IN THE UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

Jill and Ron Ryan, *et al.*, individually and on behalf of others similarly situated,	:	
Plaintiffs,	:	No. 2:06-CV-0146 (WCO)
-against-	:	Class Action
Hidden Lake Academy, Inc., *et al.*,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF THE SETTLEMENT CLASS REPRESENTATIVES' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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The Settlement Class Representative[1] plaintiffs respectfully submit this memorandum of law in support of their motion under Fed. R. Civ. P. 23 for final approval of the parties' settlement of this litigation.

I. INTRODUCTION

In reaching the proposed $400,000 cash settlement in this hotly-fought litigation, plaintiffs had the benefit of many documents concerning the claims, defenses and defendants' financial status, and extensively investigated the operative facts and law. Given the risk, uncertainty and expense of continued litigation, this settlement falls squarely within the range of fairness under Fed. R. Civ. P. 23. Further, following extensive notice to the Class describing the claims and the settlement, no Class member has filed an objection to the settlement, and only 19 have opted out. Accordingly, the settlement should be approved by the Court.

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[1] All capitalized terms not otherwise defined have the meanings set forth in the parties' Stipulation of Settlement (the "Stipulation") filed with the Court on December 13, 2007 (Doc. 85-3). The Settlement Class Representative plaintiffs include Doff Meyer, Robin Brecker, Walter Coles, Theresa Pines, Dr. Edward Roberson and Madeleine Roberson. While originally among the Settlement Class Representatives, Ron Ryan has opted out of the settlement.

II. STATEMENT OF FACTS

Plaintiffs filed this litigation on September 11, 2006. Plaintiffs' complaint arises out of the enrollment of their children at HLA, a therapeutic boarding school for teenagers located in Dahlonega, Georgia. Plaintiffs allege, in sum, that defendants breached their obligations to provide properly certain educational and therapeutic services to plaintiffs' children. Plaintiffs brought four claims: breach of contract against HLA; breach of the implied covenant of good faith and fair dealing against HLA; violation of Georgia's Fair Business Practices Act, O.C.G.A. ¶ 10-1-390, *et seq.*, against each defendant; and unjust enrichment against each defendant. Plaintiffs sought monetary damages in the form of a return of a portion of the tuition they paid to the school, a declaration that the indemnification provision in HLA's enrollment contract was unenforceable, injunctive relief and further disclosure concerning the school's costs and practices of strip searching its students.

Beginning November 8, 2006, each defendant filed answers and defenses denying plaintiffs' claims. Defendant HLA also brought a counterclaim against plaintiffs premised on the indemnification provision in the standard form enrollment contract HLA used during the Class Period, alleging that plaintiffs are

contractually obligated to reimburse HLA for all costs and attorney fees HLA (and, presumably, the other three defendants) incur as a result of this litigation.

Shortly thereafter, the parties brought several motions. Specifically, on November 16, 2006, plaintiffs filed a motion seeking permission to proceed anonymously (Doc. 25-1); on November 21, 2006, defendants filed a motion for judgment on the pleadings (Doc. 26); on November 28, 2006, plaintiffs filed a motion to dismiss HLA's counterclaim (Doc. 29); on December 8, 2006, plaintiffs filed a motion to strike an exhibit accompanying defendants' motion for judgment on the pleadings (Doc. 35); and on December 11, 2006, plaintiffs filed a motion and supporting documents for class certification (Doc. 37). Each of these motions was fully briefed. On January 31, 2007, the Court held a hearing concerning each motion. Following that hearing, plaintiffs also filed in connection with their motion for class certification: a motion and incorporated memorandum of law regarding scheduling and a limited lifting of discovery stay on February 5, 2007 (Doc. 58); a motion and incorporated memorandum of law for leave to file their second amended complaint on February 16, 2007 (Doc. 63-1); a notice of supplemental authority on February 23, 2007 (Doc. 66); and a supplemental submission regarding FBPA claims on May 7, 2007 (Doc. 73).

