**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF NEW YORK**

**CAROLINE CASTELLAW, CHERYL CARNES, KATHRYN ROSE. AMANDA WILSON, HELEN SPOSATO, KACY MCDONOUGH, SHERRY TAITZ, MARLA HUBER, JOY MARIE CZAPSKI, DANIEL QUICK, CHARITY RICHERT, DIANE RUBENS, KAREN BLANKEN, WANDA PENNINO, JILLIAN PHELAN, DEBORAH MCCARVER, DEBRA ALEXANDER, DONALD WELLS, CELESTE HOBAN, SIMON RAWSON, ILEANA MARIN, ROBIN WRIGHT, ZAVIDA BAL, BRENDA BERTUCCI, LEANN TOGAREPI, REBECCA BERNER CHRISTINA FRYE, MARCIA BROWN, AARON CHILDRESS, JENNY ST. AUBIN, RHONDA CAIN, HEIKE BAKER, STACEY DORR, CARMEN RICHARD-GOULD, LORI SCHIMSCHOCK, and JEFFERY C. SIMPSON,**

**Plaintiffs, on behalf of themselves and similarly-situated others.**

**v.**

**EXCELSIOR COLLEGE**
**7 Columbia Circle**
**Albany, New York 12203**

**Defendant.**

**No. 14-cv-01048**

(JBW)(RLM)

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

COME NOW THE PLAINTIFFS, in the above-entitled matter and in related actions previously filed with this Court, by and through their undersigned counsel,

John Hermina, Esquire, George Hermina, Esquire, and the Hermina Law Group ("Class Counsel"), and respectfully submit this Memorandum of Law in support of Plaintiffs' Motion for Preliminary Approval of Class Settlement set forth in the Parties' Stipulation of Settlement, which is being filed simultaneously, and which contains a Proposed Order granting preliminary approval of the Stipulation of Settlement as **Exhibit B** thereto, and as for their reasons, they state:

## I. STATEMENT OF FACTS:

The Plaintiffs commenced this action against Defendant Excelsior College ("Excelsior" or "Defendant") on behalf of themselves and all others similarly situated, seeking economic damages and injunctive relief arising out of Plaintiffs' enrollment into Defendant's Associate Degree in Nursing Program ("ADN" or "Program"). In their Complaint and the amendments thereof, as well as several related actions, the Plaintiffs alleged that the Defendant withheld material information regarding the ADN program and that the latter made misrepresentations and omissions regarding the nature and quality of the education. Specifically, the Plaintiffs alleged that Excelsior failed to inform them of any graduation rates, and that it failed to inform them of accurate pass rates for a test known as the Clinical Performance in Nursing Examination ("CPNE"), which costs over $2,000 for each administration; failed to inform of Program deficiencies and failed to inform them of the potential lack of transferability of credits earned in the program. The Plaintiffs also alleged that the Defendant falsely guaranteed that the CPNE was administered in a "fair and objective" manner.

Additionally, the Plaintiffs alleged that delays in completing the program caused them to incur additional annual fees and that they were misled by Excelsior's failure to accurately state the costs inherent to retaking the CPNE for a second and a third time. The Plaintiffs sought monetary and equitable relief under the New York General Business Law §§ 349 and 350. The Plaintiffs specifically requested that Excelsior discontinue the practices enumerated in their Third Amended Complaint. The Plaintiffs also requested damages pursuant to their breach of contract count.

Excelsior denied each and every allegation made by the Plaintiffs, and made a motion for summary judgment to the Court seeking dismissal of Plaintiffs' claims in their entirety. The Parties reached a resolution before the merits of the summary judgment motion were decided by the Court.

At a Settlement Conference held on January 21, 2015, the Court proposed to the parties a settlement recommendation, which both parties accepted resulting in a Settlement Agreement ("the Agreement"). The Agreement permits the Plaintiffs, through Class Counsel, to participate in the modification of disclosures to be made by the Defendant, addressing the alleged representations and omissions complained of in this Action. The Agreement further provides that each named Plaintiff would receive the incentive award payment of $2,500 for their participation in prosecuting the case, and it provides for the payment of $200 for each CPNE failure to each named Plaintiff and to each putative class member consistent with the class definition set forth in §II below and the Stipulation of Settlement between the parties annexed hereto, entitled "The Proposed Settlement."

