UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SCOTT SMITH, *et al.*,	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 1:21-cv-10654
	)	
CHELMSFORD GROUP, LLC, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S ASSENTED-TO MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT AND RELEASE

INTRODUCTION

Through the instant proceeding, Plaintiff Scott Smith seeks conditional certification of two overlapping Settlement Classes so that he may settle his Massachusetts Consumer Protection Act claims for equitable relief and damages, respectively, on behalf of the proposed Classes. Specifically, Mr. Smith – to settle his claim for equitable relief – seeks conditional certification of a proposed Rule 23(b)(2) Class composed of all persons who resided at Chelmsford Commons or were obligated to pay rent to the operator of Chelmsford Commons as of September 13, 2022 and all persons who will reside at Chelmsford Commons or will be obligated to pay rent to the operator of Chelmsford Commons after September 13, 2022 and during the Settlement Period.[1] Additionally, Mr. Smith – to settle his claim for damages – seeks conditional certification of a proposed Rule 23(b)(3) Class composed of all persons who resided at Chelmsford Commons or were obligated to pay rent to the operator of Chelmsford Commons as of September 13, 2022.

[1] The proffered Class Action Settlement Agreement and Release ("Settlement"), submitted herewith as **Exhibit 2**, defines the "Settlement Period" as the time period necessary for all rent in Chelmsford Commons to equalize per the terms of the Settlement. *See* **Ex. 2** at §§ 2.52, 4.1(a).

Through the instant proceeding, Mr. Smith also seeks preliminary approval of the proffered Class Action Settlement Agreement and Release ("Settlement"), submitted herewith as **Exhibit 2**, which is designed to resolve Smith's claims for equitable relief and damages on behalf of himself as well as the proposed Settlement Classes against the owner and property manager of Chelmsford Commons – Defendants Chelmsford Group, LLC, and Newbury Management Company. Because the proposed Settlement Classes meet the applicable requirements of Fed. R. Civ. P. 23(a), Fed. R. Civ. P. 23(b)(2), Fed. R. Civ. P. 23(b)(3) and Fed. R. Civ. P. 23(e)(1)(B)(ii), certification of the Settlement Classes for the purpose of effectuating the terms of the proffered Settlement is warranted. Moreover, because the Settlement on its face offers a fair, reasonable and adequate resolution for Class members, as required by Fed. R. Civ. P. 23(e)(1)(B)(i) and Fed. R. Civ. P. 23(e)(2), preliminary approval is also warranted. Based on the foregoing, as well as the argument below, Mr. Smith requests that the Court grant the relief sought in the Motion submitted herewith.

FACTS

I. CHELMSFORD COMMONS MANUFACTURED HOUSING COMMUNITY

Chelmsford Commons is a manufactured housing community located in Chelmsford, Massachusetts that offers affordable homeownership opportunities and wherein tenants or residents typically own their manufactured homes but rent the land on which those homes sit, land which is also called a home site. *See* Cmplt., Doc. 1-2, at ¶¶ 2, 20; Answ., Doc. 26 at ¶¶ 2, 20. At all times relevant to this litigation, Chelmsford Commons has leased or offered for lease approximately 242 home sites. *See* Cmplt., Doc. 1-2, at ¶¶ 3, 21; Answ., Doc. 26 at ¶¶ 3, 21; Decl. of Joel Brown ("J. Brown Decl."), Doc. 1-6, at ¶¶ 5, 7 & Ex. B.[2] Defendants began owning or

[2]The Court permitted Defendants to file Exhibit B to the Declaration of Joel Brown under seal. *See* Doc. 1-9, Doc. 2 & Doc. 37. Mr. Smith will withdraw his motion to unseal Exhibit B if the Settlement is finally approved.

managing Chelmsford Commons in 2011, when Defendant Chelmsford Group, LLC acquired Chelmsford Commons from its former owner and contracted Defendant Newbury Management Company to manage the community. *See* Cmplt., Doc. 1-2, at ¶¶ 18-19, 25-26; Answ., Doc. 26 at ¶¶ 18-19, 25-26; *see also* Counterclaim, Doc. 26, at ¶ 7; Counterclaim Answ., Doc. 38, at ¶ 7. At the time Defendant Chelmsford Group, LLC acquired Chelmsford Commons, the community's rent structure was governed by a judicially-approved settlement agreement which had been in effect since 1991 and which by its own terms expired at the end of 2020 ("Master Lease"). *See* Cmplt., Doc. 1-2, at ¶¶ 23-24; Answ., Doc. 26 at ¶¶ 23-24; *see also* Counterclaim, Doc. 26, at ¶¶ 11, 13-14 & Ex. A (Master Lease); Counterclaim Answ., Doc. 38, at ¶¶ 11, 13-14. The Master Lease permitted the community's former owner to charge higher rents to new entrants, a practice which generally resulted in new entrants paying higher rents than existing tenants or residents despite the fact that all tenants or residents leased similar home sites and received similar services in exchange for their rent. *See* Master Lease, Doc. 26-1, at §§ 3(a), 11. Following Defendant Chelmsford Group, LLC's acquisition of Chelmsford Commons, the Defendants continued this practice of maintaining a staggered rent structure. *See* Cmplt., Doc. 1-2, at ¶ 27; Answ., Doc. 26 at ¶ 27. Mr. Smith has leased a home site at Chelmsford Commons since 1998 and has during such time resided in a manufactured home located on that site. *See* Cmplt., Doc. 1-2, at ¶ 17; Answ., Doc. 26 at ¶ 17; *see also* Decl. of Scott Smith ("Smith Decl."), Doc. 57-1, at ¶¶ 1-3.