By order filed February 9, 2007 (Doc. 60), the Court denied plaintiffs' motion to proceed anonymously and plaintiffs' motion to strike. In accordance with that order, plaintiffs filed their amended complaint on February 16, 2007. By order filed March 26, 2007 (Doc. 67), the Court granted plaintiffs' motion to dismiss HLA's counterclaim. By order filed April 2, 2007 (Doc. 68), the Court granted in part and denied in part defendants' motion for judgment on the pleadings. And by order filed April 12, 2007 (Doc. 69), the Court granted plaintiffs leave to file their second amended complaint, and denied plaintiffs' motion for a limited lifting of the discovery stay. Accordingly, plaintiffs filed their second amended complaint on April 17, 2007 (Doc. 70).

Following extensive, arm's-length negotiations, on June 25, 2007 the parties reached an agreement-in-principle to settle this litigation. The agreement-in-principle was subject to the parties entering into a definitive settlement agreement and the approval of the Court in accordance with Fed. R. Civ. P. 23, among other conditions. That same day via a telephone conference call, the parties' counsel informed the Court of their agreement-in-principle. *See* Doc. 83. By order filed August 15, 2007 (Doc. 84), the Court denied without prejudice plaintiffs' motion

for class certification pending submission to the Court of the parties' proposed settlement and request to certify the Class for purposes of the settlement.

Following extensive negotiation, the parties executed their settlement Stipulation on December 13, 2007. That same day, plaintiffs moved for preliminary approval of the parties' settlement (Doc. 85), and defendants filed a supporting memorandum (Doc. 86). By Order filed March 6, 2008 (Doc. 89) (the "Preliminary Approval Order"), the Court preliminarily approved the parties' settlement and certified the Class. The Court's Preliminary Approval Order also approved the form of notice and Claim Form attached thereto to be sent to Class members; appointed Class counsel as counsel for the Class and Heffler, Radetich & Saitta LLP as Claims Administrator to administer the settlement and disseminate the notice to the Class; established July 3, 2008 as the deadline for any objections to, or requests to be excluded from, the settlement; and set a hearing concerning the settlement for September 9, 2008.

In accordance with the Court's Preliminary Approval Order, the Claims Administrator sent Class members the notice and Proof of Claim form beginning on March 14, 2008.[2] As of August 5, 2008, Heffler mailed a total of 1,982 notices

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[2] *See* Declaration of Edward J. Sincavage submitted herewith ("Sincavage Decl.") at ¶ 6 ; *accord* Joint Declaration of Michael J. Gorby and

to Class and potential Class members and other interested parties who requested the notice. Sincavage Decl. at ¶ 8. In addition, the defendants timely sent the notice of the settlement and other documents to the attorneys general for 36 states, the District of Columbia and the United States, in accordance with ¶ 12 of the parties' Stipulation and 28 U.S.C. § 1715.

In response to the notice, the parties received no objections to the settlement or any of the terms in the Stipulation; only 19 requests for exclusion; and only two responses from individuals who actually extol the virtues of HLA, as discussed more fully below. *See* Sincavage Decl. at ¶ 9; Joint Decl. at ¶¶ 26-28. By contrast, as of August 13, 2008, the Claims Administrator has received 243 Claim Forms. Sincavage Decl. at ¶ 10.

III. THE PROPOSED SETTLEMENT

The settlement provides that the $400,000 Settlement Fund will be timely paid to the Class by one or more of the defendants by December 31, 2008, absent which the settlement may be terminated. Stipulation at ¶¶ 4(a), 28. The settlement

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Lawrence J. Lederer (the "Joint Decl.") at ¶ 24.

also provides that after payment of administrative and legal costs which the Court may award, the net settlement proceeds will be distributed to Class members who file valid claims on a *pro rata* basis in accordance with the Plan of Allocation. *Id.* at ¶ 5. *See also* notice at pp's. 18-20 (setting forth the Plan of Allocation) (attached as Ex. A to Sincavage Decl. and Doc. 85-3).

