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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

**LINDA PARKER PENNINGTON, et al.,  
individually, and on behalf of all others  
similarly situated,**

**Plaintiffs,**

**v.**

**TETRA TECH, INC.; TETRA TECH EC,  
INC.; LENNAR CORPORATION; HPS1  
BLOCK 50 LLC; HPS1 BLOCK 51 LLC;  
HPS1 BLOCK 53 LLC; HPS1 BLOCK 54  
LLC; HPS1 BLOCK 56/57 LLC; HPS  
DEVELOPMENT CO.; FIVE POINT  
HOLDINGS, LLC; BILL DOUGHERTY;  
ANDREW BOLT; EMILE HADDAD; and  
DOES 1-100,**

**Defendants.**

**Case No. 3:18-cv-05330-JD**

**NOTICE OF MOTION AND MOTION FOR  
PRELIMINARY APPROVAL OF  
PENNINGTON PLAINTIFFS' CLASS  
SETTLEMENT WITH HOMEBUILDER  
DEFENDANTS; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

**Date:** September 24, 2020  
**Time:** 10:00 a.m.  
**Place:** Courtroom 11, 19<sup>th</sup> Floor

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

2 **PLEASE TAKE NOTICE THAT**, on September 24, 2020 at 10:00 a.m., or as soon  
3 thereafter as the matter may be heard, in the Courtroom of the Honorable James Donato, United  
4 States District Judge for the Northern District of California, located at 450 Golden Gate Avenue, San  
5 Francisco, California, the *Pennington* Plaintiffs will and hereby do move for entry of an order seeking  
6 preliminary approval of a proposed settlement with Defendants Lennar Corporation, HPS1 Block 50  
7 LLC, HPS1 Block 51 LLC, HPS1 Block 53 LLC, HPS1 Block 54 LLC, HPS1 Block 56/57 LLC,  
8 FivePoint Holdings, LLC, HPS Development Co., L.P., and Emile Haddad. This motion is brought  
9 pursuant to Federal Rule of Civil Procedure (“Rule”) 23 and the Northern District of California’s  
10 Procedural Guidance for Class Action Settlements. Plaintiffs seek approval of this settlement because  
11 it is fair, reasonable, and adequate.

12 The *Pennington* Plaintiffs also seek conditional certification of a class for settlement  
13 purposes. The settlement class meets the prerequisites of Rule 23(a), common questions of liability  
14 predominate over individual damages questions, and a class action is superior to other available  
15 methods for fairly and efficiently adjudicating the controversy.

16 Cotchett, Pitre & McCarthy (“CPM”) seeks appointment as Lead Class Counsel for purposes  
17 of settlement. CPM has spent over 11,000 hours investigating the potential claims and negotiating a  
18 favorable settlement. CPM has considerable experience in handling complex litigation. CPM has  
19 been assisted in the role as Class Counsel by Bowles & Verna, LLP and Gibbs Law Group, LLP.

20 The *Pennington* Plaintiffs seek approval of their Plan of Allocation. The Plan treats Class  
21 Members equitably relative to each other, and the plan is fair, reasonable, and adequate in light of  
22 each individual Class Member’s injuries and the strength of their claims on the merits.

23 The *Pennington* Plaintiffs seek appointment of Epiq Class Action & Class Solutions, Inc. as  
24 the Settlement Administrator.

25 Finally, the *Pennington* Plaintiffs seek approval of their Notice Plan. The proposed Notice  
26 Plan is the best practicable approach under the circumstances, and the notice itself fairly apprises the  
27 prospective Class Members of the terms of the proposal and their available options.

1 This motion is based upon this Notice, the Memorandum of Points and Authorities in Support  
2 thereof; the declarations of Anne Marie Murphy, Linda Parker Pennington, Brett Reynolds, the  
3 Honorable Daniel Weinstein, Cameron Azari, Esq., and the exhibits attached thereto; and any further  
4 papers filed in support of this motion, as well as arguments of counsel and all records on file in this  
5 matter.

6 Dated: August 14, 2020

**COTCHETT, PITRE & McCARTHY, LLP**

7  
8 By: /s/ Anne Marie Murphy  
ANNE MARIE MURPHY  
9 DONALD J. MAGILLIGAN

10  
11 **BOWLES & VERNA LLP**

12 By: /s/ Bradley R. Bowles  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

The *Pennington* Plaintiffs (“Plaintiffs” or “Homeowners”) purchased homes at the Shipyards, a brand new 500-plus-acre community being developed by Defendants Lennar Corporation and Five Point Holdings, Inc. Plaintiffs’ homes are located on Parcel A, a section of the Shipyards where Lennar and its affiliates have built and sold 347 homes since 2015. During sales meetings and in their marketing materials, Lennar emphasized the Shipyards’ proud history as a former Naval base. They downplayed its history as a nuclear waste dump, and when questions arose about the toxic history, Lennar uniformly assured Class Members that the area was clean. Plaintiffs bought homes without knowing the true levels of contamination at the Shipyards, and they later learned that government regulators suspected that the remediation firm, Tetra Tech, had engaged in fraud and other misconduct during the cleanup. Once that fraud and misconduct became widely publicized following Congresswoman Nancy Pelosi’s call for federal investigations in 2018, Plaintiffs’ home values have suffered.

Nearly one year after attending an in-person mediation followed by months of further negotiations, the Parties seek preliminary approval of a settlement on behalf of the following Class:

All individuals or entities who purchased or obtained title to one or more units at Parcel A between 2014 and the date on which this Settlement Agreement is executed by all Parties.

Excluded from this class are Defendants, their affiliates and subsidiaries, and their officers, directors, partners, employees, and agents; class counsel, employees of class counsel’s firms, and class counsel’s immediate family members; defense counsel, their employees, and their immediate family members; and any judicial officer who considers or renders a decision or ruling in this case, their staff, and their immediate family members.

The Lennar Corporation, HPS1 Block 50 LLC, HPS1 Block 51 LLC, HPS1 Block 53 LLC, HPS1 Block 54 LLC, HPS1 Block 56/57 LLC, FivePoint Holdings, LLC, HPS Development Co., L.P., and Emile Haddad (collectively, the “Homebuilders”) will pay six million, three hundred thousand dollars (\$6,300,00.00) to settle the claims against them in this Action (the “Settlement Fund”). The Settlement Fund will be distributed *pro rata* among the Class Members. Each Class Member’s settlement share was calculated by a real estate valuation expert based on objective,

1 publicly available information about the Class Member’s home such as the purchase price, purchase  
 2 date, whether they paid market rate or below market rate for the home, and if they have sold the  
 3 home, the date of sale and sale price.

4 Plaintiffs are well informed about the strength of their case. Class Counsel served over 30  
 5 public records requests on agencies involved with transferring the Shipyards from the United States  
 6 Navy to the City and County of San Francisco and finally to the Homebuilders. Discovery has not  
 7 opened, yet Plaintiffs have assembled a database of 450,000 pages of Shipyards-related documents.

