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IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL DIVISION

DANIEL BAER and ROSE BAER through Stephen Baer as their Agent with Power of Attorney for themselves and all others similarly situated	: NO. 2018-13760
vs.	:
SHANNONDELL, INC.	:

OPINION OF THE COURT PURSUANT TO Pa.R.C.P.§1710(a)

I. Procedural Background

This is a class action brought by Plaintiffs, Daniel Baer and Rose Baer ("Plaintiffs" or "Baers"), through Stephen Baer as their agent with Power of Attorney. The Baers commenced this action by filing a Class Action Complaint on May 23, 2018.

On November 30, 2018, Defendant filed Preliminary Objections to Plaintiffs' Amended Complaint. With consent of Defendant, Plaintiffs filed a Second Amended Complaint on December 13, 2018, setting forth three Counts. Count I asserted a violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 Pa. §201-2(4)(xxvi), and sought monetary damages and injunctive relief. Count II asserted a violation of the Pennsylvania Continuing Care Providers Registration and Disclosure Act, 40 Pa. Cons. Stat. §3217 (a)(3), and sought monetary damages. Count III alleged breach of contract and sought monetary damages.

On December 28, 2018, Defendant filed Preliminary Objections to Plaintiffs' Second Amended Complaint. On March 8, 2019, the Court granted Defendant's Preliminary Objections and dismissed Count I of Plaintiffs' Second Amended Complaint ("Complaint"), asserting a violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law. The Court

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entered an Order dated October 19, 2021, which denied Plaintiff's Motion to File a Third Amended Complaint to include claims for anticipatory breach of contract and tolling.

On July 11, 2019, Plaintiffs filed the pending Motion for Class Certification pursuant to Pa.R.C.P. §1707. On August 15, 2019, Defendant filed its Answer and Brief in Opposition to Plaintiffs' Motion for Class Action Certification. The court conducted evidentiary hearings on Plaintiffs' Motion on January 14, 2021 and March 17, 2021.

II. Findings of Fact

A. The Residence & Care Agreements

1. Shannondell at Valley Forge is a continuing-care retirement community (hereinafter "CCRC") operated by Shannondell, Inc., a Pennsylvania for profit corporation. Class Cert. Hrg. Ex. D-1, ¶1-8, Jan. 14, 2021.

2. During the course of Shannondell's operations from its opening in 2005 through the present, individuals who wish to become Residents at Shannondell's CCRC enter into a written agreement entitled "Shannondell at Valley Forge Residence and Care Agreement" ("Agreement" or "RCA"). *Id.* at D-10 through D-16.

3. In exchange for a refundable entrance fee (hereinafter "Entrance Fee") and the payment of a regular monthly fee, Residents are entitled to occupy an independent living unit at Shannondell and to receive certain services in accordance with the terms and conditions of the Agreement. *Id.*

4. Defendant has revised the Agreement seven (7) times, with versions ("Rev." as denoted on each Agreement) in 2004, 2005, 2006, 2008, 2013, 2014 and 2018. *Id.* at Ex. D-10 through D-16.[1]

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[1] See Ex. P-2, Def. Resp – First Set, Answer 15 listing four separate versions starting in 2008: REV 08, REV 13, REV 14 and REV 18. "REV" stands for "Revision" following by a two-digit number to indicate the year in which

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5. All seven versions contained the identical term II.B on page 2 in the "General Conditions of Residence," stating the furnishings provided in the units included kitchen appliances and cabinets:

> II. FACILITIES PROVIDED BY SHANNONDELL AT VALLEY FORGE
>
> * * *
>
> B. Furnishings
>
> Residences are furnished with a kitchen which includes a refrigerator, range, microwave, sink, cabinets, dishwasher and garbage disposal [and] a washer and dryer."

6. All seven versions provided that the Resident could modify the unit only with Shannondell's permission; and then only on the condition that if the unit could not be successfully re-marketed with the modifications, the Resident would have to pay the cost of restoration of the unit to its original condition. The exact language from Section II.C of all seven versions of the RCA at page 2 states:

> "C. Modifications to your Residence.
>
> * * *
>
> 2. Should you request alterations, renovations and/or additions to your residence after occupancy, such changes must be approved in advance by Shannondell at Valley Forge in our sole discretion. The cost for approved alterations, renovations and/or additions are your responsibility. All alterations, renovations and/or additions are subject to the following conditions:
>
> * * *
>
> > b. When the residence is vacated, Shannondell will determine whether the residence can be re-marketed without such alterations, renovations and/or additions being removed. **If Shannondell, in its sole discretion determines**

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the version was made. E.g. REV-08 is the version of the RCA as revised, effective January 1, 2018. As Shannondell Chief Financial Officer, Scott Darrenkamp, testified, the first RCA used (2003) had no version number on it. He identified the other two that existed before 2008 as REV 05 and REV 06. See Class Cert. Hrg. Tr. at 20-25, Ex. P-1 through P-10.

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> **that the alterations, renovations and/or additions must be removed prior to remarketing the residence, the cost of restoration to the original condition will be deducted from the entrance fee refund."**
>
> (emphasis added)

7. All seven versions of the RCA provided that in addition to paying a monthly fee for services provided by the Facility, each Resident had to pay an Entrance Fee.[2] All six versions in use before REV 18 described the Entrance Fee as "100 percent refundable." Later, in those RCAs,[3] there is a statement that there will be a deduction from a refund of a "Vacancy Fee."[4]

8. From the opening of Shannondell in 2003 until February 1, 2013, the four versions of the RCA used by Shannondell all described the Vacancy Fee in Section VII(3) on page 12 of the RCA as follows:

> The Vacancy Fee will be used to cover the reasonable cost of cleaning and refurbishing the residence, including, but not limited to, clearing or replacement of carpeting, spackling and/or painting of walls, any other appropriate repairs **and general restoration of the residence to its original condition.**
>
> (emphasis added)[5]

9. All versions of the RCA provided that the Vacancy Fee is refundable only after the Resident vacates his or her unit and a new Resident pays a new Entrance Fee to occupy the same unit.[6]

10. In the first four versions of the RCA used through January 2013, Section III.D at page 3 described Shannondell's agreement to replace property and equipment it owned:

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[2] See page i in paragraph 3 of Exs. P-3 through P-9.

