

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

MICHAEL FARRUGGIO, as Executor of the Estate of
THERESA FARRUGGIO, and SUSAN KARPEN,
individually and on behalf of all others similarly
situated,

Plaintiffs,

v.

918 JAMES RECEIVER, LLC; RIVER MEADOWS,
LLC; JAMES SQUARE NURSING HOME, INC.;
CLINTON SQUARE OPERATIONS, LLC; LIBERTY
SENIOR HOLDINGS, LLC; EXCELERATE
HEALTHCARE SERVICES, LLC; JUDY KUSHNER;
ABRAHAM GUTNICKI; ELIEZER FRIEDMAN;
AND DOES 1-25,

Defendants.

Index No. 003831/2017

**MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFFS'
UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL
OF CLASS ACTION
SETTLEMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

FACTUAL BACKGROUND..... 2

PROCEDURAL BACKGROUND..... 4

 I. Litigation And Discovery4

 II. Settlement8

SUMMMARY OF SETTLEMENT TERMS 13

 I. Injunctive Relief.....13

 II. The Settlnent Fund.....16

 III. Release.....14

CLASS ACTION SETTLEMENT PROCEDURE 16

ARGUMENT 16

 I. The Proposed Settlement Should Be Preliminarily Approved.18

 A. The Applicable Standard.....18

 B. The Proposed Settlement Is The Product
 Of Extensive, Arm’s-Length Negotiations.20

 C. The Settlement Contains No Obvious Deficiencies.....21

 II. The Proposed Class Notice Is Appropriate.21

CONCLUSION..... 23

TABLE OF AUTHORITIES**Cases**

<i>Bravo v. Palm West Corp.</i> , No. 14-9193, 2015 WL 5826715 (S.D.N.Y. Sept. 30, 2015)	16
<i>Colt Indus. S'holder Litig.</i> , 155 A.D.2d 154 (1st Dep't 1990)	16
<i>Fiala v. Metro. Life Ins. Co.</i> , 27 Misc. 3d 599 (Sup. Ct. N.Y. Cnty. Mar. 3, 2010).....	15, 16
<i>Gonqueh v. Leros Point To Point, Inc.</i> , No. 14-5883, 2015 WL 9256932 (S.D.N.Y. Sept. 2, 2015)	16
<i>In re Initial Pub. Offerings Sec. Litig.</i> , 226 F.R.D 186 (S.D.N.Y. 2005)	16
<i>In re Nasdaq Market-Makers Antitrust Litig.</i> , 176 F.R.D. 99 (S.D.N.Y. 1997)	16
<i>Joel A. v. Giuliani</i> , 218 F.3d 132 (2d Cir. 2000).....	15
<i>Karic v. Major Auto. Companies, Inc.</i> , No. 09-5708, 2015 WL 9433847 (E.D.N.Y. Dec. 22, 2015).....	15
<i>Klein v. Robert's Am. Gourmet Food, Inc.</i> , 28 A.D.3d 63 (2d Dep't 2006)	15, 16
<i>Rosenfeld v. Bear Stearns & Co.</i> , 237 A.D.2d 199 (1st Dep't 1997)	15
<i>Ryan v. Volume Services America, Inc.</i> , No. 652970/2012, 2012 WL 6065987 (Sup. Ct. N.Y. Cnty. Dec. 6, 2012).....	16, 17

Rules

N.Y. C.P.L.R. 908.....	15, 18
N.Y. C.P.L.R. 3017.....	4

I. INTRODUCTION

Michael Farruggio, as Administrator of the Estate of Theresa Farruggio, and Susan Karpen (“Plaintiffs”), individually and on behalf of the certified class (“Class”), respectfully request this Court’s preliminary approval of the settlement of their claims against Defendants Excelerate Healthcare Services, LLC (“Excelerate”), Judy Kushner (“Kushner”), Abraham Gutnicki (“Gutnicki”), Liberty Senior Holdings, LLC (“Liberty”), River Meadows, LLC (“River Meadows”), and Eliezer Friedman (“Friedman”) (collectively, “Defendants”) for Defendants’ ownership and operation of the skilled nursing facility known until December 2017 as James Square Nursing and Rehabilitation Centre (the “Facility”).¹ This \$5,500,000.00 settlement (the “Settlement Agreement” or “Settlement”), which resolves approximately three years of litigation between Plaintiffs and Defendants (the “Parties”), compares favorably with similar settlements – indeed, it is easily the highest nursing home class action settlement in New York.

Bankruptcy Judge Margaret M. Cangilos-Ruiz, of the Northern District of New York has already approved the settlement, stating “I cannot communicate enough what a Yeoman’s task this was for all the parties to come together. I have overseen mediations of cases involving [] numerous parties from other judges. I can only appreciate the hours that went into this and what it took to get where we are today . . . I congratulate you for coming to terms with this. I think it is certainly in the interest of your clients and the estates, and I am sure Judge Paris will be very happy to hear about the result. So, I will go ahead and enter the order.” *See In re River Meadows, LLC*, No. 19-30022-5, Hr’g Recording, ECF No. 101, 11:39-12:48, 14:07-14:29;

¹ The individual actions of individual plaintiffs identified in the Recitals to the Settlement Agreement are also being resolved by this class settlement. Plaintiffs, and the plaintiffs in the individual actions, have moved to consolidate the individual actions with this litigation.

Order Approving Settlement, ECF No. 102. Plaintiffs respectfully submit that approval by this Court is also appropriate.

“Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation. There is a strong public interest in quieting any litigation; this is particularly true in class actions.” *In re Prudential Sec. Inc. Ltd. P’ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) (internal quotations omitted). Under CPLR 908, this Court must also approve the settlement; with approval granted in two stages: the lenient preliminary approval stage and the more thorough final approval stage. Preliminary approval is typically granted, given that a grant of preliminary approval is “at most a determination that there is what might be termed ‘probable cause’ to submit the proposal to class members and hold a full-scale hearing as to its fairness.” *In re Traffic Exec. Ass’n-E. Railroads*, 627 F.2d 631, 634 (2d Cir. 1980) (further citations omitted). Here, as set forth below in more detail, preliminary approval is appropriate because the Settlement represents a strong outcome for the Class, was reached with the assistance of Jed Melnick, a highly experienced mediator, and meets all of the requirements for approval.

