IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ASHA SMITH and EMMA NEDLEY, individually and on behalf of all others similarly situated, *Plaintiffs*, v. UNIVERSITY OF PENNSYLVANIA, *Defendant*.	Case No. 2:20-cv-02086

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF MANNER OF DISTRIBUTION OF NET SETTLEMENT FUND

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs Asha Smith and Emma Nedley (collectively "Named Plaintiffs"), on behalf of themselves and the Settlement Class, respectfully submit this memorandum of law in support of their motion for final approval of the $4.5 million dollar Settlement (the "Settlement Amount") reached in this action (the "Action") and approval of the manner of distribution of the Net Settlement Fund (the "Distribution"). The terms of the Settlement are set forth in the Settlement Agreement, dated September 7, 2022 (the "Settlement Agreement"). ECF No. 97-1.

I. INTRODUCTION

Plaintiffs brought this putative class action alleging that they, and other similarly situated students, are entitled to refunds of certain amounts of tuition, fees, and other charges because, beginning in March 2020, University of Pennsylvania (hereinafter "Penn" or "University") provided classes remotely in response to the COVID-19 pandemic. Plaintiffs allege they and all other Penn students who paid tuition and/or fees for the Spring 2020 semester had express and implied contracts with Penn that entitled them to in-person instruction, and that by switching to remote education in response to the pandemic, Penn was liable for breach of contract. Named Plaintiffs also contended that Penn's shift to remote education gave rise to claims of unjust enrichment and conversion. Named Plaintiffs further allege that when Penn transitioned Spring 2020 classes to remote learning as part of its response to the COVID-19 pandemic, the alleged contract was breached.

The Court dismissed all the tuition-based claims, and it dismissed the fee-based claims for unjust enrichment and conversion. The sole remaining claim in this Action is Plaintiffs' fee-based breach-of-contract claim. (ECF No. 54).

The Settlement represents a fair and reasonable result for the Settlement Class and thus satisfies each of the Rule 23(e)(2) factors, as well as the factors set forth in the Third Circuit decisions of *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975) and *Krell v. Prudential Ins. Co. of Am. (In re Prudential)*, 148 F.3d 283 (3d Cir. 1998). When compared to comparable settlements, the Settlement at issue here provides above-average benefits. *See supra* section IV(3)(c). The Settlement is especially beneficial to the Settlement Class considering the substantial litigation risks Named Plaintiffs faced. Named Plaintiffs and Class Counsel had a thorough understanding of the strengths and weaknesses of the case before reaching the Settlement as they had conducted significant factual investigation into the merits of their claims, engaged in multiple rounds of briefing in connection with Defendant's motions to dismiss and for summary judgment, engaged in protracted settlement negotiations, and exchanged damages information with Defendant as part of the settlement process. Joint Decl. ¶¶ 19, 22, 24.

Given the risks to proceeding with litigation and that the Settlement achieved a satisfactory resolution relative to the damages sustained, the $4.5 million Settlement and the proposed Distribution are fair and reasonable in all aspects. Accordingly, Named Plaintiffs respectfully request the Court grant final approval of the settlement under Rule 23(e) of the Federal Rules of Civil Procedure.

II. FACTUAL BACKGROUND

On April 30, 2020, Plaintiff Asha Smith filed a class action complaint in the United States District Court for the Eastern District of Pennsylvania styled *Asha Smith* v. *University of Pennsylvania* Case No. 2:20-CV-2086 (the "First Action"). Joint Decl., ¶12. Three months later, on July 30, 2020, Plaintiffs moved to consolidate the First Action and an analogous matter entitled, *Nedley v. University of Pennsylvania*, No. 2:20-cv-03109. The two actions were consolidated

under the caption *Asha Smith and Emma Nedley, on behalf of themselves and all others similarly situated v. University of Pennsylvania*, Civil Action No. 20-2086 (ECF No. 17). Plaintiffs filed a Consolidated Class Action Complaint ("Complaint") on August 31, 2020 (ECF No. 18).

On September 21, 2020, Penn filed a Motion to Dismiss (ECF No. 26). On October 13, 2020, Named Plaintiffs filed papers in opposition to the Motion to Dismiss (ECF No. 31). On November 2, 2020, Penn filed its Reply in support of its Motion to Dismiss (ECF No. 33).

On April 20, 2021, the Court issued its decision on the Motion to Dismiss. The Court dismissed the tuition-based claims for breach of contract, unjust enrichment, and conversion, and it dismissed the fee-based claims for unjust enrichment and conversion. The sole remaining claim that the Court permitted to continue past the motion to dismiss was Plaintiffs' fee-based breach-of-contract claim (ECF No. 55).

