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21 on behalf of themselves and all others similarly situated

22 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
23 **FOR THE COUNTY OF ORANGE**

24 JEFF SMITH, an individual; JULIE SMITH, an
25 individual; on behalf of themselves and all others
26 similarly situated,

27 Plaintiffs,

28 vs.

PULTE HOME CORPORATION; and DOES 1-
100,

Defendants.

AND RELATED CROSS-CLAIM.

CASE NO. 30-2015-00808112-CU-CD-CXC

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

Judge: Hon. Peter Wilson
Dept: CX-101
Complaint Filed: 9/14/15

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

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

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on **March 2, 2023, at 2:00 p.m.**, or as soon thereafter
3 as the matter may be heard in Department CX-101 of the above-entitled Court, located at 751
4 West Santa Ana Blvd., Santa Ana, California 92701, Plaintiffs and Class Representatives Jeff
5 and Julie Smith (“Plaintiffs”) hereby move this Court for an order, pursuant to Rule 3.769 of the
6 California Rules of Court, as follows:

- 7 1. Granting preliminary approval of the class action settlement between
8 Plaintiffs/Class Representatives (“Plaintiffs”) and Defendant Pulte Home
9 Corporation (“Defendant”);
- 10 2. Approving the proposed form and manner of notice to be provided to the
11 settlement class and directing that notice be effectuated to the settlement class;
- 12 3. Requiring that Class Counsel provide the Class Administrator and Class Counsel
13 with an electronic version of a Class Home List, identifying the homes and
14 original owners of the homes to be included in the Settlement Class from whom
15 the Class Administrator can determine individuals in the chain of title who may
16 be a Settlement Class Member and should receive the Settlement and Class
17 Notice (attached to the Settlement Agreement as Exhibit C thereto);
- 18 4. Approving ILYM Group Inc. as Class Administrator to administer the notice and
19 claims procedures;
- 20 5. Setting a hearing for final review of the proposed settlement in Department
21 CX-101 of the above-entitled Court.

22 Good cause exists for the granting of this Motion because the proposed settlement is
23 fair, reasonable, and adequate. This Motion is based on this Notice of Motion and Motion,
24 the attached Memorandum of Points and Authorities, the Declarations of Richard Kellner,
25 Richard Bridgford, Patrick McNicholas, the Class Representatives, and Lisa Mullins, the
26 Class Action Settlement Agreement (Exhibit A to the Kellner Declaration), and the attached
27 exhibits thereto, files and documents filed with this Court, and upon such further oral
28

1 and/or documentary evidence and argument as may properly be presented to the Court at
2 the time of the hearing on this matter.

3
4 Dated: February 3, 2023

KABATECK LLP
BRIDGFORD, GLEASON & ARTINIAN
McNICHOLAS & McNICHOLAS LLP

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

9 Richard L. Kellner
10 Michael H. Artinian
11 *Attorneys for the Certified Class*
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 By this motion, Plaintiffs and Class Representatives Jeff and Julie Smith (“Plaintiffs”) seek
3 preliminary approval of a class action settlement entered between the certified class (by the class
4 representatives) and Defendant Pulte Home Corporation (“Defendant”).

5 This motion is being filed concurrently with two other motions seeking preliminary approval of
6 class settlements involving the Centex/Pulte developers in these related actions for *Shah, et. al. v. Pulte*
7 *Home Corporation*, Orange County Superior Court Case No. 30-2014-00731604; and *Del Rivero, et al.*
8 *v. Centex Homes of California LLC*, Orange County Superior Court Case No. 30-2013-00649338. All
9 three settlements were negotiated under the auspices of the Hon. Stephen J. Sundvold (ret.) of JAMS
10 ADR. (Kellner Decl., ¶ 22-23.)

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

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

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

- 24 • The Settlement Fund is \$375,200.00.
- 25 • The approximately 56 participating Settlement Class Members shall receive the net proceeds
26 of the Settlement Fund on a *pro rata (per home)* basis, after payment of Court approved
27 attorneys’ fees/costs, class administration fees/costs and a class representative enhancement.
 - 28 ○ The *pro rata* gross settlement for each class home is \$6,700.00.

- 1 • The gross *pro rata* recovery for the Class represents a significant percentage of the damages
2 that they could receive *if* they were to prevail at trial:
 - 3 ○ The *pro rata* gross settlement amount constitutes approximately 41.36% of the
4 average costs for future replacements of the copper pipe systems with PEX
5 (approximately \$16,200.00 per home) based upon a bid provided by AMA Repiping –
6 the contractor who provided the replacement of PEX piping in two other class actions
7 settlements.
- 8 • The proposed settlement is a “claims paid” settlement.

9 (Kellner Decl. ¶ 9.)

