

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

_____)	
SCOTT SMITH, <i>et al.</i> ,)	
)	
Plaintiffs,)	
v.)	Case No. 1:21-cv-10654
)	
CHELMSFORD GROUP, LLC, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF’S ASSENTED-TO MOTION FOR
FINAL APPROVAL OF
CLASS ACTION SETTLEMENT AGREEMENT AND RELEASE**

INTRODUCTION

Through the instant proceeding, Plaintiff Scott Smith – on behalf of himself and the members of the Rule 23(b)(2) Class and Rule 23(b)(3) Class conditionally certified by the Court’s September 23, 2022 Preliminary Approval Order – seeks final certification of said Classes (“Settlement Classes”) so that he may settle his Massachusetts Consumer Protection Act claims for equitable relief and damages – respectively – on behalf of the same. Through the instant proceeding, Mr. Smith also seeks approval of the Class Action Settlement Agreement and Release (“Settlement”), which is designed to resolve Smith’s claims for equitable relief and damages on behalf of himself as well as the Settlement Classes and which the Court preliminarily approved in its September 23, 2022 Preliminary Approval Order. Members of the Settlement Classes have received notice of the Settlement as well as their rights thereunder, in conformance with the Court’s September 23, 2022 Preliminary Approval Order. Moreover, no member of the Settlement Classes has objected to the Settlement and only one member – of the more than 500 who received notice of the Settlement – requested to be excluded therefrom.

Through its September 23, 2022 Preliminary Approval Order, the Court has already made an initial determination that the Settlement Classes satisfy the requirements of Fed. R. Civ. P. 23(a) and Fed. R. Civ. P. 23(b). Moreover, through its September 23, 2022 Preliminary Approval Order, the Court has already made an initial determination that the Settlement satisfies the requirements of Fed. R. Civ. P. 23(e). Without any objection from members of the Settlement Classes, Mr. Smith stands on the record established by his Assented-To Motion for Preliminary Approval of Class Action Settlement and Release, Doc. Nos. 96-97, and submits that no reason exists to disturb the findings of the September 23, 2022 Preliminary Approval Order. Mr. Smith thus respectfully requests that the Court finalize those findings and conclude this litigation by entering the proposed final order and judgment submitted herewith as **Exhibit 1**.

PROCEDURAL POSTURE

On September 23, 2022, the Court entered a Preliminary Approval Order which, among other things:

- conditionally certified the Settlement Classes proposed by Mr. Smith as satisfying the requirements of Fed. R. Civ. P. 23(a), Fed. R. Civ. 23(b)(2) and Fed. R. Civ. P. 23(b)(3), Doc. No. 99 at ¶ 22;
- preliminarily approved the Settlement proposed by Mr. Smith as satisfying the requirements of Fed. R. Civ. P. 23(e), Doc. No. 99 at ¶ 24;
- approved Mr. Smith’s proposed plan to provide notice of the Settlement to the members of the Settlement Classes (“Notice Plan”) as satisfying the requirements of Fed. R. Civ. P. 23(c) as well as Constitutional Due Process, Doc. No. 99 at ¶ 25;
- appointed Atticus Administration, LLC (“Atticus”) as the Settlement Administrator

as well as ordered Atticus to implement the approved Notice Plan, Doc. No. 99 at ¶¶ 23, 25(E); and

- conditionally designated the undersigned to serve as counsel for the Settlement Classes (“Class Counsel”) and Mr. Smith to serve as the representative of the Settlement Classes, Doc. No. 99 at ¶ 22.

On September 20, 2022, Defendants conducted a reasonable search of their business records, compiled mailing addresses, electronic mail addresses as well as other personal identifying information for all known members of the Settlement Classes and timely provided this compilation to Atticus. *See* Decl. of Josh Houldsworth, **Exhibit 3**, ¶¶ 1-3, 8-11; Decl. of Bryn Bridley (“Bridley Decl.”), **Exhibit 2**, at ¶ 4. On October 12, 2022, Atticus activated a publicly available website, which published the information outlined in the Court-approved long-form Settlement notice, Doc. No. 96-3, and a toll-free telephone number which allowed members of the Settlement Classes to request information about the Settlement directly from Atticus. *See* Bridley Decl., **Exhibit 2**, at ¶¶ 6, 10-11 & Ex. A. On October 13 and 20, 2022, Atticus caused the Court-approved publication notice, Doc. No. 96-4, to appear twice in the *Lowell Sun* – that is, once per week for two consecutive weeks. *See* Bridley Decl., **Exhibit 2**, at ¶ 9 & Ex. B. And on October 24, 2022, Atticus, after obtaining updated mailing addresses through the process outlined in the Settlement, sent via U.S. mail – as well as via electronic mail where an electronic mail address was available – the Court-approved long-form Settlement Notice, Doc. No. 96-3, to all members of the Settlement Classes identified by Defendants. *See id.*, **Exhibit 2**, at ¶¶ 4-8 & Ex. A. Moreover, although not required to do so by the Settlement or the Preliminary Approval Order, on November 15, 2022, Mr. Smith and Class Counsel took the additional step of presenting the Settlement at a public meeting and answering all questions posed by members of the Settlement Classes in

