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-TJS

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION TO PRELIMINARILY APPROVE CLASS ACTION SETTLEMENT, CERTIFY THE CLASS, APPOINT CLASS COUNSEL, APPROVE PROPOSED CLASS NOTICE, AND SCHEDULE A FINAL APPROVAL HEARING

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INTRODUCTION

Plaintiffs[1], individually and on behalf of all others similarly situated, by and through their counsel, hereby respectfully move the Court for preliminary approval of the proposed class action settlement ("Settlement") set forth in the Settlement Agreement ("Settlement Agreement" or "SA") (attached as **Exhibit 1** to the contemporaneously filed Joint Declaration of Roy T. Willey and Edward W. Ciolko ("Joint Decl.")). Plaintiffs, with consent of Defendant, the University of Pennsylvania ("Penn" or the "University"), request that the Court enter the proposed Preliminary Approval Order that would:

1. Have the Consolidated Class Action Complaint (Dkt. No. 18), serve as the operative complaint in this Litigation;
2. Grant preliminary approval of the proposed Settlement;
3. Certify, for settlement purposes only, the Rule 23 Class which consists of 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 for 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;
4. Approve the form and content of, and direct the distribution of, the proposed Short and Long Form class notices ("Notices");

[1] All capitalized terms used throughout this brief shall have the meanings ascribed to them in the Settlement Agreement.

5. Appoint the law firms of Lynch Carpenter, LLP ("LC") and Poulin | Wiley | Anastopoulo, LLC ("PWA") as Class Counsel for the Class;
6. Appoint Plaintiffs Asha Smith and Emma Nedley as Class Representatives; and
7. Set a date for the Final Approval Hearing no less than seventy-five (75) days after the Short Form Notice is disseminated (SA ¶ 36).

Plaintiffs, on behalf of themselves and a proposed class of individuals, have agreed to settle all claims against Penn as to tuition and fees paid during the Spring 2020 semester. Plaintiffs allege that Penn contracted with, charged, and collected from its students' funds for in-person education and on-campus access and services, but that Penn failed to deliver the in-person education and on-campus access and services in response to the Covid-19 pandemic when Penn moved all classes to online-only and constructively closed the campus. As set forth in the Settlement Agreement, all students who do not opt out of the Settlement will receive a payment under the Settlement in consideration for the release of their claims against Penn. All students will receive a *pro rata* portion of the Net Settlement Fund based upon the amount of Spring 2020 Fees paid by all Potential Settlement Class Members.

As set forth below, the proposed Settlement is the product of fully informed, arms-length settlement negotiations, including two mediation sessions before the Hon. Diane M. Welsh (Ret.). The Settlement satisfies all of the prerequisites for preliminary approval and certification of the Class. The proposed Settlement is fair, reasonable, and adequate as it recognizes the risks of continued litigation, in light of Penn's pending summary judgment motion and Plaintiffs' pending class certification motion, while providing substantial relief to the Settlement Class Members. For

these reasons, and those fully articulated below, Plaintiffs respectfully request that the Court preliminarily approve the Settlement and enter the proposed Preliminary Approval Order.[2]

BACKGROUND AND STATUS OF THE LITIGATION

On April 30, 2020, Plaintiff Asha Smith ("Smith") sued Penn in the United States District Court for the Eastern District of Pennsylvania, Case No.: 2:20-cv-02086. *See* Dkt. No. 1. On her own behalf, and on behalf of a putative class, Smith asserted claims for breach of contract and unjust enrichment. *See id.* On June 25, 2020, Plaintiff Emma Nedley ("Nedley") sued Penn in the United States District Court for the Eastern District of Pennsylvania, Case No.: 2:20-cv-03109. *See* Dkt. No. 1. On her own behalf, and on behalf of a putative class, Nedley asserted claims for breach of contract, unjust enrichment, and conversion. *See id*. On July 30, 2020, a Motion to Consolidate Nedley and Smith's cases was filed with this Court (Dkt. No. 13), and granted on August 17, 2020 (Dkt. No. 17). A Consolidated Class Action Complaint was filed on August 31, 2020 (Dkt. No.18).

Penn filed a motion to dismiss on September 21, 2020 (Dkt. No. 26), which was fully briefed on November 2, 2020 (Dkt. No. 33). After oral argument on March 10, 2021 (Dkt. No. 45), this Court issued an Order and Opinion granting in part, and denying in part, Penn's motion to dismiss. Dkt. Nos. 54, 55. This Court dismissed Plaintiffs' claims for breach of contract for tuition, and for unjust enrichment and conversion for tuition and fees, but allowed Plaintiffs' claim for breach of contract for fees to move to discovery. *Id.*

After extensive written discovery and depositions, Plaintiffs filed a motion to certify the class on February 4, 2022 (Dkt. No. 78), which was fully briefed on March 11, 2022 (Dkt. No.