8 Plaintiffs are also aware of their case’s weaknesses. The Homebuilders have brought their  
 9 own lawsuit alleging that they were also victimized by Tetra Tech’s fraud. The Homebuilders claims  
 10 of victimization may complicate Plaintiffs’ case at trial—if they even get a trial. The purchase and  
 11 sale agreements contain arbitration clauses, and if the Court does not approve this settlement,  
 12 Plaintiffs risk being forced into individual arbitration where they would play by rules set unilaterally  
 13 by the Homebuilders.

14 The totality of the circumstances reveal that this settlement is fair, reasonable, and adequate,  
 15 and Plaintiffs respectfully ask this Court to grant preliminary approval of the settlement and certify  
 16 the class for purposes of settlement.

## 17 **II. RELEVANT PROCEDURAL BACKGROUND**

18 Plaintiffs began filing individual lawsuits against the Lennar Corporation,<sup>1</sup> the Block  
 19 Entities,<sup>2</sup> Five Point Holdings,<sup>3</sup> and Five Point’s CEO, Emile Haddad in July of 2018. Those cases  
 20 were filed in the Superior Court of California and removed to federal court by the Tetra Tech  
 21 Defendants. This Court denied Plaintiffs’ Motion to Remand on October 18, 2019. Dkt. 57.

22 Individual cases have been filed by three firms: Cotchett, Pitre & McCarthy, Bowles & Verna,  
 23 and the Gibbs Law Group (collectively, “Class Counsel”). Class Counsel filed a Consolidated  
 24

25 \_\_\_\_\_  
 26 <sup>1</sup> Lennar Corporation through its subsidiaries is the corporate parent of the entities responsible for  
 developing Parcel A.

27 <sup>2</sup> Plaintiffs purchased their homes from one of the several Block entities: HPS1 Block 50 LLC, HPS1  
 Block 51 LLC, HPS1 Block 52 LLC, HPS1 Block 53 LLC, HPS1 Block 54 LLC, or HPS1 Block  
 28 56/57 LLC. The Block entities are affiliates of the Lennar Corporation.

<sup>3</sup> Five Point Holdings, LLC holds the rights to future development of the Shipyards.

1 Amended Complaint on August 18, 2019. Dkt. 64. The operative complaint is the Consolidated  
2 Second Amended Complaint filed on February 28, 2020. Dkt. 93.

3 The Parties have recently finalized the terms of a negotiated settlement (the “Settlement”).  
4 Declaration of Anne Marie Murphy in Support of Motion for Preliminary Approval (hereafter,  
5 “Murphy Decl.”) ¶ 14. On August 7, 2020, Plaintiffs and the Homebuilders (the “Parties”) filed an  
6 administrative motion to stay all proceedings in this action against the Homebuilders with the  
7 exception of proceedings related to the instant Motion and the Court’s approval of this Settlement.  
8 Dkt. 120.

9 **III. ARGUMENT**

10 **A. THIS COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE  
11 SETTLEMENT BECAUSE IT IS FAIR, REASONABLE, AND ADEQUATE**

12 The Court may approve settlements shown to be fair, reasonable, and adequate. Fed. R. Civ.  
13 Proc. Rule 23(e)(2). The Settlement deserves approval because the Class was adequately represented,  
14 the Settlement was negotiated at arm’s length, the relief is adequate, and the proposal treats Class  
15 Members equitably relative to each other.

16 **1. The Proposed Class Representative Has Adequately Represented the Class**

17 Plaintiffs respectfully ask this Court to provisionally designate Linda Parker Pennington as  
18 the Representative Plaintiff for purpose of this settlement. Mrs. Pennington is a member of the class  
19 she seeks to represent, she has an intimate knowledge of this case, she understands her duties as a  
20 class representative, and she has no conflicts of interest with other Class Members. Rule 23(e)(2)(A).

21 Mrs. Pennington knows this case. *See* Declaration of Linda Parker Pennington in Support of  
22 Motion for Preliminary Approval (hereafter, “Pennington Decl.”). A long-time San Francisco  
23 resident, Mrs. Pennington began considering moving to the Shipyards in 2013. She met with Lennar  
24 sales agents, she reviewed their marketing materials, and she thoughtfully weighed the advantages  
25 and risks of being an early resident at the Shipyards. When the Tetra Tech scandal broke, Mrs.  
26 Pennington promptly retained counsel and filed suit. She has closely followed subsequent events by  
27 attending homeowners’ association and community meetings, by corresponding with government  
28 representatives and politicians involved with the Shipyards, by corresponding with experts who study  
the Shipyards, by speaking to her friends in the Shipyards and surrounding communities, and by

1 staying abreast of media coverage of the Shipyards and the plan for further testing and remediation.  
2 Pennington Decl. ¶ 10. Ever since news of the Shipyards scandal broke, Mrs. Pennington has been a  
3 champion of the class, and she continues to advocate for them today.

4 Mrs. Pennington's interests align with the interest with other Class members. Every Class  
5 Member has suffered appreciation impairment damages, damages related to the payment of *Mello-*  
6 *Roos* taxes, or both. Mrs. Pennington has suffered both. By maximizing her damages and claims, she  
7 is thereby advancing the interests of every Class Member. Mrs. Pennington's interests are sufficiently  
8 similar to those of the class, and there is no antagonism between herself and the class. *See* Newberg  
9 on Class Actions (5th Ed.) § 3:58.

10 Mrs. Pennington also understands her responsibilities as a class representative. Mrs.  
11 Pennington is putting the interests of the class ahead of her own personal interests, and that her  
12 settlement share will not be increased because of her status as class representative. She is willing to  
13 sit for a deposition and to answer written discovery questions as necessary because she believes that  
14 successful resolution of this case will benefit the entire community. Pennington Decl. ¶ 9. Class  
15 Counsel are not requesting an incentive award on behalf of Mrs. Pennington in connection with the  
16 Settlement.

## 17 **2. The Parties Negotiated the Settlement at Arm's Length**

18 The Settlement is the product of an arm's length negotiation mediated by the Honorable  
19 Daniel Weinstein (Ret.) and Lizbeth Hasse, Esq. at JAMS in San Francisco. Rule 23(e)(2)(B);  
20 Declaration of Hon. Daniel Weinstein (Ret.) (hereafter, "Weinstein Decl.") ¶ 9. The Settlement  
21 process began with an in-person mediation in August of 2019 and ended on August 10, 2020 when  
22 the parties finalized the Settlement agreement that gave rise to this request for preliminary approval.  
23 In between, the Parties spent hundreds of hours negotiating the Settlement and creating the Plan of  
24 Allocation. The Settlement positions were primarily communicated through JAMS rather than  
25 directly between the Parties' counsel. Murphy Decl. ¶ 16.

26 The Parties reached the Settlement in response to a mediator's proposal. The Parties never  
27 negotiated over attorney fees. The Settlement agreement says that attorneys' fees will be paid from  
28 the Settlement fund at the court's discretion. Murphy Decl. ¶ 18.

