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15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
17

18 THOMAS CARNES, by and through his guardian
19 ad litem, JULIANA CHRISTINE CLEGG, on
20 behalf of himself and all others similarly situated,

21 Plaintiff,

22 vs.

23 ATRIA SENIOR LIVING, INC. and DOES 1
through 100,

24 Defendants.
25
26

Case No.: 3:14-cv-02727-VC

CLASS ACTION

**NOTICE OF MOTION AND MOTION
FOR FINAL APPROVAL OF CLASS
SETTLEMENT; SUPPORTING
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: June 30, 2016
Time: 10:00 a.m.
Place: Courtroom 4
Judge: Hon. Vince Chhabria

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1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 Please take notice that Plaintiff's Motion for Final Settlement Approval will be heard on
4 June 30, 2016, at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 4,
5 17th Floor, in the United States District Court for the Northern District of California, located at
6 450 Golden Gate Avenue, San Francisco, California 94102, the Honorable Judge Vince Chhabria
7 presiding. Pursuant to Federal Rule of Civil Procedure ("FRCP"), Rule 23, Plaintiff on behalf of
8 itself and the Settlement Class will and hereby do move for an order approving the parties'
9 Stipulation of Settlement as fair, reasonable, and in the best interests of the Settlement Class. This
10 motion is based on the attached Memorandum of Points and Authorities, the Notice of Lodgment
11 and declarations and exhibits attached thereto, all other records, pleadings, and papers on file in
12 this action; and such other evidence or argument as may be presented to the Court at the hearing
13 on the motion.

14 **POINTS AND AUTHORITIES**

15 **I. INTRODUCTION**

16 This motion seeks final approval of the parties' class settlement in this action, reached after
17 arms-length settlement negotiations supervised by a neutral mediator. In addition to injunctive
18 relief, the settlement provides substantial monetary payments to a settlement class of
19 approximately 13,750 current and former residents of assisted living facilities owned, managed
20 and/or operated by Atria Senior Living, Inc. ("Defendant") in California. The proposed
21 Settlement Class is readily ascertainable and Defendant has provided the Settlement Administrator
22 with a list of all Class Members from Defendant's existing records, and notice was sent to the
23 Class Members by utilizing the list.

24 This case is based on allegations that Defendant misrepresented that resident assessments
25 performed by Atria personnel would be used to set facility staffing, and allegations that Defendant
26 failed to disclose that staffing is determined by labor budgets only. Defendant disputes these
27 allegations in their entirety, denies any legal liability and vigorously defended the case since the
28

1 initial complaint was filed in June 2014. After weeks of mediation proceedings before the Hon.
2 Rebecca Westerfield (Ret) of JAMS, the parties reached a settlement to resolve the case.

3 Specifically, Defendant has agreed to pay \$6.4 million (the “Settlement Fund”) in full
4 settlement of all claims. Subject to Court approval of Plaintiff’s application for attorneys’ fees,
5 litigation costs, a service award to the Named Plaintiff, and factoring in estimated notice and
6 administration expenses, it is anticipated that approximately \$4 million will be available to fund
7 payments to Settlement Class members. That translates to a minimum per-resident payment of
8 approximately \$290. In addition, the settlement includes a Stipulated Injunction agreed to by
9 Atria. Among other terms, the Injunction requires Atria to include language in residency
10 agreements and other documents stating, among other things, that resident assessments and other
11 factors are considered in setting or monitoring staffing levels at Atria’s California facilities. The
12 injunction will begin on the Effective Date (defined in the Agreement) and remain in place for
13 three years.

14 As detailed below, the Settlement falls well within the “range of reasonableness.” The
15 \$290 per-resident minimum settlement payment represents over 32% of the average resident
16 move-in fee (which is approximately \$885 per resident). From Plaintiff’s perspective, the move-in
17 fees represent the “hard damages” realistically recoverable at trial. Specifically, under Plaintiff’s
18 case theory, the move-in fees would not have been paid had residents known the alleged “true”
19 facts that resident assessments are not used to set facility staffing. Unlike other charges (such as
20 rent payments) -- as to which residents arguably received some value for services rendered – the
21 move-in fees are unlikely to be barred or reduced by Defendant’s offset and related arguments.
22 (See Declaration of Christopher J. Healey (“Healey Decl.”), ¶33).