attendance. *See* Suppl. Decl. of Ethan R. Horowitz (“Suppl. Horowitz Decl.”), Doc. No. 103-2, at ¶ 22. To-date, of the 555 long-form Settlement notices mailed to members of the Settlement Classes, only two have been returned by the U.S. Postal Service as undeliverable. *See* Bridley Decl., **Exhibit 2**, at ¶ 7. Moreover, Atticus has received zero objections to the Settlement from members of the Settlement Classes and has received only 1 request for exclusion. *See id.*, **Exhibit 2**, at ¶¶ 12-13; *see also* Decl. of Bryn Bridley Regarding Opt-Out List (“Opt-Out List”), Doc. No. 101.

ARGUMENT

I. 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)

For the same reasons argued in Mr. Smith’s Assented-To Motion for Preliminary Approval of Class Action Settlement and Release, Doc. Nos. 96-97, and adopted by the Court in its Preliminary Approval Order, Doc. No. 99, Mr. Smith’s claims satisfy the requirements of Rule 23(a), Rule 23(b)(2) and Rule 23(b)(3). Final certification for settlement purposes of the Rule 23(b)(2) Class of current or future Chelmsford Commons tenants or residents seeking equitable relief and the Rule 23(b)(3) Class of current Chelmsford Commons tenants or residents seeking damages (collectively, the “Settlement Classes”) is thus warranted.

A. Rule 23(a)

With respect to Rule 23(a)(1) numerosity, each of the Settlement Classes encompasses tenants or residents representing the more than 200 home sites at Chelmsford Commons – *see* Cmplt., Doc. No. 1-2, at ¶¶ 3, 21; Answ., Doc. No. 26 at ¶¶ 3, 21; J. Brown Decl., Doc. No. 1-6,

at ¶¶ 5, 7 & Ex. B¹ – 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 the respective claims for equitable relief and damages of Mr. Smith and the members of the Settlement Classes 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. The 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 members of the Settlement Classes all sound in rent overpayment resulting from Defendants’ implementation of the challenged Chelmsford Commons rent structure and require application of the same remedial theories under the Massachusetts Consumer Protection and Manufactured Housing Acts such that Smith’s claims are typical of the claims of the Settlement Classes. *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 Class Counsel’s nearly 2 years of vigorously pursuing this matter in two separate

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

actions before this Court – in both litigation as well as settlement postures – demonstrate that each has responsibly pursued the best interests of the Settlement Classes. *See* Pl.’s Mem., Doc. No. 104, at pp. 4-5; *see also, infra*, at pp. 13-14. Moreover, Class Counsel have substantial experience handling manufactured housing community class action litigation, *see* Suppl. Horowitz Decl., Doc. No. 103-2, at ¶ 19, and there are no known conflicts between Mr. Smith and the Settlement Classes he currently represents. *See id.*, Doc No. 103-2, at ¶ 20. 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 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 term of the Settlement. *See, infra*, at pp. 8-9. 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’ January 2021 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. No. 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 v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir. 2003) (“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, as one member chose to do. *See* Opt-Out List, Doc. No. 101; *see also* Fed. R. Civ. P. 23(b)(3)(A)–(D).²

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

² This forum is desirable for resolving the controversy because the Rule 23(b)(3) Class, by definition, is composed of members who reside in, or who very recently resided in, Massachusetts. *See* Settlement, Doc. No. 96-2, 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.

II. THE SETTLEMENT SHOULD BE APPROVED AS FAIR, REASONABLE AND ADEQUATE

For the same reasons argued in Mr. Smith's Assented-To Motion for Preliminary Approval of Class Action Settlement and Release, Doc. Nos. 96-97, and adopted by the Court in its Preliminary Approval Order, Doc. No. 99, the Settlement satisfies the requirements of Rule 23(e) and should be approved as fair, reasonable and adequate.

A. The Key Terms of the Settlement

The cornerstone of the Settlement is a negotiated rent structure which will ensure that members of the Settlement Classes – *i.e.*, 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, equalization which is guaranteed by Defendants' commitment to cap home-site base rent³ in the community at the current market rent of \$964.37 per month during the Settlement Period.⁴ *See* Settlement, Doc. No. 96-2, at § 4.1. Specifically, during the Settlement Period:

- 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 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

³ “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, Doc. No. 96-2, at §§ 2.4, 4.1.