[3] See page 11 at ¶VII.C (Ex. P-3) or page 12 at ¶VII.3 (Exs. D, E, F and H).

[4] Starting in January 2018, pursuant to the last seven versions of the RCA used by Shannondell, Residents were charged a flat 5% of their Entrance Fee as a Vacancy Fee, regardless of what repairs or refurbishing were needed. See Ex. P-9, p. 12 at ¶VII.3.

[5] Shannondell revised the RCA starting with REV 13 on February 1, 2013 to include those words in the definition of the Vacancy Fee. See Ex. P-7 at p. 12, Section VII.3.

[6] For the first RCA, Ex. P-3, this language is on page 11 at ¶VII.E. For the other six versions, Exs. P-4 – P-9, it is on page 12 at ¶VII.3.

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III. SERVICES PROVIDED BY SHANNONDELL AT VALLEY FORGE

* * *

D. Maintenance and Repair

We will be responsible for all necessary repairs, maintenance **and replacement of Property and equipment owned by Shannondell.**

(emphasis added)[7]

11. All versions of the RCA provide that it can be modified only in writing signed by both parties.[8] Shannondell has never modified the definition of the Vacancy Fee term in an RCA.[9]

B. Relevant Evidence Presented at the Class Certification Hearing

12. At the Class Certification Hearing on January 14, 2021, Stephen Baer testified that he is the son of and legal represetative for Daniel and Rose Baer (the Baers), former Residents of Shannondell. Class Cert. Hrg. at 12. The Baers both having passed, Stephen Baer is also the Executor of their estates. *Id.*

13. The Baers occupied an independent living unit at Shannondell for approximately ten (10) years between 2007 and November, 2016 when the unit was vacated due to the Baers' health issues. *Id.* at 16-17; Ex. D-1 at ¶6.[10]

14. Mr. Baer testified that his parents entered into an Agreement with Shannondell and paid an Entrance Fee as well as a monthly fee to occupy the residence. *Id.* at 16.

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[7] Exs. P-3 – P-6. Shannondell revised the RCA starting with REV 13, eliminating the word "replacement" from the "Maintenance and Repair" clause.

[8] Class Cert. Hrg. Ex. P-3 through P-9 at ii., ¶6.

[9] Ex. P-10, Darrenkamp 108-110.

[10] In June of 2017, Daniel Baer suffered some health issues and ended up being transferred to a nursing home. Shortly thereafter, Rose Baer, who was suffering from Alzheimer's while living at Shannondell, required more care and ultimately joined Daniel at a nursing home. (*Id.* at 17.)

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15. In October 2017, ten months after his parents vacated their residence at Shannondell, the unit was refurbished, and Stephen Baer received a refund check in the amount of $323,356 from Shannondell reflecting the difference between the original Entrance Fee and fees taken out upon their vacancy. The refund was accompanied by a Shannondell-Residence Refurbishment Sheet. *Id.* at 18; Hrg. Ex. D-18. The Refurbishment Sheet itemized the items repaired in the Baer residence after their vacancy, the date the work was completed, the identity of the contractor performing the work, the costs associated with each repair, and comments regarding the work. *Id.*

16. The Baers were charged $15,885.58 in refurbishment costs, which included costs for painting, flooring, shower glass install, medicine cabinets, faucets, cleaning and sanitizing air ducts and dryer vents and an appliance depreciation fee in the amount of $7,500. *Id.* The Statement described the depreciation fee in all capital letters as "STANDARD." It stated the depreciation was calculated at "75 cents per square foot of apartment space annually" up to a $7,500 maximum charge.

17. The Statement sent to Stephen Baer also showed deductions totaling $1,693 for a "shower install" and new medicine cabinets and faucets.[11] Plaintiffs allege that similar deductions for the cost of replacing other types of property owned by Shannondell – kitchen appliances, cabinets, counter tops, vanities – appeared on the Statements received by other vacating Residents along with their entrance fee refund checks.[12]

18. Scott Darrenkamp, Director of Finance at Shannondell, testified that Shannondell is a continuing care retirement community that provides independent living, personal care, rehab and skilled nursing to Residents 55 years of age and older. Class Cert. Hrg. Tr. at 58-59. Individuals

[11] Ex. B to Second Amended Complaint attached to Ex. P-11.
[12] Ex. P-10, Darrenkamp dep. 31, 94 and Ex. P-14.

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who wish to reside in the independent living unit sign an Agreement to receive that living accommodation in exchange for the payment of an Entrance Fee and monthly payments. *Id.*

19. As the Director of Finance, Mr. Darrenkamp oversees the day-to-day accounting functions, finance, IT functions and general operations. He is also directly involved in the calculation and processing of Entrance Fee refunds issued to former Residents who signed an Agreement. Since 2003, the campus has grown to 1,106 living units. *Id.* at 60-61.