Accordingly, Plaintiffs respectfully move this Court for an Order: (1) granting preliminary approval of the Joint Stipulation and Settlement Agreement (“Settlement Agreement”), attached as Exhibit (“Ex.”) 1 to the Affirmation of Jeremiah Frei-Pearson (the “Frei-Pearson Aff.”);² and (2) approving the proposed Notice of Settlement of Class Action and Settlement Hearing (“Class Notice”), attached as Ex. 2 to the Frei-Pearson Aff.

II. Factual Background

² Unless otherwise indicated, all exhibits are attached to the Frei-Pearson Aff.

Plaintiffs filed this class action lawsuit alleging inadequate care at the Facility on August 25, 2017. NYSCEF Doc. No. 1. Plaintiff Michael Farruggio is the son of and administrator of the Estate of Theresa A. Farruggio, who was a resident of the Facility from approximately January 2012 until her death on January 7, 2016. *See* NYSCEF Doc. No. 32, Second Amended Class Action Complaint (“SAC”) ¶ 7. Plaintiff Susan Karpen has been a resident of the Facility from approximately August 21, 2015, to the present. *Id.* ¶ 10.

Plaintiffs alleged claims of negligence and violation of Public Health Law (“PHL”) § 2801-d against the multiple defendants that owned and operated the Facility during the relevant time based on their systemic failure to provide the statutorily-required level of care and staffing at the Facility. *Id.* ¶ 1. PHL § 2801-d provides a cause of action for a nursing home resident who is deprived of “any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation.” Plaintiffs alleged that conditions at the Facility were unsafe and violated numerous applicable laws, rules, and regulations, causing all residents to receive inadequate care. In particular, Plaintiffs alleged that Defendants failed to provide sufficient nursing staff to provide the nursing and related services necessary to attain and maintain the highest practicable physical and psycho-social well-being of the residents, violating their obligations pursuant to New York and federal law. *See* SAC ¶ 52.

On December 18, 2018, Plaintiffs settled their claims against Defendant Clinton Square, LLC, NYSCEF No. 340 (“First Settlement”), which purchased the Facility on October 2017 and currently owns and operates the Facility. *See* Third Amended Complaint (“TAC”), NYSCEF Doc. No. 343 at ¶ 61. The First Settlement with Clinton Square provided \$495,000 to the Class and, most importantly, required Clinton Square to spend millions of dollars on injunctive relief to

improve conditions at the Facility. *See* NYSCEF No. 340. Conditions at the Facility have substantially improved as a result of the First Settlement. *See* NYSCEF Doc Nos. 566-78

After an additional year of litigation, and extensive arm's-length negotiations before Mediator Jed Melnick, the remaining Parties reached a class settlement of \$5,500,00.00 (the "Settlement"). *Frei-Pearson Aff.* at ¶ 3. This is the highest PHL § 2801 class settlement ever agreed to and, for reasons to follow, a wholly fair compromise that easily falls within the range of reasonableness. *Id.* Accordingly, preliminary approval of the Settlement is warranted.

III. Procedural Background

A. The Parties Heavily Litigated This Matter, Engaging In Substantial Discovery.

Prior to filing the present lawsuit, attorneys for Finkelstein, Blankinship, Frei-Pearson & Garber, LLP ("Class Counsel" or "FBFG") conducted a thorough investigation into the merits of the class claims and the likelihood of class certification. *See Frei-Pearson Aff.* at ¶ 4. Since the initiation of the action, Plaintiffs have diligently litigated their and the Class's claims.

On August 25, 2017, Plaintiffs filed a summons and class action complaint against defendants 918 James Receiver, LLC ("918 James") and River Meadows. *See* NYSCEF Doc. Nos. 1-4. On October 20, 2017, Plaintiffs served discovery requests. *See Frei-Pearson Aff.* at ¶ 5. On October 31, 2017, River Meadows filed its Answer. *See* NYSCEF Doc. No. 7. On November 13, 2017, River Meadows served its First Request for Discovery and Inspection, Demand for Verified Bill of Particulars to Mr. Farruggio, Demand for Verified Bill of Particulars to Mrs. Karpen, Demand for Income Tax Returns, CPLR 3017 Demand, and Medicare/Medicaid Demand. *See Frei-Pearson Aff.* at ¶ 6.

On November 28, 2018, Plaintiffs duly served their response to River Meadows's CPLR 3017 Demand and on January 5, 2018, Plaintiffs served their responses to River Meadows's First Request for Discovery and Inspection, Demand for Verified Bill of Particulars to Mr. Farruggio,

Demand for Verified Bill of Particulars to Mrs. Karpen, Demand for Income Tax Returns, and Medicare/Medicaid Demand. *See* Frei-Pearson Aff. at ¶ 7.

On January 8, 2018, River Meadows served its responses and objections to Plaintiffs' discovery requests but did not produce any documents as it required a Protective Order be entered before any Confidential documents would be disclosed. *See* Frei-Pearson Aff. at ¶ 8.

On December 15, 2017, Plaintiffs filed an amended class action complaint, adding defendant James Square Nursing Home, Inc. *See* NYSCEF Doc. Nos. 9-12.

On December 21, 2017, Plaintiffs filed a request for judicial intervention ("RJI") seeking a preliminary conference and assignment to the Commercial Division. *See* NYSCEF Doc. Nos. 13-15.

On January 5, 2017, Plaintiffs moved for leave to file a second amended class action complaint. *See* NYSCEF Doc. Nos. 21-25 (Motion Sequence 1).

