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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF ALAMEDA

13 Donald Lollock, by and through his Guardian ad
14 Litem, Kathleen Lollock; Zareen Khan as Executor
for the Estate of Abdulwafi Khan; Frank Pearson;
15 Jo Ella Nashadka, by and through her Guardian ad
Litem, Lance Anderson; and Jane Burton-
16 Whitaker; on their own behalves, and on behalf of
others similarly situated,

17 Plaintiffs,

18 vs.

19 Oakmont Senior Living, LLC; Oakmont
20 Management Group, LLC; and Does 1 - 100,

21 Defendants.
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25
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28

CASE NO. RG17875110

*ASSIGNED FOR ALL PURPOSES TO HON.
STEPHEN KAUS, DEPT. 19*

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR FINAL APPROVAL OF
CLASS SETTLEMENT**

Date: January 20, 2021

Time: 3:00 p.m.

Dept: 19

Judge: Hon. Stephen Kaus

Reservation No.: R-2202110

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1 **I. INTRODUCTION**

2 This motion seeks final approval of the class settlement in this action, reached after multiple
3 arms-length settlement negotiations including three mediation sessions with third-party neutral mediators.
4 In addition to significant injunctive relief, the settlement provides substantial monetary payments to a
5 proposed Settlement Class of 6,975 current and former residents of Oakmont Senior Living branded
6 California assisted living facilities during the Settlement Class Period (defined as the time period from
7 September 13, 2013 through and including December 16, 2019).

8 This case is based on allegations that Defendants Oakmont Senior Living LLC and Oakmont
9 Management Group LLC (collectively “Defendants”) misrepresented that resident assessments at their
10 assisted living facilities in California would be used to set facility staffing, and allegations that
11 Defendants failed to disclose that staffing is determined by labor budgets only. Defendants dispute these
12 allegations in their entirety, deny any legal liability, and vigorously defended the case since the initial
13 complaint was filed on September 13, 2017. The lead claim for monetary relief in the lawsuit has been the
14 recovery of the approximately \$12.5 million in Community Fees paid by residents. Under Plaintiffs’ case
15 theory, the Community Fees would not have been paid had residents known the “true” facts that resident
16 assessments are not used to set facility staffing. Unlike other charges—such as care fees as to which
17 residents arguably received some value for services rendered—the Community Fees arguably are the
18 least likely to be affected by Defendants’ offset and related defenses.

19 The parties reached a settlement after three formal mediations. Specifically, Defendants have
20 agreed to pay \$9.0 million (the “Settlement Fund”) to resolve all monetary obligations owed under the
21 Stipulation of Settlement (“Settlement Stipulation” or “SS”). Subject to Court approval of Plaintiffs’
22 application for attorneys’ fees, costs, and service awards, and factoring in estimated notice and
23 administration expenses, \$5,066,254.30 will be available to fund payments to Settlement Class Members,
24 which is *more than* the \$4.98 million amount Plaintiffs projected at the preliminary settlement approval
25 stage.¹ As discussed below, that translates to an estimated average Settlement Payment Percentage of
26 approximately 37% of the Community Fees paid by Settlement Class Members.

27 In addition to the Settlement Fund, the settlement includes substantial injunctive relief. As

28 ¹ See Amended Order – Motion for Preliminary Approval of Class Settlement Granted (8/25/20), p. 3.

1 discussed below, the Stipulated Injunction obtained in this settlement conservatively translates to an
2 estimated value of \$9,066,402, in addition to the \$9.0 million Settlement Fund. Among other terms, the
3 Injunction requires Defendants to provide resident care personnel necessary to meet each of the resident’s
4 daily care needs at their California assisted living facilities, which addresses the crux of this case.

5 Notice of this class settlement was provided on September 14, 2020. To date, there have been *no*
6 objections submitted, and only thirty-eight (38) Settlement Class Members have elected to opt-out. (*See*
7 Declaration of Kelsey Skey (“Skey Decl.”), ¶ 11.) For the reasons set forth below, the motion for final
8 approval should be granted.

9 **II. BACKGROUND**

10 **A. Case Overview**

11 Plaintiffs Donald Lollock, by and through his Guardian ad Litem, Kathleen Lollock; Zareen Khan
12 as Executor for the Estate of Abdulwafi Khan; Frank Pearson; Jo Ella Nashadka, by and through her
13 Guardian ad Litem, Lance Anderson; and Jane Burton-Whitaker (collectively “Plaintiffs”) filed this
14 putative class action on September 13, 2017.

