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16 SUPERIOR COURT OF THE STATE OF CALIFORNIA

17 COUNTY OF ALAMEDA

18 Donald Lollock, by and through his Guardian ad
19 Litem, Kathleen Lollock; Zareen Khan as
20 Executor for the Estate of Abdulwafi Khan;
21 Frank Pearson; Jo Ella Nashadka, by and through
22 her Guardian ad Litem, Lance Anderson; and
23 Jane Burton-Whitaker; on their own behalves,
24 and on behalf of others similarly situated,

25 Plaintiffs,

26 vs.

27 Oakmont Senior Living, LLC; Oakmont
28 Management Group, LLC; and Does 1 - 100,

Defendants.

CASE NO. RG17875110

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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR ATTORNEYS' FEES, COSTS, AND
SERVICE AWARDS**

Date: January 20, 2021

Time: 3:00 p.m.

Dept: 19

Judge: Hon. Stephen Kaus

Reservation No.: R-2202161

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1 **I. INTRODUCTION**

2 Plaintiffs respectfully seek Court approval for (a) the payment of \$3,500,000 in attorneys’ fees,
3 (b) litigation costs of \$328,745.70, and (c) service awards to the five Named Plaintiffs collectively not to
4 exceed \$30,000. The fee request represents a 1.17 multiplier of the lodestar fees incurred to date and
5 represents roughly 19.4% of the total Settlement Value. If Plaintiffs’ fee request is granted in full, there
6 will be \$5,066,254.30 available to fund payments to Settlement Class Members, which is *more than* the
7 \$4.98 million amount Plaintiffs projected at the preliminary settlement approval stage.¹

8 As set forth herein and in the accompanying Motion for Final Approval of Class Settlement, the
9 settlement provides substantial monetary benefits and injunctive relief to directly address Plaintiffs’
10 allegations that Defendants Oakmont Senior Living LLC and Oakmont Management Group LLC
11 (collectively “Defendants”) misrepresented that resident assessments at their assisted living facilities in
12 California would be used to set facility staffing.² The fee award sought is fair and reasonable,
13 particularly given the substantial benefits obtained for the Settlement Class, the work performed to
14 achieve that settlement, the complexity of the case, the risks and challenges faced in bringing this case,
15 the experience of counsel and the fees commonly awarded in cases of this type. For the reasons set forth
16 herein, Class Counsel respectfully request that this motion be granted.

17 **II. BACKGROUND**

18 **A. Case Overview**

19 Plaintiffs Donald Lollock, by and through his Guardian ad Litem, Kathleen Lollock; Zareen Khan
20 as Executor for the Estate of Abdulwafi Khan; Frank Pearson; Jo Ella Nashadka, by and through her
21 Guardian ad Litem, Lance Anderson; and Jane Burton-Whitaker (collectively “Plaintiffs”) filed this
22 putative class action on September 13, 2017. The lawsuit sought relief on behalf of Plaintiffs and all
23 persons who resided in any Oakmont Senior Living branded California assisted living facility since

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

25 ² Capitalized terms herein have the same meaning as set forth in the Settlement Stipulation attached as
26 Exhibit A to the Notice of Lodgment (“NOL”), filed concurrently.

27 The Settlement Stipulation allows Plaintiffs’ Counsel to seek attorneys’ fees not to exceed one-third of
28 the overall Settlement Value and litigation costs not to exceed \$450,000. (SS, ¶1.3.) Factoring in the
Settlement Fund of \$9 million and the additional \$9 million value of the Injunction, the Settlement
Value exceeds \$18 million. (Declaration of Kathryn Stebner (“Stebner Decl.”), ¶ 37.)

1 September 13, 2013. Plaintiffs assert claims for damages and other relief under California’s Consumers
2 Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.* (“CLRA”); Unfair Competition Statute, Bus. & Prof.
3 Code §§ 17200 *et seq.* (“UCL”); and the Financial Elder Abuse statute, Cal. W&I Code § 15610.30.
4 Defendants deny the allegations in their entirety and deny class action treatment is appropriate for
5 litigation purposes. Defendants have agreed to settle to avoid continued burdensome and costly litigation.

6 **B. Class Counsel Expended Considerable Time and Resources to Investigate, Litigate,
7 and Settle These Class Claims.**

8 As set forth in the accompanying Final Approval Motion and as detailed in Class Counsel’s
9 declarations, substantial counsel time was spent in case development before this lawsuit was filed.
10 Then, this case was vigorously litigated for over three years before the parties reached a settlement.
11 Plaintiffs successfully opposed multiple pleading challenges from Defendants. After substantial written
12 and deposition discovery, extensive time and effort were also incurred in settlement discussions, which
13 included three formal mediation sessions and numerous other settlement communications. Plaintiffs’
14 Counsel anticipate that additional fees will be incurred in the final approval process and to oversee
15 Defendants’ compliance with the Injunction.