Three features of the settlement bear emphasis. First, as noted above, Class members were permitted to "opt out" of the settlement – that is, exclude themselves without giving the defendants any release, and thereby remain free to pursue individually their own claims, if and as they wish. *See* Stipulation at ¶ 1(g) (defining "Class Members" to include those "Persons who are members of the Class who do not timely and properly exclude themselves therefrom"); notice at ¶ 12 (setting forth how a Class member can opt out); Preliminary Approval Order at ¶¶ 11-12 (Doc. 89) (setting forth opt out rights). While the size of the Class has been estimated to include several hundred persons and notice was mailed to over 1,900 persons, only 19 have opted out. Sincavage Decl. at ¶¶ 8-9 (attaching as Ex. B a copy of each opt out).

Second, the settlement will release only Class members' Released Claims as that term is defined in ¶ 1(t) of the Stipulation. Specifically excluded from the release are any "Personal Injury Claims" (*id.* at ¶ 1(q)), any claims by non-Class

members such as any present or former students, and claims seeking the refund of certain prepaid tuition (*id.* at ¶ 1(t)).

Third, Class counsel have agreed to waive their right to seek any award of attorneys' fees as part of this settlement. *Id.* at ¶ 10. Class counsel instead seek to be reimbursed up to $68,000 from the Settlement Fund for only the actual out-of-pocket costs and expenses they have incurred and disbursed in litigating this case on behalf of the Class, and to pay the Claims Administrator for its services in sending the notice, processing the Claim Forms and administering the settlement. Joint Decl. at ¶ 7.[3]

IV. THE CLASS SATISFIES THE STANDARDS FOR CERTIFICATION OF A SETTLEMENT CLASS

The Class satisfies the standards for class certification under Federal Rules of Civil Procedure 23(a) and (b)(3). First, the Class consists of hundreds of Class members and therefore is so numerous that joinder of all members is impracticable. Sincavage Decl. at ¶ 8. Questions of both law and fact relating to the claims and proof, such as whether the defendants breached their obligations by employing unqualified personnel, are common to the Class under Rule 23(a)(2) and

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[3] Class counsel are separately submitting a motion for an award of their costs and expenses and an award to the Claims Administrator.

predominate over individual issues under Rule 23(b)(3). The claims of the Settlement Class Representative plaintiffs arise from the same course of conduct as the claims of the Class, and they have fairly and adequately protected the interests of the Class and employed qualified, experienced counsel consistent with Rule 23(g).[4]

The Class also satisfies the requirements of Rule 23(b)(1)(A) because prosecution of separate lawsuits by individual Class members would create a risk of inconsistent adjudications and of establishing incompatible standards of conduct for defendants; Rule 23(b)(1)(B), because adjudications with respect to individual Class members would potentially be dispositive of the interests of other Class members or substantially impair or impede their ability to protect their interests; and Rule 23(b)(2), because the declaratory relief, including for example that the indemnification provision in HLA's enrollment agreement is unenforceable, was sought on behalf of, and applies to, the Class as a whole.

Further, the parties' settlement itself supports certification of the Class. *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, No. 04-CV-3066-JEC, 2007

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[4] A copy of Class counsels' résumés were submitted to the Court on December 13, 2007 with plaintiffs' motion for preliminary approval. *See* Doc. 85-4. *See also* Declarations of the Settlement Class Representatives submitted herewith (the "Plaintiffs' Decls.") at ¶ 5 (supporting class certification).

U.S. Dist. LEXIS 52589, at *37-38 (N.D. Ga. July 20, 2007) ("In addition, even *Amchem* notes that the fact of settlement is relevant to the decision to certify a class."; citing cases); *Flournoy v. Honeywell Int'l, Inc.*, 239 F.R.D. 696, 698 (S.D. Ga. 2006) ("Where, as here, the parties move jointly for certification of a class for settlement purposes, '[s]ettlement is relevant to a class certification.'") (*quoting Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997)); *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 671-72 (S.D. Fla. 2006); *Lipuma v. American Express Co.*, 406 F. Supp. 2d 1298, 1313-14 (S.D. Fla. 2005); *Strube v. American Equity Investment Life Ins. Co.*, 226 F.R.D. 688, 695 (M.D. Fla. 2005).

