To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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**WILLIAM JENACK, as Attorney-in-Fact for MARY RICE and WILLIAM RAMLOW, as Administrator of the Estate of ADELINE RAMLOW, individually and on behalf of all others similarly situated,**

Plaintiffs,

-against-

**GOSHEN OPERATIONS LLC d/b/a SAPPHIRE NURSING AND REHAB AT GOSHEN, RICHARD PLATSCHEK, ESTHER FARKOVITS, MACHLA AMRAMCZYK and ROBERT SHUCK,**

Defendants.

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**DECISION AND ORDER**
**INDEX NO.: EF008129-2018**
**Motion Date: 08/15/2019**
Sequence No. 4

**SCIORTINO, J.**

The following papers numbered 1 to 30 were read on this motion by plaintiffs for an order (a) certifying this action as a class action and defining the class; (b) appointing plaintiffs William Jenack and William Ramlow as the class representatives; (c) directing defendants to provide plaintiffs with a class list; and (d) appointing plaintiff counsel as counsel for the class:

| PAPERS | NUMBERED |
|---|---|
| Notice of Motion / Affirmation (Frei-Pearson) / Exhibits A - F / Memorandum of Law / Witness Affidavits (13) | 1 - 22 |
| Affirmation in Opposition (Albani) / Exhibits A - D | 23 - 27 |
| Reply Affirmation (Frei-Pearson) / Exhibit 1 / Memorandum of Law | 28 - 30[1] |

[1]Plaintiffs additionally filed four witness affidavits on August 20, 2019, after the return date of the motion. While the affidavits were included with the working copy of plaintiff's reply which was submitted to the Court on or about August 14, 2019, they were not served on opposing counsel until they were electronically filed on August 20. The affidavits have not been considered.

Upon the foregoing papers, the motion is granted.

Plaintiffs bring this putative class action alleging that defendants provided unsafe and inadequate care in a nursing home facility in violation of Public Health Law § 2801-d. By Decision and Order dated February 11, 2019, defendants' motions for an order dismissing the complaint (Seq. #1) and for an order striking the pleadings of class certification and severing the claims of the individual plaintiffs (Seq. #2) were denied. By Decision and Order dated August 21, 2019, plaintiffs' motion for an order directing the entry of plaintiffs' Proposed ESI Discovery and Production Protocol (ESI protocol) and plaintiffs' Proposed Order for the Production and Exchange of Confidential and Protected Health Information (PHI order) was granted. The PHI order and ESI protocol both were so ordered that date.

By Notice of Motion filed on May 13, 2019, plaintiffs seek an order *inter alia* certifying this action as a class action. Plaintiffs assert that the proposed class satisfies the statutory requirements set forth in Civil Practice Law and Rules section 901. Plaintiffs further contend that the factors the Court must consider pursuant to Civil Practice Law and Rules section 902 weigh in favor of class certification. Defendants oppose the motion, asserting that plaintiffs have submitted insufficient evidence to meet the standards for class certification.

With the exception stated in Note 1, *supra*, the Court has fully considered the submissions of the parties.

**Legal Standards**

Civil Practice Law and Rules section 901(a) provides five prerequisites to certification of a class action:

1. The class is so numerous that joinder of all members... is impracticable;

2. There are questions of law or fact common to the class which predominate over any questions affecting only individual members;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. The representative parties will fairly and adequately protect the interests of the class; and
5. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Section 901(b) provides that "unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." Plaintiffs bring the instant action pursuant to Public Health Law section 2801-d, which sets a minimum measure of recovery. Section 2801-d(4) specifically authorizes damages recoverable pursuant to that section to be recovered in a class action.

An action may be maintained as a class action only if the prerequisites set by section 901 have been satisfied. If the Court so finds, it must then proceed to consider the discretionary factors listed in section 902:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
2. The impracticability or inefficiency of prosecuting or defending separate actions;
3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;
5. The difficulties likely to be encountered in the management of a class action.

"Whether a lawsuit qualifies as a class action matter is a determination made upon a review of the statutory criteria as applied to the facts presented; it ordinarily rests within the sound discretion of the trial court" (*Small v. Lorillard Tobacco Co.*, 94 NY2d 43, 52 [1999]). The requirements of Civil Practice Law and Rules Article 9 are to be liberally construed in favor of the granting of class

certification (*Globe Surgical Supply v. GEICO Ins. Co.*, 29 AD3d 129 [2d Dept 2008]). The Court's inquiry into the merits "is limited to a determination as to whether on the surface there appears to be a cause of action which is not a sham" (*Super Glue Corp. v. Avis Rent A Car Sys.*, 132 AD2d 604, 607 [2d Dept 1987]).