16 **C. The Parties Vigorously Litigated This Case from Inception.**

17 After Defendants removed to Federal Court, this Action was remanded back to State Superior
18 Court on November 7, 2017. On December 15, 2017, Plaintiffs filed their First Amended Complaint
19 (“FAC”) in the above-captioned Court. Defendants then filed a Demurrer and Motion to Strike the Class
20 Allegations in Plaintiffs’ FAC. On March 18, 2018, the state court denied Defendants’ Demurrer and
21 Motion to Strike the Class Allegations in Plaintiffs’ FAC. On April 9, 2018, Defendants answered the
22 FAC, wherein Defendants expressly denied the allegations.

23 **D. Plaintiffs Engaged in Investigation and Discovery Prior to Reaching Settlement.**

24 Before filing the initial complaint, Plaintiffs’ Counsel reviewed over 10,000 pages of background
25 documents, interviewed current and former residents (and family members), reviewed deposition and
26 written discovery from other lawsuits against Defendants, and consulted with experts on assisted living
27 facilities. (Stebner Decl., ¶ 21.) After the Action was filed, Plaintiffs engaged in extensive written and
28 deposition discovery, including written discovery responses exchanged between the parties, Defendants’

1 production of approximately 104,895 pages of documents including 829 Excel and native files, and the
2 depositions of seven (7) witnesses, including Defendants' managing agents, facility-level personnel,
3 designated Persons Most Knowledgeable, two Class Representatives, as well as third-party discovery
4 directed at Defendants' vendor to obtain resident assessment and related data. Discovery efforts included
5 numerous meet and confer discussions among Defendants and the vendor to obtain Defendants' resident
6 assessment data, which resulted in the production of an additional twenty-four (24) data intensive Excel
7 spreadsheets. Plaintiffs' review also included approximately 20,327 pages of documents from the
8 California Department of Social Services regarding Defendants' facilities. (Stebner Decl., ¶ 22.) With
9 assistance from outside experts, Plaintiffs' Counsel incurred substantial time to review and analyze
10 Defendants' resident assessment and staffing data. (Stebner Decl., ¶ 23.) The Parties also engaged in
11 substantial law-and-motion efforts prior to negotiating a settlement, specifically, litigation of Defendants'
12 demurrer and motion to strike the FAC. The Parties also engaged in extensive meet and confer efforts for
13 Defendants' documents and interrogatory responses and participation in an informal discovery
14 conference to compel Defendants' production of certain documents. (Stebner Decl., ¶ 24.)

15 **E. Parties' Extensive Settlement Negotiations Result in Agreement.**

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

21 **F. Class Counsel Coordinated Efforts to Maximize Efficiency.**

22 Class Counsel consisted of a team of experienced attorneys from various law firms, each with a
23 special set of skills and resources which contributed to the investigation, prosecution and eventual
24 resolution of this class action. The firms representing the Class offered considerable expertise litigating
25 individual and complex cases against assisted living and skilled nursing facilities, and other complex
26 class actions. Class Counsel coordinated their efforts to maximize efficiency and avoid duplication of
27 work. While Class Counsel consistently delegated duties to particular firms, they also marshaled their
28 shared expertise on projects at key moments in the case. Class Counsel met together and consulted each

1 other regularly to devise strategy, make key decisions and to craft the top-quality work product necessary
2 to successfully prosecute the case. The delegation of tasks and the cooperation around high-stakes
3 decisions and briefing were always carried out foremost for the benefit of the Class. Without Class
4 Counsel’s efforts, this Class of vulnerable assisted living facility residents would still be exposed to
5 Defendant’s misrepresentations and misleading statements. (Stebner Decl. ¶¶ 4-16, 43-44.)

6 **III. CLASS COUNSEL ACHIEVED SUBSTANTIAL BENEFITS FOR THE CLASS**

7 Class Counsel secured important and substantial benefits for the Settlement Class through
8 vigorous prosecution and extensive discovery and settlement discussions. As discussed in Section III of
9 the Final Approval Motion, the key settlement terms are as follows:

10 **A. The Settlement Fund**

11 Defendants have agreed to pay \$9 million to resolve all monetary obligations owed under the
12 settlement. (SS, ¶1.31.) In addition to the Settlement Awards to Settlement Class Members, the Fund
13 will be used to pay notice and administration costs (not to exceed \$75,000), service awards to the five
14 Named Plaintiffs (collectively, \$30,000), Plaintiffs’ attorneys’ fees and reimbursement of Plaintiffs’
15 litigation expenses in amounts approved by the Court. Plaintiffs’ requests for attorneys fees and costs are
16 *less than* the amounts authorized under the Settlement Stipulation. Factoring in an agreed-upon reserve
17 of \$25,000 to cover late claims, and if Plaintiffs’ fees and costs request is granted in full, there will be
18 \$5,066,254.30 available to fund payments to Settlement Class Members. (Stebner Decl., ¶ 26.) That is
19 *more than* the \$4.98 million amount that Plaintiffs projected at the preliminary approval stage.
20 (Amended Order – Motion for Preliminary Approval of Class Settlement Granted (Aug. 25, 2020), p. 3.)
21 Accordingly, the settlement payments to Settlement Class Members in the “Paid Community Fees” group
22 is estimated to be approximately 37% of the overall Community Fees paid. There will be no reversion of
23 any portion of the Settlement Fund to Defendants. Rather, unused Reserve Funds as well as uncashed or
24 returned checks will be distributed as cy pres. (SS, ¶7.9; Stebner Decl., ¶ 26.)