Significantly, moreover, while Class members who did not want to be included or bound by the settlement were free to opt out, this settlement is the only realistic means for many Class members to recover anything from the defendants for the claims asserted given the size of their claims and the costs of litigating individually. *Cf. In re Charter Co.*, 876 F.2d 866, 871 (11th Cir. 1989) ("[T]he effort and cost of investigating and initiating a claim may be greater than many claimants' individual stake in the outcome, discouraging the prosecution of these claims absent a class action filing procedure."); *Amchem*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo

action prosecuting his or her own rights.") (quotation marks and citation omitted); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1220 (11th Cir. 2007) (citing *Amchem* and *In re Charter*); *Romano v. SLS Residential Inc.*, No. 07-cv-2034 (SCR), 2007 U.S. Dist. LEXIS 80390, at *22-31 (S.D.N.Y. Oct. 10, 2007) (certifying class alleging mistreatment by a psychiatric facility).[5]

V. PLAINTIFFS HAVE GIVEN DUE NOTICE OF THE PROPOSED SETTLEMENT

In accordance with the Preliminary Approval Order, the Claims Administrator mailed 1,982 copies of the notice to Class and potential Class members. Sincavage Decl. at ¶ 8. The notice describes, *inter alia*, the background and history of this action; the terms of the settlement, Plan of Allocation, Final Judgment and release; the time, date and place of the Court's hearing to consider

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[5] The Settlement Class Representatives also incorporate by reference the arguments and authorities in their motion and supporting documents in support of class certification filed December 11, 2006 (Doc. 37); motion and incorporated memorandum regarding scheduling and a limited lifting of discovery stay filed February 5, 2007 (Doc. 58); motion and incorporated memorandum for leave to file a second amended complaint filed February 16, 2007 (Doc. 63-1); notice of supplemental authority filed February 23, 2007 (Doc. 66); supplemental submission regarding FBPA claims filed May 7, 2007 (Doc. 73); motion, settlement Stipulation and accompanying papers in support of preliminary approval of the parties' settlement filed December 13, 2007 (Docs. 85, 85-2, 85-3, 85-4 and 85-5); and response of defendants in support of the parties' settlement filed December 13, 2007 (Doc. 86).

approval of the settlement; the rights of Class members, including how to participate in, object to, or opt out of the settlement; the fact that Class counsel waive all attorneys' fees and seek only reimbursement of their actual costs and expenses and the fees and costs of the Claims Administrator; and how to obtain further information. *See* Sincavage Decl. at Ex. A (attaching notice). Also attached to the notice was the Claim Form. *Id.*

Accordingly, the form and method notice utilized in this case was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *United States v. Alabama*, No. 07-10235, 2008 U.S. App. LEXIS 6882, at *8-9 (11th Cir. Mar. 28, 2008) (affirming, under an abuse of discretion standard, lower court's finding that the class notice was sufficient; "Those of our sister circuits that have addressed the issue have required that the notice apprise class members of the terms of the settlement agreement in a matter that allows class members to make their own determination regarding whether the settlement serves their interests"); *Borcea*, 238 F.R.D. at 677 (holding that class notice was sufficient because it contained "clear and concise information about the settlement ..."); *Strube*, 226 F.R.D. at 698 (approving class notice).