[2] While Penn denies liability, it does not oppose this Motion, and supports preliminary approval of the Settlement Agreement, certification of the proposed class for settlement purposes only, and dissemination of the Class Notice to the students.

88), and is currently pending before this Court. Penn filed a motion for summary judgement on February 21, 2022 (Dkt. No. 82), which was fully briefed on March 14, 2022 (Dkt. No. 89), and is currently pending before this Court.

During this litigation, 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. The Parties engaged in a second mediation before the Hon. Diane M. Welsh (Ret.) on May 12, 2022, and came to an agreement in principle. The Parties then worked towards drafting and finalizing the Settlement Agreement, including the utilization of Judge Welsh as recently as last week to iron out certain contested details of the agreement, which is presented herewith for the Court's consideration and approval.

Based upon their independent analysis, and recognizing the risks of continued litigation, counsel for Plaintiffs believe that the proposed settlement is fair, reasonable, and is in the best interest of Plaintiffs and the students. Although Penn denies liability, it likewise agrees that settlement is in the Parties' best interests. For those reasons, and because the Settlement is contingent on Court approval, the Parties submit their Settlement Agreement to the Court for its review.

SUMMARY OF THE TERMS OF THE PROPOSED SETTLEMENT

The key components of the Settlement are set forth below, and a complete description of its terms and conditions are contained in the Settlement Agreement.

A. The Proposed Rule 23 Class

Through the Settlement Agreement, the Parties stipulate to the certification of the Class. The Class is comprised of the following class:

> 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 for 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.

Should the Court grant final approval of the Settlement, by operation of law and as set forth in Paragraph 11 of the Settlement Agreement: (a) all members of the Releasing Settlement Class shall be deemed to have released any and all Released Claims against the Released Penn Parties, and (b) shall forever be barred and enjoined from prosecuting any or all of the Released Claims against any of the Released Penn Parties.

B. The Proposed Class Notice

The Settlement Agreement provides for dissemination of a Short Form Class Notice. The Short Form Class Notice will provide Potential Settlement Class Members with pertinent information regarding the Settlement as well as directing them to the Long Form Class Notice, the Settlement Website, and the contact information for Class Counsel. Within fourteen (14) days after entry of the Preliminary Approval Order, Penn shall provide the Settlement Administrator with a list from the University Registrar's records that includes the names and last known email address and, if no e-mail address is available, a postal address, to the extent available, belonging to all Potential Settlement Class Members. *See* SA ¶ 18.

Shortly after receiving the Class List, the Settlement Administrator will send the Short Form Notice (attached to the SA as **Exhibit C**) via email or U.S. Mail. *See id.* ¶ 19. The Short Form Notice shall advise the Potential Settlement Class Members of their rights under the Settlement, including the right to be excluded from and/or object to the Settlement or its terms. The Short Form Notice shall also inform Potential Settlement Class Members that they can access

the Long Form Notice at upenncovidrefundsettlement.com. The Long Form Notice shall advise the Potential Settlement Class Members of the procedures specifying how to request exclusion from the Settlement or submit an objection to the Settlement. *See* SA ¶ 19.

Before the issuance of the Short Form Notice, the Settlement Administrator shall also establish a Settlement Website, upenncovidrefundsettlement.com, which will include the Settlement Agreement, relevant pleadings, the Long Form Notice, any relevant Court orders regarding the Settlement, and a list of frequently asked questions mutually agreed upon by the Parties. *See* SA ¶ 20. Contact information for the Settlement Administrator, including a Toll-Free number (877-388-1717), as well as Settlement Class Counsels' contact information will be provided. The form and method of Class Notice agreed to by the Parties satisfies all due process considerations and meets the requirements of Federal Rule of Civil Procedure 23(e)(1)(B). The proposed Long Form Class Notice describes plainly: (i) the terms and effect of the Settlement Agreement; (ii) the time and place of the Final Approval Hearing; (iii) how the recipients of the Class Notice may object to the Settlement; (iv) the nature and extent of the release of claims; (v) the procedure and timing for objecting to the Settlement; and (vi) the form and methods by which Potential Settlement Class Member may either participate in or exclude themselves from the Settlement.[3]

C. Monetary Terms

The proposed Settlement Amount is a non-reversionary cash payment of Four Million Five Hundred Thousand Dollars ($4,500,000.00). *See* SA ¶ 40. In accordance with the Settlement Agreement, the Settlement Administrator shall make deductions from the Settlement Amount for

[3] *See generally* Declaration of Justin Parks of A.B. Data in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and To Direct Notice to the Proposed Settlement Class filed contemporaneously herewith.