In or around November of 2020, Defendants circulated proposed home-site lease agreements (also called occupancy agreements) to all tenants or residents of Chelmsford Commons that offered the same staggered base rents which Defendants had assessed directly prior to the expiration of the Master Lease and which would take effect following expiration of the Master Lease. *See* Cmplt., Doc. 1-2, at ¶¶ 29-33; Answ., Doc. 26 at ¶¶ 29-33; *see also* Smith Decl., Doc.

57-1, at ¶ 4 & Sub-Ex. A. The circulated occupancy agreements limited base-rent adjustments to one annual increase of either 4.5% or a percentage tied to the U.S. Bureau of Labor Statistics Consumer Price Index for All Urban Consumers (CPI-U) Boston, Massachusetts – ALL items (1967=100) ("CPI Percentage"), whichever is greater in any given year. *See* Smith Decl., Doc. 57-1, at ¶ 4 & Sub-Ex. A. Numerous Chelmsford Commons tenants or residents subsequently signed the circulated occupancy agreements, which remain operative for five-year or 10-year terms. *See* J. Brown Decl., Doc. 1-6, at ¶ 7 & Ex. B; *supra*, n.2.

II. PROCEDURAL HISTORY

On January 8, 2021, Mr. Smith – through counsel and on behalf of himself as well as a putative class of Chelmsford Commons rent-payers – sent a statutory demand letter to each of the Defendants, a letter which challenged the rents assessed by Defendants after expiration of the Master Lease as violating Section 32L(2) of the Massachusetts Manufactured Housing Act and which sought both equitable relief as well as damages. *See* Counterclaim, Doc. 26, at ¶ 31 & Exhs. D-E; Counterclaim Answ., Doc. 38, at ¶ 31. In response to his demand letter, Defendants preemptively filed an action before this Court which sought relief against Mr. Smith under the Declaratory Judgment Act. *See* Counterclaim, Doc. 26, at ¶ 37 & Ex. F; Counterclaim Answ., Doc. 38, at ¶ 37; *see also Chelmsford Group, LLC, et al. v. Smith*, 21-CV-10522-DJC (Mar. 26, 2021) ("Related Action").[3]

On April 1, 2021, Mr. Smith commenced the instant action in the Massachusetts Superior Court for Middlesex County. *See* Decl. of Michael R. Brown, Doc. 1-1, at ¶ 2 & Ex. A. On April 20, 2021, Defendants removed the instant action to this Court. Doc. 1. During the subsequent 13

[3] To the extent the Court deems it necessary, Mr. Smith requests that the Court take judicial notice of the docket in the related litigation pursuant to Fed. R. Evid. 201.

months, the parties vigorously litigated both the instant action as well as the Related Action. Such litigation included: Mr. Smith's Rule 12 motion to dismiss the Related Action, which was granted by the Court, *see* Related Action, 21-CV-10522-DJC at Doc. Nos. 8-9, 12 & 19-20; Mr. Smith's motion to remand the instant action to state court, which was denied by the Court, *see* Doc. Nos. 24-25, 33-35 & 39; Mr. Smith's motion for class certification, which was denied without prejudice by the Court, *see* Doc. Nos. 57-58 & 80; and Defendants' motion for judgment on the pleadings, which the parties argued and which remained pending at the time of the Settlement. *See* Doc. Nos. 59-60, 73, 78 & 84.

Shortly after oral argument on the motion for judgment on the pleadings, and at the Court's suggestion, *see* Doc. No. 84, the parties attempted to mediate a resolution of the instant action with the assistance of The Honorable Mitchel H. Kaplan (retired), a highly capable and experienced mediator. *See* Decl. of Ethan R. Horowitz ("Horowitz Decl."), **Ex. 5**, at ¶ 4 & Sub-Ex. A. After three mediation sessions before Judge Kaplan, which included the confidential disclosure of informal discovery to Mr. Smith by Defendants through counsel, the parties reached an agreement to resolve this action, as embodied in the terms of the Settlement. *See id.*, **Ex. 5**, at ¶ 5.

