

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

WILLIAM ANTHONY HILL,)
ELIZEBETH A. WORTHMAN, and)
GOLDA BAILEY,)
On Behalf of Themselves and Others)
Similarly Situated,)

Plaintiff,)

v.)

MERRILL GARDENS LLC,)

Defendant.)

CASE NO.: 1:04-cv-248

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into between Plaintiff William Anthony Hill (“Plaintiff Hill”) and Golda Bailey (“Plaintiff Bailey”), on behalf of themselves and the Settlement Class, as defined below, and Merrill Gardens LLC (“Merrill Gardens”), to fully and finally settle all of the claims that have been or could have been brought relating to the above-referenced litigation and applications for employment by African-Americans or other minorities at Merrill Gardens.

I. Definitions.

As used throughout this Settlement Agreement, in addition to any definitions elsewhere in the Settlement Agreement, the following terms shall have the meanings set forth below:

A. The “Applicable Period” shall mean the period of February 17, 1998 to April 18, 2005.

B. “Georgetowne Place” means the retirement community located at 1717 Maplecrest Road, Fort Wayne, Indiana, and owned by Merrill Gardens since February 17, 1998.

C. “Plaintiff Hill” means William Anthony Hill.

D. “Plaintiff Bailey” means Golda Bailey.

E. “Parties” mean, collectively, Plaintiff Hill, Class Members, and Merrill Gardens.

F. “Merrill Gardens” means Merrill Gardens LLC and its past, present, and future parents, subsidiaries, affiliated companies, affiliates, predecessors, successors in interest and assigns, and each of its past, present, and future officers, directors, employees, attorneys, and representatives, and any of them, including any person or entity acting on behalf or at the direction of any of them.

G. The “Hill Action” shall mean and include the above-captioned lawsuit and all claims that were brought or that could have been brought by Plaintiff Hill or any Settlement Class Member in that action, or in or before any administrative agency, or in any other action or proceeding (except the “EEOC Action,” defined below), whether brought in an individual or representative capacity regarding applications of employment at Georgetowne Place, located at 1717 Maplecrest Road, Fort Wayne, Indiana, and owned by Merrill Gardens (“Georgetowne Place”) during the Application Period.

H. The “EEOC Action” shall mean the action brought against Merrill Gardens by the Equal Employment Opportunity Commission (“EEOC”) on January 4, 2005, in the United States District Court for the Northern District of Indiana, Fort Wayne Division, as Case No. 1:05-CV-004, and all claims that were brought or that could have been brought in that action, or before any administrative agency, or in any action or proceeding regarding applications for employment at Georgetowne Place during the Applicable Period.

I. The “Litigation” refers to the Hill Action and the EEOC Action collectively.

J. “Settlement Class” or “Class Member” shall mean and include all persons within the description of the Settlement Class quoted below in Section II.E.

K. “Class Counsel” shall mean and include John T. Menzie and/or Shane C. Mulholland of the law firm of Burt, Blee, Dixon, Sutton & Bloom, LLP.

L. “Effective Date” shall mean and include the day on which the Order Granting Final Approval to Class Action Settlement, Entry of Final Judgment, and Entry of Consent Decree (“Final Order”) described in Section III.H below becomes final. For purposes of this Settlement Agreement, the Final Order shall be deemed to become final on the later of (a) the day following the date on which the Final Order is no longer subject to review by appeal if no notice of appeal, motion to correct errors, or similar motion or notice is filed; or (b) if any such notices or motions are filed, on the day following the date on which the Final Order is not subject to further judicial review or appeal, either by reason of affirmance by a court of last resort or by lapse of time or otherwise.

M. “Release” means the Appendix to the Notice of Class Action, Proposed Settlement, Proposed Consent Decree, and Fairness Hearing, which is attached as Exhibit A-1.

