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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; FIVE POINT HOLDINGS, LLC; HPS DEVELOPMENT CO., L.P.; WILLIAM DOUGHERTY; ANDREW BOLT; EMILE HADDAD,

Defendants.

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

Related To: Case No. 3:19-cv-01417-JD;
Case No. 3:19-cv-07510-JD

DEFENDANTS TETRA TECH, INC., TETRA TECH EC, INC., AND ANDREW BOLT'S OPPOSITION TO DEVELOPERS' MOTION FOR GOOD FAITH SETTLEMENT DETERMINATION

Filed Concurrently with Declaration of Christopher Rheinheimer

Date: October 14, 2021
Time: 10:00 am

Judge: Hon. James Donato
Crtrm: 11, 19th Floor

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I. INTRODUCTION

Defendants Tetra Tech, Inc., Tetra Tech EC, Inc. ("TtEC"), and Andrew Bolt (together, the "Tetra Tech Parties") oppose Defendants Lennar Corporation, HPS Development Co., LP, HPS1 Block 50 LLC, HPS1 Block 51 LLC, HPS1 Block 53 LLC, HPS1 Block 54 LLC, HPS1 Block 56/57 LLC (collectively, "Lennar"), Five Point Holdings, LLC ("Five Point"), and Emile Haddad's (collectively with Lennar and Five Point, the "Developers") Motion for Good Faith Settlement Determination (the "Motion") (Dkt. 201).

Pursuant to California Code of Civil Procedure Section 877.6(c), a settling defendant that obtains a good faith settlement determination is freed from any liability to other defendants for contribution or comparative indemnity for the settled claims. *Goodman v. Lozano*, 47 Cal.4th 1327, 1333 (2010). Here, the Developers' Motion should be denied because it is premised on three falsehoods: (1) Developers did not know the full extent of the Tetra Tech Parties' alleged "misconduct" because the Tetra Tech Parties concealed it and the United States requested that the Court seal the guilty pleas of Stephen Rolfe and Justin Hubbard and the factual bases for those pleas; (2) Developers were unaware of the information contained in the sealed guilty pleas, which Developers claim contained information about the full extent of the Tetra Tech Parties' alleged misconduct and alleged "extensive, gross negligence"; and (3) because Developers were in the dark about the information contained in the guilty pleas, they did not and could not have known about the alleged "remediation fraud" and delays to their redevelopment of Hunters Point Naval Shipyard in San Francisco, California ("Hunters Point") until the pleas were unsealed in May 2018. (Motion at 2:10-12; 17-18.)

In reality, the Developers knew in 2014 about allegations of data falsification and TtEC's investigation of those issues[1], and that the transfer of Parcel G to the City and County of San Francisco (the "City") would be delayed. By March 2016 at the latest, the Developers had

[1] The Tetra Tech Parties dispute the allegations that the scope of data issues is broader than what was identified in TtEC's 2014 Investigation Report, which included the areas identified in the criminal plea agreements of Stephen Rolfe and Justin Hubbard. For purposes of this Opposition, the Tetra Tech Parties refer to data "allegations" and "issues" interchangeably without conceding the truth of any such allegations.

obtained critical portions of TtEC's April 2014 investigation report, which discussed a broader scope of investigation into data anomalies than described in the later-unsealed criminal plea agreements. By April 2016, the Developers also knew about a Nuclear Regulatory Commission ("NRC") investigation and received notice that prospective purchasers were concerned about the status of the Hunters Point remediation and redevelopment. In September 2016, the Developers were told that *all* transfers of parcels at Hunters Point would stop pending further investigation, and by the end of that year, Five Point disclosed to the United States Securities and Exchange Commission the possibility of delays in the redevelopment of Hunters Point.