court-approved attorneys' fees and reasonable litigation costs, fees, and expenses for the Settlement Administrator, and any court-approved Service Awards to the Plaintiffs, in recognition of the risks and benefits of their participation and substantial services they performed. *See id.* ¶ 41. After all applicable fees and expenses are deducted, the Net Settlement Fund will be allocated *pro rata* to each Settlement Class Member based on the ratio of (a) the total amount of Spring 2020 Fees assessed to each Potential Settlement Class Member to (b) the total amount of Spring 2020 Fees assessed to Potential Settlement Class Members enrolled in any Penn program. The resulting ratio will be multiplied by the Net Settlement Fund to determine each Settlement Class Member's Settlement Benefit. *See id.* ¶ 5. To the extent that a Potential Settlement Class Member properly executes and files a timely opt-out to be excluded from the Settlement Class, the amount that would have been distributed to such Potential Settlement Class Member had they not filed an opt-out request will instead be distributed to Settlement Class Members, in equal amounts to each Settlement Class Member. *Id.* ¶ 6.

Should the Court grant preliminary approval of the Settlement, Penn shall pay the Settlement Amount into an escrow account with the Settlement Administrator within ten (10) business days. *See id.* ¶ 40. Within sixty (60) days after Final Approval, the Settlement Administrator will send Settlement Class Members their portion of the Settlement Benefit by check, or by credit to their student account if they are projected to be Continuing Penn Students. *See* SA ¶¶ 7-8, 10. The Settlement Administrator will pay all legally mandated Taxes pursuant to the Escrow Agreement prior to distributing the settlement payments to Settlement Class Members. *See id.* ¶ 45.

Settlement Class Members shall have one hundred and eighty (180) days from the date of distribution of the checks to cash their check for the Settlement Benefit. All funds for Uncashed

Settlement Checks shall be donated, as a *cy pres* award, to (a) the Penn Vice Provost for University Life Emergency and Opportunity Fund and (b) the Penn Graduate Emergency Fund. *See* SA § 10.

D. Dismissal and Release of Claims

Upon the Settlement becoming Final, Settlement Class Members shall be deemed to have forever released any and all suits, claims, controversies, rights, agreements, promises, debts, liabilities, accounts, reckonings, demands, damages, judgments, obligations, covenants, contracts, costs (including, without limitation, attorneys' fees and costs), losses, expenses, actions or causes of action of every nature, character, and description, in law or in equity, that any Releasing Party ever had, or has, or may have in the future, upon or by reason of any matter, cause, or thing whatever from the beginning of the world to the Effective Date, arising out of, concerning, or relating in any way to Penn's transition to remote education or other analogous services during and following the COVID-19 pandemic through the end of Spring 2020 semester, or the implementation or administration of such remote education or other related educational or University services. This definition includes but is not limited to all claims that were brought or could have been brought in the Action. This definition includes but is not limited to both so called "tuition" and "fees." Further, Released Claims include any and all Penn may have, had, or discover against the Released Settlement Class Parties arising of or related to in any way the Released Settlement Class Parties' investigation, filing, prosecution, or settlement of this Action. or any other case related to or consolidated into it. *See* SA ¶¶ 10-15. These releases are described in the proposed Long Form Class Notice.

E. Proposed Schedule Following Preliminary Approval

EVENT TIMING	
Mailing of Class Notices	Within fourteen (14) calendar days after entry of Preliminary Approval, Penn will produce a list of Potential Settlement Class Members to the Settlement Administrator (SA ¶17). Within thirty (30) calendar days after entry of Preliminary Approval, the Settlement Administrator will send the Short Form Notice to Potential Settlement Class Members (SA ¶18)
Deadline for Filing Objections to the Settlement	Within forty-five (45) days after the issuance of the Short Form Notice (SA ¶ 23)
Deadline for Submitting Requests for Exclusion from the Settlement	Within forty-five (45) days after the issuance of the Short Form Notice (SA ¶ 23)
Final Approval Hearing	No less than seventy-five (75) days after the Short Form Notice is disseminated (SA ¶ 36)

ARGUMENT

A. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED BY THE COURT

The settlement of class action litigation is favored and encouraged in the Third Circuit. *See Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010) ("Settlement agreements are to be encouraged because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts"); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("there is an overriding public interest in settling class action litigation, and it should therefore be encouraged"). As another Court in this district aptly noted just last year:

> Preliminary approval of a proposed class action settlement is left to the discretion of the trial court. *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 317 (3d Cir. 1998). "The fair, reasonable and adequate standard is lowered, and the court is required to determine whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies. . . ." *Nat. Football League*, 961 F. Supp. 2d 708, 714 (quoting another source). Nevertheless, "[p]reliminary approval is not simply a judicial 'rubber stamp' of the parties' agreement." *Id.* Rather, it is "based on an examination of whether the proposed settlement is 'likely' to be approved under Rule 23(e)(2)." *Wood v. Saroj & Manju Invs. Philadelphia LLC*, No. CV 19-2820-KSM, 2020 U.S. Dist. LEXIS 243700, 2020 WL 7711409, at *10 (E.D. Pa. Dec. 28, 2020) (citing Fed. R. Civ. P. 23(e)(1)(B)(i) and other sources).

