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21 JOHN TORPHY and ELIZABETH TORPHY (as Trustees
22 of the JOHN C. TORPHY AND ELIZABETH M. TORPHY
23 TRUST DATED 5/5/2004) on behalf of themselves and all others similarly situated

24 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
25 **COUNTY OF ORANGE – CIVIL COMPLEX CENTER**

26 KAMAL ALI, an individual; and ZAINAB
27 ALI, an individual; JOHN TORPHY, an
28 individual, and ELIZABETH TORPHY, an
individual (as Trustees of the JOHN C.
TORPHY AND ELIZABETH M. TORPHY
TRUST DATED 5/5/2004); on behalf of
themselves and all others similarly situated,

Plaintiffs,

vs.

WARMINGTON RESIDENTIAL
CALIFORNIA, INC., a Corporation;
REBCO COMMUNITIES, INC. f/k/a
WARMINGTON HOMES CALIFORNIA,
INC., a Corporation; PLUMBING
CONCEPTS, INC., a Corporation;
MUELLER INDUSTRIES, INC., a
Corporation; and DOES 1-100,

Defendants.

AND RELATED CROSS-ACTION.

CASE NO. 30-2013-00689593-CU-CD-CXC
Assigned for all purposes to:
Judge Peter Wilson
Dept. CX-101

**PLAINTIFF’S NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Hearing Date: March 2, 2023
Time: 2:00 p.m.
Dept.: CX-101

Complaint Filed: 11/21/13

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

2 **PLEASE TAKE NOTICE** that on **March 2, 2023, at 2:00 p.m.**, or as soon thereafter
3 as the matter may be heard in Department CX-101 of the above-entitled Court, located at 751
4 West Santa Ana Blvd., Santa Ana, California 92701, Plaintiffs and Class Representatives
5 Kamal Ali and Zainab Ali, and John Torphy and Elizabeth Torphy (as Trustees of the John C.
6 Torphy and Elizabeth M. Torphy Trust Dated 5/5/2004 (“Plaintiffs”) hereby move this Court
7 for an order, pursuant to Rule 3.769 of the California Rules of Court, as follows:

- 8 1. Granting preliminary approval of the class action settlement between Plaintiff/Class
9 Representative Kamal Ali and Zainab Ali, and John Torphy and Elizabeth Torphy (as
10 Trustees of the John C. Torphy and Elizabeth M. Torphy Trust Dated 5/5/2004
11 (“Plaintiffs”) and Defendants Warmington Residential California, Inc. and REBCO
12 Communities, Inc. f/k/a Warmington Homes California, Inc. (“Defendants”);
- 13 2. Approving the proposed form and manner of notice to be provided to the
14 settlement class and directing that notice be effectuated to the settlement class;
- 15 3. Requiring that Defendants provide the Class Administrator and Class Counsel
16 with an electronic version of a Class List, identifying the homes and original
17 owners of the homes to be included in the Class from whom the Class
18 Administrator can determine individuals in the chain of title who may be a Class
19 Member and should receive the Settlement and Class Notice (attached to the
20 Settlement Agreement (Exhibit A, as Exhibit A thereto);
- 21 4. Approving ILYM Group Inc. as Class Administrator to administer the notice and
22 claims procedures;
- 23 5. Setting a hearing for final review of the proposed settlement in Department CX-
24 101 of the above-entitled Court.

1 Good cause exists for the granting of this Motion because the proposed settlement is
2 fair, reasonable, and adequate. This Motion is based on this Notice of Motion and Motion,
3 the attached Memorandum of Points and Authorities, the Declarations of Richard Kellner,
4 Richard Bridgford, Patrick McNicholas, and Lisa Mullins, the Class Action Settlement
5 Agreement (Exhibit A to the Kellner Declaration), and the attached exhibits thereto, files
6 and documents filed with this Court, and upon such further oral and/or documentary
7 evidence and argument as may properly be presented to the Court at the time of the hearing
8 on this matter.

9
10 Dated: November 29, 2022

KABATECK LLP
BRIDGFORD, GLEASON & ARTINIAN
McNICHOLAS & McNICHOLAS LLP

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12
13
14 By: /s/ Richard L. Kellner & Michael H. Artinian

15 Richard L. Kellner & Michael H. Artinian
16 *Attorneys for the Certified Class*
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 By this motion, Plaintiffs and Class Representatives Kamal Ali and Zainab Ali, and John
3 Torphy and Elizabeth Torphy (as Trustees of the John C. Torphy and Elizabeth M. Torphy Trust
4 Dated 5/5/2004 (“Plaintiffs”) seek preliminary approval of a class action settlement entered
5 between the certified class (by the class representatives) and Defendants Warmington Residential
6 California, Inc. and REBCO Communities, Inc. f/k/a Warmington Homes California, Inc.
7 (“Defendants”).