The parties submit a proposed Order Granting Preliminary Approval of Class Settlement (the "Preliminary Approval Order"). Entry of the proposed Preliminary Approval Order will: 1) grant preliminary approval of settlement; 2) conditionally certify the Class on a nationwide basis; 3) appoint John Hermina, George Hermina and the Hermina Law Group as Class Counsel; 4) establish procedures for providing notice to Class Members; 5) approve the form of notice to Class Members; 6) mandate procedures and deadlines for exclusion requests and objections; and 7) set a date, time and place for a final approval hearing. As will be more fully set forth below, the proposed Settlement Agreement is fair, reasonable, and worthy of preliminary approval and Class Counsel are amply qualified to serve and act on behalf of the Class.

## II. **THE PROPOSED SETTLEMENT**:

The parties reached agreement on the terms of the proposed settlement through vigorous arguments by counsel as to the legal and factual theories and through guidance from the Honorable Magistrate Judge Roanne L. Mann. The proposed settlement class ("Settlement Class" or "Class") consists of all current or former students of Excelsior College's Associate in Science and Associate in Applied Science in Nursing Degree Programs ("ADN") who took the Clinical Performance in Nursing Exam ("CPNE") at any time, failed the CPNE, and then paid for and took the CPNE on another occasion during the Class Period and did not pass the CPNE on at least one more occasion during the class period.

A. A highly significant part of the Agreement is the equitable relief agreed to by the parties. Excelsior has agreed to permit Class Counsel to participate

in the modification of disclosures. The disclosures would relate to areas covered by Plaintiffs' Third Amended Complaint and address the following:

1. Excelsior will communicate to students and prospective students that there is a cost associated with, and the student must pay for, each administration of the CPNE that the student undertakes;

2. Excelsior will accurately and promptly provide information to students regarding the passage rates for the CPNE as well as the National Council Licensure Examination-RN ("NCLEX-RN");

3. Excelsior will communicate to students and prospective students on topics which include: a student's possession of an LPN or related license does not, in and of itself, guarantee success in Excelsior's ADN Program; students enrolled in Excelsior's ADN Program will not be assigned to an individual advisor but may work with different advisors over the course of their enrollment; a student's success or failure in theory and other examinations will affect her/his progress through the ADN Program; the wait time to test at CPNE testing sites may vary depending on the number of students seeking to test at such sites; students will be responsible for paying an annual fee for each year that they continue in the ADN Program; students who fail a CPNE examination will be required to retake all portions of a subsequent examination; during CPNE examinations, Excelsior will seek to provide each student with an opportunity to work with a pediatric patient, however Excelsior may substitute an adult patient if no pediatric patient is available; because each institution of higher education maintains its own credit transfer policy, credits earned in Excelsior's ADN Program may or may not be transferable to other

institutions. Class Counsel's involvement in modifying the disclosures is significant to the Plaintiffs.

## III. ARGUMENT:

### *A. The Settlement Agreement should be approved As Fair, Reasonable, And Adequate:*

The Settlement Agreement between the parties was the result of a Settlement Conference, which was held for an entire day on January 21, 2015. A number of Plaintiffs from various regions of the Country attended the Settlement Conference. Counsel for both parties were able to make arguments regarding all aspects of their respective cases and defenses, which enabled the United States Magistrate Judge Roanne L. Mann to make the recommendations, to which both parties agreed. Having weighed the likelihood of success and the inherent risks and expense of litigation, Plaintiffs and Class Counsel believe that the proposed settlement is "fair, reasonable, and adequate" as required by Fed. R. Civ. P. 23(e)(2).