Caddick v. Tasty Baking Co., No. 2:19-cv-02106-JDW, 2021 WL 1374607, *7 (E.D. Pa. April 12, 2021).

As set forth below, preliminary approval of this proposed Settlement is appropriate as it satisfies all criteria for preliminary approval. Accordingly, Plaintiffs request that the Court grant the requested relief.

1. Standard for Approval of Class Action Settlements

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval for the settlement of class actions. When a proposed class settlement is reached, it must be submitted to the Court for approval. H. Newberg & A. Conte, NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2009) ("NEWBERG"). Preliminary approval is the first of three steps comprising the approval process for settlement of a class action. The second step is the dissemination of notice of the settlement to all class members. Finally, there is a settlement approval or final fairness hearing. *See* Manual for Complex Litigation § 21.632-633 (4th ed. 2004).

The Third Circuit has stressed that the most relevant consideration is whether the proposed settlement is within a "range of reasonableness" in light of all costs and risks of continued litigation; that is, the test is whether the proposed settlement is fair and reasonable under the

circumstances. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283 at 322 (3d Cir. 1998). To determine whether the settlement is fair, reasonable and adequate under Rule 23(e), courts in the Third Circuit apply the nine-factor test enunciated in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975), which was reaffirmed in *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 437 (3d Cir. 2016). 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.

Girsh, 521 F.2d at 156-57. At the preliminary approval stage, a court need not address every factor, as "the standard for preliminary approval is far less demanding." *Gates v. Rohm & Haas Co.,* 248 F.R.D. 434, 444 n.7 (E.D. Pa. 2008).

The question presented on a motion for preliminary approval of a proposed class action settlement is whether the proposed settlement appears fair and reasonable. If the proposed settlement falls "within the range of possible approval," the Court should grant preliminary approval and authorize the Parties to give notice of the proposed settlement to the class members. *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982). Stated another way, preliminary approval is a "determination" of whether there "might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." *In re Traffic Executive Association-Eastern Railroads*, 627 F.2d 631, 634 (2d Cir. 1980).

In this Circuit, "[i]f the proposed settlement appears to be the product of serious informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to Class representatives or segments of the Class, and falls within the range of possible approval, then the court should direct that notice be given to the Class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement." *Gaskin v. Pennsylvania*, 389 F. Supp.2d 628, 630 (E.D. Pa. 2005); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785-86 (3d Cir. 1995).

Plaintiffs' Counsel believes the terms of the proposed settlement are fundamentally fair, reasonable, and adequate, especially when considering all the risks associated with litigating this matter further. In making its determination of these risks, the Court should give deference to the opinions of Class Counsel. *Austin v. Pennsylvania Dep't of Corrs.*, 876 F. Supp. 1437, 1472 (E.D. Pa. 1995) ("In determining the fairness of a proposed settlement, the Court should attribute significant weight to the belief of experienced counsel that settlement is in the best interests of the class.").

a. Complexity, Expense, And Likely Duration Of The Litigation

This case has been diligently litigated by both sides. Significant work has been done, including but not limited to: written discovery, review of a significant volume of documents produced, legal research and comparison of analogous cases, depositions, analysis of numerous catalogs and materials, and participation in two mediation sessions with an experienced mediator. Had this case not settled, class certification and summary judgment would have been ruled upon, and depending upon the results, further discovery and litigation would have commenced before starting a jury trial. Accordingly, this factor warrants the granting of preliminary approval.

b. Reaction Of The Class To The Settlement

Class Notice has not yet been disseminated. Consequently, students have not yet had the opportunity to consider or opine on the Settlement. As such, Class Counsel will address this factor at the Final Approval Hearing. However, Plaintiffs support the Settlement.

c. Stage Of The Proceedings And The Amount Of Discovery Completed

As noted above, the Parties have engaged in significant discovery and fully briefed several issues. Indeed, Defendant produced significant financial information which allowed Plaintiffs to develop a comprehensive picture of the damages at issue, as well as Defendant's ability to pay. Further, the Parties participated in two all-day mediations before Judge Welsh (Ret.). The participation of Judge Welsh ensured that the settlement negotiations were conducted at arm's length and without collusion between the Parties. *See e.g.*, *Bernhard v. TD Bank, N.A.*, No. 1:08-CV-04392, 2009 WL 3233541 at *1-2 (D.N.J. Oct. 5, 2009); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"). For these reasons, this factor also weighs in favor of approval of the Settlement.

d. Risks Of Establishing Liability And Damages

The inquiries into the risks of establishing liability and damages "survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement." *In re Ikon Off. Sols., Inc. Sec. Litig.*, 209 F.R.D. 94, 105 (E.D. Pa. 2002) (quoting *In re Prudential Ins. Co., Am. Sales Practice Litig. Agent Actions,* 148 F.3d at 319). Here, class certification and summary judgment was fully briefed, and issues of liability have been disputed.

