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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

LINDA PARKER PENNINGTON, *et al.*,

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.; FIVEPOINT HOLDINGS, LLC; BILL DOUGHERTY; ANDREW BOLT; EMILE HADDAD; and DOES 1-100.

Defendants.

Case No. 3:18-CV-05330-JD

HOMEBUILDER DEFENDANTS' MOTION FOR GOOD-FAITH SETTLEMENT DETERMINATION

Date: October 14, 2021
Time: 10 A.M.
Judge: Hon. James Donato
Courtroom: 11- 19th Floor

NOTICE OF MOTION AND MOTION

TO THE COURT, ALL PARTIES IN THIS AND THE RELATED ACTIONS[1] AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 14, 2021, at 10:00 A.M., or as soon thereafter as this matter may be heard before the Honorable James Donato, U.S. District Court Judge, U.S. District Court for the Northern District of California, Courtroom 11, 19th Floor, 450 Golden Gate Avenue, San Francisco, California 94102, Defendants Lennar Corporation ("Lennar"), HPS Development Co., LP ("HPS Dev. Co."), HPS1 Block 50 LLC, HPS1 Block 51 LLC, HPS1 Block 53 LLC, HPS1 Block 54 LLC, and HPS1 Block 56/57 LLC (the "HPS1 Block Entities"; Lennar and the HPS1 Block Entities are collectively referred to as the "Lennar Defendants"), Five Point Holdings, LLC ("Five Point"), and Emile Haddad (collectively, the "Homebuilder Defendants") will and hereby do move this Court, pursuant to California Code of Civil Procedure §§ 877 and 877.6, for a determination of good-faith settlement.

This Motion is based upon this Notice of Motion, the following Memorandum of Points and Authorities, and the Declaration of Garrett Chan filed herewith, any reply memorandum, evidence and argument of counsel submitted at the hearing, the memorandum, declarations, and reply memorandum filed in support of the Motion for Preliminary Approval of Pennington Plaintiffs' Class Settlement with Homebuilder Defendants (ECF No. 123, the "Preliminary Approval Motion"), and such other matters as the Court may consider.

[1] *United States of America et al. v. Tetra Tech EC, Inc. et al.*, 3:13-cv-03835 (N.D. Cal.); *Bayview Hunters Point Residents et al. v. Tetra Tech EC, Inc. et al.*, 3:19-cv-01417-JD (N.D. Cal.); *Abbey et al. v. Tetra Tech EC, Inc. et al.*, 3:19-cv-07510-JD (N.D. Cal.); *Five Point Holdings, LLC et al. v. United States of America*, 3:20-cv-01480-JD (N.D. Cal.); *Five Point Holdings, LLC et al. v. Tetra Tech, Inc. et al.*, 3:20-cv-01481-JD (N.D. Cal.); *CPHP Development, LLC et al. v. Tetra Tech, Inc. et al.*, 3:20-cv-01485-JD (N.D. Cal.).

Dated: August 5, 2020

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This motion seeks a determination that the settlement submitted to this Court for approval represents a fair and good-faith settlement pursuant to California Code of Civil Procedure §§ 877 and 877.6. Such determinations may be sought in connection with the settlements of tort actions in federal court; and the good-faith determination sought here is fully supported and justified by the record. Following nearly a year of negotiation before respected mediators, named plaintiffs in this action ("Plaintiffs") and the Homebuilder Defendants (collectively, the "Settling Parties") entered into a class settlement agreement resolving the disputes between them fully and completely. The Homebuilder Defendants have agreed to make a total cash payment of $6.3 million in exchange for a Court-approved settlement class that requires Plaintiffs to dismiss with prejudice their claims against Homebuilders and to provide a full release of claims related to this lawsuit. Plaintiffs' claims against the Homebuilder Defendants are contested in their entirety, subject to a number of defenses, and subject to individual arbitrations and unlikely to succeed. A $6.3 million settlement payment is well within the "ballpark" of a fair settlement, even if Plaintiffs' estimated damages were supportable. The Homebuilder Defendants, therefore, jointly seek a determination that the settlement was made in good faith, barring any contribution claims from defendants Tetra Tech EC, Inc., Tetra Tech Inc., Bill Dougherty, or Andrew Bolt (collectively, "Tetra Tech"), or from any other potential joint tortfeasors, including but not limited to the United States, the United States Navy, Radiological Survey & Remedial Services, LLC, IO Environmental and Infrastructure, Inc., and Shaw Environmental & Infrastructure, Inc.