The Parties engaged in a mediation session before the Hon. Diane M. Welsh (Ret.) of JAMS on August 20, 2021. Although that session lasted all day, no resolution was reached. Thereafter, discovery proceeded pursuant to the Court's June 15, 2021 Scheduling Order (ECF No. 65). The Parties engaged in substantial class/class-related merits discovery, including issuing and responding to written discovery requests, collecting and producing responsive documents, and deposing Plaintiffs. In addition, Penn, through its counsel, engaged an expert economist to analyze Plaintiffs' alleged damages and this expert produced a comprehensive expert report. To facilitate the ongoing discovery, the Court extended the deadlines. *See, e.g.*, ECF Nos 71, 72.

On February 2, 2022, Plaintiffs filed their Motion for Class Certification (ECF No. 78). Defendant filed their Motion for Summary Judgment and corresponding supporting Memorandum on February 21, 2022 (ECF No. 82). Penn filed papers in opposition to Named Plaintiffs' Motion for Class Certification on February 25, 2022 (ECF No. 83). On March 7, 2022 Plaintiffs submitted

their Memorandum In Opposition to Defendant's Motion for Summary Judgment (ECF No. 87). Four days later, Plaintiffs filed their Reply Memorandum in Support of their motion for class certification (ECF No. 88). On March 13, 2022 Penn filed its Reply in support of its Motion for Summary Judgment (ECF No. 89).

Thereafter, the Parties participated in a second, in person, mediation session on May 12, 2022, with the Honorable Diane Welsh (Ret.). This full day mediation involved vigorous negotiation and resulted in a settlement in principle and was, like the first mediation, preceded by information exchange between the Parties and detailed statements to Judge Welsh. The Parties utilized the work of experts and/or consultants, as well as an extensive survey of the changing legal landscape involving analogous claims. The settlement terms resolved all of plaintiffs' tuition and fee claims.

After Plaintiffs filed their unopposed Motion for Preliminary Approval of Class Action Settlement (ECF No. 96), both the Motion for Class Certification and Motion for Summary Judgment were dismissed without prejudice (ECF Nos. 100, 101).

III. STANDARDS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS

A. The Law Favors and Encourages Settlements

"[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged." *In re: Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 535 (3d Cir. 2004). Additionally, "[t]he law favors settlement particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab.*, 55 F.3d 768, 784 (3d Cir. 1995). But, the final approval of settlement is left to the discretion of the court. *Eichenholtz v. Brennan*, 52 F.3d 478, 482 (3d Cir. 1995). Further, courts in this Circuit have great discretion in such matters:

"The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975); *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 587 (3d Cir. 1999). In order to grant final approval of a class action settlement, the Court must first determine whether a class can be certified under Rule 23(a) and at least one prong of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

B. The Settlement Must Be Procedurally and Substantially Fair, Adequate, and Reasonable

Federal Rule of Civil Procedure 23(e) provides the applicable standard for judicial approval of a class action settlement. Rule 23(e)(2), as amended, provides that courts should consider certain factors when determining whether a class action settlement is "fair, reasonable and adequate" such that final approval is warranted:

(A) whether the class representatives and class counsel have adequately represented the class;

(B) whether the proposal was negotiated at arm's length;

(C) whether the relief provided for class is adequate, taking into account:

(i) the costs, risks and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of the proposed award of attorneys' fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) whether the proposal treats class members equitably relative to each other.

See Fed. R. Civ. P. 23(e)(2).

In addition to the foregoing factors, the Third Circuit considers additional factors, the first set of which comes from *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975). In this holding, the Court elaborated on the *Girsh* factors, which are the following:

> (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 defendant 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.

Id. Importantly, no single *Girsh* factor is dispositive, as stated by the Eastern District of Pennsylvania in *Hall v. Best Buy Co.*, 274 F.R.D. 154, 169 (E.D. Pa. 2011). The Third Circuit has explained: "a court may approve a settlement even if it does not find that each of [the *Girsh*] factors weigh in favor of approval." *In re N.J. Tax Sales Certificate Antitrust Litig.*, 750 F. App'x 73, 77 (3d Cir. 2018).

Although the Court must scrutinize the Settlement Agreement for fairness, "there is an overriding public interest in settling class action litigation, and it should therefore be encouraged." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("*Warfarin*"). As set forth below, the Settlement is fair, reasonable and adequate and should be granted final approved.

In addition to the *Girsh* factors, the Third Circuit, in *Krell v. Prudential Ins. Co. of Am. (In re Prudential),* 148 F.3d 283 (3d Cir. 1998), elaborated on additional factors that reviewing courts should consider when deciding whether to approve a settlement. These factors were also given clarity in *In re Pet Food Prods. Liab. Litig.* 629, F.3d 333, 350 (3d Cir. 2010). These factors, the *Prudential* factors, overlap with the *Girsh* factors and are non-exclusive. But, importantly, on the

factors relevant to the litigation need to be addressed. *In re Prudential*, 148 F.3d at 323–24. As follows, the *Prudential* factors are:

> (1) the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages;
> (2) the existence and probable outcome of claims by other classes and subclasses;
> (3) the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved or likely to be achieved for other claimants;
> (4) whether class or subclass members are accorded the right to opt-out of the settlement;
> (5) whether any provisions for attorneys' fees are reasonable; and
> (6) whether the procedure for processing individual claims under the settlement is fair and reasonable.