III. THE SETTLEMENT

The cornerstone of the Settlement is a negotiated rent structure which will ensure that current or future tenants or residents of Chelmsford Commons experience predictable rent increases and that rents in the community will equalize during the term of Settlement, the latter of which is guaranteed by **Defendants' commitment to cap home-site base rent in the community**

at the current market rent of $964.37 per month during the term of the Settlement. *See* Settlement, **Ex. 2**, at § 4.1.[4] Specifically, during the term of the Settlement:

- For Chelmsford Commons tenants or residents who have operative home-site lease agreements (also called occupancy agreements), Defendants will honor all such agreements, which limit base-rent adjustments to one annual increase of either 4.5% or the CPI Percentage, whichever is greater; *see id.*, **Ex. 2**, at §§ 4.1(c), 25; *see also*, *e.g.*, Smith Decl., Doc. 57-1, at ¶ 4 & Sub-Ex. A;
- For all other Chelmsford Commons tenants or residents, that is, those without the protection of an operative occupancy agreement, Defendants will similarly limit base-rent adjustments to one annual increase of either 4.5% or the CPI Percentage, whichever is greater; *see* Settlement, **Ex. 2**, at § 4.1(c);
- Once a tenant or resident's base rent reaches $964.37, it will not increase during the Settlement Period; *see id.*, **Ex. 2**, at §§ 2.17, 4.1(a)-(c); *see also*, *supra*, n.1; and
- New tenants or residents who enter Chelmsford Commons will pay no more than $964.37 in base rent during the Settlement Period. *See id.*, **Ex. 2**, at §§ 2.17, 4.1(d).

This negotiated rent structure will remain in effect until every tenant or resident at Chelmsford Commons is assessed a home-site base rent of $964.37, that is, the Settlement Period. *See id.*, **Ex. 2**, at §§ 2.17, 4.1(a); *supra*, n.1. In addition to preserving the long-term affordability of Chelmsford Commons for current or future tenants or residents, the Settlement also provides a payment of $50 per home site to settle claims for alleged rent overpayment damages incurred since January of 2021. *See id.*, **Ex. 2**, at § 4.2.

[4] "Base Rent" does not include pass-through charges that Chelmsford Commons is permitted by the operative occupancy agreements to assess to Chelmsford Commons tenants or residents. *See* Settlement, **Ex. 2**, at §§ 2.4, 4.1.

In exchange for the benefits provided by the Settlement, Settlement Class members will be bound by targeted releases preventing such members from contesting the lawfulness of the negotiated rent structure or from relitigating damages claims which challenge the same or which otherwise seek to relitigate the basis of this action, *see id.*, **Ex. 2**, at §§ 5.2-5.3, the damages portion of which is subject to Rule 23(b)(3) opt-out rights. *See id.*, **Ex. 2**, at §§ 2.46, 3.2, 13.

To ensure that as many Settlement Class members as possible are notified of the Settlement, the Settlement requires the retention of a professional settlement administrator which will be charged with identifying current contact information for all members of the Settlement Classes and which will effect notice on all such Class members by first-class mail, by electronic mail (where electronic mail addresses are available) and by publication in the regional newspaper – the *Lowell Sun*. *See id.*, **Ex. 2**, at §§ 8.1-8.3.[5] The settlement administrator will also maintain a dedicated toll-free telephone number and website to provide information to Settlement Class members. *See id.*, **Ex. 2**, at § 8.4. Moreover, all expenses related to the administration of the Settlement will be paid by Defendants. *See id.*, **Ex. 2**, at §§ 2.3, 8.7, 15.

Finally, the Settlement will compensate the undersigned, as class counsel, in an amount up to $200,000, for reasonable litigation costs as well as attorney's fees associated with prosecuting this litigation and will compensate Mr. Smith, in an amount up to $2,000, for his service to the class. *See id.*, **Ex. 2**, at §§ 6-7.

ARGUMENT

I. GOVERNING LAW

A. Rule 23 Class Certification Standard

[5] Prospective Settlement Class members, that is, Future Tenants or Residents who are included in the Rule 23(b)(2) Class only, will receive notice of the Settlement through a required disclosure in their respective occupancy agreements. *See* Settlement, **Ex. 2**, at §§ 2.27, 8.5.

All class action claims advanced pursuant to Rule 23 must satisfy the initial four requirements of Rule 23(a): "(1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation." *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 38 (1st Cir. 2003). Class action claims seeking equitable relief must further demonstrate that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Class action claims seeking monetary damages must demonstrate that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). When determining the Rule 23 prerequisites in the context of a proposed class action settlement presented through a preliminary approval motion, a reviewing court need only be satisfied that it "will likely be able to … certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B)(ii).