Tetra Tech and the United States Navy are the true cause of any damage suffered by the Plaintiff class. Plaintiffs do not accuse the Homebuilder Defendants of having participated in Tetra Tech's fraud, negligence, and criminal misconduct. Plaintiffs allege that Tetra Tech undermined the value of their homes by falsifying environmental cleanup data at Hunters Point Naval Shipyard ("HPNS") and botching the cleanup, pointing to two Tetra Tech supervisors whose criminal convictions were revealed suddenly in mid-2018. (*See* Consolidated Second Amended Complaint in Parcel A Litigation ("SAC"), ECF No. 93 ¶¶ 12, 27.) According to the

SAC, Tetra Tech's conduct has led to a cascade of injuries to innocent third parties, including depressed property values and construction delays. It also triggered a number of lawsuits against the Homebuilder Defendants and others. In short, Tetra Tech's conduct has harmed the Plaintiffs and the Homebuilder Defendants alike.

Tetra Tech, not the Homebuilder Defendants, is the primary wrongdoer in and focus of Plaintiffs' complaint. This settlement reflects that reality. While Plaintiffs did bring claims against the Homebuilder Defendants in this lawsuit, their allegations are limited to the alleged failure to disclose the extent of Tetra Tech's fraud and misconduct, which Plaintiffs allege the Homebuilder Defendants knew or "should have known." (*E.g.*, *id.* ¶¶ 198-99.) In reality, the Homebuilder Defendants did not know the full extent of Tetra Tech's misconduct because Tetra Tech concealed it and the United States requested that the Court seal the guilty pleas and factual bases for those pleas. Of course, the Homebuilder Defendants were aware of the operational history of HPNS and provided extensive disclosures regarding environmental issues at the site based on the information that had been provided by the Navy, EPA, and other environmental regulators at the time. (*See* Declaration of Garrett Chan ("Chan Decl."), Ex. A.) Further, a number of class members purchased their homes *after* May 2018, when the Tetra Tech employees' criminal convictions were unsealed, revealing Tetra Tech's misconduct and extensive, gross negligence.

The Settling Parties conditioned this settlement on this Court entering an order finding that the settlement was made in good faith pursuant to California Code of Civil Procedure §§ 877 and 877.6. Such a finding will bar claims against the Homebuilder Defendants for equitable comparative contribution or partial or comparative indemnity by Tetra Tech or any other alleged, joint tortfeasor. It is an essential element of the bargained-for relief provided through this settlement. This settlement is in good faith under California law because the amount of the settlement is well within the reasonable range of the Homebuilder Defendants' worst-case, proportional share of comparative liability for the Plaintiff's injuries. This settlement is the result of nearly a year of arm's-length negotiations brokered by the Hon. Daniel Weinstein and Elizabeth Hasse of JAMS, with three experienced Plaintiffs' class action firms representing the

Plaintiffs and the settlement class.[2] Given that the Homebuilder Defendants could not and should not be found liable for damage caused to the Plaintiff class by Tetra Tech, the Court should issue the determination that this settlement was reached in good faith, barring Tetra Tech or any other third parties from seeking contribution or otherwise trying to shift responsibility for the consequences of its own gross negligence and criminal misconduct onto the Homebuilder Defendants.

II. BACKGROUND

A. Procedural History

HPNS is a former naval base located in the southeastern corner of San Francisco. In 1989, the Navy assumed responsibility for cleaning up the hazardous waste it left behind at HPNS. In 2004, the Navy and EPA cleared a portion of HPNS, Parcel A, for residential development by certain of the Homebuilders. The Plaintiff class members purchased homes that the Homebuilder Defendants subsequently constructed at Parcel A, either directly from the Homebuilder Defendants or indirectly, from a direct purchaser.[3]

Plaintiffs Linda Parker Pennington and Greg Pennington originally filed this lawsuit against Tetra Tech and the Homebuilder Defendants on July 24, 2018 in San Francisco Superior Court. *See Pennington et al. v. Tetra Tech EC, Inc., et al.*, Case No. CGC-18-568352. Defendant Tetra Tech EC, Inc., removed the case to this Court on August 29, 2018. (ECF No. 1.) Additional Plaintiffs in this action filed a number of related actions in San Francisco Superior Court, all of which made substantially the same allegations as *Pennington*. (*See* ECF No. 123-1,

