COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
CA No. 2085-CV-00971D

JOEL BURMAN as the Legal Representative of the Estate of Mary Burman, on behalf of Ms. Burman and all others similarly situated,

Plaintiff,

v.

CONTINUING CARE MANAGEMENT LLC; WHITNEY PLACE AT SHARON LLC; WHITNEY PLACE AT SHARON LIMITED PARTNERSHIP, d/b/a WHITNEY PLACE AT SHARON; WHITNEY PLACE AT SHARON MANAGEMENT LLC; SALMON HEALTH AND RETIREMENT; and SHI II WHITNEY PLACE SHARON, LLC.,

Defendants.

PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Now comes Joel Burman, personal representative of the estate of Mary Burman ("Plaintiff" or "Burman"), and hereby moves this Honorable Court for Preliminary Approval of the proposed settlement of this Class Action ("Settlement") as set forth in Settlement Agreement ("Settlement Agreement")(attached to the accompanying memorandum as **Exhibit A)** between Plaintiff and Defendants: Continuing Care Management LLC; Whitney Place at Sharon LLC; Whitney Place at Sharon Limited Partnership, D/B/A Whitney Place at Sharon; Whitney Place at Sharon Management LLC; Salmon Health and Retirement; and Shi-II Whitney Place Sharon, LLC (collectively "Defendants" or "Salmon Health").

Plaintiff attaches his memorandum in support of this motion herewith.

WHEREFORE, for the reasons set forth in the accompanying memorandum of law, Plaintiff respectfully requests that the Court enter the *[Proposed] Preliminary Approval Order* attached to the memorandum of law as **Exhibit B** ("Preliminary Approval Order").

Respectfully submitted,
Plaintiff, by his Attorneys,

DATED: February 10, 2022

/s/ *Michael C. Forrest*

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CERTIFICATE OF SERVICE

I, Michael C. Forrest, Esq., hereby certify that on January 10th, 2023, an exact copy of the foregoing document was served *via* US First Class Mail, postage prepaid and email upon the following:

Louis M. Ciavarra, Esq. *lciavarra@bowditch.com*
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/s/ *Michael C. Forrest*

Michael C. Forrest, Esq.

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Defendants.

PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Now comes Joel Burman, personal representative of the estate of Mary Burman ("Plaintiff" or "Burman"), and hereby moves this Honorable Court for Preliminary Approval of the proposed settlement of this Class Action ("Settlement") as set forth in Settlement Agreement ("Settlement Agreement")(attached hereto as **Exhibit A)** between Plaintiff and Defendants: Continuing Care Management LLC; Whitney Place at Sharon LLC; Whitney Place at Sharon Limited Partnership, D/B/A Whitney Place at Sharon; Whitney Place at Sharon Management LLC; Salmon Health and Retirement; and Shi-II Whitney Place Sharon, LLC (collectively "Defendants" or "Salmon Health").

WHEREFORE, Plaintiffs respectfully request that the Court enter the [Proposed] Preliminary Approval Order attached hereto as **Exhibit B** ("Preliminary Approval Order").

I. INTRODUCTION

In this putative class action ("Action") a former resident of a Massachusetts Assisted Living Residence ("ALR") owned and/or operated by Defendants has brought claims arising from Defendants' alleged: (1) unlawful collection of upfront Community Fees; and (2) mishandling payments which Defendants referred to as Last Month's Charges and/or Prepaid Final Fees, but which Plaintiff contends were in fact a Security Deposits subjected to the requirements of G.L. c. 186, § 15B.

Defendants deny these allegations and all allegations of wrongdoing and liability.

Here, the Settlement provides direct relief to the Class Representatives and all Settlement Class Members who: (1) entered into contracts with Defendants; (2) paid an upfront Community Fee; and/or (3) paid Defendants a Security Deposit, Last Month's Charges, and/or Prepaid Final Fees at or before the inception of their tenancy.

For the purposes of this Motion, for the purposes of Settlement, and for the reasons set forth herein, the Parties agree that the class claims meet all the necessary elements for class certification of a Settlement Class under both Mass. R. Civ. P. 23 and M.G.L. c. 93A, § 9.[1]

Plaintiff has concluded, in light of the benefits of the Settlement, along with the costs, risks, and delay of litigation, that this Settlement is fair, reasonable, adequate, and in the best interests of all members of the Settlement Class.

[1] In the event that the Settlement of this claim fails to gain the approval of the Court or is otherwise terminated prior to finalization, the Parties agree that any provisional certification shall be considered void.

Accordingly, and as set forth herein, the Parties have concluded, in light of the costs and delay of litigation, that they seek to settle this Action on the terms and conditions set forth in the Settlement Agreement.