⁴ The “Settlement Period” is the time period necessary for all rent in Chelmsford Commons to equalize per the terms of the Settlement. *See* Settlement, Doc. No. 96-2, at §§ 2.52, 4.1(a).

- Percentage”), whichever is greater; *see id.*, Doc. No. 96-2, at §§ 4.1(c), 25; *see also*, *e.g.*, Decl. of Scott Smith (“Smith Decl.”), Doc. No. 57-1, at ¶ 4 & Sub-Ex. A;
- For Chelmsford Commons tenants or residents who did not sign occupancy agreements, and thus have at-will tenancies, Defendants will similarly limit base-rent adjustments to one annual increase of either 4.5% or the CPI Percentage, whichever is greater; *see* Settlement, Doc. No. 96-2, 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.*, Doc. No. 96-2, at §§ 2.17, 4.1(a)-(c); 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.*, Doc. No. 96-2, 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.*, Doc. No. 96-2, at §§ 2.17, 4.1(a); *supra*, n.4. In addition to attaining rent parity and preserving the long-term affordability of Chelmsford Commons for current or future tenants or residents, the Settlement also provides for a payment of \$50 per home site to settle claims for alleged rent overpayment damages incurred since January of 2021. *See* Settlement, Doc. No. 96-2, at § 4.2.

In exchange for the above-described benefits, members of the Settlement Classes will be bound by targeted releases preventing them 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.*, Doc. No. 96-2, at §§ 5.2-5.3, the damages portion of which is subject to Rule 23(b)(3) opt-out rights. *See id.*, Doc. No. 96-2, at §§ 2.46, 3.2, 13.

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 Settlement Classes. *See id.*, Doc. No. 96-2, at §§ 6-7.

B. The Relief Provided to the Settlement Classes Is More Than Adequate and Treats Class Members Equitably Relative to Each Other

As described above, the Settlement provides a substantial benefit to members of the Settlement Classes by instituting a rent structure that sets Chelmsford Commons on a path to rent parity through predictable rent increases and, in doing so, ensures the community's 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, 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, Doc. No. 96-2, at §§ 2.52, 4.1(a), 4.1(c).⁵ Under this structure, in the absence of substantial additional inflation, the 29 current tenant or resident households which are presently paying the lowest base rent, or a rent within cents of 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

⁵ 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 set by the Defendants are offered equally across the community, a goal achieved by the Settlement with great benefit to the current or future tenants or residents of Chelmsford Commons.

of 10 years.⁶ See Suppl. Horowitz Decl., Doc. No. 103-2, at ¶¶ 8-10. 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, Doc. No. 96-2, 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 Cmpl., Doc. No. 1-2, at ¶¶ 29-33; Answ., Doc. No. 26, at ¶¶ 29-33; see also Smith Decl., Doc. No. 57-1, at ¶ 4 & Sub-Ex. A. Moreover, even those Chelmsford Commons tenants or residents who are paying less than \$964.37 per month but who did not sign 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 Suppl. Horowitz Decl., Doc. No. 103-2, at ¶¶ 8, 13-14. 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

⁶ 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 Suppl. Horowitz Decl., Doc. No. 103-2, at ¶¶ 8-9, 11-12. 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.

freeze estimated at over \$8,000 per household. *See id*, Doc. No. 103-2, at ¶¶ 8, 13, 15-16.⁷ The bottom-line is that all members of the Settlement Classes 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 as well as a resultant rent structure that adheres to the rent parity requirements of Mass. Gen. Laws ch. 140, § 32L(2).

Beyond the substantial value afforded to members of the Settlement Classes by the above-described negotiated rent structure, each current tenant or resident household – that is, those Chelmsford Commons tenants or residents of record as of September 13, 2022 – will also receive a payment of \$50 per household in lieu of damages. *See Settlement*, Doc. No. 96-2, at §§ 2.16, 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 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 Suppl. Horowitz Decl.*, Doc. No. 103-2, at ¶ 18. However, as described above, the Settlement is likely to provide the same tenant or resident with more than double that \$8,500 value as a result of a multi-year rent freeze. Additionally, Defendants have agreed to pay for all settlement administration costs – with an expected value of more than \$17,000, *see Bridley Decl.*, **Exhibit 2**, at ¶ 14 – and the \$200,000 estimated value of the undersigned’s services in

⁷ 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 a corresponding seven-year Settlement Period, *see, supra*, n.6, Chelmsford Commons tenants or residents who are presently paying the current market base rent will still receive a multi-year rent freeze with an estimated value of nearly \$22,000. *See Suppl. Horowitz Decl.*, Doc. No. 103-2, at ¶ 17.