[2] Plaintiffs' counsel have substantial prior experience representing parties in class action settlements that have received approval from California courts. *See, e.g.*, *In re VIZIO, Inc., Consumer Privacy Litig*., 2019 WL 3818854, at *3 (C.D. Cal. Aug. 14, 2019) (final judgment approving settlement agreement and appointing Gibbs Law Group LLP and Cotchett, Pitre & McCarthy, LLP as class counsel); *In re Lenovo Adware Litig*., 2018 WL 6099948, at *7 (N.D. Cal. Nov. 21, 2018) (granting preliminary approval and appointing Cotchett, Pitre & McCarthy, LLP as co-lead class counsel); *In re Lithium Ion Batteries Antitrust Litig*., 2017 WL 1086331, at *2 (N.D. Cal. Mar. 20, 2017), *aff'd sub nom. Young v. LG Chem Ltd.*, 783 F. App'x 727 (9th Cir. 2019) (final approval of settlement appointing Cotchett, Pitre & McCarthy, LLP as co-lead class counsel); *Beaver v. Tarsadia Hotels*, 2017 WL 2268853, at *3 (S.D. Cal. May 24, 2017) (preliminary approval order appointing Gibbs Law Group LLP as co-lead counsel).

[3] The facts underlying this case are set out in further detail in the initial Case Management Statement filed in this action. (ECF No. 31 at 7-9.)

Ex. B (the "Parcel A Actions").)[4] Tetra Tech EC removed those suits to this Court as well, where the Court ordered them related to *Pennington*.

On November 21, 2019, Plaintiffs filed a consolidated, amended class action complaint, seeking to certify a class of all current and former homeowners of HPNS Parcel A in a single action. (ECF No. 64.) Plaintiffs filed the operative complaint at the time of settlement on February 28, 2020. (ECF No. 93.) Plaintiffs asserted claims for permanent public and private nuisance, unfair and unlawful competition, fraud and false advertising, negligence, and negligent and intentional misrepresentation against all defendants in this action, asserting they have suffered loss of value to their homes, property damage, emotional distress, and increased risk of developing cancer. (*Id.* ¶¶ 221-385.) Had the parties not settled, the Lennar Defendants intended to respond to the Complaint with a motion to compel arbitration.

B. Settlement Negotiations and Settlement Agreement

The purchase agreements for every property the Homebuilder Defendants at Parcel A sold to the settlement class (the "Purchase Agreements") contain arbitration provisions requiring that Parcel A homeowners arbitrate all "disputes," including, but not limited to, those "related to . . . the property, the community or any dealings between buyer and seller." (*See* Chan Decl., Ex. B at Section 14.3.) Likewise, the Covenants, Conditions, and Restrictions (CC&Rs) governing Parcel A require individual arbitrations of "any dispute between . . . any Owner(s) and the Declarant, any Declarant Parties or other developer of the Community . . . with respect to any [] claim related to a Unit or the Association Property." (*Id.*, Ex. C at Article 14.5.1.) Both the Purchase Agreements and CC&Rs require mediation as a precondition to arbitration. (*Id.*, Ex. B at 14.3(B); Ex. C at Article 14.5.2.)

The Lennar Defendants informed the Plaintiffs represented by the Cotchett firm of the

[4] Cotchett, Pitre & McCarthy, LLP ("Cotchett") filed the majority of these suits. Tthe Gibbs Law Group LLP also filed suit in San Francisco Superior Court on behalf of Jengjia Chen on June 5, 2019. *See Chen v. Tetra Tech, Inc., et al.*, Case No. CGC-19-576485. Similarly, on August 20, 2019, Bowles & Verna LLP filed a putative class action suit in San Francisco Superior Court on behalf of 28 named Plaintiffs seeking to represent a class of Parcel A homeowners. *San Francisco Shipyard Residents et al. v. Tetra Tech, Inc., et al.*, CGC-19-578509. Following removal and this Court's order on remand, these and all other actions were joined in a consolidated class action complaint filed by all three firms on November 19, 2019.

existence of those mediation and arbitration requirements and in mid-2019, the Cotchett-represented Plaintiffs agreed to participate in a formal mediation with the Homebuilder Defendants. (ECF No. 123-1 ¶ 12.) On August 19, 2019, the parties participated in a full-day mediation, paid for by the Lennar Defendants, before Judge Weinstein and Ms. Hasse at JAMS in San Francisco. (ECF No. 123-3 ¶ 12.)