II. PROCEDURAL BACKGROUND

On or about September 9, 2020, Mary Burman commenced this action in the Worcester County Superior Court. See, *Docket Ref. No.* 1. On November 12, 2020, Mary Burman passed away.

On January 20, 2021, Joel Burman was appointed the legal representative of the estate of Mary Burman. On February 17, 2021, this Court allowed the requested substitution of Joel Burman as the legal representative of the estate of Mary Burman. On September 22, 2021, the Parties mediated this action with the Hon. Hinkle, J. (Ret.), however, said mediation was unsuccessful. On October 8, 2021, Plaintiff filed a *Motion to Amend*. On October 14, 2021 the Court allowed the proposed amendment to the operative complaint.

On January 28, 2022, Plaintiff filed her *Motion to Amend*, to include claims for Breach of Contract based upon allegations that despite the plain and unambiguous language in its Residency Agreements, Defendants purportedly did not utilize any portion of the Community Fees for the express purposes it promised and represented to its ALR tenants in the Residency Agreements. On February 8, 2022 the Court allowed the proposed amendment to the operative complaint.

On April 14, 2022 Plaintiff file her *Motion for Class Certification*. On June 2, 2022 the Court heard argument on Plaintiff's *Motion for Class Certification*. On August 9, 2022 the Court denied Plaintiff's *Motion for Class Certification* holding that, *inter alia*, the

resolution of over 100 claims was not impracticable; and further, that an individual assessment of harm would be required. See, Docket No. 22; but see, In re TJX Cos. Retail Sec. Breach Litig., 246 F.R.D. 389, 398 (D. Mass. 2007) ("Need for individualized damages decisions does not ordinarily defeat predominance requirement for class certification where there are disputed common issues as to liability."); and Campbell v. Glodis, 2011 WL 2736502, *5 (Mass. Super. Ct. May 27, 2011) ("the presence of individual questions does not, *per se*, contraindicate class action treatment.").

III. PROPOSED SETTLEMENT CLASS

For the purposes of settlement, the proposed "Settlement Class" shall be defined as follows:

> All current and former residents during the Class Period, as defined, of ALRs in Massachusetts managed, owned, and/or operated by Salmon Health who:
>
> A. Paid a Community Fee; and/or
> B. Paid an amount in consideration of Last Month's Charges; and
> C. Has not previously entered a settlement with Salmon Health regarding claims concerning Community Fees and/or Last Month's Charges.

IV. SUMMARY OF SETTLEMENT PROVISIONS, SETTLEMENT CLASS RELIEF, AND NOTICE

A. Settlement Agreement Terms and Relief

The Settlement provides a compromise that considers the strengths and weaknesses of the Parties' respective positions, as well as, the risks and costs associated with continued litigation, including a trial and potential additional appeals.

The following summary of the Settlement provides an outline of principal terms but is subject to and does not alter the provisions set forth in the Settlement Agreement.

In consideration of a full, complete, and final settlement of this Action, and in consideration of dismissal of the Action with prejudice, and the Releases as set forth in the

Settlement Agreement (and subject to the Court's approval), Defendants agree to provide significant financial compensation to Settlement Class Members, as well as instituting remedial measures going forward.

1. Class Claim Fund

Salmon Health shall make a total settlement, in accordance with the claims procedures set forth herein, of one million dollars ($1,000,000.00) ("Claim Fund"). The Claim Fund shall cover all payments to be made to participating Settlement Class Members, as well including the costs of Notice, administration, Plaintiff's incentive award and Plaintiff's Counsel's costs and fees. The Claim Fund class payments shall be distributed to:

A. Any former resident Settlement Class Member who paid a Community Fee or Last Month's Charges during the Class Period. Said Settlement Class Member shall be entitled to their *pro rata* share of the Claim Fund, which amount shall be distributed by the Claims Administrator in the manner set forth herein.

B. Any Settlement Class Member who, as of the time of Final Approval, is a current resident Settlement Class Member of a Salmon Health ALR and who paid a Community Fee or Last Month's Charges during the Class Period. Said Class Member shall be entitled to their *pro rata* share of the Claim Fund, which amount shall be distributed by the Claims Administrator in the manner set forth herein. Current resident Settlement Class Members shall not be required to submit a Claim Form to be entitled to their *pro rata* share of the Claim Fund.

C. The cost of Class Notice, administration, incentive award and attorney fees shall be funded by the Claim Fund.

2. Unclaimed Funds:

The checks issued by the Claims Administrator shall be valid for ninety (90) days following their issuance or receipt after return as undeliverable. The Parties agree that should any Settlement Class Member fail to cash their check within ninety (90) days of its issuance, and after reasonable efforts to locate such persons for whom such checks were returned, such unclaimed funds shall be re-distributed to class members who submitted claims or qualify as current residents. Should any Settlement Class Member fail to cash the second distribution check within ninety (90) days of its issuance then any such unclaimed funds shall be paid to the Massachusetts IOLTA Committee as the *cy pres* beneficiary.