15 The lawsuit sought relief on behalf of Plaintiffs and all persons who resided in any Oakmont
16 Senior Living branded California assisted living facility since September 13, 2013. Plaintiffs assert
17 claims for damages and other relief under California’s Consumers Legal Remedies Act, Cal. Civ. Code
18 § 1750, *et seq.* (“CLRA”); Unfair Competition Statute, Bus. & Prof. Code §§ 17200 *et seq.* (“UCL”); and
19 the Financial Elder Abuse statute, Cal. W&I Code § 15610.30. Defendants deny the allegations in their
20 entirety and deny any wrongdoing whatsoever. Defendants also deny that the case is appropriate as a
21 class action for purposes of litigation. Defendants have agreed to settle to avoid continued burdensome
22 and costly litigation.

23 **B. Case Proceedings**

24 The case has been vigorously litigated from inception. After Defendants removed to Federal Court,
25 this Action was remanded back to State Superior Court on November 7, 2017. On December 15, 2017,
26 Plaintiffs filed their First Amended Complaint (“FAC”) in the above-captioned Court. Following
27 Plaintiffs’ amendment to the initial complaint, Defendants filed a Demurrer and Motion to Strike the
28 Class Allegations in Plaintiffs’ FAC. On March 18, 2018, the state court rejected Defendants’ Demurrer

1 and Motion to Strike the Class Allegations in Plaintiffs' FAC. On April 9, 2018, Defendants answered
2 the FAC, wherein Defendants expressly denied the allegations.

3 **C. Case Investigation and Discovery**

4 Prior to reaching a settlement, Plaintiffs engaged in substantial investigation and discovery.
5 Before filing the initial complaint, Plaintiffs' Counsel reviewed over 10,000 pages of background
6 documents, interviewed current and former residents (and family members), reviewed deposition and
7 written discovery from other lawsuits against Defendants, and consulted with experts on assisted living
8 facilities. (Stebner Decl., ¶ 21.) After the Action was filed, Plaintiffs engaged in extensive written and
9 deposition discovery, including written discovery responses exchanged between the parties, Defendants'
10 production of approximately 104,895 pages of documents including 829 Excel and native files, and the
11 depositions of seven (7) witnesses, including Defendants' managing agents, facility-level personnel,
12 designated Persons Most Knowledgeable, two Class Representatives, as well as third-party discovery
13 directed at Defendants' assessment software vendor. Discovery efforts included numerous meet and
14 confer discussions among Defendants and the vendor to obtain Defendants' resident assessment data,
15 which resulted in the production of an additional twenty-four (24) data intensive Excel spreadsheets.
16 Plaintiffs' review also included approximately 20,327 pages of documents from the California
17 Department of Social Services regarding Defendants' facilities. (Stebner Decl., ¶ 22.) In connection with
18 settlement negotiations, Defendants produced additional information including data that \$12,530,330 in
19 Community Fees paid by Settlement Class Members.² (Stebner Decl., ¶ 23.)

20 The parties also engaged in substantial law-and-motion efforts prior to negotiating a settlement.
21 This included litigation of Defendants' demurrer and motion to strike the FAC; extensive meet and
22 confer efforts for Defendants' documents and interrogatory responses; and participation in an informal
23 discovery conference to compel Defendants' production of certain documents. (Stebner Decl., ¶ 24.)

24 **D. Parties' Settlement Negotiations Result In Agreement**

25 The parties reached a settlement agreement as a result of extensive arm's length negotiations.
26

27 ² Defendants' data further showed that 3,674 Settlement Class Members did not pay a Community Fee.
28 Among the Settlement Class Members, the average Community Fee paid was \$3,944.07, the minimum
paid was \$100. (Stebner Decl., ¶ 23.)

1 Through their counsel, the parties engaged in three full-day mediations and extensive additional
2 settlement discussions of this Action. This included a mediation on June 19, 2019 before the Honorable
3 George Hernandez (ret.) of ADR Services, Inc.; a mediation on November 8, 2019 before the Honorable
4 Richard Silver (ret.) of JAMS; and a mediation on December 16, 2019 before Judge Silver, which
5 resulted in this settlement. (Stebner Decl., ¶ 25.)