While the mediation did not resolve the Cotchett-represented Plaintiffs' claims against the Homebuilder Defendants that day, Judge Weinstein and Ms. Hasse continued to facilitate the parties' settlement discussions. (*Id.* ¶ 14.) After the Gibbs Law Group LLP and Bowles & Verna LLP filed additional suits on behalf of Parcel A homeowners, their clients joined the settlement discussions in November 2019. (*Id.*) The Cotchett, Gibbs, and Bowles clients filed their current, consolidated complaint on November 19, 2019. (ECF No. 64.) Judge Weinstein and Ms. Hasse continued to facilitate settlement negotiations, and on February 20, 2020, the Settling Parties agreed in principle to a "mediator's proposal" that would settle the claims against the Homebuilder Defendants on a class basis. (*Id.*) Between February 20, 2020 and August 6, 2020, the Settling Parties negotiated a formal settlement agreement that embodied all of the key terms in the mediators' proposal. (*Id.*) The Settling Parties executed the formal settlement agreement effective August 10, 2020. (ECF No. 123-1, Ex. A (the "Settlement Agreement").) On August 14, 2020, Plaintiffs filed their Motion for Preliminary Approval. (ECF No. 123.)

Under the terms of the Settlement Agreement, the Homebuilder Defendants will pay the Plaintiff class $6.3 million in exchange for (a) a dismissal with prejudice of all claims against the Homebuilder Defendants in this litigation and (b) a release of all claims the Plaintiff class may have against the Homebuilder Defendants related to the allegations in the Complaint. (ECF No. 123-1, Ex. A §§ III.A, V.H.)

As set forth in the Preliminary Approval Motion, class members who do not opt out of the Settlement Agreement will be compensated based on two alleged theories of economic harm: appreciation impairment and recovery of *Mello-Roos* taxes paid by class members. (ECF No. 123-4 ¶¶ 5-26.) Specifically, class members will be separated into one of four tiers based on when they purchased and/or sold their homes and whether they purchased at market rate, with

compensation for any alleged impairment to the expected appreciation of their homes paid according to tier ranking and factors such as home purchase price and length of ownership. (*Id.* ¶¶ 22, 28-31.) Similarly, compensation for allegedly excess *Mello-Roos* tax liability will be calculated by "multiplying the Class Member's purchase price of their home by the total *Mello-Roos* tax rate (.71%) and the number of years that each Class Member has owned their home." (*Id.* ¶ 32.)

The Settlement Agreement conditions the settlement on the entry of an order determining that the settlement is in good faith pursuant to California Code of Civil Procedure §§ 877 and 877.6. (*Id.* § V.F.) Nothing in the Settlement Agreement (or this motion) prohibits Plaintiffs from continuing to prosecute their claims against Tetra Tech or any other third party, or requires the Homebuilder Defendants to assist Plaintiffs in that prosecution. The Settling Parties expressly contemplate that Plaintiffs will continue to prosecute their case against Tetra Tech. (ECF No. 123-1, Ex. A § V.H.)

III. LEGAL STANDARD

California's public policy favors the voluntary settlement of litigation. *Osumi v. Sutton*, 151 Cal. App. 4th 1355, 1359 (2007). California law furthers this policy by providing that settling parties may seek a good-faith determination of their settlement terms. Cal. Civ. Proc. Code §§ 877, 877.6. A determination that a settlement is in good faith "shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." *Id.* § 877.6(c).

Although a good-faith determination is a creature of California state law, a settling party may seek such a determination in federal court. *See, e.g.*, *Fed. Sav. & Loan Ins. Corp. v. Butler*, 904 F.2d 505, 511 (9th Cir. 1990); *Chassin Holdings Corp. v. Formula VC Ltd.*, 2016 WL 5339714, at *2 (N.D. Cal. Aug. 15), *report and recommendation adopted*, 2016 WL 5109985 (N.D. Cal. Sept. 21, 2016). A district court may make a good-faith settlement determination regardless of whether jurisdiction is premised on diversity or a federal question. *Yanushkevich v. Fry's Elecs., Inc.*, 2017 WL 2457111, at *2 (N.D. Cal. May 11), *report and recommendation*

adopted, 2017 WL 2438559 (N.D. Cal. June 6, 2017) (finding "the good faith settlement procedure of section 877.6 is available in this federal case claiming violations of the ADA and various California statutes"); *Spitzer v. Aljoe*, 2015 WL 6828133, at *2 (N.D. Cal. Nov. 6, 2015) (applying §§ 877 and 877.6 to suit alleging claims under 42 U.S.C. §§ 1983 and 1985).