1           **3. The Relief Provided to the Class is Adequate**

2           The Settlement Fund is six million, three hundred thousand (\$6,300,000). Murphy Decl. ¶ 15.  
3 If the court awards attorneys' fees and costs as requested by Class Counsel, then the Settlement Fund  
4 Balance will be \$4.48 million calculated as follows:

5	Settlement Fund	\$ 6,300,000
6	Costs	(323,461)
7	Attorney Fees	<u>(1,494,135)</u>
8	Balance:	\$ 4,482,404

9           The Settlement Fund Balance is approximately 9.3 percent of the class' total economic  
10 damages. Declaration of Brett Reynolds in Support of the Motion for Preliminary Approval  
11 (hereafter, "Reynolds Decl.") ¶ 27. The Settlement Fund Balance is adequate in light of the costs of  
12 further litigation and the risk of arbitration, the effectiveness of the proposed method of distribution,  
13 the terms of any proposed attorneys' fees, and the agreements made in connection with the proposal.  
14 Rule 23(e)(2)(C).

15                   **a. The Relief is Adequate in Light of the Costs, Risks and Delay of Further**  
16                   **Litigation.**

17           The Settlement Fund Balance will pay Class Members more than \$12,000 per unit on  
18 average.<sup>4</sup> In the interest of full transparency, Plaintiffs provide a chart listing individual recoveries  
19 that are based on objective criteria prepared by an expert in real estate valuation. Reynolds Decl. ¶  
20 34, Exh. B. If this Court approves the settlement, Class Members will receive a significant portion of  
21 their total economic damages early in the litigation from the less culpable of the two tortfeasors. If  
22 the Court does not approve the settlement, Plaintiffs could spend years litigating against the  
23 Homebuilders, and they may never get a jury trial. The Homebuilders believe that Plaintiffs' claims  
24 are subject to arbitration. Murphy Decl. ¶ 10. Plaintiffs disagree, but they will likely have to  
25 participate in arbitration before they can challenge the validity of the arbitration clause. See *Loving &*  
26 *Evans v. Blick* (1949) 33 Cal.2d 603, 609.

27 <sup>4</sup> The average for all Class Members is approximately \$12,000 per home. The average distribution for  
28 Tier One homes will be \$18,000; \$1,000 for Tier Two; \$7,000 for Tier Three; and \$1,000 for Tier  
Four. See Reynolds Decl. ¶ 33, Exh. A.

1 The arbitration process would take years because the purchase and sale agreements contain  
 2 arbitration clauses that prohibit the consolidation of claims. Murphy Decl. ¶ 10. The named plaintiffs  
 3 own 85 units at the Shipyards. Murphy Decl. ¶ 28. If the Homebuilders refuse to waive the  
 4 prohibition on consolidation, 85 individual arbitrations will require a significant time commitment  
 5 from Class Counsel, Homebuilders' counsel, the expert witnesses, and the arbitrators. The  
 6 arbitrations against the Homebuilders may take longer than the litigation against Tetra Tech.

7 The arbitration process will also be risky because the rules favor the Homebuilders. The  
 8 purchase and sale agreements call for arbitration using the American Arbitration Association's Home  
 9 Construction rules. Murphy Decl. ¶ 10. These rules severely limit Plaintiffs' discovery rights.  
 10 Plaintiffs are allowed only one deposition without further approval from the arbitrator, and they are  
 11 entitled to only those documents that the Homebuilders willingly produce. Arbitration will also be  
 12 costly. According to the rules, Plaintiffs must pay significant fees for the arbitration plus their hourly  
 13 expert fees. Each homeowner's award would have to be reduced by their *pro rata* share of Class  
 14 Counsel's costs. *Ibid.* The average Class Member's net recovery at arbitration may not exceed the  
 15 \$12,000 average recovery under this settlement. These costs, risks, and delay of further litigation  
 16 compel a finding that an early recovery of 9.3 percent of their economic damages is adequate. *See*  
 17 Reynolds Decl. ¶ 27. "Immediate receipt of money through settlement, even if lower than what could  
 18 potentially be achieved through ultimate success on the merits, has value to a class, especially when  
 19 compared to risky and costly continued litigation." *Noll v. eBay, Inc.*, 309 F.R.D. 593, 606 (N.D. Cal.  
 20 2015).

21 **b. The Proposed Method of Distribution is Efficient.**

22 Class Counsel has already identified all Class Members and allocated the Settlement Fund  
 23 Balance among the Shipyards units. The settlement shares will be distributed without requiring any  
 24 action by the Class Members. The Class Notice will notify them that they will be receiving a  
 25 settlement check delivered to their Shipyards address or the address identified through the Settlement  
 26 Administrator's research. Declaration of Cameron R. Azari, Esq. in Support of Motion for  
 27 Preliminary Approval [hereafter, "Azari Decl."] ¶¶ 18–22. Epiq will issue one settlement check for  
 28 each of the 347 units on Parcel A. (They will issue 22 more checks for the homes have been re-sold.)

1 The payee will be every person and entity listed on the deed for the unit. Epiq has agreed to  
 2 accommodate Class Member requests related to the settlement checks including change their mailing  
 3 address or requesting that the payees receive separate checks. Murphy Decl. ¶ 26. Epiq has recent  
 4 experience in a similar class settlement involving real property. Azari Decl. ¶ 27.

5 **c. The Relief is Adequate in Light of the Requested Attorneys' Fees and Costs**

6 Class Counsel will ask this Court to reimburse Class Counsel for \$323,461 in reasonable costs  
 7 that would normally be charged to a fee-paying client. Murphy Decl. ¶ 35. The money paid for expert  
 8 witnesses, for hosting 450,000 pages of documents, and for 11 months of mediation with JAMS. *Ibid.*  
 9 Without those documents, expert opinions, and that assistance from the mediators, this settlement  
 10 would not have happened.

11 Class Counsel will ask the court to first reimburse their costs and expenses from the  
 12 Settlement Fund. Then Class Counsel will ask the court to award attorneys' fees in the amount of  
 13 25% of the Net Settlement Fund (i.e., the settlement fund after costs are deducted). Deducting  
 14 attorneys' fees from the Net Settlement Fund rather than from the total Settlement Fund benefits the  
 15 Class Members. Murphy Decl. ¶ 36.

16 Class Counsel's request for 25% attorneys' fees will pay them for a fraction of their lodestar,  
 17 and it is consistent with the Ninth Circuit's benchmark. See *Paul, Johnson, Alston & Hunt v. Gaulty*,  
 18 886 F.2d 268, 272 (9th Cir. 1989.) This fee is appropriate in light of the *Vizcaino* factors discussed  
 19 throughout this motion, including the favorable result achieved for the class; the risk of and expense  
 20 to counsel in litigating a case with an arbitration clause written by a Fortune 500 homebuilder; the  
 21 skill, experience, and performance of counsel on both sides; the contingent nature of Class Counsel's  
 22 fees; and the fees awarded in comparable cases. See *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043,  
 23 1048 (9th Cir. 2002).

24 Class Counsel will not be paid until after final approval. Murphy Decl. ¶18. The mediators at  
 25 JAMS will allocate fees between the three firms that form Class Counsel. *Ibid.*

26 ///

27 ///

28 ///

1 **d. The Relief is Adequate in Light of Other Agreements Made in Connection**  
 2 **with the Settlement**

3 The Parties' finalized a detailed settlement agreement on August 10, 2020. Murphy Decl. ¶  
 4 14, Exh. A. There is no undisclosed side agreement between the Parties regarding attorneys' fees.  
 5 Murphy Decl. ¶ 18.