10 Subject to approval by this Court, Plaintiffs and Class Representatives Jeff and Julie Smith
11 (“Plaintiffs”) have agreed to and support the proposed settlement of this action in accordance with the
12 terms and conditions set forth in the Settlement Agreement. (Jeff and Julie Smith Decls., ¶ 8.) As
13 described herein and considering the strengths and weaknesses of the Class claims, and the time,
14 expense and risks associated with litigation, the parties believe the settlement will result in benefits to
15 the class members on terms that are fair, reasonable and adequate for the proposed settlement class. (*See*
16 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801-02.) For these reasons, as discussed more
17 fully below, the proposed class settlement merits preliminary approval pursuant to California Rule of
18 Court 3.769(c).

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

21 I. PROCEDURAL HISTORY

22 Plaintiffs filed this action on September 4, 2015 on behalf on themselves and other similarly
23 situated individuals who own homes in the class area (Talega) that (i) were constructed by Defendants,
24 (ii) contained copper pipes installed by the Defendants, and (iii) had purchase agreements signed by
25 Defendants on or after January 1, 2003. The operative complaint alleges a cause of action against
26 Defendants for violations of standards of residential construction (Civ. Code § 895 *et seq.*, including §
27 896(a)(14) and (15)). (Kellner Decl., ¶ 11.)

28 This case was related to a number of the other similar pinhole leak cases. Ultimately, a total of

1 15 Orange County Pipe Cases were deemed related before the same judge in the Orange County
2 Superior Court – of which 10 have settled. (Kellner Decl., ¶ 13.)

3 On August 19, 2021, the Hon. Glenda Sanders (now retired) granted class certification of this
4 case. This determination culminated numerous favorable decisions for the Plaintiffs that Class Counsel
5 believes prompted Centex/Pulte and other developer defendants to engage in meaningful settlement
6 discussions. (Kellner Decl., ¶ 14.)

7 The first area of major litigation (common to all of these related actions) involved the developer
8 defendants’ attacks on the complaint and their assertion that individual issues prevented class treatment.
9 The trial judge (Judge Steven L. Perk) issued rulings that dismissed the class allegations. Those orders
10 were appealed in two cases – *Brasch v. K. Hovnanian, et al.* (Case No. 30-2013-00649417) and *Chiang*
11 *v. D.R. Horton, et al.* (Case No. 30-2013-00649435) – and the Court of Appeal ultimately reversed Judge
12 Perk’s ruling that had dismissed the class allegations. (Kellner Decl., ¶ 15.)

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

- 15 • At first, Judge Thierry Patrick Colaw (who replaced Judge Perk in these related cases),
16 denied numerous motions to dismiss by the developer defendants based upon their claim
17 that the language of SB 800 prohibited class actions. (Kellner Decl., ¶ 16 (a).)
- 18 • Writs were filed by the developer defendants on these Orders – which were all ultimately
19 denied by the Court of Appeal. (Kellner Decl., ¶ 16 (b).)
- 20 • Thereafter, similar motions to dismiss were filed by the developer defendants (some of
21 whom claimed that there was a change in law) and those motions were denied by Judge
22 Sanders (who had replaced Judge Colaw in these related cases). (Kellner Decl., ¶ 16 (c).)
- 23 • Writs again were filed (on Judge Sanders’ Orders) and – this time – the Court of Appeal
24 issued an Order to Show Cause re dismissal based upon the subsequent ruling in the case
25 entitled *Kohler Co. v. Superior Court* (2018) 29 Cal.App.5th 55. (Kellner Decl., ¶ 16 (d).)
- 26 • The matter was remanded to Judge Sanders, who conducted extensive hearings and
27 briefings on the issue. Judge Sanders issued Orders on February 7, 2019 dismissing the
28 class allegations based upon perceived constraints of *Kohler* and the Court of Appeal’s

1 Order to Show Cause. (Kellner Decl., ¶ 16 (e).)

- 2 • Plaintiffs then appealed that Order. Following full briefing and argument before the
3 Court of Appeal on two of the related cases, the Court of Appeal reversed Judge Sanders'
4 Order (largely consistent with Judge Sanders' prior orders denying Defendants' attempts
5 to dismiss the class allegations), and ruled that class actions are permitted under SB 800
6 based on the allegations in the related cases. (Kellner Decl., ¶ 16 (f).)

7 The third major area of litigation involved motions relating to expert testimony. The class claims
8 in each of the related class actions were largely predicated upon the same underlying expert opinion –
9 *i.e.*, that the combination of the common water in this area supplied by the Santa Margarita Water
10 District and the copper pipes resulted in a common chemical reaction that resulted in corrosion that
11 lessens the useful life of the pipes. As a result, tremendous discovery and motion practice revolved
12 around this expert testimony. Multiple defendants filed motions to strike Plaintiffs' expert's opinions
13 based upon *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 and its
14 progeny. Ultimately, plaintiffs' counsel prevailed in such motions before BOTH Judge Colaw and Judge
15 Sanders. (Kellner Decl., ¶ 17.)