Plaintiffs allege in their Complaint that they purchased properties at "The SF Shipyard," located on former Parcel A, without knowing the true levels of contamination at Hunters Point, and only later learned that regulators suspected TtEC of engaging in alleged "remediation fraud." (Dkt. 157 at ¶¶ 204, 236.) The Developers argue that the Tetra Tech Parties are the primary wrongdoers and the focus of Plaintiffs' complaint, and that the Developers' settlement with Plaintiffs reflects that reality. (Motion at 2:5-6.) To the contrary, the documentary evidence proves that the settlement does not meet the standard for approval of a good faith settlement and is not consistent with the equitable purposes of Code of Civil Procedure Sections 877 and 877.6, because it is not in the "ballpark" or "reasonable range" of the Developers' proportionate liability. *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, 38 Cal.3d 488, 499-500 (1985).

II. FACTUAL BACKGROUND AND EVIDENCE OF DEVELOPERS' KNOWLEDGE

Lennar obtained development rights to former "Parcel A" of Hunters Point from the City in 2005, after the Navy issued a Finding of Suitability to Transfer ("FOST") Parcel A to the City in 2004. (Declaration of Christopher Rheinheimer ("Rheinheimer Decl."), Ex. 1 [Parcel A FOST]). Lennar began building on Parcel A in 2013. (Dkt. 157 at ¶ 13.) Parcel A is adjacent to other parcels of Hunters Point planned for redevelopment by the Developers. (*See* Rheinheimer Decl., Ex. 2 [Map of Hunters Point].)

In October 2012, the Navy identified anomalies in soil sample data submitted by TtEC relating to one survey unit in Parcel E of Hunters Point. Under the Navy's oversight, TtEC investigated not only the Parcel E anomalies initially identified, but also broadened the

investigation to cover eighteen additional survey units. The investigation was documented in an April 2014 report titled: "Investigation Conclusion – Anomalous Soil Samples at Hunters Point Naval Shipyard – Revision 1" ("2014 Investigation Report"). The Executive Summary of the 2014 Investigation Report states that "an additional 12 survey units at 3 additional sites in Parcels C and E were identified as survey units for which a high probability existed that the soil samples were not representative of the respective survey units. Seven other locations reported anomalously low K-40 concentrations for some samples within systematic sample sets and were identified for potential further evaluation as well." (Rheinheimer Decl., Ex. 3 [Executive Summary of 2014 Investigation Report at ES-1].)

On October 13, 2014, NBC Bay Area published a news story titled "Contractor Submitted False Radiation Data at Hunters Point," which contained a link to the entire 2014 Investigation Report. (Rheinheimer Decl., Ex. 4.)

On October 30, 2014, the Navy transmitted Final Survey Unit Progress Reports ("SUPRs") to the Developers for Survey Units 236, 238, 242, and 243, and explicitly referenced the 2014 Investigation Report in its transmittal letter. (Rheinheimer Decl., Ex. 5.) The same day, the Navy sent a copy of the SUPR for Survey Unit 234 to the Developers, which also referenced the 2014 Investigation Report, stating: "[a]s part of an investigation into anomalous soil samples for another project at HPNS, soil samples from this trench unit were reviewed further because many of the samples had comparatively low concentrations of potassium-40 (40K)" and "[t]he results of this evaluation are presented in Attachment 19 of the Investigation Conclusion Anomalous Soil Samples Report dated April 2014 (TtEC 2014)." (Rheinheimer Decl., Ex. 6 at 3-2.)

On December 1, 2014, Lennar became aware of a data issue unrelated to the 2014 Investigation Report that threatened to delay the transfer of Parcel G for redevelopment, and Lennar counsel Gordon Hart asked for a call with the Navy to discuss "how much a delay in the Parcel G FOST this may cause." (Rheinheimer Decl., Ex. 7.)