23 The actual per-resident payment will likely be higher, given the practical difficulties in
24 locating all settlement class members. In accordance with the Court’s stated preferences for class
25 resolution, the Agreement provides several proceedings to maximize the amount of settlement
26 payments to the Settlement Class. First, before making the initial distribution, the Settlement
27 Administrator will recalculate the per-resident payment using the actual number of class members
28 located through Defendant’s records, address updates and Distribution Requests. From past

1 experience with these types of settlements, that process will likely result in an increase in the per-
2 resident payment. (Healey Decl., ¶¶ 33-34). Second, once the initial distribution has been
3 completed, the Administrator will calculate the total funds remaining from the late payment
4 reserve (\$25,000) and uncashed checks, and assuming another distribution round is economically
5 feasible (including taking into account, among other things, the postage costs), all identified
6 settlement class members who cashed their initial settlement payment will receive a second
7 settlement check. (Stipulation of Settlement (“SS” or “Agreement”), ¶ 9.6; Healey Decl., ¶27).

8 **II. BACKGROUND**

9 **A. Case Overview**

10 Plaintiff Thomas Carnes, by and through his guardian ad litem, Juliana Christine Clegg
11 filed this action on June 12, 2014. Filed as a putative class action, the lawsuit sought relief on
12 behalf Mr. Carnes and all persons who resided in any of Atria’s California assisted living facilities
13 since June 2010. The crux of Plaintiff’s case is that Defendant allegedly misled residents, family
14 members and the general public to believe that resident assessments would be used to determine
15 staffing at Atria’s facilities. (Third Amended Complaint, Dkt. No.101, “TAC”, ¶¶2-6). Plaintiff
16 alleges, facility staffing is not determined by resident assessments, but instead is based on labor
17 budgets and pre-determined profit objectives.

18 Plaintiff asserts claims for damages and other relief under California’s Consumers Legal
19 Remedies Act, Cal. Civ. Code § 1750, *et seq.* (“CLRA”), California’s unfair competition statute,
20 Bus. & Prof. Code §§ 17200 *et seq.* (“UCL”) and the Financial Elder Abuse statute, Cal. W&I
21 Code § 15610.30.

22 Defendant denies the allegations and claims in the case in their entirety, and denies any
23 wrongdoing whatsoever. Defendant also denies that the case is appropriate as a class action for
24 purposes of litigation. As stated in the Settlement Stipulation, Defendant has agreed to settle
25 solely to avoid continued burdensome and costly litigation, and disruption to its business.

26 When the lawsuit was initially filed, Ms. Clegg served as Mr. Carnes’ personal
27 representative. Thereafter, the Court approved Ms. Clegg to act as Mr. Carnes’ guardian ad litem.
28 Mr. Carnes died on or about September 29, 2015. As Ms. Clegg is the Successor Trustee of the

1 Thomas & Alice Carnes Family Trust dated September 28, 2004, Plaintiff's complaint was
2 amended to update Ms. Clegg's status as Mr. Carnes' guardian ad litem and legal successor.
3 (TAC, ¶14).

4 **B. Case Proceedings**

5 The case has been vigorously litigated from inception. Following Plaintiff's amendment to the
6 initial complaint, Defendant moved to dismiss Plaintiff's First Amended Complaint ("FAC") on multiple
7 grounds. After full briefing and oral argument in November 2014, the Court dismissed the FAC but
8 granted leave to amend. (Dkt. No. 43). Plaintiff filed a Second Amended Complaint, Dkt. No. 51
9 ("SAC"), on December 11, 2014. Among other changes, the SAC alleged that, as a result of Atria's
10 challenged conduct, Plaintiff had not received the amount of care promised in his initial admission
11 contract. Plaintiff further alleged other residents either had not received their promised care, or were
12 placed at substantial risk that they would not receive such care in the future. (SAC, ¶¶2, 6).

