COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 2006-02328D

WILLIAM M. LONERGAN and
DIANE WHITNEY-WALLACE,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,
Plaintiffs and Defendants-in-Counterclaim

Plaintiff(s),

v.

JAMES W. FOLEY,
PETER A. FOOTE,
ALEXANDER B. C. MULHOLLAND, JR.,
DONALD F. WHISTON,
ELIZABETH A. KILCOYNE,
PATRICK J. MCNALLY AND
EDWARD B. RAUSCHER,
FEOFFEES OF THE GRAMMAR SCHOOL
IN THE TOWN OF IPSWICH,
Defendants and Plaintiffs-in-Counterclaim

v.

DISTRICT ATTORNEY FOR THE ESSEX
DISTRICT, ATTORNEY GENERAL OF THE
COMMONWEALTH OF MASSACHUSETTS,
ET ALS.
Defendants-in-Counterclaim

Defendant(s).

FILED
IN THE SUPERIOR COURT
FOR THE COUNTY OF ESSEX
JUN 23 2008
CLERK

**PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PROTECTIVE ORDER WITH RESPECT TO DISCOVERY FROM ABSENT CLASS MEMBERS OF PUTATIVE CLASS**

## i. Introduction

Plaintiffs William M. Lonergan and Diane Whitney-Wallace ("Plaintiffs") hereby reply to the defendants' (the "Feoffees") Opposition to Plaintiffs' Motion for a Protective Order with Respect to Discovery from Absent Class Members of Putative Class. The Feoffees' primary argument — that this case is not a valid class action and, therefore, they are entitled to take the depositions of more than 130 non-parties — makes no sense. Indeed, if the Feoffees are right, and this is not a valid class action, then the Feoffees have absolutely no basis whatsoever for taking these depositions since the prospective deponents indisputably are not parties. Alternatively, if the Feoffees are wrong and this is a valid class action, then the Feoffees still cannot take the depositions because the absent class members still are not parties here. Either way, the Feoffees have failed to meet their burden of establishing that they seek information through these depositions that is relevant, requested in good faith, and not available from the representative parties. Therefore, as more fully set forth below, regardless whether this is a valid class action or not, the Feoffees have offered no good grounds to take these 130-plus depositions, and, thus, this Court should allow Plaintiffs' Motion for a Protective Order.

## ii. Argument

### I. WHETHER THIS IS A VALID CLASS ACTION OR NOT, THE PROSPECTIVE DEPONENTS ARE NOT PARTIES

The Feoffees allege that this case is not a class action, and alternatively, if it is a class action, it has not been certified.[1] Such decisions are not for the Feoffees to make but are within

[1] The Feoffees' own Opposition belies their allegation that this is not a valid class action. As the Feoffees describe in paragraph 5 of their Opposition, by stipulation the parties to this case agreed that the following two issues are relevant to the parties dispute over the Little Neck residents' rights to possession: (1) "were the Little Neck residents tenants at will as contended by the Defendants or did they hold possession by some other right[;]" and (2) "in the event the court determines the residents were tenants at will, whose tenancies have been terminated, is there some other basis for the tenants' continued possession of the lots on which their cottages are located[.]" Defendants Opposition ¶ 5. Thus, the parties have explicitly agreed

the sole province of this Court. Plaintiffs will move for class certification when it is appropriate. At present, no filing schedule or briefing schedule for certification has been set. Thus, the Court has not even considered class certification yet, and it is, therefore, premature for the Feoffees to raise this type of issue.

Regardless, if the Feoffees' proposition that this is not a class action were true, however, (which it is not) then the Feoffees are attempting to take the depositions of individuals who are not even parties in this matter. The Feoffees' alternative argument that, even if this is a class action, it has not been certified also does not amount to a basis for deposing the absent class members since courts prohibit discovery whether the class is certified or not. See, e.g., Baldwin & Flynn v. Nat'l Safety Assoc., 149 F.R.D. 598 (D. Cal. 1993). Either way, no relevant information concerning the claims of the named individuals could possibly be gleaned from these unnamed individuals. Moreover, the Feoffees' counterclaims against these unnamed individuals would also be defunct since they cannot bring counterclaims against individuals who are not parties to this lawsuit. See Mass. R. Civ. P. 13.

