

1 BRUCE MAYFIELD, ESQ., ABN:020884
2 DANIEL CLIFFORD, ESQ., ABN:019710
3 FEINBERG GRANT MAYFIELD KANEDA & LITT, LLP
4 1955 Village Center Circle
5 Las Vegas, NV 89134
6 (702) 947-4900 / (702) 947-4901 FAX
7 Attorneys for Plaintiffs

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SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

JOAN KIRSCH; individually and on behalf
of the class members at the Anthem and;
and ROE HOMEOWNERS 1 through 9500;

Plaintiffs,

v.

DEL WEBB COVENTRY HOMES, INC.,
an Arizona Corporation; ANTHEM
ARIZONA, LLC, an Arizona limited
liability company; PULTE HOME
CORPORATION, an Illinois corporation;
DEL WEBB'S COVENTRY HOMES
CONSTRUCTION CO., an Arizona
corporation, and DOES 1 through 100,
inclusive,

Defendants.

CASE NO.: CV 2007-023536
The Honorable Douglas Rayes

(Electronic Filing Case)

Hearing Date Previously Set By Court

Hearing Date: 08/14/09

Hearing Time: 10:30 a.m.

**MOTION FOR CLASS CERTIFICATION AND MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT THEREOF**

COMES NOW plaintiff Joan Kirsch, individually and on behalf of all similarly
situated persons, by and through Feinberg Grant Mayfield Kaneda and Litt, LLP, her
attorneys of record with her memorandum of points and authorities in support of
certification of a class consisting of the current owners of houses constructed by the
defendants in a planned community development commonly known as "Anthem." in
Maricopa County, Arizona.

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NOTICE OF MOTION

TO: ALL DEFENDANTS

YOU AND EACH OF YOU will please take notice that the undersigned will bring the foregoing MOTION FOR CLASS CERTIFICATION on for hearing before the Court on the 14th day of August, 2009 at the hour of 10:30 a.m.

DATED this 17th day of June, 2009.

**FEINBERG GRANT MAYFIELD
KANEDA & LITT, LLP**

By: s:/Bruce Mayfield, Esq.
BRUCE MAYFIELD, ESQ., ABN:020884
DANIEL CLIFFORD, ESQ., ABN:019710
1955 Village Center Circle
Las Vegas, Nevada 89134

Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND OF LITIGATION

To date, 60 homes in the Anthem Arizona community have experienced failures in their underslab unsleeved copper water pipes. This exact same problem occurred in another Del Webb community in Sun City Summerlin, Las Vegas, Nevada. There are approximately 7,779 homes in the Summerlin community; construction began in 1986. Ultimately, 5,742 of the Summerlin homes would be constructed with unsleeved copper water pipe that ran beneath the cement slab foundations of the homes. The hot and cold water copper pipe were run side by side in a trench beneath the concrete slabs of each home - - a construction practice identical to what would be used 9 years later in the community of Anthem, thirty miles north of Phoenix, Arizona.

1 The Summerlin homeowners began reporting underslab pipe leaks to Del Webb in
2 February 1996. In most instances, the homeowner would notice an increase in water
3 usage and discover a warm spot in the floor of their residence. In May of 1996, Del Webb
4 hired M.J. Schiff and Associates Inc., corrosion engineers, to investigate the failure of the
5 copper water lines in Summerlin.¹ Graham Bell, PhD, President of M.J. Schiff, was the
6 principal investigator.² Mr. Bell's preliminary report and recommendations were
7 published June 25, 1996.³ His conclusion was that the cause of the leaks in underslab
8 copper water pipe in Sun City Summerlin was thermal-galvanic corrosion. Mr. Bell
9 reported as follows:
10

11
12 "If mitigation measures are not taken, leaks will continue to occur, probably
13 at an increasing rate. It is likely that there are homes which are leaking
14 which have yet to be reported. Eventually, the leaks will manifest
15 themselves either as by physical (warm spots in the floor) or economic
16 factors (increased energy cost)."⁴

17 Mr. Bell's final report of "Cathodic Protection Feasibility Study for Domestic
18 Underslab Copper Tubing" for the Summerlin development was published October 21,
19 1996.⁵

20 After Graham Bell confirmed that thermal-galvanic corrosion was causing copper
21 water pipe failures in Sun City Summerlin, Mr. Bell was asked to investigate the house
22

23 ¹Exhibit 1. As used hereinafter "Exhibit" refers to the exhibits attached to the affidavit of Bruce
24 Mayfield filed concurrently with and in support of this motion for class certification.

25 ²Deposition of Graham Bell, Ph.d, Volume I, taken May 12, 2004 in Las Vegas, Nevada in
26 *Bernard Silver, et al. v. Del Webb Communities, Inc, et al.*, Clark County District Court Case No.
27 A437325, at 16:5 to 17:4; *see also*, Exhibit "2."

28 ³*Id.* at 150:8 to 151:14; *see also*, Exhibit "3".

⁴Exhibit "3," at 4.

⁵Deposition of Graham Bell, Ph.d, Volume I, taken May 12, 2004 at 62:15 to 63:19; *see also*,
Exhibit "4."