13 Defendant again moved to dismiss, raising among other arguments, that Plaintiff's request for
14 injunctive relief was barred on abstention grounds and that Plaintiff's financial elder abuse claim failed
15 because Ms. Clegg was not an "elder" for purposes of that statute. On February 20, 2015, the Court
16 denied Atria's motion to dismiss the SAC. (Dkt No. 61). Defendant thereafter answered the SAC by
17 denying the allegations and claims asserted in the SAC, denying any wrongdoing, and denying that the
18 case is appropriate as a class action for purposes of litigating the claims.

19 **C. Case Investigation and Discovery**

20 Prior to reaching a settlement, Plaintiff engaged in substantial investigation and discovery.
21 Before filing the initial complaint, Plaintiff's Counsel reviewed approximately 2,800 pages of
22 background documents, interviewed former Atria employees, interviewed residents (and family
23 members), and consulted with multiple experts on assisted living facilities. (Healey Decl., ¶14).

24 After the lawsuit was filed, discovery included Defendant's production and Plaintiff's
25 review of approximately 554,469 pages of documents and 2,406 additional electronic documents
26 in their native formats. Plaintiff's review also included approximately 56,345 pages of documents
27 from the California Department of Social Services, Community Care Licensing Division regarding
28 the California assisted living facilities owned and/or operated by Defendant. In addition, the

1 parties participated in depositions discovery obtained from two of Defendant's employees.
2 (Healey Decl., ¶15).

3 In connection with the mediation and settlement effort, Defendant produced additional
4 information, including a summary of the move-in fees paid by all Atria facility residents during
5 the Settlement Class Period. Defendant's records show that the average move-in fee for each
6 resident was roughly \$885. (Healey Decl., ¶16).

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

8 In late 2015, the parties engaged in preliminary settlement discussions through counsel.
9 Those discussions eventually led to an agreement to mediate before the Honorable Rebecca
10 Westerfield (Ret.) of JAMS in San Francisco. On November 17, 2015, the parties engaged in a
11 full-day mediation before Judge Westerfield.

12 Although the case did not resolve at the initial mediation session, in the month following
13 the mediation, the parties continued settlement efforts with Judge Westerfield's assistance. After
14 further discussions with counsel for the respective parties, Judge Westerfield provided both sides
15 with a mediator's proposal for the parties to either accept or reject. On December 17, 2015, the
16 parties (independently) agreed to accept Judge Westerfield's mediator's proposal to settle the case.
17 (Healey Decl., ¶¶17-18).

18 **E. Court Grants Preliminary Approval**

19 By order dated April 6, 2016, the Court granted Plaintiff's motion for preliminary approval
20 of the settlement. (Dkt. No. 103). In accordance with the Court's order, notice of the settlement
21 was provided to the Settlement Class on April 26, 2016, through mail, publication and Internet
22 website posting. The 35-day period for Class Members to opt-out or object expires on May 31,
23 2016. (Declaration of Kathleen Wyatt ("Wyatt Decl."), ¶¶3-4, 7).

24 **III. THE PROPOSED SETTLEMENT WILL BENEFIT THE CLASS**

25 A copy of the parties' Stipulation of Settlement is attached as Exhibit A to Plaintiff's
26 Notice of Lodgment ("PNOL"). The key settlement terms are as follows:
27
28

1 **A. The Settlement Fund**

2 Defendant has agreed to pay \$6.4 million to resolve all monetary obligations owed under
3 the settlement. In addition to the Settlement Awards paid to class members, the Fund will be used
4 to pay notice/administration costs (estimated \$120,000), a service award of \$3,500 to Named
5 Plaintiff, reimbursement of litigation expenses (roughly \$130,000) and Plaintiff's attorneys' fees
6 in the amount approved by the Court but not exceed one-third of the Settlement Fund. Factoring
7 in an agreed-upon reserve of \$25,000 to cover late claims, the estimated amount available to fund
8 payments to class members is roughly \$4 million. (Healey Decl., ¶19).