On January 18, 2018, the Parties appeared before this Court on the motion for leave to file a second amended class action complaint and for a preliminary conference. *See* Frei-Pearson Aff. at ¶ 9. On January 22, 2017, this Court entered an Order dated January 19, 2018, granting Plaintiffs' motion for leave to file a second amended class action complaint and scheduling another preliminary conference for February 28, 2018. *See* NYSCEF Doc. No. 31.

On January 22, 2018, Plaintiffs filed their second amended class action complaint ("SAC"), adding Clinton Square as a defendant. *See* NYSCEF Doc. Nos. 32-35. By March 2, 2018, all defendants filed answers to the SAC. *See* NYSCEF Doc. Nos. 39, 41, 69, 77.

On February 26, 2018, River Meadows moved for a stay of the action. *See* NYSCEF Doc. Nos. 43-57 (Motion Sequence 2). On February 27, 2018, Plaintiffs and River Meadows submitted letters to the Court regarding the motion for a stay. *See* NYSCEF Doc. Nos. 72-73.

On April 11, 2018, Plaintiffs opposed River Meadows's motion for a stay. *See* NYSCEF Doc. Nos. 98-106. On April 16, 2018, River Meadows replied. *See* NYSCEF Doc. Nos. 115-117.

On February 26, 2018, pursuant to the Commercial Division Rules, Plaintiffs filed a letter with the Court seeking a discovery conference. *See* NYSCEF Doc. Nos. 58-67.

On February 28, 2018, the Parties appeared before the Court for a preliminary conference. *See* Frei-Pearson Aff. ¶ 10. At the conference, the Parties agreed to a Preliminary Conference Stipulation and Order ("PCSO") which the Court so-ordered on March 2, 2018, and entered on March 13, 2018. *See* NYSCEF Doc. No. 89.

On March 1, 2018, Plaintiffs served document requests and expert demands on 918 James Receiver, James Square Nursing Home ("JSNH"), and Clinton Square. *See* Frei-Pearson Aff. ¶ 11. On March 1, 2018, Defendants began to produce insurance policies. *See* Frei-Pearson Aff. ¶ 11.

On March 9, 2018, Plaintiffs moved for entry of a HIPAA-qualified protective order. *See* NYSCEF Doc. Nos. 79-88 (Motion Sequence 3). On April 11, 2018, both River Meadows and Clinton Square opposed. *See* NYSCEF Doc. Nos. 92-97 (River Meadows) & 107-112 (Clinton Square). On April 16, 2018, Plaintiffs replied. *See* NYSCEF Doc. Nos. 113-114.

On March 26, 2018, JSNH served its responses to Plaintiffs discovery requests. *See* Frei-Pearson Aff. ¶ 12. The Parties also conferred regarding an Electronically-Stored Information ("ESI") protocol. *See* Frei-Pearson Aff. ¶ 12. On March 30, 2018, and again on April 23, 2018, the Parties filed a proposed ESI Protocol and Document Production Stipulation and Order. *See* NYSCEF Doc. Nos. 90 & 124.

On April 2, 2018, Plaintiffs served demands for verified bills of particulars on all Defendants. *See* Frei-Pearson Aff. ¶ 13. On April 17, 2018, Clinton Square moved for severance from this action. *See* NYSCEF Doc. Nos. 119-123. On May 30, 2018, River

Meadows cross-moved to sever itself from this action. *See* NYSCEF Doc. Nos. 165-179 (Motion Sequence 6). On June 6, 2018, Plaintiffs opposed Clinton Square's motion and River Meadows's cross-motion to sever. *See* NYSCEF Doc. No. 186-192. On June 11, 2018, River Meadows replied. *See* NYSCEF Doc. Nos. 204-206.

On April 18, 2018, the Parties appeared before this Court on the motions to stay (Motion Sequence 2) and for entry of a protective order (Motion Sequence 3). In an oral decision issued that day, the Court denied both motions. *See* NYSCEF Doc. No. 162.

On April 30, 2018, Clinton Square served its responses to Plaintiffs discovery requests with an accompanying production of documents. *See* Frei-Pearson Aff. ¶ 14.

On May 1, 2018, Plaintiffs moved for class certification. *See* NYSCEF Doc. Nos. 128-160 (Motion Sequence 5). On June 6, 2018, River Meadows, JSNH, and 918 James all opposed. *See* NYSCEF Doc. Nos. 180-185 (River Meadows), 193 (JSNH), & 194-203 (918 James). On June 11, 2018, Plaintiffs replied. *See* NYSCEF Doc. Nos. 207-208.

On May 11, 2018, River Meadows sought an adjournment of the pending motions to sever and for class certification. *See* NYSCEF Doc. No. 161. On May 16, 2018, Plaintiffs opposed. *See* NYSCEF Doc. No. 163. On May 21, JSNH joined in River Meadows's request for an adjournment. *See* NYSCEF Doc. No. 164. On May 22, 2018, this Court denied River Meadows and JSNH's request. *See* Frei-Pearson Aff. at ¶ 15.

On June 4, 2018, Plaintiffs provided all defendants with HIPAA-compliant authorizations for Plaintiffs. *See* Frei-Pearson Aff. at ¶ 16.

On June 11, 2018, JSNH served its Response to Plaintiffs' Demand for Verified Bill of Particulars. *See* Frei-Pearson Aff. at ¶ 16.

On June 12, 2018, Plaintiffs notified the Court that Plaintiffs and Clinton Square had agreed to settle (the "First Settlement"). *See* NYSCEF Doc. No. 209.

On June 13, 2018, the Parties appeared before this Court for a hearing on the class certification motion and motions to sever. Frei-Pearson Decl. at ¶ 17. By order dated August 21, 2018, this Court denied Clinton Square's motion to sever as moot, denied River Meadows's motion to sever without prejudice, denied without prejudice class certification of Plaintiffs' negligence claims, and granted class certification of Plaintiffs' PHL § 2801-d claims. NYSCEF Doc. No. 257. River Meadows appealed the Court's Order certifying a class to the Fourth Department, filing its brief on May 24, 2019. *See* River Meadows Appellant Br., Ex. 3 at p. 35. Plaintiffs, correspondingly, filed their response on August 28, 2019. *See* Frei-Pearson Decl. at ¶ 17.

