportunity to opt-out. (Kellner Decl., ¶ 42.)

3. The Homeowners Compelled to "Arbitration."

Structurally, the negotiations in the Centex/Pulte cases were unusual because: (1) the defendant/developer wanted all of its pending matters in these related cases to be resolved; and (2) a number of original owners who were initially part of this certified class action were subject to an Order by Judge Sanders compelling them to arbitration. As a result, there were concurrent negotiations with

the developer regarding the arbitration and non-arbitration class members in this case – all under the general rubric that the defendant developer wanted a global resolution. (Kellner Decl., ¶¶ 43-44.)

In these discussions, Class Counsel recognized that the cases compelled to arbitration had less settlement value than the ones that remained in this certified class action for the following reasons: (1) the homeowners in arbitration will not necessarily be able to take advantage of all of the favorable rulings that the class members obtained in the Orange County Superior Court actions; (2) the homeowners in arbitration will not have the same protections of appellate review from an adverse ruling made by an Arbitrator; and (3) the arbitrations cannot be litigated as a class action and there are individual expenses that the homeowner in arbitration may have to incur that would otherwise be distributed amongst members of the class. (Kellner Decl., ¶ 45.) As a result, the negotiated *pro rata* gross recovery in the arbitration cases is 75% of the amount in *pro rata* gross recovery for the class members in this proposed Settlement – in other words, a 25% discount was applied to the arbitration plaintiffs' recoveries. (Kellner Decl., ¶ 46.) The homeowners subject to arbitration have all agreed to the settlement based upon the aforesaid discount compared to the class. (Kellner Decl., ¶ 47.)

Because the defendant (and its insurers) wanted a full settlement of all claims, this proposed settlement is conditioned on all of the other settlements being final. Again, the individual arbitration settlements have been fully executed by the plaintiffs in this action and the *Smith* action (*i.e.*, the only ones in which there are individual arbitration settlements) – so this will not be an issue. (Kellner Decl., ¶ 48.) With respect to the class settlements in the *Shah* and *Smith* cases, Plaintiffs intend to notice the same hearing date for all three cases – and the terms are substantively similar. (Kellner Decl., ¶ 49.)

II. COURT APPROVAL IS REQUIRED FOR A CLASS SETTLEMENT

Any settlement of class litigation is subject to Court review and approval. Pursuant to Rule 3.769(a) of the California Rules of Court: "[a] settlement or compromise of an entire class action, or of a cause of action in a class action, or as to a party, requires the approval of the court after hearing." Moreover, Rule 3.769(e) provides that "[i]f the court grants preliminary approval, its order must include the time, date, and place of the final approval hearing; the notice to be given to the class; and any other matters deemed necessary for the proper conduct of a settlement hearing."

The structure of this Settlement is virtually identical to those that have been preliminarily

approved by Judge Glenda Sanders in the *Dye v. Richmond American* (Case No. 30-2013-00649460-CU-CD-CXS) and *Foti v. John Laing Homes (California), Inc.* (Case No. 30-2013-00649415-CU-CD-CXC) actions. (Kellner Decl., ¶ 50.)

III. THE PROPOSED SETTLEMENT AND ITS PRINCIPLE TERMS

A. The Proposed Settlement Agreement

The Settlement Agreement describes in detail the terms of the proposed settlement reached by the Parties and the details of the recovery for the Class. (Kellner Decl., Exh. A.) The material terms of the Settlement Agreement are as follows:

1. Within 30 days of final approval of the proposed Settlement, Defendants shall establish the Settlement Fund of $1,371,348.00 for the benefit of the Settlement Class. (Exh A.)
2. The Class is be defined as:

   (1) All present owners of residential homes in the Class Area whose copper pipe systems have not been replaced with PEX or epoxy coating by prior owners of the homes, or (2) prior owners of homes in the Ladera Ranch, California Class Area who replaced their copper pipe systems with PEX or epoxy coating, provided that: (a) the homes were constructed by Centex Homes of California, LLC, Centex Homes Realty Company, and Pulte Home Corporation and substantially completed within ten (10) years of the filing of the original complaint in this action, (b) the original purchase agreements were signed by the builder on or after January 1, 2003, and (c) their SB 800 claims were not released.

The Settlement Class includes (1) the Original Class Members who received the class notice in February 2018, as well as (2) either the present homeowner or a former owner of the home who provides evidence satisfactory to the parties of having repiped the home before selling it. (Exh. A; Kellner Decl., ¶ 52.)