20. Mr. Darrenkamp testified that before a prospective Resident pays their initial Entrance Fee, they have an opportunity to inspect the residence to ensure that all the fixtures and items in the unit are acceptable. *Id.* at 63. This inspection process creates a "benchmark" of the unit's fixtures and serves as the "original condition" of the unit prior to occupancy. *Id.*

21. Once a Resident notifies Shannondell in writing that they intend to vacate the apartment, Hamoudeh Qawasmy, the Director of Maintenance (also known as "Moody") revisits the unit and creates a checklist. He determines if anything in the apartment needs to be repaired and/or replaced to return that apartment to its original condition. *Id.* at 64-65.

22. Mr. Darrenkamp testified that the Vacancy Fee definition in the Agreement is intended to include any repairs, modifications and general restoration. *Id.* at 66-67. Mr. Darrenkamp testified that the goal of the refurbishment process is to ensure that the apartment is returned to a condition that is equivalent to the original "benchmark" condition, thereby improving the ability to remarket the unit and obtain a new Resident. This, in turn, triggers the refund to the former Resident. *Id.* at 68.

23. Mr. Darrenkamp testified that each refurbishment is an individual exercise. *Id.* at 86. Once "Moody" completes the refurbishment for a particular unit, he provides invoices to the Defendant's finance department.

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24. After the Refurbishment Worksheet is prepared at the time of the return of the Entrance Fee, Shannondell makes the determination as to whether the actual appliances that were replaced or the depreciation fee ($7,500) is lower. The Resident would receive the benefit of the lower amount being deducted from the Entrance Fee. *Id.* at 88, 91, 107-109.[13]

25. Mr. Darrenkamp testified that the maximum appliance fee a Resident could be charged is $7,500 and includes every single appliance in a unit, including the HVAC unit that services the particular apartment. *Id.* at 89, 107-108. As an example, the Baers' calculated depreciation fee was over $8,000, but they were only charged the maximum fee of $7,500. *Id.* at 108.

26. Defendant prepared a spreadsheet, provided to Plaintiffs during the course of discovery and identified as Class. Cert. Hrg. Ex. P-17, that categorizes the following specific information regarding former Residents:

* name of Resident and apartment number;
* the date the Resident signed the RCA and the version signed;
* the date the Resident received the Entrance Fee Refund;
* the total amount of the Vacancy Fee deducted from the Entrance Fee;
* the individual charges to each Resident to restore the residence which comprise the Vacancy Fee (i.e., appliance fee, paint, flooring, cabinets, counter and other costs).

27. At the Class Certification Hearing, Mr. Darrenkamp testified that he was unable to determine whether the appliance fee charges represented an appliance replacement cost or an appliance depreciation fee. Class Cert. Hrg. at 83. He indicated he would have to re-investigate each individual file and the refurbishment worksheets in those files to determine what refurbishments were completed with regard to which unit. *Id.* at 85.

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[13] For example, Class Cert. Hrg. Ex. D-19 provides an example of another Resident, Tessler, who was charged an appliance replacement fee for the actual costs of the appliances because that amount was lower than the appliance depreciation fee of $7,500. (*Id.*, at 100-101; Hrg. Ex. D-19.)

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C. Summary of the Claims

28. Plaintiffs instituted this class action claiming that Defendant breached several versions of its agreements with former Residents by making improper deductions from the former Residents' Entrance Fee refunds.

29. Plaintiffs claim Shannondell's practice of charging an Appliance Depreciation Fee or an Appliance Replacement Fee ("Appliance Fee") is improper because the charge is not specifically disclosed as being part of the "Vacancy Fee" that is deducted from the Resident's Entrance Fee refund. Class Cert. Hrg. Ex. D-1 at ¶17.

30. Plaintiffs also allege that additional deductions from the Entrance Fee refunds for replacement of property owned by Shannondell including kitchen cabinets, countertops, medicine cabinets, bathroom vanities and shower doors, is also improper since Shannondell is responsible for maintenance, repair and replacement of property and equipment owned by Shannondell pursuant to the provisions of the Agreement. *Id.* at Ex. D-1 at ¶16-18.

31. Plaintiffs claim the Entrance Fee refunds were underpaid to the vacating Resident and that Defendant's policy of deducting these charges constitutes a breach of contract and a violation of the Pennsylvania Continuing Care Provides Registration and Disclosure Act, 40 Pa.C.S.A. §3217(a).

32. Shannondell asserts that Appliance Depreciation Fees and Replacement Fees for Cabinets, Countertops and Other Materials are covered by the Vacancy Fee and are permissible deductions from Entrance Fee refunds.

D. The Class

33. Plaintiffs have defined the purported class as "All present and former Residents of an independent living unit at Shannondell at Valley Forge who signed a Residence & Care

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Agreement before February 1, 2013 and the representatives of each such Resident." Pl. Mot. for Class Cert., Proposed Order, July 11, 2019.

34. Based upon the information provided by Shannondell, 1,152 Residents signed a version of the RCA (i.e., Rev. 04, 05, 06 and 08) that did not specifically include the language regarding an Appliance Fee deduction in the Vacancy Fee. (Class Cert. Hrg. at Ex. D-6) Mr. Darrenkamp testified that of those 1,152 former Residents, only 293 were issued an Entrance Fee refund with a Vacancy Fee deduction on or after May 23, 2014, within four years of Plaintiffs' filing of the Complaint. (Class Cert. Hrg. at 111-113, 119-122; Ex. D-6). Of those 1,152 former Residents, an additional 154 were issued an Entrance Fee refund with a Vacancy Fee deduction on or after May 23, 2012, within six years of the filing of Plaintiffs' Complaint. Thus, the class size of claimants who may have suffered actual harm based upon the respective statutes of limitations for breach of contract (four years) and the Continuing Care Providers Registration and Disclosure Act ("CCPRDA"), 40 Pa.C.S.A. §3217(a) (six years), may include 447 claimants.