II. BACKGROUND FACTS.

A. On behalf of himself and others allegedly similarly situated, Plaintiff Hill claims in the Hill Action that applicants were denied employment at the Georgetowne Place community and that the denials of employment were on the basis of race/color, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and § 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981.

B. The EEOC has claimed in the EEOC Action that Merrill Gardens had a pattern or practice of refusing to hire non-Caucasians because of their race and/or color, in violation of § 703(a) of Title VII, 42 U.S.C. § 2000e-(2)(a); alleged that Merrill Gardens failed, in violation

of § 709(c), 42 U.S.C. § 2000e-(8)(c), to make and preserve records relevant to the determination of whether unlawful employment practices have been or are being committed; and sought appropriate relief for Caroline Aduro, Samantha Bolden, Jaela Brownlee, Debra Edwards, William Anthony Hill, Elizebeth Worthman, and a class of non-Caucasian individuals who were adversely affected by the alleged unlawful employment practices. Each of these individuals is a part of the proposed class in the Hill Action.

C. Merrill Gardens denies that Plaintiff Hill, Plaintiff Bailey, or any Class Member would have been hired at Georgetowne Place but for his/her race and/or color and that any claim is or would be timely and therefore denies liability to Plaintiff Hill, Plaintiff Bailey, or the Settlement Class for any claims, causes of action, costs, expenses, attorneys' fees, or damages of any kind.

D. The Parties and the EEOC have engaged in substantial investigation to evaluate the merits of the claims of Plaintiff Hill, Plaintiff Bailey, and the Settlement Class and Merrill Gardens' defenses thereto, including, but not limited to, defenses of causation and limitations periods. The Parties have obtained substantial information and have thoroughly analyzed the factual and legal issues surrounding Plaintiff Hill's and Plaintiff Bailey's claims and Merrill Gardens' defenses.

E. The Parties seek certification of a class pursuant to Fed. R. Civ. P. 23 defined as follows:

All African Americans and other minorities who: (1) submitted applications for employment at Georgetowne Place, located at 1717 Maplecrest Road, Fort Wayne, Indiana, operated by Merrill Gardens LLC; (2) between February 17, 1998 and April 18, 2005; (3) for vacant positions; (4) and who were denied employment in such vacant position; (5) where the positions were or may have been given to non-minority candidates.

The parties identify and seek approval of two subclasses:

The “Known Class”: Class Members Caroline Aduro, Samantha Bolden, Jaela Brownlee, Debra Edwards, William Anthony Hill, and Elizebeth Worthman (“Known Class Members”), each of whom participated in the Hill Action and/or the EEOC Action on and/or prior to April 18, 2005. Members of the Known Class are identified as “Known Class Members.”

The “Unknown Class”: Class Members, including Golda Bailey, who are not specifically identified as Known Class Members. These individuals did not actively participate in the Hill Action and/or EEOC Action on or prior to April 18, 2005. Members of the Unknown Class are identified as “Unknown Class Members.”

F. The Court gave preliminary approval to Plaintiff Hill as Class Representative. The Court gave preliminary approval to Class Counsel John T. Menzie and/or Shane C. Mulholland of the law firm Burt, Blee, Dixon, Sutton & Bloom, LLP.

G. Plaintiff Hill, Plaintiff Bailey, and their counsel have concluded that, in light of the costs, risks, and delays inherent in litigation, it is in the best interest of Plaintiff Hill, Plaintiff Bailey, and the Settlement Class to enter into this Settlement to assure a benefit to the Settlement Class and to resolve their individual claims. Class Counsel has determined that the terms of the class action settlement in this case are fair, reasonable, adequate, and in the best interest of Plaintiff Hill, Plaintiff Bailey, and the members of the Settlement Class.

H. Merrill Gardens has concluded that, in order to avoid the costs and risks of ongoing litigation but without admitting the liability asserted by Plaintiff Hill, Plaintiff Bailey, and Class Counsel, a settlement of the claims of Plaintiff Hill, Plaintiff Bailey, and the Settlement Class in this case is appropriate. In this connection, Merrill Gardens agrees that the terms of the class action settlement in this case are fair, reasonable, and adequate.