With respect to Settlement Notice, the Class Administrator shall serve by U.S. Mail the notice packets applicable to the prior homeowners who already received Class Notice (Exh. C) and the subsequent homeowners who had not received Class Notice (Exh. B). The primary difference between the two Settlement Notice packets is: (a) the Settlement Notice for the homeowners who were previously sent Class Notice are not provided with opt-out instructions ***and*** the packet ***does not*** contain a

Request for Exclusion Form; and (b) the Settlement Notice for the homeowners who had not been sent Class Notice are provided with instructions on opting-out of the action ***and*** the packet contains a Request for Exclusion Form. (Kellner Decl., ¶ 52(c); Exh. A, Proposed Settlement, § 4.2.)

For a homeowner who did not previously receive Class Notice (and thus now has an option to opt-out), such homeowner may exclude him or herself from the Settlement Class (and therefore not be bound by the terms of the Settlement Agreement) by submitting to the Class Administrator a timely and valid written Request for Exclusion, pursuant to the instructions set forth in the Notice (attached as Exhibit "D" to the Settlement Agreement). Kellner Decl., ¶ 52(d); Exh. A, Proposed Settlement, § 4.5.)

1. The Determination of Who is a Class Member.

All current homeowners will be deemed a Participating Class Member unless a prior owner had re-piped the home with PEX or an epoxy coating. This is because it is impracticable to inspect every home in the class to determine whether there has been a replacement of the copper pipes by prior owners with PEX or an epoxy coating. As a result, in order for a prior owner to be a participating settlement class member, that prior owner must submit a verification that the prior owner had re-piped the home with PEX or an epoxy coating. (Kellner Decl., ¶ 57; (Exh. A, Proposed Settlement, § 4.4.)

The proposed Settlement also contains a dispute resolution provision if there is a "dispute" between homeowners in the chain of title for a class home regarding class members.

- Under the terms of the proposed Settlement, for a Prior Owner to be included as a Class Member, that Prior Owner must submit by mail or electronic means a Prior Owner Verification Form to the Class Administrator within sixty (60) days of mailing that verifies that the Prior Owner replaced the copper pipes in the Class Home with PEX or epoxy coating of the pipes.
- In the event a prior owner submits a Prior Owner Verification Form stating that the prior owner has replaced the homes' copper pipes with PEX or epoxy coating, then the Class Administrator shall provide the present owner with written notice: (a) that a prior owner has submitted a Prior Owner Verification stating that the prior owner replaced the homes' copper pipes with PEX or epoxy coating; and (b) the present owner has 30 days within which to submit a written verification to the Class Administrator disputing the prior

owner's claim, and state that the home had copper pipes (without any epoxy coating) at the time the present owner obtained title to the home.

- If a dispute arises between a prior and present owner as to whether a prior owner had replaced the copper pipes with PEX or epoxy coating, then the two homeowners shall submit proof supporting their claims to the Class Administrator who will forward such documentation to Hon. Nancy Weiben Stock (ret.) of JAMS who: (a) shall serve as arbitrator of the dispute; and (b) whose determination of those competing claims shall be binding. The costs for Judge Stock's services shall be deemed a "cost" that shall be deductible from the Settlement Fund.

(Exh. A, Proposed Settlement, § 4.4; Kellner Decl., ¶¶ 60-62.)

For a Present Owner to be included as a Class Member, the Present Owner must not submit an Opt-Out Form and there must not be a Prior Owner Verification Form submitted by a Prior Owner for the subject Class Home.

For all Notice papers returned as undeliverable or changed address, the Class Administrator shall re-send the Notice documents after a skip-trace. The Class Administrator must also create a dedicated website for this Settlement, which will provide a portal for electronic submission of Opt-Out Forms, Prior Owner Verification Forms and any Objections to the Settlement. The dedicated website shall also make available the Settlement Agreement, the pleadings submitted in support of preliminary approval, approval of attorneys' fees, costs and class representative enhancements, and final approval. The dedicated website shall also make available all Orders by this Court with respect to the aforesaid motions. (Exh. A, Proposed Settlement, § 4.4, Class Notices at Exhs. B & C, and Proposed Order at ¶14; Kellner Decl., ¶ 53)

Finally, the proposed Settlement provides that Plaintiffs and Class Counsel shall separately file motions for approval by this Court at the time of final approval of the following: (a) Attorneys' fees not to exceed one-third (1/3) of the Settlement Fund ($457,116.00), plus costs not to exceed $75,000.00; [3]