9 Significantly, there will be no reversion of any portion of the Settlement Fund to
10 Defendant. Rather, unused reserve funds as well as uncashed or returned checks will be used to
11 fund a second round of Settlement Awards to identified class members. Alternative, if the
12 remaining amounts make a second distribution economically impractical, the balance will be
13 distributed to a *cy pres* recipient, nominated by Plaintiff's Counsel and approved by the Court
14 (SS, ¶1.29; Healey Decl., ¶26).¹

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

16 The Agreement provides for cash payments to class members (or if deceased, their legal
17 successors) on a direct distribution basis, with no claims requirement to obtain payment. The
18 parties estimate that the Settlement Class consists of approximately 13,750 current and former
19 residents. (Healey Decl., ¶20). The Settlement Administrator -- KCC/Gilardi -- will mail
20 settlement checks to each Settlement Class Member for whom a valid address has been provided
21 by Defendant (or located through the address update procedures). For Settlement Class Members
22 for whom current addresses cannot be located, the Administrator is authorized to make payment
23 based on a "distribution request" by the class member (or their legal successor). (SS, ¶9.3).

24 The amount of the Settlement Award will be determined through a straightforward
25 formula. The Net Settlement Fund available for distribution (after Court approval of the above-

26 _____
27 ¹ As referenced in the Settlement Stipulation, Plaintiff has proposed the Institute on Aging as a
28 potential *cy pres* recipient. The Institute is a non-profit entity with substantial experience in
assisting seniors and disabled persons on various matters, including assisted living facilities.
(Healey Decl., ¶26).

1 referenced expenses, service award and fee award) will be divided by the total number of
2 Settlement Class Members to yield an “Initial Settlement Award.” The Settlement Administrator
3 is authorized to increase the Initial Settlement Amount if sufficient monies are available after
4 calculating the amounts owed to all Settlement Class Members for whom current addresses have
5 been provided or located, along with the amounts owed to class members (or their successors)
6 who made timely distribution requests. (SS, ¶9.4; Healey Decl., ¶23).

7 So, for illustration purposes, if the Net Settlement Fund (after Court-approved payments) is
8 \$4 million, and there are roughly 13,750 Settlement Class Members, the Initial Settlement
9 Payment would be approximately \$290. That amount will be increased, if monies are available
10 after the Administrator calculates the amounts owed to Settlement Class Members for whom
11 current addresses are known or provided through Distribution Requests. (SS, ¶9.4).

12 The Agreement authorizes the Administrator to hold a reserve of \$25,000 to pay late-
13 submitted distribution requests or address other valid requests from Settlement Class Members.
14 Also, Settlement Award checks not cashed within the check cashing deadline (after reasonable
15 reminders issued by the Settlement Administrator) shall be added to the reserve fund. The
16 Agreement provides for a second potential distribution to identified Settlement Class Members
17 after the initial distribution and late claims process has been completed, assuming funds are left
18 over in an amount sufficient to make another distribution economically practical. (SS, ¶9.6;
19 Healey Decl., ¶26).

20 C. Stipulated Injunction

21 An integral part of the settlement is the Stipulated Injunction, which subject to Court
22 approval, will commence on the Effective Date and remain in place for three years from that date.
23 (PNOL, Ex. A.1 - Stipulated Injunction; SS, ¶ 8.2). Among other terms, the Injunction requires
24 that Defendant:

25 1. Ensure that resident assessments, including those conducted at the time of
26 admission and thereafter during a resident’s stay, are considered by Atria in determining, setting or
27 monitoring staffing levels for its California communities.

28

1 2. Ensure that all new Residency Agreements provided to, made available or
2 entered into after the Effective Date for Atria's California communities disclose that: a) resident
3 assessments are considered by Atria in determining, setting and monitoring staffing levels at its
4 California communities; and b) Atria does not guarantee that any resident will receive a specific
5 number of minutes or amount of care on any given day or time period.

6 3. Ensure that all Residency Agreements, web pages, marketing brochures or
7 other materials, and any other written statements to be provided to or made available to the
8 consuming public in California and that discuss resident assessments are in compliance with the
9 terms of the Injunction. (Stipulated Injunction, ¶¶3-6).