16 The fourth major area of litigation involved substantive determination of motions for class
17 certification. Again, there was extensive discovery and motion practice involving class certification –
18 which was largely identical in each of the related Orange County Copper Pipe actions. Following
19 extensive rounds of briefing on multiple cases – as well as multiple hearings – Judge Colaw first granted
20 class certification in the *Del Rivero v. Centex* action, and Judge Sanders later granted class certification
21 additional related class actions – including this case. (Kellner Decl., ¶ 18.)

22 **II. SETTLEMENT DISCUSSIONS IN THIS CLASS ACTION**

23 Subsequent to the certification of this class action, the Parties engaged in arms-length
24 negotiations before Hon. Stephen Sundvold (ret.) from JAMS ADR. (Kellner Decl., ¶ 19.) The
25 negotiations – albeit separate – were conducted at the same time for the two other related Centex/Pulte
26 class actions - *Shah, et. al. v. Pulte Home Corporation*, Orange County Superior Court Case No. 30-
27 2014-00731604 and *Del Rivero, et al. v. Centex Homes of California LLC, et al.*, Orange County
28 Superior Court Case No. 30-2013-00649338. As a result of this mediation, the parties were able to reach

1 agreement on settlement. (Kellner Decl., ¶¶ 20-21.)

2 **A. The Terms of the Proposed Settlement.**

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

5 The proposed settlement provides for the establishment of a \$375,200.00 Settlement Fund, which
6 equates on a *pro rata* basis to a total of \$6,700.00 for each home. (Kellner Decl., ¶ 22.) As demonstrated
7 below, this represents more than 41.36% of the gross damages that the class members could likely obtain
8 at trial. (Kellner Decl., ¶ 23.)

9 Prior to engaging in settlement negotiations, Class Counsel engaged in substantial “due
10 diligence” to determine the actual damages that could be obtained at trial by:

- 11 • obtaining a bid from AMA Repiping – the company that engaged in the actual repiping of
12 homes in classes that were settled in these related actions – for the prospective costs for
13 replacing the copper pipe systems. The per home “bid” for such PEX repiping was
14 \$16,200.00 and based upon the model/size of the homes.
- 15 • reviewing the responses to Questionnaire surveys from homeowners regarding any
16 repiping of the copper pipe systems with PEX.

17 (Kellner Decl., ¶ 24.)

18 It should be noted that this class action is substantively different than the *Shah* and *Del Rivero*
19 actions in two material respects: (a) the class homes are located in Talega (as opposed to Ladera Ranch);
20 and (b) the Class Questionnaire responses included only one homeowner who replaced their copper pipe
21 systems with PEX due to leaks by the responding class members. (Kellner Decl., ¶ 25.) As a result,
22 from an evidentiary perspective, this case was materially more challenging than the *Shah* and *Del Rivero*
23 cases – reflecting the lower settlement recovery for class members. Nonetheless, Class Counsel was
24 able to negotiate substantial relief for the Class of approximately 41.36% of the gross damages the class
25 members could likely obtain at trial. (Kellner Decl., ¶ 26.)

26 Once the size of the Settlement Fund and the settlement class definition was agreed upon by the
27 parties, negotiations were conducted regarding the amount of attorneys’ fees/costs, class administrator
28 fees/costs and class representative enhancements for which Defendants will not provide any objections.

1 (Kellner Decl., ¶ 27.) Class Counsel agreed to a 1/3 contingency fee calculation which – as will be
2 demonstrated in the motion for approval of attorneys’ fees – represents less than any apportionable
3 lodestar for the actual legal work performed over 9+ years that benefitted the settlement class. (Kellner
4 Decl., ¶ 28.)

5 Significantly, the settlement is a “claims-paid” settlement – and the only reason that payment
6 would not be made from the Settlement Fund would be if a class member “opts-out” of the settlement.
7 (Kellner Decl., ¶ 29.) The only potential “reversion” will be the net class member portion that would
8 have been due to any opt-outs. (*Id.*)

9 Finally, the Settlement is conditioned on all of the related OC Pipe class actions being “final” –
10 which should be concurrently determined by the concurrent filing (and hearing) of the motions for
11 preliminary and final approval. (Kellner Decl., ¶ 30.)

12 The Plaintiffs and Class Representatives participated in the settlement negotiations, and fully
13 support the settlement. (Kellner Decl., ¶ 31; Jeff and Julie Smith Decls., ¶ 8.)

14 **B. The Unique Opt-Out Situation Relating To Settlement Notice.**

15 The Settlement Notice for this case (as well as for the *Del Rivero* case) deals with a relatively
16 unique situation in which the proposed settlement was negotiated *after* the cases had been certified and
17 class notice was previously provided to the putative class. This is significant because the putative class
18 members have already been provided with the opportunity to “opt-out” of this case or be bound by the
19 results of the class action. (Kellner Decl., ¶ 32.)