Id. Both sets of factors are considered; and, in the matter at hand, all relevant factors favor settlement in the matter at hand. *In re: Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316 (3d Cir. 2019).

IV. THE PROPOSED SETTLEMENT IS PROCEDURALLY AND SUBSTANTIALLY FAIR, ADEQUATE, AND REASONABLE

1. The Settlement Satisfies the Requirements of Rule 23(e)(2)

a. *Named Plaintiffs and Class Counsel Have Adequately Represented the Settlement Class*

Under Rule 23, certification of a class requires the Court to determine both Named Plaintiffs and Class Counsel's adequacy. "The adequacy requirement encompasses two distinct inquiries designed to protect the interests of absentee class members: it considers whether the named plaintiffs' interests are sufficiently aligned with the absentees', and it tests the qualifications of the counsel to represent the class." *Ripley v. Sunoco, Inc.*, 287 F.R.D. 300, 309 (E.D. Pa. 2012); *see also Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 182 (3d Cir. 2012). This test

"assures that the named plaintiffs' claims are not antagonistic to the class and that the attorneys for the class representatives are experienced and qualified to prosecute the claims on behalf of the entire class." *Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006) (citation and quotation marks omitted). Here both prongs of the adequacy test are met. Both Named Plaintiffs attended Penn during the spring 2020 semester and paid tuition and fees to do so. The qualifications of Plaintiffs' counsel are set forth in the Firm Resumés. *See* ECF Nos. 97-8, 97-9.

Additionally, Named Plaintiffs and Class Counsel have adequately represented the Settlement Class by zealously prosecuting this action, including by, among other things, extensive investigation and other litigation efforts throughout the prosecution of the Action, including, *inter alia*: (1) researching and drafting the initial complaints in the Action and the Consolidated Class Action Complaint; (2) researching the applicable law with respects to the claims in the Action and the potential defenses thereto; (3) reviewing, researching and opposing Defendant's motion to dismiss; (4) actively participating in similar College and University Class Actions filed across the country and (5) engaging in extensive settlement discussions with Defendant's Counsel and the exchange of information pertaining to the damages allegedly suffered by the Class. *See generally* Joint Decl. at 40. Through each step of the Action, Named Plaintiffs and Class Counsel have strenuously advocated for the best interests of the Settlement Class. Named Plaintiffs and Class Counsel therefore satisfy Rule 23(e)(2)(A) for purposes of final approval.

b. The Proposed Settlement Was Negotiated at Arm's Length

Named Plaintiff satisfies Rule 23(e)(2)(B) because the Settlement is the product of arm's-length negotiations between the parties' counsel. Joint Decl., 43. Further, it is well settled that in the Third Circuit class action settlements enjoy a presumption of fairness under review when: "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of

the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Nat'l Football League Players Concussion Inj. Litig*., 821 F.3d 410, 436 (3d Cir. 2016), *as amended* (May 2, 2016). Given the above and the Declarations attached hereto, Rule 23(e)(2)(B) is satisfied.

c. The Proposed Settlement is Adequate in Light of the Litigation Risks, Costs and Delays of Trial and Appeal

Rule 23(e)(2)(C)(i) and both sets of factors described above overlap as they address the risks posed by continuing litigation. In fact, the first *Girsh* factor is directly analogous to Rule 23(e)(2)(C)(i). As further explained below, all these factors (to the extent relevant) weigh in favor of final approval of the Settlement.

(1) The Risks of Establishing Liability

In considering this factor, courts often consider the complexity of the issues and magnitude of the proposed settlement class. *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998). Named Plaintiffs expect that if the current action were to proceed, then Defendant Penn would contest every single element of the remaining claim. This sort of contention between the parties would become complicated and lengthy, given the current stage of litigation. Additionally, any recovery from trial would be subject to a jury's opinion and likely appeal from either party. Considering the scenarios, the risks of continuing this litigation are very substantial, even assuming some favorable facts in Plaintiffs' favor.

Moreover, issues regarding responsibility for university closure are very apparent given the governmental orders for class cancellation and campus closure. In addition, Penn filed a motion for summary judgment in which it argued that (1) the descriptions of the fees at issue cannot support a contract claim; (2) throughout the period at issue, Penn continued to offer services supported by the fees and, in fact, offered more services rather than fewer. Penn also argued that

the claims of one of the Named Plaintiffs was not legally cognizable. *See* ECF No. 82-1 at 20–23. Penn also filed a comprehensive opposition to class certification in which it argued that Plaintiffs would not be able to show a material breach through a class wide breach. Penn also argued that: (1) Plaintiffs could not satisfy Rule 23(a)'s typicality requirement for several reasons; (2) Plaintiffs' proposed Rule 23(b)(3) class was not ascertainable; (3) Plaintiffs could not show causation or the existence or terms of a contract on class-wide bases; and (4) that class litigation was not superior to individual litigation. *See* ECF No. 83. While Plaintiffs do not concede the validity of any of Penn's arguments, Plaintiffs acknowledge that Penn raised legitimate arguments.