VI. THE PROPOSED SETTLEMENT WARRANTS APPROVAL

A. Standards for Approval

Rule 23(e) of the Federal Rules of Civil Procedure provides that a class action settlement is subject to the approval of the Court. The Eleventh Circuit has held that there is a "strong judicial policy" favoring the settlement of disputed claims. *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). *Accord Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 688 (N.D. Ga. 2001) ("There is a strong judicial policy in favor of [a class action] settlement, in order to conserve the scarce resources that would otherwise be devoted to a protracted litigation."); *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1334 (N.D. Ga. 2000); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 312 (N.D. Ga. 1993); *Meyer v. Citizens and Southern National Bank*, 677 F. Supp. 1196, 1200-01 (M.D. Ga. 1988).

A class action settlement is entitled to a presumption of fairness when it is the product of arm's-length negotiations. *See* 4 Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* §11:41 (4th ed. 2002). "So long as the integrity of the arm's-length negotiation process is preserved ... a strong initial presumption of fairness attaches to the proposed settlement...." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998). *Accord*

Bennett, 737 F.2d at 986 ("It is now abundantly clear, however, that in order to approve a settlement, the district court must find that it 'is fair, adequate and reasonable and is not the product of collusion between the parties.'") (citations omitted).

The settlement here was negotiated at arm's-length. Joint Decl. at ¶ 4. Those arm's-length settlement negotiations took place over several months, included a myriad of complex legal and factual issues, and included numerous conferences. *Id.* Further, at the time the settlement was reached, the parties had many relevant documents and were able to effectively and critically evaluate the claims, the defenses and the fairness of the settlement. *Id.* at ¶¶ 5-6. Hence, there can be no legitimate question that the settlement was the result of fair and honest negotiations.

B. The Factors Considered by the Eleventh Circuit Demonstrate that the Settlement is Fair

An analysis of the factors the Eleventh Circuit has held relevant also support approval of the settlement. These factors include: the likelihood of success of trial; the range and estimate of possible recovery; the complexity, expense and duration of the litigation; the stage of proceedings at which the settlement was achieved; and the reaction of the Class. *Bennett*, 737 F.2d at 986; *accord Hillis v.*

Equifax Consumer Services, Inc., No. 04-CV-3400-TCB, 2007 U.S. Dist. LEXIS 48278, at *28-29 (N.D. Ga. June 12, 2007); *United States v. Alabama*, 2008 U.S. App. LEXIS 6882, at *6-7.

1. *The Likelihood of Success at Trial*

A more favorable result for the plaintiff Class is by no means guaranteed if this litigation is continued through trial. In fact, the Class could end up with no monetary recovery absent the settlement.

Among several other disputed issues, the parties continue to disagree most fundamentally as to whether the school breached any obligations HLA allegedly owed to the Class. HLA's enrollment agreement obligated the school to "[p]rovide an education commensurate with the student's abilities and capacities" and to "[p]rovide adequate room and board facilities." *See* Doc. 37 (attaching plaintiffs' enrollment agreements). Defendants have asserted that even if the Class proved that the school employed uncertified personnel and admitted improperly certain students, this conduct does not amount to any breach of the school's obligations. Indeed, this risk was noted explicitly by the Court in denying in part and granting in part defendants' motion for judgment on the pleadings. *See* April 2, 2007 Order (Doc. 68) at p. 4 ("Defendants, perhaps for good reason, believe that the plaintiffs will not be able to prove a breach of the parties' contract merely by showing, for

example, that the defendants hired some uncertified teachers ...."). The parties similarly disagree over whether the school imposed any excess, undisclosed charges; the school's policies and disclosures concerning strip-searching; whether plaintiffs can hold liable any of the HLA entities which were not parties to the enrollment agreement; whether defendant Buccellato may be held personally liable for any claim; and whether, ultimately, the Class is entitled to any recovery. Joint Decl. at ¶ 6.

Moreover, further litigation will also increase the costs for all parties and likely involve heated discovery battles. For example, the defendants indicated that they would seek to depose not only the plaintiffs but also their children who attended the school, and potentially the children of other Class members. Joint Decl. at ¶ 5. These depositions may be particularly undesirable from the perspective of the well-being of these children.