3. Remedial Measures/ Equitable Relief

A. Last Month's Charges Fee. Going forward, for all prospective residents at ALRs owned, operated, and/or managed by Salmon Health in Massachusetts, Salmon Health shall deposit any Last Month's Charges collected from such residents in an interest-bearing account; and further, shall credit, or pay, accrued interest on the Last Month's Charges to residents on an annual basis or, should a residency agreement terminate prior to its one year anniversary, shall pay interest within thirty (30) days of the date of the termination of said residency agreement.

1. For all current residents who paid Last Month's Charges, upon termination of their tenancy Salmon shall credit the resident's account in the amount deposited plus 5% per annum and apply it to outstanding charges and return any balance.

B. Community Fees. Going forward, Salmon Health shall deposit Community Fees collected from such residents in a separate account and allocate such funds solely for ALR-distinctive services.

C. Subsequent Legal Confirmation. The remedial measures described above shall continue to the earlier of: (i) judicial, legislative, or regulatory guidance confirming that such an approach is not necessary to comply with M.G.L. §15B and or M.G.L 19D, § 1; or (ii) a five-year period which commences upon the anticipated date of the final approval of the Settlement.

B. Notice to Settlement Class Members

Subject to the Court granting Preliminary Approval of this Settlement, the Claims Administrator shall provide the Settlement Class with notice within twenty (20) days after the entry of the Preliminary Approval Order.

In accordance with the timetable established under the Preliminary Approval Order, the Claims Administrator (at the direction of Plaintiff's Counsel) shall: (a) issue Notice and Claim Forms by first-class mail, postage prepaid, to the most current address available for each Settlement Class Member; and (b) Post the Notice on a designated website for this Settlement administration. The proposed Notice is attached as Exhibit 1 to the Settlement Agreement, and the proposed Claim Form is attached as Exhibit 2 to the Settlement Agreement.

Further, Article V(f) of the Settlement Agreement addresses the procedures that shall be instituted by the Claims Administrator with regard to Undeliverable Notices and Best Notice Practicable, in order to ensure that the Notice procedures satisfy the requirements of the Massachusetts Rules of Civil Procedure, the Constitution of the

Commonwealth of Massachusetts, the United States Constitution, and any other applicable law or rule. See, **EXHIBIT A**, at 12.

C. Effect of Settlement Agreement

Pursuant to the Settlement Agreement, the following will become effective upon the Final Effective Date and the Releasees shall be bound as follows:

1) Be bound by this Settlement Agreement; and
2) Have recourse exclusively to the benefits, rights, and remedies provided by the Agreement; and
3) Be barred from pursuing any other action, demand, suit, or other claim against the Releasees with respect to the Released Claims unless brought as a result of breach of this Agreement.

See, **EXHIBIT A**, Art. VII.

V. LEGAL ARGUMENT IN SUPPORT OF PRELIMINARY APPROVAL

A. Massachusetts Law Supports the Preliminary Approval of this Settlement.

In Massachusetts there is a "well-established public policy favoring the private settlement of disputes." Cabot Corp. v. AVX Corp., 448 Mass. 629,638 (2007); see also, Moloney v. Boston Five Cents Sav. Bank FSB, 422 Mass. 431,435 (1996)(noting that [s]ettlement is favored because it minimizes the transaction costs of litigation"); Williams v. First Nat'l Bank, 216 U.S. 582, 595 (1910)("Compromises of disputed claims are favored by the courts.").

A class action in Massachusetts brought pursuant to Mass. R. Civ. P 23 may not be settled without final approval of the court. See, Mass.R.Civ.P. 23(c). In making a determination as to final approval, a court must determine whether the proposed settlement

is "fair, reasonable and adequate". Sniffin v. Prudential Ins. Co. of America, 395 Mass. 415, 421 (1985)(citation omitted). In addition, when making determinations regarding a proposed settlement, the court must analyze whether the interests of the class are better served by settlement than by further litigation. See In re Relafen Antitrust Litigation, 360 F. Supp. 2d 166 (D. Mass. 2005).[2]

In advance of final approval of class action settlement, Massachusetts litigants regularly seek preliminary approval in conjunction with ordering notice to the class. See e.g., In re Cohen, 435 Mass. 7, 9 (2001) (in a prior proceeding, court had preliminarily approved a proposed class settlement and directed notice to the class); Buston v. Zoll Medical Corp., No. SUCV2012-01190-BLS (Mass. Super. Ct. Nov. 15, 2012) 2013 WL 5612566, (granting preliminary approval of class action settlement, approving form of notice, and scheduling final approval hearing).