6 The Parties have also entered into a Supplemental Agreement regarding the number of  
 7 requests for exclusion. Murphy Decl. ¶ 19. The Homebuilders have the option to withdraw from the  
 8 settlement if the number of Class Members who opt out exceeds a certain threshold. The Parties  
 9 prefer to keep that threshold confidential, but we are willing to share that number *in camera* if the  
 10 Court so desires.

11 Some of the Homebuilders entered into another agreement in connection with this settlement.  
 12 They settled a separate lawsuit in Superior Court alleging that some of the Homebuilders made  
 13 misrepresentations about their intent to build a certain park at the Shipyards. (Superior Court of  
 14 California, San Francisco County docket CGC-19-576625, [hereafter, the "Park Action].") The Park  
 15 Action plaintiffs sued the Lennar Corporation, some of the Block entities,<sup>5</sup> and the Mark Company,  
 16 the real estate broker hired by Lennar to sell units at the Shipyards. Lennar and the Mark Company  
 17 settled the Park Action for Two Hundred and Fifty-Five Thousand dollars (\$255,000.00). JAMS  
 18 negotiated the Park Action settlement simultaneously with the instant settlement. The Park Action  
 19 will be handled exclusively in state court because Lennar never removed the case. There are 20 Park  
 20 Action plaintiffs, all of whom are Class Members. Murphy Decl. ¶ 30.

21 **4. The Proposal Treats Class Members Equitably Relative to Each Other**

22 The proposed settlement is fair because it allocates the settlement fund balance on a *pro rata*  
 23 basis. Rule 23(e)(2)(D). Each Class Member will receive a different Settlement Share, but those  
 24 differences are appropriate because each Class Member's damages are subject to a different  
 25 calculation. The Equity of Class Member treatment is discussed further in § B.1.d, *infra*.

26 ///

27 ///

28 <sup>5</sup> HPS1 Block 50, LLC; HPS1 Block 51, LLC; HPS1 Block 53, LLC; and HPS1 Block 54, LLC.

1 **B. NORTHERN DISTRICT’S PROCEDURAL GUIDANCE FOR CLASS ACTION**  
2 **SETTLEMENTS**

3 **1. Information About the Settlement**

4 **a. Class Definition**

5 In the operative complaint (Dkt. 93), the proposed class is defined as:

6 All current and former owners of one or more units in the SF Shipyard  
7 development.

8 Excluded from this class are purchasers of BMR units, Defendants, their affiliates  
9 and subsidiaries, and their officers, directors, partners, employees, and agents;  
10 class counsel, employees of class counsel’s firms, and class counsel’s immediate  
11 family members; defense counsel, their employees, and their immediate family  
12 members; and any judicial officer who considers or renders a decision or ruling in  
13 this case, their staff, and their immediate family members.

14 The only material difference between the proposed settlement class<sup>6</sup> and the class defined  
15 above relates to the treatment of below-market rate (“BMR”) units. Class Counsel originally  
16 excluded the owners of BMR units from the class definition because they were thought to have had  
17 no damages. Murphy Decl. ¶ 38. However, after working with experts, Class Counsel believes that  
18 the owners of BMR units have damages related to the payment of *Mello-Roos* taxes discussed in §  
19 B.1.d.(2), *infra*. The proposed settlement class includes the owners of BMR units to compensate them  
20 for those damages.

21 **b. Claims Released**

22 The only material difference between the claims to be released and the claims in the operative  
23 complaint relate to personal injury claims. The operative complaint does not allege a personal injury  
24 cause of action, but plaintiffs do seek emotional distress damages for fear of cancer as part of their  
25 negligence cause of action. *See* Dkt. 93, ¶¶ 300–04. Personal injury claims, including claims for  
26 emotional distress, are released by the settlement with the Homebuilder Defendants. The risk of  
27 unknown present physical injuries does not justify rejecting the amount of consideration being paid  
28 by the Homebuilder Defendants for the release. Murphy Decl. ¶ 31.

**c. Settlement Value v. Potential Recovery at Trial**

If Plaintiffs fully prevail on each of their claims at trial, they could recover approximately \$48

<sup>6</sup> *See* § I, *supra*.

1 million in economic damages calculated through July 2020. Reynolds Decl. ¶ 27. Under this  
 2 proposed settlement, the Settlement Fund Balance will be \$4,482,404—9.3 percent of the total  
 3 economic damages for the Class.<sup>7</sup> *Ibid.*

4 This settlement is adequate because the Homebuilders and Tetra Tech are jointly and  
 5 severally liable for Plaintiffs' economic damages. Plaintiffs expect to recover the remaining  
 6 economic damages from Tetra Tech, the more culpable of the two tortfeasors. At trial, the factfinder  
 7 will allocate comparative fault between the Homebuilders and Tetra Tech. A factfinder could  
 8 conceivably assign only 10 percent fault to the Homebuilders. If so, this proposed settlement would  
 9 be 93 percent of the economic damages recoverable from the Homebuilders. If they assign 50 percent  
 10 fault to the Homebuilders, this settlement would be 18.6 percent of the Class's total economic  
 11 damages.

12 The Complaint also includes claims for punitive damages and non-economic damages for fear  
 13 of cancer. If the Class fully prevailed on these claims, their potential recovery at trial could be  
 14 substantially more than \$48 million. Plaintiffs decided to settle because the potential for recovering  
 15 punitive and fear of cancer damages is outweighed by the benefits of an early, substantial settlement  
 16 from the less-culpable tortfeasor. The Class Members' claims for fear of cancer damages are more  
 17 viable against Tetra Tech because Tetra Tech, not the Homebuilders, was responsible for removing  
 18 toxic substances from the Shipyards. If this case went to trial, Plaintiffs believe that they could  
 19 recover punitive and fear of cancer damages from the Homebuilders. However, if the cases are forced  
 20 into arbitration, Plaintiffs are less likely to recover these categories of damages from arbitrators.  
 21 Plaintiffs are willing to forego those damages in exchange for the Settlement Fund offered by the  
 22 Homebuilders at this early stage of the litigation.

23 **d. The Proposed Plan of Allocation for the Settlement Fund**

24 The Settlement Fund Balance will be allocated to the Class Members based on objective,  
 25 publicly available data. Mrs. Pennington has suffered two categories of damages because of the  
 26 Homebuilders' conduct: Appreciation impairment damages and damages related to the payment of  
 27

28 <sup>7</sup> These figures assume that the Court grants Class Counsel's request for attorneys' fees and costs.

1 *Mello-Roos* taxes. The Plan of Allocation will distribute the Settlement Fund Balance based on the  
2 amount of each type of damages that each Class Member has suffered. *See* Reynolds Decl. ¶¶ 28–34.

### 3 (1) Appreciation Impairment

4 Plaintiffs allege that the value of their homes have not kept up with the San Francisco real  
5 estate market since news broke of the Tetra Tech fraud. Plaintiffs’ homes may have appreciated since  
6 the date they purchased their homes, but not as much as comparable homes in the San Francisco Bay  
7 Area. Reynolds Decl. ¶¶ 5–21.