Another potential risk is that even assuming complete victory at trial through appeal, the Class may be unable to collect the judgment it may obtain. Indeed, the defendants have taken the position that the school's financial status has deteriorated significantly. *See* Doc. 86 ("At the hearing conducted on January 31, 2007 ... counsel for the defendants informed the Court of the significant deleterious effects the suit had had upon" HLA). Further, the defendants have also been

required as part of the settlement to file publicly their personal financial statements, and defendant Buccellato was required to attest personally to the accuracy of those financial statements. *See* Stipulation Ex. D (Doc. 85-3) (containing defendants' financial statements and defendant Buccellato's affidavit).[6] During the settlement negotiations the defendants even raised the prospects of bankruptcy, and the school's liability insurance policies in place during the Class Period do not appear to provide coverage even if plaintiffs prevailed in obtaining a judgment. Joint Decl. at ¶ 6. Hence, even if the Class overcame all defenses, prevailed on all of its claims, and was completely successful at trial and on appeal, the Class faced very real issues of collectibility.

2. *The Settlement Compares Favorably with the Likely Result of Continued Litigation*

Measured against the risks of continued litigation, the settlement also compares favorably with the result the Class could have obtained. The Settlement Fund represents a concrete monetary benefit for the Class. Further, this is in addition to the relief already obtained, including the voiding of the indemnification provision in HLA's enrollment agreement in use during the Class Period (Doc. 67);

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[6] The Stipulation (at ¶ 4(e)) also provides that the settlement may be declared void if defendants' financial statements are proven materially inaccurate.

further disclosures concerning the school's costs and operations (Joint Decl. at ¶¶ 3, 23); and reformation of HLA's standard form enrollment agreement (*id.*).

By contrast, further litigation involves significant contingent risk. In addition to the risks summarized above, there was a risk that the Class would not be certified by the Court for purposes of continued litigation, as the parties hotly disputed during the July 31, 2008 hearing. Absent class certification, many Class members would likely be denied any monetary relief or even seek to proceed individually at all. *See In re Charter*, 876 F.2d at 871; *In re Conagra Peanut Butter Products Liab. Litig.*, No. 07-MDL-1845-TWT, 2008 U.S. Dist. LEXIS 56763 (N.D. Ga. July 22, 2008) (denying class certification). In comparison, the settlement not only provides a significant monetary recovery, but itself supports class certification. *See, e.g.*, *Columbus Drywall*, 2007 U.S. Dist. LEXIS 52589, at *37 ("Courts have, thus, certified classes at the settlement stage noting that such a certification does not present the same problems that certification of a litigation class proposing the same class definition would present."); *Amchem*, 521 U.S. at 619 (accord).

The Settlement Fund itself also falls within the range of fairness in monetary terms, as settlements may be approved which recover only a fraction of alleged damages. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir.

1974) ("In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery."); *In re Motorsports*, 112 F. Supp. 2d at 1334 (approving class action settlement where recovery constituted a small percentage of alleged damages "[b]ecause the Plaintiffs face[d] a real risk of no recovery without the settlements ....").

Here, however, demonstrating liability, damages and even obtaining certification of the Class through trial were by no means certain. In this context, "[a] very large bird in the hand in this litigation is surely worth more than whatever birds are lurking in the bushes." *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838 (W.D. Pa. 1995). As summarized in *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971):

> It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced. Merely by way of example, two instances in this Court may be cited where offers of settlement were rejected by some plaintiffs and were disapproved by this Court. The trial in each case then resulted unfavorably for plaintiffs; in one case they recovered nothing and in the other they recovered less than the amount which had been offered in settlement.

Accord Ingram, 200 F.R.D. at 689; *In re Motorsports*, 112 F. Supp. 2d at 1333-34; *In re Domestic Air Transp.*, 148 F.R.D. at 316; *Meyer*, 677 F. Supp. at 1200-02;

Borcea, 238 F.R.D. at 673 (approving class action settlement because "[e]ven assuming that the plaintiffs could show that Carnival failed to pay them wages at the end of their voyages, it would have been difficult for them to establish a violation of the Seaman's Wage Act at trial").