25 **B. Substantial Settlement Payments to Class Members**

26 As discussed in Section III(B) of the Final Approval Motion, the Settlement Stipulation provides for
27 cash payments to Settlement Class Members (or if deceased, their legal successors) on a direct
28 distribution basis with no claims requirement. The Settlement Class consists of 6,975 current and former

1 residents. Subject to Court approval, the settlement cash payments will be calculated as follows:

- 2 1. Settlement Class Members who paid no Community Fee shall each be entitled to a
3 Settlement Award of One-Hundred Dollars (\$100). The Administrator shall calculate the
4 total amount owed to the “No Community Fee Paid” group.
- 5 2. Settlement Class Members who paid a Community Fee (or had someone pay a
6 Community Fee on their behalf) shall each be entitled to a Settlement Award calculated
7 as follows. First, the Net Settlement Fund (\$5,066,254.30) is reduced by amounts
8 allocated for the No Community Fee Paid group (approximately \$367,400) and the
9 Reserve Fund for late claims (\$25,000). Second, that amount is divided by the total
10 amount of Community Fees paid by or on behalf of all Settlement Class Members
11 (\$12,530,330) to calculate a Settlement Payment Percentage (“SPP”), estimated to be
12 approximately 37%. Next, the SPP shall be applied against the actual Community Fee
13 paid by or on behalf of each Settlement Class Member to derive the corresponding
14 Settlement Award amount. (*See* SS, ¶¶7.2 and 7.6; Stebner Decl., ¶ 30.)

15 The Settlement Administrator is authorized to increase the initial settlement amount if sufficient
16 monies are available after calculating the amounts owed to all Settlement Class Members for whom
17 current addresses have been provided or located, along with the amounts owed to class members who
18 made timely distribution requests. (SS, ¶¶7.4–7.9; Stebner Decl., ¶ 39.)

19 **C. Stipulated Injunction**

20 As discussed in Section III(C) of the Final Approval Motion, the settlement includes substantial
21 injunctive relief in addition to the Settlement Fund. (NOL, Ex. B - Stipulated Injunction; SS, ¶7.1.) Among
22 other terms, the Injunction requires Defendants to provide resident care personnel necessary to meet each
23 of the resident’s daily care needs at the Oakmont Senior Living branded California assisted living
24 facilities, which addresses the crux of this case. (Stebner Decl., ¶ 33; Stipulated Injunction, ¶¶4, 9).

25 At the direction of Plaintiffs’ Counsel, Dr. Patrick Kennedy calculated the residents’ economic
26 harm that would have been incurred but-for the Injunction. Dr. Kennedy conservatively estimates that the
27 avoided economic harm (which is the equivalent of the benefit received) for resident Class Members
28 during the period of the Injunction to be \$9,066,402. (Declaration of Patrick Kennedy, Ph.D. (“Kennedy
Decl.”), ¶¶6-7, 12-19.) That benefit is in addition to the \$9 million Settlement Fund.

29 **IV. PLAINTIFFS’ FEE REQUEST IS FAIR AND REASONABLE**

30 In this action, Plaintiffs asserted claims under the Consumers Legal Remedies Act, Cal. Civil Code §
31 1750 *et seq.*, which requires mandatory payment of attorneys’ fees and costs to successful plaintiffs. The
32 attorneys’ fees provision of the CLRA, Section 1780(e), states: “The court *shall* award court costs and
33

1 attorney fees to a prevailing plaintiff in litigation filed pursuant to this section.” Thus, some award of
2 attorneys’ fees is mandatory. (*Kim v. Euromotors West/The Auto Gallery*, 149 Cal.App.4th 170, 177 (2007).)
3 Under California law, the Court may award reasonable fees and costs when a litigant proceeding in a
4 representative capacity has achieved a “substantial benefit” for a class of persons. (*Serrano III v. Priest*, 20
5 Cal.3d 25, 38 (1977) (“*Serrano III*”).) There are two methods of calculating fees in civil class actions: (1)
6 the lodestar/multiplier method, and (2) the percentage of recovery method. (*Wershba v. Apple Computer*,
7 *Inc.*, 91 Cal.App.4th 224, 254 (2001).) A recognized approach is to determine the plaintiffs’ lodestar fees,
8 determine whether a multiplier is warranted, and then “cross check” the propriety of that amount as a
9 percentage of the overall recovery. (*See Lealao v. Beneficial Cal., Inc.*, 82 Cal.App.4th 19, 49-50 (2000).)

10 **A. Plaintiffs’ Fees Are Reasonable Under the Lodestar Analysis**

11 Under California law, “[t]he primary method for establishing the amount of ‘reasonable’ attorney
12 fees is the lodestar method.” (*In re Vitamin Cases*, 110 Cal. App. 4th 1041, 1052 (2003).) In consumer
13 protection cases that provide for mandatory fee-shifting (such as the instant case), the Court must also
14 consider that “legislative policies are in favor of [plaintiffs’] recovery of all attorney’s fees reasonably
15 expended, without limiting the fees to a proportion of [their] actual recovery.” (*Graciano v. Robinson*
16 *Ford Sales, Inc.*, 144 Cal.App.4th 140, 164 (2006).) These principles support the reasonableness of the
17 fees requested here.