Although there is no set standard for preliminary approval under the Massachusetts rules, "the standard for preliminary approval is less stringent than for final approval, because preliminary approval means simply that notice of the proposed settlement will be sent to class members, who will then be given a chance to be heard at the hearing regarding final approval." In re Mass. Smokeless Tobacco Litig., 2008 WL 1923063 at *3 (Mass. Super. April 9, 2008).

Preliminary approval does not "require the court to have come to a final conclusion as to whether the proposed settlement is fair, reasonable, and adequate, since the court may

[2] The Massachusetts Supreme Judicial Court ("SJC") has recognized that although Mass. R. Civ. P 23 is independent from its Federal counterpart, in most cases the same standards of legal analysis apply. See, Waldman v. American Honda Motor Co., Inc., 413 Mass. 320 (1992)(the Supreme Judicial Court stating that where it has, "adopted comprehensive rules of civil procedure in substantially the same form as the earlier Federal Rules of Civil Procedure, the adjudged construction theretofore given to the Federal rules is to be given to our rules, absent compelling reasons to the contrary or significant differences in content.").

be persuaded by dissenting class members at the hearing that the settlement agreement is not fair." Id.

Nevertheless, a court may grant preliminary approval if the proposed settlement agreement "appears to fall within the range of possible approval." In re Prudential Sec. Litig., 163 F.R.D. 345, 355 (E.D.N.Y. 2006); see also, *Manual for Complex Litigation*, 4th, § 13.14, at 172-73 (2004) ("MANUAL FOURTH") (at the preliminary approval stage, "[t]he judge must 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.").

Preliminary approval permits notice of the hearing of final settlement approval to be given to the class members, at which time, class members and the settling parties may be heard. Id. at 322. Preliminary approval is, therefore, the first step in a two-step process required before a class action may be finally settled. Id. at 320. In some cases, this initial assessment can be made on the basis of information already known to the court and then supplemented by briefs, motions, and an informal presentation from the settling parties. Id. at 320-21.

In deciding whether a settlement should be preliminarily approved under Rule 23, courts look to whether there is a basis to believe that the more rigorous final approval standard will be satisfied. See, MANUAL FORTH at § 21.633, at 321 ("Once the judge is satisfied as to the certifiability of the class and the results of the initial inquiry into the fairness, reasonableness, and adequacy of the settlement, notice of a formal Rule 23(e) fairness hearing is given to the class members.") The standard for final approval of a settlement consists of showing that the settlement is fair, reasonable, and adequate. See

e.g., Durrett v. Housing Authority of the City of Providence, 896 F.2d 600, 604 (1st Cir. 1990).

As discussed more fully herein, the terms of the Settlement Agreement satisfy all of the requirements for preliminary approval.

A. The Terms of The Settlement Are Fair, Reasonable and Adequate.

Before granting approval of a proposed class action settlement, the Court must find that the proposed settlement is fair, reasonable, and adequate. See, e.g., MASS. R. CIV. P. 23(c); see also, Sniffin, supra at 421.

Although no set standard exists for determining the fairness, reasonableness and adequacy of a proposed class settlement, courts will often look at the following: (1) the complexity, expense, and duration of litigation; (2) the amount of the proposed settlement compared to the amount at issue; (3) reaction of the class to the settlement; (4) the stage of proceedings and the amount of discovery completed; (5) Plaintiffs' likelihood of success on the merits and recovering damages on their claims; (6) whether the agreement provides benefits which Plaintiffs could not achieve through protracted litigation; (7) good faith dealings and the absence of collusion; (8) the settlement's terms and conditions. See e.g., Sniffin, supra at 420-422; Rolland v. Patrick, 562 F. Supp. 2d 176 (D. Mass. 2008); In re Relafen Antitrust Litig., 231 F.R.D. 52, 72 (D. Mass. 2005); In re Lupron Mktg. & Sales Practices Litig., 228 F.R.D. 75, 93 (D. Mass. 2005); M. Berenson Co. v. Faneuil Hall Marketplace, Inc., 671 F. Supp. 819, 822-833 (D. Mass. 1987).

A "strong initial presumption" of fairness arises where the parties can show, like here, that "the settlement was reached after arm's-length negotiations, that the proponents' attorneys have experience in similar cases, that there has been sufficient discovery to

enable counsel to act intelligently, and that the number of objectors or their relative interest is small." Rolland v. Cellucci, 191 F.R.D. at 6; see also, City P'ship Co. v. Atlantic Acquisition Ltd. P'ship, 100 F. 3d 1041, 1043 (1st Cir. 1996).