6 **E. Court Grants Preliminary Approval**

7 By order dated August 27, 2020, the Court granted Plaintiffs' motion for preliminary approval of
8 the settlement. In accordance with the Court's order, notice of the settlement was provided to the
9 Settlement Class on September 14, 2020, through mail, e-mail, publication, and Internet website posting.
10 The 60-day period for Settlement Class Members to opt-out or object expires on November 13, 2020.
11 To date, from a class that consists of 6,975 residents, there have been *no* objections submitted, and only
12 thirty-eight (38) Settlement Class Members have elected to opt-out. (Skey Decl., ¶¶ 2-11.)

13 **III. KEY SETTLEMENT TERMS**

14 The parties' Settlement Stipulation is attached as Exhibit A to Plaintiffs' Notice of Lodgment
15 ("NOL"). The key settlement terms are as follows:

16 **A. The Settlement Fund**

17 Defendants have agreed to pay \$9.0 million to resolve all monetary obligations owed under the
18 settlement. In addition to the Settlement Awards paid to class members, the Fund will be used to pay
19 notice and administration costs; service awards to the five Named Plaintiffs; Plaintiffs' attorneys' fees
20 and reimbursement of Plaintiffs' litigation expenses in amounts approved by the Court. As reflected in
21 the separate application filed concurrently with this motion, Plaintiffs' request for attorneys fees and
22 costs are *less than* the amounts authorized under the Settlement Stipulation. Factoring in an agreed-upon
23 reserve of \$25,000 to cover late claims, there will be \$5,066,254.30 available to fund payments to
24 Settlement Class Members. (Stebner Decl., ¶ 26.) That is *more than* the \$4.98 million amount Plaintiffs
25 projected at the preliminary approval stage. (Amended Order – Motion for Preliminary Approval of
26 Class Settlement Granted (Aug. 25, 2020), p. 3.) Significantly, there will be no reversion of any portion
27 of the Settlement Fund to Defendants. Rather, unused Reserve Funds as well as uncashed or returned
28

1 checks will be distributed as cy pres.³ (SS, ¶7.9; Stebner Decl., ¶ 32.)

2 **B. Settlement Payments to Class Members**

3 The Settlement Stipulation provides for cash payments to Settlement Class Members (or if
4 deceased, their legal successors) on a direct distribution basis with no claims requirement. The Settlement
5 Class consists of 6,975 current and former residents. The Settlement Administrator (“Administrator”)
6 proposed by the parties (CPT Group, Inc.⁴) will mail settlement checks to each Settlement Class Member
7 for whom a valid address has been provided by Defendants or located through skip trace procedures. For
8 Settlement Class Members for whom current addresses cannot be located, the Administrator is authorized
9 to make payment based on a “distribution request” by the Settlement Class Member (or their legal
10 successor). (SS, ¶7.5; Stebner Decl., ¶ 27.)

11 Subject to Court approval, the settlement cash payments will be calculated as follows:

- 12 1. Settlement Class Members who paid no Community Fee shall each be entitled to a Settlement
13 Award of One-Hundred Dollars (\$100). The Administrator shall calculate the total amount owed
14 to the “No Community Fee Paid” group.
- 15 2. Settlement Class Members who paid a Community Fee (or had someone pay a Community Fee on
16 their behalf) shall each be entitled to a Settlement Award calculated as follows. First, the Net
17 Settlement Fund (\$5,066,254.30) is reduced by amounts allocated for the No Community Fee
18 Paid group (approximately \$367,400) and the Reserve Fund for late claims (\$25,000). Second,
19 that amount is divided by the total amount of Community Fees paid by or on behalf of all
20 Settlement Class Members (\$12,530,330) to calculate a Settlement Payment Percentage (“SPP”),
21 estimated to be approximately 37%. Next, the SPP shall be applied against the actual Community
22 Fee paid by or on behalf of each Settlement Class Member to derive the corresponding Settlement
23 Award amount. (SS, ¶¶7.2 and 7.6; Stebner Decl., ¶ 30.)

24 Before the distribution, the Administrator will recalculate the per-resident payment using the
25 actual number of class members located through Defendants’ records, address updates and Distribution
26 Requests. From past experience with these types of settlements, that process will likely result in an
27 increase in the per-resident payment. The checks will be mailed five days after the Effective Date as

28 _____
29 ³ The Court has preliminarily approved the proposed cy pres recipient, Groceries for Seniors, a non-
30 profit based in San Francisco providing free food to poor, elderly people. (Stebner Decl., ¶ 32; Amended
31 Order – Motion for Preliminary Approval of Class Settlement Granted (Aug. 25, 2020), p. 3.)