8 Class Counsel hired an expert in real estate valuation to calculate appreciation impairment  
9 damages for the Class and to allocate the Settlement Fund Balance among them. The expert analyzed  
10 the sales of existing homes. Existing home sales are homes that have been sold twice: Once by  
11 Lennar to the original owner, and once by the original owner to a second owner. Existing home sales  
12 show how much Shipyards homes have *actually* appreciated or depreciated. Reynolds Decl. ¶ 8.

13 To calculate the amount that Shipyards homes *should have* appreciated (i.e., the normative  
14 appreciation), the expert consulted the S&P CoreLogic Case-Shiller Home Price Index (“HPI”) which  
15 measures normative appreciation in the San Francisco Bay Area for comparable homes. Appreciation  
16 impairment is measured by comparing the actual appreciation to the normative appreciation.  
17 Reynolds Decl. ¶¶ 5–21.

18 The expert’s analysis of existing home sales revealed a significant change in 2018. Existing  
19 homes that were re-sold prior to 2018 outperformed the market by an average of 8 percent. Those  
20 homes sold for 8 percent more than the HPI showed that they should have sold for. Prior to 2018,  
21 demand was strong for Shipyards homes. Reynolds Decl. ¶ 11.

22 Existing homes that sold since August 1, of 2018 have under-performed the market by 19.5  
23 percent. Reynolds Decl. ¶ 21. That means that they sold for 19.5 percent less than the HPI showed  
24 that they should have sold for. This shows that demand has significantly weakened since August  
25 2018. On August 2, 2018, the San Francisco Chronicle reported that Congresswoman Nancy Pelosi  
26 announced a federal investigation into the Tetra Tech scandal at the Shipyards. Reynolds Decl. ¶ 16.  
27 By August 22, 2018, SF Weekly and Curbed SF had also reported on Congresswoman Pelosi’s call  
28 for federal investigations. Reynolds Decl. ¶ 17. Since then, housing prices in the San Francisco Bay

1 Area have been rising, but they have been falling precipitously at the Shipyards. Reynolds Decl. ¶ 19.  
2 Furthermore, major banks have stopped making loans at the Shipyards due to the widespread media  
3 attention on the Tetra Tech scandal beginning in 2018. Reynolds Decl. ¶ 17.

4 The expert analysis shows that every home at the Shipyards is worth at least 19.5 percent less  
5 than the normative value as measured by HPI. To calculate appreciation impairment damages, he  
6 calculated the normative value for each home and subtracted 19.5 percent. Reynolds Decl. ¶¶ 28–31.  
7 This calculation provides total appreciation impairment damages.

8 However, only the Class Members with the most viable claims will receive appreciation  
9 impairment damages. *Ibid.* To account for differing viability of appreciation impairment claims, the  
10 Plan of Allocation separates Class Members into four tiers.

11 **Tier One:** Nearly two-thirds of the Class Members, including Mrs. Pennington, are current  
12 owners who purchased their homes prior to August 1, 2018. See Reynolds Decl. ¶ 33, Exh. A. These  
13 Class Members have the strongest claims against Lennar for concealing evidence of the Tetra Tech  
14 fraud, and they have suffered the greatest appreciation impairment because they can't sell their homes  
15 for decent prices. Those **Tier One** Class Members have suffered appreciation impairment damages  
16 equal to 19.5 percent of the normative value of their homes. Reynolds Decl. ¶¶ 22, 29.

17 **Tier Two** Class Members purchased their homes after August 1, 2018 will not recover  
18 appreciation impairment damages under the Plan of Allocation. The gravamen of this lawsuit is that  
19 the Homebuilders concealed evidence of the Tetra Tech scandal. At trial, Plaintiffs' must prove that  
20 the Tetra Tech fraud was known only to the Homebuilders and the Tier Two homeowners could not  
21 have uncovered that scandal on their own. CACI 1901. The Tier Two homeowners' claims are not as  
22 viable as the Tier One homeowners' claims because of Congresswoman Pelosi's call for federal  
23 investigations and the subsequent media attention it received between August and December of 2018.  
24 Reynolds Decl. ¶¶ 22, 30.

25 **Tier Three** Class Members are former owners. Twenty-two homes have been re-sold, and the  
26 owners of those homes are Tier Three Class Members. Thirteen of those homes have demonstrated  
27 appreciation impairment, and the owners of those homes will be treated the same as Tier One Class  
28

1 Members.<sup>8</sup> Nine of those homes did not suffer appreciation impairment, so they will not recover  
 2 appreciation impairment damages.<sup>9</sup> Reynolds Decl. ¶¶ 22, 31.

3 **Tier Four** Class Members are owners of BMR units. Tier Four Class Members have not  
 4 suffered appreciation impairment damages because the value of their homes is not set by the open  
 5 market; the value is capped by the city of San Francisco's Limited Equity Home Ownership Program.  
 6 As long as demand remains strong for BMR units, Tier Four homeowners will profit from the sale of  
 7 their homes because they purchased them for below-market rates. These units are so competitively  
 8 priced, supply is so limited, and demand is so strong in a city like San Francisco, that these owners  
 9 will not suffer appreciation impairment damages when they sell despite the Tetra Tech fraud.  
 10 Reynolds Decl. ¶ 22.

## 11 (2) Mello-Roos Damages

12 Class Members in all four Tiers will recover a portion of their past *Mello-Roos* tax liabilities.  
 13 Shipyards homeowners are subject to special tax levies known as *Mello-Roos* taxes. Reynolds Decl. ¶  
 14 24; See Cal. Gov. Code § 53311, et seq. In 2018, each homeowner was assessed .71% more in  
 15 property taxes than the average San Francisco homeowner. These supplemental taxes are designed to  
 16 finance certain capital facilities at the Shipyards. See Cal. Gov. Code § 53311.5. According to the  
 17 Homebuilders' disclosures, the Shipyards is located within two separate Communities Facilities  
 18 Districts ("CFDs") subject to *Mello-Roos* taxes. Pennington Decl. ¶ 7, Exh. A at ¶¶ 53–54. In CFD-7,  
 19 homeowners are subject to a .51% property tax to "to finance, among other improvements, roadway  
 20 improvements, wastewater management improvements, water system improvements, drainage system  
 21 improvements, parks and landscaping improvements and retention improvements." *Id.* In CFD-8,  
 22

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23  
 24 <sup>8</sup> 527 Donahue is an example of a unit that suffered appreciation impairment. This unit had been  
 25 purchased in April 2015 for \$680,500. When it re-sold in March 2020, HPI said the normative value  
 26 was \$945,214 (i.e., it should have appreciated 38.9%). It actually sold for \$800,000 (17.6%  
 appreciation). The owner of this unit under-performed the market by 21.3%.

27 <sup>9</sup> 507 Donahue is an example that did not suffer appreciation impairment. That home had been  
 28 purchased in April 2015 for \$658,700. When it was re-sold in February 2018, the HPI said the market  
 price (i.e., the normative value) was \$876,000. It actually sold for \$899,000, so the owner suffered no  
 appreciation impairment damages.

