COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT
No. SUCV2019-00670-BLS1

ZHUOER LI and YELISEI MURAUSKI
on behalf of themselves and all others
similarly situated,
Plaintiff
v.

KA FAI MANAGEMENT INC.
Defendant

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR ASSENTED-TO MOTION FOR FINAL APPROVAL OF THE CLASS AND OF THE SETTLEMENT**

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## I. INTRODUCTION

Plaintiffs Zhouer Li and Yelisei Murauski ("Plaintiffs") move that the Court's preliminary approval of the class and of the settlement be finalized. The class meets the requirements of Rule 23 and M.G.L. c. 93A. The settlement is fair. The class notice was successful. Tracking down former tenants of the buildings at issue in this case required significant work. The Settlement Administrator and Class Counsel, however, are believed to have reached 94% of the class, a rate the Settlement Administrator calls "exceptional." Significantly, no class members have objected to the settlement. Final approval will allow for speedy distribution of much-needed funds to the class.

This is a prototypical class action – a claim by tenants against a landlord for mishandling security deposits and illegal lease terms. The settlement is fair. The settlement provides for a fund of $362,500. Defendant maintains it has already returned all improperly held security deposits. It is expected that class members will receive an additional 135% of their improperly withheld security deposits. Finally, Defendant has agreed to remove the contested provisions from its leases. The whole fund will be distributed, with no funds reverting back to Defendant.

On November 2, 2023, the Court (Kazanjian, K.) entered an order preliminarily approving the class and the settlement. The Settlement Administrator and Class Counsel have now completed the notice process. Critically, no objections to the settlement were received.

Accordingly, Plaintiffs request that the accompanying order be entered. Distributions can then be made to the class.

## II. BACKGROUND

### A. Alleged Security Deposit Violation

Plaintiffs allege Defendants violated G.L. c 186 §15B (the "Security Deposit Law") by not holding security deposits in a statutorily compliant bank account. The Security Deposit Law requires security deposits "shall be held in a separate, interest-bearing account in a bank, located within the commonwealth under such terms as will place such deposit beyond the claim of creditors of the lessor, including a foreclosing mortgagee or trustee in bankruptcy, and as will provide for its transfer to a subsequent owner of said property." G.L. c 186 §15B(3)(a). If the bank account is not statutorily compliant, §15B(3)(a) requires the return of the deposit: "Failure to comply with this paragraph shall entitle the tenant to immediate return of the security deposit." A landlord also forfeits the right to withhold any amounts from the security deposit: "The lessor shall forfeit his right to retain any portion of the security deposit for any reason, or, in any action by a tenant to recover a security deposit, to counterclaim for any damage to the premises if he: (a) fails to deposit such funds in an account as required by subsection (3)."

Here, the Plaintiffs subpoenaed account records for the account where Defendant held the security deposits. Plaintiffs allege that the account was co-mingled with the Defendant's other funds.

Defendant alleges that it is an unsophisticated family-run business whose elderly principals attempted, in good faith, to comply with the statute, and that, upon being sued, returned deposits to its tenants. Additionally, Defendant has represented that it has limited funds.

## B. Allegedly Unlawful Lease Terms

Next, Plaintiffs allege that the Defendant's leases contain illegal lease provisions, including: a lease preparation fee; a waiver of security deposit rights; a disposal of tenant belongings provision; a waiver of warranty of habitability; a waiver of liability for damage to property or personal injury; and a waiver of rights related to landlord entry of unit.

Defendant argues that it is an unsophisticated family run business; that it used a lease template from another state; and that it does not regularly enforce these provisions.

# III. THE SETTLEMENT

The parties engaged in extensive discovery and settlement negotiations. The parties expended significant resources researching and creating a detailed spreadsheet charting the alleged violations and attendant damages. The parties then engaged in a full-day mediation with professional mediator Bette Roth. The mediation was hard fought and emotional. The ultimate amount exceeded the ability of Defendant to make immediate payment.