In the case *sub judice*, an examination of each of the factors demonstrates that that the proposed Settlement Agreement is fair, reasonable, and adequate to all members of the Settlement Class.

First, with respect to complexity, expense, and duration of litigation; further prosecution of this case would require the expense of significant additional time and expense. If this Settlement Agreement is not approved, the Parties shall likely face further lengthy and costly legal disputes involving: (a) extensive additional class-wide discovery and depositions; (c) dispositive motion practice; (d) a second motion for class certification; and (e) a lengthy and complicated trial. Should this claim continue, the Parties contend that there remain many additional stages of litigation, as well as likely appeals.

More precisely, this case was initially filed in 2020. Barring settlement, this case would likely continue for many more years. Protracted litigation would result in the expenditure of substantial additional costs and legal fees before reaching a final resolution, including exhaustion of all appeals. Moreover, further prolonging of the case will adversely impact Settlement Class Members, who are elderly and infirm.

As it stands, the proposed Settlement faces challenges posed by the advanced age and declining health of the Settlement Class Members. Such challenges only increase if the case extends for years of continued litigation.

Second, with respect to the amount of the Settlement compared to the amount potentially at issue, the Parties agree that the value of the Settlement is fair and reasonable given the various challenges facing Plaintiffs.

Specifically, each Settlement Class Member shall be entitled to his/her *pro rata* share of the Claim Fund. In sum, the significant compensation to be paid to Settlement Class Members is reasonable considering the risks of litigation, the uncertainty of likely appeals, and delay posed to each Settlement Class Member. See, In re Lupron Mktg. & Sales Practices Litig., 345 F. Supp. 2d 135, 138 (D. Mass 2004) (finding the proposed settlement warranted preliminary approval because, *inter alia*, "the proposed settlement amount is sufficiently within the range of reasonableness").

Accordingly, the Settlement Agreement fairly and adequately resolve the claims at issue based upon consideration of "the terms of the compromise with the likely rewards of litigation." See, Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414,424-25 (1968).

Third, the Parties expect that given the extent of the individual compensation, the Settlement will satisfy all members of the Settlement Class. Furthermore, each Settlement Class Member will have a chance to express any objections; and after the Notice period, the Court will have the opportunity to evaluate any responses from the members of the Settlement Class.

Fourth, with respect to the stage of proceedings, and the amount of discovery completed, Plaintiff's Counsel has thoroughly investigated the claims represented. Likewise, Defendants conducted an extensive internal review to assess and identify Settlement Class Members. Nevertheless, Plaintiffs will again confirm the accuracy of

representations made by Defendants through formal confirmatory discovery.

Fifth, with respect to Plaintiff's likelihood of success, Defendants contend to possess certain defenses which may limit the amount of recovery owed to each Settlement Class Member. Likewise, Defendants recognize the costs associated with further litigating the action, as well as the risk of an ultimate judgment and award of damages for Plaintiff and the Settlement Class that exceeds the amount agreed-to by way of the Settlement Agreement.

Sixth, with respect to whether the Settlement Agreement provides benefits which Plaintiff and the Settlement Class could not achieve through protracted litigation, the Settlement provides significant compensation to members of the Settlement Class compared to their best potential full actual damages. Further, settlement at this time avoids further delay of any such compensation and payments to Settlement Class Members and/or their representative estates.

Seventh, the Settlement was reached as the result of good faith dealings and the absence of collusion. Plaintiff and Defendant are represented by experienced and competent counsel familiar with class action litigation. Settlement Class Counsel has obtained other significant court-approved settlements of class action cases.[3] Likewise,

[3] Settlement Class Counsel has successfully represented numerous classes throughout the Commonwealth and in Federal Courts. See e.g., Hartigan et al. v. The Realty Assoc. fund X LP., et al., CA No. SUCV-2018-00056-BLS1 (Allowed October 5, 2021, Davis, J.); Gowen, et al. v. Benchmark Senior Living, LLC, CA No. 1684-cv-03972-BLS2 (Allowed June 1, 2021, Salinger, J.,); Garcia et al. v. 15 Taylor, LLC, et al., CA No. 3:17-cv-10891-MGM (Allowed, October 4, 2018); Khun et al. v. Sleepy's, LLC, et al., CA No. 1:17-cv-10110-FDS; Doe et al., v. The Medical Treatment Center of Revere, et al., CA No. SUCV-2014-3487A (Allowed May 15, 2018, Campo, J.); Hyman et al. v. Metropolitan Property & Casualty Ins. Co., et al., CA No. SUCV-1684CV00488-BLS2 (Allowed, August 23, 2017, Sanders, J.); Kappotis et al. v. Bertucci's, Inc. et al., CA No. SUCV-1584CV03821-BLS1 (Allowed, February 24, 2017, Kaplan, J.); Reis et al. v. Knight's Airport Limousine Service, Inc., et al., CA No. WOCV2014-01558C (Allowed, November 10, 2015); and Fama et al. v. Bactes Imaging Solutions, Inc., Suffolk Superior Court, C.A. No.: 13-01435-BLS1, consolidated with 13-00681-BLS1; 13-04165-BLS1; and 14-00352-BLS1 (Allowed, May 4, 2015, Kaplan, J.).