In comparison to the risks as discussed above, the Settlement as it stands currently is an excellent result for the Settlement Class as it provides above-average benefits. *See supra* section IV(3)(c).

(2) <u>The Risks of Establishing Damages at Trial</u>

The risks of establishing liability apply with equal force to establishing damages. If this litigation were to continue, Named Plaintiffs would rely heavily on expert testimony to establish damages, likely leading to a battle of the experts at trial and a *Daubert* challenge. Joint Declaration., ¶ 47. If the Court were to determine that one or more of Named Plaintiffs' experts should be excluded from testifying at trial, Named Plaintiffs' case would become much more difficult to prove. *Id*. Moreover, while Defendant Penn did shift to distance learning and requested that most students leave on-campus housing, these steps were due to Covid-19 and the accompanying government orders. Plaintiffs have never disputed the necessity of these actions; the issue is whether plaintiffs were entitled to a refund of fees paid to Penn. For these reasons, there is a risk in establishing damages. Further, some students were given scholarships for all or some tuition and fees. Moreover, Penn has already argued that one of the two Named Plaintiffs

did not suffer legally cognizable damages and that Plaintiffs would not be able to show a material breach through class wide evidence. *See* ECF No. 82-1 at 20–23; ECF No. 83 at 44–49. Thus, in light of the significant risks Named Plaintiffs faced at the time of the Settlement with regard to establishing damages, including the possibility that plaintiffs would not be able to establish direct damages to each student, this factor weighs heavily in favor of final approval. *Id*.

(3) The Settlement Eliminates the Additional Costs and Delay of Continued Litigation

The anticipated complexity, cost, and duration of the Action would be considerable, and these factors are critical in a Court's evaluation of proposed settlements. *See Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975) (holding that the complexity, expense, and likely duration of litigation are critical factors in evaluating the reasonableness of a settlement). Indeed, if not for the Settlement, litigation will continue, and there is a high likelihood it will be expensive, protracted, and contentious litigation. Joint Decl., ¶ 49. As mentioned earlier, this would consume significant funds and expose Named Plaintiffs and the Class to many risks and uncertainties. The preparation for what would likely be a multi-week trial and possibly appeals, would cause the Action to persist for likely several more years before the Settlement Class could possibly receive any recovery. *Id*., ¶49. Such a lengthy and highly uncertain process would not serve the best interests of the Settlement Class compared to the immediate, certain monetary benefits of the Settlement. *Id*.. Accordingly, this Rule 23(e)(2)(C)(i) factor, as well as the analogous *Girsh* factors, all weigh in favor of final approval.

d. The Proposed Method for Distributing Relief is Effective

With respect to Rule 23(e)(2)(C)(ii), Named Plaintiffs and Class Counsel have taken appropriate steps to ensure that the Settlement Class is notified about the Settlement and that the Settlement Benefit is properly distributed.

Settlement Class Members will receive a portion of the Net Settlement Fund to be allocated pro rata to each Settlement Class Member based on the ratio of the total number of Potential Settlement Class Members to the total Net Settlement Fund. The resulting ratio will be multiplied by the Net Settlement Fund to determine each Settlement Class Member's Settlement Benefit. To the extent a Potential Settlement Class Member properly executes and files a timely opt-out request to be excluded from the Settlement Class, that Potential Settlement Class Member's Settlement Benefit will be distributed to Settlement Class Members, in equal amounts to each Settlement Class Member. Each Settlement Class Member's Settlement Benefit will be distributed to that Settlement Class Member automatically, with no action required by that Settlement Class Member.

With respect to Settlement Class Members who are Continuing Penn Students, the Settlement Administrator will calculate the amount of the Settlement Benefit and transfer this benefit to Penn, which will issue a credit in this amount to each Settlement Class Member's student account. Penn will not impose an administrative charge to issue this credit. The remaining Settlement Class Members will be paid by a check issued by the Settlement Administrator, and the Settlement Administrator will mail the check by first class U.S. Mail to the Settlement Class Member's last known mailing address on file with the University Registrar.

The Settlement Administrator has also provided a form on the Settlement Website that these remaining Settlement Class Members may visit to (a) provide an updated address for sending a check; or (b) elect to receive the Settlement Benefit by Venmo or PayPal instead of a paper check.