I. The Parties desire to fully settle and compromise the Hill Action and all related claims that were and/or could have been brought in it.

J. The Parties desire and intend to seek Court approval of this Settlement Agreement, and the Parties intend to seek a Final Order from the Court dismissing with prejudice

all claims of Plaintiff Hill, Plaintiff Bailey, and all members of the Settlement Class made in this Litigation as covered by the Release in Section III.K and in the attached Release. The Parties agree that this Settlement Agreement is final and enforceable only upon Court approval and is contingent upon approval of the Consent Decree in the EEOC Action.

III. AGREEMENT.

In consideration of the agreements, promises, and mutual covenants set forth in this Settlement Agreement, the Release, the entry by the Court of a Final Order dismissing the Hill Action with prejudice and approving the terms and conditions of this Settlement Agreement, and for such other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the Parties agree that this action shall be settled and compromised under the conditions and terms set forth below. The Parties agree that this Settlement is contingent upon the approval of the proposed Consent Decree in the EEOC Action and that the monetary relief itemized in the proposed and contemporaneously negotiated Consent Decree is identical, and not in addition to, the consideration under this Settlement Agreement.

A. Agreement on The Settlement Class.

1. For settlement purposes only, the Parties agree that the Settlement Class identified above in Section II.E should be certified as an “opt-out” class under Fed. R. Civ. P. 23 (b)(2), (b)(3), and (c)(2).

2. Persons who timely submit requests for exclusion (“opt out”) after notice of the conditional class certification order and preliminary approval by the Court will not be entitled to participate in the Settlement Class or to receive the financial consideration described in this Settlement Agreement or the Consent Decree.

3. Persons who do not opt out of the Settlement Class but who do not timely return executed Releases at least seven (7) days before the Fairness Hearing will be a part of the

Settlement Class but will not be entitled to receive financial consideration described in the Settlement Agreement. The only exception to this deadline for submission of executed Releases will be for those individuals who timely submit objections to the EEOC's preliminary determination that such individuals are not in the Class. If such individuals are determined to be in the Class, their executed Releases are due at the Fairness Hearing. Amounts assigned to Class Members (who do not opt out and who do not timely execute Releases) pursuant to Sections III.B and III.C will be distributed pursuant to this Settlement Agreement and the Consent Decree.

B. Financial Consideration To The Known Class.

1. As consideration for this Settlement Agreement and proposed Consent Decree in the EEOC Action, assuming that each identified individual meets the eligibility requirements set forth in the Settlement Agreement and Consent Decree, Merrill Gardens will, within twenty (20) days after the Effective Date of the Final Order pay the amounts to Class Members which are set forth below:

- a. Merrill Gardens shall pay \$10,000, minus applicable taxes and withholdings, for alleged back pay to each of the Known Class Members, as defined herein and if eligible, or to their heirs or assigns in the event of an individual's death.
- b. Merrill Gardens shall pay \$50,000 for alleged compensatory damages (other than for wages) to Caroline Aduro, Samantha Bolden, Jaela Brownlee, Debra Edwards, and William Hill, if eligible. Merrill Gardens shall pay \$14,000 for alleged compensatory damages (other than for wages) to Elizebeth Worthman.