B. Rule 23 Settlement Approval Standard

Before approving a class action settlement, a reviewing court must find that the proposed settlement "is fair, reasonable, and adequate" – Fed. R. Civ. P. 23(e)(2) – a determination which is highly discretionary but which should generally presume a proposed settlement is reasonable. *See Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 82 (1st Cir. 2015) ("If the parties negotiated at arm's length and conducted sufficient discovery, the district court must presume the settlement is reasonable.") (internal quotation omitted). Factors which a reviewing court should consider in making such a determination include: (1) whether "the class representative and class counsel have adequately represented the class" in the litigation to-date; (2) whether the Settlement negotiations were conducted "at arm's length;" (3) whether the proposed class relief is "adequate" when viewed

in light of – (a) "the costs, risks, and delay of trial and appeal," (b) the "effectiveness" of the proposed "method of distributing relief to the class," (c) the "terms" of the proposed attorney's fee award and the timing of its payment and (d) "any agreement" made "in connection with the [settlement] proposal;" and (4) whether "the proposal treats class members equitably" relative to one another. Fed. R. Civ. P. 23(e)(2)(A)–(D), (e)(3).[6]

Incentive awards and awards of attorney's fees or litigation costs are permissible elements of a class settlement, provided that the awards comply with applicable law and are reasonable in light of the class representative's and class counsel's respective contributions to the class. *See* Fed. R. Civ. P. 23(e)(2)(C) & (D), 2018 cmt. ("… the relief actually delivered to the class can be a significant factor is determining the appropriate fee award."); *see also, e.g., In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 82 (D. Mass. 2005) (Young, C.J.) ("…because a named plaintiff is an essential ingredient of any class action, an incentive award can be appropriate to encourage or induce an individual to participate in the suit.") (internal quotations omitted).

C. Required Notice to Absent Class Members

If a reviewing court determines that a proposed class is likely to be certified for settlement purposes and the corresponding settlement is likely to be approved as fair, reasonable and adequate, "the court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). If the proposal includes a Rule 23(b)(3)

[6] *See also* Fed. R. Civ. P. 23(e)(2), 2018 cmt. ("Courts have generated lists of factors . . . . The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal."); *Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 82 (1st Cir. 2015) ("The case law offers laundry lists of factors pertaining to reasonableness, but the ultimate decision by the judge involves balancing the advantages and disadvantages of the proposed settlement as against the consequences of going to trial or other possible but perhaps unattainable variations on the proffered settlement.") (internal quotation omitted).

damages class, such notice must be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also* Fed. R. Civ. P. 23(c)(2), 2018 cmt. ("Although first class mail may often be the preferred primary method of giving notice … the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court"). When class members cannot be identified and thus individualized notice – even after reasonable effort – is not practicable, notice by publication satisfies Rule 23(c)(2). *See Reppert v. Marvin Lumber & Cedar Co., Inc.*, 359 F.3d 53, 56-57 (1st Cir. 2004) ("Individual notice of class proceedings is not meant to guarantee that every member entitled to individual notice receives such notice, but it is the court's duty to ensure that the notice ordered is reasonably calculated to reach the absent class members. … Such is the present case, with notification by mail to all known members of the certified class, and the publication of this notice …") (internal quotation omitted).

II. MR. SMITH'S CONSUMER PROTECTION ACT CLAIMS FOR EQUITABLE RELIEF AND DAMAGES WARRANT CERTIFICATION, FOR SETTLEMENT PURPOSES, OF A CLASS UNDER RULE 23(B)(2) AND A CLASS UNDER RULE 23(B)(3)

As outlined in detail below, Mr. Smith's claims satisfy the requirements of Rule 23(a), Rule 23(b)(2), Rule 23(b)(3) and Rule 23(e)(2)(B)(ii), and thus warrant certification for settlement purposes of the proposed Rule 23(b)(2) Class of current or future Chelmsford Commons tenants or residents seeking equitable relief and the proposed Rule 23(b)(3) Class of current Chelmsford Commons tenants or residents seeking damages.

A. Rule 23(a)

With respect to Rule 23(a)(1) numerosity, each of the proposed Settlement Classes will encompass tenants or residents representing the more than 200 home sites at Chelmsford

Commons – *see* Cmplt., Doc. 1-2, at ¶¶ 3, 21; Answ., Doc. 26 at ¶¶ 3, 21; J. Brown Decl., Doc. 1-6, at ¶¶ 5, 7 & Ex. B; *see also, supra*, n.2 – a number which satisfies this requirement. *See García-Rubiera v. Calderón*, 570 F.3d 443, 460 (1st Cir. 2009) ("low threshold for numerosity" generally met by at least 40 putative class members) (internal citation omitted).

With respect to Rule 23(a)(2), the commonality requirement is satisfied by the fact that Mr. Smith's and the Settlement Class members' respective claims for equitable relief and damages all rely on the same factual and legal determinations concerning the contours and lawfulness of the Chelmsford Commons rent structure. *See, e.g., Ouadani v. Dynamex Operations East, LLC*, 405 F. Supp. 3d 149, 161 (D. Mass. 2019) (Saris, C.J.) ("…a single common issue is sufficient for the purposes of Rule 23(a)(2)."); *Hogan v. InStore Group, LLC*, 512 F. Supp. 3d 157, 188 (D. Mass. 2021) (Woodlock, J.) ("Commonality is generally satisfied where class claims arise out of a uniform company policy or practice.").