The total settlement fund will be \$362,500. Motion, Ex. A, § 1(k). Costs and administrative fees will be paid. Id. §§ 6(b)(c). The named Plaintiffs will receive incentive awards of \$5,000 each for their efforts in prosecuting this action, and Class Counsel will request 1/3 of the fund. Id. § 6(e). A dispute fund of \$7,500 will be set up in the event any issues arise with respect to claims or distributions. Id. § 6(d). Settlement checks will be sent to all class members for whom current addresses have been found. If any class member is to receive more than \$600, they may need to supply tax information. Id. § 6(f). Significantly, in addition to the security deposits which Defendant maintains it has already returned as a result of this litigation, each class member is expected to receive approximately an additional 135% of the amount of their security deposit that was allegedly improperly withheld by the landlord in violation of the Security Deposit Law.

Any amounts not distributed, either because settlement checks are not cashed and/or an amount remains in the dispute fund, will revert to a cy pres fund to be distributed to the Massachusetts IOLTA Committee, as suggested by Mass. R. Civ. P. 23(e)(3). Id. § 6(g). The IOLTA Committee has submitted to the Court a "Non-Objection to Proposed Disposition of Residual Funds" (Docket No. 10).

## IV. THE PRELIMINARY CLASS CERTIFICATION SHOULD BE FINALIZED

The Court's preliminary certification of the class should be finalized. Courts interpret the Rules to favor the maintenance of class actions. See e.g., Feeney v. Dell, 454 Mass. 192, 200 (2009); Aspinall v. Philip Morris Companies, Inc., 442 Mass. 381, 391 (2004); Weld v. Glaxo Wellcome, Inc., 434 Mass. 81, 94 (Mass. 2001).

Under Mass. R. Civ. P. 23(a), a class action is appropriate if: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. In addition, under Mass. R. Civ. P. 23(b), questions of law or fact common to members of the class must predominate over any questions affecting only individual members, and a class action must be superior to other methods for the fair and efficient adjudication of the controversy. Class certification under Chapter 93A[1] is similar, except that superiority is not

[1] Section 9(2) sets out the standard for class actions brought pursuant to c. 93A:

> Any persons entitled to bring such action may, if the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of

required. Preliminary certification under Chapter 93A requires 1) "the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated" (Numerosity); 2) the putative class representation "adequately and fairly represents such other persons" (Adequacy); and 3) the putative class representative brings "the action on behalf of himself and such other similarly injured and situated persons" (Commonality). G.L. c. 93A, § 9(2); Aspinall v. Philip Morris Companies, Inc., 442 Mass. 381, 391 (2004).

**A. Certification Is Particularly Appropriate for Security Deposit and Lease Violations.**

Class certification is particularly appropriate for security deposit and lease violation cases. The individual damages are low, and the class damages depend on simple proof and are easily calculable. Indeed, courts routinely certify such cases. See e.g., Perry v. Equity Resident. Mgmt, LLC, No. 12-10779, 2014 WL 4198850 (D. Mass. Aug. 26, 2014) (certifying classes of tenants for application fees); Ortins v. Lincoln Property Co., No. 2014CV01122 (Mass. Super. Ct. Oct. 31, 2017) (certifying class for unlawful application and lock fees); Schaffer v. Grafton Acquisitions, LLC, No. 1785CV01602-D (Mass. Sup. Ct. Nov. 14, 2019) (certifying class of tenants for unlawful application fees; commingling security deposits; and failure to timely return deposits); Reniere v. Alpha Management Corp., No. 2103-cv-00560, 2014 WL 7009753 (Mass. Sup. Ct. Nov. 21, 2014) (certifying class of tenants whose security deposits not put in segregated account).

**B. Plaintiffs More than Meet the Criteria for Certification.**

Here, the Class should be certified because it meets all the criteria.

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himself and such other similarly injured and situated persons; the court shall require that notice of such action be given to unnamed petitioners in the most effective practicable manner. Such action shall not be dismissed, settled or compromised without the approval of the court, and notice of any proposed dismissal, settlement or compromise shall be given to all members of the class of petitioners in such manner as the court directs.

**1. Numerosity.** Numerosity requires a class be so large that joinder of all members is "impracticable." "Impracticable" does not, however, mean "impossible or incapable of being performed." Brophy v. Sch. Comm.'r of Worcester, 6 Mass. App. Ct. 731, 735 (1978) (cites omitted). Rather, the term "has been interpreted to mean impracticable, unwise or imprudent." Id. "Numbers alone do not control. In assessing numerosity, the court also considers efficiency, limitation on judicial resources, and expenses to the plaintiff." Campbell v. Glodis, No. 2010-397, 2011 WL 2736502, at *3 (Mass. Sup. Ct. May 27, 2011) (Inge, J.)