3. *The Complexity, Expense and Likely Duration of the Litigation Supports Approval of the Settlement*

Class actions "are notoriously difficult and unpredictable and settlement conserves judicial resources." *In re Delphi Corp. Secs.*, 248 F.R.D. 483, 501 (E.D. Mich. 2008). There is no doubt that this action involved complex factual and legal issues. Moreover, some of those issues, such as the precise tuition "offset" to which the Class would be entitled even assuming it survived pretrial motions and prevailed in demonstrating liability, would have been the subject of expert testimony at trial. A trial might well turn on close questions of evidence and fact and, in all events, would consume further resources. If not for this settlement, the case would have continued to be fiercely contested by the defendants (assuming they did not file for bankruptcy), who have demonstrated a commitment to defend the case through and beyond trial, if necessary, and are represented by able counsel.

The complexity, expense and delay of continued litigation here would, in sum, be substantial. Accordingly, this factor also supports approval.

4. *The Stage of the Proceedings and the Information Available Supports Approval of the Settlement*

In determining whether a class action settlement is fair, reasonable and adequate, courts consider the stage of the proceedings and the amount of information available to ensure that the plaintiffs had access to sufficient information to properly evaluate the claims and defenses and to assess the adequacy of the settlement. *See In re Domestic Air Transp.*, 148 F.R.D. at 314. Here, there was sufficient information available to evaluate the strengths and weaknesses of the claims, the defenses, and the propriety of the settlement. *See* Joint Decl. at ¶ 6.

Among other things, the Class counsel issued some 31 subpoenas and obtained and reviewed numerous documents relating to the claims, defenses and defendants' asserted financial condition. *Id.* at ¶¶ 5-6, 9. This included documents and other information from the defendants and multiple other persons and entities. *Id.* In addition, the parties had filed and fully briefed and argued several motions, and had the benefit of several Court rulings. As a result, the parties had an extensive understanding of the strengths and weaknesses of the claims and

defenses. *In re Motorsports*, 112 F. Supp. 2d at 1333-34; *In re Domestic Air Transp.*, 148 F.R.D. at 316; *Meyer*, 677 F. Supp. at 1200-03; *Borcea*, 238 F.R.D. at 673-74.

5. *The Reaction of the Class to the Settlement*

The facts that no Class member has objected to the settlement, only 19 have opted out, and 243 Claim Forms were filed also strongly support final approval. Joint Decl. at ¶ 29; Plaintiffs' Decls. at ¶ 6. Indeed, courts have repeatedly approved settlements even where there were significant Class member objections. *See, e.g.*, *Bennett*, 737 F.2d at 986-88 (approving settlement of antitrust class action over extensive objections); *Ingram*, 200 F.R.D. at 691-93 (approving class settlement over nine objectors); *Hillis*, 2007 U.S. Dist. LEXIS 48278 (five objectors); *Meyer*, 677 F. Supp. at 1210 (10 objectors); *Borcea*, 238 F.R.D. at 671 (six objectors); *Lipuma*, 406 F. Supp. 2d at 1309-10 (41 objectors); *Strube*, 226 F.R.D. at 703 (three objectors).[7] Similarly, courts in this Circuit have routinely

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[7] One response to the settlement was filed. *See* Joint Decl. at ¶ 27. However, it is unclear whether that respondent, Ms. Carol Collins, paid any money to HLA during the Class Period and, hence, is even a Class member. In any event, this response actually illustrates the high degree of contingent risk the Class faced through trial as it states that HLA successfully treated her grandson. Indeed, Ms. Collins explicitly praised HLA's "incredible and dedicated staff" which helped enable her grandson to make a "life-changing breakthrough that would allow him to get on with his life in a normal way." *Id.* Ms. Collins also specifically praised

approved settlements in which significant numbers have opted out. *See, e.g., Ingram*, 200 F.R.D. at 701 (24 opt outs); *Lipuma*, 406 F. Supp. 2d at 1309-10 (1,159 opt-outs); *Strube*, 226 F.R.D. at 703 (35 opt outs). Here, moreover, the relatively small number of opt outs and lack of any objections is particularly strong evidence of the settlement's fairness given the highly personal nature of the Class claims at issue.