1 homeowners are subject to a .20% property tax “to pay for the operations and maintenance of parks,  
2 pocket parks, open space and streetscape elements.” *Id.*

3 Many of those improvements have not materialized because development at the Shipyards has  
4 effectively stopped. The Homebuilders sold a vision of the Shipyards as a “true destination”  
5 including a flourishing, walkable community, with bay views, office space, supermarkets, an outdoor  
6 mall, a thriving commercial center with restaurants, bars, shops, schools, parks, and other public  
7 services including public transportation. Class members are paying for that vision partially through  
8 their *Mello-Roos* taxes, and the Class Members are entitled to a refund of a portion of their *Mello-*  
9 *Roos* tax liabilities due to the Homebuilders’ failure to deliver the promised amenities and  
10 improvements. *See* Reynolds Decl. ¶ 24; Pennington Decl. ¶ 7.

11 Class Members in all four Tiers will recover 20 percent of their total *Mello-Roos* taxes  
12 liabilities incurred through July 7, 2020. The liabilities were calculated by multiplying the CFD tax  
13 rates by the purchase price of the home and the number of years of ownership. Reynolds Decl. ¶ 32.

#### 14 e. Estimate of Number of Claims

15 There will not be a claim form. As discussed in § III.A.3.b, *supra*, Class Members will be  
16 mailed a check for their *pro rata* share of the settlement fund. Any checks that remain uncashed after  
17 180 days will be voided and re-distributed to the Class or allocated to *Cy Pres* recipient. Murphy  
18 Decl. ¶ 14, Exh. A, § III.B.

#### 19 f. Reversions

20 Under no circumstances will any portion of the Settlement Fund revert back to Homebuilders.  
21 Murphy Decl. ¶ 15.

## 22 2. Settlement Administration

23 The Parties have selected Epiq Class Action & Class Solutions, Inc. (“Epiq”) as the  
24 Settlement Administrator after a competitive bidding process. Murphy Decl. ¶ 21. Class Counsel sent  
25 requests for proposals to five settlement administration firms with experience handling complex class  
26 actions. Four firms responded with detailed proposals. The Parties selected Epiq because of their  
27 experience handling class settlements involving diminution in value of real property. This experience  
28 includes the administration of the Millennium Tower class settlement in San Francisco Superior

1 Court where homeowners claimed diminution in property value caused by their tilting building. Azari  
 2 Decl. ¶ 27. CPM has retained Epiq once in the last two years. We have worked with them on three  
 3 other cases within the last two years. Murphy Decl. ¶ 22.

4 The costs of settlement administration will not be paid from the settlement fund. The  
 5 Homebuilders have agreed to pay up to \$50,000.00 for settlement administration, and Epiq has  
 6 agreed to cap their fees \$50,000.00. The settlement administration fees are equal to 1.11 percent of  
 7 the Settlement Fund Balance. Murphy Decl. ¶ 23.

### 8 **3. Notice**

9 The Notice Plan includes Notice via Postcard and email directing Class Members to a website  
 10 dedicated to this settlement where they can access the Long Form Notice and other important  
 11 information (hereafter, “Notice Plan”). Azari Decl. ¶¶ 18–26. Summary Postcard notice will be  
 12 mailed to each Class Member’s home at the Shipyards. The Postcard Notice will clearly and  
 13 concisely summarize the Settlement and highlight the process for Class Members to collect their  
 14 Settlement Share, objecting to the settlement, or requesting exclusion. Murphy Decl. ¶ 25, Exh. C.  
 15 The Postcard Notice will direct Class Members to a website dedicated specifically to this settlement  
 16 where they can access additional information including the Long Form Notice, the motion for  
 17 approval, the motion for attorneys’ fees and costs, other important documents in the case, important  
 18 dates and deadlines. Azari Decl. ¶¶ 18, 25.

19 The Long Form Notice contains contact information for counsel to answer questions,  
 20 instructions for accessing the case docket via PACER or in person at the court’s locations. Murphy  
 21 Decl. ¶ 24, Exh. B. The notice will state the date of the final approval hearing with a caveat that the  
 22 date may change without further notice to the Class Members. The Long Form Notice will instruction  
 23 Class Members to check the settlement website or Pacer to confirm that the date has not changed.

24 *Ibid.*

25 Notice will also be emailed to addresses collected by the Homebuilders when they sold the  
 26 homes. Azari Decl. ¶¶ 23–24. The emailed notice will contain a link to the settlement website.

27 *././*

28 *././*

1           **4. Requests for Exclusion**

2           The proposed Long Form Notice instructs Class Members who wish to opt out of the  
3 settlement to send a letter to the Claims Administrator with the information needed to opt out of the  
4 settlement. Murphy Decl. 24, Exh. B. That information includes the Class Member's name, address  
5 of home on Parcel A, mailing address (if different), contact information, and signature. The Class  
6 Member must also identify all other persons or entities that own your Parcel A home with them and  
7 indicate whether those co-owners also wish to be excluded from the Settlement. The proposed Long  
8 Form Notice also advises the Class Members of the deadline to opt out and the consequences of  
9 doing so. *Ibid.*

10           **5. Objections**

11           The Long Form Notice instructs Class Members who wish to object to the settlement to send  
12 their written objections only to the Court. The Long Form Notice includes the language suggested by  
13 the Procedural Guidance for Class Action Settlements in the United States District Court, Northern  
14 District of California. *Ibid.*

15           **6. Attorneys' Fees**

16           Class Counsel intend to request attorneys' fees in the amount of 25% of the Net Settlement  
17 Fund. Murphy Decl. ¶ 36. If the court reimburses Class Counsel for their costs and expenses  
18 (\$323,461), the Net Settlement Fund is \$5,976,539. *Ibid.*

19           If the Court awards 25 percent of the Net Settlement Fund, Class Counsel would receive  
20 approximately \$1,494,135 in attorneys' fees. *Ibid.* This fee is consistent with both this Circuit's  
21 benchmark rate, *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011), and  
22 California law, *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480 205 Cal.Rptr.3d 555, 376 P.3d 672  
23 (2016); *see also Mangold v. Cal. Public Util. Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995)  
24 ("Existing Ninth Circuit precedent has applied state law in determining not only the right to fees, but  
25 also in the method of calculating the fees."). It is also reasonable in light of Class Counsel's  
26 significant work on this litigation overall, which to date includes at least 12,000 hours of work by  
27 partners, associates, paralegals, and law clerks. *See Paul, Johnson, Alston & Hunt v. Gaulty*, 886  
28 F.2d 268, 272 (9th Cir. 1989.) The great majority of work was performed by CPM. CPM was assisted

1 by Bowles & Verna LLP and Gibbs Law Group LLP, both firms assisted in the role of class counsel  
 2 and assisted in the negotiation of the final settlement agreement in 2020. The single fee application  
 3 will be submitted on behalf of all three firms and will provide appropriate information to support the  
 4 request. If the Court awards fees, mediators at JAMS will allocate fees among the firms that form  
 5 Class Counsel. Class Counsel has coordinated their efforts in an attempt to avoid duplication of  
 6 expenses work. *See*, Murphy Decl. ¶¶9, 29, 37.