In this case, the number of class members far exceeds that threshold. There are 343 class members.

**2. Commonality.** "A class has sufficient commonality if there are questions of fact and law which are common to the class." In re. Pharma Indus. Average Wholesale Pricing Litig., 230 F.R.D. 61, 77 (D. Mass. 2005) (quote omitted). "The threshold of commonality is not high. Aimed in part at determining whether there is a need for combined treatment and a benefit to be derived therefrom, the rule requires only that resolution of the common questions affect all or a substantial number of class members." Id. at 78 (quote omitted). "The test or standard for meeting [commonality] is qualitative rather than quantitative; that is, there need be only a single issue common to all members of the class. Therefore, this requirement is easily met in most cases." Id. (quoting 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 3.10 (4th ed. 2002)). "Total commonality is unnecessary." Campbell, 2011 WL 2736502, at *3. "The interest of each member of the class does not have to be identical in all respects" but need only "arise out of a common relationship to a definite wrong." Id.

In this case, commonality is self-evident. The class claims all arise from the Defendant's standard practice of allegedly mishandling security deposits and including unlawful provisions in its leases.

**3. Typicality.** Typicality requires that the representative's claim be typical of those of the members of the class. "The typicality requirement is not highly demanding" because "the claims only need to share the same essential characteristics, and need not be identical." 5 Moore's Federal Practice § 23.24[4]. "Typicality is established when there is a sufficient relationship between the injury to the named plaintiff and the conduct affecting the class, and the claims of the named plaintiff and those of the class are based on the same legal theory." Weld, 434 Mass. at 87 (quotes and cites omitted). A plaintiff "normally satisfies the typicality requirement with an allegation that the defendant acted consistently toward the representative and the members of the putative class." Id. (quotes omitted).

Here, there is a sufficient relationship between the injury to the named Plaintiffs and to the class. All of Plaintiffs' claims, like those of the proposed class, arise out of Defendant's allegedly standard practice across all of its properties. Plaintiffs allege that Defendant treated them the same as they did the other members of the class.

**4. Adequacy.** Adequacy requires that the representative parties fairly and adequately protect the interests of the class. This requirement has traditionally entailed a two-pronged inquiry: first "[t]he moving party must show that the interests of the representative part[ies] will not conflict with the interests of class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation." Andrews v. Bechtel Power Corp., 780 F.2d 124, 130 (1st Cir. 1985).

In this case, the proposed class representatives have no interests which are antagonistic to those of the members of the proposed class. Plaintiffs have no conflicts of interest, they are committed to the case and will fairly and adequately protect the interests of all class members in the prosecution of this action.

Next, class counsel are experienced in class action work, and are prepared to continue to devote significant resources to represent the class. Attorney Gardner devotes the majority of his practice to class actions, and Attorneys Saccardi and Rice devote the entirety of their practice to landlord/tenant law. The firms are committed to devoting the necessary resources to this matter.

**5. Superiority.** Although superiority is an element under Mass. R. Civ. P. 23, it is not part of the Chapter 93A analysis. Examining whether a class action is superior to other methods of adjudication "requires consideration of the efficiency of the class-action device, the possible expense to the plaintiffs, and the likelihood of judicial economy being served." Escobor, 2017 WL 4872657, at *6. "A class action is the superior method if it will achieve economies of time, effort, and expense and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. Further, class actions are superior if each plaintiff's cause of action is the type that allows those plaintiffs to pool claims which would be uneconomical to litigate individually." Lannan v. Levy & White, 186 F. Supp.3d 77, 90 (D. Mass. 2016) (internal quotes and cites omitted).