[3] It should be noted that at the Final Approval Hearing, Class Counsel will be seeking reimbursement of pre-settlement costs on a *pro rata* basis from all class members ***and*** arbitration plaintiffs (since they all experienced a common benefit from such costs), and the reimbursement of class administration and

(b) Class administrator costs for this settlement not to exceed $19,550.00; and (c) Class representative incentive payment totaling $20,000.00 (or $10,000 per class representative household). To the extent any class member opts-out of the Settlement, the *pro rata* net settlement payment that would have otherwise been due to that opt-out class member shall be paid back to Defendant. (Exh. A, Proposed Settlement, § 3.1.) It should be noted that Class Counsel's costs include the administrative costs previously incurred for Class Notice and the Questionnaire, and that the Class Administrator costs are relatively lower because its tasks will be lessened by the prior determination of the chain of title ownership of class homes through the date of Class Notice and the Questionnaire. (Kellner Decl., ¶¶ 63-65.)

Settlement class members will release Defendants from claims **asserted in the Action** (and expressly no other construction defect claims). (Exh. A, Proposed Settlement, § V; Kellner Decl. ¶ 66.)

B. Value of Settlement to The Class: Duties, Obligations And Benefits.

The proposed Settlement Agreement provides for the most cost-effective administration of the settlement, which imposes minimal burdens on the Class. Under SB 800, the relief sought in this class action is the cost of replacing the copper pipes that fail to conform with the standards of Civil Code § 896(a)(14) and (15) – *i.e.*, copper pipes that leak and/or corrode so as to lessen their useful life. As a result, in the chain of title for each home, the individual who has a right to redress will be either: (a) a homeowner who replaced the copper pipes; or (b) the present homeowner. (Kellner Decl., ¶ 55.)

Because it would be cost-prohibitive to physically inspect each home to determine the individual in the chain of title who has a right to redress, the parties have agreed to the following process that can expeditiously determine the individual who has the right to redress:

1) First, the class administrator will determine and then mail the Settlement Notices and other documents to all the individuals in the chain of title for the homes in the Class Home List.
    a. This process will be less expensive than usual since the class administrator will only have to update the chain of title information for those ***after*** the Class Questionnaires were previously sent.

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approval motion costs on a *pro rata* basis for only class members (since only they benefitted from such costs). (Kellner Decl., ¶ 63.)

b. The class administrator will also have to determine the individuals who were mailed the Class Notice in 2017 – since they no longer have a right to opt-out.

i. Accordingly, two separate Settlement Notice packets will be sent to the homeowners who had previously been mailed Class Notice – and those who had not.

2) Second, for the present owners on the Class List to receive any benefits from this Settlement, **they do not have to do anything.**

3) Third, for prior owners who paid for a repipe/epoxy to receive the benefits from this Settlement, they must fill out a simple Prior Owner Verification Form (attached as Exh E to Kellner Decl.) that attests to their replacement of the copper pipes in the home that is included in the Class.

a. In the event a prior owner submits a Prior Owner Verification Form stating that the prior owner has replaced the homes' copper pipes with PEX or epoxy coating, then the Class Administrator shall provide the present owner with written notice: (a) that a prior owner has submitted a Prior Owner Verification stating that the prior owner replaced the homes' copper pipes with PEX or epoxy coating; and (b) the present owner has 30 days within which to submit a written verification to the Class Administrator disputing the prior owner's claim, and state that the home had copper pipes (without any epoxy coating) at the time the present owner obtained title to the home. In the event that there is a dispute between a prior and present owner as to whether a prior owner had replaced the copper pipes with PEX or epoxy coating, then the two homeowners shall submit proof supporting their claims to the Class Administrator who will forward such documentation to Hon. Nancy Weiben Stock (ret.) of JAMS who: (a) shall serve as arbitrator of the dispute; and (b) whose determination of those competing claims shall be binding. The costs for Judge Stock's services shall be deemed a "cost" that shall be deductible from the Settlement Fund.

(Kellner Decl., ¶¶ 58-62.)