2. Class Counsel, independently or with or through the EEOC, within seven (7) days of the Final Fairness Hearing, will notify the Court and counsel for Merrill Gardens which Known Class Members did not opt out of the Settlement and who timely submitted executed Releases and completed IRS W-4 forms, and are therefore eligible for payment under the Settlement Agreement and Consent Decree, and will cause copies of such documents to be

forwarded to counsel for Merrill Gardens. Within twenty (20) days after the Effective Date, Merrill Gardens shall mail appropriate payments for eligible Known Class Members via certified mail, payable to eligible Known Class Members, or to any appropriate heir or assign in the event of a Known Class Member's death. Absent alternate acceptable instruction, checks will be sent to the following addresses:

Caroline Aduro
3410 Hawkechee Drive
Fort Wayne IN 46815

Samantha Bolden
c/o John T. Menzie/Shane C. Mulholland [or as otherwise timely updated]
Burt, Blee, Dixon, Sutton & Bloom, LLP
Suite 1000
200 East Main Street
Fort Wayne, IN 46802

Jaela Brownlee
6226 Mayfair Road
Fort Wayne IN 46818

Debra Edwards
5405 Scepter Court
Fort Wayne IN 46835

William Hill
c/o John T. Menzie/Shane C. Mulholland
Burt, Blee, Dixon, Sutton & Bloom, LLP
Suite 1000
200 East Main Street
Fort Wayne, IN 46802

Elizebeth Worthman
c/o John T. Menzie/Shane C. Mulholland
Burt, Blee, Dixon, Sutton & Bloom, LLP
Suite 1000
200 East Main Street
Fort Wayne, IN 46802

Merrill Gardens shall prepare the checks in amounts determined under Paragraph III.B above. Applicable taxes and withholdings shall be subtracted from the back pay amounts under

Paragraph III.B.1.a pursuant to the IRS Forms W-4 completed and tendered to Merrill Gardens. If a Known Class Member fails to submit a completed IRS Form W-4 with his/her executed Release, then Merrill Gardens will make the maximum withholdings as set forth by law. Merrill Gardens will not deduct from any amount the employer's share of any costs, taxes, or social security required by law to be paid by Merrill Gardens. Further, Merrill Gardens will not withhold any amounts from the payments under Section III.B.1.b above. Merrill Gardens offers no tax advice or opinion regarding the tax consequences of the payments under Section III.B.1 to any Class Member.

Merrill Gardens shall promptly mail a copy of the checks and proof of their delivery (signed certified mail receipts) to Class Counsel. Class Counsel, on their own or with or through the EEOC, shall promptly provide Merrill Gardens with original Releases executed by Class Members.

If a Known Class Member does not return an executed Release, the Known Class Member will be ineligible for any payment under this Settlement Agreement and the Consent Decree, and any funds that claimant would have received shall be split equally among the remaining Known Class Members under this Settlement Agreement and the Consent Decree.

C. Financial Consideration To The Unknown Class.

1. Merrill Gardens will pay an additional amount of up to \$325,000 to approved Unknown Class Members, as defined above, who have executed and timely submitted Releases. Merrill Gardens will pay up to \$54,166.67 to each approved, eligible Unknown Class Member, if no more than six Unknown Class Members come forward and meet all eligibility requirements (*i.e.*, Merrill Gardens will pay \$54,166.67 for each Unknown Class Member, \$108,333.33 for two Unknown Class Members, etc. up to a cap of \$325,000). If more than six Unknown Class Members meet the eligibility requirements for payment and are approved by the Court, the

\$325,000 will be divided equally among those Unknown Class Members who satisfy eligibility requirements.

2. If the number of eligible Unknown Class Members allows payments of at least \$10,000 to each eligible Unknown Class Member pursuant to Section 403 above, \$10,000 will be identified as claimed loss wages (back pay). The remainder will be treated as payment for potential compensatory damages (other than back pay).

3. If the number of eligible Unknown Class Members allows for payments to eligible Unknown Class Members in any amount less than \$10,000, such amount will be treated as claimed loss wages (back pay).

4. Unknown Class Members will be notified as set forth in Section I.B and Exhibits C, D-1, and D-2 of the Preliminary Approval Order.

5. If any individual contacts legal counsel for or a manager of Georgetowne Place in response to a notice in the media or based upon some other source, Merrill Gardens will provide the EEOC with contact information as soon as possible and by no later than seven days after receiving the information.