With respect to Rule 23(a)(3) typicality, the respective injuries alleged by Mr. Smith and the Settlement Class members all sound in rent overpayment resulting from application of the challenged Chelmsford Commons rent structure, require application of the same remedial theories under the Consumer Protection and Manufactured Housing Acts and thus satisfy this requirement. *See García-Rubiera*, 570 F.3d at 460 (typicality satisfied when "Plaintiffs' claims arise from the same event or practice or course of conduct that gives rise to the claims of other class members, and are based on the same legal theory.") (internal quotation omitted).

And with respect to the Rule 23(a)(4) adequacy requirements, Mr. Smith's and the undersigned's 17 months of vigorously pursuing this matter in two separate actions before this Court – in both litigation as well as settlement postures – demonstrate that each will responsibly pursue the best interests of the proposed Settlement Classes. *See, supra*, Facts – Sec. II/Procedural

History. Moreover, the undersigned have substantial experience litigating manufactured housing community class action litigation, *see* Horowitz Decl., **Ex. 5**, at ¶ 17, and there are no known conflicts between Mr. Smith and the proposed Settlement Classes he seeks to represent. *See id.* **Ex. 5**, at ¶ 18. Rule 23(a)(4)'s adequacy requirements are thus satisfied. *See Lannan v. Levy & White*, 186 F. Supp. 3d 77, 89 (D. Mass. 2016) (Talwani, J.) ("To meet the adequacy requirement, 'the moving party must show first that the interests of the representative party will not conflict with the interests of any of the class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation.'") (quoting *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir.1985)).

B. Rule 23(b)

With respect to Rule 23(b)(2), the multi-year rent structure Mr. Smith has negotiated on behalf of the proposed Rule 23(b)(2) Class will benefit all current or future tenant or resident Class members, insofar as the negotiated rent structure preserves current occupancy agreements, ensures predictable annual base-rent increases and ultimately sets an upper limit as to how high base rent can climb during the pendency of the Settlement. *See, supra*, Facts – Sec. III/Settlement. Rule 23(b)(2) is thus satisfied as to Mr. Smith's claim for equitable relief. *See, e.g.*, *Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. 288, 297 (D. Mass. 2011) (Ponsor, J.). (Rule 23(b)(2) is appropriate to implement "relief that would benefit the entire class.").

With respect to Rule 23(b)(3) predominance, Mr. Smith's damages claim alleges a class-wide rent overpayment injury resulting from Defendants' implementation of what Smith asserts has been an unlawful rent structure at Chelmsford Commons, a claim which requires resolution of the same factual and legal questions respecting the Chelmsford Commons rent structure to establish all elements of liability on behalf of Rule 23(b)(3) Class members, except for the

calculation of individual damages. *See, e.g.*, Pls. Mem., Doc. 58, at p 7-8, 13-15. Without more, Rule 23(b)(3) predominance is satisfied for settlement purposes. *See Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) (predominance satisfied by "sufficient constellation of common issues [which] bind[] class members together"); *Smilow*, 323 F.3d at 40 ("The individuation of damages in consumer class actions is rarely determinative under Rule 23(b)(3)."). Moreover, class treatment of Mr. Smith's damages claim also satisfies Rule 23(b)(3)'s superiority requirement by offering an efficient and consistent resolution of the damages claims of the Rule 23(b)(3) Class members, in a local forum, while also permitting those Class members with more substantial individualized damages to opt out. *See* Fed. R. Civ. P. 23(b)(3)(A)–(D).[7]

In this way, Mr. Smith has satisfied his burden, for settlement purposes, under Rule 23 of establishing that his Consumer Protection Act claims for equitable relief and damages merit certification of the proposed Rule 23(b)(2) Class and Rule 23(b)(3) Class for settlement purposes.

III. THE PROFFERED SETTLEMENT SHOULD BE PRELIMINARILIY APPROVED AS FAIR, REASONABLE AND ADEQUATE

A. The Relief Provided to the Proposed Settlement Classes Is More Than Adequate

As described above, the proffered Settlement provides a substantial benefit to current or future tenants or residents of Chelmsford Commons by instituting a rent structure that encompasses predictable rent increases and ensures Chelmsford Commons' affordability for most (if not all) of the next decade. For all current tenants or residents who presently pay base rent below the current market base rent of $964.37 per month, even those without the protection of an operative

[7] This forum is desirable for resolving the controversy because the proposed Rule 23(b)(3) Class, by definition, is composed of members who reside in Massachusetts. *See* Settlement, **Ex. 2**, at §§ 2.16, 2.46, 3.2. The Court need not consider whether trial "would present intractable management problems" because "the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Moreover, the undersigned are not aware of any other litigation concerning this controversy already begun by or against Rule 23(b)(3) Class members.

occupancy agreement, their base rent will increase only once annually beginning in April of 2023 by the greater of 4.5% or the CPI Percentage, until all base rents in Chelmsford Commons reach parity at $964.37 per month, *i.e.*, the Settlement Period. *See* Settlement, **Ex. 2**, at §§ 2.52, 4.1(a), 4.1(c).[8] Under this structure, in the absence of substantial additional inflation, the approximately 30 current tenant or resident households which are presently paying the lowest base rent at Chelmsford Commons will not reach a base rent of $964.37 per month until April of 2033 – that is, a Settlement Period of 10 years.[9] *See* Horowitz Decl., **Ex. 5**, at ¶¶ 5-8. Moreover, under this structure, no base rents will increase beyond $964.37 per month (including the base rents of new entrants) until all Chelmsford Commons tenants or residents are paying base rents of $964.37 per month. *See* Settlement, **Ex. 2**, at § 4.1.