Defendants' counsel is experienced and highly competent in the defense of complex litigation and class action claims.

The experience and reputation of counsel weighs heavily in favor of the Settlement Agreement's approval. See e.g., Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977); In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F.Supp. 659, (D. Minn. 1974) ("The recommendation of experienced antitrust counsel is entitled to great weight."); and Fisher Brothers v. Phelps Dodge Industries, Inc., 604 F. Supp. 446, (E.D. Pa. 1985) ("The professional judgment of counsel involved in the litigation is entitled to significant weight.").

Finally, the Settlement Agreement was not reached as the product of collusive dealings, but, rather, was informed by the vigorous representation by experienced and qualified counsel. The determination to agree to the terms of the Settlement Agreement was made by experienced counsel who reached the Settlement terms only after significant arm's-length negotiation. These circumstances further support the Court's preliminary approval of the Settlement. See Lyons v. Marrud, Inc., No. 66 Civ. 415, 1972 U.S. Dist. LEXIS 13401, at *5 (S.D.N.Y. June 6, 1972) ("Experienced and competent counsel have assessed these problems and the probability of success on the merits. They have concluded that compromise is well-advised and necessary. The parties' decision regarding the respective merits of their positions has an important bearing on this case."); Reed v. Gen. Motors Corp., 703 F.2d 170,175 (5th Cir. 1983); and Armstrong v. Bd. Of Sch. Dirs., 616 F.2d 305,325 (7th Cir. 1980).

Accordingly, the Settlement Agreement meets the standards for preliminary approval under MASS. R. CIV. P. Rule 23(c).

B. The Proposed Notice Provides Adequate Notice to The Members of the Class.

Proper notification to class members serves to ensure that absent class members have an opportunity to appear and present objections and/or defenses if they so desire. MASS. R. CIV. P. Rule 23(d).

The primary concern regarding class members and their notification is the protection of their respective due process rights. See Spence v. Reeder, 382 Mass. 398, 408–409 (1981). If class members and their interests are fairly and adequately represented, then their due process rights have been protected. See, Id. In notifying prospective class members, litigants should employ the "best practicable" means of notification under the circumstances. See e.g., Fed. R. Civ. P. 23(c).

Unlike their Federal counterparts, Mass. R. Civ. P. 23(c) and Mass. R. Civ. P. 23(d) do not require the notification of absent class members. See, Mass. R. Civ. P. 23, *1973 Reporter's Note*. Nevertheless, a court may order such notice, especially in light of potential *res judicata* issues, and to ensure class members have an opportunity to object and/or appear. Id. Determining the "best practicable" means for what constitutes "reasonable effort" is a determination of fact to be made in the individual litigation. See, e.g., In re Franklin National Bank Securities Litigation, 599 F.2d 1109 (2d Cir. 1978).

Here, the Claims Administrator, in addition to establishing a website for Settlement Class Members, shall perform duties related to Notice and Distribution including, but not limited to: (i) identifying Settlement Class Members; (ii) notifying Settlement Class Members; (iii) calculating the amounts to be paid to each respective Settlement Class Member under the terms of the Settlement Agreement; and (iv) issuing payment to each Settlement Class Member. See, **EXHIBIT A**, Art. V.

According to the terms of Settlement, each member of the Settlement Class will be

provided direct Notice of the Settlement of this Action in accordance with the requirements of Due Process. Id.

Under the Notice procedures in the Settlement Agreement, the *[Proposed] Notice* will be mailed directly to each Settlement Class Member, using contact information in the possession of Defendants. Id.

As above, the Parties have agreed upon BrownGreer PLC as the Claims Administrator. BrownGreer has an exceptional reputation for administration of class claims. BrownGreer was formed in 2002 and has been involved in the administration of multiple significant class action claim settlements. Brown Greer's broad settlement experience includes administration of programs ranging from several hundred class members to several million class members.

Moreover, BrownGreer, PLC was also responsible for the administration of a similar claim involving the Community Fees of Assisted Living Facilities in Florida. See, https://www.brookdalefloridaalfsettlement.com/Index (last visited, December 10, 2020)(The Brookdale Florida ALF [Assisted Living Facility] Settlement Program); as well as an almost identical claim in Gowen, et al. v. Benchmark Senior Living, LLC, CA No. 1684-cv-03972-BLS2 (Final Approval Allowed: June 1, 2021, Salinger, J.,).