Superiority is the least burdensome factor. It "should be construed in light of the underlying objectives of class actions" and "is intended to be less stringent" than other factors. Smilow v. Southwestern Bell Mobile Sys., 323 F.3d 32, 41 (1st Cir. 2003). The factor is meant to "vindicate the claims of consumers and other groups of people whose individual claims would be too small to warrant litigation." Id. at 41. "[P]olicies of judicial efficiency and access to courts ... underly the consumer class action suit: it aggregates numerous small claims into one action, whose likely range of recovery would preclude any individual plaintiff from having his or her day in court." Weld, 434 Mass. 81, 85 (2000). Where "as here, common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain." Smilow v. Southwestern Bell Mobile Sys. Inc., 323 F.3d 32, 40 (1st Cir. 2003).

This present case "presents a classic illustration of the policies of judicial efficiency and access to courts that underlie the employee class action suit: it aggregates numerous small claims into one action, whose likely range of recovery would preclude any individual plaintiff from having his or her day in court." Escobor, 2017 WL 4872657, at *6, quoting Weld, 434 Mass. at 93. Here, the class members are individuals for whom individual actions are not realistic or efficient. Indeed, prior to this lawsuit, many class members likely were not aware of their claim. Moreover, absent a class action, the courts would be faced with the task of potentially litigating numerous lawsuits. See Bernson v. Faneuil Hall, 100 F.R.D. 468, 471 (D. Mass. 1984) (class actions provide "not only economy which will benefit members of the class, but economy which will benefit the judicial system as well").

## V. THE SETTLEMENT SHOULD BE FINALIZED

### A. The Settlement Is Fair

The overriding public interest favors settling class actions. See Durett v. Housing Auth. of Providence, 896 F.2d 600, 604 (1st Cir. 1990) ("clear policy in favor of encouraging settlements"). Settlements "spare the judicial system and the litigants the expense and time associated with the full panoply of pretrial and posttrial proceedings." Vermont Pure Holdings v. Berry, No. 0601814, 2010 WL 1665258, at *11 (Mass. Super. Ct. Feb. 8, 2010).

In determining whether to approve a proposed settlement, the Court must determine whether it is "fair, reasonable and adequate." See Sniffin v. Prudential Ins. Co. of Am., 395 Mass. 415, 421 (1985). The SJC has noted that "because settlement of a class, like the settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel." Id., at 420.

"When sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement." City P'ship Co. v. Atl. Acquisition Ltd. P'Ship, 100 F.3d 1041, 1043 (1st Cir. 1996); see In re M3 Power Razor Sys. Mktg. & Sales Pract. Litig., 270 F.R.D. 45, 62-63 (D. Mass. 2010). "There is a "presumption of fairness" where "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." In re Lupron Mktg. & Sales Pract. Litig., 345 F. Supp. 2d 135, 137 (D. Mass. 2004). Courts likewise look at "1. likelihood of recovery, or likelihood of success; 2. amount and nature of discovery and evidence; 3. settlement terms and conditions; 4. recommendation and experience of counsel; 5. future expense and likely duration of litigation; 6. recommendation of neutral parties, if any; 7. number of objectors and nature of objections; and 8. the presence of good faith and the absence of collusion." Vermont Pure, 2010 WL 1665258, at *10.

In this case, the settlement is more than fair. The process by which the settlement was reached was proper. The negotiations were at arms-length by attorneys experienced in similar litigation. The parties took part in a hotly contested mediation before an experienced mediator. Additionally, the parties reviewed the entire universe of available data concerning the tenants' security deposits.

The negotiated settlement amount itself is fair and adequate. Defendant maintains it has already returned all improperly held security deposits. It is expected that class members will receive an additional 135% of their improperly withheld security deposits. Defendant has also agreed to cease including certain provisions in its leases. Moreover, the settlement is non-reversionary. The whole fund will be distributed, with no funds reverting back to Defendant.

Next, the proposed incentive award is fair and reasonable. Courts widely recognize that incentive awards serve an important function in encouraging class suits and settlement. See In re Relafen Antitrust Litig., 231 F.R.D. 52, 82 (D. Mass. 2005) ("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 a suit"). The amount of the incentive award in this case is less than awards in other class actions.[2]

Next, the proposed 1/3 share for attorneys' fees is fair. Massachusetts federal and state courts routinely approve fees representing one-third of the class recoveries.[3] When a class settlement produces a common fund, courts favor an award of attorney fees from the fund. See In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Lit., 56 F 3d 295, 307 (1st Cir. 1995) (percentage "method in common fund cases is the prevailing praxis"). As the First Circuit has observed, the percentage method is "less burdensome to administer" and it "enhances efficiency" because its "results-oriented" approach encourages attorneys to fairly resolve matters rather than prolong litigation in order to inflate their recoverable hours. Id. Additionally, Class Counsel submits an accompanying attorney fee memorandum concerning the reasonableness of the fees, detailing that the common fund multiplier here is just 1.28, well within the range of reasonableness.

