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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

SUZANNE GOLDBERG, et al.,	)	
	)	
Plaintiffs	)	
	)	
vs.	)	Case No. 2:10-cv-02990-HGD
	)	
CLAYTON COLLEGE OF NATURAL HEALTH, INC., et al.,	)	
	)	
Defendants	)	

FINAL ORDER

The above-entitled civil action is before the court on the Motion for Final Approval of Class Action Settlement and for Approval of Fees and Costs filed by plaintiffs Suzanne Goldberg and Juli Madacey. (Doc. 57). The parties have consented to the jurisdiction of the undersigned magistrate judge pursuant to 28 U.S.C. § 636(c), Fed.R.Civ.P. 73 and LR 73.2.

Pursuant to the November 15, 2011, Preliminary Approval Order conditionally approving of the settlement of this class action, the Court set a hearing for February 15, 2012, at 10:00 a.m. to consider among other things: (a) whether the proposed settlement of this action was fair, reasonable and adequate, was consistent

with the Constitution of the United States and should be approved by this Court; (b) whether the notice provided to the class met the requirements of Federal Rule of Civil Procedure 23(b)(3) and the Constitution of the United States; (c) whether this Court should enter a final judgment approving the settlement, dismissing the action and enjoining and prohibiting the filing of further litigation with respect to, or based upon, the claims released in the Settlement Agreement; and (d) whether this Court should approve the fees and costs sought by Class Counsel. After individual notice to the Settlement Class Members, and an opportunity to submit objections, argument, and evidence in support of or in opposition to the proposed settlement, the Court held a Final Fairness Hearing in open court on February 15, 2012, at 10:00 a.m.

The Court, at the Final Fairness Hearing, heard argument and received evidence and made its own determinations regarding the credibility of such evidence. Furthermore, the Court has reviewed carefully the Settlement Agreement, and the parties' motions, briefs, and evidence in support of Final Approval. Having fully considered all of the evidence, the Settlement Agreement, the legal standards under which this Court must evaluate the proposed settlement, the pleadings and earlier filings in this case, and the arguments and briefs submitted by the parties, the Court makes the following findings.

I. PROCEDURAL HISTORY AND FINDINGS OF FACT.

On November 5, 2010, plaintiffs Suzanne Goldberg, Juli Madacey, Michelle Reeves and Krista Walsh filed their individual and class action complaint alleging that defendants William Fishburne, Kay Channell, Lloyd Clayton, Jeff Goin, Clayton College of Natural Health, Inc. (CCNH) and Magnolia Corporate Services, Inc. (Magnolia), were liable to them for breach of fiduciary duty, conversion, bailment, negligence, fraudulent concealment and omission, promissory estoppel, unjust enrichment/breach of quasi-contract, equitable estoppel and breach of contract, in connection with the sudden closing of CCNH in July 2010 and termination of CCNH's distance learning program.

On February 11, 2011, defendants Channell, Clayton, Fishburne and Goin filed a motion to dismiss plaintiffs' claims of breach of fiduciary duty, negligence, fraudulent concealment and omission, promissory estoppel, conversion, bailment and unjust enrichment/breach of quasi-contract. (Doc. 8). Plaintiffs also filed a motion to amend the complaint and a motion for class action certification. (Docs. 34 & 36). Before a ruling on the motion to dismiss, the parties asked the court to stay discovery so that the case could be submitted to non-binding mediation. Plaintiffs' counsel, CCNH defendants' counsel, plaintiffs Suzanne Goldberg and Juli Madacey attended the mediation, along with defendants Lloyd Clayton, Jeff Goin,William Fishburne,

and Kay Channell, and two representatives of RSUI Indemnity Company (RSUI). After a 12-hour mediation with Rodney Max, the parties reached the settlement that was submitted for Court approval. As part of the mediation process, discovery was allowed regarding the assets of CCNH and Lloyd Clayton.

On November 4, 2011, plaintiffs submitted a motion for preliminary approval of a class action settlement and approval of class notice. (Doc. 41). The motion was not opposed by defendants. On November 15, 2011, the Court entered an Order certifying a Rule 23(b)(3) class action and defining the class as:

> All individuals who were enrolled in but had not graduated from Clayton College of Natural Health in a distance education program as of July 2010

(Doc. 46). Thomas H. Howlett and Dean M. Googasian were appointed as Class Counsel, Suzanne Goldberg and Juli Madacey were designated as Class Representatives, and Garden City Group, Inc. (GCG) was appointed as Claims Administrator. (*Id.*). On that date, the Court also preliminarily approved the settlement. (Doc. 47).

The terms of the settlement are contained in the parties' Settlement Agreement. (Doc. 42-1; Doc. 58-3). The settlement provides a means for a Settlement Class of approximately 14,000 persons who were enrolled in but had not graduated or withdrawn from CCNH in a distance education program as of July 2010 to make a

claim for benefits. The settlement creates a $2.31 million Settlement Fund, along with the opportunity for tuition discounts ranging from $900 to $4500, exclusive of books, at other natural health programs, Global College of Natural Medicine (GCNM) and Natural Healing Institute of Naturopathy, Inc. (NHI)[1] The Settlement Fund consists of $2.3 million from a Directors and Officers Liability Policy issued by RSUI[2] and $10,000 from defendant Lloyd Clayton.

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[1] Specifically, the settlement provides tuition discounts at Global College of Natural Medicine (GCNM) for all class members who submit valid claims before the deadline. Class members who submit valid claims will be entitled to receive discounts of more than 40% off certificate, diploma, bachelor's, master's and Ph.D. programs in holistic health. In addition, class members enrolling in degree programs at GCNM will be eligible for credit transfer consideration for courses completed at Clayton College with additional tuition reductions possible. These tuition discounts and credit transfer opportunities will be available to class members at GCNM through December 31, 2012.

The settlement also provides tuition discounts at Natural Healing Institute of Naturopathy, Inc. (NHI) for all class members who submit valid claims before the deadline. Class members who submit valid claims will be entitled to enroll in certificate and practitioner programs at tuition rates that are approximately 50-75% lower than the fee schedule for other students. Class members will also be eligible for transfer credit consideration for courses completed at Clayton College. These tuition discounts and credit transfer opportunities will be available to class members at NHI through December 31, 2012.

The aggregate additional benefits available to the more than 5000 claimants is represented to range from more than $4.5 million to more than $22.5 million in tuition savings, depending on the number of claimants who elect to take advantage of the discounts and the specific programs in which they elect to enroll. *See* Doc. 58, Plaintiffs' Brief in Support of Motion for Final Approval, at 13-14).