6. The Parties agree that the EEOC shall make a preliminary determination as to which individuals meet the definition of Class Members under the Settlement Agreement and Consent Decree (under which the definitions are identical) and shall ensure that each such preliminarily identified Class Member receives a copy of the Notice that is attached hereto as Appendix A. The EEOC has the resources and expertise to address such matter. Class Counsel, either themselves or with or through the EEOC, shall notify Merrill Gardens of each person recommended by Class Counsel and/or the EEOC to be Class Members and each person who has been issued the Notices attached hereto as Exhibits A-1 and A-2.

7. If the EEOC determines that any individual who comes forward is not eligible to share in class relief, Class Counsel, either themselves or through the EEOC, shall so notify Merrill Gardens by no later than two weeks before the Fairness Hearing. Merrill Gardens may then, within seven (7) days of receiving notice, alert the EEOC in writing to any disagreement with the EEOC's determination. If the parties are unable to resolve the disagreement, Merrill Gardens may lodge an objection with the Court, which the Court will resolve at the Fairness Hearing addressed below.

8. Merrill Gardens will defer to the good faith recommendations of the EEOC and Class Counsel regarding whether individuals meet the definition of Class Members. The Court will, however, issue final approval of such recommendations.

9. Merrill Gardens shall provide appropriate IRS Forms W-4 to the EEOC for timely distribution to Class Members.

D. Opt-Outs.

The Notice of Class Action, Proposed Settlement, Proposed Consent Decree, and Fairness Hearing at Exhibits A-1 and A-2 shall be approved by the Court and shall thereafter be available to Class Members. Each Class Member shall have until ten (10) days before the Final Fairness Hearing to opt out as provided in this Settlement Agreement and the Notice attached hereto at Exhibits A-1 and A-2.

E. Release.

To be entitled to receive payment under this Settlement Agreement, a Class Member shall timely submit his or her executed Release.

F. Preliminary Approval And Notice Of Proposed Settlement.

Class Counsel shall present this Settlement Agreement to the Court along with a Motion for Preliminary Approval of Class Settlement and Approval of Notice to Class Members. In

addition, counsel for the Parties agree to take all appropriate steps to obtain an Order from the Court: (i) preliminarily approving this Settlement Agreement and finding that the Settlement is fair, reasonable and sufficient to allow notice to be disseminated to members of the Settlement Class; (ii) approving notice in the media to Class Members in the forms attached to the Preliminary Approval Order, (iii) approving Mailed Notice in the form attached as Exhibits A-1 and A-2 to be mailed by the EEOC to those who identify themselves as potential class members, (iv) directing that the notice to Class Members be disseminated and published pursuant to the terms of this Settlement Agreement and the Preliminary Order; and (v) scheduling a hearing on final approval of the proposed Settlement (“Fairness Hearing”).

G. Exclusions And Objections.

1. Subject to Court approval, any Class Member may present written objections as to (a) why this Settlement Agreement should not be approved as fair, reasonable, and adequate, (b) why attorneys’ fees and expenses to Class Counsel should not be awarded in the amounts requested, and/or (c) why Class Representative’s or Class Counsel’s appointment should not be finally approved. All objections must (1) be in writing, (2) include the objector’s full name, address and telephone number and, if applicable, the name, address and telephone number of the Class Member’s independently retained attorney, (3) state with specificity the basis for the objection, (4) include any supporting papers, materials, or briefs, and (5) be accompanied by a Notice of Intent to Appear at the Final Approval Hearing if the objector desires to appear personally or by counsel. Such written objections must be filed with the Court and mailed to and received by Class Counsel by no later than seven (7) days before the Fairness Hearing. Class Counsel will immediately provide such objections to counsel for Merrill Gardens.

2. Any Class Member who has filed a written objection may appear at the Final Fairness Hearing and show cause why the Settlement Agreement should not be approved as fair,

reasonable, and adequate. Any Class Member who does not file and serve written objections to the Settlement and notice of his or her intent to appear at the Fairness Hearing in the manner and within the time set forth above shall not be permitted to object to the Settlement at the Fairness Hearing, and shall be barred from seeking review of the Settlement by appeal or otherwise.