III. Conclusions of Law and Legal Discussion

A. General Principles Applicable to the Class Certification Motion

1. The purpose behind class action suits is "to provide a means by which the claims of many individuals could be resolved at one time, thereby eliminating the possibility of repetitious litigation and providing small claimants with a method to seek compensation for claims that would otherwise be too small to litigate." *DiLucido v. Terminix International, Inc.*, 450 Pa. Super. 393, 397, 676 A.2d 1237, 1239 (Pa. Super. 1996).

2. "Pennsylvania Rule of Civil Procedure 1702, which governs class certification requirements, specifies that five criteria be met in establishing the existence of a class: numerosity of class members; commonality of questions of law or fact; typicality of claims

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or defenses; adequacy of representation so as to protect the interests of the class; and fairness and efficiency." *Eisen v. Independence Blue Cross*, 839 A.2d 369, 371 (Pa. Super. 2003). Courts are permitted to employ reasonable inferences, presumptions and judicial notice.[14] *Janicik v. Prudential Ins. Co. of America*, 451 A.2d 451, 454 (Pa.Super. 1982)(citations omitted).

3. A court has broad discretion and its determination of class certification will not be disturbed on appeal "unless the court failed to consider the requirements of the rules or abused its discretion in applying them." *Id.*; *Baldassari v. Suburban Cable TV CO., Inc.*, 808 A.2d 184,189 (Pa.Super. 2002). See also *Klemow v. Time Inc.*, 466 Pa. 189, 197, 352 A.2d 12, 16 (1976). In exercising that discretion, the Court's inquiry is limited to the class action allegations; it should not focus on the merits of the action. Pa. R.C.P. 1707(c). *Samuel-Basset v. Kia Motors Am., Inc.*, 34 A.3d 1, 15-16 (Pa. 2011); *Baldassari* at 189-190.

4. "[C]ourts should strike the balance mindful that the class action is inherently a 'procedural device designed to promote efficiency and fairness in handling large numbers of similar claims.'" *Janicik*, 451 A.2d at 461 (citing *Lilian v. Commonwealth*, 467 Pa. 15, 21, 354 A.2d 250, 253 (1976)). "[D]ecisions in favor of maintaining a class action should be liberally made." *Baldassari*, 808 A.2d at 189.

5. The burden of proof in a class certification proceeding is upon the party seeking certification. "[T]he class proponent at the class certification hearing must present evidence of the underlying facts from which the court can conclude that the five class certification requirements are met." *Baldassari*, at 189 (citing *Janicik*, 451 A.2d at 455). "Because the

[14] Pa.R.C.P. §1707 establishes that a hearing regarding certification of the action as a class action is mandatory. "The hearing is confined to a consideration of the class action allegations and is not concerned with the merits of the controversy or with attacks on the other averments of the complaint. Its only purpose is to decide whether the action shall continue as a class action or as an action with individual parties only. In a sense, it is designed to decide who shall be the parties to the action and nothing more. Viewed in this manner, it is clear that the merits of the action and the right of the plaintiff to recover are to be excluded from consideration." See explanatory comm. to Pa.R.C.P. §1707.

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requirements for class certification are closely interrelated and overlapping, the class proponent need not prove separate facts supporting each; rather, her burden is to sufficiently establish those underlying facts from which the court can make the necessary conclusions and discretionary determinations." *Janicik*, 451 A.2d at 455. See also *Debbs v. Chrysler Corp*., 2002 Pa.Super. 326, 810 A.2d 137, 153-154 (2002), quoting *Jancik* at 455.

6. The requirements of Pa.R.C.P. §1702 must be liberally applied; and any doubt should be resolved in favor of certification. *Liss & Marion, P.C. v. Recordex Acquisition Corp*., 937 A.2d 503, 508 (Pa. Super. 2007), aff'd, 603 Pa. 198, 983 A.2d 652 (2009). *Weismer v. Beech-Nut Nutrition Corp.*, 615 A.2d 428, 431 (Pa. Super. 1992); *Cambanis v. Nationwide Ins.Co*., 348 Pa. Super. 41, 45, 501 A.2d 635, 637 (Pa. Super. 1985); *Foust v. Septa*, 756 A.2d 112, 118 (Pa. Cmwlth. 2000). If later developments in the litigation reveal that some prerequisite to certification is not satisfied, then "[t]he court may alter, modify, or revoke the certification." *Jancik*, supra, 451 A.2d 454.

7. "The proponent need only make out a *prima facie* showing that the five requirements of Rule 1702 are satisfied." *Piper v. Elkhard Brass Mfg.Co.*, 2016 WL 1615703, *2 (citing *Debbs v. Chrysler Corp.*, 810 A.2d 137, 153–54 (Pa. Super. 2002), *appeal denied*, 829 A.2d 311 (Pa. 2003)). *Prima facie* evidence is "[e]vidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion." *Cosmas v. Bloomingdales Bros.*, 660 A.2d 83, 86 (Pa.Super.1995) (quoting *Black's Law Dictionary* (6th ed.1990)). Although not heavy, the burden requires the proponent to show "more than mere conjecture, and conclusory allegations, especially if facts of record tend to contradict the propriety of the class action." *Janicik* at 455.

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B. Class Certification Criteria

For a suit to proceed as a class action, Rule 1702 of the Pennsylvania Rules of Civil Procedure requires satisfaction of five criteria.

(1) Numerosity.