Seeking summary judgment against Plaintiffs' claims, Penn produced alleged evidence that after the transition to remote learning caused by the pandemic, Penn continued to offer substantial

services and activities supported by the fees at issue in this case. In addition, Penn argued in support of summary judgment that the pertinent fee language was not breached. While Plaintiffs vigorously opposed each of these arguments, Plaintiffs cannot foreclose the possibility that this Court could grant Penn's pending Motion for Summary Judgment.

Moreover, similar issues in directly analogous cases are currently pending on appeal before the Third Circuit, where proposed Class Counsel is representing Plaintiffs in both matters.[4] It is Class Counsel's considered opinion that settlement on the proposed terms at this juncture in the Litigation, given all the risks involved, is the most prudent course.

e. Risks Of Maintaining The Class Action Through The Trial

"The existence of obstacles, if any, to a plaintiff's success at trial weighs in favor of settlement." *Harshbarger v. Penn Mut. Life Ins. Co.*, No. 12-CV-6172, 2017 WL 6525782 at *7 (E.D. Pa. Dec. 20, 2017). The risks associated with class certification increase the risk of maintaining the proposed class, and therefore supports settlement. *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004) (concluding that settlement was appropriate as there was "appreciable risk to the class members' potential for recovery").

Here, the Court has pending before it Plaintiffs' motion to certify the class. Courts across the country generally have favored class certification in this context, but some have also denied certification. As such, there is no guarantee that certification will be granted in this action. At this stage of the Litigation, the Parties were able to make an informed decision concerning the risks involved. The risks render settlement at this juncture the prudent course.

[4] *See Hickey v. University of Pittsburgh*, No. 21-2013 (3d Cir) and *Ryan v. Temple University*, No. 21-2016 (3d Cir.)

f. Ability Of Defendant To Withstand A Greater Judgment

A "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Flores v. Anjost Corp.*, No. 11 Civ. 1531 (AT), 2014 WL 321831, at * 6 (S.D.N.Y. Jan. 29, 2014) (citation omitted). This factor alone is not an impediment to settlement when other factors favor the settlement. *See In re Vitamin C Antitrust Litig*., No. 06–MD–1738 (BMC)(JO), 2021 WL 5289514, at * 6 (E.D.N.Y. Oct. 23, 2021) (acknowledging that "in any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and . . . this fact alone does not undermine the reasonableness of the instant settlement."). Although Penn may have the ability to withstand a greater judgment, the outstanding result—a $4.5 million settlement—is still fair, reasonable, and adequate to compensate the proposed Settlement Class, and weighs in favor of preliminary approval. Notably, courts have found settlements for far less than $4.5 million in factually similar matters to be fair, reasonable, and adequate. *See Choi v. Brown University*, No. 1:20-cv-00191 (D.R.I., 2022) (Court approving settlement for $1.5 million) (**Exhibit 2** to Joint Decl.); and *Fittipaldi v. Monmouth University,* No. 3:20-cv-05526, (D. N.J., 2022) (Court approving settlement for $1.3 million).

g. Range Of Reasonableness Of The Settlement Fund In Light Of The Best Possible Recovery And All The Attendant Risks Of Litigation

"This inquiry measures the value of the settlement itself to determine whether the decision to settle represents a good value for a relatively weak case or a sell-out of an otherwise strong case." *General Motors*, 55 F.3d at 806. Here, the proposed Settlement confers a substantial and real benefit on the Settlement Class Members in one of a series of novel breach of contract cases arising out of the COVID-19 pandemic higher learning's and society's response to it. Hundreds of similar cases have been filed across the country and the law regarding everything from what is a college student's contract with a University to how can one accurately value the economic

differences between in person, online, and hybrid-delivered educational services is being weighed, considered, and, frankly, made from state courts in California and Florida, to federal Circuit Courts in New York, Texas, Illinois and, yes, Pennsylvania. As can be seen in this Court's detailed and thoughtful motion to dismiss decision, claims in these cases may be dressed in simple breach of contract garb; but they contain all the complexities of a 21st century information landscape. To get a real return for affected Penn students in the near term, while the Third Circuit is still mulling the metes and bounds, and ultimate viability, of the Class' claims, is something the undersigned feels is an achievement given the quite possible recovery of zero. Settlement will result in Settlement Class Members receiving a *pro rata* share of the Net Settlement Fund based on the ratio of (a) the total number of Potential Settlement Class Members to (b) the total Net Settlement Fund. SA ¶ 4. The resulting ratio will be multiplied by the Net Settlement Fund to determine each Settlement Class Member's Settlement Benefit. *Id.* Consequently, preliminary approval is warranted.