20 As a result, two different sets of Settlement Notice were negotiated – the first for individuals who
21 were provided with Class Notice and the opportunity to opt-out of the class; and the second for
22 subsequent owners who necessarily did not receive the initial Class Notice and the opportunity to opt-
23 out. (Kellner Decl., ¶ 33.)

24 For the latter, the Settlement Notice provides the distinct opportunity to opt-out. (*Id.*)

25 **C. The Homeowners Compelled to “Arbitration.”**

26 Structurally, the negotiations in the Centex/Pulte cases were unusual because: (1) the
27 defendant/developer wanted all of its pending matters in these related cases to be resolved; and (2) a
28 number of original owners who were initially part of this certified class action were subject to an Order

1 by Judge Sanders compelling them to arbitration. As a result, there were concurrent negotiations with
2 the developer regarding the arbitration and non-arbitration class members in this case – all under the
3 general rubric that the defendant developer wanted a global resolution. (Kellner Decl., ¶¶ 34-35.)

4 Because the defendant (and its insurers) wanted a full settlement of all claims, this proposed
5 settlement is conditioned on all of the other settlements being approved. Again, the individual
6 arbitration settlement agreements with those who have filed for arbitration have also been fully executed
7 by the plaintiffs in this action and the *Del Rivero* action (*i.e.*, the only ones in which there are individual
8 arbitration settlements) – so this will not be an issue. (Kellner Decl., ¶ 36.) With respect to the class
9 settlements in the *Shah* and *Del Rivero* cases, the same hearing date has been scheduled for all three
10 cases – and the terms are substantively similar. (Kellner Decl., ¶ 37.)

11 **III. COURT APPROVAL IS REQUIRED FOR A CLASS SETTLEMENT**

12 Any settlement of class litigation is subject to Court review and approval. Pursuant to Rule
13 3.769(a) of the California Rules of Court: “[a] settlement or compromise of an entire class action, or of a
14 cause of action in a class action, or as to a party, requires the approval of the court after hearing.”
15 Moreover, Rule 3.769(e) provides that “[i]f the court grants preliminary approval, its order must include
16 the time, date, and place of the final approval hearing; the notice to be given to the class; and any other
17 matters deemed necessary for the proper conduct of a settlement hearing.”

18 The structure of this Settlement is virtually identical to those that have been preliminarily
19 approved by Judge Glenda Sanders in the *Dye v. Richmond American* (Case No. 30-2013-00649460-CU-
20 CD-CXS) and finally approved by this Court in *Foti v. John Laing Homes (California), Inc.* (Case No.
21 30-2013-00649415-CU-CD-CXC) actions. (Kellner Decl., ¶¶ 38.)

22 **IV. THE PROPOSED SETTLEMENT AND ITS PRINCIPLE TERMS**

23 **A. The Proposed Settlement Agreement**

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

- 27 1. Within 30 days of final approval of the proposed Settlement, Defendants shall establish
28 the Settlement Fund of \$375,200.00 for the benefit of the Settlement Class. (Exh A, §

1 3.1 and 3.1.0.)

2 2. The Class is be defined as:

3 *(1) All present owners of residential homes in Talega whose copper pipe systems*
4 *have not been replaced with PEX or epoxy coating by prior owners of the homes,*
5 *or (2) prior owners of homes in Talega, California who replaced their copper pipe*
6 *systems with PEX or epoxy coating, provided that: (a) the homes were constructed*
7 *by Pulte Home Corporation and substantially completed within ten (10) years of*
8 *the filing of the original complaint in this action (or September 14, 2005), (b) the*
9 *original purchase agreements were signed by the builder on or after January 1,*
10 *2003, and (c) their SB 800 claims were not released.*

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

14 With respect to Settlement Notice, the Class Administrator shall serve by U.S. Mail the notice
15 packets applicable to the prior homeowners who already received Class Notice (Exh. C) and the
16 subsequent homeowners who had not received Class Notice (Exh. B). The primary difference between
17 the two Settlement Notice packets is: (a) the Settlement Notice for the homeowners who were previously
18 sent Class Notice are not provided with opt-out instructions **and** the packet **does not** contain a Request
19 for Exclusion Form; and (b) the Settlement Notice for the homeowners who had not been sent Class
20 Notice are provided with instructions on opting-out of the action **and** the packet contains a Request for
21 Exclusion Form. (Kellner Decl., ¶ 40; (Exh. A, Proposed Settlement, § 4.2.)

22 For a homeowner who did not previously receive Class Notice (and thus now has an option to
23 opt-out), such homeowner may exclude him or herself from the Settlement Class (and therefore not be
24 bound by the terms of the Settlement Agreement) by submitting to the Class Administrator a timely and
25 valid written Request for Exclusion, pursuant to the instructions set forth in the Notice (attached as
26 Exhibit “D” to the Settlement Agreement). Kellner Decl., ¶ 40(d); (Exh. A, Proposed Settlement, § 4.5.)
27 In the motion for Final Approval, Class Counsel and Plaintiffs shall report to the Court the specifics of
28 any objections or requests for exclusion. (Kellner Decl., ¶ 42.)