[2] The insurance policy provides a maximum of $3.5 million in benefits, with defense costs and expenses included in the limits.

Pursuant to the settlement, no less than $1.33 million of the common fund is to be distributed equitably to persons submitting valid claims in accordance with a formula described in detail in a Court-approved Notice sent to class members.[3]

After preliminary approval of the settlement and proposed notice to Class Members, Class Counsel provided GCG with lists of names and current addresses of more than 700 persons who had identified themselves to the firm as former students who had been enrolled in CCNH programs at the time the school closed in Julky 2010. Class Counsel also made the Class Notice and Claim Form available to potential class members via an informational website. By December 30, 2011, GCG

[3] In brief, pursuant to the settlement, claimants are divided into three groups of students who were enrolled in but had not graduated or withdrawn from CCNH as of July 2010. The three claimant groups are referred to as Group A, Group B and Group C. Group A includes students who enrolled in a program at CCNH less than five years prior to the school's closure in light of CCNH's five-year time period for completion of self-paced programs. Group B includes students who enrolled in a program more than five years before the school closed and had not completed their program. Group C includes all students who completed the program in which they were enrolled during the teach-out offered by CCNH between the closure of the school in July 2010 and the end of January 2011. During the claim process, Group B claimants had an opportunity to be moved into Group A by demonstrating to the Claims Administrator: (1) submission of coursework within 12 months of the closure of the school; (2) submission of coursework between 12 and 36 months of the closure and good cause for not submitting coursework more recently; or (3) compelling circumstances for not submitting coursework within 36 months of the school's closure. All valid claimants in Group A and Group B will be entitled to a settlement payment from the common fund. Pursuant to the notice, each Group A claimant will be entitled to a pro rata share of 100 percent of the tuition paid by the claimant to CCNH in connection with enrollment in any program that the claimant did not complete; each Group B claimant will be entitled to a pro rata share of 25 percent of the tuition paid by the claimant to CCNH in connection with any program that the claimant did not complete. Members of Group A, Group B, and Group C all are entitled through the claim process to become eligible for tuition discounts at other natural health programs.

gave individual notice of the class action and the settlement to the approximately 14,000 class members. (Doc. 58-2, Decl. of Thomas Howlett).

The deadline for parties to opt-out or object to the settlement was January 31, 2012. As of January 31, 2012, eight persons have opted-out of this settlement, and eight objections to the settlement have been filed. (Docs. 48, 49, 50, 51, 52, 53, 54 & 56). Further, 5171 timely claims have been submitted to the Claims Administrator. A total of 52 untimely claims were received by GCG from February 1, 2012, through February 15, 2012, and 38 additional untimely claims were received by GCG from February 16, 2012, through April 16, 2012. (*See* Doc. 62). Plaintiffs suggested that the untimely claimants be included in the Class Settlement, and defendants do not oppose the inclusion of the untimely claimants in the Class Settlement. (*See* Doc. 64). Therefore, the Court APPROVES the inclusion of the 52 claims received by GCG from February 1, 2012, through February 15, 2012, and the 38 claims received by GCG from February 16, 2012, through April 16, 2012, in the Settlement Class.

On February 15, 2012, this Court conducted a Fairness Hearing. At the Hearing the Court heard oral testimony from Lisa Rogers and heard arguments from Class Counsel, defendants and defense counsel and counsel for RSUI regarding the propriety of the settlement. The hearing revealed the following facts.

CCNH began offering distance education programs about 1980. Its offices were in Birmingham, Alabama, the home of Lloyd Clayton. CCNH was never accredited by the State of Alabama; however, it had a license from the State of Alabama and offered courses not available in traditional colleges and universities. It offered courses initially through correspondence and later through the Internet, with self-paced distance education. Students could pay some or all of their tuition in advance, and CCNH offered a monthly payment plan. At its height, CCNH had about 100 employees. From 2008 to 2010, new enrollments dropped, the amount of tuition collected dropped, and the State of Alabama advised CCNH that its license would not be renewed in 2011 absent accreditation. The school began the accreditation process, but it was time-consuming and difficult. Ultimately, CCNH closed in July 2010. No tuition refund program was developed or announced, there was no place for students to complete their studies, and many students were unaware CCNH had closed because its programs were self-paced.

Jeff Goin, President and a past employee of CCNH, testified that CCNH closed because of the poor economy in 2007 and 2008 and decreasing new enrollments. In response to these problems, CCNH took professional action. Goin also testified that CCNH kept account of its enrollment and tuition and realized early that it was in financial trouble. To counteract the decreasing enrollment, it increased its marketing,

reviewed its retention policies to determine why students were dropping out and how to retain them, reduced staff salaries and implemented staff layoffs. In some cases, staff members continued working without pay. The last resort was closing the school, but only after two to three years of measures designed to keep the school open.

CCNH did have monetary reserves, and it drew on them. However, when the State of Alabama informed CCNH it would have to get accreditation in order to keep its license, this had a huge impact on CCNH and its cash reserves and revenues. CCNH gave a discount to students paying their whole tuition in advance. However, accreditation put limits on how long students had to complete their studies, so CCNH lost students who wanted more time to complete their degrees. Further, to get accreditation, CCNH no longer could require prepayment of tuition; the decrease in income meant that CCNH had to draw upon its reserves to remain open.

Lloyd Clayton also reduced his compensation in the last years that CCNH was open. Even if the other individual defendants did not agree with Clayton's salary, he was the founder and owner of CCNH, and they had no control over how much he paid himself. There was no evidence that the other individual defendants, besides Clayton, received unusually large salaries, and they worked for their salaries.

At the time CCNH closed, it took some steps to facilitate the process. The CCNH website and Alabama Department of Postsecondary Education website both

advised of the closing of CCNH and the option for its students to enter a teach out program. The deadline for the teach out program was extended. About 1400 students did complete the teach out program.[4] There was no residual fund when CCNH closed; there were some payments to staff and to the warehouse where CCNH documents were stored. These were kept as independent contractors to facilitate the transfer of students to other schools and so they could obtain copies of their transcripts and the curriculum. An e-mail was sent to every enrolled and active student to advise them of the teach out option, and the teach out option was funded by what little money CCNH had left.