## II. THE FEOFFEES HAVE OFFERED NO VALID GROUNDS FOR DEPOSING THE ABSENT CLASS MEMBERS

Since the same standards govern the taking of depositions of absent class members whether the class action has been certified or not, as described in greater detail in Plaintiffs' Motion for Protective Order, the Feoffees have the burden of demonstrating that the information sought is relevant to the decision of common questions; that the discovery is requested in good faith and not unduly burdensome; and that the information is not available from the representative parties. See Aspinall v. Phillip Morris Co., Inc., 20 Mass. L. Rptr. 303, 2005 WL 3629358, *2 (Mass. Super. Ct., Nov. 22, 2005) (Lauriat, J.) (attached as Exhibit C to Plaintiffs'

through the stipulation that one of the chief prerequisites for a valid class action is present here, namely, that "there are questions of law or fact common to the class[.]" See Mass R. Civ. P. 23(a).

Motion for Protective Order). The Feoffees Opposition fails to satisfy any of these elements let alone all of them.

### A. The Feoffees Have Not Demonstrated That the Information Sought Is Relevant to Common Questions

The Feoffees' Opposition did nothing to dispel Plaintiffs' assertion in their Motion that the information sought is not relevant to the decision of common questions. Specifically, as the Feoffees conceded in their Opposition, they are using the depositions to question the absent class members about the value of their homes and about any individual promises and representations which the Feoffees made to them before they purchased their homes. See Defendants Opposition at ¶¶ 10-11. Such individualized issues by definition are in no material way relevant to the decision of common questions. Therefore, the Feoffees are unable to establish the first element and for this reason alone the Court should allow the Motion.

### B. The Feoffees Have Not Shown That the Discovery Requested Is Not in Bad Faith and Is Not Unduly Burdensome

Having already taken the depositions of seventy (70) of the roughly two hundred (200) absent class members, the Feoffees have indisputably had ample opportunity to garner whatever information they needed concerning the common questions in this case. The Feoffees have offered no valid reason for taking another 130 depositions, and that is because no valid reason exists. Such further depositions are plainly cumulative and are designed solely to burden and harass the Little Neck residents who stand to benefit from this litigation. The bitter irony of this litigation is that the Feoffees are paying for it with the *Plaintiffs'* rent money – money that otherwise would be going to the Little Neck Public Schools. The Feoffees' litigation strategy is apparently to spend Plaintiffs into submission by taking every absent class members' deposition. It is this type of tactic that prompted the Court in Aspinall to observe that "treating absent class

members as 'parties' for the purposes of discovery would undermine one of the fundamental purposes of the rule allowing certification of the class." Aspinall, 20 Mass. L. Rptr. at * 2. Trying to take the deposition of every single absent class member in a class action – thereby forcing each member to expend personal time and money – is the very embodiment of unduly burdensome discovery, and, therefore, such discovery clearly is not sought in good faith.

### C. The Feoffees Have Not Shown That the Information Sought From the Absent Class Members Is Relevant and Is Not Available From the Representative Parties

In attempting to argue that the information they seek in these 130 depositions is relevant and not otherwise available, the Feoffees make two separate arguments. Each is without merit.

First, the Feoffees cite paragraph 4 of the Complaint concerning the allegation of certain promises and representations made by the Feoffees to Plaintiffs during the purchase of their cottages. Paragraph 4 is part of the introduction to the Complaint, however, and Plaintiffs have nowhere advanced a claim for misrepresentation concerning those particular pre-purchase promises and representations. Accordingly, questioning 200-some absent class members about the statements made to them by the Feoffees prior to the purchase of their homes is completely irrelevant to this litigation.

Second, the Feoffees' claim that each tenant has a different damages claim about which they must be deposed. On the contrary, the Complaint alleges an aggregate damages amount based on a property assessment for the fair market value of the properties. As the courts have repeatedly held, the aggregate computation of class damages is proper. See Aspinall, 20 Mass. L. Rptr. at *4 ("[a]s the plaintiffs claim only economic, not personal injury, absent class member discovery regarding injury is irrelevant"). Accordingly, depositions of absent class members to parse out each class member's individual damages is improper. See id. Here, as in Aspinall,

"[a]ll class members have been similarly injured and are, thus, similarly situated." Id. at *5 (citation omitted). Therefore, the information the Feoffees need concerning damages is obtainable from the representative plaintiffs.

### iii. Conclusion

For the foregoing reasons, as well as those described in Plaintiffs' Motion for Protective Order, Plaintiffs respectfully request that the Court allow their motion in its entirety and bar Defendants from taking further discovery of absent class members of the uncertified class in this case.

Respectfully submitted,

WILLIAM M. LONERGAN and
DIANE WHITNEY-WALLACE

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June 19, 2008

CERTIFICATE OF SERVICE
I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by (hand) (mail) on 6-19-08