1 **1. The Determination of Who is a Class Member.**

2 All current homeowners will be deemed a Participating Class Member unless a prior owner had
3 re-piped the home with PEX or an epoxy coating. This is because it is impracticable to inspect every
4 home in the class to determine whether there has been a replacement of the copper pipes by prior owners
5 with PEX or an epoxy coating. As a result, in order for a prior owner to be a participating settlement
6 class member, that prior owner must submit a verification that the prior owner had re-piped the home
7 with PEX or an epoxy coating. (Kellner Decl., ¶¶ 43-44; (Exh. A, Proposed Settlement, § 4.4.)

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

- 10 • Under the terms of the proposed Settlement, for a Prior Owner to be included as a Class
11 Member, that Prior Owner must submit by mail or electronic means a Prior Owner
12 Verification Form to the Class Administrator within sixty (60) days of mailing that
13 verifies that the Prior Owner replaced the copper pipes in the Class Home with PEX or
14 epoxy coating of the pipes.
- 15 • In the event a prior owner submits a Prior Owner Verification Form stating that the prior
16 owner has replaced the homes’ copper pipes with PEX or epoxy coating, then the Class
17 Administrator shall provide the present owner with written notice: (a) that a prior owner
18 has submitted a Prior Owner Verification stating that the prior owner replaced the homes’
19 copper pipes with PEX or epoxy coating; and (b) the present owner has 30 days within
20 which to submit a written verification to the Class Administrator disputing the prior
21 owner’s claim, and state that the home had copper pipes (without any epoxy coating) at
22 the time the present owner obtained title to the home.
- 23 • If a dispute arises between a prior and present owner as to whether a prior owner had
24 replaced the copper pipes with PEX or epoxy coating, then the two homeowners shall
25 submit proof supporting their claims to the Class Administrator who will forward such
26 documentation to Hon. Nancy Wieben-Stock (Ret.) of JAMS who: (a) shall serve as
27 arbitrator of the dispute; and (b) whose determination of those competing claims shall be
28 binding. The costs for Judge Stock’s services shall be deemed a “cost” that shall be

1 deductible from the Settlement Fund.

2 (Exh. A, Proposed Settlement, § 4.4; Kellner Decl., ¶¶ 48-50.)

3 For a Present Owner to be included as a Class Member, the Present Owner must not submit an
4 Opt-Out Form and there must not be a Prior Owner Verification Form submitted by a Prior Owner for
5 the subject Class Home. (Kellner Decl., ¶ 45).

6 For all Notice papers returned as undeliverable or changed address, the Class Administrator shall
7 re-send the Notice documents after a skip-trace. The Class Administrator must also create a dedicated
8 website for this Settlement, which will provide a portal for electronic submission of Opt-Out Forms,
9 Prior Owner Verification Forms and any Objections to the Settlement. The dedicated website shall also
10 make available the Settlement Agreement, the pleadings submitted in support of preliminary approval,
11 approval of attorneys' fees, costs and class representative enhancements, and final approval. The
12 dedicated website shall also make available all Orders by this Court with respect to the aforesaid
13 motions. (Exh. A, Proposed Settlement, § 4.4, Class Notices at Exhs. B & C, and Proposed Order at ¶14;
14 Kellner Decl., ¶ 41.)

15 Finally, the proposed Settlement provides that Plaintiffs and Class Counsel shall separately file
16 motions for approval by this Court at the time of final approval of the following: (a) Attorneys' fees not
17 to exceed one-third (1/3) of the Settlement Fund (\$125,066.66), plus costs not to exceed \$25,000.00;¹
18 (b) Class administrator costs for this settlement not to exceed \$13,550.00; and (c) a Class representative
19 incentive payment totaling \$10,000 cumulatively for their household. To the extent any class member
20 opts-out of the Settlement, the *pro rata* net settlement payment that would have otherwise been due to
21 that opt-out class member shall be paid back to Defendant. (Exh. A, Proposed Settlement, § 3.1; Kellner
22 Decl., ¶¶ 51, 54.) It should be noted that Class Counsel's costs include the administrative costs
23 previously incurred for Class Notice and the Questionnaire, and that the Class Administrator costs are
24

25 ¹ It should be noted that at the Final Approval Hearing, Class Counsel will be seeking reimbursement of
26 pre-settlement costs on a *pro rata* basis from all class members **and** arbitration plaintiffs (since they all
27 experienced a common benefit from such costs), and the reimbursement of class administration and
28 approval motion costs on a *pro rata* basis for only class members (since only they benefitted from such
costs). (Kellner Decl., ¶ 53) In addition to customarily incurred costs (such as deposition transcripts and
expert payments), a large portion of the costs incurred will include the payments to class administrators
for previously disseminated notice and the Questionnaire. (Kellner Decl., ¶ 53.)