Should any settlement checks go uncashed after one hundred and eighty (180) days from the date of distribution, those funds will be donated as a *cy pres* award to Philadelphia Futures, an entity identified by this Court. *See* ECF No. 103 at ¶ 32. Philadelphia Futures is a nonprofit

organization that provides low-income, first-generation-to-college students with tools, resources, and opportunities necessary to succeed in an educational setting. See https://philadelphiafutures.org/about-us/. The Parties agree Philadelphia Futures is an appropriate entity to receive funds of uncashed settlement checks donated as a *cy pres* award.

e. Lead Counsel's Request for Attorneys' Fees is Reasonable

Rule 23(e)(2)(C)(iii) addresses "the terms of any proposed award of attorney's fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(C)(iii). Consistent with the Notice, and as discussed in Class Counsel's fee memorandum, Class Counsel seeks an award of attorneys' fees in the amount of one third or less of the Settlement Amount, and expenses to be paid at the time of award. Joint Decl., ¶ 35.

As set forth in Class Counsel's accompanying fee memorandum, this request is in line with recent fee awards in this District in similar common-fund cases. *Id*., ¶57. Class Counsel's fee request is reasonable. In addition, the Short Form Class Notice informed the Settlement Class that the fee motion would be available for review on the Settlement Website after the deadline for the motion for fees and provided a link to the Settlement Website. *See* ECF No. 104-1 at 7. Accordingly, this factor supports final approval of the Settlement.

Plaintiff's request for fees is reasonable in comparison to other similar settlements. Beginning with *Rocchio et. al v. Rutgers*, the court approved a settlement in which attorneys' fees amounted which amounted to $950,000.[1] The total settlement value for *Rutgers* amounted to $5,000,000.[2] Moving to another similar case, *Fittipaldi v. Monmouth University*, the court

[1] *Rocchio et al. v. Rutgers, The State University of New Jersey*, No. MID-L-003039-20 (N.J. Super. Ct.)
[2] *Fittipaldi v. Monmouth University*, No. 3:20-cv-05526 (D. N.J.)

approved attorney's fees in the amount of one third of the Settlement.[3] Also, the proposed manner for distribution is directly analogous as this payment comes directly from the proposed settlement fund.

f. The Settlement Ensures Settlement Class Members are Treated Equitably

Rule 23(e)(2)(D), the final factor, considers whether Class Members are treated equitably. As reflected in the proposed manner of distribution, *see* Settlement Agreement, ¶¶5, 10, and 16, the proposed Settlement treats Settlement Class Members equitably relative to each other, and all Settlement Class Members will be giving Penn the same release. Named Plaintiffs will be subject to the same formula for distribution of the Net Settlement Fund as every other Settlement Class Member. This factor therefore merits granting final approval of the Settlement. This scheme, as mentioned earlier, is directly analogous to other settlements, notably the *Monmouth* Settlement.[4] As it currently stands, the Monmouth Settlement speaks definitively about the price per student refund, in regards to what funds are received per student. Secondly, the *Rutgers* settlement is directly in line with the proposed settlement herein.[5] Both *Rutgers* and the current proposed settlement involve common funds that are then divvied out to each student equally. And finally, this distribution is fair and in line with the settlement as described in *Choi et al. v. Brown University*, in which the plaintiffs were allocated funds from a general settlement fund after funds were paid to attorneys and the three named plaintiffs.[6]

[3] *Id.*
[4] *Id.*
[5] *Rocchio et al. v. Rutgers, The State University of New Jersey*, No. MID-L-003039-20 (N.J. Super. Ct.)
[6] *Choi et al. v. Brown University*, No. 1:20-cv-00191 (D.R.I.).

Based on the foregoing, Named Plaintiffs and Class Counsel respectfully submit that each of the Rule 23(e)(2) factors support granting final approval of the Settlement.

2. The *Girsh* Factors Favor Settlement

a. The complexity, expense, and likely duration of the litigation

This element is met as the case raises complex factual and legal questions regarding the alleged non-deliverance of services supported by the fees at issue. The matter at hand is almost three years old and has been subject to all sorts of protracted litigation. If this matter were to continue, it is likely that it would be subject to appeal. The continued prosecution of these claims will require significant additional expenses to the class, given further discovery and experts. Further, no matter the outcome at the district court level, the result will likely be appealed, leading to further costs and delay any realized recovery. Thus, this settlement would avoid all sorts of unnecessary expenditures related to said further litigation. This avoidance benefits all parties and weighs in favor of approving settlement. *In re Gen. Motors*, 55 F.3d at 812 (holding that lengthy discovery and potential opposition by the defendant were factors weighing in favor of settlement).

b. The Reaction of the Class to the Settlement

The second *Girsh* factor to consider is the reaction of the class to the settlement. To determine such a reaction, the number of objectors to the settlements is often evaluated. *In re Certainteed Corp. Roofing Shingle Prods. Liab. Litig.*, 269 F.R.D. 468, 485 (E.D. Pa. 2010) (citing *In re Cendant Corp. Litig.*, 264 F.3d 201, 234–35 (3d Cir. 2001)). Further, silence "constitutes tacit consent to the agreement." *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1313 n.15 (3d Cir. 1993). And lastly, a low number of objectors or opt-outs is persuasive evidence that the proposed settlement is fair and adequate. *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp 2.d 402, 415 (E.D. Pa. 2010) (citing *In Re Cendant*, 264 F.3d at 234–35).