VII. THE DISTRIBUTION PLAN IS FAIR

The Court should also approve the Plan of Allocation. *See In re Ikon Office Solutions*, 194 F.R.D. 166, 184 (E.D. Pa. 2000) ("Approval of a plan of allocation of a settlement fund in a class action, 'is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution must be fair, reasonable and adequate.'") (quotation omitted); *McCoy v. Health Net, Inc.*, No. 01-CV-4183 (FSH), 2008 U.S. Dist. LEXIS 60446, at *59 (D.N.J. Aug. 8, 2008) ("[I]n evaluating the formula for apportioning the settlement fund, the Court is mindful that district courts have broad supervisory powers over the administration of class action settlements to allocate the proceeds among the claiming class members equitably."). As with other aspects of the settlement, the

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defendant Buccellato. *Id.* *Accord* Joint Decl. at ¶ 28 (describing similar May 3, 2008 letter from claimant).

opinion of experience and informed counsel is entitled to considerable weight. *In re American Bank Note Holographics, Inc. Secs. Litig.*, 127 F. Supp. 2d 418, 430 (S.D.N.Y. 2001).

The Plan of Allocation proposes that the net Settlement Fund will be distributed to eligible Class members on a *pro rata* basis depending on how much they paid to HLA in tuition and room and board. This methodology is therefore inherently reasonable. *See In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-cv-0085 (FSH), 2005 WL 27013, at *30 (D.N.J. Nov. 9, 2005) ("Plaintiffs propose to allocate the Settlement funds, net of Court approved attorneys' fees, incentive award, and expenses ... in proportion to the overcharge damages incurred by each Class member due to Defendants' alleged conduct in restraint of trade. Such a method of allocating the Net Settlement Fund is inherently reasonable."); *In re Electrical Carbon Products Antitrust Litig.*, 447 F. Supp. 2d 389, 404 (D.N.J. 2006) (*pro rata* distribution "strikes this Court as eminently reasonable and fair to the class members"); *In re Automotive Refinishing Paint Antitrust Litig.*, MDL Docket No. 1426, 2004 U.S. Dist. LEXIS 29161, at *27-28 (E.D. Pa. Sept. 27, 2004) (same). Accordingly, it should be approved.

VIII. CONCLUSION

For the reasons set forth above, the Settlement Class Representative plaintiffs request that the parties' settlement be approved.

Dated: August 22, 2008

Respectfully submitted,

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437912

IN THE UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

Jill and Ron Ryan, *et al.*, individually and on behalf of others similarly situated,	:	
Plaintiffs,	:	No. 2:06-CV-0146 (WCO)
-against-	:	Class Action
Hidden Lake Academy, Inc., *et al.*,	:	
Defendants.	:	

CERTIFICATION

Counsel for the Settlement Class Representative plaintiffs hereby certifies that the text of this document has been prepared with Times New Roman 14 point, one of the fonts and point selections approved by the Court, and complies in all respects with Local Rule 5.1(C) of the United States District Court, Northern District of Georgia.

This 22nd day of August, 2008.

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IN THE UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
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Jill and Ron Ryan, *et al.*, individually and on behalf of others similarly situated,	:	
Plaintiffs,	:	No. 2:06-CV-0146 (WCO)
-against-	:	Class Action
Hidden Lake Academy, Inc., *et al.*,	:	
Defendants.	:	

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the **MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF THE SETTLEMENT CLASS REPRESENTATIVES FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following counsel of record:

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Respectfully submitted, this 22nd day of August, 2008.

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