18 **1. Class Counsels’ Lodestar Amounts Are Reasonable**

19 The lodestar method requires the Court to determine a lodestar figure based on a compilation of time
20 spent and reasonable hourly compensation for each attorney. (*See, e.g., Graham v. DaimlerChrysler Corp.*,
21 34 Cal.4th 553, 579 (2004); *Vo v. Los Virgenes Mun. Water Dist.*, 79 Cal.App.4th 440, 445 (2000); *Lealao*,
22 82 Cal.App.4th at 26.) Generally, hours are reasonable if they were “reasonably expended in pursuit of the
23 ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying
24 client.” (*Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983).) California courts apply a liberal standard in
25 considering evidence to support attorney’s hours. Detailed time records are not required; an attorney’s
26 testimony or declarations alone as to the number of hours worked on a particular case are sufficient to
27 support an award of attorney’s fees, even in the absence of detailed time records. (*See, e.g., Martino v.*
28 *Denevi*, 182 Cal.App.3d 553, 559 (1986).)

1 Here, Class Counsel were required to spend significant time, both in litigation efforts and
 2 extended settlement negotiations. Defendants were aggressively represented, and Class Counsel had no
 3 choice but to match or exceed their efforts. To date, Class Counsel’s total lodestar is \$2,993,553. That
 4 includes significant work undertaken to prosecute this case through investigation, filing, motion
 5 practice, discovery, and eventual settlement. The primary task categories and lodestar figures are as
 6 follows³:

Firm	Hours	Lodestar	Task Category
Stebner and Associates	2,395.5	\$1,672,917	Investigation and preliminary analysis, coordination of efforts by co-counsel, client contact, witness interviews, drafting pleadings, document review, drafting written discovery requests and responses, preparing client for deposition, drafting motions, mediation briefing, settlement negotiations and preparation, settlement documentation, and contact with defense counsel.
Dentons US	580	\$460,045	Investigation and preliminary analysis, reviewing and assistance in drafting pleadings, discovery, drafting and reviewing motions and pleading challenges, research and analysis regarding class certification, mediation briefing, settlement negotiations and preparation, and settlement documentation.
Law Offices of Michael D. Thamer	331	\$223,290	Evaluating facility staffing, investigation, contact with experts, written discovery, preparing and taking PMK re Staffing Deposition, document review, assisting in developing the acuity model, preparing the injunction, and settlement negotiations and preparations.
Schneider Wallace	498.6	\$398,859	Investigation and preliminary analysis, reviewing draft pleadings, review and assist with written discovery requests and reviewing responses, drafting and reviewing motions, preparing for depositions, document organization, and settlement negotiations and preparation.
Janssen Malloy	164.3	\$85,112	Investigation, document review, contact with witnesses, legal research, work on pleadings, and settlement negotiations.
Marks Balette	145.9	\$138,605	Review staffing, contact with experts, investigation, settlement negotiations and preparation, assisting with the draft Injunction.
The Arns Law Firm	24.0	\$14,725	Investigation and preliminary analysis, reviewing and assistance in drafting pleadings, settlement negotiations and preparation.
Total	4,139.3	\$2,993,553	

24 ³ See Stebner Decl., ¶¶ 43-56; Declaration of Christopher Healey (“Healey Decl.”), ¶¶ 10-11;
 25 Declaration of Guy Wallace (“Wallace Decl.”), ¶¶ 6-37; Declaration of Michael Thamer (“Thamer
 26 Decl.”), ¶¶ 10-14; Declaration of Timothy Needham (“Needham Decl.”), ¶¶ 8-12; Declaration of David
 27 Marks (“Marks Decl.”), ¶¶ 2-10; Declaration of Robert Arns (“Arns Decl.”), ¶¶ 2-9; and exhibits
 28 attached thereto. Class Counsel have detailed time records and litigation expense reports, which can be
 submitted for *in camera* review if the Court requests. To ensure there is no waiver of the attorney-client
 privilege or work product protection, Class Counsel have provided summaries of their respective
 lodestar fees and litigation expenses.

1 The number of hours that Class Counsel devoted to this case is reasonable. *See, e.g., Ketchum v.*
2 *Moses*, 24 Cal.4th 1122, 1133 (2001) (fee award should be “fully compensatory [and] absent
3 circumstances rendering the award unjust, an attorney fee award should ordinarily include compensation
4 for *all* the hours reasonably spent.”) (emphasis in original); *Serrano III*, 20 Cal.3d at 49. While
5 collaboration between Class Counsel was necessary and important to the successful case prosecution,
6 each firm was assigned lead responsibility on specific task areas to minimize the potential for
7 duplication. As Class Counsel’s declarations make clear, all time reported in the chart above was
8 devoted to necessary and non-duplicative tasks and calculated at counsel’s reasonable billing rates.
9 Additionally, tasks were delegated when possible to associate attorneys or legal assistants.