In April 2015, Lennar began selling homes in its development on Parcel A, called "The SF Shipyard." (Reynolds Decl. ISO Mot. for Final Approval, Ex. B [Dkt. 200-4].) According to Plaintiffs, the Developers marketed the Hunters Point redevelopment with the promise of "a

flourishing, walkable community, with bay views, office space, supermarkets, an outdoor mall, a thriving commercial center with restaurants, bars, shops, schools, parks, and other public services including public transportation." (Dkt. 157 at ¶ 19.) However, the Developers did not disclose their knowledge of the TtEC data investigation or the potential redevelopment delays to prospective purchasers at The SF Shipyard.

In or about July 2015, Lennar spun off Five Point pursuant to a Contribution and Sale Agreement, which resulted in the formation of Five Point Holdings, LLC. (Rheinheimer Decl., Ex. 8 [December 17, 2015 Amended and Restated Contribution and Sale Agreement].) Lennar and Five Point, and their affiliates, maintained close connections after the spin-off, including sharing employees and officers.

On March 17, 2016, Amy Brownell, an Environmental Engineer for the San Francisco Department of Public Health, forwarded an email she received from the EPA Hunters Point cleanup manager to the Developers' representatives. Attached to the email were an excerpt of the Executive Summary of the 2014 Investigation Report and other excerpts from the Report. (Rheinheimer Decl., Ex. 9.) One of those excerpts, attached to the email as "Rad anomalous – timeline investigation.pdf," included Table 2 from the 2014 Investigation Report showing the survey units recommended for resampling as part of the investigation. (*Id.* at p. CPHP-0302807.) In addition, the email forwarded by Ms. Brownell contained a link to an NBC Bay Area news article titled "Former Hunters Point Worker Claims Supervisors Ordered Him to Hide Radiation." (*Id.* at p. CPHP-0302700.)

In April 2016, the Developers learned that the NRC was investigating allegations of data falsification at Hunters Point. (Rheinheimer Decl., Ex. 10.)

On September 16, 2016, Ms. Brownell forwarded to representatives of the Developers a press release issued by Greenaction for Health and Environmental Justice describing a September 13, 2016 letter from EPA and DTSC to the Navy discussing the decision to halt any further transfers of parcels at Hunters Point. (Rheinheimer Decl., Ex. 11.)

On October 19, 2016, Ms. Brownell forwarded to the Developers an email sharing a public posting from the DTSC project manager at Hunters Point stating that no further transfers of

parcels would take place until allegations from a former Hunters Point worker were investigated and addressed as necessary, including additional sampling. (Rheinheimer Decl., Ex. 12.) The Developers continued to market The SF Shipyard to prospective purchasers without disclosing any information about data allegations or delays in the transfer of parcels for redevelopment.

On or about December 15, 2016, Five Point representatives met with the Navy, EPA, DTSC, and other agencies and regulators to discuss radiological issues at Hunters Point. According to the Meeting Notes, Five Point's Regional Project Manager, Kofi Bonner, asked whether the EPA was committed to the Navy's scope and schedule regarding review of Hunters Point data. (Rheinheimer Decl., Ex. 13.) In response, EPA Director Enrique Manzanilla said that while he understood the time pressures and objective to repurpose the property, the alleged data issues had to be thoroughly addressed, and EPA could not guarantee a date for transfer. (*Id.*) DTSC Director Mohsen Nazemi agreed that DTSC could not commit to a timeline until the data had been thoroughly analyzed. (*Id.*)

On December 21, 2016, Five Point disclosed to the United States Securities and Exchange Commission that the allegations against TtEC at Hunters Point could delay or impede the scheduled transfer of parcels, which would in turn delay or impede Five Point's future development of those parcels. (Rheinheimer Decl., Ex. 14.) However, the Developers made no such disclosure to prospective purchasers of The SF Shipyard properties.

