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15 Attorneys for Plaintiffs and the Proposed Class

16 **UNITED STATES DISTRICT COURT**

17 **NORTHERN DISTRICT OF CALIFORNIA - OAKLAND**

18 June Newirth, by and through her Guardian
19 ad Litem, Frederick J. Newirth; Barbara
20 Feinberg; and Elizabeth Barber, Andrew
21 Bardin, and Thomas Bardin as successors-in-
22 interest to the Estate of Margaret Pierce; on
23 their own behalves and on behalf of others
24 similarly situated,

25 Plaintiffs,

26 vs.

27 Aegis Senior Communities, LLC, dba Aegis
28 Living; and Does 1 Through 100,

Defendants.

CASE NO. 4:16-cv-03991-JSW

CLASS ACTION

**JOINT SUPPLEMENTAL BRIEF IN
SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF CLASS
SETTLEMENT**

Date: May 7, 2021

Time: 9:00 a.m.

Place: Courtroom 5, 2nd Floor

Judge: Hon. Jeffrey S. White

Action Filed: April 12, 2016

Trial Date: None Set

1 **I. INTRODUCTION**

2 The parties submit this joint supplemental brief in support of the pending motion for
3 preliminary approval of the class action settlement pursuant to the Court’s April 26, 2021 Order
4 Requiring Supplemental Briefing. (Dkt. 208.)

5 This matter is scheduled for a hearing on May 7, 2021, to consider the motion for
6 preliminary approval of the class action settlement and the motion to amend the scheduling order,
7 to file a third amended complaint, and for permissive joinder.

8 **II. RESPONSES TO THE COURT’S QUESTIONS**

9 The parties respectfully submit the following responses to the Court’s questions that were
10 raised in its April 26, 2021 Order. (Dkt. 208.)

11 **1. Reference to Frederick Newirth in the Proposed Class Notice**

12 Subject to the Court granting the parties’ stipulated motion to file a third amended
13 complaint, the proposed Class Notice should be modified wherein the two references to Frederick
14 Newirth as the guardian ad litem of June Newirth are replaced with references to Kathi Troy as
15 successor-in-interest to the Estate of June Newirth. (Dkt. 201-5, Notice of Lodgment (“NOL”),
16 Ex. C, Class Notice, at pp. 1 and 2.)

17 Kathi Troy is being added to the matter and signed the Settlement Stipulation as the
18 successor-in-interest because Frederick Newirth passed. (*See* Dkt. 202-1, pp. 70-73, NOL, Ex. A,
19 Att. 4, Declaration of Kathi Troy Pursuant to California Code of Civil Procedure Section 377.32.)

20 **2. Dates Applicable to the Washington Facilities in the Proposed Class Notice**

21 The proposed Class Notice indicates the overall Washington Settlement Class Period to be
22 “any time between March 8, 2014 through and including October 30, 2020.” (Dkt. 201-5, at pp. 2,
23 3, 4, and 11, NOL, Ex. C, Class Notice.) The proposed Class Notice further specifies that “[w]ith
24 respect to Aegis of Bothell, Aegis of Edmonds, and Aegis at Northgate, the Settlement Class
25 includes only persons who resided at those facilities between March 8, 2014 through and including
26 September 30, 2015.” (*Id.* at p. 4.) The Settlement Class Period for these three Washington
27 facilities was shortened to comport with the shorter time period that they were owned and/or

1 managed by Aegis. As such, Plaintiffs believe the proposed Class Notice does not require
2 modification in this regard.

3 **3. Deadline to File Motion for Attorneys’ Fees, Costs, and Service Awards**

4 Plaintiffs will file their motion for attorneys’ fees, costs, and service awards thirty-five (35)
5 days prior to the deadline to opt-out and to object pursuant to the Northern District’s Procedural
6 Guidance for Class Action Settlements, paragraph 9.

7 **4. Definition of Releasing Parties at Section 1.29(ii) of the Settlement Stipulation**

8 Under section 1.29(ii) of the Settlement Stipulation, the Releasing Parties include “any
9 person or entity that paid fees to have any of the foregoing [the residents defined in 1.29(i)] move
10 in to, reside or receive care at an Aegis branded assisted living facility in California during the
11 California Class Period or in Washington during the Washington Class Period.”