This factor is met as there have been only 3 opt-outs and no objections among class members, after being given notice of such settlement. *See* Cowen Decl. at ¶¶ 16, 17. As of the date the final approval hearing, there has been zero objections to the terms of the proposed settlement or the request for attorneys' fees. *See* Cowen Decl. at ¶ 16. As the December 19, 2022 deadline for objections and opt-outs has not yet arrived, undersigned counsel will update this Court following the December 19 deadline.

c. The Stage of the Proceedings and The Amount of Discovery Completed

The third *Girsh* factor "captures the degree of case development that class counsel [had] accomplished prior to settlement." *In Re Cendant*, 264 F.3d at 235. In assessing this third factor, courts must evaluate the procedural stage of the case at the time of the proposed settlement to assess whether counsel adequately appreciated the merits of the case while negotiating, as proclaimed by *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004). Obviously, the matter at hand has been subject to discovery with all sorts of discovery responses, requests, and depositions. The parties completed substantial fact and expert discovery, including all fact and expert discovery relating to class certification, the service of discovery responses, the depositions of the Named Plaintiff, a substantial production of documents by Penn, the service of third party subpoenas, and the completion of an expert report by Penn's economic expert. At its current stage, the litigation is ripe for settlement.

d. The Risks of Establishing Liability

In combination, the fourth and fifth Girsh factors "survey the potential risks and rewards of proceeding to litigation in order to weigh the likelihood of success against the benefit of an immediate settlement." *Warfarin*, 391 F.3d at 537; *In re Flonase Antitrust Litig.*, 951 F.Supp.2d 739, 744 (E.D. Pa. 2013). As stated by both *In Re Warfarin* and *In Re Prudential*, the existence

of obstacles to the plaintiff's success at trial weighs in favor of settlement. This factor weighs in favor of settlement for the reasons set forth above. *See supra* section III(1)(c)(1).

e. The Risks of Establishing Damages

The fifth *Girsh* factor, working in combination with the fourth factor, in short: "attempts to measure the expected value of litigating the action rather than settling it at the current time." *In re Cendant*, 264 F.3d at 238–39. This factor weighs in favor of settlement as well. Much aligned with the directly previous factor, the risk of establishing damages is apparent—for all the reasons set forth *infra* and in Defendants' expert-supported, extensive briefing in opposition to Plaintiffs' class certification motion. *See* ECF 83.

f. The Risks of Maintaining the Class Action Through Trial

Maintaining the current class action could be quite risky. Based upon the factors included in Rule 23 of the Federal Rules of Civil Procedure, this class could be subject to challenges by Defendant. Actions similar to the one at hand have been decertified, dismissed, and also multiple classes have been refused certification by courts.[7] Moreover, Penn has already submitted a comprehensive brief setting forth multiple arguments against class certification. *Id.*. Given such de-certifications and such refusals to certify, this *Girsh* factor weighs in favor of settlement.

g. The Ability of Defendant to Withstand a Greater Judgment

In the matter at hand, there is no contention that Defendant could not stand a greater judgment. The seventh *Girsh* factor requires the Court to consider "whether the defendant could withstand a judgment for an amount significantly greater than the settlement." *Warfarin*, 391 F.3d

[7] *Ryan v. Temple Univ.*, 535 F. Supp. 3d 356 (E.D. Pa. 2021); *Hickey v. Univ. of Pittsburgh*, 535 F. Supp. 3d 372 (W.D. Pa. 2021);

at 537–38. The Third Circuit has noted, "in any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 323 (3d Cir. 2011). This is because, "when there is no 'reason to believe that Defendant face any risk of financial instability[,] . . . this factor is largely irrelevant.'" *In re: Nat'l Football League Players Concussion Injury Litig.*, 307 F.R.D. 351, 394 (E.D. Pa. 2015) (quoting *Reibstein v. Rite Aid Corp.*, 761 F.Supp.2d 241, 254 (E.D. Pa. 2011)). Thus, "the settling defendant's ability to pay greater amounts [may be] outweighed by the risk that the plaintiffs would not be able to achieve any greater recovery at trial." *In re: Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 632 (E.D. Pa. 2004). As such, this factor's weight is irrelevant.

h *The Range of Reasonable in Light of Best Possible Recovery and All Attendant Risks of Litigation*

Often considered together, these factors evaluate whether the settlement represents a good value relative to case strength. *In re Warfarin*, 391 F.3d at 538. In order to determine this reasonability, "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing should be compared with the amount of the proposed settlement." *In re Prudential*, 148 F.3d at 322. For all the reasons stated above, the settlement represents a very good value when all the risks to plaintiffs' case are considered.