On February 22, 2017, then-San Francisco Mayor Ed Lee scheduled a meeting with the Developers and representatives of regulatory agencies to discuss the Hunters Point cleanup and transfer schedule. In a document titled "Meeting Overview," Mayor Lee was advised that the Developers "will express concern over the transfer schedule for Navy Parcel C (74 acres) being delayed beyond 2018." (Rheinheimer Decl., Ex. 15.) In addition, Mayor Lee was advised that the Developers have "expressed concern that the news coverage has caused 6 individuals to break their contract to purchase homes on the Shipyard." (*Id.* at p. CPHP-0054820.) The Developers, paying attention to news media about Hunters Point, wanted the Navy, EPA, and the City to vouch for the safety of Hunters Point, but they continued to withhold their knowledge of data allegations and redevelopment delays from prospective purchasers.

On September 8, 2017, a representative from CH2M, a contractor hired by the Navy to evaluate TtEC's data at Hunters Point, sent an email to the Developers attaching a "preview copy" of a Navy Fact Sheet referencing allegations of data falsification against TtEC and stating that further evaluation was being conducted to determine additional actions to confirm or replace data collected by TtEC. (Rheinheimer Decl., Ex. 16.)

On October 23, 2017, Ms. Brownell forwarded to representatives of Lennar and Five Point the EPA's comments on CH2M's draft data evaluation report for Parcel G, which characterized numerous survey units in Parcel G as "suspect" and in need of resampling. (Rheinheimer Decl., Ex. 17.)

On March 26, 2018, Ms. Brownell sent an email to representatives of Lennar and Five Point attaching DTSC's comment letter on the Navy's draft work plan for re-sampling Parcel G at Hunters Point. The draft Parcel G work plan was released to the public for notice and comment on or about June 15, 2018. (Rheinheimer Decl., Ex. 18.)

On May 2, 2018, Justin Hubbard's criminal plea agreement was unsealed; two days later, on May 4, 2018, Stephen Rolfe's criminal plea agreement was unsealed. (Mot. at 1:26-28 [citing ECF No. 93 at ¶¶ 12, 27].)

On May 5, 2018, Lennar supplemented the disclosures provided to prospective purchasers. (Declaration of Garrett Chan ISO Mot. for Good Faith Settlement ¶ 5, Exh. D) (the "May 2018 Disclosure Statement"). The May 2018 Disclosure Statement provided information about the Rolfe and Hubbard's guilty pleas, EPA's statement that there was "no reason to question any cleanup work performed on Parcel A," and the Navy's representation that "radiological issues at the Shipyard presented no risk at Parcel A." (*Id.*) However, the May 2018 Disclosure Statement did not include any information about the 2014 Investigation Report or delays in the transfer of Hunters Point parcels.[2]

[2] The Tetra Tech parties served formal document requests on the Developers to obtain discovery specifically tailored to the good faith settlement determination, and requested that the Developers produce responsive documents prior to the deadline for filing this Opposition. The Developers refused; their statutory deadline for producing responsive documents is September 15, 2021.

III. LEGAL STANDARD

The determination that a settlement with some but not all defendants has been made in good faith is "left to the discretion of the trial court." *Long Beach Mem. Med. Cntr. v. Superior Court*, 172 Cal.App.4th 865, 873 (2009) (citing *Mattco Forge, Inc. v. Arthur Young & Co*., 38 Cal.App.4th 1337, 1349 (1995)). The California Supreme Court in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates, Inc.*, 38 Cal.3d 488, 499 (1985) ("*Tech-Bilt*") defined good faith as "whether 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."

Courts analyze the following factors when determining whether a settlement has been made in good faith: (1) a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability; (2) the amount paid in settlement; (3) the allocation of settlement proceeds among plaintiffs; (4) a discount for settlement rather than trial verdict; (5) the financial conditions / insurance policy limits of the settling defendants; and (6) any collusion, fraud, or tortious conduct aimed at injuring non-settling defendants. *Tech-Bilt*, 383 Cal.3d at 499. "The ultimate determinant of good faith is whether the settlement is grossly disproportionate to what a reasonable person at the time of settlement would estimate the settlor's liability to be." *City of Grand Terrace v. Superior Court* (1987) 192 Cal.App.3d 1251, 1262; *PacifiCare of Cal. v. Bright Medical Associates, Inc*., 198 Cal.App.4th 1451, 1465 (2011) (A party asserting lack of good faith is permitted to demonstrate that the settlement is so far "out of the ballpark" in terms of the settling party's proportionate share of comparative liability for plaintiff's alleged injuries as to be inconsistent with the equitable objectives of the statute.)