CCNH also notified the bond company, Platte River Insurance Company, that kept a $50,000 bond required by Alabama statute, and offered to cooperate at the expense of defendants' firm to provide all information needed to enable payment of that bond to students. About 900 students have filed claims against the payment bond, but the proceeds have not yet been paid out. Instead, the bond company hired counsel to try to intervene in this action. When that was unsuccessful, the bond company filed a separate lawsuit. Lloyd Clayton agreed to and was required to indemnify the bond company. The separate action has been resolved and the bond

[4] A substantial part of the course materials for courses previously offered by CCNH are available electronically. With respect to the teach out program, a packet of the curriculum is available electronically to students who request it even though the degree is no longer available.

money will be paid to the Alabama Department of Postsecondary Education to pay the claimants (some of whom are also class members). *See Platte River Ins. Co. v. Clayton College of Natural Health, Inc., et al.*, Case No. 2:11-cv-02751-SLB (N.D.Ala.).

CCNH has been described as a good school. In fact, plaintiff Suzanne Goldberg testified positively and enthusiastically in her deposition, in response to a question about the quality of CCNH. She also stated she knew of nothing untrue that was told her by anyone at CCNH. Defendants' depositions included some CCNH employees who had been fired due to lack of money. All were complimentary about the organization of the school, the quality of the faculty, and the passion of the faculty and staff. There was no criticism of the operation of CCNH; they testified that CCNH provided a valuable service and alternate education at the students' own pace; and they testified that CCNH prepared its students to do a job they loved but training for which was not available elsewhere. There also was professional management of the transition from a paper curriculum to the Internet. The school provided catalogs and conferences to its students.

At the mediation, the parties tried to evaluate expenses and attorney fees. Defense counsel has incurred approximately $400,000 in fees and expenses. Further, RSUI did file a reservation of rights regarding the coverage issues but has agreed to

pay 74% of the insurance proceeds. Christian & Small was chosen to represent defendants based on the firm's reasonable hourly rate and demonstrated care not to duplicate time and effort.

CCNH produced a large volume of discovery, much of it in electronic format, as well as many paper documents that had to be reviewed by an independent contractor. There were no significant discovery disputes during the litigation, and all counsel cooperated as much as possible. Defendants took only one deposition, of class representative Suzanne Goldberg, and did not resist producing defendants' financial records. Defendants also did not resist mediation, in order to keep the attorneys fees paid by RSUI from the policy to a minimum. Defendants' counsel also has been in contact with the Alabama Attorney General and Alabama Department of Postsecondary Education from early on and done all possible to facilitate settlement and preserve funds. There is no current or contemplated criminal prosecution of any of the individual defendants.

When questioned how the sum of 74% of the insurance proceeds was decided upon, counsel for RSUI stated that it came about through arms' length negotiation. RSUI still contends that policy exclusions would apply. The Directors and Officers Liability Policy has cost depleting limits of $3.5 million, $400,000 of which already has been paid to defense counsel as of the mediation, leaving policy proceeds of $3.1

million. RSUI asserts that the essence of the case is a breach of contract claim, but such a claim is not within the policy's coverage. It also asserts that the pending motion to dismiss of the individual defendants as to the breach of fiduciary duty and other tort claims is well taken. The second relevant policy exclusion is that restitution or disgorgement of ill-gotten gains is not an insurable loss. Thus, if defendants got plaintiffs' money by fraud, entrustment or some other tortious conduct and were required to pay this money back to plaintiffs, this would be ill-gotten gains and not covered by the policy. Any fraudulent or criminal conduct also would be excluded from coverage. Therefore, even if defendants' motion to dismiss were denied, RSUI still would have a good defense to any claim for insurance proceeds.

Defendants also state that they had arguments against class certification but chose to allow certification to avoid litigating the issue all over the United States.

One of the objectors to the settlement, Lisa Rogers, testified at the fairness hearing. Ms. Rogers is a Group A Claimant who prepaid tuition of $8050 in 2009. She was strongly solicited to enroll by CCNH and was offered a $400 tuition discount. She paid in cash and did not have to borrow. She was aware of one student, Carli Astell, who has been reimbursed in full through a government student loan program (Sallie Mae); however, that is a different fund than the settlement fund. Ms. Rogers stated her belief that students who already have been reimbursed by the

government should be excluded from the class and further reimbursement. She testified that she will have to pay $6000 more to complete her degree, even after reimbursement of about $300 expected from the Settlement Fund.

Ms. Rogers seeks a reduction in attorneys fees, by both plaintiffs and defense counsel, and possibly some contribution of free legal service by defendant Fishburne, so students can also get books, for example. She suggests a 20-25% contingency fee and states her attorney in Peoria, Illinois, charges $125 or $175 per hour.

Ms. Rogers denied that CCNH cooperated all along and stated that she e-mailed and called her advisor, Tony Cox, but never heard back from anyone. She also suggested that defendant Clayton should put more into the settlement fund because he is not bankrupt and that RSUI should contribute more of the policy proceeds.

She also expressed her concern with the characterization of the school opportunities as an additional $4 million benefit to claimants. She called the two schools offering tuition discounts and course credit and said they are good, but it depends on how much a person wants to spend. The California education group which oversees those schools advised her that its approval of GCNM expired and no renewal is pending. Ms. Rogers averred that the other school, NHI, has not submitted

an application for approval, despite its prior approval expiring in June 2011; therefore, under California law, it is not approved to be offering courses.

In response to questioning by the court, it was represented by Class Counsel that the two schools offering tuition discounts and course credit to claimants are in business, and letters from the schools are in the court record. (*See* Docs. 58-6 and 58-7). Counsel suggested a possible disconnect between the schools and the regulatory accrediting entity. NHI has a physical campus in California. The claim form mailed to class members makes it clear that no one is making any representations about the suitability of the schools or their accreditation, and it is the students' responsibility to determine this for themselves.

As to the Carli Astell letter (Doc. 58-5), this letter was written to GCG, but Astell is neither a claimant nor an objector to the settlement. Instead, Astell objected to the entire lawsuit. Astell was able to get her Sallie Mae loan discharged because when a school closes, a student can go to Sallie Mae (a private lender) and get his or her money back. No government loans were available to attend CCNH because it was not an accredited school. Further, any claimant must declare under oath that they are entitled to reimbursement and could not do so if they have had any (Sallie Mae) loan discharged. Plaintiffs received the tax returns, real property records, records from

divorce proceedings and other records from Lloyd Clayton and are satisfied that he is judgment-proof.