12 This covers persons such as family members who paid from their own funds the
13 community fees or services fees on behalf of a resident Settlement Class Member. Plaintiffs are
14 informed by Aegis that they have contact information for such persons. Thus, they should receive
15 notice of the class settlement and can object, opt-out or elect to remain in the class settlement.

16 **5. The Three-Year Duration of the Injunction**

17 The proposed Injunction, subject to Court approval, will commence on the Effective Date
18 and remain in place for three years from that date. (Dkt. 201-3, NOL, Ex. A(1) – Stipulated
19 Injunction, ¶ 13; SS, ¶ 7.1). The three-year duration of the proposed Injunction is a product of
20 multiple arms-length settlement negotiations and, as outlined below and set forth in the
21 Declarations of Kathryn Stebner and Patrick Kennedy, provides significant benefits to the
22 proposed settlement class. The three-year duration compares favorably with stipulated injunctions
23 obtained in similar court-approved class settlements involving long term care facilities. (*See, e.g.,*
24 *Carnes v. Atria Senior Living, Inc.*, N.D. Cal., Case No. 3:14-cv-02727-VC (duration of injunction
25 was three years); *Lollock, et al. v. Oakmont Senior Living, LLC, et al.*, Superior Court of
26 California, County of Alameda, Case No. RG17875110 (duration of injunction was two years);
27 *Walsh v. Kindred Healthcare, et al.*, Case No. 11-00050-JSW (duration of injunction was two

1 years).)

2 The duration of the proposed Injunction also compares favorably with the average duration
3 of resident stay at Aegis facilities. (Dkt. 203-4, Declaration of Patrick Kennedy, PhD, In Support
4 of Settlement Approval, ¶¶ 19-20, 28-29 (average resident duration is approximately 18 to 25
5 months).) Thus, Plaintiffs believe there is a reasonable likelihood that the proposed Injunction
6 will remain in place during the anticipated stay of the current resident Settlement Class Members.

7 Moreover, the three-year injunction requiring changes regarding Aegis's assessments,
8 resident contracts, and marketing materials, and a detailed and intrusive reporting and monitoring
9 procedure regarding staffing levels and care delivery, provides significant benefits to the
10 Settlement Class. Defendants' position is that a longer injunction is unnecessary and would
11 provide no greater benefit to the class, for at least the following reasons. First, the nature of the
12 changes required by the injunction – including the implementation of a software program to
13 monitor care service delivery – is such that the impact on Defendant's operations will be enduring
14 and there is no danger of Defendant making the same alleged misrepresentations and non-
15 disclosures in the future. Second, Defendant, like other assisted living facilities, is already and
16 will remain subject to state oversight, including with respect to adequate staffing, and the
17 injunction's provisions that require Aegis to comply with applicable law will always be
18 applicable. Third, a longer injunction would unnecessarily pose an undue hardship for Defendant,
19 as the expense and procedural complications of compliance with the reporting and monitoring
20 requirements under the injunction are substantial. Moreover, extended monitoring and reporting is
21 unnecessary in light of the private and governmental enforcement mechanisms already in place
22 (e.g., regulatory fines, future class actions, etc.) should Aegis allegedly violate state law in the
23 future. From Plaintiffs' perspective, the benefits of the stipulated Injunction to the Settlement
24 Class, together with the litigation risks involved with a trial seeking a longer injunction, justify
25 agreement to the three-year injunction term.

26 The Parties therefore submit that for all of these reasons, the proposed three-year
27 injunction is appropriate, and a longer duration would not make the settlement more fair,

1 reasonable, or adequate.

2 **III. CONCLUSION**

3 For the reasons set forth herein and in the previously filed moving papers, the parties
4 respectfully request the Court to grant the motion for preliminary approval of a class action
5 settlement and the stipulated motion to amend the scheduling order, to file a third amended
6 complaint, and for permissive joinder.

7 The e-filing attorney hereby attests that she has obtained concurrence in the filing of
8 the document from the other signatory.

9

10 DATED: May 3, 2021

STEBNER AND ASSOCIATES

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12

/s/ Kathryn A. Stebner

Kathryn Stebner

Attorneys for Plaintiffs and Proposed Class

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15 DATED: May 3, 2021

LEWIS BRISBOIS BISGAARD AND SMITH LLP

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17

/s/ Soojin Kang

Soojin Kang

Attorneys for Defendant Aegis Senior Communities
LLC

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