**Discussion**

Section 901 Prerequisites

The Court finds that the statutory prerequisites for certification of the class are met in this matter. It is undisputed that defendants' facility consists of approximately 120 beds and operates at 90 percent occupancy or more. Joinder of all persons who were residents of the facility during the applicable period is impracticable. The proposed class exceeds the numerosity threshold contemplated by the legislature and recognized by courts (*Borden v. 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382 [2014]).

Plaintiffs in their moving papers presented affidavits of numerous witnesses attesting to the harms suffered by residents due to the alleged understaffing of the facility. Plaintiffs' claims relating to violations of the Public Health Law and Deapartment of Health regulations predominate in this matter. "It is predominance, not identity or unanimity, that is the linchpin of commonality" (*City of New York v. Maul*, 14 NY3d 499, 514 [2010]). "The fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action" (*Friar v. Vanguard Holding Corp.*, 78 AD2d 83, 98 [2d Dept 1980]).

The claims of the named plaintiffs and proposed class representatives are typical of the claims of the class. Plaintiffs' claims arise "from the same practice or course of conduct that [gives] rise to the remaining claims of other class members and [are] based upon the same legal theory"

(*Friar*, 78 AD2d at 99). "It is not necessary that the claims of the named plaintiff[s] be identical to those of the class" (*Super Glue Corp.*, 132 AD2d at 607).

Plaintiffs and their counsel will fairly and adequately protect the interests of the class. Nothing in the papers before the Court suggests that the interests of the named plaintiffs may be adverse to those of the remaining members of the class. Defendants question plaintiffs' motive, asserting that plaintiffs have outstanding bills at the facility. Defendants cite no authority for the proposition that this creates a conflict of interest. The Court's research revealed no such authority. Further, plaintiff counsel has prosecuted numerous class actions, including matters alleging violations of Public Health Law section 2801-d.

A class action is superior to other available methods. "The very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights" (*Globe Surgical Supply*, 59 AD3d at146, *quoting Amchem Prods., Inc. V. Windsor*, 521 US 591, 617 [1997]). The applicable statute fixes a plaintiff's damages at 25 percent of the daily per patient Medicaid reimbursement rate. There is little or no incentive for members of the class to bring individual actions.

The discretionary factors set forth in Civil Practice Law and Rules section 902 weigh heavily in favor of class certification. As the Third Department observed in a Public Health law section 2801-d action:

> Presumably, aged and infirm nursing home residents are not interested in individually controlling the prosecution of the action, prosecuting separate actions would be inefficient and impractical, no other litigation concerning this controversy is currently in progress, it is desirable to concentrate the litigation in the county where the facility is located, and there are no apparent difficulties in managing this class.

(*Fleming v. Barnwell Nursing Home & Health Facilities*, 309 AD2d 1132, 1134 [3d Dept 2003]).

The statutory prerequisites set forth in Civil Practice Law and Rules section 901 are met in this matter, and the discretionary factors set forth in section 902 weigh in favor of certification of the class. Defendants' opposition to the instant motion essentially asks the Court to conduct a thorough investigation of the merits of plaintiffs' claims. However, such is not the Court's function on a motion for class certification. Plaintiffs papers are sufficient to satisfy the Court that "on the surface there appears to be a cause of action which is not a sham" (*Super Glue Corp.*, 132 AD2d at 607).

Accordingly, it is hereby ORDERED that plaintiffs motion is in all respects granted; and it is further

ORDERED that the following class is hereby certified pursuant to Civil Practice Law and Rules Article 9: all persons who reside, or resided, at the subject facility from September 1, 2017 through the present; and it is further

ORDERED that defendants shall provide plaintiffs with a class list within 15 days of the entry of this Decision and Order, including mailing addresses, telephone numbers, and e-mail address where available, to permit plaintiffs to provide the necessary notice to members of the class; and it is further

ORDERED that the firm of Finkelstein, Blankinship, Frei-Pearson and Garber, LLP is appointed Class Counsel.

The parties shall appear for conference on September 30, 2019 at 10:00 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: September 10, 2019
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

TO: Counsel of Record
VIA NYSCEF