H. Final Order and Judgment.

1. At least three (3) business days before the Final Fairness Hearing, Class Counsel shall provide to the Court and to Merrill Gardens a complete proposed accounting of the distributions of the total amount Merrill Gardens has agreed to pay.

2. The Settlement Agreement is subject to and conditional upon the issuance by the Court, following the Final Fairness Hearing, of a Final Order granting final approval to the Settlement Agreement in accordance with Rule 23(e) of the Federal Rules of Civil Procedure. A copy of that Final Order will be provided to each Class Member who has executed a Release, together with the check to be paid to each such Class Member.

3. Subsequent to the Final Fairness Hearing and upon the Court's approval of this Settlement Agreement and Consent Decree, the parties contemplate that a Final Order will be entered by the trial court, essentially in the form attached hereto as Exhibit A-3. The parties understand that the Court retains the right and ability to enter the Order it deems appropriate. However, the Parties agree that they will submit to the Court for entry an Order Granting Final Approval to Class Action Settlement and Entry of Final Judgment essentially in the form attached hereto as Exhibit A-3.

I. Events To Nullify Agreement.

This Settlement Agreement shall be null and void and shall have no further force and effect with respect to any party in this action in the event that (i) the preliminary or final approval of the Settlement described in this Settlement Agreement is not obtained or is reversed on

appeal; (ii) the Effective Date as described in Section I.K above does not occur for any reason; (iii) entry of the Final Order and Judgment described in Section III.H above is finally reversed; (iv) the Final Order and Judgment is substantially modified by the Court or on appeal, and either Merrill Gardens or Plaintiff Hill does not agree with such modification; and/or (v) the Court does not approve the proposed Consent Decree in the EEOC Action. In such event, this Settlement Agreement shall not be offered in evidence or used in this or any other action for any purpose including, but not limited to, the existence, certification or maintenance of any purported class. In the event of nullification of this Settlement Agreement for the reasons set forth in this paragraph, all negotiations, proceedings, documents and statements made in connection with this Settlement Agreement shall be without prejudice to any party and shall not be admissible into evidence, and shall not be deemed or construed to be an admission or confession by any party of any fact, matter or proposition of law, and shall not be used in any manner for any purpose, and all Parties to this action shall stand in the same position as if this Settlement Agreement had not been negotiated, made or filed with the Court.

J. Cooperation For Implementation.

Plaintiff Hill, Plaintiff Bailey, and Merrill Gardens, individually and collectively, together with their respective counsel, agree to take all actions necessary to obtain preliminary approval of this Settlement Agreement and its plan for notice, final approval of this Settlement Agreement, and entry of the Final Order and Judgment dismissing this action with prejudice as to Plaintiff Hill and all Class Members. Plaintiff Hill, Plaintiff Bailey, and Merrill Gardens also agree to take all actions necessary to obtain dismissal of the Hill Action, all pending lawsuits (except for the EEOC Action), and all other subsequent lawsuits that may be filed by any non opting out Class Member between the time that this Settlement Agreement is executed and the

Effective Date, relating to the subject matter of the Hill Action against Merrill Gardens, either individually or collectively, for claims covered by the Release.

K. Release And Dismissal Of Claims; Covenant Not To Pursue Related Claims.

1. Plaintiff Hill, Plaintiff Bailey, and each Class Member (who has not opted out) agree to the form and substance of the Release that is appended to the attached Notice at Exhibits A-1 and A-2

2. Upon the Effective Date, Plaintiff Hill and Plaintiff Bailey shall have, and each Class Member and the Settlement Class shall be deemed to have, covenanted and agreed that he or she shall not, at any time, institute, cause to be instituted, assist in instituting or permit to be instituted on his or her behalf any proceeding in any state or federal court, in or before any administrative agency, or any other proceeding or otherwise allege or assert any of the claims released against the Released Parties, individually or collectively, as described in the Release.