IV. ARGUMENT

The proposed settlement between the Developers and Plaintiffs is not within the ballpark of the Developers' proportionate liability. The Motion is premised entirely on the false contention that the Developers did not know about the "full scope" of the alleged data issues at Hunters Point until May 2018, and therefore, the Developers are not primarily responsible for Plaintiffs' alleged damages. This premise is contradicted by ample evidence that demonstrates the Developers knew for years about the full scope of the data allegations, the investigations, and the delays for

transferring parcels for development, yet the Developers did not disclose this information to Plaintiffs. This failure to disclose—not the allegations, investigations, or delays—is the primary cause of the harm alleged by Plaintiffs.

A. The Developers Knew About Alleged Data Issues and Parcel Transfer Delays Years Before the Plea Agreements Were Unsealed in May 2018.

The Developers' entire argument is premised on the claim that they were not aware of the "full extent of Tetra Tech's [alleged] misconduct" until the Rolfe and Hubbard plea agreements were unsealed in May 2018. (Motion at 2:5-6; 9-12; 15-18.) In the Developers' telling, they "had no way of knowing about Tetra Tech's harmful conduct" because, as Plaintiffs allege, "Tetra Tech went to great lengths to conceal its conduct." (Mot. at 11-13 (citing Pltfs' SAC, ¶¶ 169-182).) However, the Developers produce not a single shred of evidence suggesting the Tetra Tech Parties concealed anything about the data allegations. Indeed, TtEC never attempted to keep the 2014 Investigation Report private or remove it from the public record once it was released. To the contrary, the 2014 Investigation Report demonstrates that TtEC disclosed a wider investigation into data anomalies than was revealed in the Rolfe and Hubbard plea agreements.

In fact, as described above, the Developers have possessed information for years that alerted them to allegations of broader data issues than those described in the Rolfe and Hubbard plea agreements. For example, Table 2 of the 2014 Investigation Report, which was made publicly available in October 2014 and which was sent directly to Lennar and Five Point in March 2016, on its own refutes the Developers' argument about their lack of knowledge:

TABLE 2 - SURVEY UNITS RECOMMENDED FOR RESAMPLING[3]

Area	Survey Unit	Sample Numbers	Date Collected	COC Radiological Technician	
517	2	123-158	10-Apr-12	Jeff Rolfe	Not identified in plea agreements
707	9	59-78	08-Jun-11	Jeff Rolfe	Not identified in plea agreements
707	16	67-86	07-Jun-11	Jeff Rolfe	Not identified in plea agreements

[3] *See* Rheinheimer Decl., Ex. 9 at CPHP-0302807.

Area	Survey Unit	Sample Numbers	Date Collected	COC Radiological Technician	
707	17	64-83	08-Jun-11	Jeff Rolfe	Not identified in plea agreements
707	**22**	**81-100**	**12-Aug-12**	**Anthony Smith**	**Rolfe plea agreement (p. 3)**
707	23	5-24	31-Jul-12	Jeff Rolfe	Not identified in plea agreements
North Pier	**1**	**28-47**	**31-May-12**	**Ray Roberson**	**Hubbard plea agreement (p. 4)**
North Pier	7	30-49	04-Jun-12	Justin Hubbard	Not identified in plea agreements
North Pier	**8**	**32-51**	**31-May-12**	**Ray Roberson**	**Hubbard plea agreement (p. 4)**
North Pier	**10**	**27-46**	**31-May-12**	**Ray Roberson**	**Hubbard plea agreement (p. 4)**
North Pier	**11**	**27-46**	**31-May-12**	**Ray Roberson**	**Hubbard plea agreement (p. 4)**
79/80	2	3, 5-6, 8-22	04-Apr-12	Jeff Rolfe	Not identified in plea agreements