Defendants addressed Rogers' concerns about defense counsel fees by stating that their fees were taken out of the policy proceeds prior to any proceeds being paid into the settlement fund. Defense counsel truly believes that CCNH tried to survive the economy and was very motivated to do so, and its accounting was legal. However, the accreditation process was its downfall. Further, experts could have looked at CCNH's accounting practices and administration and disagreed whether they were good or bad. Because CCNH was licensed in Alabama and had its employees from Alabama, it was just as disruptive to move to another state or to try to stay in Alabama.

II. THE NOTICE GIVEN IN THIS CASE MEETS THE REQUIREMENTS OF RULES 23(c)(2)(B) AND 23(e) AND DUE PROCESS.[5]

Rules 23(c)(2)(B) and 23(e) govern the notice requirements in a Rule 23(b)(3) settlement class. Rule 23(c)(2)(B) provides:

> For any class certified under Rule 23(b)(3), the court must direct to class members the ***best notice that is practicable under the circumstances***, ***including individual notice to all members who can be identified***

[5] As this case has been previously certified, this Court deems it unnecessary to repeat the analysis justifying class certification and incorporates by reference the reasoning set forth in its November 15, 2011, Order. This Court finds that its certification order remains valid, that plaintiffs Suzanne Goldberg and Juli Madacey (and Class Counsel) remain adequate, and the class certification shall become final with this Order.

> ***through reasonable effort***. The notice must clearly and concisely state in plain, easily understood language:
>
> (i) the nature of the action;
>
> (ii) the definition of the class certified;
>
> (iii) the class claims, issues, or defenses;
>
> (iv) that a class member may enter an appearance through an attorney if the member so desires;
>
> (v) that the court will exclude from the class any member who requests exclusion;
>
> (vi) the time and manner for requesting exclusion; and
>
> (vii) the binding effect of a class judgment on class members under Rule 23(c)(3).

Fed.R.Civ.P. 23(c)(2)(B) (emphasis added). In addition, Rule 23(e) "requires that notice of a proposed settlement must inform class members: (1) of the nature of the pending litigation; (2) of the settlement's general terms; (3) that complete information is available from the court files; and (4) that any class member may appear and be heard at the Fairness Hearing." *In re Diet Drugs Prod. Liab. Lit.*, MDL No. 1203, 2005 WL 636788, at *18 (E.D.Pa. Mar. 15, 2005) (citing *Newberg on Class Actions*, § 8.32, at 8-103).

In determining whether the notice was sufficient, the Court should consider both the "mode of dissemination and its content . . . ." *In re Diet Drugs Prod. Liab.*

Lit., 2005 WL 636788, at *18. Although the "notice need not be unduly specific, . . . the notice document must describe, in detail, the nature of the proposed settlement, the circumstances justifying it, and the consequences of accepting and opting out of it." *Id*. Further, the fact that "[n]o one objecting to the settlement has raised any issue with regard to the sufficiency of notice to class members" should also be considered in determining the adequacy of the notice. *Strube v. American Equity Investment Life Ins. Co.*, 226 F.R.D. 688, 698 (M.D.Fla. 2005).

The notice given in this case meets the requirements of Rules 23(c)(2)(B) and 23(e). CCNH used its computer database of students and Class Counsel used its list of former students who contacted them to determine all individuals who were potential class members. Further, a third-party, independent settlement administrator, Garden City Group, Inc. (GCG), provided individual notice to each of the class members by using the names and addresses of the class members provided to it by CCNH and Class Counsel. To date, eight objections have been filed, and eight persons have opted-out of the settlement. Accordingly, this Court finds that the notice given to the class was adequate and meets the requirements of Rules 23(c)(2)(B) and 23(e) and Due Process.

III. THE SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE.

Under Federal Rule of Civil Procedure 23(e)(1)(A), "[t]he court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses in a certified class." Fed.R.Civ.P. 23(e)(1)(A). To approve a proposed class settlement, the Court must find that the settlement is "fair, adequate, and reasonable." Fed.R.Civ. 23(e)(1)(a); *see also Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983). Judicial evaluation [of class action settlements] is guided by public policy which strongly favors the pretrial settlement of class action lawsuits. *See In re U.S. Oil & Gas Litigation*, 967 F.2d 489, 493 (11th Cir. 1992). "The Court's judgment is informed by the strong judicial policy favoring settlement as well as the realization that compromise is the essence of settlement." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984).

In reviewing a settlement for fairness, adequacy and reasonableness, the Court should consider, among other things, the following factors:

1. The likelihood of success at trial (including the likelihood of establishing liability);

2. The range of possible recovery and the point on or below the range at which the settlement is fair, adequate and reasonable;

3. The complexity, expense, and duration of the litigation;

4. The substance and amount of opposition to the settlement;

5. The stage of the proceedings at which the settlement was achieved; and

6. The financial ability of the defendant to withstand a greater judgment and the potential for a judgment in an amount likely to trigger due process considerations.

Bennett, 737 F.2d at 986.

In applying these factors, the Court need not reach ultimate conclusions on the merits of the litigation. Instead, the review of the proposed settlement involves a limited inquiry into whether the possible awards of litigation with its risks and costs are outweighed by the benefits of settlement. *See Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) (stating that the trial court does not have "the right or duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute."); *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971) ("In examining a proposed compromise for approval or disapproval under Fed.R.Civ.P. 23(c), the court does not try the case. The very purpose of compromise is to avoid the delay and expense of such a trial.").[6] Further, a settlement that is reached after extended arm's-length negotiations between experienced and capable counsel is also relevant to approval. *See, e.g., Cotton*, 559 F.2d at 1330 (stating that trial court is "entitled to

[6] The United States Court of Appeals for the Eleventh Circuit adopted as binding precedent the decisions of the United States Court of Appeals for the Fifth Circuit handed down prior to September 30, 1981. *See Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981).

rely on upon the judgment of experienced counsel for the parties" in evaluating settlement); *see also Conte & Newberg, Newberg On Class Actions* at § 11.47 ("recommendation of counsel is entitled to great weight following arm's-length negotiations").

A. The Settlement Provides the Maximum Relief that Could Be Awarded at Trial.

First, the benefit this settlement provides to the class, both in terms of monetary and other relief, should be compared with the likely recovery for the class at trial. *See Cotton*, 559 F.2d at 1330. This question implicates the first two of the *Bennett* factors, which are closely related: "(1) the likelihood of success at trial; and (2) the range of possible recovery." *Bennett*, 737 F.2d at 986. This standard often justifies approving settlements that are substantial compromises of the relief that could be obtained through litigation.

This Court finds that the result obtained under the settlement is consistent with and in some respects exceeds the relief that the class could expect to obtain at trial while obviating the risks that further litigation entails.