3.* The *Prudential Factors are Satisfied

a. *Maturity of the substantive issues;*

The substantive issues in this matter are quite mature. Given that the case has proceeded through motion to dismiss briefing (and decision), class certification discovery, class certification

briefing, and summary judgment briefing, both parties are in a position to fully evaluate their own strengths and weaknesses. This advanced stage lends itself in favor of approval of the settlement.

b. The existence and probable outcome of claims by other classes and subclasses;

Since only 3 class members have elected to be excluded, this factor weighs heavily in favor of approval. *See* Cowen Decl. at ¶ 17. Further, even if these claims were to be brought on an individual basis, the same dismissals would likely be met. As such, the results are relatively the same.

c. The comparison between the results achieved by the settlement for individual class or subclass members and the results achieved or likely to be achieved for other claimants;

This settlement is fair and reasonable and provides Penn students with a higher than average settlement benefit. Under the Settlement Agreement, undersigned counsel expects that each Settlement Class Member will receive a payment of approximately $110.[8] This amount exceeds the payments in comparable class action settlements. *See Rocchio et al. v. Rutgers, The State University of New Jersey*, No. MID-L-003039-20 (N.J. Super. Ct.) (granting final approval of settlement providing each settlement class member with payment of approximately $52); *Choi et al. v. Brown University*, No. 1:20-cv-00191 (D.R.I.) (pending final approval of settlement providing each settlement class member with payment of approximately $104).[9] In comparison, the estimated $110 settlement benefit here is greater than both of these settlements.

[8] This expectation is based on the following calculations: After deducting one third for attorney's fees and $88,554 for estimated settlement administration expenses, $2,911,446 would be remaining. When distributed pro rata across the estimated number of class members (24,500), the expected pro rata settlement benefit will be approximately $110 for each class member. ($2,911,446/24,500 ~ $110.)

[9] As is the case here, both the Brown and Rutgers settlements involve a release of all claims for both tuition and fee refunds. To the best of undersigned counsel's knowledge, this will be the third

Given the risks of litigation, this value is fair and proportional. It is unlikely that Plaintiffs could bring these claims on their own, given the imbalance between the cost of litigation and the limited ability to recover damages. These claims also would be subject to the same defenses that are outlined above, including the defenses set forth in Penn's motion for summary judgment, which was never decided by this Court. As such, this factor weighs heavily in favor of Settlement.

d. Whether class or subclass members are accorded the right to opt-out of the settlement;

As mentioned earlier, class members were given notice of such proposed settlement and three class members have opted out. As such, this *Prudential* factor weighs in favor of settlement.

e. Whether any provisions for attorneys' fees are reasonable; and

The provision for attorney's fees is reasonable. As reflected in the accompanying memorandum addressing the requested attorneys' fees, the request is based upon fees awarded in other analogous matters. As such, this *Prudential* factor weighs in favor of Settlement.

f. Whether the procedure for processing individual claims under the settlement is fair and reasonable.

Under the settlement scheme, as stated earlier, the procedure for individual claims is reasonable. Each settlement class member will automatically receive their settlement benefit, without the need for taking any action.

V. THE MANNER OF DISTRIBUTION OF THE NET SETTLEMENT FUND IS FAIR AND ADEQUATE

settlement of COVID-19 tuition and fee refund claims in which each member of the settlement class will receive a pro rata portion of the settlement benefit. To be sure, other class settlements involving COVID-19 tuition and refund claims exist but are not comparable because those settlements either (1) failed to disclose the amount each settlement class member would receive or (2) distributed settlement benefits pursuant to formulas resulting in students at the same university receiving payments of varying amounts.

The standard for approval of a proposed distribution of settlement funds to a class is the same as the standard for approving the Settlement as a whole. Named Plaintiffs and Class Counsel believe that the proposed manner of distribution is fair and reasonable, and respectfully submit it should be approved by the Court. Indeed, as noted above, the manner of distribution could not be any simpler; each settlement class member will automatically receive their settlement benefit, without the need for taking any action. Notably, there have been no objections to the distribution proposal to date, which supports the Court's approval.

VI. THE COURT SHOULD FINALLY CERTIFY THE SETTLEMENT CLASS FOR PURPOSES OF EFFECTUATING THE SETTLEMENT

In their motion for preliminary approval of the Settlement, Named Plaintiffs requested that the Court certify the Settlement Class for settlement purposes only so that notice of the Settlement, the Settlement Hearing, and the rights of Settlement Class Members to object to the Settlement, request exclusion from the Settlement Class, or submit Proofs of Claim, could be issued. For purposes of effectuating this Settlement, the Court should finally certify the Class. As mentioned in The Court's Order, dated October 5, 2022, the Court preliminarily certified the proposed class (ECF No. 103). The class, as preliminary certified is:

> All students enrolled in any Penn program who were assessed Spring 2020 Fees, with the exception of:
> (i) any person who withdrew from Penn on or before March 17, 2020;
> (ii) any person enrolled for the Spring 2020 semester solely in a program that, at the beginning of the Spring 2020 semester, was intended to be delivered as an online program;
> (iii) any person who properly executes and files a proper and timely opt-out request to be excluded from the Settlement Class; and
> (iv) the legal representatives, successors or assigns of any such excluded person.