### 7 **7. Incentive Awards**

8 Class Counsel is not currently requesting an incentive award for Mrs. Pennington.

### 9 **8. *Cy Pres***

10 In the event that funds remain due to uncashed checks, and the Settlement Administrator  
 11 determines that the cost of further *pro rata* distributions will require more than half of the remaining  
 12 funds, then the relevant sums shall be distributed by the Settlement Administrator to the Shipyard  
 13 Trust for the Arts, a qualified 501(c)(3) charity jointly chosen by Defendants and Class Counsel.  
 14 Murphy Decl. ¶ 14, Exh. A § III.B. This charity supports an artist colony located on Parcel A, and  
 15 thus adds directly to the Parcel A community. Murphy Decl. ¶ 20.

### 16 **9. Timeline**

17 The Parties propose the following timeline for events following this Court's Order  
 18 preliminarily approving the settlement:

Event	Time
Mail Notice	30 days after Order
Class Counsel's Motion for Attorneys' Fees and Reimbursement of Expenses	30 days after Order
Exclusion and Objection Deadline	110 days after Order
Motion for Final Approval	125 days after Order
Final Approval Hearing	160 days after Order

### 26 **10. CAFA Notice**

27 The Homebuilders are required to notify the Attorney General of the United States and the  
 28 California Attorney General or the primary regulator, supervisor, or licensing authority to whom the

1 Homebuilders are responsible. 28 U.S.C. § 1715. The Homebuilders have confirmed that they will  
 2 prepare the CAFA notice, and the Settlement Administrator will serve that notice within ten days of  
 3 this motion being filed.

4 **11. Past Distributions**

5 A table showing one of CPM's past comparable settlements is attached to the Murphy  
 6 Declaration as Exhibit E. Murphy Decl. ¶ 34.

7  
 8 **C. THIS COURT SHOULD CONDITIONALLY CERTIFY THE CLASS FOR SETTLEMENT PURPOSES**

9 Plaintiffs respectfully ask this court to conditionally certify the Class for settlement purposes  
 10 only. The proposed class of "all individuals or entities who purchased or obtained title to one or more  
 11 units at Parcel A" satisfies the requirements of Rule 23(a) and Rule 23(b)(3).

12 **1. This Settlement Meets the Prerequisites of Subdivision (a) of Rule 23.**

13 **a. Numerosity**

14 Lennar has sold 347 units at the Shipyards, and 22 of those units have been re-sold to a  
 15 second owner. There are 620 Class Members that currently own units, and 42 more Class Members  
 16 that formerly owned units, for 662 total Class Members. Murphy Decl. ¶ 25. The class is so  
 17 numerous that joinder of all members is impracticable. See *Stovall-Gusman v. W.W. Grainger, Inc.*,  
 18 No. 13-CV-02540-JD, 2014 WL 5492729, at \*3 (N.D. Cal., Oct. 30, 2014) [330 members of the class  
 19 sufficient to meet numerosity requirement].

20 **b. Commonality**

21 Commonality is generally satisfied by the existence of a single issue of law or fact common  
 22 across all class members. Newberg on Class Actions (5th Ed.) § 3:18. Common questions here  
 23 include whether the Homebuilders made uniform misrepresentations and material omissions about  
 24 the toxic history of the Shipyards and the adequacy of Tetra Tech's cleanup. Those questions are not  
 25 only common to the class, but they predominate over questions affecting only individual members.

26 **c. Typicality**

27 Mrs. Pennington, the proposed class representative, purchased and obtained title to her home  
 28 in 2015. Pennington Decl. ¶ 1. Her claims include damages for appreciation impairment, damages

1 related to the payment of *Mello-Roos* taxes, and punitive and non-economic damages. The class  
 2 claims are fairly encompassed by Mrs. Pennington's claims. See *General Tel. Co. of the Northwest,*  
 3 *Inc. v. Equal Employment Opportunity Commission*, 446 U.S. 318, 330 (1980). Although not every  
 4 class member possesses all of Mrs. Pennington's claims, no class member has any claims that Mrs.  
 5 Pennington does not also possess. By pursuing her own claims, Mrs. Pennington is advancing the  
 6 interests of the entire class.

7 **d. Adequacy of Representation**

8 As discussed in § III.A.1, *supra* (class representative), and § III.D, *infra* (counsel), the class  
 9 representative and Class Counsel have adequately and fairly protected the interests of the class.

10 **2. This Settlement Meets the Requirements of Subdivision (b)(3) of Rule 23.**

11 **a. Common Liability Questions Predominate Over Individual Damages Questions**

12 Questions of law and fact common to Class Members predominate over questions affecting  
 13 only individual Class Members. Rule 23(b)(3). This case turns on the Homebuilders' knowledge  
 14 about the Tetra Tech fraud and their concealment of those facts from purchasers. Those questions are  
 15 subject to generalized class-wide proof and answering them will not require evidence that varies from  
 16 member to member. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1045 (2016).

17 Questions about causation are also susceptible to generalized, class-wide proof. Plaintiffs'  
 18 appraisal expert will testify that every Class Member suffered from impaired property values caused  
 19 by Tetra Tech's misconduct. Each Class Member will have a different amount of damage, but those  
 20 individual damage calculations are susceptible to formulaic calculation, so they do not defeat class  
 21 certification. See *Yokoyama v. Midland Nat'l Life Ins.*, 594 F.3d 1087 (9th Cir. 2010).

22 **b. A Class Action is Superior to Other Available Methods for Fairly and**  
 23 **Efficiently Adjudicating the Controversy**

24 Class Counsel represents 125 Class Members between the three firms. Murphy Decl. ¶ 28.  
 25 The class has a high degree of cohesion, and the prosecution of the action as a class action is  
 26 unobjectionable. Class Counsel is unaware of any class member who prefers to individually control  
 27 the prosecution of a separate action. The only other related lawsuit involves the Park Action,  
 28 discussed in § III.A.3.d, *supra*. The Park Action resolved simultaneously with this action which

1 suggests that those plaintiffs do not have an interest in pursuing individual litigation now that this  
2 Class Action has settled. See Murphy Decl. ¶ 30.

3 A class action in this district is desirable because the Class Members' homes are all located in  
4 this district and because all other Shipyards-related litigation is pending before this Court. A class  
5 action would not present intractable management problems where, like here, the Parties request  
6 settlement-only certification. See *Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591, 593.

7 **D. THIS COURT SHOULD APPOINT CPM AS LEAD CLASS COUNSEL FOR**  
8 **PURPOSES OF SETTLEMENT**

9 When certifying a class, including for settlement purposes, the Court should appoint class  
10 counsel. Rule 23(g)(1). When appointing the class counsel, the Court must consider: (i) the work  
11 counsel has done on the case; (ii) counsel's prior experience with similar complex cases; (iii)  
12 counsel's knowledge of the applicable law; (iv) the resources that counsel will commit to  
13 representing the class. Rule 23(g)(1)(A).