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[2] See e.g. Matamoros v. Starbucks Corp., No. 08-10772 (D. Mass. 2013) ($25,000); DaSilva v. CleanNet USA Inc., No. 12-10580 (D. Mass. 2013 ($25,000); Abla v. Brinker Restaurant Corp., No. 10-10373 (D. Mass. 2011) ($15,000); Shea v. Weston Golf Club, No. 02-1826 (Middlesex Sup. Ct., 2009) ($25,000).

[3] See e.g. Matamoros v. Starbucks Corp., No. 08-10772 (D. Mass. 2013); Johnson v. Morton's Restaurant Gp., No. 05-11058 (D. Mass. 2009); Martinez v. Burlington Motor Sports, Inc., No. 1984CV1876 BLS1 (Suffolk Sup. Ct., Business Litigation Session, 2021); Santos v. Foreign Auto Import, Inc., 1981CV02407 (Middlesex Sup. Ct., 2020); Gregoriades v. Daniel J. Quirk, Inc., No. 19-1300 (Norfolk Sup. Ct., 2020).

### B. The Claims Process Was Resounding Success

After the Court granted the Assented-To Motion for Preliminary Approval of Settlement Agreement, the Settlement Administrator sent a copy of the Court-approved notice to all class members. Motion, Exhibit B, ¶ 5.

On November 22, 2023, notice was sent to all class members for whom addresses were available through the United States Postal Service. Id. Only 67 notices were returned by the United States Postal Service as undeliverable. Id. ¶ 6. The Settlement Administrator and Class Counsel then used skip tracing software to secure almost all addresses. Id. ¶ 7. Class Counsel's paralegal staff spent over 20 hours tracking new addresses.

There were 21 class members for which the Settlement Administrator and Class Counsel were unable to find valid addresses. Id. ¶ 8. Accordingly, it is believed that 94% of class members received notice. Id. In the experience of the Settlement Administrator, this underliverable rate is "well below the average for consumer class actions (typically around 80%)." Id. The Settlement Administrator further notes that "the demographics for the class in this case, many of whom appear to be international students, makes contacting them difficult," but that "in our experience in the field, the contact rate that we achieved in this case is exceptional and the product of a lot of hard work." Id. ¶¶ 9-10.

Finally, no objections have been received. Id. ¶ 11.

## VI. CONCLUSION

For all these reasons, with the assent of the Defendant, Plaintiffs request that the preliminarily certification of the class and approval of the settlement be finalized, and the Court enter the proposed order. Distributions to the class can thereafter be made.

Dated: February 9, 2024

Respectfully submitted,
Zhouer Li and Yelisei Murauski
By their attorneys,

Josh Gardner
BBO# 657347
Gardner & Rosenberg, P.C.
One State St., Fourth Floor
Boston, MA 02109
(617) 390-7570
josh@gardnerrosenberg.com

Edward Rice
BBO# 637513
45 Pierce Street
Malden MA 02148
(617) 475-0909
ed@edricelaw.com

Christopher Saccardi
BBO# 672934
Broderick Bancroft & Saccardi
761 Broadway
Somerville, MA 02144
(617) 500-3198
cts@broderickbancroft.com

**Assented to By:**

KA FAI MANAGEMENT INC.
By its attorney,

Patrick Tinsely
Fletcher Tilton PC
370 Main Street, 12th Floor
Worcester, MA 01608
ptinsely@flectchertilton.com

Certificate of Service

I, Josh Gardner, certify that on February 9, 2024, this document was served by priority mail and email upon:

Patrick Tinsely
Fletcher Tilton PC
370 Main Street, 12th Floor
Worcester, MA 01608
ptinsely@flectchertilton.com