A settlement is made in good faith under § 877.6 when "the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the Plaintiff's injuries," taking into consideration the facts and circumstances of the particular case. *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs*., 38 Cal. 3d 488, 499 (1985). In *Tech-Bilt*, the California Supreme Court identified several non-exclusive factors courts are to consider in determining whether a settlement is made in good faith, including: (1) the amount paid in settlement; (2) a rough approximation of the Plaintiff's total potential recovery and the settling defendant's proportionate liability; (3) recognition that a settling defendant should pay less in settlement than it would if it were held liable after trial; and (4) whether the settlement was the result of collusion or fraud aimed at injuring the interests of the non-settling parties. *Id*. at 499.

Any party challenging a settlement and "asserting the lack of good faith" carries the burden of proof and must prove that "the settlement is so far 'out of the ballpark' in relation to the *Tech-Bilt* factors as to be inconsistent with the equitable objectives of the statute." *Id*. at 499-500; *see also Abbott Ford, Inc. v. Superior Ct.*, 43 Cal. 3d 858, 874 (1987). The *Tech-Bilt* court took pains to "emphasize the broad parameters of the 'ballpark' within which settlements will be deemed to be in good faith," observing that "the 'reasonable range' test" adopted in that case "leaves substantial latitude to the parties and to the discretion of the trial court[.]" *Tech-Bilt*, 38 Cal. 3d at 500, 501 n.9. The court made clear that a lack of good faith ***cannot*** be established "by a showing that a settling defendant paid less than his theoretical proportionate or fair share." *Id*. at 499 (citation and quotation marks omitted). Such a rule would unduly discourage settlements. *Id*.

IV. ARGUMENT

The settlement here is fair and reasonable. It provides for a substantial payment to the Plaintiff class notwithstanding the fact that the Homebuilder Defendants played no role in causing

any harm to the class, and any class member hoping to recover from the Homebuilder Defendants would be required to pursue individual arbitrations. The settlement easily satisfies the *Tech-Bilt* factors.

A. The Generous Settlement Payment Will Be Distributed Under Objective Criteria Without the Homebuilder Defendants' Involvement

The Homebuilder Defendants will pay $6.3 million into the class settlement fund. (ECF No. 123-1, § III.A.) Plaintiffs, with assistance from the mediators, negotiated the allocation of the settlement funds among the settling class members without any participation by or input from the Homebuilder Defendants. (ECF No. 123-1, ¶ 17.) The settlement is structured to ensure that none of this payment will revert to the Homebuilder Defendants in the event there are unclaimed funds, which means there is no question about the amount the Homebuilder Defendants will pay. (*Id.* § III.B.) Tetra Tech is specifically excluded from the settlement and remains a viable defendant from which the Plaintiff class may recover additional compensation. (*Id.* § V.H.)

B. Plaintiffs' Recovery Compares Favorably to the Homebuilder Defendants' Alleged Proportionate Liability

Tetra Tech is the sole defendant in this action to cause Plaintiffs harm. The Homebuilder Defendants should bear no liability for that harm. Even if it were appropriate for the Homebuilder Defendants to be held liable for a share of Plaintiffs' harm, the $6.3 million payment is well within the "reasonable range" of the Homebuilder Defendants' theoretical, proportionate liability.

First, Plaintiffs' expert estimates that the maximum theoretical recovery for the class here is about $48 million. (ECF No. 123-4, ¶ 27.) Plaintiffs acknowledge that the Homebuilder Defendants are not responsible for liability arising from the allegations in the Complaint relating to Tetra Tech's environmental cleanup work. (*E.g.*, ECF No. 93 ¶¶ 198-99.) The Homebuilder Defendants did not participate in any cleanup; that was solely Tetra Tech's and the United States' responsibility. Plaintiffs acknowledge that Tetra Tech is "the more culpable" party, and allege only that a "factfinder could conceivably assign only 10 percent fault to the Homebuilders." (ECF No. 123 at 10.) Nevertheless, $6.3 million constitutes approximately 13% of Plaintiffs'

total maximum theoretical recovery. (*Id.*) Considering that the Homebuilder Defendants should bear no liability at all for the damage Tetra Tech caused, the settlement payment is well within the ballpark of any proportionate liability.