32 ⁴ With over thirty years of experience, CPT Group, Inc., has administered thousands of complex class
33 action cases and billions of dollars in settlement funds. CPT Group, Inc., has extensive knowledge of
34 complex class action settlement notice programs and are known for their quality of work, timeliness, and
35 competitive pricing. (Stebner Decl., ¶ 28; see CPT Group, Inc.’s website at <https://www.cptgroup.com>.)

1 defined in the Settlement Stipulation. Settlement Award checks not cashed within the 120-day check
2 cashing deadline (after reasonable reminders issued by the Administrator) shall be added to the Reserve
3 Fund. (SS, ¶¶7.4–7.9; Stebner Decl., ¶ 31.)

4 **C. Stipulated Injunction**

5 An integral part of the settlement is the Stipulated Injunction, which subject to Court approval,
6 will commence on the date it is approved and signed by the Court and remain in place for two years from
7 that date. (NOL, Ex. B - Stipulated Injunction; SS, ¶7.1.) Among other terms, the Injunction requires
8 Defendants to provide resident care personnel necessary to meet each of the resident’s daily care needs at
9 the Oakmont Senior Living branded California assisted living facilities. These facilities are to maintain
10 staffing equal to or greater than the “Required Resident Care Personnel Minutes,” which is defined as
11 follows: (i) the daily aggregated personal care minutes assigned to each resident based on the time
12 necessary to perform each assessed care task (“Assessed Minutes”), plus (ii) additional daily resident care
13 personnel minutes equal to twenty percent (20%) of the aggregated Assessed Minutes. (Stipulated
14 Injunction, ¶¶4, 9). The implementation of the Required Resident Care Personnel Minutes and other
15 terms of the Injunction address the alleged failures to provide sufficient staffing at Defendants’ facilities.
16 (Stebner Decl., ¶ 33.)

17 At the direction of Plaintiffs’ Counsel, the required and available staffing hours per day at four
18 Oakmont facilities were analyzed for various periods between March 2016 and December 2018. The
19 analysis calculated the average required hours per day based on resident assessment data and other
20 information and then compared the required hours to the average available hours per day based on
21 Defendants’ payroll records. If the available hours at a facility fell below the required hours as
22 determined by the resident assessments, this represented a shortfall in required resident care at that
23 facility. The data analysis showed an average daily shortfall of -17.53%. (Declaration of Patrick
24 Kennedy, Ph.D. (“Kennedy Decl.”), ¶¶6-7). Dr. Kennedy calculated the residents’ economic harm that
25 would have been incurred but-for the Injunction by factoring the “first month Care Fees,” the combined
26 average shortfall percentage, the two-year term of the injunction, and the average resident length of stay.
27 Dr. Kennedy conservatively estimates that the avoided economic harm (which is the equivalent of the
28 benefit received) for resident Class Members during the period of the Injunction to be \$9,066,402.

1 (Kennedy Decl., ¶¶6-7, 12-19.) That benefit is in addition to the \$9.0 million Settlement Fund.

2 **D. Release Provisions**

3 Under the Settlement Stipulation, the Named Plaintiffs and Settlement Class Members (excluding
4 opt-outs) will release any and all actions, claims, demands, rights, suits, and causes of action of whatever
5 kind or nature whatsoever that the Class Representatives and/or any member of the Settlement Class,
6 including their respective predecessors, successors, agents, representatives, executors, administrators,
7 decedents, dependents, heirs, beneficiaries, trustees, attorneys, employees, assignors and assignees ever
8 had, now have or hereafter can, shall, or may have against the Released Parties, including without
9 limitation any and all damages, loss, costs, expenses, penalties, attorneys' fees and expert fees, and
10 interest, whether known or unknown, suspected or unsuspected, arising out of or relating in any way or
11 manner to the claims and allegations asserted in the Action or that could have been asserted in the Action
12 based on or related to the allegations in Plaintiffs' operative complaint; provided that the following
13 claims only are specifically excluded from the Release: (i) any claim for the recovery of entrance fee,
14 transfer fee or similar fee charged to or paid at any time during the Class Period by or on behalf of a
15 person who resided in a Continuing Care Retirement Community ("CCRC") owned or operated by any
16 Defendant that does not arise out of or relate in any way or manner to the claims and allegations asserted
17 in the Action⁵; (ii) any individual claims for personal injuries, wrongful death, bodily harm, or emotional
18 distress resulting from said claims for personal injuries, wrongful death or bodily harm; and (iii) claims
19 based on a breach of the Settlement Stipulation or the Injunction. Nothing in the Settlement Stipulation
20 shall preclude any person or entity from asserting any and all relevant allegations in support of a claim
21 for personal injuries, wrongful death, bodily harm, or emotional distress resulting from said personal
22 injuries, wrongful death or bodily harm, including without limitation, allegations that the facility was
23 understaffed. The releases are effective only after the settlement has been granted final approval and the
24 Effective Date is reached. (SS, ¶8.1.)