8 This case and the other related OC Copper Pipe cases have been hotly litigated for over 9
9 years. Significantly, the trajectory of this and the related cases has been impacted by recent rulings
10 on important common legal issues. First, the Court of Appeal in August 2020 (in the *Brasch v. K.*
11 *Hovnanian* and *Smith v. Pulte* appeals) held that the alleged SB 800 claims may proceed as class
12 actions, consistent with *Kohler Co. v. Superior Court* (2018) 29 Cal.App.5th 55. Second, and no
13 less significant, Judge Glenda Sanders has certified this case as a class action on July 26, 2022.
14 Subsequent to certification of this class action, the Parties engaged in arms-length negotiations
15 before Hon. Nancy Weiben-Stock (ret.) from JAMS ADR. As a result of this mediation, the
16 parties were able to reach agreement on settlement. The terms of that negotiated settlement are
17 reflected in this Agreement. (Kellner Decl., ¶¶ 39-40 and Exh. A thereto.)

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

- 20 • The Settlement Fund is \$1,537,500.00.
- 21 • The 123 class members shall receive the Net Proceeds of the Settlement Fund on a
22 *pro rata* basis, after payment of Court approved attorneys’ fees/costs, class
23 administration fees/costs and class representative enhancements.
- 24 • The *pro rata* gross settlement for each class member is \$12,500.
 - 25 ○ This is the largest *pro rata* cash settlement in these OC Copper Pipe class
 - 26 actions.
 - 27 ○ It also represents approximately 71.43% of the of the average cost for
 - 28 replacing the pipes in 123 class members’ homes with PEX, as bid by AMA

1 Repipe (*i.e.*, about \$17,500.00) – which is the contractor who provided the
2 replacement of PEX piping in two other class action settlements.

- 3 • It is a “claims paid” settlement.
- 4 • This case is uniquely different than most of the other OC Pipe Class Actions because
5 the primary defendant has obtained bankruptcy relief and there is a potential limitation
6 of recovery from their insurers.

7 Subject to approval by this Court, Plaintiffs and Class Representatives Kamal Ali and
8 Zainab Ali, and John Torphy and Elizabeth Torphy (as Trustees of the John C. Torphy and
9 Elizabeth M. Torphy Trust Dated 5/5/2004 (“Plaintiffs”) have agreed to and support the proposed
10 settlement of this action in accordance with the terms and conditions set forth in the Settlement
11 Agreement. (Torphy & Ali Decls., ¶ 8.) As described herein and considering the strengths and
12 weaknesses of the Class claims, and the time, expense and risks associated with litigation, the
13 parties believe the settlement will result in benefits to the class members on terms that are fair,
14 reasonable and adequate for the proposed settlement class. (*See Dunk v. Ford Motor Co.* (1996)
15 48 Cal.App.4th 1794, 1801-02.) For these reasons, as discussed more fully below, the proposed
16 class settlement merits preliminary approval pursuant to California Rule of Court 3.769(c).

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

20 **I. PROCEDURAL HISTORY**

21 The original plaintiffs filed this action on November 21, 2013 on behalf on themselves and
22 other similarly situated individuals who own homes in the class area (Ladera Ranch) that (i) were
23 constructed by Defendants, (ii) that contained copper pipes installed by the Defendants, and (iii)
24 had purchase agreements signed by Defendants on or after January 1, 2003. The operative
25 complaint alleges a cause of action against Defendants for violations of standards of residential
26 construction (Civ. Code § 895 *et seq.*, including § 896(a)(14) and (15)). (Kellner Decl., ¶ 11.)

27 On January 14, 2014, a Declaration of Non-Involvement was filed by Defendant, stating
28 that Warmington Residential California, Inc. (“Warmington”) was not involved in the building of

1 homes in Ladera Ranch, and that the proper entity was REBCO Communities, Inc. fka
2 Warmington Homes of California. Based thereon, Plaintiffs dismissed Warmington without
3 prejudice; and Defendant REBCO was “Doe’d” into the Complaint. (ROA 28.) However, it was
4 stipulated that Plaintiffs could rename Warmington at their discretion, and that all statutes of
5 limitations were tolled. Plaintiffs subsequently learned facts regarding Warmington, necessitating
6 that it be brought back into the case – and said entity is a defendant along with REBCO. (Kellner
7 Decl., ¶ 12.)