To be eligible for certification, Plaintiffs must "establish that the class is "so numerous that joinder of all members is impracticable." Pa.R.C.P. 1702(1). "There is no clear test of numerosity, but it is proper for a court to inquire whether the number of potential individual plaintiffs would pose a grave imposition on the resources of the court and an unnecessary drain on the energies and resources of the litigants should such potential plaintiffs sue individually." *Foust v. Southeastern Pennsylvania Transp. Authority* 456 A.2d 112, 118 (Pa.Cmwlth. 2000)(citing *Temple University v. Pennsylvania Department of Public Welfare,* 30 Pa.Cmwlth. 595, 374 A.2d 991 (1977)).

Whether the number is so large as to make joinder impracticable is dependent "not upon any arbitrary limit, but rather upon the circumstances surrounding [each] case." *Janicik* at 456 (citing 3B J. Moore, *Federal Practice and Procedure,* § 23.05 (19)). The proponent "need not prove the number of class members so long as she is able to define the class with some precision and affords the court with sufficient indicia that more members exist than it would be practicable to join." *Janicik* at 456. "When a class is narrowly and precisely drawn and there are still so many potential class members that joinder is impracticable or impossible, the class is sufficiently delineated to meet the numerosity requirement." *Foust* at 118(referring to *Weismer v. Beech–Nut Nutrition Corp.,* 419 Pa. Super. 403, 615 A.2d 428 (1992)); but see *Weinberg v. Sun Co., Inc.*, 777 A.2d 442, 446 (Pa. 2001) (determining that when questions of fact applicable to each individual private plaintiff would be numerous and extensive and those individual questions of

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fact "would predominate over common issues of fact and law" the certification requirements of commonality and numerosity were not met.)

In the case at bar, Plaintiffs propose that the class should be defined as "all present or former Residents of an independent living unit at Shannondell at Valley Forge who signed a Residence & Care Agreement before February 1, 2013 and the representatives of each such former Resident." Pl. Motion for Class Cert., Proposed Order, July 11, 2019. Based upon Defendant's discovery responses, there appears to be 1,153 Residents who fit Plaintiffs' proposed class definition. Class Cert. Hrg. at Exhibit D-20.

In support of his position, Plaintiffs argue that "[t]he class consists of hundreds of individuals and is therefore so numerous that joinder of all members is impractable." Pl. Amend. Compl. ¶9, Nov. 15, 2018. He brings the class action "on behalf of all former Residents of [Shannondell] independent living units or their representatives who received or are still owed the refund of an Entrance Fee." *Id.* at ¶8. He asserts that each of 1,153 Residents have signed Agreements with identical terms. Pl. Proposed Findings of Fact, §B, ¶5, Jan. 13, 2021; see also Class Cert. Hrg., Ex. P-17; D-20.

Defendant argues that numerosity is not satisfied because the class definition proposed by Plaintiff "is overly broad and not properly defined" in that it does not "identify Residents who were actually 'injured,'" only verifying the number of Residents who signed particular versions of the Agreement. Def. Proposed Findings of Fact, ¶13, May 3, 2021. Defendant argues that any alleged breach of contract or damages pertaining to current Residents has not yet occurred.

The Court finds that the definition of "class" proposed by Plaintiff to be overly broad. The Court agrees with Defendant that only a portion of the identified 1,153 Residents who signed the Agreements received an Entrance Fee which was reduced by the Vacancy Fee

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deductions. Therefore, we find that the "class" shall be defined as Residents who executed Agreements before February 1, 2013 and who received an Entrance Fee refund after May 22, 2012 that included a Vacancy Fee Deduction. The evidence suggests that this class may include as many as 447 Residents or their legal representatives - and possibly more if vacancies occur before this litigation concludes. The Court finds that the numerosity requirement has been satisfied. See *Janicik* 451 A.2d at 456 (noting *Wolfson v. Solomon,* 54 F.R.D. 584, 591 (S.D.N.Y.1972) ("court may assume sufficient numerousness [*sic*] where reasonable to do so, in absence of a contrary showing by the class opponent"); *Temple University v. Pennsylvania Department of Public Welfare,* 30 Pa.Cmwlth. 595, 374 A.2d 991 (1977) (court determined that over 123 separate plaintiff hospitals satisfied numerosity requirement).

(2) Commonality

The proponent must establish that "questions of law or fact common to the class" exist. Pa.R.C.P. 1702(2). "The common question of fact means precisely that the facts must be substantially the same so that proof as to one claimant would be proof as to all." *Baldassari,* 808 A.2d at 191(citing *Allegheny County Housing Auth. v. Berry,* 338 Pa. Super. 338, 487 A.2d 995, 997 (1985); *Cook v. Highland Water and Sewer Auth.*, 108 Pa. Cmwlth. 222, 530 A.2d 499, 504 (1987)). "The existence of individual questions essential to a class member's recovery is not necessarily fatal to the class, and is contemplated by the rules." *Janicik,* 451 A.2d at 457. "Common questions will generally exist if the class members' legal grievances arise out of the 'same practice or course of conduct' on the part of the class opponent." *Id.* "[C]lass actions may be maintained even when the claims of members of the class are based on different contracts" so long as "the relevant contractual provisions raise common questions of law and fact and do not

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differ materially." *Id.* (citing *Sharkus v. Blue Cross of Greater Philadelphia*, 431 A.2d 883, 886 (Pa. 1981)).

In the case at bar, the claims of the members of the class are based upon identical provisions within different versions of the Agreement. Plaintiff argues that Defendant's "practice of deducting from their entrance fee refunds a) appliance depreciation fees, all calculated using the same formula...and b) [r]eplacement fees for cabinets, countertops and other materials" satisfies the commonality requirement. Pl. Proposed Findings of Fact, §B, ¶7. Additionally, Plaintiff argues that both legal theories, breach of contract and violation of the Continuing Care Community Provider Registration and Disclosure Act, have common issues as to the elements of the claim.

