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Attorneys for Plaintiff and Class Representative KENDALL BRASCH on behalf of himself and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE – CIVIL COMPLEX CENTER

KENDALL BRASCH, an individual; on behalf of himself and all others similarly situated,

Plaintiffs,

vs.

K. HOVNANIAN ENTERPRISES, INC., a Corporation; K. HOVNANIAN COMPANIES OF CALIFORNIA, INC., a Corporation; PLUMBING CONCEPTS, INC., a Corporation; MUELLER INDUSTRIES, INC., a Corporation; and DOES 1-100,

Defendants.

AND RELATED CROSS-CLAIM.

CASE NO. 30-2013-00649417-CU-CD-CXC
Assigned for all purposes to:
Judge Peter Wilson
Dept. CX-101

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Hearing Date: June 29, 2023
[Hearing Date Reserved by Courtroom]
Time: 2:00 p.m.
Dept.: CX-101

Complaint Filed: 5/9/13

Declarations of Kendall Brasch, Richard Kellner, Richard Bridgford, Patrick McNicholas and Lisa Mullins filed concurrently herewith

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on **June 29, 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, Plaintiff and Class Representative Kendall Brasch ("Plaintiff") hereby moves 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 Representative and Defendants K. Hovnanian Enterprises, Inc. and K. Hovnanian Companies of California, Inc. ("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 Settlement Administrator 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 Settlement 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 Settlement 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 Kendall Brasch, Richard Kellner, Michael Artinian, Patrick McNicholas, and Lisa Mullins, the Class Action Settlement Agreement (Exhibit 1 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: April 21, 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MEMORANDUM OF POINTS AND AUTHORITIES

By this motion, Plaintiff and Class Representative Kendall Brasch ("Plaintiff") seeks preliminary approval of a class action settlement entered between the certified class (by the class representative) and Defendants K. Hovnanian Enterprises, Inc. and K. Hovnanian Companies of California, Inc. ("Defendants").

This case and the other related OC Copper Pipe cases have been hotly litigated for nearly 10 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 this case [*Brasch v. K. Hovnanian*] and in *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 this action was approaching, and Defendants stated an interest in a mediation to explore a global resolution. Against this backdrop, the parties agreed to mediation.

The Parties engaged in arms-length negotiations before Hon. Nancy Wieben Stock (ret.) from JAMS ADR on December 2, 2022, and Judge Stock presided over prolonged post-mediation discussions for approximately three months thereafter. 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. 1.)

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 $1,428,007.00.
- The 151 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/settlement administration fees/costs and class representative enhancements.
    - The *pro rata* gross settlement for each class member is $9,457.00 per home (the same *pro rata* amount as the recently settled *Del Rivero v. Centex* class action [Orange County Superior Court Case No. 30-2013-00649338-CU-CD-CXC).

- 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 54.14% of the average costs for future replacements of the copper pipe systems with PEX (approximately $17,466.28 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 $17,466.28 per home, since it is likely that the jury would consider the ***actual*** amount paid by some class members who had replaced their copper pipes with PEX at a lower cost prior to trial.
        - In responses to questionnaires, those who had repiped already indicated an average cost of approximately $11,000.00 per home – an amount substantially less than the present bids provided by AMA Repiping (which makes sense given the increase in construction costs, in general, over the years).
    - Accordingly, the *pro rata* gross settlement amount likely constitutes more than 54.14% of the damages that could be obtained at trial.
- The proposed settlement is a "claims paid" settlement.

(Kellner Decl., ¶¶ 9-11; Exh. 1.)

Subject to approval by this Court, Plaintiff has agreed to and support the proposed settlement of this action in accordance with the terms and conditions set forth in the Settlement Agreement. (Kendall Brasch Decl., ¶ 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 will be submitted concurrently herewith (and is also attached

as Exh. 4 to the Kellner Decl.).