8 Importantly, in 2014, defendant REBCO Communities, Inc. filed a Chapter 7 voluntary
9 petition in the United States Bankruptcy Court for the Central District of California (Case No.
10 8:14-bk-11049). On August 5, 2014, Plaintiffs obtained an Order granting relief from the
11 Automatic Bankruptcy Stay against REBCO Communities, Inc. provided that the relief sought
12 against the debtor was limited to its insurance proceeds. (Kellner Decl., ¶ 13.) The litigation then
13 continued against REBCO (and later Warmington) along with the other Orange County Copper
14 Pipe cases – all of which have been heavily litigated over the past 9 years.

15 This case was related to a number of the other similar pinhole leak cases early in this
16 action. Ultimately, a total of 15 Orange County Pipe Cases were deemed related before the same
17 judge in the Orange County Superior Court – of which 5 cases had previously settled. (Kellner
18 Decl., ¶ 16.)

19 The first area of major litigation (common to all of these related actions) involved the
20 developer defendants’ attacks on the complaint and their assertion that individual issues prevented
21 class treatment. The trial judge (Judge Steven L. Perk) issued rulings that dismissed the class
22 allegations. Those orders were appealed in two cases – *Brasch v. K. Hovnanian, et al.* (Case No.
23 30-2013-00649417) and *Chiang v. D.R. Horton, et al.* (Case No. 30-2013-00649435) – and the
24 Court of Appeal ultimately reversed Judge Perk’s ruling that had dismissed the class allegations.
25 (Kellner Decl., ¶ 17.)

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

- 28 • At first, Judge Thierry Patrick Colaw (who replaced Judge Perk in these related

1 cases), denied numerous motions to dismiss by the developer defendants based
2 upon their claim that the language of SB 800 prohibited class actions. (Kellner
3 Decl., ¶ 18(a).)

- 4 • Writs were filed by the developer defendants on these Orders – which were all
5 ultimately denied by the Court of Appeal. (Kellner Decl., ¶ 18(b).)
- 6 • Thereafter, similar motions to dismiss were filed by the developer defendants (some
7 of whom claimed that there was a change in law) and those motions were denied by
8 Judge Sanders (who had replaced Judge Colaw in these related cases). (Kellner
9 Decl., ¶ 18(c).)
- 10 • Writs again were filed (on Judge Sanders’ Orders) and – this time – the Court of
11 Appeal issued an Order to Show Cause re dismissal based upon the subsequent
12 ruling in the case entitled *Kohler Co. v. Superior Court* (2018) 29 Cal.App.5th 55.
13 (Kellner Decl., ¶ 18(d).)
- 14 • The matter was remanded to Judge Sanders, who conducted extensive hearings and
15 briefings on the issue. Judge Sanders issued Orders on February 7, 2019 dismissing
16 the class allegations based upon perceived constraints of *Kohler* and the Court of
17 Appeal’s Order to Show Cause. (Kellner Decl., ¶ 18(e).)
- 18 • Plaintiffs then appealed that Order. Following full briefing and argument before the
19 Court of Appeal on two of the related cases, the Court of Appeal reversed Judge
20 Sanders’ Order (largely consistent with Judge Sanders’ prior orders denying the
21 attempts to dismiss the class allegations), and ruled that class actions are permitted
22 under SB 800 based on the allegations in the related cases. (Kellner Decl., ¶ 18(f).)

23 The third major area of litigation involved motions relating to expert testimony. The class
24 claims in each of the related class actions were largely predicated upon the same underlying expert
25 opinion – *i.e.*, that the combination of the common water in this area supplied by the Santa
26 Margarita Water District and the copper pipes resulted in a common chemical reaction that
27 resulted in corrosion that lessens the useful life of the pipes. As a result, tremendous discovery and
28 motion practice revolved around this expert testimony. Multiple defendants filed motions to strike

1 Plaintiffs’ expert’s opinions based upon *Sargon Enterprises, Inc. v. University of Southern*
2 *California* (2012) 55 Cal.4th 747 and its progeny. Ultimately, plaintiffs’ counsel prevailed in such
3 motions before BOTH Judge Colaw and Judge Sanders. (Kellner Decl., ¶ 19.)

4 The fourth major area of litigation involved substantive determination of motions for class
5 certification. Again, there was extensive discovery and motion practice involving class
6 certification – which was largely identical in each of the related Orange County Copper Pipe
7 actions. Following extensive rounds of briefing on multiple cases – as well as multiple hearings –
8 Judge Colaw first granted class certification in the lead related class action (*Del Rivero v. Centex*),
9 and Judge Sanders later granted class certification in this action on July 26, 2022 and five
10 additional related class actions. (Kellner Decl., ¶ 20.)