California courts have approved good-faith determinations in cases involving payments representing a much lower percentage of total recovery. For instance, in *Wilshire Ins. Co. v. Tuff Boy Holding, Inc.*, 86 Cal. App. 4th 627 (2001), the Court of Appeals upheld a good-faith settlement determination for a settlement in which the defendant paid less than 4% of the trial court's valuation of the Plaintiff's maximum theoretical recovery. *Id.* at 634. There, Tuff Boy had manufactured the weld in a commercial truck involved in a fatal accident. *Id.* at 631. While the weld was alleged to have been defective and could have contributed to the accident, the driver of the truck had driven for longer than permitted and his vehicle was over the weight limit. *Id.* at 630. The Court of Appeals found the settlement to be in good faith because the amount was not "grossly disproportionate" to Tuff Boy's proportionate liability, and the "lion's share of liability" was borne by the party "plainly . . . most at fault." *Id.* at 641. Likewise, in *GATX/Airlog Co. v. Evergreen Int'l Airlines, Inc.*, 2000 WL 36741015 (N.D. Cal. Aug. 4, 2000) (Wilken, J.), the court determined that a settlement in which the settling defendant paid Plaintiffs approximately 6-10% of Plaintiffs' maximum theoretical recovery was made in good faith. *Id.* at *3. The court concluded that the defendants' "substantial defenses to liability" and the fact that "in Plaintiffs' view, [the non-settling defendant] is at least equally to blame for the harm allegedly suffered" indicated that the settlement amount was not "so far 'out of the ballpark' as to demonstrate bad faith." *Id.* Here, the Homebuilder Defendants are not "equally to blame." Rather, Plaintiffs argue that Tetra Tech is "the more culpable." (Dkt. 123, at 10:6.) A settlement constituting 13% of Plaintiffs' maximum alleged recovery is therefore well within the ballpark established in *GATX/Airlog*.

Second, the settlement is substantial in light of the Homebuilder Defendants' unique defenses to Plaintiffs' claims. Courts consider the availability of defenses to a settling defendant when assessing proportionate liability. *See*, *e.g.*, *GATX/Airlog*, 2000 WL 36741015, at *3. As a threshold matter, the arbitration provisions contained in the purchase agreements and CC&Rs

governing each class member's property purchase require each class member to pursue the claims asserted in this action in individual, private arbitrations. (*See* Chan Decl., Ex. B; Ex. C.) The costs of those individual arbitrations would be shared between each homeowner and the Homebuilder Defendants under the applicable American Arbitration Association's Home Construction Arbitration Rules and Mediation Procedures. (*Id.*, Ex. B, Section 14.3(C); Ex. C, Article 14.5.3.) Given those requirements, it is fully conceivable that many, if not most, Plaintiffs would not have chosen to pursue any claims against the Homebuilder Defendants, focusing resources on their civil action against Tetra Tech instead. This factor significantly lowers the maximum potential recovery. Yet through this settlement, the entire class of Parcel A home purchasers will receive remuneration from the Homebuilder Defendants before the pleadings are even at issue, without the necessity of paying arbitration costs.

Even if some Plaintiffs chose to pursue arbitration, they would face strong defenses on the merits. For starters, Plaintiffs do not allege that the Homebuilder Defendants were in any sense responsible for creating the alleged nuisance in this case, which is an essential element of public and private nuisance claims. *See Melton v. Boustred*, 183 Cal. App. 4th 521, 542 (2010) ("Public nuisance liability does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance." (internal quotations omitted)). The Navy, not the Homebuilder Defendants, is responsible for contamination at HPNS. Nor do Plaintiffs allege that the Homebuilder Defendants played *any* role in *any* remediation work at the site, let alone the allegedly fraudulent remediation work by Tetra Tech that forms the basis of Plaintiffs' nuisance claims—nor could they. Consequently, Plaintiffs could not maintain these claims against the Homebuilder Defendants. Plaintiffs retain such claims against Tetra Tech.