With respect to the *pro rata* relief provided, it compares favorably with the potential relief that the class members could receive at trial if they prevail. As noted above, Class Counsel engaged in substantial "due diligence" before settlement negotiations to determine the actual costs for replacing the Class copper pipe systems with PEX by: (1) reviewing the responses to Questionnaire surveys from homeowners regarding the actual costs incurred by those owners who replaced the class home copper pipe systems with PEX; and (2) obtaining a bid from AMA Repiping – the company that engaged in the actual repiping of homes in other classes that were settled in these related actions – for the prospective costs for replacing the copper pipe systems. (Kellner Decl., ¶ 73.)

Further, Class Counsel obtained an excel spreadsheet from the applicable government entity for the homes in Ladera Ranch that contain: (a) the plumbing permit history for each home in Ladera Ranch by address; and (b) the details of the plumbing work that was being permitted. (Kellner Decl., ¶ 74.) Class Counsel then determined that approximately 50% of the homes in the Class Area had obtained permits for the replacement of copper pipes. (Kellner Decl., ¶ 74.)

The proposed settlement provides for the establishment of a $1,371,348.00 Settlement Fund, which represents on a *pro rata* basis a total of $9,457.57 for each home. (Kellner Decl., ¶ 75.) This represents approximately 56.3% of the higher damage model that only considers the AMA Repiping bid (and not the lower amounts actually paid by class members who repiped their homes). (Kellner Decl., ¶ 75.) By any measure, this is an extremely good result for the class – given the risks that: (a) normally attend any class trial; (b) the possibility that the jury will not credit Plaintiffs' experts' opinions regarding general and individual causation; (c) the potential evidentiary issues relating to class damages set forth above; and (d) the possibility of a change in the law. (Kellner Decl., ¶ 76.)

In the event that this Court approves the maximum application for attorneys' fees, costs, class representative enhancements and class administration costs, the *pro rata* net payments to each of the 145 class members will be $5,515.04, calculated as follows:

Gross Settlement Fund	$1,371,348.00
Attorneys' Fees (Max)	- $457,116.00
Attorney Costs (Max)	- $75,000.00
Class Representative Enhancement	- $20,000.00
Class Administration Costs	- $19,550.00
Subtotal for Distribution	$799,682.00
Per Class Member (÷ 145)	**$5,515.04**

(Kellner Decl., ¶ 80.)

C. Attorneys' Fees and Costs.

Pursuant to sections 3.1.6 and 7.1 of the Settlement Agreement, at the final approval hearing Class Counsel will apply to the Court for an award of attorneys' fees not to exceed one third (1/3) of the Settlement Fund (or $457,116.00) and costs (not to exceed $75,000.00). This application will be supported with attorney declarations providing a cross-check of the lodestar attributable to the legal work over 9+ years that benefitted the Settlement Class. Defendants have agreed that they will not oppose such a request for fees and costs consistent with these amounts, and anticipates filing a statement of non-opposition to Class Counsel's application for attorneys' fees. (Kellner Decl., ¶ 63.)

D. Incentive Payments to Named Plaintiffs

Pursuant to Section 3.1.7 of the Settlement Agreement, Plaintiffs intend to apply to the Court for two (2) incentive payments (one for each household of Class Representatives) of $10,000.00 each (*i.e.,* a total of $20,000.00), subject to approval from this Court. (Kellner Decl., Exh A, § 3.1.7.) This sum shall be paid from the Settlement Fund.

IV. THE SETTLEMENT AGREEMENT MEETS ALL CRITERIA FOR COURT APPROVAL

At the preliminary approval stage, the Court need only "make a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement and date of the final fairness hearing." MANUAL FOR COMPLEX LITIGATION (Fourth), § 21.633 at 321 (2004); *see also Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1389. The Court should consider factors including "the strength of [p]laintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, [and] the experience and views of counsel." *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128 (citing *Dunk*, 38 Cal.App.4th at 1801).

Although recommendations of counsel proposing the settlement are not conclusive, the Court can properly take them into account – particularly if they have been involved in litigation for some period of time, appear to be competent, have experience with this type of litigation, and discovery has commenced. *See* 2 H. Newberg, *Newberg on Class Actions* § 11.47 (2d ed. 1985). Indeed, courts do not

substitute their judgment for that of the proponents, particularly when experienced counsel familiar with the litigation have reached a settlement. *See, e.g.*, *Hammon v. Barry*, (D.D.C. 1990) 752 F.Supp. 1087 (citing *Newberg on Class Actions*, § 11.44). Rather, courts presume the absence of fraud or collusion in the negotiation of a settlement unless evidence to the contrary is offered.