Pursuant to the terms of Settlement Agreement, BrownGreer shall coordinate with the Parties to distribute a notice and Claim Form by mail. See, **Exhibit A**, Art. V. The Settlement Class Members in this action will receive a simple but informative Notice, and the former resident Settlement Class Members will also receive a simplified Claim Form.

The Claim Forms will also be made available for Settlement Class Members (for viewing, download, and submission) on the settlement website maintained by the Claims

Administrator.

Upon receipt of each Claim Form submitted (for non-resident Settlement Class Members), BrownGreer will verify that each Claim Form includes the requisite basic required information, information establishing the claimant's eligibility, and the Member's certification or alternatively, the information necessary to establish if an authorized representative of a Settlement Class Member is entitled to a distribution (and if not what further materials are required from the representative). BrownGreer may require additional documents as supporting proof.

C. Distribution of Settlement Class Member Payments.

Brown Greer will maintain a list of eligible Settlement Class Members (provided by Defendants) and calculate the settlement amounts due to those Settlement Class Members. After calculating payments, BrownGreer will import payment information into the program database, and coordinate the distribution of payments to eligible Settlement Class Members. BrownGreer will coordinate the printing and mailing of standard-sized checks to those Settlement Class Members who are eligible for a cash payment, and checks will remain active for ninety (90) days.

The Settlement Agreement includes procedures for undeliverable payments, whereby BrownGreer will receive, track, and analyze all returned checks. If the USPS provides a forwarding address on the returned check, BrownGreer will attempt a second-effort payment to that forwarding address. BrownGreer will also remail checks to payees upon written request.

Pursuant to the terms of Settlement, BrownGreer shall also establish a qualified settlement fund ("QSF") and shall coordinate with the Parties (and bank) to establish such

an account to hold settlement funds to be paid into the QSF for valid claims made; and from which, it will disburse payments to eligible Settlement Class Members and related costs, expenses and fees. See, **EXHIBIT A,** Art. V.

As set forth above, the Notice procedures set forth above comply with the requirements of Due Process and the standards of fairness, completeness, and neutrality required of a settlement class notice disseminated under authority of the Court. See e.g., 4 Newberg on Class Actions at §§ 8.21, 8.39; Manual Fourth at §§ 21.311-21.312.

C. The Settlement Process is Reasonable Because the Settlement Terms Protect the Interest of Settlement Class Members.

1. The Settlement Calls for Direct Distribution to Current Resident Settlement Class Members, and the Simple Claims-Made Process Serves to Ensure the Non-Resident Settlement Class Members Receive their Award.

a. Notice and Claims Procedures

Issuance of direct payments to class members is optimal where possible. See, Rubenstein, 4 Newberg on Class Actions § 13:58 (5th ed.); and County of Monmouth, New Jersey v. Florida Cancer Specialists, P.L., 2019 WL 1487340, at *4 (M.D. Fla. 2019), subsequent determination, 2019 WL 3242491 (M.D. Fla. 2019), quoting, Newberg on Class Actions) (observing that "avoiding a claiming process is 'optimal where possible' …"). Here, the Settlement Agreement provides for direct payment to all current resident Settlement Class Members. See, Art. III(B).

Issuing payment directly to each current resident Settlement Class Member (based upon the records of Defendants) shall ensure effective distribution to a large fraction of the Settlement Class; and further, shall serve the goal of getting "as much of the available damages remedy to class members as possible and in as simple and expedient a manner as possible" In re LIBOR-Based Fin. Instruments Antitrust Litig., 327 F.R.D. 483, 496

(S.D.N.Y. 2018)(internal citation omitted); see also, In re Credit Default Swaps Antitrust Litig., 2016 WL 2731524, at *9 (S.D.N.Y. Apr. 26, 2016)("A principal goal of a plan of distribution must be the equitable and timely distribution of a settlement fund without burdening the process in a way that will unduly waste the fund.").

Here, the Claims Administrator shall facilitate direct notice of the Settlement to every Settlement Class Member, and every Settlement Class Member notified of the Settlement will have the opportunity to return the Claim Form and receive compensation. As such, the Settlement only requires minimal action on the part of Settlement Class Members in order to receive the agreed-upon relief.

Direct notice and direct payment to current resident Settlement Class Members increases the likelihood that such Settlement Class Members will receive and retain the agreed-upon compensation.