Plaintiffs aver that evidence will show that (1) all Residents signed a version of the Agreement with identical pertinent terms; (2) Defendant breached the Agreement by imposing a standard fee for appliance depreciation and charging replacement fees for cabinets, countertops and other materials; and (3) all Residents lost money that was inappropriately taken out of the returned Entrance Fee. *Id.* at §B, ¶8. Likewise, Plaintiffs aver the same evidence will show that Defendant acted wrongfully under the Continuing Care Community Provider Registration and Disclosure Act.

For both causes of action, proof by Mr. Baer on behalf of his parents, will be proof as to all members of the class. See *Weismer v. Beechnut Nutrition Corp.*, 615 A.2d 428 (Pa. Super. 1992) (facts as to each class member's claim must be substantially the same so proof as to one claimant would be proof as to all). Considering that Plaintiff need only make a *prima facie* showing that common questions of law or fact exist, the Court finds that this requirement has been met.

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(3) Typicality

A proponent "must show that her "claims or defenses ... are typical of the claims or defenses of the class." *Janicik,* 451 A.2d at 457 (citing Pa.R.C.P. 1702(3)). The court must determine "whether the class representative's overall position on the common issues is sufficiently aligned with that of the absent class members to ensure that her pursuit of her own interests will advance those of the proposed class members." *Id.*; *Debbs,* 810 A.2d at 160; *Baldassari,* 808 A.2d at 193 (citing *D'Amelio,* 500 A.2d 1137, 1146 (Pa. Super. 1985)); *Janicik,* 451 A.2d at 457. See also *Dunn v. Allegheny County Prop. Assessment App. And Review,*794 A.2d 416, 425 (Pa. Cmwlth. 2002) (concluding "that the class representatives' claims are typical of other class members' claims because their claims arise out of the same course of conduct, involve the same legal theories, and do not raise divergent goals or interests.")

In the case at bar, the Baers maintain an overall position sufficiently aligned with that of the remainder of the class. The Baers executed an Agreement containing identical terms to each of the claims of class members, and had Appliance Depreciation Fees and Replacement Fees deducted from their refunded Entrance Fee. Their individual claims involve the same legal theories and do not raise divergent goals to that of the prospective class. As such, the typicality requirement has been satisfied.

(4) Adequacy of Representation.

Pa.R.C.P. 1702(4) establishes that in order to achieve class certification, the court must conclude that representative "will fairly and adequately assert and protect the interests of the absent class members...To make this determination the court must consider: (1) whether the attorney for the representative party will adequately protect the class's interests; (2) whether the representative parties have a conflict of interest in maintaining the action; (3) whether the

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representative parties 'have or can acquire' adequate financial resources; and (4) 'other matters.'" *Janicik*, 451 A.2d at 458 (citing Pa.R.C.P. 1709).

Defendant argues that "neither class counsel nor the named Plaintiffs themselves are adequate representatives who can protect the interests of the proposed classes." Def. Proposed Findings of Fact at ¶60. Specifically, Defendant argues that (1) Stephen Baer is "incapable of representing the classes [because] he has relinquished any and all control over this lawsuit to class counsel;" and, (2) counsel's advancement of all costs of litigation and "unfettered discretion" in prosecution of the class action creates a conflict of interest to those involved. Def. Proposed Findings of Fact at ¶60-63.

Preliminarily, the representative party must be a member of the class he/she purports to represent. *McMonagle v. Allstate Ins. Co.*, 331 A.2d 467, 472 (Pa. 1975). Defendant argues that Stephen Baer, as power of attorney for his parents and former Residents of Shannondell, is an inadequate representative because he was not a party to the Agreement signed by his parents, nor did he put forth evidence that he was privy to any communications with Shannondell surrounding the Agreement. Further, Defendant asserts that Stephen Baer has "relinquished any and all control over this lawsuit to class counsel." Def. Proposed Findings of Fact at ¶63.

"[A] class representative need not be the best of all possible representatives but rather one that will pursue a resolution of the controversy with the requisite vigor and in the interest of the class." *Janicik*, 451 A.2d at 460 (internal citations omitted). "Courts should not impose unrealistically high burdens of knowledge or ability to supervise counsel, for to do so would render the class action an impotent tool or deny it to those most in need." *Id.*

Stephen Baer testified that he is an attorney, practicing family law, criminal defense and mediation. Class Cert. Hrg. Tr. at 12. Upon his parents' vacancy of their unit at Shannondell, Mr.

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Baer, as power of attorney, received a refund of the original Entrance Fee, less fees imposed by Shannondell which are the subject of the instant claim. Mr. Baer testified that he was "involved in the Entrance Fee refund process" and received a copy of the Refurbishment Sheet and reviewed the same. *Id.* at 25. He further acknowledged having accepted the refunded Entrance Fee and did not "realize that the appliance depreciation fee was wrongful." *Id.* at 27. Mr. Baer also recalled some conversations with Defendant representatives regarding what would be paid back to his parents upon sale of the unit and "questioning the process and what was going to be deducted." *Id.* at 32, 33-34.

Mr. Baer testified he believed the main claim in the lawsuit related to the appliance depreciation fee, and that he needed to consult with counsel regarding the other claims being pursued. *Id.* at 23-24. Contrary to the assertions made by Defendant that Mr. Baer has "relinquished any and all control" to his counsel, Mr. Baer testified that he believed his role as class representative is to "monitor the lawsuit and consult with Mr. Spector [Plaintiff counsel]." *Id.* at 24-25.