25 _____
26 ⁵ CRCC residents are giving up claims for all payments made or charges incurred, including the
27 Entrance Fees and/ Transfer Fees, to the extent any such claims arise out of or relate to the
28 claims/allegations that were or could have been asserted in this Action. However, as provided in the
Settlement Stipulation, the settlement does not otherwise impact the rights and obligations of the CCRC
residents or Defendants under the CCRC contracts. (SS, ¶1.23.)

1 **E. Class Notice and Settlement Administration Costs**

2 Pursuant to the Settlement Stipulation, Class Notice in the form preliminarily approved by the
3 Court was disseminated to Settlement Class Members by first class U.S. Mail and e-mail. To effectuate
4 notice, Defendants provided names and contact information for all Settlement Class Members (and
5 representatives/family members to the extent available) to the Administrator, which were updated
6 through standard change of address and other procedures. Returned mail was re-sent after a skip trace
7 was performed. In addition to mailing and e-mailing, a summary form of the Court-approved class notice
8 was published in the Los Angeles and San Francisco editions of *USA Today* and posted on the settlement
9 website. The costs of class notice and settlement administration expenses will be paid from the
10 Settlement Fund. (Skey Decl., ¶¶ 2-10; SS, ¶¶ 4.2.1, 4.2.3 and 4.2.4.)

11 On September 14, 2020, CPT increased its settlement administration cost bid to a “not to exceed”
12 amount of \$75,000. As the Class Notice referenced a \$65,000 amount, Plaintiffs’ Counsel propose that
13 the \$10,000 cost “overrun” be added to litigation expense reimbursement or, alternatively, deducted from
14 the attorneys’ fee award. (Stebner Decl., ¶¶ 29; Skey Decl., ¶ 8.)

15 **F. Payment of Service Awards, Attorneys’ Fees and Litigation Costs**

16 Subject to Court approval, the Settlement Stipulation provides for Service Awards to the five
17 Named Plaintiffs, collectively not to exceed \$30,000. As will be established in detail in the separate and
18 concurrently filed application for Service Awards, Named Plaintiffs devoted substantial time to the case
19 prosecution, including with discovery, depositions, and/or settlement negotiations. (Stebner Decl., ¶ 58.)

20 In addition, the Settlement Stipulation allows Plaintiffs’ Counsel to file an application for
21 attorneys’ fees not to exceed one-third of the overall Settlement Value and litigation costs not to exceed
22 \$450,000. (SS, ¶1.3.) Plaintiffs estimate the overall Settlement Value is at least \$18 million, based on the
23 \$9 million Settlement Fund and the additional value of injunctive relief over \$9 million. However, as
24 reflected in Plaintiffs’ separate and concurrently filed fee application, Plaintiffs’ Counsel will seek Court
25 approval for payment of \$3,500,000 in attorney’s fees and reimbursement of \$328,745.70 in litigation
26 costs. Those amounts are *less* than the full amounts authorized under the Settlement Stipulation. (SS,
27 ¶1.3.). Accordingly, the Net Settlement Fund will be *more than* the \$4.98 million amount Plaintiffs
28 projected at the preliminary settlement approval stage.

1 As discussed in Plaintiffs' separate fee application, California courts routinely approve class
2 action settlements that included fee requests seeking a positive multiplier. (*See, e.g., Wershba v. Apple*
3 *Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001) [“[m]ultipliers can range from 2 to 4 or even higher”].)
4 And here, the economic value and other benefits of the Injunction should be considered along with the \$9
5 million Settlement Fund in considering the overall value of the settlement obtained. (*See Staton v. Boeing*
6 *Co.*, 327 F.3d 938, 974 (9th Cir. 2003); *Linney v. Cellular Alaska Partnership*, No. C-96-3008DLJ 1997
7 U.S. Dist. LEXIS 24300, 1997 WL 450064, pp. *6-*7 (N.D. Cal., July 18, 1997).)