h. The Permissive Factors Also Support Settlement

In *In re NFL,* the Third Circuit again noted that in reviewing a proposed settlement, a court should also – to the extent applicable – look at "several permissive and non-exhaustive factors" when evaluating a proposed settlement. *In re NFL,* 821 F.3d at 437. These factors also support preliminary approval. First, all students have the right to opt-out of this Settlement. *See* SA ¶ 5. Second, Settlement Class Members will receive a *pro rata* share of the Net Settlement Fund based on the ratio of (a) the total number of Potential Settlement Class Members to (b) the total Net Settlement Fund. *Id.* ¶ 4.

Further, the Settlement does not unduly grant preferential treatment to anyone. Instead, Plaintiffs are permitted to seek, subject to the Court's approval, a reasonable Service Award that

recognizes their efforts in prosecuting and resolving this Litigation and the risks associated with bringing this action. *See id.* ¶ 53.

Finally, the provision regarding attorneys' fees is reasonable. Pursuant to the Settlement Agreement, prior to a Final Approval Hearing, Class Counsel will file a motion seeking an amount not to exceed one-third of the Settlement Amount as a fee award, plus reimbursement of all reasonable litigation expenses incurred. This maximum amount Plaintiffs' Counsel can request is presumptively reasonable. In *In re Ravisent Techs., Inc. Sec. Litig.,* Judge Surrick noted that "courts within this Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses." 2005 WL 906361, 2005 U.S. Dist. LEXIS 6680 (E.D.Pa. Apr. 18, 2005) (referencing *In re CareSciences. Inc. Sec. Litig.,* Civ. A. No. 01–5266 (E.D.Pa. Oct. 29, 2004)) (awarding one-third recovery of $3.3 million settlement fund, plus expenses). Importantly, this fee request is plainly documented in the proposed Short Form and Long Form Class Notices. As such, Class Counsel will be fully prepared to substantiate their final fee request after Settlement Class Members have had an opportunity to opine on its propriety.

Thus, all applicable factors support preliminary approval of this proposed Settlement.

B. THE COURT SHOULD CERTIFY THE PROPOSED CLASS FOR SETTLEMENT PURPOSES

1. The Rule 23 Class Should Be Certified As Provided For In The Settlement Agreement

Plaintiffs request that the Court certify the proposed Class for settlement purposes only. These proposed settlement class plainly satisfies the four elements of Rule 23(a), and one or more of the requirements of Rule 23(b). Importantly, courts across the country have granted certification when evaluating settlement of analogous claims.. *See In re Columbia Univ. Tuition and Fee Action*, Case No. 1:20-cv-03208, Dkt. No. 115 at 3 (JMF) (S.D.N.Y. Mar. 29, 2022) (final judgment certifying the proposed class for settlement purposes); *Choi et al v. Brown University,*

Case No. 1:20-cv-00191-JJM-LDA, Dkt. No. 78 at 2 (D.R.I. Sept. 6, 2022) (preliminarily approving the proposed settlement and conditionally certifying the proposed class); *Wright v. S. New Hampshire Univ.*, 565 F. Supp. 3d 193, 210 (D.N.H. 2021) (granting preliminary approval of the parties' proposed class action settlement and preliminarily certifying the proposed class for settlement purposes). Moreover, Defendant does not oppose certification of the Class for settlement purposes only.

2. Rule 23(a) Requirements Are Satisfied

To certify a class under Rule 23, a plaintiff must establish that the class meets each of the four requirements of subsection (a) of the Rule. These four elements are referred to as (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *In re Corel Corp. Secs. Litig.*, 206 F.R.D. 533, 539 (E.D. Pa. 2002). Here, all four elements are clearly satisfied.

a. 23(a)(1) - "Numerosity"

The proposed Class is sufficiently numerous. Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23. Here, there are approximately 26,000 students in the Class. *See* Joint Decl. ¶ 10. *See also* **Exhibit 3** to Joint Decl. The numerosity requirement is therefore amply satisfied.

b. Rule 23(a)(2) – "Commonality"