The Baers executed an Agreement with identical provisions as those of the rest of the purported class. Stephen Baer, as legal representative of the Baers, now deceased, is alleging an overall position sufficiently aligned with that of the remainder of the class. See Class Cert. Hrg. Ex. P-5. In addition to his appropriate reliance on his counsel for specific claims, Stephen Baer indicated an understanding of his role in the instant litigation and demonstrated a willingness to pursue the matter, knowledge of pertinent facts underlying the action, and a general understanding of the essence of the legal claim(s) before the Court. See *Janicik,* 451 A.2d at 461(evidence of honesty, willingness to pursue the matter, knowledge of facts underlying the action, understanding of the essence of the legal claim, desire to right a perceived wrong, or the

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hope of recovery will all support a named party's adequacy as a representative). As such, Plaintiff has satisfied this requirement.

Because courts are permitted to assume that members of the bar are skilled in their profession, the same inference may be made of the attorney's adequacy from "the pleadings, briefs, and other material presented to the court." *Janicik*, 451 A.2d at 458-459 (internal citations omitted); *Weinberg v. Sun Co.*, 740 A.2d 1152, 1171 (Pa. Super. 1999), aff'd in part, rev'd in part on other grounds, 565 Pa. 612, 777 A.2d 442 (2001). Counsel's adequacy in this regard was not challenged by Defendant.[15]

We note that "[i]nitial funding by the class representative's attorney is not uncommon in class suits...nor is it barred by the Code of Professional Responsibility." *Janicik*, 451 A.2d at 459. "The dangers of the potential conflict of interest arising from counsel's financing a class suit, however, must be viewed realistically in light of the circumstances and the procedural safeguards inherent in class suits." *Id.* at 460. Plaintiffs' counsel has represented that he will advance the costs of litigation, "subject to the requirement that the costs may ultimately be the representative plaintiffs' responsibility." Pl. Proposed Findings of Fact at ¶15 (c). See also Pa.R.C.P. 1713, 1716, 1717 (providing court oversight during class action process and settlement). No specific evidence was presented that Plaintiffs' counsel has a conflict of interest in this matter. Counsel is qualified to represent the class.

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[15] Until shown to the contrary, this requirement is assumed. Although not challenged by Defendant, the Court acknowledges Plaintiffs' counsel representation that Mr. Spector has litigated several securities fraud class actions and has over 40 years of experience in complex commercial litigation. Mr. Spiegel has represented plaintiffs in consumer and antitrust class action matters for over a decade, including acting as co-lead counsel in a breach of contract matter brought on behalf of a class of website subscribers.

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(5) Fair and Efficient Method of Adjudication

"In determining fairness and efficiency, the court must balance the interests of the litigants, present and absent, and of the court system." *Janicik*, 451 A.2d at 461. Unlike federal class action litigation, class actions brought under the Pennsylvania rules need not be "superior" to alternative methods. *Id.* "Rather, courts should strike the balance mindful that the class action is inherently a 'procedural device designed to promote efficiency and fairness in handling large numbers of similar claims.'" *Id.* (citing *Lilian v. Commonwealth,* 467 Pa. 15, 21, 354 A.2d 250, 253 (1976)).

Pa. Rule of Civil Procedure § 1708(a) provides the following guidance to the Court to determine fairness and efficiency.

1. Whether Common Questions of Law or Fact Predominate Over Any Question Affecting Only Individual Members

"Common questions will generally exist if the class members' legal grievances arise out of the 'same practice or course of conduct' on the part of the class opponent." *Janicik*, 451 A.2d at 457. "[W]hether common questions of law or fact predominate over individual questions," Pa.R.C.P. 1708(a)(1), "is closely akin to the requirement that sufficient common questions exist to support the class action, Pa.R.C.P. 1702(2). Individual questions, even those essential to recovery, are not necessarily fatal to the class action." *Janicik*, 451 A.2d at 461(internal citations omitted).

Similar to the contract under dispute in *Janicik*, there is a common question of the interpretation of particular provisions of a form contract. The interpretation thereof is critical to determine whether the matter would be resolved in favor of the class, although "individual questions of eligibility and amount of damages" exist. Conversely, "a determination in favor of [Defendant] could moot those individual questions." *Janicik* 451 A.2d at 462. Since the only

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individual issue is the amount of damages, those common questions predominate over any question affecting only individual members.

2. Manageability of Controversy

The court must consider the size of the class and the difficulties likely to be encountered in the management of the action as a class action. Pa.R.C.P. §1708 (a)(2). In the case at bar, Defendant argues that because "[m]any of the Residents who have left their units at Shannondell were infirm or likely deceased or of diminished mental capacity," an inordinate amount of time would be necessary to "track down each particular Resident, or the Resident's legal representative." Def. Proposed Findings of Fact, ¶ 71. "However, problems of administration alone do not justify the denial of an otherwise appropriate class action because to do so would contradict the public policy favoring class actions. Moreover, the court should rely on the aid of counsel and the court's authority to control the action to solve whatever management problems the litigation may bring." *Hannis v. Sacred Heart Hosp.*, 2000 WL 33258465 *41 (Pa. D. & C., 2000) (referring to *Janicik*, 451 A.2d at 462).