1 of Phillip Dion, the Chief Executive Officer and Chairman of the Board for Del Webb in
2 Phoenix, Arizona.⁶

3 A video conference to provide information concerning thermal-galvanic corrosion
4 and soil corrosivity testing guidelines in September of 1996 was held for all Del Webb's
5 vice-President of Construction and Vice-President of Land Development across the
6 nation.⁷

8 On November 1, 1996, Frank D. Pankratz, Senior Vice-President and General
9 Manager for Del Webb in Las Vegas, Nevada, wrote to all Sun City Summerlin residents.⁸
10 In this letter, just days after Mr. Bell's final report concerning thermal-galvanic corrosion
11 was published, Mr. Pankratz advised the Sun City Summerlin homeowners that 17
12 homes in Summerlin had experienced thermal-galvanic corrosion. On May 23, 1997, Mr.
13 Pankratz again wrote the Sun City Summerlin residents concerning thermal-galvanic
14 corrosion and the failure of 29 homes spread throughout the community⁹. Mr. Pankratz
15 wrote the homeowners a third time on June 22, 2001.¹⁰ At that time, Mr. Pankratz
16 reported that thermal-galvanic corrosion had occurred in less than 300 of the
17
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21 ⁶Deposition of Toby Loughrige, taken on March 23, 2009 in *Joan Kirsch et al v. Del Webb Coventry
Homes, et al.*, Maricopa County Superior Court, Case No. CV2007-023536, 96:17-23; *see also*, Exhibit "5."

22
23 ⁷Deposition of Scott Widener, Volume I, taken on Thursday, May 15, 2003 in Las Vegas, Nevada
24 in *Bernard Silver, et al. v. Del Webb Communities, Inc, et al.*, Clark County District Court Case No.
A437325; pages 72:1 to 73:1 and 73:10 to 74:16.

25 ⁸Deposition of Frank Pankratz at 56:4-16 taken Wednesday, May 14, 2003 in Las Vegas, Nevada
26 in *Bernard Silver, et al. v. Del Webb Communities, Inc, et al.*, Clark County District Court Case No.
A437325; *see also*, Exhibit "6."

27 ⁹*Id.* at 114:20 to 115:21; *see also*, Exhibit "7." (A later copy of this letter was interlineated near
28 Mr. Pankratz' signature to reflect that between May 1997 and October 1998 an additional 30 Sun City
Summerlin homes suffered sub-slab copper water pipe leaks).

¹⁰Exhibit 8.

1 approximately 7,800 homes in Sun City Summerlin.¹¹

2 On July 17, 2001, a group of Sun City Summerlin residents filed a construction
3 defect class action lawsuit against Del Webb based upon the underslab copper water pipe
4 failures due to thermal-galvanic corrosion in the community.¹²

5
6 The Sun City Summerlin thermal-galvanic corrosion class action was certified by
7 the Clark County District Court on January 15, 2002. On October 4, 2002, Chris Haynes,
8 Division President for Del Webb Communities, Inc. wrote all Sun City Summerlin
9 homeowners and encouraged them not to opt-out of the class action lawsuit.¹³

10
11 On June 18, 2004, after nearly 3 years of discovery and negotiations, 3 days prior
12 to the commencement of trial, the parties reached a proposed settlement which was
13 preliminarily approved by the Clark county District Court Judge Nancy M. Saitta (now
14 a Justice on the Nevada Supreme Court) on June 21, 2004. The final class action
15 settlement in the Sun City Summerlin matter was approved on August 24, 2004.
16 Through August of 2004, 695 homes with unsleeved underslab copper water pipe had
17 failed due to thermal-galvanic corrosion in Sun City Summerlin. The total settlement
18 reached in the *Silver* case was \$21,500,000.00; each class member received \$5,000.00 to
19 re-plumb their underslab copper pipe overhead.
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22 ...

23 **ANTHEM ARIZONA**

24
25 ¹¹While there were 7779 homes in Sun City Summerlin, only approximately 5742 of them had
26 unsleeved, underslab copper pipe, and only 3807 were included in the *Silver* class action; 1900 plus
homes were excluded due to the Nevada Statute of Repose.

27 ¹²*Bernard Silver, et al. v. Del Webb Communities, Inc, et al.*, Clark County District Court Case
28 No. A437325, filed on July 17, 2001.

¹³Exhibit "9."

1 Anthem Arizona is a master planned community in Anthem, Arizona. There are
2 9,364 single family homes in the Anthem Community. Approximately 3,533 homes have
3 unsleeved copper water pipe running in a single trench beneath the concrete slabs of the
4 homes. Both the hot and cold water pipes are run in a trench beside one another,
5 identical to the construction practice employed in Sun City Summerlin, Las Vegas,
6 Nevada. Homes with unsleeved copper pipe closed escrow between July 9, 1999 and
7 December 2003.¹⁴ In late 2003, a decision was made to stop using copper pipe in the
8 Anthem community and plumb Ipex pipe overhead. Before the decision was made to use
9 Ipex pipe, all of the homes in Anthem were built with underslab, unsleeved copper water
10 lines.¹⁵ Mr. Ray Noble was a Lead Superintendent, Project Manager, and Director of
11 Construction at Anthem from its inception until he left in 2003¹⁶. While at Anthem,
12 either Riggs Plumbing or AMPAM Riggs Plumbing did all of the underslab copper water
13 pipe installation at Anthem.¹⁷ The hot and cold copper water pipe was run in a trench
14 unsleeved underslab.¹⁸

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18 Construction began in Anthem in 1998, two years after the first thermal-galvanic
19 corrosion pipe leaks in unsleeved underslab copper pipe were found in Sun City
20 Summerlin, Las Vegas, Nevada. The first underslab copper water pipe leak attributed
21

22
23 ¹⁴Exhibit 10.