The proposed Class also satisfies the commonality requirement. *See generally Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 357-360 (2011). Rule 23(a)(2) requires that there be "questions of law or fact common to the class," and that the class members "have suffered the same injury." *Wal-Mart*, 564 U.S. at 349-50. The commonality inquiry focuses on the defendant's conduct. *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 297 (3d Cir. 2011) (en banc) ("commonality is informed by the defendant's conduct as to all class members and any resulting injuries common to all class members"). "Commonality exists when proposed class members challenge the same

conduct of the defendants." *Schwartz v. Dana Corp.*, 196 F.R.D. 275, 279 (E.D. Pa. 2000). Here, commonality exists because the Class members' claims are predicated on common core issues:

a. Whether Defendant engaged in the conduct alleged herein;

b. Whether there is a difference in value between online distance learning and live in-person instruction;

c. Whether Defendant breached its contracts with Plaintiffs and the other members of the Fees Class by retaining fees without providing the services the fees were intended to cover;

d. Whether certification of the Class proposed herein is appropriate under Fed. R. Civ. P. 23;

e. Whether Class members are entitled to declaratory, equitable, or injunctive relief, and/or other relief; and

f. The amount and nature of relief awarded to Plaintiffs and the other Class members.

As such, the Rule 23 Class raises common questions of law and fact which arise from a "common nucleus of operative facts" with respect to their claims against Defendant. *See In re Centocor, Inc. Secs. Litig. III*, No. 2:98-CV-00260, 1999 WL 54530 at *2 (E.D. Pa Jan. 27, 1999).

c. Rule 23(a)(3) – "Typicality"

Rule 23(a)(3) requires that a representative plaintiff's claims be "typical" of those of other class members. Fed. R. Civ. P. 23. Whereas commonality evaluates the sufficiency of the class, typicality judges the sufficiency of the named plaintiffs as representatives of the class. *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. Dec. 15, 1994). "When a defendant has engaged in a common scheme relative to all members of the class, there is a strong assumption that the claims of the representative parties will be typical of the absent class members." *Sherman v. American Eagle Exp., Inc.*, No. 09-575, 2012 WL 748400, at *5 (E.D. Pa. March 8, 2012) (citing *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 207 (E.D. Pa. 2001)). "Even relatively

pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories or where the claim arises from the same practice or course of conduct." *In re NFL*, 821 F.3d at 428. Plaintiffs' experiences were typical of all other students. Plaintiffs and each member of the Class enrolled as on-campus students of Penn, registered for in-person classes, paid their Mandatory Fees for in-person and on-campus facilities and services, and were denied the same when Penn closed its campus in Spring 2020. Moreover, the members of the proposed Class have no individual interests in controlling the litigation because, unlike a tort claim, all of their claims share a common set of facts. As such, the Plaintiffs' claims are typical of the claims of members of the proposed class.

d. Rule 23(a)(4) – "Adequacy"

The final requirement of Rule 23(a) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23. "The adequacy requirement encompasses two distinct inquires designed to protect the interests of absentee class members: whether the named plaintiffs' interests are sufficiently aligned with the absentees', and the qualifications of the counsel to represent the class." *Ripley v. Sunoco, Inc.*, 287 F.R.D. 300, 309 (E.D. Pa. June 26, 2012); *see also Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 182 (3d Cir. 2012).

Here, adequacy is readily met, and Plaintiffs satisfy both prongs. First, Plaintiffs have no interests adverse or "antagonistic" to absent Class Members. Plaintiffs seek to hold Defendant accountable for, among other things, allegedly failing to refund the portion of tuition and fees associated with the part of the Spring 2020 semester when they failed to provide in-person education and on-campus access and services. Further, Plaintiffs have demonstrated allegiance and commitment to the Litigation. As such, Plaintiffs' interests are perfectly aligned with the interests

of the absent Class members, thereby meeting the first adequacy prong. Second, Plaintiffs' Counsel is qualified, experienced, and competent in complex litigation, and have an established, successful track record in class litigation – including analogous cases to that here. *See* Joint Decl. ¶¶ 11, 12. Accordingly, the adequacy requirement is satisfied.

e. Rule 23(b) Requirements Are Satisfied Here

Under Rule 23(b)(3), a class action should be certified when the court finds that common questions of law or fact predominate over individual issues and a class action would be superior to other methods of resolving the controversy. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 594, 623 (1997). Superiority requires the court "to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative methods of adjudication." *In re Prudential Ins. Co. of Am. Sales Prac. Litig. Agent Actions*, 148 F.3d at 316. Here, Plaintiffs readily meet both requirements.