10 2. Class Counsels’ Hourly Rates Are Well Within the Prevailing Rates

11 The second step is determining the reasonable market value of the attorneys’ services at an
12 hourly rate. (*Ketchum v. Moses*, 24 Cal.4th 1122 (2001); *PLCM Group, Inc. v. Drexler*, 22 Cal.4th
13 1084, 1094 (2000); *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008).) This rule
14 applies even when, as here, attorneys from several firms representing the Named Plaintiffs (Michael
15 Thamer, Timothy Needham, Kathryn Stebner, and Robert Arns) normally work on a contingent fee
16 basis. (*See, e.g., Robertson v. Fleetwood Travel Trailers*, 144 Cal.App.4th 785, 818 (2006); *Blanchard*
17 *v. Bergeron*, 489 U.S. 87, 96 (1989).) Rates are reasonable if they are “within the range of reasonable
18 rates charged by and judicially awarded comparable attorneys for comparable work.” (*Children’s Hosp.*
19 *and Med. Ctr. v. Bonta*, 97 Cal.App.4th 740, 783 (2002).) A reasonable hourly rate is the prevailing rate
20 charged by attorneys of similar skill and experience in the relevant community. (*PLCM Group, Inc. v.*
21 *Drexler*, 22 Cal.4th 1084, 1095 (2000)). Declarations regarding the prevailing market rate in the
22 relevant community are sufficient to establish a reasonable hourly rate. (*See Widrig v. Apfel*, 140 F. 3d
23 1207, 1209 (9th Cir. 1998)).

24 Class Counsel have substantial experience in class action litigation and, in particular, consumer
25 class action cases involving assisted living facilities and skilled nursing facilities. They brought a
26 unique blend of expertise and skill, including specialized knowledge in elder care class actions and
27 complex litigation vital to the success of this case. (Stebner Decl. ¶¶ 4-16.) Here, the rates requested by
28 Class Counsel are well within the rates charged by skilled counsel in the Bay Area in similar complex

1 civil litigation. (Declaration of Richard M. Pearl, ¶¶ 10-17.) The rates requested here are similar or
2 equal to Class Counsel’s rates in class actions against operators of assisted living and skilled nursing
3 facilities previously approved by U.S. District Judge Vince Chhabria in *Carnes v. Atria Senior Living,*
4 *Inc.* (N.D. Cal., case no. 3:14-cv-02727-VC); U.S. District Judge Haywood Gilliam in *Winans v.*
5 *Emeritus Corporation* (N.D. Cal., case no. 3:13-cv-03962-HSG); Chief Judge of the Northern District of
6 California Claudia Wilken in *Wehlage v. Evergreen at Arvin LLC* (N.D. Cal., case no. 3:10-cv-05839-
7 CW); U.S. District Judge Jeffrey S. White in *Walsh v. Kindred Healthcare, et al.* (N.D. Cal., case no.
8 3:11-cv-00050-JSW); Judge Robert Freedman in *Valentine v. Thekke Health Services, Inc., et al.*
9 (Alameda Cty. Sup. Ct., Case No. RG-10546266); Judge Wynne Carvill in *Shuts v. Covenant Holdco*
10 *LLC* (Alameda Cty. Sup. Ct., Case No. RG 10551807), *Dalao v. LifeHouse Holdings, LLC* (Alameda
11 Cty. Sup. Ct., Case No. RG12660602), and *Correa v. SnF Management Company, LLC* (Alameda Cty.
12 Sup. Ct., Case No. RG-13664498); Judge Jane Johnson in *Montreuil v. The Ensign Group, Inc.* (Los
13 Angeles Cty. Sup. Ct., Case No. BC449162); Judge Richard Kramer in *Hernandez v. Golden Gate*
14 *Equity Holdings, LLC* (San Francisco Cty. Sup. Ct., Case No. CGC-10-505288); and Judge George
15 Hernandez, Jr. in *Regina v. Hycare, Inc.* (Alameda Cty. Sup. Ct., Case No. RG-12647573). (Stebner
16 Decl., ¶ 46.) Given that Class Counsel’s hourly billing rates have been approved by California state
17 courts and by Federal District Courts in assisted living and skilled nursing facility class actions, Class
18 Counsel’s hourly rates are “in line” with prevailing market rates and are reasonable.

19 **B. The Fee Request Represents a Reasonable 1.17 Multiplier of Present Lodestar Fees**

20 Class Counsel’s fee request represents a reasonable **1.17 multiplier** of the lodestar fees incurred in
21 prosecuting this case, which is another reason this motion should be granted. As the California Supreme
22 Court has held, “a contingent fee must be higher than a fee for the same legal services paid as they are
23 performed.” (*Ketchum*, 24 Cal.4th at 1132-33.) Application of that rule is particularly appropriate where the
24 case is brought to redress important rights of venerable persons. (*Id.*) In short, a risk enhancement is neither
25 a bonus nor a windfall. It is “earned compensation; unlike a windfall, it is neither unexpected nor fortuitous.
26 Rather it is intended to approximate market-level compensation for such services which typically includes a
27 premium for the risk of nonpayment or delay in payment of attorney fees.” (*Ketchum*, 24 Cal.4th at 1138.)
28 Multipliers normally range from **two to four or higher**. (*Wershba*, 91 Cal.App.4th at 255; *Jones v.*