Accordingly, all Chelmsford Commons tenants or residents who entered into occupancy agreements and who are paying less than $964.37 per month in base rent will retain the benefit of those occupancy agreements. *See* Cmplt., Doc. 1-2, at ¶¶ 29-33; Answ., Doc. 26 at ¶¶ 29-33; *see also* Smith Decl., Doc. 57-1, at ¶ 4 & Sub-Ex. A. Moreover, even those Chelmsford Commons

[8] While some Chelmsford Commons tenants or residents may be unhappy with the amount of their annual rent increases, particularly during an inflationary economy, no provision of the Manufactured Housing Act permits a court to review the absolute reasonableness of a rent increase, except perhaps if the increase is unconscionable. *See* Mass. Gen. Laws ch. 140, § 32P (requiring rents to be set by fair market); 940 Code Mass. Regs. 10.03(5) (clarifying that fair market requirement creates no rights beyond those provided at common law or by other statute). Rather, the gravamen of this litigation is to ensure that the rents offered by the Defendants are offered equally across all Chelmsford Commons tenants or residents, a goal achieved by the Settlement with great benefit to the members of the proposed Settlement Classes.

[9] Of course, the Settlement Period will reduce if the United States economy experiences sustained inflation. For example, if the CPI Percentage hits 5% every year, then the lowest base rents in Chelmsford Commons will reach $964.37 per month by April of 2032 – a period of nine years. Or if the CPI Percentage hits 6% every year, then the lowest base rents in Chelmsford Commons will reach $964.37 per month by April of 2030 – a period of seven years. *See* Decl. of Ethan R. Horowitz ("Horowitz Decl."), **Ex. 5**, at ¶¶ 5-7, 9-10. The Settlement Period may also reduce via attrition, that is, if the tenants or residents who are paying the lowest base rents in Chelmsford Commons relocate or pass away.

tenants or residents who are paying less than $964.37 per month but who did not elect the protection of an occupancy agreement will receive the benefit of the same annual rent increase limitation as their neighbors who signed occupancy agreements. Additionally, in the absence of substantial additional inflation, a Chelmsford Commons tenant or resident who is presently paying the current market base rent of $964.37 per month will receive the benefit of a 10-year base rent freeze, with an estimated value of $33,000 per household. *See* Horowitz Decl., **Ex. 5**, at ¶¶ 5-6, 11-12. Indeed, in this scenario even tenants or residents whose base rent reaches $964.37 per month in the middle of the Settlement Period will receive a substantial benefit, with the value of a seven-year rent freeze estimated at nearly $16,000 per household or the value of a five-year rent freeze estimated at over $8,000 per household. *See id*, **Ex. 5**, at ¶¶ 5-6, 11, 13-14.[10] The bottom-line is that all current or future tenants or residents will receive a valuable benefit, in the form of predictable base-rent increases, a base-rent cap or some combination of both, during the approximately 10-year term of the Settlement, in addition to a resultant rent structure that adheres to M.G.L. ch. 140, § 32L(2).

Beyond the substantial value afforded to current or future tenants or residents by the above-described negotiated rent structure, each current tenant or resident household will also receive a payment of $50 per household in lieu of damages. *See* Settlement, **Ex. 2**, at § 4.2. This number is modest because Mr. Smith purposefully traded retrospective damages for what he believes to be the more valuable guarantee of future affordability. For example, under Mr. Smith's theory of rent

[10] Even in an inflationary economy, a Chelmsford Commons tenant or resident who is presently paying the current market base rent of $964.37 per month will receive a substantial benefit. For example, in the above scenario of consistent 6% CPI Percentage increases and the corresponding seven-year Settlement Period, *see*, *supra*, n.9, Chelmsford Commons tenants or residents who are presently paying the current market base rent will still receive a value of nearly $22,000. *See* Horowitz Decl., **Ex. 5**, at ¶¶ 5-6, 11, 15.