10 **D. Release Provisions**

11 Under the Agreement, the Named Plaintiff and Settlement Class Members (excluding opt-
12 outs) will release all claims that were asserted or could have been asserted in the lawsuit arising
13 out of or relating to statements, representations, acts, omissions or failures to disclose prior to
14 March 17, 2016 (the close of the Settlement Class Period) regarding Defendant's agreements,
15 advertising, marketing or other documents concerning the use or consideration of resident
16 assessments to determine, evaluate, review or set facility staffing, staffing levels or care amounts.
17 The releases are effective only after the settlement has been granted final approval and the
18 "Effective Date" is reached. Expressly excluded are any claims for personal injuries, emotional
19 distress or bodily harm. (SS, ¶ 1.25; Healey Decl., ¶28).

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

21 The Agreement provides for mailed class notice by U.S. mail to all Settlement Class
22 Members for whom current addresses can be located. In addition, where Defendant's records
23 include an email address for a resident or responsible party, notice was sent to the email address as
24 well. To effectuate the mailed notice, Defendant provided a list of names and contact information
25 for all resident class members (and representatives/family members to the extent available) to the
26 Administrator. Those addresses were updated by the Administrator using standard change of
27 address and other procedures. (SS, ¶6.2). In addition to mailing, a summary form of the Court-

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1 approved class notice was published in the California edition of USA Today, and posted on the
2 settlement website. (Wyatt Decl., ¶¶3-5).

3 Notice of the settlement was also provided to the applicable state and federal authorities in
4 accordance with the provisions of the Class Action Fairness Act, 28 U.S.C. §1715. [Cottriel
5 Decl., ¶2.]

6 The costs of class notice and settlement administration expenses will be paid from the
7 Settlement Fund. KCC/Gilardi estimates the notice and administration costs will not exceed
8 \$120,000. (Healey Decl., ¶39).

9 **F. Payment of Service Awards, Attorneys' Fees and Litigation Costs**

10 Subject to Court approval, the Agreement provides for a service award of \$3,500 to Ms.
11 Clegg, who served as the representative and guardian ad litem to Mr. Carnes in the prosecution of
12 this lawsuit. After Mr. Carnes' death in September 2015, Ms. Clegg continued the case
13 prosecution as Mr. Carnes' legal successor. As will be established in more detail in the formal
14 application for the requested service award, Ms. Clegg has devoted substantial time to the case,
15 assisting with discovery, monitoring and consulting on settlement negotiations and preparing for
16 case deposition (which was canceled shortly before the scheduled date due to settlement). (Healey
17 Decl., ¶29).

18 In addition, the Agreement allows Plaintiff's Counsel to seek reimbursement of litigation
19 costs up to \$135,000 and attorneys' fees not to exceed one-third of the Settlement Fund.
20 (SS, ¶12.1). To date, Plaintiff's Counsel have incurred over \$2.67 million in lodestar attorneys'
21 fees and advanced \$144,506.97 in litigation expenses. Counsel anticipate that additional fees and
22 costs will be incurred in connection with the approval proceedings, settlement administration and
23 related matters. (Healey Decl., ¶30).

24 **IV. THE SETTLEMENT MEETS THE STANDARDS FOR FINAL SETTLEMENT**
25 **APPROVAL**

26 Rule 23 contemplates a three-step procedure for approval of class action settlements:

- 27 1) certification of a settlement class and preliminary Court approval of the proposed settlement;
28 2) notice of the proposed settlement to the affected class members; and 3) Court determination

1 with respect to the fairness of the settlement in a final settlement approval hearing. Federal
2 Judicial Center, Manual for Complex Litigation (4th ed. 2004), §§ 21.63, *et seq.* (“Manual 4th”).
3 With the Court’s preliminary approval order, the first two steps have been completed. Dkt. No.
4 99. With this motion, Plaintiff respectfully seek Court approval with respect to the third step, i.e.,
5 determination that the settlement meets the fairness requirement sufficient to warrant final
6 approval.