24 ¹⁵Deposition of Matthew Spina taken March 12, 2009 in *Joan Kirsch et al v. Del Webb Coventry Homes, et al.*, Maricopa County Superior Court, Case No. CV2007-023536, 41:4 to 42:20, 46:5 to 49:20.

25 ¹⁶Deposition of Ray Noble taken March 25, 2009 in *Joan Kirsch et al v. Del Webb Coventry Homes, et al.*, Maricopa County Superior Court, Case No. CV2007-023536, 13:13 to 14:19.

26
27 ¹⁷*Id.* at 16:17-25.

28 ¹⁸ Deposition Spina, 52:1-18; deposition Noble, 21:10 to 22:11, 25:11 to 27:9; deposition of Steve Koebele, taken on March 24, 2009 in *Joan Kirsch et al v. Del Webb Coventry Homes, et al.*, Maricopa County Superior Court, Case No. CV2007-023536, 35:15 to 36:15.

1 to thermal-galvanic corrosion in Anthem was reported by Del Webb in June of 2000.¹⁹
2 Unfortunately, Del Webb did not start keeping track of underslab copper water pipe leaks
3 until sometime in 2004, and then only informally by reliance upon its customer relations
4 managers to report thermal-galvanic corrosion leaks at Anthem.²⁰
5

6 Matthew Spina is the present General Manager of all special operations for Del
7 Webb/Pulte.²¹ Mr. Spina first heard of underslab unsleeved copper pipe leaks in 1999 or
8 2000.²² Mr. Spina participated in the first investigations of thermal-galvanic corrosion
9 pipe leaks. It is his recollection that a sample of the pipe was sent to Brad Oberg, a
10 consultant with IBACOS, who determined that the cause of the leak was thermal-
11 galvanic corrosion.²³ IBACOS is an acronym which stands for Integrated Building and
12 Construction Solutions.²⁴ IBACOS is Pulte Homes consultant of choice across the country
13 for issues where they need to get scientific answers.²⁵ IBACOS was asked to investigate
14 thermal-galvanic corrosion in Anthem²⁶ and published a report October 26, 2006.²⁷
15

16 ...

17 ...

18 CONTRIBUTING FACTORS TO PIPE CORROSION

19
20
21 ¹⁹Deposition Spina, 37:8-13.

22 ²⁰Deposition Loughrige, 56:7 to 58:6, 58:22 to 59:11.

23 ²¹Deposition Spina at 5:15-21, 6:12-16.

24 ²²*Id.* at 11:11-23.

25 ²³*Id.* at 18:5-22.

26 ²⁴www.IBACOS.com/about/history.

27 ²⁵Deposition Spina at 85:21 to 86:18.

28 ²⁶Deposition Koebele at 62:7 to 63:9.

²⁷Deposition Spina at 86:10-14; *see also*, Exhibit "11."

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Several important facts were emphasized in the IBACOS Report:

“**Corrosive Soil** Soils tested in the area have shown moderate or low corrosiveness potential. If soil testing reports could be found ,the typical comment is that the soil tested is moderate or low, but not free of corrosion potential. . .”²⁸

“**Conductive Soil** Soils testing in the area has shown moderate to high conductivity potential. It does not appear that anyone considered these measurements important. Even without corrosiveness potential, highly conductive soils will contribute to a galvanic group. When conductive soils combine with even low levels of corrosiveness, a large potential for corrosion is set up. . .”²⁹

“**Water Temperature** Thermal-galvanic corrosion is driven by temperature differences between the hot anode and the cold cathode. Temperature difference creates an electrical potential, particularly when water is running. This potential combined with the electrical conductivity of the soils can result in copper ions leaving the hot water pipe onto the cold water pipe.”³⁰

“**Hot Water Circulating Systems** . . .The combination of moving water and temperature will exasperate thermal-galvanic corrosion.”³¹

“**Proximity of Hot and Cold Water Pipe** The proximity of the hot and cold water pipes to each other contributes to higher rates of thermal-galvanic corrosion. When the hot and cold pipes are buried in the same trench, and sometimes touching or crossing, it doesn’t take a very highly conductive soil to allow a conductive loop to be created.”³²

To date, the total number of thermal-galvanic corrosion underslab leaks in copper pipe at Anthem that have been documented by Del Webb/Pulte is 60.³³ However, testimony of Del Webb customer relation managers in the special operations group, which

²⁸Exhibit “11” at 2.

²⁹*Ibid.*

³⁰*Id.* at 3.

³¹*Ibid.*

³²*Ibid.*

³³Exhibit 12.

1 was assigned to respond to, repair, and track underslab thermal-galvanic corrosion copper
2 water pipe leaks, gives rise to a strong inference that the number of thermal-galvanic
3 corrosion leaks has been significantly under-reported.³⁴
4

5 Steve Koebele became the general manager of customer relations special operations
6 group for Del Webb/Pulte sometime in 2006. The special operations group was a division
7 formed to handle warranty issues on homes between 18 months and ten years after their
8 close of escrow.³⁵ This special operations division was formed sometime in 2005.³⁶ The
9 customer relations managers in the special operations division, when it was originally
10 formed, were Matthew Spina, who was the manager of the division, Toby Loughrige,
11 Steve Koebele, and several Others.³⁷ Matthew Spina testified at deposition that at some
12 point in time, Del Webb/Pulte developed a protocol for repairing thermal-galvanic leaks
13 which did not include any investigation of the corroded copper pipe. If the tell-tale signs
14 of a thermal-galvanic corrosion leak is present in a home - - underslab pipe, warm floor
15 and increased water usage - - the Del Webb/Pulte repair was to abandon the copper hot
16 water pipe and re-plumb the hot water service overhead.³⁸ In part, the decision to re-
17 plumb the hot water pipe overhead was based upon the fact that repair of the pipe
18 beneath the slab did not prevent the reoccurrence of thermal-galvanic corrosion and
19 additional underslab leaks.³⁹
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24 ³⁴Deposition Loughrige, 56:7 to 58:16.