In light of the instant settlement, the Parties informed the Fourth Department of their tentative resolution of the matter on September 17, 2019 and the Parties ultimately stipulated to withdraw the appeal. *See* Robinson Letter, Ex. 4; Fourth Department Letter, Ex. 5.

B. The Class Settles With Clinton Square

Plaintiffs and Clinton Square entered productive settlement discussions soon after Clinton Square's appearance in the action subsequent to its take-over of the Facility on December 15, 2017. *See* Frei-Pearson Aff. ¶ 18.

The Court preliminarily approved the First Settlement on August 20, 2018, NYSCEF No. 254, and finally approved the First Settlement on December 18, 2018. NYSCEF No. 340.

C. Plaintiffs File A Third Amended Complaint Naming Additional Defendants, And The Parties Continued To Vigorously Litigate

After taking discovery, Plaintiffs filed a detailed Third Amended Complaint naming Excelerate, Kushner, Gutnicki, Liberty, and Friedman as additional defendants. NYSCEF Doc. No. 343. The newly-added defendants moved to dismiss. *See* NYSCEF Doc. No. 374, Memorandum of Law in Support of Judy Kushner and Abraham Gutnicki's Motion to Dismiss the Third Amended Complaint (requesting dismissal because LLC members are immune from

liability for the negligent acts of the company; the trial court lacks personal jurisdiction over Kushner and Gutnicki; and Plaintiffs' claims are barred by the statute of limitations); NYSCEF Doc. No. 383, Memorandum of Law in Support of Excelerate's Motion to Dismiss the Third Amended Complaint (requesting dismissal because Excelerate is not a proper defendant,; Excelerate did not owe a duty of care to Plaintiffs; and Plaintiffs claims are barred by the statute of limitations); NYSCEF Doc. No. 358, Liberty's Memorandum of Law in Support of the Motion to Dismiss Plaintiffs' Third Amended Complaint (requesting dismissal because of documentary evidence, failure to state a valid cause of action, and Plaintiffs claims are barred by the statute of limitations); NYSCEF Doc. No. 372, Memorandum of Law in Support of the Motion by Defendant, Eliezer Friedman, to Dismiss Plaintiffs' Third Amended Complaint (the "Friedman Motion") (requesting dismissal alleging Friedman did not own or operate the facility during any of the relevant times and did not provide or oversee Plaintiffs' care).

At a July 10, 2019 motion hearing, this Court denied, on the record, all motions to dismiss. *See Hr'g Tr.*, NYSCEF Doc. No. 556 at 45, 48 ("[The pre-answer motions of the moving defendants [Friedman, Kushner, Gutnicki, Liberty, and Excelerate, brought pursuant to CPLR 3211(a)(1) and (a)(7),] are denied, and they are directed to interpose answers and other responsive pleadings within thirty days of the filing of this order with notice of entry.>").

Plaintiffs also moved to attach certain Defendants' assets. NYSCEF Doc. Nos. 406, 407. At the July 10, 2019 motion hearing, the Court denied that motion without prejudice. *See Hr'g Tr.*, NYSCEF Doc. No. 556 at 48.

On October 22, 2018, Plaintiffs filed a Motion to Compel Electronically Stored Information ("ESI"), asking the Court to impose a final deadline for River Meadows to review and produce all responsive ESI. NYSCEF Doc. No. 277. On January 10, 2019, the court granted Plaintiffs' Motion to Compel Production of ESI, ordering that "Defendants must produce

all electronically-stored information responsive to Plaintiffs' discovery requests on or before March 11, 2019." NYSCEF Doc. No. 342 at p. 2.

River Meadows did not make the ESI deadline, because a petition for bankruptcy was filed with the United States Bankruptcy Court for the Northern District of New York ("Bankruptcy Court") on January 11, 2019. See *In re River Meadows, LLC*, No. 19-30022-5, ECF No. 11; NYSCEF Doc. No. 376.

Thereafter, on April 4, 2019, Plaintiffs filed another motion to compel requesting an order compelling Defendants to produce all ESI responsive to Plaintiffs' discovery requests within one week of the Court's Order and requesting sanctions. NYSCEF Doc. No. 388. The Court granted Plaintiffs' motion on July 10, 2019. See Hr'g Tr., NYSCEF Doc. No. 556 at Pg. 48.

**D. River Meadows Filed For Bankruptcy
And Plaintiffs Successfully Moved To Lift The Bankruptcy Stay.**

As set forth above, on January 11, 2019, River Meadows filed for protection under Chapter 7 of Title 11 of the United State Code (the "Bankruptcy Case") in the Bankruptcy Court). *In re River Meadows, LLC*, No. 19-30022-5, ECF No. 1. On January 30, 2019, Judge Cangilos-Ruiz appointed William J. Leberman, Esq., as Chapter 7 trustee in the Bankruptcy Case. *Id.*, ECF No. 5.

On February 28, 2019, Plaintiffs sought to dismiss the Chapter 7 bankruptcy petition or, alternatively, to lift the automatic stay. *In re River Meadows, LLC*, No. 19-30022-5, ECF No. 10. Judge Cangilos-Ruiz denied the request to terminate the bankruptcy, *id.* at ECF No. 10, but ultimately granted Plaintiffs' request to lift the bankruptcy stay. *Id.* at ECF No. 34.

Certain Defendants have requested a defense and/or indemnification for this class action litigation and related individual actions under Policy No. SB-LTCA-01554-17 (the "PL/GL Insurance Policy"), a long term care professional liability and general liability insurance policy

issued to River Meadows, LLC d/b/a James Square Nursing & Rehabilitation Centre. Settlement Agreement at p. 4. The insurers dispute whether certain Defendants are entitled to a defense and/or indemnification under the PL/GL Insurance Policy and whether the claims alleged are covered by the PL/GL Insurance Policy. *Id.*

In the instant action, the Parties have agreed to compromise all disputes including this case, the related individual actions pending before this Court, and the Bankruptcy Case -- to avoid the expense, effort, uncertainty, and inconvenience entailed in continuing litigation. *Id.* At pp. 4–5.