First, the class would undertake significant risks by proceeding further with litigation. For instance, the court could grant the individual defendants' motion to dismiss, leaving only the breach of contract claim against CCNH. Because the RSUI

policy contains an exclusion for breach of contract and CCNH is without other assets to pay a judgment, plaintiffs might receive an uncollectible judgment. Another possible scenario is that the court could deny the individual defendants' motion to dismiss and they ultimately might be found liable in tort. However, RSUI then could deny insurance coverage based on the restitution/ill-gotten gains and fraudulent conduct exclusions, and plaintiffs again might be hard-pressed to collect any judgment.

Second, the relief afforded to the class provides the maximum recovery possible given the assets available. The RSUI insurance policy is the only asset of CCNH, and it contains exclusions which arguably would apply to the claims in this litigation. Further, Lloyd Clayton has agreed to pay $10,000 into the settlement fund but otherwise has been determined by plaintiffs to be judgment-proof. Thus, the settlement potentially provides the maximum available remedy to the class, given the claims and circumstances.

Third, the settlement provides relief in the form of tuition discounts and course credit at GCNM and NHI which would not be available otherwise in this action were it to proceed to trial.

B. Continued Litigation of this Case Would Have Been Expensive and Lengthy.

The novelty of some of the issues presented in this case would have made the trial and appeal of this case expensive and lengthy. A credible projection for litigating this case through trial and appeal would be at least two to three years. *See, e.g., U.S. Oil & Gas. Lit.*, 967 F.2d at 493 ("Complex litigation--like the instant case--can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive."). Each phase of litigation would entail substantial costs, attorney time, travel and other expenses. In short, the likely alternative to settlement now is lengthy, burdensome and expensive litigation. The strength of the relief and the added benefit of obtaining it now rather than years from now make approval of this settlement in the best interests of the class.

C. Eight Persons Have Objected to the Settlement.

Although the Court must review and address such objections, "this is not to say that the trial judge is required to open to question and debate every provision of the proposed compromise." *Cotton*, 559 F.2d at 1331. The central question at issue is not whether any particular provision could have been negotiated in a slightly different or marginally more favorable way. While the number of objectors is "not controlling," *Cotton*, 559 F.2d at 1331, a relatively small number of objectors can be taken as "some indication that the class members as a group did not think the

settlement was unfair." *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 506 n.4 (5th Cir. 1981).

Here, actual notice of the settlement was given to approximately 14,000 class members, and 5171 class members submitted timely claims. As of the deadline of January 31, 2012, eight persons (.057% of the total class) filed objections to the settlement and only eight persons (.057% of the total class) have opted out of the settlement. Courts have approved settlements with far greater percentage of objectors than is present in this case. *See, e.g., Reed v. General Motors Corp.*, 703 F.2d 170, 174-75 (5th Cir. 1983) (affirming district court's approval of class settlement notwithstanding a nearly 40% objection rate). Thus, the lack of any significant opposition to this settlement weighs in favor of final approval.

The objections filed are as follows:

(1) Beverly Speiss, Laguna Niguel, CA

Ms. Speiss objects to ¶ 17 of the Settlement Agreement, which calls for payment of $200,000 for expenses incurred ($50,000) and to be incurred in the administration of the settlement, plus attorneys' fees of up to $775,000. She asks that Class Counsel prove, by time sheets, that they spent time investigating facts, litigating the case and negotiating a settlement, such that they are entitled to an award of

$775,000, and that they actually incurred or will incur $200,000 in expenses, and that such fees and expenses were necessary and reasonable.

(2) Aida Al-Salman, Alhambra, CA

Ms. Al-Salman objects that she cannot benefit from the part of the settlement offering tuition discounts at specified schools because they do not offer the degree she was pursuing, such that she and other students in the same situation are at a disadvantage in the settlement in that they can only receive partial tuition reimbursement.

(3) Nadia Therese Brandon, Falls Church, VA

Ms. Brandon objects that she will receive only a "minimal symbolic amount" of tuition reimbursement, which is "grossly disproportionate" when considering her payment of $8500 and four years in pursuit of Doctorate of Naturopathy, as well as the loss of job prospects because she cannot get that degree now. She asks for more reimbursement or that full tuition costs at a similar school be covered for class members.

(4) Berrenda (and Gary) McCarthy, Sacramento, CA

Ms. McCarthy objects that she and her husband paid $28,000 (for which they took out a loan at high interest at CCNH's urging). They object to the amount allotted for tuition reimbursement as insufficient.

(5) LaRissa Parker

Ms. Parker objects to ¶ 8 of the Settlement Agreement requiring release of all claims against defendants relating to CCNH, its curriculum, or manner of conducting business. She finds it unfair that individuals are released and that she is in Class B, which eliminates all future options of any form of compensation despite her financial investment and sacrifice to make payments, beginning in 2009.

(6) Janice Kasiecki, New Boston, NH

Ms. Kasiecki objects that settlement as structured is unfair, unreasonable and inadequate and that more effort should be made to reimburse students for 100% of tuition paid. She contends that attorneys' fees and expenses make up too much of the settlement (almost 50% of available funds of $2.31 million) and that the individual defendants committed fraud and should sell their personal assets to increase the settlement fund up to 100% tuition reimbursement plus 100% punitive damages.

(7) Lisa Rogers, Chillicothe, IL[7]

Ms. Rogers objects to the settlement reimbursement of approximately a nickel for each dollar, as inadequate. She paid $8050 in advance but got no courses before CCNH closed. She was diagnosed with rheumatoid arthritis in 2009 and offered to

[7] Ms. Rogers appeared at the fairness hearing and testified in detail about her objections to the settlement. A synopsis of her objections is set out *supra*.

withdraw, to receive full tuition reimbursement, but was assured by her adviser, Tony Cox, that she could just take courses when she was up to it. She asks that the court consider the financial responsibility of the individual defendants who allegedly stole or mishandled tuition money.

(8) Carol Ritter-Mayberry, Jefferson Township, PA

She objects to the amount of attorneys' fees compared to the tuition reimbursement for students. She also asks that students be allowed electronic access to all study guides for all courses previously offered. While there was a form for students to fill out to get study guides, she states that CCNH has not followed through with providing the study guides.