The remaining claims—unfair and unlawful competition, fraud and false advertising, negligence, negligent misrepresentation, and intentional misrepresentation—are also susceptible to attack for several reasons. First, to succeed on any of these claims, Plaintiffs would have to establish that the Homebuilder Defendants had actual knowledge of, but failed to disclose, Tetra Tech's misconduct or the presence of contamination at Parcel A that posed a threat to human

health. *Shapiro v. Sutherland*, 64 Cal. App. 4th 1534, 1544 (1998) (real property disclosure duties depend on whether "seller has actual knowledge of an undisclosed fact"). In other words, Plaintiffs could not rely on their allegation that the Homebuilder Defendants "should have known" about Tetra Tech's misconduct. (*See*, *e.g.*, ECF No. 93 ¶¶ 198-99.) Plaintiffs' only substantive allegation to that effect, however, even after conducting independent research into the issue for years and reviewing tens of thousands of documents (ECF No. 123-1 ¶¶ 6-9), is the conclusory statement that the Homebuilder Defendants were "privy to many of the discussions with government agencies, the Navy and contractors, including Tetra Tech, regarding environmental hazards, concerns, and clean-up plans," and therefore must have been aware of Tetra Tech's misconduct. (ECF No. 93 ¶ 242.) That allegation does not come close to satisfying the "actual knowledge" standard. Significantly, Plaintiffs allege that Tetra Tech went to great lengths to conceal its conduct. (*Id.* ¶¶ 169-182.) In light of that concealment, the Homebuilder Defendants had no way of knowing about Tetra Tech's harmful conduct.

As for Plaintiffs' allegations regarding the safety of Parcel A specifically, the California Department of Public Health conducted a thorough scan of the site once the full extent of Tetra Tech's misconduct became public and concluded that "no radiological health and safety hazards to the residents of Parcel A[]" were observed.[5] Regardless, Plaintiffs' allegations need not be disproven to determine that a settlement has been made in good faith. It is enough that the alleged facts are disputed. *E.g.*, *Dole Food Co. v. Superior Ct.*, 242 Cal. App. 4th 894, 904 (2015).

Second, in order for any damages award from the Homebuilder Defendants to even be considered, Plaintiffs would need to establish that property disclosures failed to include "facts materially affecting the value or desirability of the property" *and* that the Homebuilder

[5] *See* Cal. Dep't of Public Health, Div. of Radiation Safety and Environmental Management, Radiologic Health Branch, *Hunters Point Shipyard, Parcel A-1, Health and Safety Survey* at 23 (Feb. 5, 2019), *available at* https://www.cdph.ca.gov/Programs/CEH/DRSEM/CDPH%20Document%20Library/RHB/Environment/Hunters%20Point%20Parcel%20A1%20Final%20Report%20and%20Appendices.pdf. This report is properly the subject of judicial notice "as it is part of a publicly available government record." *GeoVector Corp. v. Samsung Elecs. Co.*, 234 F. Supp. 3d 1009, 1016 (N.D. Cal. 2017).

Defendants "kn[ew] that such facts [we]re not known to, or within the reach of the diligent attention and observation of the buyer." *Shapiro*, 64 Cal. App. 4th at 1544. All purchasers of properties at Parcel A were provided with extensive disclosures about the operational history and resulting environmental impacts at HPNS, including Parcel A. (*See*, *e.g.*, Chan Decl., Ex. C.) Those disclosures informed potential purchasers that "[h]istorical use of radiological materials on other Shipyard parcels is well-documented" and that "[s]oil and groundwater at the adjacent Shipyard Parcels have been found to contain PCBs, pesticides, petroleum hydrocarbons, solvents, metals and radiological debris." (*Id.* at 3, 5.) Appendix A to that disclosure directed potential purchasers to a wide range of additional resources describing in detail the historical use of the site and the ongoing cleanup efforts overseen by the Navy. (*Id.* at 4-10.) When in spring 2018 the unsealing of criminal pleas revealed Tetra Tech's negligence and fraudulent conduct, the Homebuilder Defendants updated their disclosures to include the newly available information about Tetra Tech's conduct. (Chan Decl., Ex. D.) Together with information that was publicly available throughout the class period, these disclosures would have belied any allegation that ***all*** Parcel A home purchasers were not fully informed about the potential environmental issues at Hunters Point and, later, Tetra Tech's publicly disclosed misconduct. The Homebuilder Defendants would have prevailed in arbitration over all of Plaintiffs' disclosure-related claims. With no other basis for holding the Homebuilder Defendants liable, Plaintiffs would have recovered nothing in individual arbitrations. [6]

C. A Settling Defendant Should Pay Less in Settlement Than It Would If It Were Held Liable After Trial

Even assuming that the Homebuilder Defendants could be found liable for any harm to Plaintiffs or the class, and that the potential damages exposure might exceed $6.3 million, a

