COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS | SUPERIOR COURT
DOCKET NO. 1977CV00257

CELINET SANCHEZ and WILSON FIGUEROA, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs

JH ONE PROPERTIES LLC, and KCMP CAPITAL INC., as Trustee of the 501 WASHINGTON STREET LYNN NOMINEE TRUST,

Defendants.

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

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I. INTRODUCTION

Plaintiffs Celient Sanchez and Wilson Figueroa ("Plaintiffs") submit this memorandum in support of their Renewed[1] Assented-To Motion for Final Approval of Class Certification and of the Settlement (the "Motion"). The preliminary approval of the class and of the settlement should be finalized. The class meets the requirements of Rule 23. The settlement is fair. The class notice was successful. Tracking down former tenants of the buildings at issue in this case required significant work, including many hours of performing skip-traces of tenants who have moved. The Settlement Administrator and Class Counsel, however, are believed to have reached over 99% 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. The settlement is fair. The settlement provides for a fund of $575,000. All class members will receive more than their actual damages. Those whose security deposits were returned and who signed releases, which Defendants argue preclude their participation in the case, are expected to receive approximately an additional 25% of their deposit as part of the settlement, and those who did not sign releases and whose security deposits were not returned are expected to receive approximately 133% of their security deposit. The whole fund will be distributed, with no funds reverting back to Defendants. Any remainder after distribution will be provided 50% to a local housing non-profit and 50% to the IOLTA Committee.

[1] As detailed below, the spreadsheet used for the original class list and notice inadvertently included only the names of the lead tenant for each apartment. When class counsel learned of this, they alerted the Court and asked that the final approval hearing be rescheduled so that a new notice could be issued to all class members. The new notice was sent to all members of the class (both the lead tenant for each apartment as well as the other tenants) informing them of the new final approval hearing date.

On March 14, 2024, the Court (Howe, J.) 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. Plaintiffs' Allegations

Plaintiffs allege the following: Plaintiffs were tenants at the building at 501 Washington Street, Lynn, Massachusetts. Amended Complaint ("AC") ¶ 4. Defendant JH One Properties LLC ("JH One") is the landlord/property manager at 501 Washington Street, Lynn, Massachusetts. Id. ¶ 5. Defendant KCMP Capital Inc., as Trustee of the 501 Washington Street Lynn Nominee Trust ("KCMP") is the landlord/owner of the property located at 501 Washington Street, Lynn, Massachusetts. Id. ¶ 6. Plaintiffs entered into a lease with Defendants. Id. ¶ 16.

Plaintiffs allege that Defendants violated the Security Deposit Statute by failing to maintain tenants' security deposits in a properly segregated escrow account in violation of M.G.L. ch. 186 § 15B(3)(a). Id. ¶ 29.

B. Defendants' Arguments

Defendants maintain the following: Defendants deny all liability and maintain that they acted in good faith. Most significantly, Defendants returned security deposits to a large number of tenants. Those tenants executed unambiguous releases that specifically waived any claims under the Security Deposit Statute.

III. THE SETTLEMENT

The parties conducted a substantial investigation of the facts and law. Plaintiffs served extensive discovery on Defendants. Both parties took depositions. Defendants produced significant discovery concerning the key data points for all class members. The parties performed extensive analysis of the data, ultimately creating a spreadsheet with 27,758 data points.

On May 31, 2023, the Parties participated in a voluntary mediation with Hon. Peter Lauriat (Ret.). The mediation was contentious and hard fought. With Judge Lauriat's significant prodding, the parties were ultimately able to settle the case for $575,000.

The total settlement fund will be $575,000. Ex. B to Motion, § 1(j). One third of the gross settlement fund will be paid to class counsel. Id. § 6(a). Costs and claims administration will be paid. Id. §§ 6(b) and (c). The named Plaintiffs will receive incentive awards of $5,000 each for their efforts in prosecuting this action. Id. § 6(d). The parties have also agreed to set aside $4,000 in a dispute fund should any administration issues arise. Those whose security deposits were returned and who signed releases are expected to receive approximately an additional 25% of their deposit as part of the settlement, and those who did not sign releases and whose security deposits were not returned are expected to receive approximately 133% of their security deposit.

The settlement has no reversion. No portion of the settlement will revert back to Defendants. Any amounts not distributed will revert to a cy pres fund. Id. § 6(g). The cy pres fund will be distributed with 50% going to Lynn United for Change ("Lynn United"). Lynn United is a non-profit organization based in the North Shore that assists with rental issues among low-income tenants, including tenants of Defendants. The remaining 50% will be distributed to the Massachusetts IOLTA Committee, as suggested by Mass. R. Civ. P. 23(e)(3). Id. The IOLTA Committee has submitted to the Court a "Non-Objection to Proposed Disposition of Residual

Funds" (Docket No. 28).

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 (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.

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.

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). In this case, there are 789 class members. Joinder of so many plaintiffs would be impracticable.

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. Among the common questions are whether Defendants complied with the Security Deposit Statute.

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 their 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. Finally, the questions of law or fact common to the members of a class must predominate over any question affecting only individual members, and a class action must be superior to other available methods to adjudicate the controversy. Courts consider "the efficiency of the class-action device, the possible expense to the plaintiffs, and the likelihood of judicial economy being served." Escobor v. Helping Hands Co., Inc., No. 20152053, 2017 WL 4872657 (Mass. Sup. Ct. Sept. 13, 2017) at *6. 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. S.W. Bell Mobile Sys. Inc., 323 F.3d 32, 40 (1st Cir. 2003). Here, the factual questions concerning Defendants' accounts, and the legal question of whether Defendants have complied with the Security Deposit Statute predominate.