representing the Settlement Classes, on top of the value of the negotiated rent structure and damages award.⁸ *See* Settlement, Doc. No. 96-2, at §§ 2.3, 7, 8.7, 15. Moreover, in exchange for the benefits provided by the Settlement, members of the Settlement Classes 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.*, Doc. No. 96-2, at §§ 5.2-5.3, the damages portion of which is subject to Rule 23(b)(3) opt-out rights. *See id.*, Doc. No. 96-2, 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 relief is adequate and equitable as contemplated by Fed. R. Civ. P. 23(e)(2)(C) and Fed. R. Civ. P. 23(e)(2)(D).⁹

C. Class Counsel and Mr. Smith More Than Adequately Represented the Settlement Classes and Negotiated the Settlement at Arm's Length.

The parties reached this Settlement after 17 months of hard-fought litigation and settlement negotiations. This litigation included procuring the dismissal of a preemptive federal court lawsuit filed by Defendants in response to Mr. Smith's Consumer Protection Act statutory demand letter, by way of a contested Rule 12 proceeding. *See* Counterclaim, Doc. No. 26, at ¶ 37 & Ex. F; Counterclaim Answ., Doc. No. 38, at ¶ 37; *see also Chelmsford Group, LLC, et al. v. Smith*, 21-

⁸ The reasonableness of the proposed award of attorney's fees to Class Counsel and the reasonableness of the proposed incentive award to Mr. Smith are set forth in Smith's Motion for Approval of Attorney's Fees and Class Representative Award. Doc. Nos. 103-04.

⁹ As described above, no agreement has been made in connection with the Settlement other than the Settlement Agreement itself. *See* Settlement, Doc. No. 96-2, at § 33.

CV-10522-DJC at Doc. Nos. 8-9, 12 & 19-20.¹⁰ This litigation included multiple, though ultimately unsuccessful, motions challenging federal court jurisdiction as to Mr. Smith's subsequently filed state-court lawsuit, after Defendants removed that lawsuit to this Court. Doc. Nos. 24-25, 33-35, 39, 44-45, 50, 53. This litigation included filing a motion for class certification as well as substantial additional motion practice seeking a prompt hearing on the certification issue. Doc. Nos. 57-58, 65-71, 79-82. This litigation included substantial briefing and oral argument as to the merits of Mr. Smith's claims, in response to a motion for judgment on the pleadings filed by Defendants, an oral argument which directly preceded the mediated settlement negotiations and consequent Settlement. Doc. Nos. 59-60, 73, 78, 84; *see also* Suppl. Horowitz Decl., Doc. No. 103-2, at ¶¶ 6-7 & Ex. A. And the litigation only resolved after more than 2 months of intensive settlement negotiations. *See id.*; Settlement, Doc. No. 96-2. In this way, the record demonstrates that Class Counsel and Mr. Smith more than "adequately represented" members of the Settlement Classes. Fed. R. Civ. P. 23(e)(2)(A); *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.").

Moreover, the parties reached the Settlement as a result of multiple weeks of mediation before an experienced mediator, sessions which involved the exchange of informal discovery so that Class Counsel and Mr. Smith could adequately evaluate Defendants' multiple proposals, craft counter-proposals and eventually reach the terms of the Settlement. Suppl. Horowitz Decl., Doc. No. 103-2, at ¶¶ 6-8 & Ex. A; Suppl. Decl. of Brian J. O'Donnell, Doc. No. 103-1, at ¶ 6. The record thus also demonstrates that the Settlement "was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B); *see also, e.g.*, 4 NEWBERG & RUBINSTEIN ON CLASS ACTIONS, §13.50 (6th ed.)

¹⁰ 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.

(“there appears to be no better evidence of such a [truly adversarial bargaining] process than the presence of a neutral third party mediator”).

And without more, the Court should approve the Settlement as fulfilling the requirements of Fed. R. Civ. P. 23(e).¹¹

CONCLUSION

Based on the foregoing, Mr. Smith respectfully requests that the Court finalize the findings issued by the Court in its September 23, 2022 Preliminary Approval Order and conclude this litigation by entering the proposed final order and judgment submitted herewith as **Exhibit 1**.

Respectfully submitted,
SCOTT SMITH,
By his attorneys,

This 19th day of January, 2023

/s/ Ethan R. Horowitz

/s/ Brian J. O'Donnell

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¹¹ Mr. Smith also notes that Defendants have provided notice of the Settlement to the appropriate state and federal officials within the timelines provided by and in conformance with 28 U.S.C. § 1715. *See* Decl. of Patrick L. Rawsthorne, **Exhibit 4**; Bridley Decl., **Exhibit 2**, at ¶ 5.

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2023, the foregoing Memorandum was 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: January 19, 2023

Ethan R. Horowitz
BBO # 674669