7 Courts consider a number of factors in evaluating class action settlements, recognizing that
8 “it is the settlement taken as a whole, rather than the individual component parts, that must be
9 examined for overall fairness.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003) (quoting
10 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). Among the factors considered
11 are the strength of the plaintiff’s case; the risk, expense, complexity, and likely duration of further
12 litigation; the risk of maintaining class action status through trial; the amount offered in
13 settlement; the extent of discovery completed and the stage of the proceedings; the experience and
14 considered views of counsel; the defendant’s ability to pay; and the reaction of the class to the
15 proposed settlement. *See Staton*, 327 F.3d at 959; *see also Grunin v. International House of*
16 *Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975), cert. denied, 423 U.S. 864 (1975).

17 The law favors the compromise and settlement of class-action suits. *See, e.g., Churchill*
18 *Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Class Plaintiffs v. City of Seattle*,
19 955 F.2d 1268, 1276 (9th Cir. 1992); *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615,
20 625 (9th Cir. 1982). The Ninth Circuit recognizes the “overriding public interest in settling and
21 quieting litigation . . . particularly . . . in class action suits . . .” *Van Bronkhorst v. Safeco*
22 *Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

23 “[T]he decision to approve or reject a settlement is committed to the sound discretion of
24 the trial judge because he is exposed to the litigants and their strategies, positions, and proof.”
25 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (internal citations and quotations
26 omitted). In exercising such discretion, the Court should give “proper deference to the private
27 consensual decision of the parties [T]he court’s intrusion upon what is otherwise a private
28 consensual agreement negotiated between the parties to a lawsuit must be limited to the extent

1 necessary to reach a reasoned judgment that the agreement is not the product of fraud or
2 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
3 whole, is fair, reasonable and adequate to all concerned.” *Id.* at 1027 (internal citations and
4 quotations omitted); see also Fed. R. Civ. P. 23(e).

5 The instant settlement clearly meets the requirements for final approval.

6 **A. The Settlement is Entitled to a Presumption of Fairness**

7 Where a settlement is the product of arms-length negotiations conducted by capable and
8 experienced counsel, the Court begins its analysis with a presumption that the settlement is fair
9 and reasonable. See 4 *Newberg* § 11.41; *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18
10 (N.D. Cal. 1980). The facts support such a presumption here.

11 First, the settlement was reached after settlement negotiations supervised by an
12 experienced JAMS neutral, Judge Rebecca Westerfield (Ret.). Those negotiations included a full
13 day of mediation on November 17, 2015, followed by weeks of further settlement discussions.
14 The parties ultimately agreed to the settlement outlined in Judge Westerfield’s proposal. (Healey
15 Decl., ¶¶17-18).

16 Second, Plaintiff’s Counsel here have extensive experience litigating and settling
17 consumer class actions and other complex matters. (Healey Decl., ¶¶3-8). They have
18 investigated the factual and legal issues raised in this action. Before reaching settlement, the
19 parties engaged in substantial discovery that included a review of over 557,00 pages of
20 documents, and propounding several sets of discovery requests. (Healey Decl., ¶¶14-15).
21 Likewise, the pleadings were contested in Defendant’s motions to dismiss the First and Second
22 Amended Complaints. (Healey Decl., ¶¶12-13).

23 These and other proceedings in the case produced a thorough vetting (pre-settlement) of
24 the factual and legal bases for Plaintiff’s claims and the key defenses to those claims. The fact
25 that qualified and well-informed counsel endorse the Settlement as being fair, reasonable, and
26 adequate weighs heavily in favor of approval. See *Linney v. Cellular Alaska Partnership*, No. C-
27 96-3008 DLJ, 1997 WL 450064, at *5 (N.D. Cal. July 18 1997); *Ellis v. Naval Air Rework*
28 *Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D.

1 Cal. 1979) (“The recommendations of plaintiffs’ counsel should be given a presumption of
2 reasonableness.”).

3 **B. The Settlement is Fair Given the Settlement Benefits and the Risks Associated**
4 **With Continued Litigation.**

5 Even without a presumption of fairness, the benefits of the proposed settlement clearly
6 warrant final Court approval, particularly given the risks of continued litigation for the class.