25 ³⁵Deposition Koebele, 11:21 to 12:19.

26 ³⁶*Id.* at 14:13-19.

27 ³⁷*Id.* at 14:22 to 15:3.

28 ³⁸*Id.* at 36:22 to 37:24.

³⁹*Id.* at 37:25 to 38:22.

1 The other significant reason Del Webb/Pulte's ceased investigating thermal-
2 galvanic corrosion leaks in the Anthem community was to avoid gathering evidence which
3 could be used against it in any subsequent class action lawsuit in Anthem.⁴⁰ In Sun City
4 Summerlin, Del Webb/Pulte repeatedly notified the homeowners of the thermal-galvanic
5 corrosion underslab copper water pipe leak problem as the number of leaks increased over
6 time. Summerlin homeowner questions were answered at homeowner meetings and with
7 mailings which described what thermal-galvanic corrosion was, how to recognize it, and
8 how it would be repaired if a homeowner experienced such a leak.⁴¹

9
10
11 Disturbingly, in Anthem, Del Webb has clearly made a decision to not notify
12 homeowners about the occurrence of underslab copper pipe leaks due to thermal-galvanic
13 corrosion.⁴² Charles Meyer has been a customer relations manager with Pulte since 2005
14 and he has been the manager of the special operations team of customer relations
15 managers since mid to late 2007; his responsibility includes the Anthem community and
16 repair of underslab copper pipe leaks due to thermal-galvanic corrosion. At the time of
17 Mr. Meyer's deposition in March of 2009, he had undertaken no investigation concerning
18 the thermal-galvanic corrosion problem in Anthem; nor had he asked any of his customer
19 relations managers to track underslab copper pipe leaks, and as far as he knew no one
20 is tracking the occurrence of underslab copper pipe leaks in Anthem at the present time.⁴³

21
22 When asked how many leaks would have to occur in underslab copper pipe in Anthem
23

24
25 ⁴⁰ *Id.* at 42:6 to 43:23.

26 ⁴¹ Exhibits "13" and "15."

27 ⁴² Deposition of Charles Meyer, III, taken on March 26, 2009 in *Joan Kirsch et al v. Del Webb*
28 *Coventry Homes, et al.*, Maricopa County Superior Court, Case No. CV2007-023536, 44:17 to 45:9, 53:14
to 55:14.

⁴³ *Id.* at 60:3-15.

1 before Del Webb/Pulte would notify the homeowners, Mr. Meyer responded “I don’t
2 know.”⁴⁴

3 Pulte’s decision to not disclose the occurrence of thermal-galvanic corrosion in the
4 Anthem community has also been imposed upon homeowners whose homes suffered a
5 thermal-galvanic corrosion pipe leak which Del Webb repaired. In emails sent from
6 Chuck Meyer to Jeff Salmon, Vice-President in charge of customer relations in Anthem,
7 Mr. Meyer specifically indicates that the homeowners were given a release letter which
8 required that they were “not to discuss the repairs with other homeowners.”⁴⁵

9
10 Mr. Meyer has never seen any matrices or maps tracking underslab copper water
11 pipe leaks.⁴⁶ Steve Koebele, a prior manager of the special operations team of customer
12 relation managers, testified that several maps were prepared showing the location of
13 thermal-galvanic corrosion copper pipe failures.⁴⁷ Equally puzzling, is the fact that Mr.
14 Meyers was unaware of and had never seen the IBACOS report which determined that
15 thermal-galvanic corrosion was occurring in Anthem.⁴⁸

16
17
18 ...

19 Toby Loughrige left the Anthem community in June or July of 2007.⁴⁹ When Mr.
20 Loughrige left the Anthem community, he did not know who would have the
21 responsibility of keeping track of thermal-galvanic corrosion copper pipe leaks and does
22

23
24 ⁴⁴*Id.* at 60:16 to 61:4.

25 ⁴⁵Exhibit “14.”

26 ⁴⁶Deposition Meyer at 51: to 52:3 and 61:16 to 62:9.

27 ⁴⁷Deposition Koebele at 72:3-13.

28 ⁴⁸Deposition Meyer at 40:18 to 41:22.

⁴⁹Deposition Loughrige at 32:7-13.

1 not know if anyone is keeping track of the leaks at this time.⁵⁰ During the time that Mr.
2 Loughrige was tracking and recording thermal-galvanic corrosion leaks in the Anthem
3 community, there was never a letter sent to homeowners concerning thermal-galvanic
4 corrosion, nor was there any town hall meeting with the homeowners to discuss underslab
5 leaks.⁵¹ Toby Loughrige was the only individual at Del Webb/Pulte with responsibility
6 for mapping thermal-galvanic corrosion leaks in the Anthem community.⁵²
7

8 INTRODUCTION AND STATEMENT OF FACTS

9 Plaintiff Joan Kirsch is an owner of one of 9,500 houses planned, designed,
10 developed, constructed and sold at the Subject Property by Del Webb Coventry Homes,
11 Anthem Arizona, LLC; Pulte Home Corporation; and, Del Webb's Coventry Homes
12 Construction Co. (hereinafter, collectively, "Del Webb"). Approximately 3,533 homes at
13 the Subject Property, including the house owned by plaintiff Kirsch, has a plumbing
14 system constructed of uninsulated copper pipe, portions of which are buried in a trench
15 beneath the house foundation. As a result of thermal-galvanic corrosion, the copper pipes
16 are corroding to the point of failure and are required to be replaced at significant cost.
17
18

19 The 3,533 homes at Anthem were mass produced pursuant to common plans,
20 specifications and blueprints. No house is unique; rather, each is substantially similar
21 to the others.