D. CCNH's Only Asset is the Insurance Policy and the Individual Defendants May Not be Subject to Liability.

This factor concerns the worth of defendants CCNH and Lloyd Clayton (plaintiffs having acknowledged that the other individual defendants likely would not be subject to liability for tort claims) and the potential for protracted litigation with respect to the individual liability of Lloyd Clayton. With respect to the first facet, CCNH's insurer has potentially provided the maximum amount of monetary relief allowed by the insurance policy, in light of the policy exclusions, and Lloyd Clayton has contributed to the Settlement Fund and appears to be otherwise judgment-proof.

Further, the settlement provides additional relief to the class in the form of course credits and tuition discounts. To that extent, this factor weighs heavily in favor of the proposed settlement. The settlement of the case pretermits what could have been a lengthy and expensive trial and appeal process, thereby preserving the insurance proceeds for payments to Class Members. The settlement also provides relief which would not be available in this case: course credits and tuition discounts at two other distance learning schools offering the same or similar courses of study.

IV. THE ATTORNEYS' FEES AND COSTS REQUESTED BY CLASS COUNSEL, AS ADJUSTED BY THE COURT, ARE FAIR AND REASONABLE.

In reviewing a request for attorney's fees in a class action settlement with a common fund, the Eleventh Circuit case of *Faught v. American Home Shield Corp.*, 668 F.3d 1233 (11th Cir. 2011), provides guidance.

> The district court reviews a class action settlement for fairness, reasonableness, and adequacy. *In re CP Ships Ltd. Sec. Litig.*, 578 F.3d at 1314-15 (citing *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)). We have instructed the district court to consider the following factors: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the anticipated complexity, expense, and duration of litigation; (5) the opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved. *Id.* at 1315.
>
> "[A]ttorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the

class." *Camden I*, 946 F.2d at 774. And this court has often stated that the majority of fees in these cases are reasonable where they fall between 20–25% of the claims. *Id.* Where the requested fee exceeds 25%, the court is instructed to apply the twelve *Johnson* factors. *Id.* The *Johnson* factors include: (1) the time and labor required; (2) the difficulty of the issues; (3) the skill required; (4) the preclusion of other employment by the attorney because he accepted the case; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Hensley v. Eckerhart*, 461 U.S. 424, 430 n.3, 103 S.Ct. 1933, 1938 n.3, 76 L.Ed.2d 40 (1983) (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

In approving the fee award, the district court began by citing well-settled law from this court that 25% is generally recognized as a reasonable fee award in common fund cases. *See, e.g., Waters*, 190 F.3d at 1294 ("The majority of common fund fee awards fall between 20% to 30% of the fund."). The district court did not separately analyze whether the 25% awarded here was a reasonable fee in itself, but determined that because 25% is generally accepted as reasonable in common fund cases, *see Camden I*, 946 F.2d at 774, it should also be considered reasonable in this case. The district court then turned its attention to the $1.5 million lump sum award that took the total fee award above the 25% benchmark and thoroughly analyzed that amount under the *Johnson* factors. The district court also pointed out that to the extent the $1.5 million made the total fees exceed 25% of the common fund, it should not be viewed negatively for two reasons. First, the $1.5 million did not come from the money set aside for the class; rather, it is a separate lump sum from AHS to class counsel. Second, the district court noted that the $1.5 million was intended to compensate class counsel for additional work performed and value added to the settlement, specifically, the work done in changing AHS's business practices and in establishing a state of the art center to field class member inquiries regarding the settlement. The

> court calculated the hours and the rates of the attorneys and staff working on the claims and determined that the $1.5 million was a very small amount compared to the amount of money invested in the case.

668 F.3d at 1240, 1242-43.

In this case, the requested fee exceeds 25% of the settlement fund, if the value of the tuition discounts is not taken into account. The court is reluctant to consider the possible value of those tuition discounts because it is uncertain whether any class members will avail themselves of the opportunity to pursue distance learning at GCNM or NHI and because of the questions regarding the accreditation of these schools raised by Ms. Rogers. Therefore, only the value of the actual settlement fund is considered for purposes of the attorney's fee award.

Because the requested fee exceeds 25% of the settlement fund, the court must examine the *Johnson* factors: (1) the time and labor required; (2) the difficulty of the issues; (3) the skill required; (4) the preclusion of other employment by the attorney because he accepted the case; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

The time required by Class Counsel was approximately 1910 hours, and three attorneys of the five-member firm devoted much labor to field inquiries from CCNH students before and since the filing of this action. Class Counsel also expended effort in filing the complaint, responding to defendants' motion to dismiss, seeking class certification, conducting discovery and reviewing produced documents, preparing for and participating in mediation, and participating in setting up the claims process and maintaining the informational website.

The issues involved in the case presented some difficulty: a defunct entity, limited financial resources, possible individual liability of CCNH's officers and directors, and the discovery necessary to determine the circumstances surrounding the school's closing and what funds were available to pay plaintiffs and class members. However, the declaration of Thomas Howlett shows that Class Counsel has not been precluded from acting as counsel in other cases during the pendency of this action. They are currently representing classes in *Smith v. Computer Training.Com*, *Inc.* in the United States District Court for the Eastern District of Michigan, *Lauber v. Belford High School* in the United States District Court for the Eastern District of Michigan, and *Ferrara v. Palm Beach Institute of Technology, Inc.* in the Fifteenth Judicial Circuit in Palm Beach County, Florida.

There is no evidence in the record of the customary hourly fee in the community; Class Counsel is seeking the equivalent of $375 per hour. "A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman v. Housing Auth. of City of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988) (citing *Blum v. Stenson*, 465 U.S. 886, 895-96, 104 S.Ct. 1541, 1547 n.11, 79 L.Ed.2d 891 (1984)). The general rule is that the "relevant market" for purposes of determining the reasonable hourly rate for an attorney's services is "the place where the case is filed." *Cullens v. Georgia Dep't. of Transp.*, 29 F.3d 1489, 1494 (11th Cir. 1994). Thus, the relevant market is the Northern District of Alabama, Southern Division. The Court has nonetheless examined cases and information both in Alabama and Michigan for guidance on this question.