3. Plaintiff Hill and Plaintiff Bailey agree, and each Class Member shall be deemed to have agreed, to the dismissal with prejudice of the Hill Action.

L. Payment to Class Representative of Unknown Class and Payment of Attorneys' Fees And Expenses.

Merrill Gardens agrees to pay to Plaintiff Bailey the gross amount of \$1,000, minus applicable deductions and withholdings, which one-time payment is in addition to the amount Plaintiff Bailey will be eligible to receive as a result of her membership in the Unknown Class and for her role as the Representative for the Unknown Class, which representation required her preparation for and participation in the final fairness hearing. Merrill Gardens also agrees to make a one-time payment of \$100,000 in attorney fees to Class Counsel. This fee will, in part, pay for any services rendered in the Litigation. Class Counsel, to avoid any apparent conflict of interest and as consideration for the agreed-upon fees to them, agrees to refrain from

representing any individual, directly or indirectly, in any action against Merrill Gardens in which any allegations are made regarding the Merrill Gardens' purported discriminatory failure to hire during the Application Period.

M. Final Report to the Court.

At the conclusion of delivery of consideration to all eligible Class Members, the Parties will jointly report to the Court that the Settlement has been effected and concluded.

N. Miscellaneous Provisions.

1. **Entire Agreement.** This Settlement Agreement and its attachments shall constitute the entire agreement of the Parties in the Hill Action and shall not be subject to any change, modification, amendment, or addition without the express written consent of counsel on behalf of all Parties to the Settlement Agreement and shall be binding and inure to the benefit of the Parties hereof and their representative heirs, successors, and assigns, except that it should be viewed in conjunction with the proposed Consent Decree in the EEOC Action and the Preliminary Approval Order in both the Hill Action and the EEOC Action.

2. **Illegality Or Unenforceability Of Provisions.** In the event that any provision of this Settlement Agreement shall for any reason be held, in whole or in part, to be invalid, illegal, or unenforceable in any respect, then the Settlement Agreement will be null and void unless Merrill Gardens, the Class Representative, and Class Counsel agree in writing to proceed as if such invalid, illegal, or unenforceable provision had never been included in this Settlement Agreement. If this Settlement Agreement is terminated for any reason prior to issuance by the Court of a Final Order approving the Settlement, or if the Settlement contemplated by this Settlement Agreement is not concluded substantially as described in this Settlement Agreement with an Order of the Court approving the settlement that becomes final after all appeals, then the Settlement Agreement and all other acts taken to effect a settlement shall be void and of no effect

and shall not be admissible by or against any Party to this Agreement. The Parties to this Settlement Agreement shall use their best efforts to obtain approval of this Settlement Agreement by the Court.

3. **Agreement Mutually Prepared.** This Settlement Agreement shall be deemed to have been mutually prepared by the Parties and shall not be construed against any of them by reason of authorship.

4. **Independent Investigation And Decision.** The Parties hereto understand, acknowledge and agree that they (i) have each performed an independent investigation of the allegations of fact and law made in connection with this action; and (ii) that they each may hereafter discover facts in addition to, or different from, those that they now know or believe to be true with respect to the subject matter of this Settlement Agreement. Nevertheless, it is the Parties' intention to resolve their disputes pursuant to the terms of this Settlement Agreement. In furtherance of their stated intentions, the Settlement Agreement shall remain in full force and effect notwithstanding the discovery of any additional facts or law, or changes in law, and this Settlement Agreement shall not be subject to rescission or modification by reason of any change or difference in facts or law.

5. **Authority To Enter Into Agreement.** The Parties hereby warrant and represent that the persons signing this Settlement Agreement shall have full power and/or authority to bind to all terms of this Settlement Agreement of Class Action Settlement every person included within the definitions of the Settlement Class and Merrill Gardens as set forth in Section II.E above.