22 This case fits perfectly into the criteria as enunciated in *London v. Green Acres*
23 *Trust*, 159 Ariz. 136, 139 (App. 1988) for certification as a class action:
24

25 Numerosity: The proposed class consists of the owners of 3,533 single family

26 ⁵⁰ *Ibid.*

27 ⁵¹ *Id.* at 32:14-21; Deposition Koebele at 55:19 to 57:8.

28 ⁵² Deposition Loughrige at 111:19 to 112:6.

1 homes.

2 Commonality: All plaintiffs have alleged claims for breach of express and implied
3 warranty. All plaintiffs have alleged similar damages arising from the defective
4 copper piping used in the plumbing systems.

5 Typicality: All members of the class are owners of nearly identical homes at
6 Anthem. All homes are exposed to corrosion of the copper pipe installed below the
house foundation.

7 Adequacy: Counsel for the class representative is very experienced in construction
8 defect cases and class action complex litigation. There is no conflict between the
9 class representative and members of the punitive class. All seek damages arising
out of identical construction defects.

10 Prosecution of Separate Actions Would Create a Risk of Inconsistent Adjudications:
11 Plaintiff's allegations in the complaint regarding the varying adjudications must
be taken as true for purposes of class certification.

12 Common Issues Predominate and a Class Action is a Superior Method: Due to the
13 complex nature of this construction defect action and the high cost of prosecuting
14 a construction defect case, a class action is superior to 3,533 separate actions.

15 Class actions are governed by Arizona Rules of Civil Procedure, rule 23 that is
16 generally based on the Federal Rules of Civil Procedure, rule 23 with exceptions that are
17 not applicable here. Class actions are favored as a practical tool to resolve multiple
18 claims on a consistent basis at a cost savings to plaintiffs, defendants and the courts.
19 *Andrew S. Arena, Inc. v. Superior Court (Maricopa)*, 163 Ariz. 423, 425 (1990). As a
20 result, rule 23 should be construed liberally and all doubts regarding certification should
21 be resolved in favor of certification. *ESI Ergonomic Solutions, LLC v. United Artists*
22 *Theatre Circuit, Inc.*, 203 Ariz. 94, 98 (App. 2002).

24 ...

25 The burden to demonstrate the propriety of class certification falls on the purported
26 class representative. *Carpinteiro v. Tucson School District No. 1 of Pima County*, 18
27 Ariz.App. 283, 286 (App.1972). Certification of a class is within the trial court's
28

1 of a class of sixty condominium owners to address defective construction of the
2 condominium's common elements. *But see, Shuette v. Beazer Homes Holding Corp.*, 121
3 Nev. 837, 856 (2005) (class certification not warranted were the soils conditions at issue
4 required independent litigation of the liability to each parcel and its owner).

5
6 *Deal* has been relied upon by courts in California to certify classes in construction
7 defect cases. *See Raven's Cove Townhomes v. Knuppe Development Co.*, 114 Cal.App.3d
8 783 (1981) (class action by 65 homeowners); *Erreca's v. Superior Court* 19 Cal.App.4th
9 1475 (1993) (class action by 88 homeowners); *Del Mar Beach Club Owners Association v.*
10 *Imperial Contracting Company*, 123 Cal.App.3d 898 (1981) (class action by owners of 192
11 units).

12
13 Another California case is very similar to the one for which certification is being
14 sought before the Court. In *Hicks v. Kaufman and Broad Home Corp.*, 89 Cal.App. 4th 908
15 (2001), homeowners brought a construction defect action against the developer for
16 damages arising out of the developer's use of a defective product in each of their 10,000
17 concrete house foundations that allowed, or would allow, the foundations to crack. The
18 court rejected the developer's contention that the class was not ascertainable as required
19 by the California Supreme Court in *Vasquez v. Superior Court*, 4 Cal.3d 800, 809 (1971).

20 The *Hicks* court concluded:

21
22 "The class in the case before us is ascertainable. It consists of the owners
23 of homes in specified developments constructed and marketed by Kaufman
24 in which Fibermesh was utilized in the concrete foundation slabs. As such,
25 the class is precise, objective, and can be determined from public records and
Kaufman's own records ..."

26 *Hicks*, 89 Cal.App.4th at 916.

27 Colorado also has approved class actions to resolve construction defects litigation.

28 *See Villa Sierra Condominium Association v. Field Corporation*, 787 P.2d 661

1 (Colo.App.1990), *abrogated by statute on other grounds*. In *Villa Sierra* the court certified
2 a class of the owners of 200 units in the development.