11 **A. Settlement Discussions in This Class Action.**

12 Subsequent to certification of this class action, the Parties engaged in arms-length
13 negotiations before Hon. Nancy Weiben-Stock (ret.) from JAMS ADR. As a result of this
14 mediation, the parties were able to reach agreement on settlement. (Kellner Decl., ¶ 21.)

15 At the outset, the settlement negotiations were conducted under the backdrop of the fact
16 that the relief obtainable against REBCO (the primary defendant) was limited to insurance
17 proceeds pursuant to the August 5, 2014 Order granting relief from the Automatic Bankruptcy Stay
18 against REBCO Communities, Inc. (Kellner Decl., ¶ 22.) That limitation was significant for the
19 Class because – unlike other proposed OC Copper Pipe class actions – the only contributions
20 toward the settlement would likely come from insurance and any cross-defendants. Further, there
21 was the potential for limitations on insurance based upon customary self-insured retention
22 provisions. (Kellner Decl., ¶ 23.) Notwithstanding such limitations, Plaintiffs were pleased to
23 obtain a settlement that – in gross *pro rata* recovery – is larger than any other of the OC Copper
24 Pipe cases. (Kellner Decl., ¶ 24.)

25 The terms of that negotiated settlement are reflected in this Agreement, which Plaintiffs
26 and their counsel contend are fair and reasonable under the circumstances. (Kellner Decl., ¶ 25.)
27 Indeed, Class Counsel engaged in substantial “due diligence” to determine the actual costs for
28 replacing the Class copper pipe systems with PEX by obtaining a bid from AMA Repiping – the

1 company that engaged in the actual repiping of homes in classes that were settled in these related
2 actions. While not recommending that any class member utilize AMA Repiping, Class Counsel
3 was able to obtain a bid from AMA Repiping that is attached hereto as Exhibit F, for each home in
4 the class based upon the floor plans for those homes (by address). (Kellner Decl., ¶¶ 26-27.) The
5 range of prices is from \$16,688 to \$18,940 based upon the size of the homes. (Kellner Decl., ¶ 27;
6 Exh. F.) This averages approximately \$17,500.00 per home. (Kellner Decl., ¶ 27.)

7 Class Counsel also obtained AMA Repiping’s contractual commitment to keep these prices
8 for one year for each homeowner. (Kellner Decl., ¶ 29.)

9 The proposed settlement provides for the establishment of a \$1,537,500.00 Settlement
10 Fund, which represents on a *pro rata* basis a total of \$12,500.00 for each home. (Kellner Decl., ¶
11 30.) This represents approximately 71.43% of the average cost to replace the copper pipes in the
12 homes that were provided to Class Counsel by AMA Repiping. (Kellner Decl., ¶¶ 26-30.) By any
13 measure, this is an extremely good result for the class.

14 Once the size of the Settlement Fund and the settlement class definition was agreed upon
15 by the parties, negotiation were conducted regarding the amount of attorneys’ fees/costs, class
16 administrator fees/costs and class representative enhancements for which Defendants will not
17 provide any objections. (Kellner Decl., ¶ 32.) Class Counsel agreed to a 1/3 contingency fee
18 calculation which – as will be demonstrated in the motion for approval of attorneys’ fees –
19 represents less than any apportionable lodestar for the actual legal work performed that benefitted
20 the settlement class. (Kellner Decl., ¶ 33.)

21 Significantly, the settlement is a “claims-paid” settlement – and the only reason that
22 payment would not be made from the Settlement Fund would be if a class member “opts-out” of
23 the settlement. (Kellner Decl., ¶ 34.) The only potential “reversion” will be the net class member
24 portion that would have been due to any opt-outs. (Kellner Decl., ¶ 35.)

25 The Plaintiffs and Class Representatives participated in the settlement negotiations, and
26 fully support the settlement. (Kellner Decl., ¶ 36-37; Torphy & Ali Decls., ¶ 8.)

27 **II. COURT APPROVAL IS REQUIRED FOR A CLASS SETTLEMENT**

28 Any settlement of class litigation is subject to Court review and approval. Pursuant to Rule

1 3.769(a) of the California Rules of Court: “[a] settlement or compromise of an entire class action,
2 or of a cause of action in a class action, or as to a party, requires the approval of the court after
3 hearing.” Moreover, Rule 3.769(e) provides that “[i]f the court grants preliminary approval, its
4 order must include the time, date, and place of the final approval hearing; the notice to be given to
5 the class; and any other matters deemed necessary for the proper conduct of a settlement hearing.”