1 relatively lower because its tasks will be lessened by the prior determination of the chain of title
2 ownership of class homes through the date of Class Notice and the Questionnaire. (Kellner Decl., ¶ 52.)

3 Settlement Class Members will release Defendants from claims **asserted in the Action** (and
4 expressly no other construction defect claims). (Exh. A, Proposed Settlement, § V; Kellner Decl., ¶ 55.)

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

6 The proposed Settlement Agreement provides for the most cost-effective administration of the
7 settlement, which imposes minimal burdens on the Class. Under SB 800, the relief sought in this class
8 action is the cost of replacing the copper pipes that fail to conform with the standards of Civil Code
9 § 896(a)(14) and (15) – *i.e.*, copper pipes that leak and/or corrode so as to lessen their useful life. As a
10 result, in the chain of title for each home, the individual who has a right to redress will be either: (a) a
11 homeowner who replaced the copper pipes; or (b) the present homeowner. (Kellner Decl., ¶¶ 44-45.)

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

- 15 1) First, the class administrator will determine and then mail the Settlement Notices and other
16 documents to all the individuals in the chain of title for the homes in the Class Home List.
 - 17 a. This process will be less expensive than usual since the class administrator will only
18 have to update the chain of title information for those *after* the Class Questionnaires
19 were previously sent.
 - 20 b. The class administrator will also have to determine the individuals who were mailed
21 the Class Notice in 2021 – since they no longer have a right to opt-out.
 - 22 i. Accordingly, two separate Settlement Notice packets will be sent to the
23 homeowners who had previously been mailed Class Notice – and those who
24 had not.
- 25 2) Second, for the present owners on the Class Home List to receive any benefits from this
26 Settlement, **they do not have to do anything.**
- 27 3) Third, for prior owners who paid for a repipe/epoxy to receive the benefits from this
28 Settlement, they must fill out a simple Prior Owner Verification Form (attached as Exh E to

1 Kellner Decl.) that attests to their replacement of the copper pipes in the home that is
2 included in the Class.

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

19 (Kellner Decl., ¶¶ 44-50.)

20 With respect to the *pro rata* relief provided, it represents a significant portion of the potential
21 relief that the class members could receive at trial if they prevail. As noted above, Class Counsel
22 engaged in substantial "due diligence" before settlement negotiations to determine the actual costs for
23 replacing the Class copper pipe systems with PEX by: (1) reviewing the responses to Questionnaire
24 surveys from homeowners regarding the actual costs incurred by those owners who replaced the class
25 home copper pipe systems with PEX; and (2) obtaining a bid from AMA Repiping – the company that
26 engaged in the actual repiping of homes in other classes that were settled in these related actions – for
27 the prospective costs for replacing the copper pipe systems. (Kellner Decl., ¶ 62.)

28 The proposed settlement provides for the establishment of a \$375,200.00 Settlement Fund, which

1 represents on a *pro rata* basis a total of \$6,700.00 for each home. (Kellner Decl., ¶ 63.) This represents
 2 approximately 41.36% of the higher damage model that only considers the AMA Repiping bid (and not
 3 the lower amounts actually paid by class members who repiped their homes). (Kellner Decl., ¶ 63(a).)
 4 By any measure, this is a good result for the class – given the risks that: (a) normally attend any class
 5 trial; (b) the possibility that the jury will not credit Plaintiffs’ experts’ opinions regarding general and
 6 individual causation; (c) the potential evidentiary issues relating to class damages set forth above; and
 7 (d) the possibility of a change in the law. (Kellner Decl., ¶¶ 64-65.)

8 In the event that this Court approves the maximum application for attorneys’ fees, costs, class
 9 representative enhancements and class administration costs, the *pro rata* net payments to each of the 56
 10 class members will be \$3,599.70, calculated as follows:

Gross Settlement Fund	\$375,200.00
Attorneys’ Fees (Max)	- \$125,066.66
Attorney Costs (Max)	- \$25,000.00
Class Representative Enhancement	- \$10,000.00
Class Administration Costs	- <u>\$13,550.00</u>
Subtotal for Distribution	\$201,583.34
Per Class Member (÷ 56)	\$3,599.70

16 **C. Attorneys’ Fees and Costs.**

17 Pursuant to sections 3.1.6 and 7.1 of the Settlement Agreement, at the final approval hearing
 18 Class Counsel will apply to the Court for an award of attorneys’ fees not to exceed one third (1/3) of the
 19 Settlement Fund (or \$125,066.66) and costs (not to exceed \$25,000.00). This application will be
 20 supported with attorney declarations providing a cross-check of the lodestar attributable to the legal
 21 work over 9+ years that benefitted the Settlement Class. Defendants have agreed that they will not
 22 oppose such a request for fees and costs consistent with these amounts, and anticipates filing a statement
 23 of non-opposition to Class Counsel’s application for attorneys’ fees.