1 *Dominion Res. Servs.*, 601 F.Supp. 2d 756 (W.Va. 2009) [“Courts have generally held that lodestar
2 multipliers falling between 2 and 4.5 demonstrate a reasonable attorneys’ fee”].) The failure to award a
3 multiplier in cases where counsel has a right to statutory fees has been held reversible error. (*See, e.g.*,
4 *Horsford v. Bd. of Trs. of Cal. State Univ.*, 132 Cal.App.4th 359, 400 (2005).) Factors considered in
5 determining whether a lodestar multiplier is appropriate generally include: (1) the risks presented by the
6 contingent nature of the case; (2) the novelty and difficulty of the questions involved and the skill requisite to
7 perform the legal service properly; (3) the nature of the opposition; (4) the preclusion of other employment
8 by the attorney due to acceptance of the case; and (5) the result obtained and the importance of the lawsuit to
9 the public. (*Serrano v. Priest*, 20 Cal. 3d 25, 48-49 (1977); *Graham v. DaimlerChrysler Corp.*, 34 Cal.4th
10 553, 582 (2004); *Edgerton v. State Pers. Bd.*, 83 Cal.App.4th 1350, 1363 (2000).)

11 Here, all of these factors favor approval of a multiplier greater than what is requested. To date,
12 Class Counsel have incurred \$2,993,553 in attorney’s fees and advanced \$328,745.70 in litigation costs
13 and expenses. After reimbursement of their reasonable out-of-pocket expenses, Class Counsel’s fee
14 request represents a reasonable 1.17 multiplier of the lodestar fees incurred in prosecuting this case.
15 Considering the additional attorney time required for settlement approval and two-year oversight of
16 Injunction compliance, the multiplier will be even less.

17 **1. Risks Presented by the Contingent Nature of Recovery**

18 As noted in *Ketchum*, the major consideration in determining the necessity of a multiplier is the
19 contingent nature of the award. In determining what multiplier to award the probability of success must
20 be assessed *ex ante*, that is as viewed from the outset of the case. (*In Re: Combustion, Inc.*, 968 F.Supp.
21 1116, 1133 (W.D.La. 1997); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991).) Further,
22 the possibility of no recovery is only one of the uncertainties involved in taking on such a case. Other
23 uncertainties are the amount that will be recovered, uncertainty as to the cost, both in effort and
24 expenses, and uncertainty about how time passing before the recovery is obtained. (*See e.g., Krumme v.*
25 *Mercury Ins. Co.*, 123 Cal.App.4th 924, 947 (2004); *Ketchum*, 24 Cal.4th at 1132-1133, 1138.)

26 Class Counsel have been the only counsel to represent class members in this matter and have
27 borne the entire risk and costs of litigation for over three years purely on a contingency basis. Class
28 Counsel’s outlay of time and money in this case has been significant. In all, Class Counsel and their

1 staffs have spent approximately 4,139.3 hours investigating, analyzing, researching, litigating, and
2 negotiating a favorable resolution of this case, and have incurred \$328,745.70 in necessary litigation
3 expenses. Unsettled legal issues also presented risks to the claims in this case. Class Counsel considered
4 the uncertain outcome and risk of any litigation, particularly in complex actions such as class actions, as
5 well as the difficulties and delay inherent in such litigation. There was the prospect of the enormous cost
6 inherent in class action litigation, as well as extensive negotiations with corporate defendants who
7 retained a premier defense firm. Class Counsel bore considerable risks to obtain a successful settlement.

8 **2. Difficulty of the Questions Involved and the Skill Required**

9 As discussed above and in Class Counsel’s declarations, Class Counsel are skilled attorneys who
10 have had success in class actions, including two prior class actions against an assisted living facility
11 operator and multiple understaffing cases against the skilled nursing industry. (Stebner Decl., ¶¶ 4-16.)
12 This case required experienced and competent lawyers and expertise in the unique issues presented. To
13 obtain such an attorney on the free market, a client must pay the prevailing market rate. While most
14 class actions are complex, Class Counsel had to overcome several major obstacles in prosecuting this
15 case. As reflected in motion practice before the Court, the case raised novel issues, and the pleadings
16 were heavily contested. Although Plaintiffs believe they would prevail with respect to class certification
17 and anticipated defense arguments, Defendant’s contentions, asserted by extremely skilled and
18 experienced counsel, raised trial risks. Any of these obstacles may have prevented the Class from
19 recovering anything. Further, proceeding to trial would have added years to the resolution of this case
20 because of the difficult legal and factual issues raised and the likelihood of appeals. This is a significant
21 concern given the elderly status of most class members. This settlement provides immediate relief
22 without the delay associated with protracted litigation, trial, and a likely appeal. Class Counsel should
23 be commended (not penalized) for obtaining significant monetary and injunctive benefits for the Class.
24 (See *Lealao*, 82 Cal.App.4th at 52.) California courts place “an extraordinarily high value” on
25 settlement, and successful counsel should be rewarded, not punished, for achieving this goal. (*Id.*)

26 **3. Vigorous Opposition by Defendants**

27 Plaintiffs who skillfully overcome difficult issues or uncompromising opposition in the litigation
28 are also entitled to a fee enhancement. (*Serrano*, 20 Cal.3d at 49; *Edgerton*, 83 Cal.App.4th at 1363

1 [multiplier was justified given “the skill displayed by plaintiff’s counsel in overcoming the intransigent
2 opposition of defendant”].) Defendants asserted a vigorous defense before eventually agreeing to the
3 settlement. As discussed above, Plaintiffs successfully opposed multiple pleading challenges from
4 Defendants. After substantial written and deposition discovery, the parties reached a settlement after a
5 protracted settlement effort was protracted, with three mediation sessions, extended discussions, and
6 several instances when it appeared the parties would not reach a settlement. (Stebner Decl., ¶¶ 17-25.)