8 **IV. ALL REQUIREMENTS FOR FINAL SETTLEMENT APPROVAL ARE MET**

9 To protect absent class members' interests, class action settlements require trial court approval.
10 (*See Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800.) The basic test is whether the
11 settlement is “fair, adequate and reasonable.” (*Id.* at 1801.) Courts have broad discretion to determine
12 whether the settlement is fair. (*Id.* at 1801; *Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 438
13 [trial court “has broad powers to determine whether a proposed settlement in a class action is fair”].) In
14 determining whether to approve a class settlement, the court does not reach “ultimate conclusions on the
15 contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of
16 outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual
17 settlements.” (*7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135,
18 1145.) California courts favor settlement, and that policy applies to class action settlements. (*See Dunk*,
19 48 Cal.App.4th at 1801.)

20 **A. The Settlement Is Entitled to a Presumption of Fairness**

21 Class action settlements are presumed to be fair when: (1) the settlement is reached through hard
22 fought arms-length negotiations; (2) investigation and discovery are sufficient to allow counsel and the
23 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
24 objectors is small. (*See Dunk*, 48 Cal.App.4th at 1802; *In re Microsoft IV Cases* (2006) 135 Cal.App.4th
25 706, 723; *Kullar v. Foot Locker Retail Inc.* (2008) 168 Cal.App.4th 116, 128.)

26 That presumption exists here. The Settlement Stipulation was reached through extensive arms-
27 length negotiations, which included three formal full-day mediations supervised by experienced neutrals,
28 multiple conference calls and email exchanges that occurred over several months. This included a

1 mediation on June 19, 2019 before Hon. George Hernandez (ret.) of ADR Services, Inc.; a mediation on
2 November 8, 2019 before Hon. Richard Silver (ret.) of JAMS; and a mediation on December 16, 2019
3 before Judge Silver, which resulted in this settlement. The negotiations were hard-fought, with several
4 instances where it appeared that the parties would not reach agreement. (Stebner Decl., ¶ 25.)

5 Second, as discussed in detail below in Section IV(B)(3), Plaintiffs’ Counsel here have
6 extensive experience litigating and settling consumer class actions and other complex matters, and they
7 have investigated the factual and legal issues raised in this action. (Stebner Decl., ¶¶ 4-25, 38-53.) As
8 discussed above, the pleadings were contested, and the parties engaged in substantial motion practice and
9 written and deposition discovery before reaching settlement. (Stebner Decl., ¶¶ 22-24.) These and other
10 proceedings in the case produced a thorough vetting (pre-settlement) of the factual and legal bases for
11 Plaintiffs’ claims and the key defenses to those claims. Counsel have undertaken sufficient
12 investigation to allow the parties and the Court to act intelligently. Moreover, the fact that qualified
13 and well-informed counsel with substantial expertise endorse the settlement as being fair, reasonable,
14 and adequate weighs heavily in favor of approval. (*See Reed v. General Motors Corp.*, 703 F.2d 170,
15 175 (5th Cir. 1983).)

16 **B. The Settlement Provides Substantial Benefits to the Class and is “Fair, Adequate,
17 and Reasonable”**

18 Even without a presumption of fairness, the settlement provides substantial benefits to the
19 Settlement Class and is fair, adequate, and reasonable. Plaintiffs have provided an estimate of the total
20 maximum theoretical recovery for the Settlement Class based on an analysis of the strength of Plaintiffs’
21 claims so that the Court may balance the estimated potential recovery against that recovered under the
22 Settlement Stipulation. (*See Kullar*, 168 Cal.App.4th 116, 130.)

23 **1. Strength of Plaintiffs’ Case and Amount Offered in Settlement**

24 The lead claim for monetary relief in the lawsuit has been the recovery of Community Fees paid by
25 residents. Community Fees are monies generally paid at or prior to moving into the assisted living
26 facility. Under Plaintiffs’ case theory, the Community Fees would not have been paid had residents
27 known the “true” facts that resident assessments are not used to set facility staffing. Unlike other
28 charges—such as care fees as to which residents arguably received some value for services rendered—the