24 **D. Incentive Payments to Named Plaintiffs**

25 Pursuant to Section 3.1.7 of the Settlement Agreement, Plaintiffs intend to apply to the Court for
 26 an incentive payment (cumulatively for both Class Representatives) of \$10,000.00 subject to approval
 27 from this Court. (Kellner Decl., Exh A, § 3.1.7.) This sum shall be paid from the Settlement Fund.
 28

1 **V. THE SETTLEMENT AGREEMENT MEETS ALL CRITERIA FOR COURT**
2 **APPROVAL**

3 At the preliminary approval stage, the Court need only “make a preliminary determination on the
4 fairness, reasonableness and adequacy of the settlement terms and must direct the preparation of notice
5 of the certification, proposed settlement and date of the final fairness hearing.” MANUAL FOR
6 COMPLEX LITIGATION (Fourth), § 21.633 at 321 (2004); *see also Cellphone Termination Fee Cases*
7 (2010) 186 Cal.App.4th 1380, 1389. The Court should consider factors including “the strength of
8 [p]laintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of
9 maintaining class action status through trial, the amount offered in settlement, the extent of discovery
10 completed and the stage of the proceedings, [and] the experience and views of counsel.” *Kullar v. Foot*
11 *Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128 (citing *Dunk*, 38 Cal.App.4th at 1801).

12 Although recommendations of counsel proposing the settlement are not conclusive, the Court can
13 properly take them into account – particularly if they have been involved in litigation for some period of
14 time, appear to be competent, have experience with this type of litigation, and discovery has
15 commenced. *See* 2 H. Newberg, *Newberg on Class Actions* § 11.47 (2d ed. 1985). Indeed, courts do not
16 substitute their judgment for that of the proponents, particularly when experienced counsel familiar with
17 the litigation have reached a settlement. *See, e.g., Hammon v. Barry*, (D.D.C. 1990) 752 F.Supp. 1087
18 (citing *Newberg on Class Actions*, § 11.44). Rather, courts presume the absence of fraud or collusion in
19 the negotiation of a settlement unless evidence to the contrary is offered.

20 This settlement was reached only after lengthy arms-length negotiations during and after a
21 mediation session. (Kellner Decl. ¶¶19-21.)

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

1 **A. The Settlement Agreement Is “Fair, Adequate And Reasonable”**

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

9 The Settlement Class provides approximately 41.36% of the likely maximum damages that the
10 class members could receive if they prevail at trial. *See Kullar, supra* (Court should be provided with
11 information regarding any discounts provided for settlement purposes). Nonetheless, there are
12 significant risks to Plaintiffs and the class if this case were not to be settled.

13 All trials have inherent risks – and there always remains the potential that law could change
14 between the present date and trial. Here, the case is particularly subject to risk because it is based upon
15 conflicting expert opinions by individuals with established credentials. The parties further acknowledge
16 that further discovery and trial preparation will be time consuming and expensive, and a trial would be
17 protracted and costly. (Kellner Decl., ¶65.) Indeed, there are further potential issues relating to the
18 damage models that the jury would or would not accept at trial.

19 It is anticipated that even though this Court will separately consider this motion for preliminary
20 approval (while also separately considering the motion for preliminary approval in the *Shah* and *Del*
21 *Rivero* class actions), the question that could be asked is why this *Smith* settlement represents a slightly
22 larger discount than the other class settlements under consideration. Specifically, this settlement
23 constitutes approximately 41.36% of the AMA Repiping bid – while the other settlements constitute
24 approximately 56% of the AMA Repiping bid. (Kellner Decl., ¶ 69.)

25 There are two primary obstacles that differentiate this case from the others. The first is that the
26 homes are located in Talega. The second (and more important reason) is that in Questionnaire responses
27 received in connection with this case, ***only one homeowner stated that they had repiped their homes***
28

1 **with PEX.** (Kellner Decl., ¶ 70.) While not necessarily representative of the entire class, it did represent
2 a significant data point in case evaluation that Plaintiffs needed to consider. (Kellner Decl., ¶ 71.)

3 Class Counsel and Plaintiffs further recognize the other risks involved in further litigation. If this
4 matter were to proceed to trial, Class Counsel would be well-within their right to: (a) incur additional
5 expert and trial-related costs; and (b) seek a 40% contingency fee – all of which would further dilute the
6 net recovery to the Class. (Kellner Decl., ¶ 72.) Based upon the foregoing, Plaintiffs and Class Counsel
7 maintain that the settlement that represents approximately 41.36% of the AMA Repiping bid is well
8 within the range of a class settlement that is fair, adequate and reasonable under the circumstances.
9 (Kellner Decl., ¶ 73.)