Additionally, this case "presents a classic illustration of the policies of judicial efficiency and access to courts;" the case "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 of modest means 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 provides "not only economy which will benefit members of the class, but economy which will benefit the judicial system as well"). In sum, this is precisely the type of case that demands class treatment.

The parties ask that the class be defined as:

> All current and former residential tenants at the following buildings owned or managed by the Defendants for whom Defendants' records show paid a security deposit and whose deposit was held during between February 20, 2015 and May 31, 2023:
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> 1. 1-4 Brightwood Terrace Lynn, MA 01902
> 2. 102-104 Pleasant Street Gloucester, MA 01930
> 3. 129 South Elm Street Haverhill, MA 01835
> 4. 132-138 South Common Street & 1-4 Fosdick Terrace, Lynn, MA 01905
> 5. 166 Winter Street Haverhill, MA 01830
> 6. 22 Shepherd Street Gloucester, MA 01930
> 7. 26 Arch Street Haverhill, MA 01832
> 8. 28-43 Barrett Street Lynn, MA 01905
> 9. 286 South Main Street Haverhill, MA 01835
> 10. 31 Bartlett Street Haverhill, MA 01832
> 11. 36 Surfside Road Lynn, MA 01901
> 12. 4-10 Warren Street Haverhill, MA 01830
> 13. 42 Vine Street Lynn, MA 01905
> 14. 50 Taylor Street Gloucester, MA 01930
> 15. 501 Washington Street Lynn, MA 01901
> 16. 57-59 Arch Street Haverhill, MA 01832
> 17. 6-8 Summit Street Gloucester, MA 01930
> 18. 604 Essex Street Lynn, MA 01901
> 19. 65 Mason Street Salem, MA 01970
> 20. 66-68 Pilling Street Haverhill, MA 01832
> 21. 79-81 North Common Street & 1-12 North Common Terrace, Lynn, MA 01905
> 22. 9-30 Surfside Road Lynn, MA 01901
> 23. 136-148 Liberty Street, Lynn, MA 01901
>
> For the avoidance of any doubt, the class members include only those whose names appear on the spreadsheet attached as Exhibit A to the Motion.

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 formal mediation with Judge Lauriat. Additionally, the parties reviewed the entire universe of available data concerning the tenants' security deposits. The settlement itself is fair. All class members will receive more than their actual damages. Moreover, the settlement is non-reversionary. The whole fund will be distributed, with no funds reverting back to Defendant. Any unclaimed funds will be distributed 50% to a non-profit that addresses housing issues on the North Shore, and 50% to the Massachusetts IOLTA Committee.

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 33.33% 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

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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).

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.

B. The Claims Process Was Ultimately a 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. Unfortunately, the spreadsheet used for the original class list and notice inadvertently included only the names of the lead tenant for each apartment. When class counsel learned of this, they alerted the Court and asked that the final approval hearing be rescheduled so that a new notice could be issued to all class members. As detailed below, the new notice (the "Re-Notice") was sent to all members of the class (both the lead tenant for each apartment as well as the other tenants) informing them of the settlement and of the new final approval hearing date.

On June 26, 2024, the settlement administrator sent the "Re-Notice of Proposed Class Settlement" in English and Spanish to all class members by mail. Affidavit of Scott Simpson ¶¶ 8-9. Copies were also sent to class members for whom email addresses were available (498 class members). Id. ¶¶ 7-9. A copy of the "as-sent" Re-Notice is attached to the Simpson Affidavit as Exhibit A. The Simpson Affidavit is Exhibit C to the Motion.

Ultimately, only 93 Re-Notices were returned by the United States Postal Service as undeliverable. Id. ¶ 11. In the experience of the settlement administrator, this undeliverable rate of 11% is well below the average for consumer class actions (typically around 20-30%). Id. ¶ 11.

The settlement administrator and class counsel then spent considerable time performing skip tracing on those 93 class members, and were able to secure new addresses for 82 of those class members. Id. ¶ 12. The Re-Notice was sent to those new addresses. Id.

Of the 498 emails that were sent, only 9 bounced back as undeliverable. Id. ¶ 13. None of the 9 bounced back emails were for the same class members for whom a mailed notice had been returned as undeliverable. Id.

Of the 11 class members for whom the mailed Re-Notice was returned by the postal service as undeliverable, 5 received emails of the Re-Notice. Id. ¶ 14.

In sum, it is believed that only 6 of 789 class members did not receive the Re-Notice by mail or email. Id. ¶ 15. According to the settlement administrator, this notice delivery success rate of 99.2% is "exceptional." Id. In their experience the success rate is typically around 70-80%. Id.

Critically, there have been no objections to the settlement. Id. ¶ 16. Should any objections be received before the final approval hearing, class counsel will alert the Court.

VI. CONCLUSION

For all these reasons, with the assent of the Defendants, 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: September 12, 2024

CELINET SANCHEZ and
WILSON FIGUEROA,
on behalf of themselves and all others similarly situated,
By their attorneys,

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

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

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

Certificate of Service

I, Josh Gardner, certify that on September 12, 2024, a true copy of the above document was served on counsel to Defendants by email.

Anthony McGuinness
amcguinness@richmaylaw.com

Christian Hinrichsen
chinrichsen@melicklaw.com

/s/ Josh Gardner
Josh Gardner