Moreover, the Developers also received forwarded press material about allegations of wide-ranging "remediation fraud" at Hunters Point that referenced, linked to, or attached reports, public meeting documents, or Navy and regulator statements about delays in the project. (Rheinheimer Decl., Exs. 9, 11.) The Developers also received copies of reports (Rheinheimer Decl., Exs. 5, 6, and 9), and EPA's comments on draft reports regarding the alleged radiological issues at Hunters Point (Rheinheimer Decl., Ex. 17). In December 2016, the Developers participated in discussions and decision-making with regulators, the Navy, and elected officials regarding allegations of data falsification. (Rheinheimer Decl., Ex. 13.) Every one of these communications occurred *before* the plea agreements were unsealed in May 2018, and contain *more* information about allegations of data issues at Hunters Point than the plea agreements. Yet, the Developers disclosed none of that information to prospective purchasers.

B. The Developers' Failure to Disclose to Prospective Purchasers What They Knew About the Data Issues and Delays Caused the Plaintiffs' Alleged Harm.

The Developers knew about the full scope of alleged data issues by no later than March 2016 and about the delay in transfer of future parcels by no later September 2016, but the

Developers failed to disclose that information to prospective purchasers – more than 200 of whom bought properties between March 2016 and May 2018. It is the Developers' failure to disclose the data issues and delays that caused the Plaintiffs' alleged harm.

Plaintiffs claim they have suffered two categories of damages: appreciation impairment damages and damages related to the payment of *Mello-Roos* taxes. (Dkt. 200 at 11:3-6.) Regarding appreciation impairment, Plaintiffs allege their properties have not appreciated on par with the San Francisco real estate market outside The SF Shipyard. (*See id.* at 11:11-15.) Plaintiffs allege the Developers sold a vision of The SF Shipyard consisting of "42-story highrises, stormwater ecogardens, solar and wind energy infrastructure, an international African marketplace, a regional retail center, library reading rooms, community events, and 300-plus acres of parks and open space for residents as a true destination" (Dkt. 93 at ¶ 195; Dkt. 157 at ¶ 201); however, according to Plaintiffs, "many of those planned community amenities have been cancelled, reduced, delayed, or materially altered," and Plaintiffs allege they are now entitled to a refund of their *Mello-Roos* tax liabilities. (Dkt. 200 at 11:18-28.)

In support of their Motion, the Developers attach a declaration from Garrett Chan, Vice President of Sales and Marketing for Lennar Corporation, regarding the disclosures made to prospective purchasers of properties at The SF Shipyard between 2014 and May 2018 (Chan Decl., Ex. A) (the "2014-2018 Disclosure Statement"). The 2014-2018 Disclosure Statement provides a general overview of the environmental issues and hazardous materials investigations related to The SF Shipyard, describing the historical use of Parcel A as non-industrial and primarily residential. (*Id.* at 1.) The 2014-2018 Disclosure Statement describes the investigations supporting the 2004 Parcel A FOST for residential use, the investigations and actions conducted after 2004 during the redevelopment process, and hazardous materials cleanup activities on adjacent properties. (*Id.* at 2-4.). There is no mention whatsoever in the 2014-2018 Disclosure Statement of the soil sampling allegations, the 2014 Investigation Report, the NRC investigation, or the delay in the transfer of Hunters Point parcels – all of which the Developers knew about and, according to Plaintiffs, were required to disclose pursuant to Civil Code Section 1102, *et seq*. (Dkt. 157 at ¶ 208.)