The settlement of this educational service consumer matter is particularly important since this case would be resolved as a nationwide class action and would have a significant equitable relief component, which will assist future consumers of online nursing education. As this Honorable Court noted in *D.S. v. New York City Dep't of Educ.*, 255 F.R.D. 59, 65 (E.D.N.Y. 2008), "[t]he class action is well suited to protect educational rights. Federal Rule 23(b)(2) was 'designed to assist litigants seeking institutional change in the form of injunctive relief.'"

#### 1. Settlement And Class Action Approval Process:

The Second Circuit has recognized that there is a "strong judicial policy in favor of settlement, particularly in the class action context." *Wal-Mart Stores, Inc. v.*

*Visa U.S.A., Inc.,* 396 F.3d 96, 116 (2d Cir. 2005); *In re PaineWebber Ltd. P'ships Litig*., 147 F.3d 132, 138 (2d Cir. 1998). To grant preliminary approval, the court need only determine whether there is "'probable cause to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *In re Traffic Exec. Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980). In evaluating a class action settlement, courts in the Second Circuit consider the nine factors stated in *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 463 (2d Cir. 1974). These factors are:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d at 463 (cites omitted). All of the *Grinnell* factors weigh in favor of approval. Should objections arise subsequent to the issuance of notice to the Class, this Court may reevaluate its determination. However, because settlement is fair, reasonable and adequate on its face, Plaintiffs request that the Court grant preliminary approval in this matter.

Examining the facts of this case in light of the *Grinnell* factors, the Court will find that the approval sought is warranted. The **first** *Grinnell* factor weighs in favor of approval of the proposed settlement. Continuing this lengthy and complex litigation would involve expense and delays. *See, TBK Partners, Ltd. v. W. Union Corp.*, 517 F. Supp. 380, 389 (S.D.N.Y. 1981). The parties have engaged in extensive discovery. The Plaintiffs have reviewed thousands of documents they received in

discovery and took three depositions of the Defendants. The next step would have been the litigating of a number of bellwether trials, the first of which would have commenced on February 23, 2015. The remaining bellwether trials would have taken months or years to complete. The parties would have filed a number of motions and other papers in connection with the trials, which would have resulted in further expense to the parties.

As to the **second** factor, because notice has not yet been issued, it is difficult to accurately gauge a reaction of the Class at this time. However, because each Class Member will receive some monetary compensation for CPNE failure(s) and because of the significant equitable benefits (i.e. the disclosures), which will benefit future consumers, Class Counsel expects that the Class will react favorably.

As to the **third** *Grinnell* factor, the parties believe that sufficient discovery has been conducted to allow them to evaluate the strengths and weaknesses of their respective cases. Specifically, the parties have exchanged documents and sworn Answers to Interrogatories. The Plaintiffs filed several motions requesting additional discovery and the Plaintiffs were able to receive additional discovery as a result of the filing of such Motions. One Plaintiff testified in a lengthy deposition as to the particulars of her allegations, while the Defendant submitted three senior representatives of Excelsior for their depositions. Because the discovery was lengthy, hard-fought, and meaningful, the third *Grinnell* factor is satisfied.

*Grinnell* factors **four** and **five** are also met in this case and weigh in favor of preliminary approval. While the Plaintiffs believe that their cases are strong, they are also aware of the risks inherent to further litigation. The proposed settlement

alleviates the risks and provides monetary benefit to the Class in a timely manner and without the possibility of incurring further expense and delay. The same is true with respect to factor **six**, which requires the evaluation of the risk of maintaining class status through trial. Based on prior arguments made by Excelsior, it is likely that Counsel for the Defendant will take legal positions that would require additional re-briefing of the issues and would result in more risk, expense and delay. The proposed settlement eliminates these potential negative consequences and weighs in favor of preliminary approval.

Factor **seven** also weighs in favor of settlement. Excelsior holds a non-profit status and its ability to pay a significant verdict may be curtailed. Even if Excelsior could pay a significant verdict, however, its ability to pay, in and of itself, would not render settlement unfair. *See, Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005).