In *Harvard Drug Group, LLC v. Lineman*, 2010 WL 3906094 (E.D.Mich. Sept. 3, 2010), the court approved as reasonable hourly partner fees of $478 and hourly associate fees of $289. In *Poly-Flex Const., Inc. v. Neyer, Tiseo & Hindo, Ltd.*, 600 F.Supp.2d 897 (W.D.Mich. 2009), the court approved hourly fees of $185-$235 for partners and $125-$175 for associates. According to the 2010 survey of attorney hourly billing rates conducted by the State Bar of Michigan, the median hourly rate for managing and equity partners was $250, with a range of $$200 to

$475.[8] Mr. Googasian graduated from law school in 1997 and Mr. Howlett graduated from law school in 1990. For attorneys in practice 22 years, the median hourly rate is $228, with a range of $185 to $450. For attorneys in practice 15 years, the median hourly rate is $211, with a range of $175 to $400. For a firm size of five attorneys, the median hourly rate is $225, with a range of $175 to $450. For Oakland County, Michigan, in which Class Counsel has its office, the median hourly rate is $250, with a range of $190 to $455. For the field of practice of consumer law, the median hourly rate is $300, with a range of $200 to $515.

In *Thomas v. Byrne*, 2009 WL 752469 (M.D.Ala. March 19, 2009), the court approved an hourly rate in an award of fees pursuant to 42 U.S.C. § 1988 of $250 for attorneys with "very high" Martindale-Hubble ratings and over 30 years of practice. In *Denny Mfg. Co., Inc. v. Drops & Props, Inc.*, 2011 WL 2180358 (S.D.Ala. June 1, 2011), the court found that a reasonable and customary hourly rate in an intellectual property case for senior counsel with 13 years of experience was $250. *See also Smith v. First Continental Mortgage, Inc.*, Civil Action No. 09-0381-KD-N (S.D.Ala. Nov. 1, 2010) (awarding $250.00 as a reasonable hourly rate for an attorney with 22 years of experience who was a founding partner in his firm); *Dempsey v. Palisades Collection, Inc.*, 2010 WL 923473, at *3 (S.D.Ala. Mar. 11, 2010) (awarding $250

[8] http://www.michbar.org/pmrc/articles/0000146.pdf

as a reasonable hourly rate for an attorney with over 19 years of experience); *Mitchell Co. v. Campus*, 2009 WL 2567889, at *1 & *17-18 (S.D.Ala. Aug. 18, 2009) (finding $275.00 was a reasonable rate for an attorney with approximately 34 years of experience); *Wells Fargo Bank, N.A. v. Williamson*, 2011 WL 382799, *4 (S.D.Ala. Jan. 3, 2011) (awarding $225.00 as a reasonable hourly rate for an attorney with ten years of experience).

In *Byrd v. Gregory Barro, PLC*, 2011 WL 814544 (S.D.Ala. Feb. 16, 2011), the court determined that a reasonable hourly rate for an attorney experienced in Fair Debt Collection Practices Act litigation was $250. In *Mortensen v. Mortgage Elec. Registration Sys., Inc.*, 2011 WL 1675269 (S.D.Ala. May 3, 2011), the court found "eminently reasonable" an hourly rate of $190 for a partner at a large law firm in Birmingham with 13 years of litigation experience. In *Adams v. Austal, U.S.A., L.L.C.*, 2009 WL 3261955 (S.D.Ala. Oct. 7, 2009), the court noted that an hourly rate of $275 for an attorney with 21 years of experience was reasonable and approved an hourly rate of $240 for an attorney with 19 years of experience.

In this case, the fee was contingent, set at one-third of the recovery. The only real time limit imposed in this case was the need to streamline the litigation in order to preserve as much of the RSUI insurance policy proceeds as possible. The amount involved would not have exceeded $3.5 million and likely would have been less

given the fact that Lloyd Clayton has been determined to be judgment-proof and the liability of the other individual defendants is questionable. However, the results obtained under the circumstances weighs heavily in favor of Class Counsel. There is no question that Class Counsel are experienced in consumer litigation, especially in the subset of litigation involving for-profit schools. Every indication is that Mr. Googasian and Mr. Howlett have good reputations and considerable ability given the number of years they have been practicing. The Googasian Firm is AV rated in Martindale-Hubble, as is Mr. Howlett.

The case could be considered undesirable given the frequent contact required with former CCNH students, the limited financial resources available for damages, the RSUI policy exclusions and the fact that the main defendant is a defunct entity. As to the nature and length of the professional relationship with the client, Class Counsel did not have a long relationship with the class representatives or members, but the nature of that relationship, representing a fairly large nationwide class, weighs in favor of the requested fees. The court has been hard-pressed to find similar cases and so has looked to cases involving class action consumer litigation. For example, in *In re Checking Account Overdraft Litig.*, ___ F.Supp.2d ___, 2011 WL 5873389 (S.D.Fla. Nov. 22, 2011), the court approved an award of 30% of a $410 million

settlement fund in a class action alleging conversion, unjust enrichment, and violation of state unfair trade practice statutes based on overdraft fees.

A. Class Counsel Undertook Risk to Prosecute this Action.

Class Counsel requests that this Court approve an award of $716,000 for attorneys' fees and $184,863.14 for reimbursement of costs. Class Counsel accepted and litigated this case entirely at risk and on a contingency basis but also without any certainty that the Class would ultimately be certified or indeed that they would be appointed to represent the Class.

The $716,000 in fees sought is just less than 31% of the common fund and does not count the benefit of the tuition discounts. Less than 6/100 of 1% of claimants have any objection to the fees. The firm undertook the case on a one-third contingency fee basis at substantial risk. The fee falls within the appropriate range of common fund to fee–the upper limit is 50% but usually 20 to 30% of the common fund.

The firm (five lawyers) has been working on this case for 19 months, and has logged over 1910 hours (including local counsel which spent 20 hours and will be paid by Class Counsel). Dividing the fee sought by the number of hours expended yields an hourly rate of approximately $375. The case was undesirable in that it was against a defunct entity with complex insurance coverage issues and great risk.

B. The Requested Attorneys' Fees and Costs Are to be Paid from the Settlement Fund.

The United States Supreme Court has indicated that the consensual resolution of attorneys' fee issues is the ideal toward which litigants should strive. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation. **Ideally, of course, litigants will settle the amount of the fee**.") (emphasis added).

After Defendants agreed to settle the claims of the Class, Class Counsel commenced negotiations for the payment of reasonable attorneys' fees and costs in mediation. The fees and costs included in the Settlement Agreement were arrived at through arm's-length, contentious negotiations during mediation.

In these circumstances, the result of adversarial negotiations between the party paying the award and the attorneys receiving them is presumptively reasonable. As the Fifth Circuit has explained, "[i]n cases of this kind, we encourage counsel on both sides to utilize their best effort to understandingly, sympathetically, and professionally arrive at a settlement as to attorneys' fees." *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974).