For Settlement Class Members who do not currently reside at Defendants' ALRs as of the time of Final Approval, and who have been a current resident Settlement Class Member of a Salmon Health ALR, the Parties have agreed to a claims-made procedure for distribution.

This procedure has been simplified and is particularly useful in the context of this claim. For non-resident Settlement Class Members, the Claims-form to be disseminated to such Settlement Class Members includes simple instructions for how a Settlement Class Member can submit a claim for the designated award. See, **Exhibit A,** Exhibit 2 *([Proposed] Claim Form*).

Here, the procedures set forth in the Settlement Agreement, which include but are not limited to, robust notice and direct payment to Settlement Class Members who submit

valid claims, along with the lack of any need for future deterrence, supports the approval of this Settlement as fair and reasonable.

Further, Defendant has agreed in a judicially enforceable manner to continue to adhere to a series of remedial measures meant to address the matters alleged in the Action. See, **Exhibit A**, Art. III(2). That is, by way of this Settlement, Defendants have agreed to alter certain practices related to the collection of Community Fees and Last Month's Charges. This agreed upon relief shall remain in effect (and be enforceable) until the earlier of: (1) judicial, legislative, or regulatory guidance confirming that such approaches are not necessary in order to comply with Defendants duties under G.L. c. 186, § 15B; or (2) a five-year period ending after final approval of this Settlement.

Thus, in addition to monetary compensation for Settlement Class Members, this agreement ensures that Defendants' resident intake and funds-handling procedures are consistent with applicable law; and further, does not impose a stricter than necessary financial burden upon Defendants which could affect the quality of care and treatment presently provided to current resident Settlement Class Members.

As such, and in light of the significant benefit achieved on behalf of all Settlement Class Members, the distribution plan proposed and detailed in the Settlement Agreement not only provides significant benefit to each Settlement Class Member; but further, the terms of Settlement and distribution are fair and reasonable when viewed through the particular facts and challenges presented by this claim and associated Settlement.

D. Request for A Final Fairness Hearing.

The Parties request that, in the event the Court allows this *Motion for Preliminary Approval*, the Court schedule a Final Fairness/Final Approval hearing to assess, and rule

upon, Final Approval of this Settlement.

The fairness hearing will provide a forum to explain, describe or challenge the terms and conditions of the Settlement Agreement, including the fairness, adequacy, and reasonableness of said Agreement.

Plaintiffs request that the Court schedule a final fairness hearing Seventy-Five (75) days from the date of the Court's order on this Motion.

VI. THE SETTLEMENT CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES.

The Parties now seek certification of a Settlement Class of residents of ALRs owned and/or operated by Defendants in the Commonwealth who have been affected by Defendants' similar identifiable course of unlawful conduct. Certification is preliminary and is void should the Settlement not be approved by the Court.

Here, all of the putative Settlement Class Members entered into almost identical form contracts with Defendants, and in connection therewith, paid both an alleged unlawfully collected and expended, non-refundable, Community Fee and were subjected to the alleged unlawful mishandling and misapplication of their Last Month's Charges.

Further, each Settlement Class Member is easily identifiable as he/she is or was a residential tenant who, during the class period, either signed an agreement with Defendants directly or with one of Defendants' associated Massachusetts ALRs. For settlement purposes Plaintiff can establish all necessary elements for class certification under both Mass.R.Civ.P. 23 and M.G.L. c. 93A, summarized as follows:

- Numerosity: Defendants have collected Community Fees and Security Deposits/Last Month's Charges from at least 900 individuals;
- Commonality: All Class Members have a common interest in the subject matter of the suit, as well as a common right and interest in seeking the same relief against Defendants in relation to the disputed/collected fees.

- Typicality: All claims arise from the same operative facts and are based on the same legal theories.
- Adequacy: Plaintiff will fairly protect the interests of the Class and is represented by able counsel.
- Predominance: All Class Members suffered the same imposition of unlawfully expended Community Fees and/or the mishandling and misapplication of a Security Deposit/Last Month's Charges payment.
- Superiority: All of the Members of the Class are persons who were subjected to violations of M.G.L. c. 186, § 15B. Management of this settlement class claim is likely to present significantly fewer difficulties than those presented in the litigation of hundreds of individual claims.

VII. CONCLUSION

WHEREFORE, for the reasons set forth herein, Plaintiffs respectfully request that the Court enter the *[Proposed] Preliminary Approval Order* attached hereto as **Exhibit B**.

Respectfully submitted,
Plaintiff, by his Attorneys,

DATED: February 10, 2023

/s/ *Michael C. Forrest*

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CERTIFICATE OF SERVICE

I, Michael C. Forrest, Esq., hereby certify that on January 10th, 2023, an exact copy of the foregoing document was served *via* US First Class Mail, postage prepaid and email upon the following:

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