7 **1. The Settlement Will Result in Substantial Benefits to the Class**

8 Under the Agreement, Defendant has agreed to pay \$6.4 million, of which over \$4 million
9 will be available for distribution to class members. Assuming that every settlement class member
10 is located for distribution of the payments, the minimum Settlement Award will be roughly \$290.
11 If current addresses cannot be located for all potential class members (or their successors), such
12 that additional funds are available for distribution, the Settlement Administrator will increase the
13 per-class member payment. (SS, ¶9.4).

14 Even at the \$290 range, the projected average settlement award compares favorably with
15 the likely recovery if the case was tried. The primary focus of Plaintiff’s claim for monetary relief
16 is the recovery of the initial move-in fees paid by residents, which arguably are the least likely to be
17 affected by Defendant’s offset and related defenses.² (See TAC, ¶¶12, 96; Healey Decl., ¶33).

18 Defendant’s records indicate that the average move-in fee was approximately \$885.
19 (Healey Decl., ¶16). The projected *minimum* settlement award of \$290 represents over 32% of the
20 average move-in fees paid by residents during the relevant time period.

21 While the move-in fees represent the most solid damage claim at trial, for settlement
22 purposes, there is no guarantee that the trier of fact would award the full amount of these fees. As
23 to these fees, and other payments made by residents (such as rent), Atria contends that Plaintiff’s
24 damage claims are barred (or at least mitigated) by the resident’s receipt of care services after

25 _____
26 ² If the case were tried, Plaintiff would assert claims for statutory damages under the CLRA as
27 well. However, CLRA statutory damages are not mandatory, but instead may be awarded at the
28 discretion of the trier of fact if the required showing is made. Civ. Code § 1780(b)(1) (listing
factors required for CLRA statutory damage award, including whether the trier of fact finds “an
additional award is appropriate.”)

1 move-in. In addition to substantive defenses, Atria argues the claims are not suitable for class
2 treatment, given the arguable resident-specific issues raised. (Healey Decl., ¶¶35-37).

3 While Plaintiff disagrees with Atria's position, for settlement evaluation purposes, these and
4 other defense arguments must be considered. In any event, the fact that the projected per-resident
5 settlement award is less than the potential trial recovery does not preclude settlement approval.
6 Quite the contrary, it is "well-settled law that a cash settlement amounting to only a fraction of the
7 potential recovery does not per se render the settlement inadequate or unfair." *In re Mego Fin.*
8 *Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (quoting *Officers for Justice v. Civil Serv.*
9 *Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982)). A proposed settlement is not to be measured against
10 a hypothetical ideal result that might have been achieved. *See, e.g., Linney v. Cellular Alaska*
11 *Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998). That is because the "very uncertainty of
12 outcome in litigation" and avoidance of expensive litigation "induce consensual settlements." *Id.*

13 Here, the projected minimum settlement payment of \$290 (which represents roughly 32%
14 of the hard damages most likely to be recovered at trial per class member) is well within the range
15 of reasonableness for Court approval. *See, e.g., In re Omnivision Techs. Inc.*, 559 F. Supp. 2d
16 1036, 1042 (N.D. Cal. 2008) (approving settlement where class received payments totaling 6% of
17 potential damages); *In Re Armored Car Antitrust Litig.*, 472 F. Supp. 1357, 1373 (N.D. 1979)
18 (collecting cases in which settlements with a value of 1% to 8% of the estimate total damages were
19 approved); *Trombley v. Nat'l City Bank*, 759 F. Supp. 2d 20, 25-26 (D.D.C., 2011) (settlement in
20 range of 17-24% of potential recovery at trial was within range of possible approval); *Winans et al.*
21 *v. Emeritus et al.*, No. 13-cv-03962-HSG, 2016 U.S. Dist. LEXIS 3212 at **13-15 (N.D. Cal.
22 2016) (approving class settlement that provided roughly 20-40% of the estimated "hard damages"
23 at trial).

24 Further, it is likely that the actual settlement awards will exceed the projected minimum
25 average of \$290. The Settlement Administrator is tasked with making all reasonable efforts to
26 locate and pay all Settlement Class Members (or their legal successors). But the practical reality is
27 that some Class Members will not be located or not have successors. As such, some funds will go
28

1 undistributed. If so, under the Agreement, the Administrator will use those funds to increase the
2 payment amounts for the Class Members who have been located. (SS ¶9.4).