Defendant has prepared a spreadsheet identifying the Residents who signed Agreements and the amount each Resident was charged. See Hrg. Tr., Exhibit P-17; D-20. The identification of class members and potential damages of each Resident has already been identified. Therefore, the Court is unable to identify any significant manageability problems "beyond the challenges inherent in managing any class action." *Hannis* at 42; See *Janicik*, 451 A.2d at 462 (finding that when evidence indicated that the names, addresses, and insurance records of all potential class members were centrally stored by appellee "management problems unique to the class procedure would not be unduly burdensome[.]").

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3. Risk of Inconsistent Adjudications

"The court must also consider the risks of inconsistent adjudication from both the plaintiff's and defendant's viewpoints. It must consider whether separate actions (1) would "confront the party opposing the class with incompatible standards of conduct," or (2) would, "as a practical matter," be dispositive of the interests of absent potential class members or otherwise "substantially impair or impede their ability to protect their interests." *Janicik*, 451 A.2d at 462(citing Pa.R.C.P. §1708(a)(3)(i),(ii)). Such risks "will be forceful arguments in support of the approval of the class action." Pa.R.C.P. §1708 Explanatory Note.

As discussed above, the claims here arise out of identical provisions within separate Agreements and the claims will hinge on the interpretation of the contract language applicable to those provisions. Therefore, "even a small risk of inconsistent adjudications is unnecessary. The class action, when compared to separate actions under this criterion, affords the speedier and more comprehensive...determination of the claim and thus, the better means to ensure recovery if the claim proves meritorious or to spare appellee repetitive piecemeal litigation if it does not." *Janicik*, 451 A.2d 462-463. Prosecution of separate actions by individual class members would create a risk of inconsistent results that would create conflicting standards for Shannondell as to what deductions from Entrance Fee refunds are proper.

4. Extent and Nature of Any Current Litigation

The Court is unaware of any current litigation between Plaintiffs and Defendant.

5. Appropriateness of the Forum for the Entire Class

The appropriateness of the forum has not been challenged by the Defendant and is specifically required to be Montgomery County, Pennsylvania by the terms of the Agreements. See Hrg. Tr, Ex. D-10 through16 § XXIV.

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6. Whether In View of the Complexities of the Issues or the Expenses of Litigation, the Separate Claims of Individual Class Members are Insufficient in Amount to Support Separate Actions

The Court must consider whether the "complexity of issues" or "expenses of litigation" are so burdensome that, upon comparison, the amounts of individual class members' claims "are insufficient to support separate actions." Pa.R.C.P. §1708(a)(6). In the instant matter, the issues are not complex; rather, to determine the merits of the claim, basic contract law principles will be analyzed and determined. Similarly, any claims arising out of the Continuing Care Community Provider Registration and Disclosure Act are not complex.

The Court is aware that damages will differ among class members. While variation among class members might exist, we must consider this criterion "realistically in light of the circumstances." *Janicik*, 451 A.2d at 463. Like the class members in *Janicik*, here, in order "[t]o prevail on individual claims, class members would be forced to retain separate counsel and pay court costs, thus duplicating expenses. Moreover, small, but meritorious, claims may go unlitigated. Further, there is a possibility that appellee would simply settle appellant's individual claims, preventing an adverse decision on the merits, and thereby precluding effective relief to many." *Id.* Such a result would give Defendant "an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit procedure was to prevent." *Id.* (citing *Hohmann v. Packard Instrument Co.*, 399 F.2d 711, 715 (7th Cir. 1968)). Moreover, requiring individual suits regarding identical provisions of a contract has the potential to "clog court dockets with repetitive litigation." *Janicik*, 451 A.2d at 463. Upon review of all circumstance under this criterion, the Court determines that proceeding as a class action is a fair and efficient method of adjudicating the instant controversy.

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7. Whether Likely Amount of Monetary Recovery is Too Small to Justify the Expense and Effort of Administering the Class Action

"The class action in Pennsylvania is a procedural device designed to promote efficiency and fairness in the handling of large numbers of similar claims." *Lilian*, 354 A.2d at 253. "[I]n determining whether the requirement of Rule 1708(a)(7) is satisfied, one does not view the potential recovery by itself. Rather, the rule requires a consideration of whether the potential expenses and effort of administering the action would render the amount of recovery so small that a class action would not be justified." *Kelly v. County of Allegheny*, 546 A.2d 608, 612 (Pa. 1988)(denial of class certification due to small dollar amount of average individual claim, in action to recover unrefunded portion of social security contributions erroneously deducted from sick pay benefits, was abuse of discretion where potential costs and expenses were not disproportionate to total class claims). Here, it is averred that many claims will be as high as $7,500. While the costs of prosecuting this class action have not been presented, the Court does not believe that the potential costs and expenses are disproportionate to the total class claims. There is no support in the record that suggests to this Court that administration of the action would render the designation as a class action unjustified.[16]

[16] Plaintiffs requested injunctive relief in Count I of the Second Amended Petition. By Order of March 8, 2019, the Court granted Defendant's Preliminary Objections as to Count I and dismissed the same. Accordingly, Court will not address the factors in Rule §1708(c).

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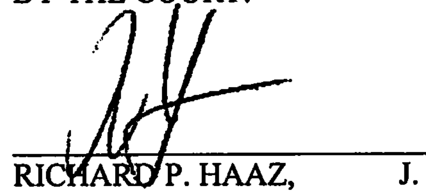
IV. Conclusion

Plaintiffs have met their burden of establishing the requirements for class certification pursuant to Pa.R.C.P. § 1702. Accordingly, Plaintiffs' Motion for Class Certification is **GRANTED.** A corresponding Order shall follow.

BY THE COURT:



RICHARD P. HAAZ, J.

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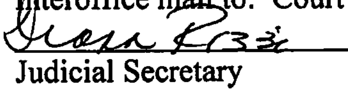

Judicial Secretary