ECF No. 103 at 1. Since the Court's entry of the Preliminary Approval Order, nothing has changed to alter the propriety of the Court's preliminary certification of the Settlement Class for settlement purposes. Joint Decl., ¶6. Thus, for all of the reasons stated in Named Plaintiffs' motion for

preliminary approval (incorporated herein by reference), Named Plaintiffs respectfully request that the Court affirm its preliminary certification and finally certify the Settlement Class for purposes of carrying out the Settlement pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3) and make a final appointment of Named Plaintiffs as class representatives and Class Counsel as class counsel.

VII. NOTICE TO THE SETTLEMENT CLASS SATISFIES THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

Rule 23 requires that notice of a settlement be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," Fed. R. Civ. P. 23(c)(2)(B), and that it be directed to class members in a "reasonable manner." Fed. R. Civ. P. 23(e)(1)(B). Notice of a settlement satisfies Rule 23(e) and due process where it fairly apprises "'members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Wal-Mart Stores v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005).

As described by the Third Circuit: Generally speaking, the notice should contain sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or, when relevant, opting out of the class. *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013).

The Notice and the method used to disseminate the Notice to potential Settlement Class Members satisfy these standards. Joint Decl., ¶27. The Court-approved Notice (the "Notice") amply informs Settlement Class Members of, among other things: (i) the pendency of the Action; (ii) the nature of the Action and the Settlement Class' claims; (iii) the essential terms of the Settlement; (iv) the proposed manner of distribution of the Net Settlement Fund; (v) Settlement Class Members' rights to request exclusion from the Settlement Class or object to the Settlement, the manner of distribution, or the requested attorneys' fees or expenses; (vi) the binding effect of

a judgment on Settlement Class Members; and (vii) information regarding Class Counsel's motion for an award of attorneys' fees and expenses and incentive awards for Named Plaintiffs. *Id*. The Notice also provides specific information regarding the date, time, and place of the Final Fairness Hearing, and sets forth the procedures and deadlines for: (i) requesting exclusion from the Settlement Class; and (ii) objecting to any aspect of the Settlement, including the proposed distribution plan and the request for attorneys' fees and expenses and case awards for Named Plaintiffs. *Id*., ¶28.

Class members were mailed and/or emailed notices and Class forms after a thorough email validation process. *See* Cowen Decl. at ¶¶ 9 and 11. There were 32,879 emails sent, with 32,842 confirmed as delivered, which is a 99.89% delivery rate. *See* Cowen Decl. at ¶ 10. There were 5,135 Notices mailed via first class mail because an email address was not available for that Class Member. *See* Cowen Decl. at ¶ 11.

Additionally, a settlement-specific website was created where key Settlement documents were posted, including (i) the Long Form Notice; the Court's Order (ECF No. 97); and (iii) the Settlement Agreement (including all of its exhibits). *See* Cowen Decl. at ¶ 6. As of December 2, 2022, the website has had over 14,500 visits. *Id.* Furthermore, a toll-free telephone number has been set up to respond to frequently asked questions and a dedicated email address was created to further respond to Class Member inquiries. *Id.* at ¶¶ 4, 5. Settlement Class Members have until December 19, 2022, to object to the Settlement or request exclusion from the Settlement Class. While that date has not yet passed, to date there have been no objections to the Settlement, and only three requests for exclusion.

Notice programs, such as the one deployed by Class Counsel, have been approved as adequate under the Due Process Clause and Rule 23. *See In re CertainTeed Corp. Roofing Shingle*

Prod. Liab. Litig., 269 F.R.D. 468 (E.D. Pa. 2010). And in other COVID-19 refund actions against other universities, substantially similar methods of notice have been preliminarily approved. *See, e.g.*, *Wright v. S. New Hampshire Univ.*, No. 20-cv-609-LM, 2021 WL 1617145, at *2 (D.N.H. Apr. 26, 2021); *see also Rosado v. Barry Univ., Inc.*, No. 1:20-cv-21813-JEM, Order, (S.D.N.Y. Mar. 30, 2021).

VIII. CONCLUSION

The $4.5 million Settlement obtained by Plaintiffs and Class Counsel represents an excellent recovery for the Settlement Class, particularly in light of the significant litigation risks the Settlement Class faces, including the very real risk of the Settlement Class receiving no recovery at all. For the foregoing reason, Named Plaintiffs respectfully request that the Court approve the proposed Settlement and the proposed manner of distribution of the Net Settlement Fund as fair reasonable, and adequate.

Dated: December 7, 2022

Respectfully submitted,

/s/ Edward W. Ciolko

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**Admitted *Pro Hac Vice*

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on December 7, 2022, I authorized a true and correct copy of the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such public filing to all counsel registered to received such notice.

/s/ Edward W. Ciolko
Edward W. Ciolko