3 In addition to cash payments, the settlement provides important non-monetary relief.
4 Specifically, the Stipulated Injunction requires Atria to consider resident assessments in setting
5 facility staffing, and to disclose to residents that assessments, as well as other factors, are used to
6 determine staffing. (Stipulated Injunction, ¶¶ 3-6). The non-monetary term further supports the
7 reasonableness of the overall settlement. See *Linney v. Cellular Alaska Partnership* (N.D. Cal. July
8 18, 1997) 1997 WL 450064, at **6-7 (court considers injunctive relief in evaluating fairness of
9 overall settlement fairness and fee request).

10 **2. The Litigation Risks Support Final Approval**

11 The potential risks attending further litigation support final settlement approval. Plaintiff
12 faces significant challenges with respect to class certification. Among other arguments, Defendant
13 contends that Plaintiff's claims necessarily require consideration of the care services provided (or
14 not) to each resident. According to Defendant, that will trigger individual issues and thus negate
15 class certification, under recent cases such as *Walmart* and *Comcast*. Defendant also contends that
16 written arbitration agreements between Defendant and a majority of residents preclude a litigation
17 class in this case. While Plaintiff believes the claims asserted are proper for class treatment,
18 Defendant's anticipated challenge to class certification is a litigation risk that bears on the overall
19 settlement evaluation.

20 Even if the Court certified a litigation class, Defendant is expected to raise vigorous trial
21 defenses as to both liability and damages. For example Defendant has asserted that residents
22 received value (in the form of care services and other benefits) that negate (or at least mitigate)
23 any recovery. Defendant also argues that there is no misrepresentation or omission concerning
24 staffing or staffing levels at Atria's communities, or the use of assessments in setting or reviewing
25 staffing or staffing levels. Defendant contends that resident assessments are considered in setting
26 or reviewing staffing at its communities, that Atria's residency agreement does not promise that
27 facility staffing levels will be based on any particular factor, including resident assessments, and
28 that prospective residents based their decision to enter Atria's facilities on non-staffing factors.

1 Again, Plaintiff disagrees with Defendant’s arguments and other anticipated defense
2 arguments. But Defendant’s contentions, asserted by extremely skilled and experienced counsel,
3 raise real trial risks. Further, proceeding to trial (and the inevitable appeal) could add five years or
4 more to the resolution of this case. Given the elderly status of most class members, the potential
5 for years of delayed recovery is a significant concern. Considered against the risks of continued
6 litigation, and the advanced age of many of the plaintiff class members, the totality of relief
7 provided under the proposed Settlement is more than adequate and well within the range of
8 reasonableness. (See Healey Decl., ¶¶35-37).

9 **C. Reaction of Class Members**

10 Class notice issued on April 26, 2016. As of May 13, 2016, only eight Settlement Class
11 Members have opted out of the settlement and none have submitted objections. (Wyatt Decl., ¶7).
12 The deadline to opt-out or object runs on May 31, 2016. Plaintiff will update the Court on class
13 member reaction after the May 31 deadline.

14 **V. CONCLUSION**

15 In sum, the proposed settlement is fair, reasonable and should be approved. The settlement
16 provides substantial monetary benefits that, in the aggregate, represents at least 32% of the
17 maximum realistic damages available if the case were tried. In addition, the settlement includes
18 injunctive relief to address the challenged practice. That is a strong result for the Settlement Class,
19 particularly given the litigation risks presented on class certification and the merits. Defendant is
20 represented by highly skilled counsel and has the resources to vigorously litigate all issues through
21 trial and appeal, if necessary. With this resolution, the Settlement Class (many of whom are
22 elderly) get real relief now, as opposed to years down an uncertain litigation road.

23 DATED: May 16, 2016

Respectfully submitted,
DENTONS US LLP

25 */s/ Chris Healey*

26 Christopher J. Healey
27 Attorneys for Plaintiff and the Proposed Class