On May 28, 2020, Judge Cangilos-Ruiz approved the Settlement, subject to this Court's approval.

E. The Parties Settled The Instant Action With The Assistance Of Jed Melnick, An Experienced Mediator.

Early in this litigation before the additional individual defendants were added as defendants, Plaintiffs and River Meadows held a mediation before Judge Lunn, on September 18, 2018. *See* Frei-Pearson Aff. ¶ 19. Despite good faith efforts, this mediation was unsuccessful. *Id.* After that unsuccessful mediation, the Parties informally discussed settlement while continuing to litigate. *Id.* at ¶ 19. After the Court denied Defendants' motions to dismiss, the informal settlement discussions became more serious. *Id.* at ¶ 20. In August of 2019, the Parties agreed to stay the litigation pending mediation before Jed Melnick, a highly experienced mediator. *See Id.* at ¶ 20. The Parties agreed to discuss a global settlement that would encompass: (1) this case; (2) the bankruptcy proceedings; and (3) the individual actions by Class Members against Defendant River Meadows pending before this Court. *Id.*

Prior to mediation, the Parties had several separate calls with Mediator Melnick and his team and also provided detailed pre-mediation statements to Mediator Melnick in all actions. *Id.* at ¶ 21. The Parties mediated in Syracuse with Mediator Melnick over two days -- September 11

and 12, 2019. *Id.* In the evening of September 12, 2019, the Parties reached a verbal agreement in principle concerning the settlement terms. *Id.* at ¶ 22. With Mediator Melnick's assistance, Class Counsel subsequently negotiated with counsel for plaintiffs in the consolidated individual actions concerning settlement terms. *Id.* Class Counsel and Defendants' counsel then negotiated the terms of the Settlement Agreement, which were finally agreed to on March 27, 2020. *Id.* The Settlement requires River Meadows' insurer and certain Defendants to contribute \$5.5 million to the River Meadows Bankruptcy estate, which the estate will contribute to the Settlement for a total of \$5.5 million, which is easily the highest nursing home class action settlement in New York. *See* Settlement Agreement, Ex. 1 at ¶ 6.

The Parties recognize and acknowledge the benefits of settling this case. *See* Frei-Pearson Aff. at ¶ 23. Although Plaintiffs believe strongly that the claims asserted in this action have merit and that the evidence developed to date supports their claims. *Id.* Defendants strongly disagree and, absent settlement, would continue to mount an aggressive defense against Plaintiffs' claims. *Id.* Plaintiffs recognize and acknowledge the length of time litigating this matter would take, and the risk of being able to collect a larger settlement, particularly in light of the fact that River Meadows has filed for bankruptcy and River Meadows, Excelerate and Liberty Senior Holdings are covered by an eroding insurance policy. *Id.* at ¶ 24. Had the Parties not settled now, River Meadows' insurance policy would have been spent in litigation and the Class would likely have recovered zero or a *de minimus* amount from River Meadows, Excelerate, and Liberty Senior Holdings instead of the \$2.1 million made available. *Id.* at ¶ 24. In addition, there was a risk that the other Defendants may have prevailed on appeal or avoided paying a judgment. *Id.* at ¶ 25. Class Counsel has, therefore, determined that the Settlement agreed to by the Parties is fair, reasonable, and adequate. *Id.* The Settlement confers substantial benefits upon, and is in the best interests of, the Class. *Id.*

Defendants maintain that they have a number of meritorious defenses to the claims asserted in this action and denies any and all liability. *Id.* at ¶ 26. Further, Defendants also maintain that at all times they were not negligent, and deny that they failed to satisfy their obligations pursuant to PHL § 2801-d. *Id.* Nevertheless, Defendants recognize the risks and uncertainties inherent in litigation, the significant expense associated with defending class actions, the costs of any appeals, and the disruption to its business operations. *Id.* at ¶ 27. Defendants also recognize that a trial on class-wide claims would pose litigation risk. *Id.* Accordingly, Defendants believe that the settlement set forth in the Settlement Agreement is likewise in its best interests. *Id.*

IV. SUMMARY OF SETTLEMENT TERMS

The proposed Settlement resolves all disputes between Plaintiffs, class members,³ and Defendants -- including, but not limited to, those in the State Court Actions, the Bankruptcy Case, and as otherwise set forth below -- to avoid the expense, effort, uncertainty, and inconvenience entailed in continuing the State Courts Actions and the Bankruptcy Case. *Id.* at ¶28.

A. **Defendants Will Pay \$5,500,000.**

Under the proposed Settlement, Defendants shall provide the Settlement amount of \$5,500,000 to the Trustee. Settlement Agreement at ¶ 20. Judge Cangilos-Ruiz approved payment of \$200,000 to the Trustee. *In re River Meadows, LLC*, No. 19-30022-5, ECF No. 102. The Trustee shall submit the \$5,300,000 to the Claims Administrator for deposit into the

³ This also resolves all of individual plaintiffs' individual actions against Defendants, listed in the Settlement Agreement.

Qualified Settlement Fund (“QSF”)⁴ within fourteen days of the Effective Date.⁵ Settlement Agreement at ¶ 20. By no later than ten (10) days thereafter, the Claims Administrator will mail: (1) the Settlement Checks to participating Class Members; (2) a check (or wire, at Class Counsel’s discretion) to Class Counsel for Class Counsel’s Attorneys’ Fees, as approved by the Court; and (3) checks to the Individual Plaintiffs and Named Plaintiffs. *Id.*

Class Members’ individual payments will be determined by the Settlement Claims Administrator pursuant to the following formula: Class Members’ Settlement Check equals the total money available after deducting cost of administration, payment to the Trustee, payment to the Individual Plaintiffs, Payment of Enhancement Awards, and Class Counsel’s Attorneys’ Fees and Costs, multiplied by total number of days the Class Member resided at the Facility in the Settlement Class Period, divided by the total number of days all Class Members resided at the Facility in the Settlement Class Period. *Id.* at ¶ 20(e).