6 The structure of this Settlement is virtually identical to those that have been preliminarily
7 approved by Judge Glenda Sanders in the *Dye v. Richmond American* (Case No. 30-2013-
8 00649460-CU-CD-CXS) and *Foti v. John Laing Homes (California), Inc.* (Case No. 30-2013-
9 00649415-CU-CD-CXC) actions. (Kellner Decl., ¶ 38.)

10 11 **III. THE PROPOSED SETTLEMENT AND ITS PRINCIPAL TERMS**

12 **A. The Proposed Settlement Agreement**

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

- 16 1. Within 30 days of preliminary approval of the proposed Settlement, Defendants
17 shall establish the Settlement Fund of \$1,537,500 million for the benefit of the
18 Settlement Class. (Exh A, § 3.1 and 3.1.0.)
- 19 2. The Settlement Class is be defined as:
20 *(1) All present owners of residential homes in the Class Area whose copper pipe*
21 *systems have not been replaced with PEX or epoxy coating by prior owners of the*
22 *homes, or (2) prior owners of homes in the Class Area who replaced their copper*
23 *pipe systems with PEX or epoxy coating, provided that: (a) the homes were*
24 *constructed by Warmington and substantially completed within ten (10) years of the*
25 *filing of the original complaint in this action, (b) the original purchase agreements*
26 *were signed by the builder on or after January 1, 2003, and (c) their SB 800 claims*
27 *were not released.*
- 28 3. The Class Administrator shall serve by U.S. Mail the Settlement and Class Notice,

1 Opt-Out Form and a Prior Owner Verification Form on all individuals within the
2 chain of title of the Class Homes listed on Exhibit “A” to the Settlement
3 Agreement.

4 a. For a Prior Owner to be included as a Class Member, that Prior Owner
5 must submit by mail or electronic means a Prior Owner Verification Form
6 to the Class Administrator within sixty (60) days of mailing that verifies
7 that the Prior Owner replaced the copper pipes in the Class Home with
8 PEX or epoxy coating of the pipes.

9 i. In the event a prior owner submits a Prior Owner Verification
10 Form stating that the prior owner has replaced the homes’ copper
11 pipes with PEX or epoxy coating, then the Class Administrator
12 shall provide the present owner with written notice: (a) that a
13 prior owner has submitted a Prior Owner Verification stating that
14 the prior owner replaced the homes’ copper pipes with PEX or
15 epoxy coating; and (b) the present owner has 30 days within
16 which to submit a written verification to the Class Administrator
17 that the home had copper pipes (without any epoxy coating) at
18 the time the present owner obtained title to the home. In the
19 event that there is a dispute between a prior and present owner as
20 to whether a prior owner had replaced the copper pipes with PEX
21 or epoxy coating, then the two homeowners shall submit proof
22 supporting their claims to the Class Administrator who will
23 forward such documentation to Hon. Nancy Weiben Stock (ret.)
24 of JAMS who: (a) shall serve as arbitrator of the dispute; and (b)
25 whose determination of those competing claims shall be binding.
26 The costs for Judge Stock’s services shall be deemed a “cost”
27 that shall be deductible from the Settlement Fund.
28

- 1 b. For a Present Owner to be included as a Class Member, the Present Owner
2 must not submit an Opt-Out Form and there must not be a Prior Owner
3 Verification Form submitted by a Prior Owner for the subject Class Home.
- 4 4. For all Notice papers returned as undeliverable or changed address, the Class
5 Administrator shall re-send the Notice documents after a skip-trace.
- 6 5. The Class Administrator must also create a dedicated website for this Settlement,
7 which will provide a portal for electronic submission of Opt-Out Forms, Prior
8 Owner Verification Forms and any Objections to the Settlement. The dedicated
9 website shall also make available the Settlement Agreement, the pleadings
10 submitted in support of preliminary approval, approval of attorneys' fees, costs and
11 class representative enhancements, and final approval. The dedicated website shall
12 also make available all Orders by this Court with respect to aforesaid motions.
- 13 6. Any member of the Settlement Class who desires to be excluded from the
14 Settlement Class, and therefore not be bound by the terms of the Settlement
15 Agreement, must submit to the Class Administrator, pursuant to the instructions set
16 forth in the Notice, a timely and valid written Request for Exclusion (attached as
17 Exhibit "D" to the Settlement Agreement).
- 18 7. Plaintiffs and Class Counsel shall separately file motions for approval by this Court
19 at the time of final approval of the following: (a) Attorneys' fees not to exceed one-
20 third (1/3) of the Settlement Fund (\$512,500.00), plus costs not to exceed
21 \$35,000.00; (b) Class administrator costs for this settlement not to exceed
22 \$27,000.00; and (c) Class representative incentive payment totaling \$20,000.00 (or
23 \$10,000 per each of the 2 class representative households).
- 24 7. To the extent any class member opts-out of the Settlement, the *pro rata* net
25 settlement payment that would have otherwise been due to that opt-out class
26 member shall be paid back to Defendant.
- 27 8. Settlement class members will release Defendants from claims **asserted in the**
28 **Action** (and expressly no other construction defect claims).