7 **4. Result and the Importance of the Lawsuit to the Public Justifies an**
8 **Enhancement**

9 The results obtained in litigation “can properly be used to enhance a lodestar calculation where
10 an exceptional effort produced an exceptional benefit.” (*Graham*, 34 Cal. 4th at 582; *Edgerton*, 83
11 Cal.App.4th at 1363 (“excellent results achieved by plaintiffs” justified a fee enhancement).) Here, in
12 addition to cash payments, the case settlement produced substantial injunctive relief as described above
13 (Section III(C) *supra*). The injunction accomplishes what Plaintiffs sought to achieve when they took
14 on the prosecution of this case and will benefit the Settlement Class and other prospective residents of
15 Defendant’s facilities, who are among the most vulnerable members of our society.

16 **5. Preclusion of Other Litigation Justifies an Enhancement**

17 There are only so many cases that Class Counsel can take at any one time. Consequently, there were
18 other meritorious cases presented to Class Counsel that would have generated substantial fees, but were
19 declined, during the pendency of this action to devote the attention necessary to achieve favorable results.
20 (Stebner Decl., ¶ 56; Thamer Decl., ¶ 12.) These factors collectively favor approval of the 1.17 multiplier.

21 **C. The Percentage Cross-Check Supports the Reasonableness of the Fee Request**

22 A common cross-check regarding the reasonableness of a fee award is their percentage to the
23 total value of the benefits conferred on the class. (*Serrano*, 20 Cal. 3d at 34; *Boeing Co. v. Van Gemert*,
24 444 U.S. 472, 478-81 (1980); *Lealao*, 82 Cal.App.4th at 49-50; *Graciano*, 144 Cal.App.4th at 164; 3
25 *Newberg on Class Actions*, § 14.7.) In calculating the overall settlement benefit, the Court considers the
26 total potential benefits made available. (*Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 46 (2008)
27 (approving methodology that adds fees and class payments in the percentage of recovery cross-check)).
28 The overall settlement benefit includes items such as attorneys’ fees, costs, class notice and

1 administration costs and other settlement amounts that defendants have agreed to pay. (*Id.*). Here, Class
2 Counsel estimate the overall Settlement Value exceeds \$18 million factoring in the Settlement Fund of
3 \$9 million and the additional \$9 million value of the Injunction. (SS, ¶1.31; Stebner Decl., ¶ 37;
4 Kennedy Decl., ¶¶6-7, 12-19.)

5 As such, Class Counsel’s fee request of \$3,500,000 represents 19.4% of the overall benefits
6 made available to the Class. Even if Injunction value is not considered (and it should be), the fee
7 request of \$3,500,000 represents 38.9% of the Settlement Fund. That percentage underscores the
8 reasonableness of the requested fees. See *Cotchett, Pitre & McCarthy v. Universal Paragon Corp.*, 187
9 Cal.App.4th 1405, 1421 (2010) (contingency fees typically range from 33 to 40% of class benefit); see
10 also *de Munecas v. Bold Food, LLC*, No. 1:09-cv-00440, 2010 WL 3322580, at *9 (S.D.N.Y. Aug. 23,
11 2010) (request for 33% is reasonable “because reasonable paying client[s] typically pay one-third of
12 their recoveries under private retainer agreements.” (citations omitted)).⁴

13 The Court may increase a fee award or set aside a fund for future services. (*See Hanlon v.*
14 *Chrysler Corp.*, 150 F.3d 1011, 1029-30 (9th Cir. 1998).) Class Counsel expect to incur additional fees
15 and costs of approximately \$50,000 to \$70,000 for work related to monitoring compliance with the two-
16 year Injunction. (Stebner Decl., ¶ 37.) This further supports the reasonableness of the requested fees.

17 **V. REIMBURSEMENT OF LITIGATION EXPENSES IS WARRANTED**

18 The CLRA provides for reimbursement of costs incurred. (*Cal. Hous. Fin. Agency v. E. R.*
19 *Fairway Assocs. I*, 37 Cal.App.4th 1508, 1514 (1995).) Reimbursement of costs is also necessitated under
20 the common fund doctrine of *Trustees v. Greenough*, 105 U.S. 527, 533 (1881). Here, the Settlement
21 Stipulation expressly authorizes a request for litigation costs not to exceed \$450,000. (SS, ¶1.3.) As shown
22 in the attached declarations and the chart below, the requested amount in expenses necessary for the
23 investigation, prosecution, and settlement of this action is *less than* the amount allowed under the Settlement
24
25

26
27 ⁴ This is particularly true given this case involves consumer protection fee-shifting statutes where Court-
28 awarded fees routinely exceed the actual recovery to the client. (*See, e.g., Vo*, 79 Cal.App.4th at 445
(plaintiffs obtained award of \$37,500 in damages and \$470,000 in statutory attorney fees); *Graciano*,
144 Cal.App.4th at 164 (reversing a negative multiplier due to modest class recovery).)