3 **II. The Proposed Class Satisfies the Requirements of A.R.C.P. 23(a)**

4 The general requirements for certification of a class are set forth in A.R.C.P. 23(a):

5
6 “One or more members of a class may sue or be sued as representative
7 parties on behalf of all only if (1) the class is so numerous that joinder of all
8 members is impracticable, (2) there are questions of law or fact common to
9 the class, (3) the claims or defenses of the representative parties are typical
10 of the claims or defenses of the class, and (4) the representative parties will
11 fairly and adequately protect the interests of the class.”

12 In the jargon of class actions these prerequisites are referred to as “numerosity,”
13 “commonality,” “typicality,” and “adequacy.”

14 **A. Numerosity**

15 The general rule to meet the “numerosity” prerequisite is that the class is so
16 numerous that joinder of all members would be impracticable. *London v. Green Acres*
17 *Trust, supra*, 159 Ariz. at 139. The Second Circuit of Appeals, in the context of the
18 analogous F.R.C.P. 23(a) numerosity prerequisite, has stated “Impracticable does not
19 mean impossible.” *Robidoux v. Celani*, 987 F.2d 931, 935 (2nd Cir.1993). The key is that
20 the number of potential class members must be positively demonstrated in an
21 examination of the specific facts of each case. *Id.* at 936. In reaching a conclusion for
22 numerosity, courts may consider “judicial economy arising from the avoidance of a
23 multiplicity of actions, geographic dispersion of class members, financial resources of
24 class member, the ability of claimant to institute individual suits and request for
25 prospective injunctive relief which would involve future class members”
26

27 Here, that prerequisite is easily met. There are 3533 homes in Anthem with
28 unsleeved copper pipe and, clearly, joining the owners of each of those houses would be

1 impracticable. Furthermore, they are in the same geographical area, the costs for
2 pursuing individual actions would weigh heavily on the individual members with respect
3 to attorney fees, expert investigation and other court costs and the burden of having even
4 a small percentage of the owners filing separate actions would be overwhelming on the
5 court.
6

7 **B. Commonality**

8 In Arizona, courts tend to merge the analysis of the commonality prerequisite of
9 rule 23(a) with the analysis of rule 23(b)(3) of whether those common question
10 predominate over questions affecting only individual class members. *Reader v. Magma-*
11 *Superior Copper Co.*, 110 Ariz. 115, 119 (1973). Therefore, the question of whether the
12 commonality prerequisite is met, will be addressed *post*.
13

14 **C. Typicality**

15 As a general rule, the typicality prerequisite concentrates on the defendants'
16 actions, not the conduct of the plaintiffs. *See, e.g., Wagner v. NutraSweet Co.*, 95 F.3d,
17 527, 534 (7th Cir.1996) ("Typicality under [F.R.C.P.] 23(a)(3) should be determined with
18 reference to the [defendant's] actions, not with respect to particularized defense it might
19 have against certain class members"); *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 404
20 (D.C.Pa.1995) ("When inquiring into the typicality requirement under [F.R.C.P.] 23(a)(3),
21 the focus must be on the defendant's behavior and not that of the plaintiffs"). The
22 typicality prerequisite can be satisfied by showing that "each class member's claim arises
23 from the same course of events and each class member makes similar legal arguments to
24 prove the defendant's liability." *Robidoux*, 987 F.2d at 936.
25
26

27 Thus, to meet the typicality prerequisite the representative's claims need not be
28 identical, and class certification will not be prevented by mere factual variations among

1 the class members' underlying individual claims. *Robidoux*, 987 F.2d at 936.

2 Here, Del Webb was responsible for the planning, design, development,
3 construction and sale of every house at Anthem. In each house, Del Webb, through a
4 single subcontractor, installed the copper pipe plumbing under each concrete foundation
5 slab.
6

7 In *Hicks v. Kaufman Broad Home Corp.*, *supra*, 89 Cal.App.4th at 922 - 923, the
8 court addressed the question of whether every homeowner had to have had a failure of
9 their defective concrete foundation slab to be included in the class. After distinguishing
10 two California products liability class actions where certification was rejected because
11 there was no history of the products failing, the *Hicks* court stated:
12

13 “Foundations, however, are not like cars or tires. Cars and tires have a
14 limited useful life. At the end of their lives, they, and whatever defect they
15 may have contained, wind up on a scrap heap. If the defect has not
16 manifested itself in that time span, the buyer has receive what he bargained
17 for. A foundation’s useful life, however, is indefinite. Some houses continue
18 to provide shelter for centuries. And in contrast to cars and tires ...,
19 plaintiffs in the case at bench present expert testimony based on
20 observations and analysis showing foundations containing Fiber mesh ‘will
21 someday most likely crack badly’ and cause problems in the floor and
22 premature wearing of carpeting and damage to vinyl floor coverings and
23 ceramic tile.”

24 *Ibid.*

25 The same is true for the copper piping under the concrete foundation slabs at
26 Anthem. Copper tubes have been used for millenniums to convey water. The first use
27 is considered to have occurred about the year 2750 B.C. The Berlin State Museum has
28 an example of copper tubing that was taken from the Temple of King Sa-Hu-Re at Abusir
in Egypt. See www.eurocopper.org/copper/plumbing-heating.html, June 10, 2009.

“Copper’s popularity is based on a combination of properties that make it
unique. It is capable of withstanding extremes of heat without suffering any
degradation. It is resistant to corrosion and high water pressure. I doesn’t

1 burn, it keeps its shape and strength in high temperature environments and
2 it give long life service.”

3 *Ibid.*

4 “Plumbing system engineers and designers most often select copper because
5 of its history of good performance. A conservative service life of 20 years is
6 generally assumed for design purposes, but an actual life of 25 to 30 years,
and more in some areas of the U.S., is usually obtained.”