This settlement was reached only after lengthy arms-length negotiations during and after a mediation session. (Kellner Decl, ¶¶ 22-32.)

Further, the litigation in this and related copper pipe cases has been extensive and extraordinarily time-consuming during the past 9+ years. (Kellner Decl., ¶¶ 15-21.) It is safe to say that virtually no aspect of this case has not been extensively researched, evaluated and litigated by counsel for the parties. Finally, counsel for the Parties are experienced in similar litigation. The law firms of Bridgford, Gleason & Artinian, Kabateck LLP, and McNicholas & McNicholas LLP are each counsel in numerous related "pinhole leak" cases in Orange County – 10 of which have now settled on a class-wide basis (Bridgford Decl. ¶2-3,15; McNicholas Decl. ¶2-5).

A. <u>The Settlement Agreement Is "Fair, Adequate And Reasonable"</u>

Beyond any presumption of fairness, the Settlement is "fair, adequate and reasonable" under any standard. In making a fairness determination, courts consider a number of factors, including: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status through trial; (4) the benefits conferred by settlement; (5) the experience and views of counsel; (6) the extent of discovery completed and the state of the proceedings; and (7) the reaction of Class members to the proposed settlement. *See Dunk*, 48 Cal.App.4th at 1802.

The Settlement Class provides approximately 56.3% of the higher damage model of relief that the class members could receive if they prevail at trial. *See Kullar, supra* (Court should be provided with information regarding any discounts provided for settlement purposes). Nonetheless, there are significant risks to Plaintiffs and the class if this case were not to be settled.

All trials have inherent risks – and there always remains the potential that law could change between the present date and trial. Here, the case is particularly subject to risk because it is based upon conflicting expert opinions by individuals with established credentials. The parties further acknowledge

that further discovery and trial preparation will be time consuming and expensive, and a trial would be protracted and costly. (Kellner Decl., ¶ 77.) Indeed, there are further potential issues relating to the damage models that the jury would or would not accept at trial.

For these reasons, Class Counsel recognize the risks involved in further litigation. In light of the foregoing, Class Counsel maintain that the gross recovery of approximately 56.3% of the Class's potential trial damages is fair, reasonable, and adequate, and in the best interest of the Class in light of all known facts and circumstances. (Kellner Decl., ¶ 78.) Indeed, if this matter were to proceed to trial, Class Counsel would be within their right to: (a) incur additional expert and trial-related costs; and (b) seek a 40% contingency fee, all of which would further dilute the net recovery to the Class. (*Id.* at ¶ 79.)

B. The Proposed Release

The class release proposed by the Settlement is specifically limited to claims of participating Settlement Class members (who do not choose to opt out); and is further limited to only the claims actually asserted in this action related to any alleged violations of Civil Code § 895 *et seq.* arising from the installation of copper pipes. The release expressly excludes any *other* construction defects or *other* claims relating to the construction of the homes. (Kellner Decl., ¶ 66.)

V. THE PROPOSED NOTICE TO THE CERTIFIED CLASS IS APPROPRIATE

"When the court approves the settlement or compromise of a class action, it must give notice to the class of its preliminary approval and the opportunity for class members to object and, in appropriate cases, opt out of the class." *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177 Cal.App.4th 734, 746 (citing Cal. Rules of Court 3.769). California Rule of Court 3.769(f) provides that "notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement." The rules also specify the content of the notice to class members. Cal. Rules of Court 3.766. The "notice … must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members." *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 251. The proposed notice readily meets these requirements.

Plaintiffs submit that the proposed Notice is appropriate under California law and is the best notice practicable for this Class of approximately 145 class members. The Notice describes in plain

language the background of the litigation, the benefits that Defendants will be providing to the Class Members, the meaning and effect of opting out (where applicable), the right to object and the procedure to do so, the legal effect of not objecting, and the timing of other important events during the settlement process. (See Settlement Notice attached as Exh. B and Exh. C to the Kellner Decl.) Indeed, the Notice is modeled after the Federal Judicial Center's forms, as suggested by the Court on its website, and is substantively identical to the Class Notice that Judge Sanders has approved in these other related actions. (Kellner Decl., ¶¶ 68-69.)

The Notice provides concise details regarding the underlying litigation and explains to Class members the options they have in exercising their rights accordingly. The Notice further explains the scope of their release of Defendants should they decide to participate in the Settlement. The Proposed Notice also provides contact information for the Class Administrator and Class Counsel should Class members have further questions about the litigation or if they seek clarity of the information provided in the Notice, as well as an interactive website. (Kellner Decl., ¶ 70.)