Even after the plea agreements were unsealed, the Developers' disclosures remained limited. Mr. Chan states that new disclosures were provided to prospective purchasers beginning on May 5, 2018. (Chan Decl. ¶ 5, Exh. D) (the "May 2018 Disclosure Statement"). The May 2018 Disclosure Statement provided information about Rolfe and Hubbard's guilty pleas, EPA's statement that there was "no reason to question any cleanup work performed on Parcel A," and the Navy's representation that "radiological issues at the Shipyard presented no risk at Parcel A." (*Id.*) However, the Developers still did not disclose any information about the 2014 Investigation Report or delays in the transfer of Hunters Point parcels.

If the Developers had disclosed the information they knew about data allegations and parcel transfer delays when they sold the properties to the Plaintiffs, the Plaintiffs would have been able to make well-informed decisions about whether or not to buy the properties. The Plaintiffs could have negotiated lower purchase prices for the properties, knowing the larger Hunters Point development was delayed. Instead, Plaintiffs were duped by the Developers into allegedly paying more than what their properties and community were worth because the Developers failed to disclose critical information at the time of purchase.

C. The Developers are the Primary Wrongdoers.

Plaintiffs do not allege personal injury claims or seek damages for alleged exposure to chemicals at Hunters Point. Rather, as noted above, Plaintiffs' damages claim is that each putative class member has suffered appreciation impairment damages, damages related to excess payment of *Mello-Roos* taxes, or both. (Dkt. 200 at 11.) The Developers were well aware of the prospective purchasers' concerns with the status of the Hunters Point cleanup, since Ms. Brownell had shared those concerns with the Developers in September 2016. (Rheinheimer Decl., Ex. 19.) The Developers, by failing to disclose the data allegations and delays at Hunters Point, violated their common law and statutory duties to Plaintiffs and thus are primarily responsible for the alleged damages. Cal. Civ. Code § 1102 *et seq.*, including §1102.7, §1102.13, §1102.17; Bus. & Prof. Code § 17500; *Lingsch v. Savage*, 213 Cal.App.2d 729, 735 (1963) (seller of real property has a common law duty to disclose "where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such

facts are not known to, or within the reach of the diligent attention and observation of the buyer. . .").

The Developers argue they did not know about the data allegations and delays before selling over 200 homes to purchasers, and therefore, "Tetra Tech is the sole defendant in this action to cause Plaintiffs harm," and the Developers "should bear no liability for that harm." (Motion at 8:16-17.) In support of their argument, the Developers rely on Plaintiffs' unsupported assertion that a "factfinder could conceivably assign only 10 percent fault to the Homebuilders." (Motion at 8:26-27.) The reality—based on the documentary evidence—is that the Developers are the primary wrongdoers because they knew about the data allegations regarding Hunters Point, the regulatory agencies' response, and the delays, yet they failed to disclose that information to Plaintiffs at the time of purchase. *See City of Grand Terrace*, 192 Cal.App.3d at 1262 (settling defendant's proportionate liability is a critical factor in the good faith determination). Plaintiffs would not have suffered the alleged appreciation impairment damages, or allegedly paid excessive *Mello-Roos* taxes, without Developers' concealment.

Based on an estimate by Plaintiffs' expert that the maximum theoretical recovery for the class is about $48 million[4] (Dkt. 123-4 at ¶ 27), the Developers argue that their $6.3 million settlement payment to Plaintiffs, constituting approximately 13% of Plaintiffs purported maximum theoretical recovery, "is well within the ballpark of any proportionate liability." (Motion at 8:28-9:3.) That is incorrect, because the Developers sold properties to Plaintiffs while deliberately withholding information about alleged data issues and delays at Hunters Point. Moreover, once costs and attorneys' fees are deducted, the Developers' contribution to the settlement fund amounts to $4,482,404.00, or approximately 9.3% of the class's total economic damages, far from the ballpark of reasonableness given the Developers' proportionate liability. (Dkt. 123 at 5:1-10.)