1 (Kellner Decl., ¶ 41 (a-k).)

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

3 The proposed Settlement Agreement provides for the most cost-effective administration of
4 the settlement, which imposes minimal burdens on the Class. Under SB 800, the relief sought in
5 this class action is the cost of replacing the copper pipes that fail to conform with the standards of
6 Civil Code § 896(a)(14) and (15) – *i.e.*, copper pipes that leak and/or corrode so as to lessen
7 their useful life. As a result, in the chain of title for each home, the individual who has a right to
8 redress will be either: (a) a homeowner who replaced the copper pipes; or (b) the present
9 homeowner. (Kellner Decl., ¶ 41.)

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

- 13 1) First, the class administrator will determine and then mail the Settlement and Class
14 Notice and other documents to the individuals in the chain of title for the homes in the
15 Class List.
- 16 2) Second, for the present owners on the Class List to receive any benefits from this
17 Settlement, **they do not have to do anything.**
- 18 3) Third, for prior owners who paid for a repipe/epoxy to receive the benefits from this
19 Settlement, they must fill out a simple Prior Owner Verification Form (attached as Exh
20 E to Kellner Decl.) that attests to their replacement of the copper pipes in the home that
21 is included in the Class. As noted above, Class Counsel will also be making a public
22 records search to determine the issuance of permits for the re-piping of the homes – that
23 will include the date(s) when the permits were issued and the name of the homeowner
24 at the time the permit was issued. (Kellner Decl., ¶ 42 (a-c).);
 - 25 a. In the event a prior owner submits a Prior Owner Verification Form stating that
26 the prior owner has replaced the homes’ copper pipes with PEX or epoxy
27 coating, then the Class Administrator shall provide the present owner with
28 written notice: (a) that a prior owner has submitted a Prior Owner Verification

1 stating that the prior owner replaced the homes' copper pipes with PEX or
 2 epoxy coating; and (b) the present owner has 30 days within which to submit a
 3 written verification to the Class Administrator that the home had copper pipes
 4 (without any epoxy coating) at the time the present owner obtained title to the
 5 home. In the event that there is a dispute between a prior and present owner as
 6 to whether a prior owner had replaced the copper pipes with PEX or epoxy
 7 coating, then the two homeowners shall submit proof supporting their claims to
 8 the Class Administrator who will forward such documentation to Hon. Nancy
 9 Weiben Stock (ret.) of JAMS who: (a) shall serve as arbitrator of the dispute;
 10 and (b) whose determination of those competing claims shall be binding. The
 11 costs for Judge Stock's services shall be deemed a "cost" that shall be
 12 deductible from the Settlement Fund. (Kellner Decl., ¶ 42(d).)

13 With respect to the *pro rata* relief provided, it compares favorably with the potential relief
 14 that the class members could receive at trial. Class Counsel has consulted with AMA – the
 15 company who actually replaced the copper pipes with PEX in two of the settlements in the related
 16 actions - to obtain the average cost of replacing the copper pipes in the Settlement Class homes.
 17 The average cost for replacement of the copper pipes (based upon house size and configuration) is
 18 approximately \$17,500.00. As a result, the gross *pro rata* recovery of \$12,500.00 for each home
 19 (the \$1,537,500 Settlement Fund divided by 123 homes) represents approximately 71.43% of the
 20 damages that could be attained at trial. (Kellner Decl., ¶¶ 26-30.) This – of course – is
 21 extraordinary given the limitations of recovery against the REBCO (the primary defendant) to
 22 insurance proceeds pursuant to the August 2014 Order granting relief from the automatic
 23 bankruptcy stay.