I. PROCEDURAL HISTORY

Plaintiff filed this action on May 9, 2013 on behalf of himself 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 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 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 related cases were "technically" litigated separately, the overlap of legal issues in all of the related cases resulted in common rulings that were eventually duplicated in all the actions. Further, during the times when key legal issues were being adjudicated in the related cases on appeal, the litigation of this matter was stayed. (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 this case (*Brasch v. K. Hovnanian, et al.*) and the related case of *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 in this case. 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 – including in this case. (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 the *Del Rivero* class action, and Judge Sanders later granted class certification of 8 additional related class actions (including this class action). (Kellner Decl., ¶ 21.)

A. Settlement Discussions in This Class Action.

On August 19, 2021, this Court granted Plaintiffs' motion for class certification of this case. Thereafter, other developer defendants entered settlements in these related actions and post-class certification discovery continued for the potential class trial in July 2023.

On December 2, 2022, as the parties were engaged in intensive pre-trial discovery, the parties agreed to a mediation before the Hon. Nancy Wieben Stock (ret.) of JAMS. (Kellner Decl., ¶ 23.) Thereafter, for approximately three months, Judge Stock presided over continued post-mediation settlement discussions. This finally culminated in the settlement – pursuant to a Mediator's double-blind proposal – that is being proffered for the Courts' approval. (Kellner Decl., ¶ 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 $1,428,007.00 Settlement Fund, which equates on a *pro rata* basis to a total of $9,457.00 for each home. (Kellner Decl., ¶ 9.) This represents over 54% 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 between $16.800.00 to $19,800.00 per home – or an average of $17,466.28 per home. The difference in bids was based upon the size of the homes.
- reviewing the responses to Questionnaire surveys from homeowners regarding the actual costs already incurred by homeowners in this case for replacement of class home copper pipe systems with PEX in the related actions (relative to the AMA Repiping bids).

- obtaining 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. 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 $17,466.28 per home.[1] The *pro rata* gross settlement of $9,457.00 for each home equates to over 54% 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 ***actually 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 in this action, Class Counsel determined that the average cost for the replacement of copper pipes was substantially less than AMA Repiping bids – or about $11,000.00 per home. (Kellner Decl., ¶ 30.) This makes sense, of course, based upon the general increase of construction costs over the years. (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 $17,466.28 per home AMA Repiping bid. (Kellner Decl., ¶ 31.) As a result, the *pro rata* gross settlement of $9,457.00 for each home equates to substantially more than 54.14% 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

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

parties, negotiations were conducted regarding the amount of attorneys' fees/costs, Settlement 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 provision which – as will be demonstrated in the motion for approval of attorneys' fees – represents less than any apportionable lodestar for the actual legal work performed almost 10 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.)

Plaintiff participated in the settlement negotiations, and fully supports the settlement. (Kellner Decl., ¶ 38; Brasch Decl., ¶ 7-8.).

2. Settlement Notice.

The Settlement Notice for this case addresses the fact that the proposed settlement was negotiated ***after*** the cases had been certified and class notice was previously provided to the putative class in February 2022. 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., ¶¶ 40-41.)

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 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 this case 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 (made pursuant to the Mediator's double-blink Mediator's proposal - 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.)

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 finally approved by this Court 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, and also either before this Court or preliminarily approved in the *Ali v. Warmington, Del Rivero v. Centex Home, Smith v. Pulte* and *Shah v. Pulte* actions. (Kellner Decl., ¶ 43.)