1 Community Fees arguably are the least likely to be affected by Defendants’ offset and related defenses.⁶

2 Defendants’ records indicate the total amount of Community Fees paid by Settlement Class
3 Members was \$12,530,330.⁷ As discussed above, in addition to the Injunction valued over \$9 million,
4 Defendants have agreed to pay a settlement fund \$9.0 million, of which \$5,066,254.30 will be available
5 for distribution to class members. That translates to an estimated average Settlement Payment Percentage
6 of approximately 37% of the average Community Fees paid by Settlement Class Members. (*See* SS,
7 ¶¶7.4, 7.6; Stebner Decl., ¶ 39.) It is well-settled that class action settlements that provide for only a
8 fraction of the potential full recovery at trial are proper. (*See, e.g., In re Omnivision Techs.*, 04-2297-SC,
9 559 F. Supp. 2d 1036, 1042 (N.D. Cal., Jan. 9, 2007) (approving settlement where class received
10 payments totaling 6% of potential damages); *Trombley v. Nat’l City Bank*, No. CIV-A-10-00232JDB,
11 759 F. Supp. 2d 20, 25-26 (D.D.C., 2011).

12 Further, the Injunction provides important additional benefits that further support the adequacy and
13 reasonableness of the settlement. As discussed in detail above, the Injunction requires Defendants to
14 provide resident care personnel necessary to meet the resident’s daily care needs at their assisted living
15 facilities, an added benefit to the Settlement Class conservatively estimated to be \$9,066,402. (Kennedy
16 Decl., ¶¶6-7, 12-19.)

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19 ⁶ Settlement Class Members include approximately 500 former residents of five Continuing Care
20 Retirement Communities (“CCRC”) owned or operated by Defendants. Though some of these residents
21 paid CCRC entrance and transfer fees during the Settlement Class Period, any claims with respect to
22 such payments are arguably subject to additional defenses based on disclosures made pursuant to CCRC
23 admissions procedures. Given the refund provisions, the proper focus for the entrance and/or transfer
24 fees is on former CCRC residents because a resident moving out or dying is the point at which there is a
25 determination as to whether a CCRC resident will have some portion of their entrance fee retained.
26 Defendants’ data showed that nearly 98% of the CCRC former residents did not pay entrance or transfer
27 fees, were refunded those fees, or were not assessed to require resident care services. (Stebner Decl., ¶
28 35.)

⁷ If the case were tried, Plaintiffs would assert claims for recovery of care service fees paid and
statutory damages under the CLRA. However, Defendants have stronger arguments to reduce the
care fees given the arguable value of services rendered. And CLRA statutory damages are not
mandatory, but instead may be awarded at the discretion of the trier of fact if the required showing
is made. Civ. Code § 1780(b)(1) (listing factors required for CLRA statutory damage award,
including whether the trier of fact finds “an additional award is appropriate.”)

1 **2. Risk and Expense of Further Litigation**

2 The potential risks and expenses of further litigation also support final approval. While the
3 Community Fees represent the most solid damage claim at trial, for settlement purposes, there is no
4 guarantee that the trier of fact would award the full amount of these fees. As to these fees, and other
5 payments made by residents (such as rent), Defendants contend Plaintiffs’ damage claims are barred (or
6 at least mitigated by the resident’s receipt of care services after move-in. In addition to substantive
7 defenses, Defendants argue the claims are not suitable for class treatment, given the arguable resident-
8 specific issues raised. Even if the Court certified a litigation class, Defendants are expected to raise
9 vigorous trial defenses as to both liability and damages. For example, Defendants argue there is no
10 omission or misrepresentation concerning staffing levels or the use of assessments in setting or reviewing
11 staffing levels at their assisted living facilities. Defendants contend resident assessments are considered
12 in setting or reviewing staffing at its facilities, that their residency agreement does not promise that
13 facility staffing levels will be based on any particular factor including resident assessments, and that
14 prospective residents based their decision to enter their facilities on non-staffing factors. Moreover, as
15 certain of the Oakmont agreements contained arbitration provisions, a possible arbitration defense was
16 another litigation risk factor. While Plaintiffs disagree with Defendants arguments and other anticipated
17 defense arguments, for settlement evaluation purposes, these and other defense arguments, asserted by
18 skilled and experienced counsel, raise real trial risks and must be considered. Moreover, the settlement in
19 this case was reached before the Court was asked to rule on class certification. While Plaintiffs believe the
20 instant claims should be certified for litigation purposes, the Court could have come to a different
21 conclusion. And the trial court’s determination on class certification is entitled to substantial deference by
22 the appellate courts. (*Sav-on Drugs v. Superior Court* (2004) 34 Cal.4th 319, 329.)