The \$5,300,000.00 Plaintiff’s Fund shall be submitted by the Trustee to the Claims Administrator for deposit into the QSF within fourteen days of the Effective Date. *Id.* at ¶ 20(f)(i). By no later than ten (10) days thereafter, the Claims Administrator will mail: (1) the Settlement Checks to participating Class Members; (2) a check (or wire, at Class Counsel’s discretion) to Class Counsel for Class Counsel’s Attorneys’ Fees, as approved by the Court; and

⁴ The Qualified Settlement Fund is the account established by the Claims Administrator into which Defendants will deposit the Settlement Payment necessary to pay the Class Member Payment Settlement Fund, Catastrophic Injury Fund, the Individual Plaintiff Actions Fund, and the Fees, Costs, and Enhancements Settlement Fund.

⁵ The “Effective Date” is the date the Settlement Agreement shall become effective. The Settlement Agreement will become effective upon the latest of the following: (i) the Agreement’s execution by the Parties hereto, (ii) the expiration of the notice period to opt out without any of the Class Action Plaintiffs having done so or without Defendants having exercised their right to withdraw from the Agreement in the event of opt-outs; (iii) entry by the Bankruptcy Court of the Bankruptcy Court Order, and (iv) the entry by the New York Supreme Court of the Final Approval Order, on a final and non-appealable basis.

(3) checks to the Individual Plaintiffs and Named Plaintiffs for resolution of the Individual Actions and the Enhancement Award. *Id.*

The Settlement Checks will be mailed by the Claims Administrator to each Class Member at the address listed on the Class Member's Notice Form. *Id.* at ¶ 20(f)(ii). If a participating Class Member's Settlement check is returned with a forwarding address, the Claims Administrator shall promptly re-mail the Settlement Check to the forwarding address. *Id.* If a participating Class Member's Settlement Check is returned without a forwarding address, the Claims Administrator will take reasonable and customary steps to obtain the correct address of any Class Member for whom a Settlement Check is returned by the Post Office as undeliverable and shall attempt re-mailings. *Id.* Class Members will have ninety (90) days from the date of mailing to cash or deposit their Settlement Checks (the "Acceptance Period"). *Id.* at ¶ 20(f)(vi). Class Members will be informed of the Acceptance Period in the Notice Form and on the Settlement Checks. *Id.*

B. The Catastrophic Injury Fund Provides Elevated Payments To Class Members Who Suffered Catastrophic Injuries.

The Catastrophic Injury Fund is the portion of the Settlement distributed to Class Members who suffered catastrophic injuries, as determined by the Settlement Master. The Catastrophic Injury Fund shall be funded with the value of all unclaimed funds in the QSF after the claims period expires. *Id.* at ¶ 20(g)(i). Class Members participating in the Catastrophic Injury Fund (which may include Individual Plaintiffs and the Named Plaintiffs) shall provide any documentation requested to the Settlement Master.⁶ *Id.* at ¶ 20(g)(ii). The Settlement Master

⁶ "Settlement Master" means Jed Melnick, Esq. and anyone with whom Mr. Melnick associates to evaluate how the Catastrophic Injury Fund should be distributed.

shall, using his expertise and acting at his sole discretion, determine how the funds in the Catastrophic Injury Fund should be distributed. *Id.* at ¶ 20(g)(iii). He shall share this determination with the Claims Administrator, who shall distribute the funds in the Catastrophic Injury Fund in accordance with the Settlement Master's determination. *Id.* All moneys in the Catastrophic Injury Fund, minus any costs of administration or money that Individual Plaintiffs privately contract to pay to their counsel, shall be distributed to Class Members participating in the Catastrophic Injury Fund (which may include Individual Plaintiffs and the Named Plaintiffs) as determined by the Settlement Master. *Id.* All Money in the Catastrophic Injury Fund shall be entirely distributed within nine (9) months of the Effective Date. *Id.* at ¶ 20(g)(iv).

C. Class Members Release Their Claims.

The Settlement Agreement provides that any Class Member who does not validly submit an Opt-Out Statement pursuant to the Settlement Agreement will be deemed to have accepted the terms of the Settlement Agreement, and will be bound by the Final Approval Order, and will have all Released Claims released and forever discharged as to the Released Parties in accordance with the Settlement Agreement. *Id.* at ¶ 19(d)(iv). The Released claims include any and all possible claims, demands, rights, actions, and causes of action of every kind and nature whatsoever, known or unknown, foreseen or unforeseen, direct, indirect, or consequential, matured or unmatured, accrued or unaccrued, at law or in equity, that each of the Plaintiff Releasing Parties now has, claims to have, or has had at any time from the beginning of time, to and including the date hereof, against the Defendant Released Parties. *Id.* at ¶ 4.⁷

⁷ The Attorney General's Medicaid Fraud Control Unit ("MFCU") contacted the Parties to confirm that no party will take the position that the release operates to hold Class Members and individual plaintiffs liable or financially responsible for any Medicaid damages Defendants may owe to the State of New York. *Frei-Pearson Aff.* ¶ 29. A majority of parties have provided confirmation, with the exception of Eliezer Friedman and Liberty Senior Holdings, LLC, and Plaintiffs are optimistic that all Parties will provide confirmation in short order. *Id.* In the event

V. Class Action Settlement Procedure

The Parties respectfully submit the following proposed schedule for final resolution of this matter for the Court's consideration and approval:

A. Notice to Class Members.

- i. Within seven (7) days of receipt of the Preliminary Approval Order, the Claims Administrator will mail to all Class Members, via United States Mail, postage prepaid, the Notice Form and the Claim Form. *Id.* at ¶ 19(b)(i). The Claims Administrator will also email the Notice Form to all Class Members for whom Defendants have an email address. *Id.* The Notice Form shall inform the Class Members of their approximate settlement amount. *Id.*
- ii. The Claim Form will provide Class Members with the opportunity to: (1) recover their share of the QSF; (2) provide further information to the Settlement Master for his consideration; (3) opt out of the settlement; or (4) object to the settlement. *Id.* at ¶ 19(b)(ii).
- iii. The Claims Administrator will take reasonable and customary steps to obtain the correct address of any Class Members for whom a Notice Form is returned by the Post Office as undeliverable and shall attempt re-mailings. *Id.* at ¶ 19(b)(iii). These steps shall include, at a minimum, confirmation and updating of addresses by the National Change of Address system and skip tracing. *Id.* The Claims Administrator will notify Class Counsel and Defendants' Counsel of any Notice Form sent to a Class Member that is returned undeliverable after the first mailing, as well as any such Notice Form returned as undeliverable after any subsequent mailing(s) as set forth in this Settlement Agreement. *Id.*
- iv. Fourteen (14) days before the end of the Claim Period, the Claims Administrator will send a postcard and, if email addresses are identified, email reminder notice and Claim Form to Class Members. *Id.* at ¶ 19(b)(iv).
- v. The Claims Administrator will set up a settlement website at www.jamessquaresettlement.com which will also have a long form notice and other appropriate Court documents, as well as other useful features of settlement websites, including the ability for Class Members to submit a Claim Form and update their addresses. *Id.* at ¶ 19(b)(v).

that all parties do not provide confirmation, the MFCU intends to raise this issue with the Court. *Id.*

B. Motion for Judgment and Final Approval

- i. Not later than seven (7) days before the Fairness Hearing, Class Counsel will submit a Motion for Judgment and Final Approval to Defendants. *Id.* at ¶ 19(f).
- ii. Defendants will review and make any comments and/or suggestions with respect to the Motion for Judgment and Final Approval within seven (7) days after receipt of the draft Motion for Judgment and Final Approval from Class Counsel. *Id.*
- iii. The Motion for Judgment and Final Approval from Class Counsel will request that the Court, among other things, (a) enter Judgment in accordance with the Settlement Agreement; (b) approve the Settlement and Settlement Agreement as final, fair, reasonable, adequate, and binding on all Class Members who have not validly opted out of the Settlement; and (c) dismiss the Class Action with prejudice as against Defendants. *Id.*

VI. Legal Argument**A. The Proposed Settlement Should Be Preliminarily Approved.**

The proposed Settlement should be preliminarily approved; it is the product of extensive, arm's-length negotiations and contains no obvious deficiencies. *Frei-Pearson Aff.* at ¶ 30.

B. The Applicable Standard

This Court has preliminarily approved a settlement agreement where the agreement was “the product of extensive, arm's-length negotiations,” and did not contain “obvious deficiencies.” Preliminary Approval Order, NYSCEF Doc. No. 254 at p. 1. CPLR 908 specifies that the Court must approve any proposed “compromise” of a class action. New York courts regularly refer to the federal standards in making this determination, in recognition that the two statutory schemes are similar. *See Fiala v. Metro. Life Ins. Co.*, 27 Misc. 3d 599, 606-607 (Sup. Ct. N.Y. Cnty. Mar. 3, 2010) (collecting cases). Courts examine “the fairness of the settlement, its adequacy, its reasonableness and the best interests of the class members.” *Id.* at 537 (citing *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 73 (2d Dep't 2006)); *accord Karic v. Major Auto. Companies, Inc.*, No. 09-5708, 2015 WL 9433847, at *7 (E.D.N.Y. Dec. 22, 2015);

Rosenfeld v. Bear Stearns & Co., 237 A.D.2d 199 (1st Dep't 1997); *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000).

In the final approval determination, the Court's consideration of whether the proposed settlement is fair and adequate "balance[s] the value of that settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation." *Klein*, 28 A.D.3d at 73; accord *Matter of Colt Indus. S'holder Litig.*, 155 A.D.2d 154, 160 (1st Dep't 1990). Courts may also consider "support of the class members, the opinion of counsel, lack of collusion and counsels' and class representatives' adherence to fiduciary standards." *Fiala*, 27 Misc. 3d at 607.

Preliminary approval, however, is subject to a less rigorous standard than final approval. Preliminary approval is granted "[w]here the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval[.]" *In re Initial Pub. Offerings Sec. Litig.*, 226 F.R.D 186, 191 (S.D.N.Y. 2005) (quoting Manual for Complex Litig., Third § 30.41 (1995)); accord *In re Nasdaq Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (same); *Bravo v. Palm West Corp.*, No. 14-9193, 2015 WL 5826715, at *1 (S.D.N.Y. Sept. 30, 2015) (granting preliminary approval as it "requires only an 'initial evaluation' of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties"); *Gonqueh v. Leros Point To Point, Inc.*, No. 14-5883, 2015 WL 9256932, at *3-4 (S.D.N.Y. Sept. 2, 2015) (same); *Ryan v. Volume Services America, Inc.*, No. 652970/2012, 2012 WL 6065987 (Sup. Ct. N.Y. Cnty. Dec. 6, 2012) (granting preliminary approval where settlement was "the result of extensive, arm's length negotiations by counsel well-versed in the prosecution of wage and hour class and collective actions, and [] the proposed settlement has no obvious deficiencies"). This

Court preliminarily approved the First Settlement, NYSCEF Doc No. 254, and Plaintiffs respectfully submit that the same result is appropriate here.