C. Class Counsel Achieved Significant Relief for the Class.

In this case, the Settlement has resulted in the maximum possible amount for the Settlement Fund of $2.31 million. In addition to this cash component of the recovery for the Class Members, the Settlement provides for CCNH students to enroll at GCNM and NHI and receive credit for courses taken at CCNH, as well as tuition discounts.

Given all of the above factors, this Court finds that the attorneys' fee request is somewhat excessive. Instead of the equivalent of an hourly fee of $375, the Court finds and determines that the equivalent of a $300 hourly fee is fair and reasonable in light of the circumstances of this case. Therefore, the Court finds that an attorneys' fee award of $573,000 (1910 hours x $300 per hour) to Class Counsel is fair and reasonable, along with an award of costs in the amount of $184,863.14.

VI. THE REQUESTED AWARD TO THE CLASS REPRESENTATIVES IS FAIR AND REASONABLE.

Defendants have agreed to pay an award to the Class Representatives Suzanne Goldberg and Juli Madacey in the amount of $1,000 each. This payment will be paid separately from funds available to the class.

Numerous courts have held incentive awards to class representatives to be appropriate. *See Newberg on Class Actions* § 11.38 (3d ed. 1992) and cases cited therein. Incentive awards are particularly appropriate, as here, when the class

representatives initiated an action which results in significant class relief and perform services such as monitoring the litigation.

CONCLUSIONS

Based on the findings and conclusions set forth above, and after due deliberation and consideration of the totality of the circumstances, the entire record, the arguments of the parties and the Court's discretion, it is hereby ORDERED that:

1. The terms of the settlement set forth in the Settlement Agreement are fair, adequate and reasonable and are therefore FINALLY APPROVED, and the full text of the Settlement Agreement is incorporated into this Order. Final judgment hereby is ENTERED in favor the Settlement Class. All parties are hereby ORDERED to perform their obligations set forth in the Settlement Agreement, to the extent not already performed.

2. CCNH, and its present and former affiliates, insurers, reinsurers, instrumentalities, dealers, agents, assigners, assignees, transferors, transferees directors, officers, employees, servants, loaned agents, loaned servants, servicers and servicing agents, attorneys, or other entity of any type or description for whose acts or omissions CCNH may be held liable (including any entity that could claim against defendants under a theory of contribution or indemnification), and defendants Kay

Channell, Lloyd Clayton, William Fishburne, Jeff Goin, and Magnolia Corporate Services, Inc., are forever discharged from any and all claims, actions, liens, demands, causes of action, obligations, damages, and liabilities of any nature whatsoever, known or unknown, of any kind or nature whatsoever, direct or consequential, foreseen or unforeseen, developed or undeveloped arising under, related to, or authorized by federal or state statutory, regulatory, or common law including, but not limited to, breach of contract, breach of fiduciary duty, conversion, bailment, negligence, unjust enrichment/breach of quasi-contract, equitable estoppel, and/or fraud, suppression, misrepresentation or deceit, which have been asserted, or could have been asserted in this action. Plaintiffs (including Class Members and their assigns, successors, heirs or agents) shall be forever barred from instituting, maintaining or prosecuting against defendants, its or their insurers, and attorneys, any such claim, demand, action, cause of action or liability arising under, related to, or authorized by federal or state statutory, regulatory, or common law including, but not limited to, breach of contract, breach of fiduciary duty, conversion, bailment, negligence, unjust enrichment/breach of quasi-contract, equitable estoppel, and/or fraud, suppression, misrepresentation or deceit, which have been asserted, or could have been asserted in this action.

This Court finds that the Plaintiffs and Class Counsel expressly understand and acknowledge that it is possible that unknown losses or claims exist or that present losses may have been underestimated in amount or severity. This Court finds that the Plaintiffs and Class Counsel explicitly took this uncertainty into account in entering into the Settlement Agreement, and a portion of the consideration and the mutual covenants contained therein, having been bargained for between the Plaintiffs and Defendants with the knowledge of the possibility of such unknown claims, were given in exchange for a full accord, satisfaction, and discharge of all such claims. Consequently, this Court finds that the Plaintiffs (including Class Members and their assigns, successors, heirs or agents) waive any and all rights arising under, related to, or authorized by federal or state statutory, regulatory, or common law including, but not limited to, breach of contract, breach of fiduciary duty, conversion, bailment, negligence, unjust enrichment/breach of quasi-contract, equitable estoppel and/or fraud, suppression, misrepresentation or deceit, which they and the Class have asserted, or could have asserted in this Action.

3. The failure of any Class Member who may be entitled to monetary or other relief under this Settlement Agreement to obtain such monetary or other relief shall not affect the releases under this Settlement Agreement or this Order, including, without limitation, the Class Members' claims, and the settlement shall retain its full,

binding effect. Efforts made by the parties as provided in this Settlement Agreement to locate Class Members who may have been entitled to monetary or other relief in this Class are deemed and determined to be fair and reasonable. As to any Class Member who was not located, or who for any other reason did not receive notice of this Settlement Agreement, or who for any reason did not return a Claim Form, all rights of such Class Member to payment in this Action shall lapse and be forever forfeited, and such person shall be barred by the releases and other provisions of the Stipulation of Settlement. Defendants shall not be required to pay any additional sums of money to the Court or to Class Members on account of the forfeiture of payments by Class Members.

4. The named plaintiffs and all members of the Settlement Class are ENJOINED and PROHIBITED from commencing or prosecuting any action, either directly, individually, representatively, or in any capacity, asserting any claims that are released under the Settlement Agreement and this Final Order.

5. Class Counsel is AWARDED $573,000 in attorneys' fees and $184,863.14 in costs, to be paid out of the Settlement Fund when the deadline to appeal this order runs or this Court's judgment is affirmed on appeal, whichever is sooner.

7. The named plaintiffs Suzanne Goldberg and Juli Madacey are AWARDED $1,000 each. CCNH and/or its insurer shall pay the named plaintiffs $1,000 each when the deadline to appeal this order runs or this Court's judgment is affirmed on appeal, whichever is sooner.

8. The Court RESERVES, RETAINS, and MAINTAINS continuing jurisdiction over all matters relating to the Settlement Agreement and this Final Order, including but not limited to the consummation, validity, interpretation, effectuation, implementation and enforcement of the Settlement Agreement and this Final Order, and any other orders entered pursuant thereto. Other than as expressly stated above, or in the Settlement Agreement or other Order entered by the Court, each party shall bear its own costs.

DONE and ORDERED this 25th day of May, 2012.

HARWELL G. DAVIS, III
UNITED STATES MAGISTRATE JUDGE