24 In the event that this Court approves the maximum application for attorneys' fees, costs,
 25 class representative enhancements and class administration costs, the *pro rata* net payments to
 26 each of the 123 class members will be \$7,666.66, calculated as follows:

27	Gross Settlement Fund	\$1,537,500.00
28	Attorneys' Fees (Max)	- \$512,500.00
	Attorney Costs (Max)	- \$35,000.00

Class Representative Enhancement	-	\$20,000.00
Class Administration Costs	-	\$27,000.00
Subtotal for Distribution		\$943,000.00
Per Class Member (÷ 123)		\$7,666.66

C. Attorneys’ Fees and Costs.

Pursuant to sections 3.1.6 and 7.1 of the Settlement Agreement, at the final approval hearing Class Counsel will apply to the Court for an award of attorneys’ fees not to exceed one third (1/3) of the Settlement Fund (or \$512,500.00) and costs (not to exceed \$35,000.00). This application will be supported with attorney declarations providing a cross-check of the lodestar attributable to the legal work that benefitted the Settlement Class. Defendants have agreed that they will not oppose such a request for fees and costs consistent with these amounts, and anticipates filing a statement of non-opposition to Class Counsel’s application for attorneys’ fees.

D. Incentive Payments to Named Plaintiff

Pursuant to Section 3.1.7 of the Settlement Agreement, Plaintiffs intend to apply to the Court for two (2) incentive payments (one for each household of Class Representatives) of \$10,000.00 each (*i.e.*, a total of \$20,000.00), subject to approval from this Court. (Kellner Decl., Exh A, § 3.1.7.) This sum shall be paid from the Settlement Fund.

IV. THE SETTLEMENT AGREEMENT MEETS ALL CRITERIA FOR COURT

APPROVAL

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

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

10 This settlement was reached only after arms-length negotiations. (Kellner Decl, ¶¶ 21-35.)
11 Further, the litigation in this and related copper pipe cases has been extensive and extraordinarily
12 time-consuming during the past 9 years. (Kellner Decl., ¶¶ 15-20.) It is safe to say that virtually
13 no aspect of this case has not been extensively researched, evaluated and litigated by counsel for
14 the parties. Finally, counsel for the Parties are experienced in similar litigation. The law firms of
15 Bridgford, Gleason & Artinian, Kabateck LLP, and McNicholas & McNicholas LLP are each
16 counsel in numerous related “pinhole leak” cases in Orange County – three of which have
17 previously settled on a class-wide basis.

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

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

26 The Settlement Class provides approximately 71.43% of the relief that the class members
27 could have received if they completely prevailed at trial. *See Kullar, supra* (Court should be
28 provided with information regarding any discounts provided for settlement

1 purposes). Nonetheless, there are significant risks to Plaintiffs and the class if this case were not to
2 be settled.

3 First, all trials have inherent risks – and there always remains the potential that law could
4 change between the present date and trial. In any event, the parties acknowledge that discovery
5 will be time consuming and expensive, and if a class is certified, a trial would be protracted and
6 costly.

7 Second, because relief to the Class against the primary defendant (REBCO) is limited to
8 insurance funds pursuant to the Bankruptcy Court Order, there are further risks involving
9 insurance claims that could further limit the class members’ recovery. This includes a potential
10 “offset” of the Self-Insured Retention due and owing by the Defendants against the jury award
11 (which issue could be further litigated in the U.S. Bankruptcy Court). (Kellner Decl., ¶¶ 22-23.)

12 For these reasons, Class Counsel recognize the risks involved in further litigation. In light
13 of the foregoing, Class Counsel maintain that the gross recovery of approximately 71.43% of the
14 Class’s potential trial damages is fair, reasonable, and adequate, and in the best interest of the
15 Class in light of all known facts and circumstances. (Kellner Decl., ¶ 52-53.) Indeed, if this matter
16 were to proceed to trial, Class Counsel would be well-within its right to: (a) incur additional expert
17 and trial-related costs; and (b) a 40% contingency fee – all of which would further dilute the net
18 recovery to the Class. (*Id.* at ¶ 54.)

19 **B. The Proposed Release**

20 The release proposed by the Settlement is specifically limited to claims of participating
21 Settlement Class members (who do not choose to opt out); and is further limited to only the claims
22 actually asserted in this action related to any alleged violations of Civil Code § 895 *et seq.* arising
23 from the installation of copper pipes. The release expressly excludes any *other* construction
24 defects or *other* claims relating to the construction of the homes. (Kellner Decl., ¶ 45.)

25 **V. THE PROPOSED NOTICE TO THE CERTIFIED CLASS IS APPROPRIATE**

26 “When the court approves the settlement or compromise of a class action, it must give
27 notice to the class of its preliminary approval and the opportunity for class members to object and,
28 in appropriate cases, opt out of the class.” *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177

1 Cal.App.4th 734, 746 (citing Cal. Rules of Court 3.769). California Rule of Court 3.769(f)
2 provides that “notice must contain an explanation of the proposed settlement and procedures for
3 class members to follow in filing written objections to it and in arranging to appear at the
4 settlement hearing and state any objections to the proposed settlement.” The rules also specify the
5 content of the notice to class members. Cal. Rules of Court 3.766. The “notice ... must fairly
6 apprise the class members of the terms of the proposed compromise and of the options open to
7 dissenting class members.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 251.
8 The proposed notice readily meets these requirements.