C. The Proposed Settlement Is The Product Of Extensive, Arm's-Length Negotiations.

In the Order preliminarily approving the First Settlement, this Court held that the agreement was “the product of extensive, arm’s-length negotiations.” Preliminary Approval Order, NYSCEF Doc. No. 254 at p. 1. Plaintiffs respectfully contend that the Court should decide similarly in this action. The Settlement Agreement is the result of arm’s-length negotiations that were even more substantial than those in the First Settlement. *See* Frei-Pearson Aff. at ¶ 30. As discussed *supra*, the Settlement is the largest PHL § 2801 class settlement and the Parties vigorously-negotiated settlement discussions were guided by expert analysis. *See, e.g., id.* at ¶¶ 3, 29. Jed Melnick, a highly experienced Mediator with experience resolving nursing home class actions, presided over the mediation. *Id.* at ¶ 30. “A settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion.” *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 35 (E.D.N.Y. 2019) (internal quotations and further citations omitted).

As Judge McMahon explained, Mr. Melnick’s assistance militates particularly strongly in favor of approving class action settlements:

Mr. Melnick’s role in the settlement negotiations overcomes any hesitation this court might have about approving a settlement reached prior to any discovery. According to his published JAMS biography, Mr. Melnick “has mediated over 750 disputes, published articles on mediation, founded a nationally ranked dispute resolution journal and taught young mediators.” Jed D. Melnick, Esq.—JAMS, www.jamsadr.com/melnick/ (last visited July 15, 2014). He also has specific experience in the area of Chinese securities litigation and assisted the Hon. Daniel Weinstein (Ret.) in the successful mediation that led to the settlement approved by this Court in the action *In re Telik, Inc. Securities Litigation*, 576 F.Supp.2d 570 (S.D.N.Y.2008). *Id.* The participation of this highly qualified mediator strongly supports a finding that negotiations were

conducted at arm's length and without collusion.

Yang v. Focus Media Holding Ltd., No. 11-9051, 2014 WL 4401280, at *5 (S.D.N.Y. Sept. 4, 2014). Here, the negotiations were at all times hard fought and arm's-length, and they have produced a result that Class Counsel believes to be in the best interests of the Class Members in light of the costs and risks of continued litigation. *Frei-Pearson Aff.* at ¶ 25.

D. The Settlement Contains No Obvious Deficiencies.

In the Order granting preliminary approval in the Clinton Square litigation, this Court held that the agreement did not contain "obvious deficiencies." Preliminary Approval Order, NYSCEF Doc. No. 254 at p. 1. Respectfully, a similar decision in the instant action is warranted. The proposed Settlement has no obvious deficiencies. As explained above, the proposed Settlement was reached only after arm's-length negotiations between the Parties and their counsel, who considered the advantages and disadvantages of continued litigation, with the assistance of a highly experienced mediator. *See Frei-Pearson Aff.* at ¶¶ 25, 27, and 29.

Class Counsel have carefully evaluated the merits of the case and the proposed Settlement. *Id.* at ¶¶ 23, 26. Even if this case were to proceed to trial, Class Counsel recognize that the apparent strengths of Plaintiffs' claims are no guarantee against a complete or partial defense verdict. *Id.* Moreover, it would take a long time to get to trial, and due to the eroding nature of the insurance policy, there is a good chance the Class would have recovered less than the settlement amount no matter how large a verdict Plaintiffs obtained at trial. *Id.* at ¶ 25. As is reflected by the fact that the Settlement is the highest nursing home class action settlement in New York, the Settlement is a good result and contains no obvious deficiencies.

E. The Proposed Class Notice Is Appropriate.

CPLR 908 requires that "[n]otice of the proposed . . . compromise [of a class action] shall be given to members of the class in such manner as the court directs." The Settlement

Agreement provides that the Claims Administrator will mail the Notice Form and Claim Form to all Class Members. Settlement Agreement, at ¶ 19(b)(i). In the event that a Notice mailed to a Class Member is returned as undeliverable, the Claims Administrator shall take reasonable steps to obtain the correct address of such Class Member, including skip traces, and shall attempt a re-mailing provided the skip trace identifies a more recent address. *Id.* at ¶ 19(b)(iii). Fourteen (14) days before the end of the Claim Period, the Claims Administrator will send a postcard and, if email addresses are identified, email reminder notice to Class Members. *Id.* at ¶ 19(b)(iv). The Claims Administrator will also set up a settlement website which will also have a long form notice and other appropriate Court documents, as well as other useful features of settlement websites, including the ability for Class Members to update their addresses. *Id.* at ¶ 19(b)(v).

The Notice Form clearly describes the terms of Settlement, the relief available to Class Members, and the procedures for participating, opting-out of, or objecting to the Settlement. *See* Ex. 2, Class Notice. The Notice Form also describes the fees and costs that Class Counsel will seek and the proposed Enhancement Awards to the Named Plaintiffs. *Id.* Finally, the Notice Form provides contact information for the Claims Administrator and Class Counsel and discloses the date, time, and place of the Fairness Hearing.⁸ *Id.* Indeed, the Notice Form is substantially similar to the notice form that this Court approved in connection with the First Settlement. *See* Preliminary Approval Order, NYSCEF Doc. No. 254 at p. 1.

⁸ Class Counsel will petition for attorneys' fees at the final approval hearing. *See* Preliminary Approval Order, NYSCEF Doc. No. 254 at p. 2 (holding that "upon passage of the deadline for opt-out requests and objections, Class Counsel shall promptly file a motion for final approval of the proposed settlement, the proposed service awards, and the proposed attorney's fee and cost awards[.]").

VII. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court preliminarily approve the Settlement, approve the Class Notice, and enter the Proposed Order.

Dated: October 1, 2020.

White Plains, New York

**FINKELSTEIN, BLANKINSHIP,
FREI-PEARSON & GARBER, LLP**

By: /s/Jeremiah-Frei-Pearson
Jeremiah Frei-Pearson
John D. Sardesai-Grant
Earl A. Kirkland III
One North Broadway, Suite 900
White Plains, New York 10601
Tel: (914) 298-3281
jfrei-pearson@fbfglaw.com
jsardesai-grant@fbfglaw.com
ekirkland@fbfglaw.com

Attorneys for Plaintiffs and the Class