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. 1.) 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 $1,428,007.00 for the benefit of the Settlement Class. (Exh 1.)
2. The Class (which had been previously modified by Court Order) is be defined as: *(1) All present owners of residential homes in the Class Area whose copper pipe systems have not been replaced by prior owners of the homes; or (2) prior owners of homes in the Class Area who replaced their copper pipe system; provided that with regard to (1) and (2); (a) the homes were constructed by K. Hovnanian ("Builder") and the homes were substantially completed within (10) years of the filing of the original complaint in this action; and (b) the original purchase agreements were signed by the Builder on or after 01/01/2003, and (c) the SB 800 claims were not released, and (d) the original-purchaser class members were not compelled to arbitration by the Court or have not stipulated to arbitration by agreement of the parties as approved by the Court.*

With respect to Settlement Notice, the Settlement Administrator shall serve by U.S. Mail the notice packets applicable to the prior homeowners who already received Class Notice (Exh. 3) and the subsequent homeowners who had not received Class Notice (Exh. 2). The primary difference between the two Settlement Notice packets is: (a) the Settlement Notice for the homeowners who were previously sent Class Notice (Exh. 3 to Kellner Decl.) are not provided with opt-out instructions ***and*** the packet ***does not*** contain a Request for Exclusion Form (Exh. 5 to Kellner Decl.); and (b) the Settlement Notice for the homeowners who had not been sent Class Notice (Exh. 2 to Kellner Decl.) are provided with instructions on opting-out of the action ***and*** the packet contains a Request for Exclusion Form (Exh. 5 to Kellner Decl). (Kellner Decl., ¶ 50; Exh. 1, 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 Settlement Administrator a timely and valid written Request for Exclusion (attached as Exhibit "E" to the Settlement Agreement and Exhibit 5 to Kellner Decl.), pursuant to the instructions set forth in the Notice. Kellner Decl., ¶ 50(d); Exh. 1, 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., ¶ 55; (Exh. 1, 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 Re-Piping Form (Exh. 6 to Kellner Decl.) to the Settlement Administrator within sixty (60) days of mailing of the Notice package 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 Re-Piping Form stating that the prior owner has replaced the homes' copper pipes with PEX or epoxy coating, then the Settlement Administrator shall provide the present owner with written notice: (a) that a prior owner has submitted a Prior Owner Re-Piping Form 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 Settlement 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 Settlement Administrator who will forward such documentation to Ross Feinberg 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 Mr. Feinberg's services shall be deemed a "cost" that shall be deductible from the Settlement Fund. Mr. Feinberg has agreed to a charge of $250.00 per dispute for his services.

(Exh. 1, Proposed Settlement, § 4.4; Kellner Decl., ¶¶ 56-59.)

For a Present Owner to be included as a Class Member, the Present Owner must not submit a Request for Exclusion Form and there must not be a Prior Owner Re-Piping Form submitted by a Prior Owner for the subject Class Home (or the Arbitrator determines in a conflict that the Present Owner obtained ownership of the home with copper pipe systems).

For all Notice papers returned as undeliverable or changed address, the Settlement Administrator shall re-send the Notice documents after a skip-trace (which shall re-start the time for a potential Class member to provide a response). The Settlement Administrator must also create a dedicated website for this Settlement, which will contain Request for Exclusion Forms, Prior Owner Re-Piping Forms and any Objections to the Settlement. The dedicated website shall also make available the Settlement Agreement, the operative complaint, 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. 1, Proposed Settlement, § 4.4, Class Notices at Exhs. 2 & 3, and Proposed Order at ¶14, Exh. 4; Kellner Decl., ¶ 51.)

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 (*i.e.*, $476,002.33), plus costs not to exceed $100,000.00; (b) Settlement Administrator costs for this settlement not to exceed $19,550.00; and (c) one Class representative incentive payment totaling $10,000.00. 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 Defendants. (Exh. 1, 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 Settlement 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., ¶¶ 61-62.)

Settlement class members will release Defendants from claims **asserted in the Action** (and expressly no other construction defect claims). (Exh. 1, Proposed Settlement, § V; Kellner Decl. ¶ 64.)

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., ¶ 53.)