Finally, *Grinnell* factors **eight** and **nine** are also satisfied inasmuch as the settlement amount is reasonable in light of the possible recovery and the attendant risks of litigation. "The determination whether a settlement is reasonable does not involve the use of a 'mathematical equation yielding a particularized sum.'" *Frank v. Eastman Kodak Co*., *Supra*., 228 F.R.D. 174, at 186 (quoting *In re Austrian & German Bank Holocaust Litig*., 80 F. Supp. 2d at 178). "Instead, 'there is a range of reasonableness with respect to a settlement -- a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Id.* (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972), *cert. denied*, 409 U.S. 1039, 93 S.

Ct. 521 (1972). "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *City of Detroit v. Grinnell Corp., Supra.*, 495 F.2d 448, at 455. Here, each class member will receive monetary compensation. In addition, the Plaintiffs will be able to insure, through their Class Counsel, that Defendant's disclosures, to the fullest extent possible, will not be misleading to future consumers.

***B. Provisional Certification Of The Settlement Class Is Appropriate:***

The possibility of class certification has been raised with the Court on several occasions throughout this litigation. On August 15, 2014, the Court issued an Order (Docket No. 63), which indicated that the Court may consider certifying a class on a limited set of issues. In this Order, the Court suggested that the Plaintiffs' consider proposing a class that included:

> All persons who enrolled in Excelsior, paid a CPNE fee within three years of filing this lawsuit, took the CPNE and failed, then paid additional CPNE fee(s) for additional administration(s) of the CPNE, and stood for additional administration of the CPNE.

The Court's August 19, 2014 Order (Docket No. 64) reflects that the Plaintiffs amended their second complaint to seek certification of the above-referenced class. The nature of the class is reflected in the class definition set forth in the Parties' Stipulation of Settlement.

The parties, in accepting Judge Mann's settlement proposal, have agreed that this settlement will be certified as a nationwide Settlement Class as set forth above.

Permitting certification at this stage will allow notice of the proposed settlement to be issued to inform Settlement Class Members of the existence and terms of the Settlement, their right to be heard at a fairness proceeding, their right to opt out, and the date, time and place of the formal fairness hearing. In this regard, the Plaintiffs request that this Court issue a determination that the proposed Settlement Class satisfies Rule 23(a)'s requirements of numerosity, commonality, typicality and adequacy of representation. For the reasons set forth below, this Class meets the requirements of Rule 23(a) and (b).

**1. Rule 23(a) Requirements Are Met:**

**a. Numerosity:**

Numerosity is met when "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Impractical does not mean impossible." *Robidoux v. Celani*, 897 F.2d 931, 935 (2d Cir. 1993)."[N]umerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

In the present case, the number of Named Plaintiffs alone suggests that the element of numerosity is met. Furthermore, the putative class is composed of over a thousand of consumers nationwide. Because of the number of Class Members and the geographic scope of the class, joinder of the class would be impracticable. Thus, the proposed settlement more than satisfies Rule 23's numerosity requirement.

**b. Commonality:**

The Rule 23(a)(2) requirement is satisfied where, as here, there exists "questions of fact and law, which are common to the class." All questions of fact and law need not

be common to satisfy the Rule. Rather, there need only be a "unifying thread" among the claims to warrant class certification. *Kamean v. Local 363, Int'l Bhd. Of Teamsters*, 109 F.R.D. 391, 394 (S.D.N.Y. 1986); *see also Damassia v. Duane Reade, Inc*., 250 F.R.D. 152, 156 (S.D.N.Y. 2008) (commonality satisfied where two questions of law were common to all class members).