7 Richard O. Lewis, *History of Use and Performance of Copper Tube for Potable Water*
8 *Service*, (July, 1999), p1. See www.wssc.dst.md.us/copperpipe/copperpipewp.cfm , June
9 10, 2009.

10 While copper pipe is superior to almost any other type of pipe, “[p]roper
11 construction and installation of copper water plumbing is highly dependent on the skill
12 and workmanship of the plumbing contractor in assembling and joining copper tube to
13 the fittings and valves necessary to construct a distribution system.” Lewis, *supra*, at p2.

14 A serious problem occurs when cold and hot water pipes are laid side by side in a
15 trench under a foundations slab. Through a process known as Thermal Galvanic
16 Corrosion (TGC), the difference in temperature between the two pipes causes a galvanic
17 action (similar to how a car battery operates) resulting in the corrosion, and eventual
18 failure in the hot water pipe. More technically:
19

20
21 “An electrical potential difference develops between two identical pieces of
22 copper piping when one of the pieces is heated. The increase in the surface
23 or pipe to soil potential with an increasing temperature is an intrinsic or
24 natural property of copper. In domestic water systems, a potential
25 difference is developed between the hot and cold water piping whenever hot
26 water runs through the hot water piping. This potential difference provides
27 the driving force for a corrosion cell. Corrosion damage occurs to the hot
28 water piping which has been rendered anodic. The adjacent cold water
piping is preserved because it has been rendered cathodic. The corrosion is
due to a galvanic difference brought about by a thermal difference between
two otherwise identical materials, and is therefore termed Thermo-galvanic

1 corrosion.”⁵³

2 As of the filing of this motion for certification, 60 homes have experience leaks due
3 to thermal-galvanic corrosion. There are multiple variables that affect the time between
4 installation of the copper pipe and resultant leaks; consequently, some plumbing systems
5 have failed in the short run, some will take longer, and some may survive the lifetime of
6 the building. But, each and every plumbing system at Anthem is subject the effects of
7 thermal-galvanic corrosion and failure resulting in underslab leaks.
8

9 **D. Adequacy**

10 The class representative must have the ability to “fairly and adequately protect the
11 interests of the class.” A.R.C.P. 23(a)(4). The United States Supreme Court has that this
12 question “serves to uncover conflicts of interest between named parties and the class they
13 seek to represent. *Amchem Products, Inc. v. Windsor*, 521 U.S. 592, 625, 117 S.Ct. 2231,
14 138 L.Ed.2d 689 (1997). Class members must “possess the same interest and suffer the
15 same injury” as other class members. *Id.* at 625 - 626; *see also, East Texas Motor Freight*
16 *Systems Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1997).
17
18

19 Here, the named class representative is an owner of a home in Anthem that has
20 unsleeved copper pipes under the foundation slab. The hot and cold water pipes are laid
21 side by side in a single trench. She has the same interests and has suffered the same
22 injury as all other homeowners at the Subject Property.
23

24 The other aspect of “adequacy” is whether counsel for the class can adequately
25 prosecute the class claims. Here, there can be no legitimate dispute that counsel is very
26 capable of prosecuting the class claims. *See* Affidavit of Bruce Mayfield.

27 **III. The Proposed Class Satisfies the Requirements of A.R.C.P. 23(b)**

28 _____
⁵³Exhibit “16.”

1 The additional requirements for maintaining a class action are governed by
2 A.R.C.P. 23(b).

3 **A. A.R.C.P. 23(b)(1)**

4 This section of rule 23 is met where there is a “risk,” not a certainty, that the
5 prosecution of separate actions by individual members of the class could 1) result in
6 inconsistent results, or 2) the adjudication with respect to individual members of the class
7 would be dispositive of the interest of other members not parties to the litigation, or
8 would substantially impair or impede their ability to protect there interests. For
9 purposes of certification this requirement generally is met through the pleadings in the
10 complaint that must be taken as true for certification. *Blackie v. Barrack* 524 F.2d 891,
11 901 n17 (9th Cir.1975), *cert denied*, 429 U.S. 816 (1976).
12

13 **B. A.R.C.P. 23(b)(2)**

14 Rule 23(b)(2) is limited to instances where injunctive or declaratory relief is sought
15 and, therefore, are not applicable to the action before the bench.
16

17 **C. A.R.C.P. 23(b)(3)**

18 There are two prongs to the third prerequisite of rule 23(b) - predominance and
19 superiority. In other words, the issue is whether the common questions predominate over
20 individual question and whether the class action is a superior method for adjudication of
21 the claims. There are four nonexclusive considerations that the rule requires the Court
22 to address: 1) the interests of members of the class in prosecuting or defending separate
23 claims; 2) the extent and nature of existing litigation concerning the controversy; 3) the
24 desirability of concentrating litigation of the controversy in a single forum; and, 4) the
25 management difficulties likely to be encountered. *Reader v. Magma-Superior Copper Co.*,
26 *supra*, 110 Ariz. at 117, n1.
27
28

1 **1. Predominance**

2 The focus of the predominance prong of the third condition is “whether proposed
3 classes are sufficiently cohesive to warrant adjudication by representation. *Amchem*
4 *Products*, 521 U.S. at 623. The predominance inquiry is related to A.R.C.P. 23(a)(2)
5 “commonality” but it is more demanding. Common questions of law or fact predominate
6 over individual questions if they significantly and directly impact each class member’s
7 effort to establish liability and entitlement to relief and their resolution “can be achieved
8 through generalized proof.” *Id.* at 624; *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252
9 (2d Cir.2002). Not all questions of law or fact must be common to all class members;
10 however, those issues that are common must predominate in the litigation. *Home*
11 *Federal Savings and Loan Association v. Pleasants*, 23 Ariz.App. 467, 470 (App.1975);
12 *overruled on other grounds, Hanania v. City of Tucson*, 123 Ariz. 37, 38 (App.1979).