overpayment damages, a Chelmsford Commons tenant or resident who has been paying a base rent of $964.37 per month since January of 2021 and who has suffered the greatest retrospective injury according to Smith's theory of damages would be owed approximately $8,500. *See* Horowitz Decl., **Ex. 5**, at ¶ 16. However, as described above, the proffered Settlement is likely to provide the same tenant or resident with more than double that $8,500 value in multi-year rent freezes. Additionally, Defendants have agreed to pay for all settlement administration costs – with an approximate value of $17,000, *see* Decl. of Christopher Longley ("Longley Decl."), **Ex. 7**, at ¶ 8, and the $200,000 estimated value of the undersigned's services in representing the proposed Settlement Classes, on top of the value of the negotiated rent structure and the damages award. *See* Settlement, **Ex. 2**, at §§ 2.3, 7, 8.7, 15. Moreover, in exchange for the benefits provided by the Settlement, Settlement Class members will only be bound by targeted releases preventing such members from contesting the lawfulness of the negotiated rent structure or from relitigating damages claims which challenge the same or which otherwise seek to relitigate the basis of this action, *see id.*, **Ex. 2**, at §§ 5.2-5.3, the damages portion of which is subject to Rule 23(b)(3) opt-out rights. *See id.*, **Ex. 2**, at §§ 2.46, 3.2, 13

In light of the risk of zero recovery created by Defendants' expected challenge to class certification, Defendants' pending Rule 12 motion for judgment on the pleadings or future dispositive motion practice as well as the possibility of a contested trial and subsequent appeals, the immediate relief provided to the current or future tenants or residents of Chelmsford Commons by this Settlement leave no doubt that the proposed relief is adequate as contemplated by Fed. R. Civ. P. 23(e)(2)(C).

B. The Terms of the Proposed Attorney's Fee Award Are Reasonable

In light of the undersigned's contribution to the proposed Settlement Classes, the Settlement's award of up to $200,000 in fees and costs is a fair and reasonable component of the Settlement. In reviewing the reasonableness of an attorney's fee award requested as part of a class action settlement, a reviewing court – sitting in its diversity jurisdiction – applies federal law when determining the reasonableness of the award in the context of the overall settlement, *see* Fed. R. Civ. P. 23(e)(2)(C)(iii), but applies the substantive law of the forum state in assessing whether the award is independently reasonable in relation to the work performed by the attorney. *See In re Volkswagen & Audi Warranty Extension Litig.*, 692 F.3d 4, 15 (1st Cir. 2012); Fed. R. Civ. P. 23(h). With respect to the state-law analysis, courts typically channel their discretion through application of the "lodestar method" – that is, identifying a reasonable number of hours the attorney spent litigating the matter, multiplying that figure by a reasonable hourly rate and then considering whether to apply a "multiplier" which enhances the "lodestar appropriately to reflect, for example, the scale of the results achieved . . . or the risks counsel took in pursuing contingent fees." *In re Volkswagen & Audi Warranty Extension Litig.*, 89 F. Supp. 3d 155, 164-65 (D. Mass. 2015) (Young, J.) ("*Volkswagen II*").

The undersigned have vigorously litigated the above-captioned action and the Related Action – both in litigation and settlement postures – for the benefit of the Settlement Classes. After careful review of their time records, the undersigned have identified to-date more than 450 hours spent on tasks which benefitted the proposed Settlement Classes – more than 300 hours spent by Attorney Brian J. O'Donnell and more than 150 hours by Attorney Ethan R. Horowitz. *See* Horowitz Decl., **Ex. 5**, at ¶¶ 20-21; Decl. of Brian J. O'Donnell ("O'Donnell Decl."), **Ex. 6**, ¶¶ 6-7. Attorney Horowitz is the Managing Director of his civil legal aid law firm who has been practicing law for approximately 13 years and whose professional experience, qualifications and

work on this litigation should be valued at a rate of at least $340 per hour. *See* Horowitz Decl., **Ex. 5**, at ¶¶ 1-2, 17.[11] During the time he worked on this litigation, Attorney O'Donnell was a Staff Attorney at that same legal aid law firm who had been practicing law for approximately four years and whose professional experience, qualifications and work on this litigation should be valued at a rate of at least $185 per hour. *See* O'Donnell Decl., **Ex. 6**, at ¶¶ 1, 3; *see also, e.g.*, *Commonwealth Care All. v. AstraZeneca Pharm. L.P.*, 2013 WL 6268236, *1 (Mass. Super. Ct. Aug. 5, 2013) (Sanders, J.) (collecting cases regarding reasonable fees).

Moreover, given the risk they assumed in undertaking this litigation as well as the results they achieved, the undersigned respectfully submit that their work merits the standard multiplier of two for litigation without a paying client that involves novel issues of law and that implicates substantial questions of public import. *See, e.g.*, *Volkswagen II*, 89 F. Supp. 3d at 166–67, 171 (adopting multiplier of 2); *Commonwealth Care All.*, 2013 WL 6268236 at *2 (same); *see also, e.g.*, *Roberts v. TJX Cos., Inc.*, 2016 WL 8677312, at *13 (D. Mass. Sept. 30, 2016) (Burroughs, J.) (collecting cases where "[m]ultipliers of 2 and more have been found reasonable"). Accordingly, the undersigned respectfully submit that the $200,000 in attorney's fees – which will not be distributed until the Settlement receives final approval – *see* Settlement, **Ex. 2**, at § 7 – are reasonable components of this Settlement.[12]

[11] The U.S. District Court recently approved a rate of $340 per hour for Attorney Horowitz in the context of another manufactured housing class action settlement. *See Craw, et al. v. Hometown America, LLC, et al.*, 18-12149-LTS at Doc. Nos. 198-99, 216-17 (D. Mass. Sep. 23, 2021). Mr. Smith respectfully requests that the Court take judicial notice of the docket in that action pursuant to Fed. R. Evid. 201.