6. **No Promise Or Inducement For Release.** The Parties hereto warrant and represent that no promise or inducement has been offered or made for the release in Section

III.E, and in the attached Release except as herein or therein set forth, that this Settlement Agreement is executed without reliance on any statements or any representations not contained herein, and this Settlement Agreement and the attached Release reflect the entire agreement among the Parties with respect to the terms of the release. The warranties and representations made herein shall survive the execution and delivering of this Settlement Agreement and shall be binding upon the respective heirs, representatives, successors and assigns of each of the Parties.

7. **Binding Agreement.** Plaintiff Hill, Plaintiff Bailey, and Merrill Gardens, individually and collectively, expressly agree that the terms of this Settlement Agreement and all provisions hereof, including all representations, promises, agreements, covenants, and warranties, are contractual and not a mere recital and shall survive the execution of this Settlement Agreement and entry of the Final Order and Judgment and shall continue in full force and effect thereunder.

8. **Receipt Of Advice Of Counsel.** The Parties acknowledge, agree and specifically warrant to each other that they have fully read this Settlement Agreement and the accompanying Release, received independent legal advice with respect to the advisability of entering into this Settlement Agreement concerning the legal effect of this Settlement Agreement, and fully understand this Settlement Agreement and its effect.

9. **Extensions Of Time.** The Parties may agree, subject to approval of the Court when required, to reasonable extensions of time to carry out the provisions of this Settlement Agreement.

10. **Execution Of Agreement In Counterparts.** This Settlement Agreement may be executed in counterparts by the Parties, and a facsimile signature shall be deemed an original signature for purposes of this Settlement Agreement.

11. **Retention Of Jurisdiction.** The Court shall retain continuing and exclusive jurisdiction over the Parties hereto for the purpose of enforcing, implementing, and interpreting this Settlement Agreement, including jurisdiction over all Class Members, and over the administration and enforcement of the Settlement and the distribution of benefits to Class Members. Any disputes or controversies arising out of or related to the interpretation, enforcement, or implementation of the Settlement shall be made by motion to the Court.

12. **Controlling Law.** For all issues of procedure relating to this Settlement or this Settlement Agreement, the laws of the State of Indiana shall apply.

Dated

By _____
William Anthony Hill
Class Representative

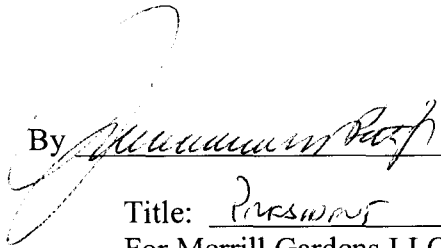
Dated

By _____
Golda Bailey
Class Representative

Dated

By _____
John T. Menzie
Shane C. Mulholland
BURT, BLEE, DIXON, SUTTON
& BLOOM LLP
Suite 1000
200 East Main Street
Fort Wayne, Indiana 46802

October 7, 2005
Dated

By  _____
Title: President
For Merrill Gardens LLC

8. **Receipt Of Advice Of Counsel.** The Parties acknowledge, agree and specifically warrant to each other that they have fully read this Settlement Agreement and the accompanying Release, received independent legal advice with respect to the advisability of entering into this Settlement Agreement concerning the legal effect of this Settlement Agreement, and fully understand this Settlement Agreement and its effect.

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William A. Hill
10-11-05
Dated

By

William Anthony Hill
Class Representative

Golda Bailey
10/13/09
Dated

By

Golda Bailey
Class Representative

J T Menzie
10-11-09
Dated

By

John T. Menzie
Shane C. Mulholland
BURT, BLEE, DIXON, SUTTON
& BLOOM LLP
Suite 1000
200 East Main Street
Fort Wayne, Indiana 46802

Dated

By

Title:
For Merrill Gardens LLC