In this case, the Plaintiffs alleged, *inter alia,* that they received the same representations regarding: the costs of the CPNE, i.e. that they would only be required to pay for the exam on the first administration, and not that there was a test cost associated with each administration of the CPNE. Plaintiffs' complaints involve the same legal question, which is essentially whether Excelsior's actions violated the Consumer Protection Act, which is codified at § 349 of the General Business Law. GBL § 349 makes it unlawful to engage in "[d]eceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service." NY CLS Gen Bus § 349. The goal of the Act is to "'empower customers,' especially 'the disadvantaged'" to "even the playing field of their disputes with better funded and superiorly situated fraudulent businesses." *Watts v. Jackson Hewitt Tax service Inc*., 579 F. Supp. 2d 334, 346 (E.D.N.Y. 2008)(*quoting, Vitolo v. Mentor H/S, Inc*., 426 F. Supp. 2d 28, 33 (E.D.N.Y. 2006). This statute is a public interest law that aims at eradicating wrongs against the public at large. The Consumer Protection Act of New York has been used as an effective tool by consumers seeking to challenge alleged deceptive practices in connection with the provision of educational services. *See*, examples, *Andre v. Pace Univ*., 161 Misc. 2d 613, 623, 618 N.Y.S.2d, 979 (Yonkers City Ct. 1994), *rev'd on other grounds*, 170 Misc. 2d 893, 655 N.Y.S.2d 777 (*citing e.g. State v. Interstate Tractor*

*Trailer*, 66 Misc. 2d 678, 682, 321 N.Y.S. 2d 147, 151-152 (N.Y. Sup. Ct. 1971); *Drew v. Sylvan Learning Ctr. Corp*., 16 Misc. 3d 836, 842 N.Y.S.2d 270, (N.Y. Civ. Ct. 2007); *People v. McNair*, 9 Misc. 3d 1121(A)(N.Y. Sup. 2005); *Chais v. Technical Career Institutes*, 2002 N.Y. Misc LEXIS 2086, *17, 2002 NY Slip Op 30082(U) (N.Y. Sup. Ct. Mar. 1, 2002); *Brown v. Hambric*, 168 Misc. 2d 502, 509, 638 N.Y.S. 2d 873, (N.Y. City Ct. 1995); and *Alexon v. Hudson Valley Community College*, 125 F. Supp.2d 27 (N.D.N.Y 2000).

**c. Typicality of Claims**

Rule 23(a)(3) requires that "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A. by Forbes v. Guiliani*, 126 F.3d 372, 376 (2d Cir. 1997)(internal quotations omitted). "Minor variations in the fact patterns underlying individual claims" do not defeat typicality when the defendant directs "the same unlawful conduct" at the named plaintiffs and the class. *Robidoux, supra.,* 987 F.2d 931, at 936-37. "Like the commonality requirement, typicality does not require the representative party's claims to be identical to those of all class members." *Frank v. Eastman Kodak Co*., Supra., 228 F.R.D. 174, 182 (cite omitted). The facts underlying the named Plaintiffs' cases are typical. Plaintiffs, at times relevant to this action, were enrolled in Excelsior's ADN program. These consumers alleged that, due to Excelsior's alleged misrepresentation and omissions, they were not aware that there were costs associated with additional administrations of the CPNE. In this respect, Plaintiffs' claims present virtually identical fact patterns and legal theories, which each class member would have to present if he or she filed an individual suit. The claim of every class member is based

upon the same conduct by Excelsior.

**d. Adequacy of Representation**

The standards of Rule 23(a)(4) are met if it appears that the named plaintiffs' interests are not antagonistic to those of other class members and that the plaintiffs' attorneys are qualified, experienced, and generally able to conduct the litigation. *See examples: Rodolico v. Unisys Corp.,* 199 F.R.D. 468, 477 (E.D.N.Y. 2001); *Bogosian v. Golf Oil Corp.*, 561 F.2d 434, 449 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Brown v. Cameron-Brown*, 92 F.R.D. 32, 40-41 (D.C. Va. 1981).

The Plaintiffs are adequate representatives, with no conflicts of interest with the class. These Plaintiffs agreed to step in to carry the burden of representing this Class since the filing of the Complaint, and there is no question as to their willingness to continue the effort to conclusion. Moreover, the Plaintiffs are represented by counsel experienced in class actions and complex cases, including cases that are similar to the case at bar. Counsel for the Plaintiffs has represented Plaintiffs in significant class actions matters. *See*, *e.g., Richard v. Bell Atlantic Corporation*, 946 F. Supp. 54 (1996) wherein the Honorable Judge Charles R. Richey adopted the integrated enterprise test in a District of Columbia case; and, *see also*, *Sanders v. Career Education Corporation* (D.C. Md., Case No. 8:2006-cv-01031; class action certification approval granted on 9/26/2008) in an educational service consumer protection case.