23 Finally, implementing the settlement now avoids delay, which is particularly important given the
24 advanced age and frail condition of many Settlement Class Members. Proceeding to trial (and the
25 inevitable appeal) could add several years to the case resolution. Considered against the risks of
26 continued litigation and the advanced age of many Class Members, the totality of relief provided under
27 the proposed Settlement Stipulation is fair, more than adequate, and well within the range of
28 reasonableness. (Stebner Decl., ¶¶ 38-42.)

1 **3. Extent of Discovery / Experience of Class Counsel**

2 As discussed herein, Plaintiffs engaged in substantial investigation and formal discovery prior to
3 reaching a settlement. Counsel have undertaken sufficient investigation to allow the parties and the
4 Court to act intelligently and have a reasonable basis to enter into the Settlement Stipulation and
5 Injunction. (Stebner Decl., ¶¶ 4-25, 38-53.)

6 Plaintiffs’ Counsel are well-versed in class actions generally and elder abuse matters in particular,
7 including consumer claims against assisted living facilities. As discussed in the declarations filed by
8 Plaintiffs’ Counsel, they have been approved by California state and federal courts to serve as Class
9 Counsel in numerous other consumer class actions against assisted living facilities and skilled nursing
10 facilities. Certain Plaintiffs’ Counsel have experience representing plaintiffs in six other California class
11 action cases against owners of assisted living facilities alleging violations of the CLRA, fraudulent
12 business practices (pursuant to Business & Professions Code section 17200), and elder financial abuse, as
13 well as a class action against owners of assisted living facilities in Washington State. Certain Plaintiffs’
14 Counsel obtained a plaintiff’s verdict in the Skilled Healthcare understaffing litigation after a six-month
15 jury trial. On the appellate level, Plaintiffs’ Counsel have been at the forefront on nurse understaffing and
16 related issues in skilled nursing facilities, including several reported decisions in nurse staffing class
17 actions. (*Shuts v. Covenant Holdco LLC* (2012) 208 Cal.App.4th 609.)⁸ (Stebner Decl., ¶¶ 4-16.)

18 Based on that experience and others, and in consideration of the litigation risks for the Settlement
19 Class Members, Plaintiffs’ Counsel have concluded that the settlement is fair, adequate, reasonable, and
20 appropriate. (Stebner Decl., ¶¶ 38 and 57.) The opinion of experienced counsel supporting the settlement
21 is entitled to considerable weight. (*See Reed*, 703 F.2d at 175.)

22 **4. Class Member Reaction**

23 To date, from a Settlement Class that consists of 6,975 residents, there have been *no* objections
24 submitted, and only thirty-eight (38) Settlement Class Members have elected to opt-out. (*See Skey Decl.*,
25 ¶ 11.) The favorable class reaction is another reason why the Court should grant final approval. (*See*

26 _____
27 ⁸ *See also, Conservatorship of Gregory* (2000) 80 Cal.App.4th 514; *Fitzhugh v. Granada*
28 *Healthcare and Rehabilitation Center* (2007) 150 Cal.App.4th 469; *Walsh v. Kindred Healthcare*
(N.D. Cal 2011) 798 F.Supp. 2d 1073; *Wehlage v. EmpRes Healthcare, Inc.* (N.D. Cal 2011) 791
F.Supp.2d 774, all of which were relied on by the court in *Shuts*.

1 *Dunk*, 48 Cal. Aph 4th 1802 (a presumption of fairness exists when, among other considerations, “the
2 percentage of objectors is small”.)

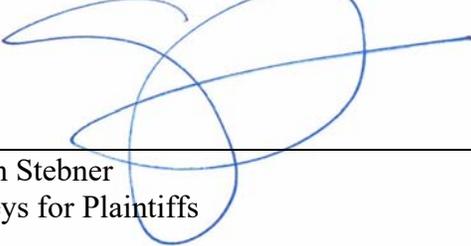
3 **V. CONCLUSION**

4 In sum, the proposed settlement is fair, adequate, and reasonable and should be approved. The
5 settlement provides substantial monetary benefits that, in the aggregate, represents approximately 37% of
6 the realistic damages available if the case were tried. In addition, the settlement includes strong
7 injunctive relief that directly addresses the challenged practice. That is a strong result for the Settlement
8 Class, particularly given the litigation risks presented on class certification and the merits. With this
9 resolution, the Settlement Class Members (many of whom are elderly) get real relief now, as opposed to
10 years down an uncertain litigation road. A proposed form of order has been submitted.

11 Dated: October 29, 2020

Respectfully submitted,

12 STEBNER AND ASSOCIATES

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