Plaintiffs maintain that the method of notice proposed for the class is the best notice practicable under the circumstances, *i.e.*, mail. Plaintiffs anticipate that the proposed method of providing notice information is the most reasonable method available.

VI. ILYM GROUP INC. SHOULD BE APPOINTED AS CLASS ADMINISTRATOR

The Parties have agreed on ILYM Group, Inc. ("ILYM") to handle the notice and claims administration process as outlined in the Settlement Agreement. ILYM is experienced and qualified in the area of class action administration and notice.

Plaintiffs and Class Counsel do not have any financial interest in ILYM or otherwise have a relationship with ILYM Group Inc. that could create a conflict of interest. ILYM has provided a cap of $19,550.00 for its services – which are extensive considering its need to determine chain of title information. (Kellner Decl, ¶ 72); Mullins Decl., ¶ 9.)

Plaintiffs respectfully request that this Court appoint ILYM to administer the Settlement and Class Notice and the claims administration procedures as set forth in the Settlement Agreement.

VII. CONCLUSION

For the foregoing reasons, the parties respectfully request that this Court issue an Order:

1. Granting preliminary approval of the class action settlement between the Class (by Plaintiffs Enrique Del Rivero, Ana Del Rivero, Greg Estes and Cherie Estes) and Defendants;
2. Approving the proposed form and manner of notice to be provided to the settlement class and directing that notice be effectuated to the settlement class;
3. Approving ILYM Group Inc. as Class Administrator to administer the notice and claims procedures; and
4. Setting a hearing for final review of the proposed settlement in Department CX-101 of the above-entitled Court.

For the Court's benefit, the chart below sets forth the calculation of key dates that needs to be included in the proposed Order Granting Preliminary Approval:

Days After Prelim. Approval	**Event**	**Date/Deadline**
Day 14	Deadline for Class Administrator Getting Addresses (note – already done)	Ten court days after Preliminary Approval.
Day 30	Settlement and Class Notice going out	Thirty days after Preliminary Approval.
Day 90	Opt-Out and Objection Deadline	Sixty days after Notice
Day 97	Class Administrator Report Due to Court	Seven days after Opt-Out & Objection deadline
Day 102	Motion for Final Approval and Fees	*Plaintiffs suggest it will be prepared within 5 days of the Class Administrator Report, if not sooner*
Day 126	Final Approval Hearing	24 days after Motion is filed

Dated: February 3, 2023

KABATECK LLP
BRIDGFORD, GLEASON & ARTINIAN
McNICHOLAS & McNICHOLAS LLP

By:/s/ *Richard L. Kellner* *Michael H. Artinian*

Richard L. Kellner and Michael H. Artinian
Attorneys for the Certified Class

PROOF OF SERVICE
Del Rivero v. Centex Homes, et al.
Orange County Superior Court Case No.: 30-2013-00649338

I, the undersigned, declare that:

I am over the age of 18 years and not a party to the within action. I am employed in the County where the Proof of Service was prepared and my business address is Law Offices of BRIDGFORD, GLEASON & ARTINIAN, 26 Corporate Plaza, Suite 250, Newport Beach, CA 92660.

On the date set forth below, I served the following document(s): **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** on the interested party(s):

SEE ATTACHED SERVICE LIST

by the following means:

( ) **BY MAIL**: By placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid. I am readily familiar with the business practice for collecting and processing correspondence for mailing. On the same day that correspondence is processed for collection and mailing it is deposited in the ordinary course of business with the United States Postal Service in Newport Beach, California to the address(es) shown herein.

( ) **BY PERSONAL SERVICE**: By placing a true copy thereof, enclosed in a sealed envelope, I caused such envelope to be delivered by hand to the recipients herein shown (as set forth on the service list).

( ) **BY OVERNIGHT DELIVERY:** I served the foregoing document by Overnight Delivery as follows: I placed true copies of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed to recipients shown herein (as set forth on the service list), with fees for overnight delivery paid or provided for.

(X) **BY ELECTRONIC MAIL (EMAIL)**: I caused a true copy thereof sent via email to the address(s) shown herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: February 3, 2023 /s/Debbie Knipe
Debbie Knipe

SERVICE LIST
Del Rivero v. Centex Homes, et al.
Orange County Superior Court Case No.: 30-2013-00649338

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