In their Motion, the Developers cite cases wherein California courts approved payments representing a much lower percentage of total recovery than 13%. Both cases, *Wilshire Ins. Co. v. Tuff Boy Holding, Inc*., 86 Cal.App.4th 627 (2001), and *GATX/Airlog Co. v. Evergreen Int'l*

[4] The Tetra Tech Parties accept Plaintiffs' maximum theoretical recovery estimate only for purposes of this Opposition.

Airlines, Inc., 2000 WL 36741015 (N.D. Cal. Aug. 4, 2000), are inapposite. The Developers are the primary wrongdoers and creators of Plaintiffs' alleged harm because they, not the Tetra Tech Parties, were the ones that had a duty to disclose the issues surrounding Hunters Point to the Plaintiffs, but they failed to do so. In its analysis, the Court must consider not only the Developers' potential liability to Plaintiffs (which is high), but also its proportionate share of culpability among all parties alleged to be liable for the same injury, which is even higher. *See TSI Seismic Tenant Space, Inc. v. Superior Court*, 149 Cal.App.4th 159, 167 (2007) (trial court abused its discretion in determining $50,000 settlement of construction defect action between owner of apartment project and geotechnical engineer was in good faith without considering geotechnical engineer's proportionate share of culpability, which evidence indicated exceeded $3.4 million); *Gehl Bros. Manufacturing Co. v. Superior Court*, 183 Cal.App.3d 178, 186 (1986) (settling not in good faith where there was likely possibility that factfinder could assess substantial liability to settling defendant that would greatly exceed settlement amount); *Long Beach Mem. Med. Ctr. v. Superior Court*, 172 Cal.App.4th 865, 874 (2009) (denying motion for good faith settlement where settlement payment was wholly disproportionate to share of liability).

D. Unlike the Developers, the Tetra Tech Parties' Proportionate Liability to Plaintiffs Is Low.

The Developers argue they should bear little to no liability for Plaintiffs' alleged harm, when the opposite is true: they should bear all of the liability based on their failures to disclose. By contrast, the Tetra Tech Parties have robust defenses to Plaintiffs' claims. First, Plaintiffs fail to identify the Tetra Tech Parties' legal duty to them as purchasers of properties at The SF Shipyard from the Developers – unlike the Developers who are in contractual privity with Plaintiffs. Courts routinely invoke the concept of duty to limit the otherwise infinite liability which would follow from every allegedly negligent act. *See, e.g*., *Bily v. Arthur Young & Co*., 3 Cal.4th 370, 376 (1992) (holding that an auditor owed no general duty of care regarding conduct of audit to persons other than client).

Plaintiffs' negligent misrepresentation and intentional misrepresentation claims are also defective as to TtEC. (Dkt. 157 at ¶¶ 312-342.) The negligent misrepresentation claim fails

because there is no evidence that any purported misrepresentation by TtEC was intended to be repeated and relied on by Plaintiffs, and no evidence showing Plaintiffs' justifiable reliance on TtEC's allegedly false statements. *Mirkin v. Wasserman*, 5 Cal.4th 1082, 1096 (1993) ("[A] plaintiff who hears an alleged misrepresentation indirectly must still show justifiable reliance upon it. . . .") Similarly, Plaintiffs' intentional misrepresentation claim lacks evidentiary basis, because TtEC did not make any statements to Plaintiffs, let alone statements that Plaintiffs allegedly relied on when purchasing their properties. *See Masters v. San Bernardino Cty. Employees Ret. Ass'n.*, 32 Cal.App.4th 30, 41-42 (intentional misrepresentation is a type of "actual fraud" under Cal. Civ. Code Section 1572 and common law fraud embodied in Cal. Civ. Code Section 1710). Plaintiffs' Unfair Competition Law and Fraud and False Advertising causes of action under California Business and Professions Code Sections 17200, *et seq*., and 17500, *et seq*. are flawed for the same reasons.

V. CONCLUSION

Based on the foregoing, the Tetra Tech Parties respectfully request that the Court deny the Developers' Motion.

DATED: September 9, 2021

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