13 Here, the plaintiff and putative class representative has pleaded just two causes
14 of action: breach of express warranties and breach of implied warranties. Both of these
15 causes of action apply to each putative member of the class. If the class members were
16 to bring individual actions for the defective plumbing systems, those causes of action are
17 the only causes of action on which they could recover for the defective piping. *See Nastri*
18 *v. Wood Bros. Homes, Inc.*, 142 Ariz. 439 (App.1984); *Richards v. Powercraft Homes, Inc.*,
19 139 Ariz. 242 (1984). Therefore, the class action law is common to all members and
20 predominates.

21 Moreover, the claims are identical, with the sole exception that there may be a
22 variance in the cost of repair based on the size of the house, number of plumbing outlets,
23 etc. The issues of liability, of course, are identical from house to house, as also would be
24 the defenses.

1 Plaintiff's investigation has uncovered no legal or factual "questions affecting only
2 individual members." A.R.C.P. 23(b)(3). All 3533 putative class member have an interest
3 in and are affected by the construction defects. Common issues need only predominate
4 and need not be dispositive of the entire litigation. *Contract Buyers League v. F & F*
5 *Investment*, 48 F.R.D. 7, 12 (N.D.Ill.1969).
6

7 **2. Superiority**

8 Plaintiff knows of no other litigation addressing TGC claims in Arizona; however,
9 such an action was certified in the Eighth Judicial District Court for Clark County,
10 Nevada. *See Silver, et al. v. Del Webb Communities, Inc.* 8th J.D., Clark County No.
11 A437325 As more fully explained *supra*, the *Silver* case involved approximately 5900
12 homes that were planned, designed, developed, constructed and sold by Del Webb in a
13 community commonly known as Sun City Summerlin. It was certified for class action and
14 Del Webb informed each of the Summerlin class members that the class action was a
15 superior way of adjudicating their claims than would be individual claims.⁵⁴
16
17

18 Here, the number of putative class members is far too numerous and the typical
19 claim is far too small for each individual to maintain a separate action. The class device
20 is the only viable vehicle by which persons injured by defendants' conduct can obtain a
21 remedy. The *Villa Sierra* court explained in finding as "clearly erroneous" the trial court's
22 decision not to certify a class of over 200 homeowners in a construction defect action:
23

24 "Finally, defendants do not seriously contend that there are procedures
25 superior to a class action by which an adjudication of all of the class
26 members' claims can be obtained. [T]he only other available procedure
27 would be separate lawsuits by more than 200 unit owners, or their voluntary
28 or involuntary joinder. We do not consider either approach to be a superior

⁵⁴Exhibit "9" ("Del Webb now believes the best way for you to protect the investment in your home and assure the availability of insurance funds to correct any future thermal-galvanic corrosion occurrence is to remain in the pending class action lawsuit").

1 method to adjudicate these claims.”

2
3 *Villa Sierra*, 784 P.2d at 661, citations omitted.

4 Any notion that such claims could be litigated individually is wholly unrealistic and
5 contrary to the philosophy of rule 23. In the instant case, the expert and litigation costs
6 alone will be in the hundreds of thousands of dollars. To investigate and litigate each
7 claim individually would double the cost of litigation not only for the class, but also for
8 the defendants.
9

10 Plaintiff can foresee no management difficulties which should preclude this action
11 from being maintained as a class action. Courts heartily agree that possible management
12 problems are not, standing alone, grounds for denying class certification. *See In re Sugar*
13 *Industry Antitrust Litigation*, 73 F.R.D. 322, 358 (D.C.Pa.1976) (manageability problems
14 are significant only if they create a situation that is less fair and efficient than other
15 available techniques).
16

17
18 **CONCLUSION**

19 Any doubt regarding certification of this class must be resolved in favor of
20 certification. As the court stated in *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir.1968)
21 *cert. denied*, 394 U.S. 928 (1969) (the interest of justice require that in a doubtful case
22 any error should be committed in favor of allowing the class action).
23

24 ...

25 ...

26 As argued herein, the case before the Court meets the criteria for certification
27 established by A.R.C.P. 23(a) and (b). Therefore, the action must be certified as a class
28 action.

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DATED this 17th day of June, 2009.

**FEINBERG GRANT MAYFIELD
KANEDA & LITT, LLP**

By: *s:/Bruce Mayfield, Esq.*
BRUCE MAYFIELD, ESQ., SBN:020884
DANIEL CLIFFORD, ESQ., SBN:019710
1955 Village Center Circle
Las Vegas, NV 89134
(702) 947-4900 / (702) 947-4901 FAX

Attorneys for Plaintiffs

CERTIFICATE OF E-FILING/SERVICE

The below hereby certifies that on the 17th day of June, 2009, she submitted
**MOTION FOR CLASS CERTIFICATION AND MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF** to the court for electronic filing and for service
upon parties on the Court’s service list for the above-referenced case.

s:/ Robin Black
An employee of FEINBERG GRANT
MAYFIELD KANEDA & LITT, LLP