**2. The Criteria of Rule 23(b) Are Satisfied**

After finding that the requirements of Rule 23(a) have been met, the Court

should certify the case as a class action if any one of three criteria in part (b) of the Rule is satisfied. In this case, Plaintiff seeks certification only under Rule 23 (b)(3).

**a. Rule 23(b)(3): Common Issues Predominate**

Rule 23(b)(3) states that a class action may proceed where: The court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to the other available methods for the fair and efficient adjudication of the controversy.

Class certification is appropriate under Rule 23(b)(3) because the issues in this case, both factual and legal, are common to all class members. The lawsuit focuses on Defendants' alleged uniform, consistent and unlawful practice.

Subdivisions (b)(1) and (b)(2) of the Rule, focus largely on declaratory, injunctive and equitable actions. Plaintiffs do not seek such certification under this part of the Rule, with the exceptions of the requests that the Defendant modify the disclosures as set forth in Section II, supra.

**b. Rule 23(b)(3): Superior Method of Adjudication**

The second factor to consider under part (b)(3) is that a class action must be superior to other available methods for the fair and efficient adjudication of the controversy. Class action adjudication is the only practical way in which the class can obtain relief against the Defendant without significant expense in pursuing each of the claims. Since the claims are being certified for purpose of settlement, there is no issue as to manageability. Resolving the case of over a thousand consumers in a single action is superior to individual actions. *See*, Fed. R. Civ. P. 23(b)(3).

***C. The Proposed Notice to Class Members Is Appropriate:***

Rule 23(e)(1) requires that a court "direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). To protect the rights of the absent Class Members, the Court must provide the best notice practicable under the circumstances of this case. *See, Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-175 (1974). In accordance with Rule 23 (c)(2)(B):

> "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 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 members under Rule 23(c)(3)."

In *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652 (1950), the Supreme Court stated that to satisfy the due process requirements, "notice [must be] 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." As this Court will observe, the proposed Notice satisfies the requirements of the Rule. The Notice provides all the pertinent information and fully informs the Class Members of this matter, the Settlement reached, and the

action each Class Member must undertake. The Notice explains the relief provided by the Settlement, how to obtain compensation for the CPNE failure, and the rights Class Members have with respect to opting-out, the right to retain counsel, and how to secure additional information in connection with the matter in addition to providing the claim form. Because the proposed Notice is clear and provides Class Members of sufficient information, the notice plan is adequate pursuant to Rule 23(c)(2).

***D. Scheduling A Final Approval Hearing Is Proper At This Time:***

To determine whether a final order and judgment pursuant to Rule 23(e) should be entered, this Court will hold a fairness hearing to consider all of the arguments in support of, or in opposition to, the Settlement Agreement. Excelsior's attorneys and Class Counsel propose that this Court incorporate into its Preliminary Approval Order the dates submitted in the parties' Stipulation of Settlement.

## IV. CONCLUSION:

For the foregoing reasons, the Plaintiffs respectfully request that this Honorable Court grant them the relief they request in this Memorandum. The parties have concurrently filed hereto the Parties' Stipulation of Settlement, which contains a Proposed Order granting preliminary approval of the settlement, certifying the nationwide Settlement Class, appointing Class Counsel, approving the proposed Notice, and setting deadlines related to class notice and final approval.

**Certificate of Service**

I hereby certify that on this 20th day of February 2015, a copy of this Memorandum of Law In Support of Plaintiffs' Motion For Preliminary Approval of Class Action Settlement was served via the Court's ECF system:

Joan M. Gilbride, Esquire
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New York, NY 10271

BY: ***/s/ John Hermina***