14 CPM has spent over 11,000 hours investigating and pursuing the claims of the class including  
15 settling this portion of the case, with the assistance and cooperation of Gibbs Law Group, LLP and  
16 Bowles & Verna, LLP. Murphy Decl. ¶ 9. CPM is recognized as one of the top litigation firms in the  
17 United States, and we have extensive experience as class counsel in other complex litigation matters.  
18 Murphy Decl. ¶ 32. CPM is aware of no objections to our appointment as settlement class counsel.  
19 Murphy Decl. ¶ 28. CPM has worked cooperatively with Bowles & Verna LLP and Gibbs Law  
20 Group LLP pursuant to a Joint Prosecution Agreement ("JPA") with those firms, which provides that  
21 CPM is the lead firm and BV and GLG are on the steering committee. Murphy Decl. ¶ 29. As  
22 outlined in the Murphy Declaration, both BV and GLG have contributed critical support to the  
23 litigation, paving the way for the \$6.3 million dollar class settlement with the Homebuilder  
24 Defendants. The firms' respective clients are reflected on the signature block to this Motion. All three  
25 firms have worked to ensure that their respective clients support the settlement that is before the  
26 Court. *Ibid.*

26 ///

27 ///

28 ///

1           **E. THIS COURT SHOULD APPROVE THE PROPOSED PLAN OF ALLOCATION**  
 2           **BECAUSE IT IS FAIR, REASONABLE, AND ADEQUATE**

3           “Approval of a plan for the allocation of a class settlement fund is governed by the same legal  
 4 standards that are applicable to approval of the settlement: the distribution plan must be ‘fair,  
 5 reasonable and adequate.’” *In re Citric Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1154 (N.D. Cal.  
 6 2001) (internal citations omitted). When allocating funds, “[i]t is reasonable to allocate the settlement  
 7 funds to Class Members based on the extent of their injuries or the strength of their claims on the  
 8 merits.” *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1045-46 (N.D. Cal. 2008)  
 9 (internal citations omitted) (approving securities class action settlement allocation on a “per-share  
 10 basis”).

11           *Pro rata* distribution has frequently been determined by courts to be fair, adequate, and  
 12 reasonable. See *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2015 U.S. Dist. LEXIS 170525, at  
 13 \*198-200 (N.D. Cal. Dec. 17, 2015) (approving *pro rata* plan of allocation based upon proportional  
 14 value of price-fixed component in finished product); *In re Dynamic Random Access Memory*  
 15 *(DRAM) Antitrust Litig.*, No. M-02-1486 PJH, Dkt. No. 2093, at \*2 (Oct. 27, 2010) (Order  
 16 Approving Pro Rata Distribution); *In re Vitamins Antitrust Litig.*, No. 99-197 TFH, 2000 U.S. Dist.  
 17 LEXIS 8931, at \*32 (D.D.C. Mar. 31, 2000) (“Settlement distributions, such as this one, that  
 18 apportion funds according to the relative amount of damages suffered by Class Members have  
 19 repeatedly been deemed fair and reasonable.”) (citations omitted).

20           Here, the Plan of Allocation (§ III.B.1.d, *supra*) allocates the Settlement Fund Balance based  
 21 on the extent of the Class Members’ injuries and the strength of their claims on the merits. Those  
 22 Class Members with the most significant injuries and strongest claims—Tier One Class Members—  
 23 will receive the bulk of the Settlement Fund Balance. Reynolds Decl. ¶ 33, Exh. A. The Plan of  
 24 Allocation deserves this Court’s approval because it is fair, reasonable, and adequate. See Weinstein  
 25 Decl. ¶ 15.

26           **F. THIS COURT SHOULD APPROVE PLAINTIFFS’ NOTICE PLAN**

27           In the context of Rule 23(b)(3) actions, “the court must direct to class members the best notice  
 28 that is practicable under the circumstances,” and that notice “must clearly and concisely state in plain,

1 easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii)  
 2 the class claims, issues or defenses; (iv) that a class member may enter an appearance through an  
 3 attorney if the member so desires; (v) that the court will exclude from the class any member who  
 4 requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a  
 5 class judgment on members under Rule 23(c)(3).” Rule 23(c)(2)(B).

6 A class settlement notice satisfies due process if it contains a summary sufficient to “apprise  
 7 interested parties of the pendency of the action and to afford them an opportunity to present their  
 8 objections.” *UAW v. GMC*, 497 F.3d 615, 629 (6th Cir. 2007) (quoting *Mullane v. Cent. Hanover*  
 9 *Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). A settlement notice need only be a summary, not a  
 10 complete source of information. See, e.g., *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1153 (8th  
 11 Cir. 1999); *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987); *Mangione v.*  
 12 *First USA Bank*, 206 F.R.D. 222, 233 (S.D. Ill. 2001). The Ninth Circuit requires a general  
 13 description of the proposed settlement. *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 575 (9th Cir.  
 14 2004); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374-75 (9th Cir. 1993); *Mendoza v. United*  
 15 *States*, 623 F.2d 1338, 1351 (9th Cir. 1980).

16 As discussed in § III.B.3, *supra*, the Notice Plan sufficiently apprises interested parties about  
 17 the action and affords them the opportunity to object or opt out. Class Members will be contacted by  
 18 Postcard Notice at either their Shipyards address or an updated address identified by the Settlement  
 19 Administrator. Azari Decl. ¶¶ 18–22. The Postcard Notice will summarize the terms of the  
 20 settlement, explain the Class Members’ options, and direct them to a website specifically dedicated to  
 21 this settlement. Murphy Decl. ¶ 25, Exh. C. The website will allow Class Members to download the  
 22 Long Form Notice. Azari Decl. ¶ 25.

23 The Long Form Notice contains all the information suggested in the Northern District’s  
 24 Procedural Guidance for Class Action Settlements. See Murphy Decl. ¶ 24, Exh. B. It also describes  
 25 the nature of the action, the definition of the class certified, the class claims, that a Class Member  
 26 may enter an appearance through an attorney, that the court will exclude any Class Member that  
 27 requests it, the time and manner of exclusion, and the binding effect of a class judgment. *Ibid.*

28 The website will also provide access to this motion for approval, the motion for attorneys’

1 fees and costs, other important documents, and important dates and deadlines. Azari Decl. ¶ 25.

2 This Notice Plan is the best practicable program under the circumstances, and the notice itself  
3 satisfies the requirements of Rule 23(c)(2)(B).

4 **IV. CONCLUSION**

5 For the foregoing reasons, Plaintiffs respectfully ask this court to enter an order: (1)  
6 preliminarily approving the Parties’ settlement; (2) conditionally certifying the class for settlement  
7 purposes only; (3) appointing CPM as lead class counsel; (4) approving the Plan of Allocation; and  
8 (5) approving the Notice Plan.

9  
10 Dated: August 14, 2020

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**Civil Local Rule 5-1(i)(3) Attestation**

Pursuant to Civil Local Rule 5-1(i)(3), I, Anne Marie Murphy, the ECF user whose user ID and password are being utilized in the electronic filing of the foregoing Motion for Preliminary Approval of *Pennington* Plaintiffs’ Class Settlement with Homebuilder Defendants, hereby attest that I obtained concurrence in the filing of the document from each of the signatories hereto.

Dated: August 14, 2020

By: /s/ Anne Marie Murphy