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 Settlement 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 Settlement Administrator will only have to update the chain of title information for those ***after*** the Class Questionnaires were previously sent.
    b. The Settlement Administrator will also have to determine the individuals who were mailed the Class Notice in February 2022 – 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 Re-Piping Form (attached as Exh 6 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 Re-Piping Form stating that the prior owner has replaced the homes' copper pipes with PEX or epoxy coating, then the Settlement Administrator shall provide the present owner with written notice: (a) that a prior owner has submitted a Prior Owner Re-Piping Form 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 Settlement 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 Settlement Administrator who will forward such documentation to Ross Feinberg 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 Mr. Feinberg's services shall be deemed a "cost" that shall be deductible from the Settlement Fund.

(Kellner Decl., ¶¶ 54-59.)

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., ¶ 71.)

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., ¶ 67.) 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., ¶ 72.)

The proposed settlement provides for the establishment of a $1,428,007.00 Settlement Fund, which represents on a *pro rata* basis a total of $9,457.00 for each home – the same as the comparable *Del Rivero v. Centex* related action. (Kellner Decl., ¶ 73.) This represents approximately 54.14% of the higher damage model that only considers the AMA Repiping bid (and not the lower amounts actually paid by some class members who repiped their homes). (Kellner Decl., ¶ 73[a].) 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., ¶ 74.)

In the event that this Court approves the maximum application for attorneys' fees, costs, class representative enhancements and class settlement administration costs, the *pro rata* net payments to each of the 151 class members will be $5,446.71, calculated as follows:

Gross Settlement Fund	$1,428,007.00
Attorneys' Fees (Max)	- $476,002.33
Attorney Costs (Max)	- $100,000.00
Class Representative Enhancement	- $10,000.00
Settlement Administration Costs	- $19,550.00
Subtotal for Distribution	$822,454.67
Per Class Member (÷ 151)	**$5,446.71**

(Kellner Decl., ¶ 78.)

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 $476,002.33) and costs (not to exceed $100,000.00). This application will be supported with attorney declarations providing a cross-check of the lodestar attributable to the legal work over almost 10 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., ¶ 61.)

D. Incentive Payments to Named Plaintiff

Pursuant to Section 3.1.7 of the Settlement Agreement, Plaintiff intends to apply to the Court for one incentive payment of $10,000.00, subject to approval from this Court. (Kellner Decl., Exh 1, § 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 prolonged mediation sessions. (Kellner Decl, ¶¶ 22-32.)

Further, the litigation in this and related copper pipe cases has been extensive and extraordinarily time-consuming during the almost 10 years of the litigation. (Kellner Decl., ¶¶ 22-38.) It is safe to say that virtually every aspect of this case has 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 (Kellner Decl., ¶¶ 2-7; 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 54.14% 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 the 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., ¶ 75.) 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 54.14% 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., ¶ 76.) 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 ¶ 77.)

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., ¶ 64.)

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 151 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. 2 and Exh. 3 to the Kellner Decl.) This includes the option to orally object and appear at the Final Approval hearing. 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 other related actions. (Kellner Decl., ¶¶ 65-67.)

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 Settlement 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 a website that will contain the operative complaint, the motions for preliminary and final approval, and all notices and documents submitted in connection therewith. (Kellner Decl., ¶ 68.)

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 SETTLEMENT ADMINISTRATOR

The Parties have agreed on ILYM Group, Inc. ("ILYM") to manage the settlement 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 – and ILYM has already been appointed in this action to provide class notice and questionnaire services.

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 additional settlement administration services – which are extensive considering its need to confirm/determine chain of title information and prior owner contact information. (Kellner Decl, ¶ 70); 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 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 Settlement 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 Settlement 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	Settlement 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 Settlement Administrator Report, if not sooner*
Day 126	Final Approval Hearing	24 days after Motion is filed

Dated: April 21, 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
Brasch v. K. Hovnanian, et al.
Orange County Superior Court Case No.: 30-2013-00649417

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: May 23, 2023 /s/Debbie Knipe
Debbie Knipe

SERVICE LIST
Brasch v. K. Hovnanian, et al.
Orange County Superior Court Case No.: 30-2013-00649417

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