[6] In addition, Lennar Corporation, Five Point, and Emile Haddad are not proper defendants as they did not develop or sell homes at the Shipyard. *See Carney v. Lennar Corp.*, 2017 WL 3981127, at *4 (D.N.J. Sept. 11, 2017) ("Plaintiff's evidence is insufficient to show that the subsidiaries were merely the alter ego or agent of parent Lennar Corporation or that the independence of Defendant and these separate corporate entities was disregarded."); *Witt v. Condos. at the Boulders Ass'n*, 2006 WL 348086, at *4 (D. Colo. Feb. 13, 2006) ("[T]he Court finds that the Association has failed to make a sufficient prima facie showing that Genesee is an alter ego of Lennar Corporation, such that Lennar Corporation can be held vicariously liable for Genesee's acts.").

settlement that is significantly less than what Plaintiffs contend they would have obtained at arbitration or trial is still considered to be made in good faith for purposes of California Code of Civil Procedure §§ 877 and 877.6. The Homebuilder Defendants would have no incentive to settle if their settlement payment were not substantially discounted from what Plaintiffs intended to claim at arbitration. *See Tech-Bilt*, 38 Cal. 3d at 500. As the California Supreme Court explained, "[A] good faith settlement does not call for perfect or even near perfect apportionment of liability. In order to encourage settlement, it is quite proper for a settling party to pay less than his proportionate share of the anticipated damages." *Abbott Ford*, 43 Cal. 3d at 874.

D. The Settlement Was Negotiated at Arm's Length and Is Not Aimed at Injuring the Interests of the Non-Settling Parties

Finally, the settlement was reached through the course of extensive, arm's-length negotiations between the parties and their counsel over the course of nearly a year, overseen by experienced, neutral mediators, culminating in a mediator's proposal agreeable to all the Settling Parties. (ECF 123-1 ¶¶ 13-14.) This settlement comes after Plaintiffs' counsel spent years investigating and evaluating the facts and law related to the claims asserted to determine how best to serve the interests of the class. Plaintiffs made numerous records requests to state and federal agencies involved in the remediation at HPNS. Their counsel reviewed tens of thousands of records released in connection with those requests. Plaintiffs consulted with economic experts about the effect of the alleged misconduct on the value of their homes. (*Id.* ¶¶ 6-11.) Likewise, the written settlement agreement was the product of several months of careful negotiation between the Settling Parties. (*Id*. ¶¶ 14, 17.) Negotiations on behalf of Plaintiffs were led by three different law firms, adding additional levels of vigilance to protect Plaintiffs' interests. (*Id.* ¶ 14.)

Finally, the agreement is not the result of collusion, fraud, or tortious conduct aimed at harming the interests of the non-settling defendants. The Declaration of Anne Marie Murphy filed in support of the Preliminary Approval Motion establishes that this settlement was negotiated "primarily [] through the mediators." (ECF No. 123-1 ¶ 16.) After Plaintiffs' counsel spent hundreds of hours negotiating the settlement and evaluating "the fairness of the

consideration and release," Plaintiffs decided to settle given "the benefits of an early, substantial settlement from the less-culpable tortfeasors." (*Id.* ¶¶ 17, 34.) As Ms. Murphy's declaration establishes, the settlement negotiations and ultimate agreement were entirely proper and are consistent with the interests of the class, with no intent to harm the interests of the non-settling defendants. *See McIntosh v. N. Cal. Universal Enters.*, 2010 WL 2629858, at *6 (E.D. Cal. June 29, 2010) (declaration from Plaintiff's counsel that settlement reached through "reasonable arms-length negotiation" and intended to "avoid 'risks associated with any adverse ruling'" established absence of collusion).

V. CONCLUSION

For all the foregoing reasons, the Homebuilder Defendants respectfully request that the Court grant this Motion and enter an Order finding that their settlement with Plaintiffs was entered in good faith. If there should be any opposition to this Motion, the Homebuilder Defendants reserve the right to augment the record. *City of Grand Terrance v. Superior Ct.*, 192 Cal. App. 3d 1251, 1262 (1987).

Dated: August 5, 2021

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By: */s/ David Marroso*
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Civil Local Rule 5-1(i)(3) Attestation

Pursuant to Local Rule 5-1(i)(3), I, David Marroso, the ECF filer of this document, hereby attest that I obtained concurrence in the filing of this document from each of the other signatories.

Date: August 5, 2021

By: */s/ David Marroso*
David Marroso