1 Stipulation.⁵

Firm	Costs
Stebner and Associates	\$34,041.71
Dentons LLP	\$89,558.58
Law Offices of Michael D. Thamer	\$3,565.53
Schneider Wallace Cottrell & Konecky, LLP	\$70,177.12
Janssen Malloy, LLP	\$21,104.24
Marks Balette Giessel & Young	\$113,864.05
TOTAL	\$328,745.70

6
7 **VI. THE SERVICE AWARDS FOR THE NAMED PLAINTIFFS ARE FAIR**

8 In light of their efforts resulting in a substantial settlement on behalf of the Class, the Named
9 Plaintiffs merit service awards as allotted by the Settlement Stipulation in the amount of Five-Thousand
10 Dollars (\$5,000) to Donald Lollock, by and through his Guardian ad Litem, Kathleen Lollock; Seven-
11 Thousand-Five Hundred Dollars (\$7,500) to the Estate of Abdulwafi Khan; Five-Thousand Dollars
12 (\$5,000) to Frank Pearson; Seven-Thousand-Five Hundred Dollars (\$7,500) to Jo Ella Nashadka, by and
13 through her Guardian ad Litem, Lance Anderson; and Five-Thousand Dollars (\$5,000) to Jane Burton-
14 Whitaker (for a total of \$30,000 combined) out of the Settlement Fund. Class representatives play a
15 crucial role in bringing justice to those who would otherwise be without a remedy. (*See, e.g., Bowens v.*
16 *Atl. Maint. Corp.*, 546 F.Supp.2d 55, 80 (E.D.N.Y. 2008); *Bell v. Farmers Ins. Exchange*, 115
17 Cal.App.4th 715 (2004); *Clark v. Am. Residential Servs. LLC*, 175 Cal.App.4th 785, 804 (2009)).
18 Relevant factors in determining whether such an award is warranted include: the named plaintiff's
19 actions to protect the interests of the class; the degree to which the class has benefitted from those
20 actions; the time and effort named plaintiff expended in pursuing the litigation; the risk to named
21 plaintiff in commencing suit, both financial and otherwise; the notoriety and personal difficulties
22 encountered by named plaintiff; the duration of litigation; and the personal benefit (or lack thereof) to
23 the named as a result of the litigation. (*Clark*, 175 Cal.App.4th at 804-07.)

24 Here, the Named Plaintiffs lent their names to this case and thus subjected themselves to public
25 attention. The Named Plaintiffs had various initial hesitations about becoming class representatives.
26 Nonetheless, they agreed to become class representatives to stand up for vulnerable residents. As

27
28 ⁵ See Stebner Decl., ¶ 54; Healey Decl., ¶ 12; Thamer Decl., ¶ 15; Needham Decl., ¶ 13; Wallace Decl.,
¶ 6; Marks Decl., ¶¶ 11-18; and exhibits attached thereto.

1 detailed in their respective declarations⁶, the Named Plaintiffs each devoted 10 to 25 hours or more to
2 this case to help secure the Settlement Fund to the class members and Injunction. They met in person
3 with Class Counsel on numerous occasions and communicated extensively via telephone with Class
4 Counsel throughout the pendency of this lawsuit. They gave significant assistance in providing facts
5 towards the drafting of the complaints and written discovery responses. Named Plaintiffs Kathleen
6 Lollock and Lance Anderson prepared and sat for their depositions. The Named Plaintiffs all reviewed
7 documents related to their admissions to Defendants' facilities, were willing to put forth documents for
8 public scrutiny, and took on the weighty responsibility of representing the Class. All of these activities
9 were time-consuming and emotionally difficult, as they forced them to relive and talk about the
10 circumstances at Defendants' facilities. The Named Plaintiffs made this case possible when many other
11 potential class representatives refused to step forward and represent the class. They carefully reviewed
12 the settlement terms and support final approval. Their sacrifices and contributions over three years
13 helped produce the substantial benefits now offered to the Settlement Class. (Stebner Decl., ¶ 58.)

14 **VII. CONCLUSION**

15 For the foregoing reasons, Plaintiffs respectfully request the Court to enter an order that
16 approves: (a) Class Counsel attorneys' fees in the amount of \$3,500,000; (b) reimbursement of litigation
17 costs in the amount of \$328,745.70; and (c) the service awards to the five Named Plaintiffs as detailed
18 above, collectively not to exceed \$30,000. A proposed form of order is submitted with this motion.

19 Dated: October 29, 2020

STEBNER AND ASSOCIATES

20
21 By: _____

Kathryn A. Stebner
Attorney for Plaintiffs

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23
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25
26
27 _____
28 ⁶ See Named Plaintiffs' Declarations by Kathleen Lollock, ¶¶ 2-13; Charmaine Pearson, ¶¶ 2-16; Lance Anderson, ¶¶ 2-14; William Ray, ¶¶ 2-14; and Zareen Khan, ¶¶ 2-15.