9 Plaintiffs submit that the proposed Notice is appropriate under California law and is the
10 best notice practicable for this Class of approximately 123 class members. The Notice describes in
11 plain language the background of the litigation, the benefits that Defendants will be providing to
12 the Class Members, the meaning and effect of opting out, the right to object and the procedure to
13 do so, the legal effect of not objecting, and the timing of other important events during the
14 settlement process. (See Notice attached as Exh. B to the Kellner Decl.) Indeed, the Notice is
15 modeled after the Federal Judicial Center’s forms, as suggested by the Court on its website, and is
16 substantively identical to the Class Notice that Judge Sanders has approved in these related actions.
17 (Kellner Decl., ¶ 48.)

18 The Notice provides concise details regarding the underlying litigation and explains to
19 Class members the options they have in exercising their rights accordingly. The Notice further
20 explains the scope of their release of Defendants should they decide to participate in the
21 Settlement. The Proposed Notice also provides contact information for the Class Administrator
22 and Class Counsel should Class members have further questions about the litigation or if they seek
23 clarity of the information provided in the Notice, as well as an interactive website. (*Id.*, ¶ 49; Exh.
24 B)

25 Plaintiffs maintain that the method of notice proposed for the class is the best notice
26 practicable under the circumstances, *i.e.*, mail. Plaintiffs anticipate that the proposed method of
27 providing notice information is the most reasonable method available. (Kellner Decl., ¶ 50.)
28

1 **VI. ILYM GROUP INC. SHOULD BE APPOINTED AS CLASS ADMINISTRATOR**

2 The Parties have agreed on ILYM Group, Inc. (“ILYM”) to handle the notice and claims
3 administration process as outlined in the Settlement Agreement. ILYM is experienced and
4 qualified in the area of class action administration and notice.

5 Plaintiffs and Class Counsel do not have any financial interest in ILYM or otherwise have a
6 relationship with ILYM Group Inc. that could create a conflict of interest. ILYM has provided a
7 cap of \$27,000 for its services – which are extensive considering its need to determine chain of
8 title information. (Kellner Decl, ¶ 51; Mullins Decl., ¶ 9.)

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

12
13 **VII. CONCLUSION**

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

- 15 1. Granting preliminary approval of the class action settlement between the Class (by
16 Plaintiffs) and Defendants Warmington Residential California, Inc. and REBCO
17 Communities, Inc. f/k/a Warmington Homes California, Inc;
- 18 2. Approving the proposed form and manner of notice to be provided to the settlement
19 class and directing that notice be effectuated to the settlement class;
- 20 3. Requiring that Defendants provide the Class Administrator and Class Counsel with an
21 electronic version of a Class List, identifying the homes and original owners of the
22 homes to be included in the Class from whom the Class Administrator can determine
23 individuals in the chain of title who may be a Class Member and should receive the
24 Settlement Notice (attached to the Settlement Agreement (Exhibit A, as Exhibit A
25 thereto);
- 26 4. Approving ILYM Group Inc. as Class Administrator to administer the notice and
27 claims procedures; and
28

1 5. Setting a hearing for final review of the proposed settlement in Department CX-101 of
2 the above-entitled Court.

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

Date	Event	
Day 14	Deadline for Class Administrator Getting Addresses (note – already done)	Ten court days after Preliminary Approval.
Day 30	Settlement and Class Notice going out	Thirty days after Preliminary Approval.
Day 90	Objection Deadline	Sixty days after Notice
Day 97	Class Administrator Report Due to Court	Seven days after Opt-Out & Objection deadline
Day 102	Motion for Final Approval and Fees	<i>Plaintiffs suggest it will be prepared within 5 days of the Class Administrator Report, if not sooner</i>
Day 126	Final Approval Hearing	24 days after Motion is filed

16 Dated: November 29, 2022

KABATECK LLP
BRIDGFORD, GLEASON & ARTINIAN
McNICHOLAS & McNICHOLAS LLP

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

20 Richard L. Kellner & Michael H. Artinian
21 Attorneys for the Certified Class

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SERVICE LIST
Ali v. Warmington Residential California, Inc., et al.
Orange County Superior Court Case No.: 30-2013-00689593

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