[12] The propriety of Mr. Smith's modest $2,000 incentive award, *see* Settlement, **Ex. 2**, at § 6, in light of the nearly two years Smith spent preparing for or litigating an action on behalf of his current or future neighbors, requires little comment. *See, e.g.*, *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 98 (D. Mass. 2005) (Stearns, J.)

C. The Remaining Rule 23(e)(2) Factors Support Approval of the Settlement

As described above, the parties reached this Settlement after 17 months of hard-fought litigation and settlement negotiations. *See*, *supra*, Facts – Sec. II/Procedural History; *see also* Fed. R. Civ. P. 23(e)(2)(A) & (B), 2018 cmt. ("… the focus at this point is on the actual performance of counsel acting on behalf of the class."). As described above, the parties reached this Settlement after multiple weeks of mediation before an experienced mediator. *See*, *supra*, Facts – Sec. II/Procedural History; *see also, e.g.*, 4 NEWBERG ON CLASS ACTIONS, §13.50 ("there appears to be no better evidence of such a [truly adversarial bargaining] process than the presence of a neutral third party mediator"). And as described above, no agreement has been made in connection with the Settlement other than the Settlement Agreement itself, which effectively and fairly provides relief to all members of the Settlement Classes. *See*, *supra*, Facts – Sec. III/Settlement; *see also* Settlement, **Ex. 2**, at § 33. The Court should preliminarily approve the Settlement.

IV. THE NOTICE PLAN ADOPTED BY THE SETTLEMENT IS THE BEST NOTICE PRACTICABLE AND SHOULD BE ORDERED BY THE COURT

As outlined in the Settlement, the parties' agreed-upon notice plan requires that Defendants conduct a reasonable search of their Chelmsford Commons business records, identify mailing addresses and electronic mail address of all known Settlement Class members and timely provide them to a professional settlement administrator selected by the parties, *see* **Ex. 2** at §§ 8.1, 38.2, which is Atticus Administration, LLC, an experienced and highly-qualified administrator. *See*, *generally*, Longley Decl., **Ex. 7**. Within 30 days after the Court's entry of the Preliminary Approval Order, Atticus will obtain an updated mailing address and send via U.S. mail, as well as via electronic mail where an electronic mail address is available, an individualized Settlement notice, **Ex. 3**, to all Settlement Class members identified in the Chelmsford Commons business records. *See* Settlement, **Ex. 2**, at § 8.2.

To the extent that Defendants' reasonable review of Chelmsford Commons business records may not identify all potential Settlement Class members, Atticus, within 30 days after the Court's entry of the Preliminary Approval Order, will also cause a publication notice, **Ex. 4**, to appear twice in the region's newspaper of record – the *Lowell Sun* – that is, once per week for two consecutive weeks. *See* Settlement, **Ex. 2**, at § 8.3.[13] Given the timing of these notices, Settlement Class members will have a more than adequate opportunity to object to the Settlement, if they choose, or opt-out from the Rule 23(b)(3) Class, the deadline for each running 90 days after the Court's entry of the Preliminary Approval Order. *See id.*, **Ex. 2**, at §§ 12-13.

Moreover, the notices proposed by the parties are fair, adequate and reasonable as they clearly and straightforwardly provide Settlement Class members with enough information to evaluate whether to participate in the Rule 23(b)(3) Class or opt out or whether to object to the Settlement, including information about the Settlement's proposed releases. These notices also highlight the address for the Settlement website, the toll-free number administered by Atticus and all applicable deadlines. *See* **Exhibits 3-4**; *see also* Settlement, **Ex. 2**, at § 8.4. Without more, the parties respectfully submit that the agreed-upon notice plan satisfies Rule 23(c)(2) and should be effectuated as part of the Court's Preliminary Approval Order.

CONCLUSION

In this way, Mr. Smith respectfully submits that the proposed Settlement Classes, the proffered Settlement and the agreed-upon notice plan satisfy the requirements of Rule 23, such that the Motion filed herewith should be granted and that the Court should enter the Preliminary Approval Order submitted herewith as **Exhibit 1**.

[13] By definition Settlement Class members are or recently were tenants or residents of Chelmsford Commons and should be living or doing business in the circulation area of the *Lowell Sun*, which includes Chelmsford, when notice is published. *See* Settlement, **Ex. 2**, at §§ 2.16, 2.45-46.

Respectfully submitted,
SCOTT SMITH,
By his attorneys,

This 19th day of September 2022

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2021, the foregoing Memorandum was electronically filed with the Clerk of the Court through the CM/ECF system, which will send notification of such filing to registered participants, including counsel for the Defendants.

/s/ Ethan R. Horowitz

Dated: September 19, 2022

Ethan R. Horowitz
BBO # 674669