10 **B. The Proposed Release**

11 The class release proposed by the Settlement is specifically limited to claims of participating
12 Settlement Class members (who do not choose to opt out); and is further limited to only the claims
13 actually asserted in this action related to any alleged violations of Civil Code § 895 *et seq.* arising from
14 the installation of copper pipes. The release expressly excludes any *other* construction defects or *other*
15 claims relating to the construction of the homes. (Kellner Decl., ¶ 55.)

16 17 **VI. THE PROPOSED NOTICE TO THE CERTIFIED CLASS IS APPROPRIATE**

18 “When the court approves the settlement or compromise of a class action, it must give notice to
19 the class of its preliminary approval and the opportunity for class members to object and, in appropriate
20 cases, opt out of the class.” *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177 Cal.App.4th 734, 746 (citing
21 Cal. Rules of Court 3.769). California Rule of Court 3.769(f) provides that “notice must contain an
22 explanation of the proposed settlement and procedures for class members to follow in filing written
23 objections to it and in arranging to appear at the settlement hearing and state any objections to the
24 proposed settlement.” The rules also specify the content of the notice to class members. Cal. Rules of
25 Court 3.766. The “notice ... must fairly apprise the class members of the terms of the proposed
26 compromise and of the options open to dissenting class members.” *Wershba v. Apple Computer, Inc.*
27 (2001) 91 Cal.App.4th 224, 251. The proposed notice readily meets these requirements.

28 Plaintiffs submit that the proposed Notice is appropriate under California law and is the best

1 notice practicable for this Class of approximately 56 homes/members. The Notice describes in plain
2 language the background of the litigation, the benefits that Defendants will be providing to the Class
3 Members, the meaning and effect of opting out (where applicable), the right to object and the procedure
4 to do so, the legal effect of not objecting, and the timing of other important events during the settlement
5 process. (See Settlement Notice attached as Exh. B and Exh. C to the Kellner Decl.) Indeed, the Notice
6 is modeled after the Federal Judicial Center’s forms, as suggested by the Court on its website, and is
7 substantively identical to the Class Notice that Judge Sanders has approved in other related actions.
8 (Kellner Decl., ¶¶ 56-58.)

9 The Notice provides concise details regarding the underlying litigation and explains to Class
10 members the options they have in exercising their rights accordingly. The Notice further explains the
11 scope of their release of Defendants should they decide to participate in the Settlement. (Kellner Decl., ¶
12 59.) The Proposed Notice also provides contact information for the Class Administrator and Class
13 Counsel should Class members have further questions about the litigation or if they seek clarity of the
14 information provided in the Notice, as well as an interactive website that also includes all pertinent
15 pleadings. (*Id.*)

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

20 **VII. ILYM GROUP INC. SHOULD BE APPOINTED AS CLASS ADMINISTRATOR**

21 The Parties have agreed on ILYM Group, Inc. (“ILYM”) to handle the notice and claims
22 administration process as outlined in the Settlement Agreement. ILYM is experienced and qualified in
23 the area of class action administration and notice, and is currently serving as the administrator in several
24 related cases (both pending settlements, and for purposes of class notice in active litigation).

25 Plaintiffs and Class Counsel do not have any financial interest in ILYM or otherwise have a
26 relationship with ILYM Group Inc. that could create a conflict of interest. ILYM has provided a cap of
27 \$13,550.00 for its services – which are extensive considering its need to reconfirm chain of title
28 information. (Kellner Decl, ¶ 61; Mullins Decl., ¶ 9.)

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

3
 4 **VIII. CONCLUSION**

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

- 6 1. Granting preliminary approval of the class action settlement between the Class (by Plaintiffs
 7 Jeff and Julie Smith and Defendant Pulte Home Corporation;
- 8 2. Approving the proposed form and manner of notice to be provided to the settlement class and
 9 directing that notice be effectuated to the settlement class;
- 10 3. Approving ILYM Group Inc. as Class Administrator to administer the notice and claims
 11 procedures; and
- 12 4. Setting a hearing for final review of the proposed settlement in Department CX-101 of the
 13 above-entitled Court.

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

<u>Days After Prelim. Approval</u>	<u>Event</u>	<u>Date/Deadline</u>
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	<i>Plaintiffs suggest it will be prepared within 5 days of the Class Administrator Report, if not sooner</i>
Day 126	Final Approval Hearing	24 days after Motion is filed

1 Dated: February 3, 2023

KABATECK LLP
BRIDGFORD, GLEASON & ARTINIAN
McNICHOLAS & McNICHOLAS LLP

2
3
4 By:/s/ Richard L. Kellner & Michael H. Artinian
Richard L. Kellner and Michael H. Artinian
5 *Attorneys for the Certified Class*
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PROOF OF SERVICE
Smith v. Pulte Homes, et al.
Orange County Superior Court Case No.: 30-2015-00808112

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.
- 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

Smith v. Pulte Homes, et al.

Orange County Superior Court Case No.: 30-2015-00808112

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