"[The] predominance test asks whether common issues of law or fact in the case predominate over non-common, individualized issues of law or fact. Predominance begins, of course, with the elements of the underlying cause of action." *Neale v. Volvo Cars of North America, LLC*, 794 F.3d 353, 370 (3d Cir. 2015) (citations and quotation marks omitted). Nevertheless, "the presence of individual questions does not *per se* rule out a finding of predominance. If issues common to the class overwhelm individual issues, predominance should be satisfied." *Id.* at 371. Notably, the Third Circuit has remarked that it is "more inclined to find the predominance test met in the settlement context." *In re NFL*, 821 F.3d at 434 (quoting *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 304 n.29 (3d Cir. 2011) (en banc)). Here, the common issues that exist in this case—whether Defendant breached its contracts with Plaintiffs and the members of the Class by failing to provide them with in-person, on-campus instruction, educational services,

and use of facilities after March of 2020—clearly predominate over any individual issues that may exist. Each Class member suffered the same harm for the same amount of time due to the same actions or inactions of Defendant. Further, the alleged contractual arrangements between each of Defendant's students and Defendant—receiving in-person, on-campus instruction, educational services, and use of facilities—are effectively identical. Similarly, the nature of Defendant's alleged breach is the same for each member of the Class, regardless of their academic major, scholarships, or any other ancillary criteria.

Second, the Federal Rules of Civil Procedure direct courts to weigh the following factors to determine whether a class action is superior to other alternative methods of adjudication: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(A)–(D).

In the present case, each factor weighs in favor of superiority. Plaintiffs and the other Class members, due to Defendant's alleged misconduct, experienced almost identical circumstances. Seeing that these cases involve a relatively small amount of damages compared to the enormous investment of time and money that it will take to litigate them, individual Plaintiffs have little interest in and gain little benefit from initiating separate actions, and individual lawsuits would needlessly waste judicial resources as each lawsuit would likely involve the same evidence concerning Defendant's alleged wrongdoing. Indeed, this proposed settlement effectively resolves approximately 24,000 students' lawsuits. Accordingly, the Court should enter an order certifying the Class for settlement purposes only.

C. THE PROPOSED SETTLEMENT NOTICE TO THE CLASS SHOULD BE APPROVED

"Rule 23(e)(1)(B) requires the Court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise...." Manual for Complex Litigation, §21.312. "First, Rule 23(c)(2)(B) requires 'the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.'" *In re Remicade Antitrust Litig.*, No. 17-CV-04326, 2022 WL 3042766, at *10 (E.D. Pa. Aug. 2, 2022) (citing *In re Nat'l Football League Players*, 821 F.3d 410, 435 (3d Cir. 2016). "Additionally, principles of due process 'require[ ] that notice 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.'" *Id.* (finding notice sufficient where notice was sent via email, then by postcard if an email bounced back).

Here, the Parties proposed notice plan includes email (where available), direct mail (where email is not available), and posting on Penn's own website a link to the Settlement Website. Information can likewise be found by calling 877-388-1717 or visiting upenncovidrefundsettlement.com. This comprehensive notice plan is intended to fully inform Potential Settlement Class Members of the proposed Settlement, and the information they require in order to make informed decisions about their rights. The proposed Short Form and Long Form Class Notices contain "simple and straightforward language and not legalese" and "the notice program is robust and is likely to ensure that all members receive notice of the claims and their rights with respect to the settlement." *Caddick*, 2021 WL 1374607, *2. Accordingly, this Court should approve the form of notice and the method of publication that Plaintiffs propose as they satisfy the due process requirements of Fed. R. Civ. P. 23.

D. LYNCH CARPENTER, LLP AND POULIN WILEY ANASTOPOULO, LLC SHOULD BE APPOINTED AS CLASS COUNSEL

Fed. R. Civ. P. 23(g) requires the Court to examine the capabilities and resources of counsel to determine whether they will provide adequate representation to the class. Class Counsel –Lynch Carpenter, LLP and Poulin | Wiley | Anastopoulo, LLC – easily meet the requirements of Rule 23(g). *See* Firm Resumes of Lynch Carpenter, LLP and Poulin | Wiley | Anastopoulo, LLC, **Exhibit 4** and **Exhibit 5** to Joint Decl. Importantly, Plaintiffs are represented by counsel experienced in class action litigation including directly analogous cases. Indeed, these firms were appointed class counsel in a substantially similar matter. *See*, Joint Decl. ¶ 3, n.1. Moreover, Class Counsel's work in this case on behalf of the Plaintiffs and the proposed class and collective has been substantial. As such, this Court should not hesitate in appointing Lynch Carpenter, LLP and Poulin | Wiley | Anastopoulo, LLC as Class Counsel.

CONCLUSION

The proposed Settlement is fair, reasonable, and adequate. Thus, for all the reasons set forth above, preliminary approval should be, respectfully, granted and the Preliminary Approval Order entered so as to permit the Parties to effectuate notice to the Potential Settlement Class Members.

Dated: September 7, 2022

Respectfully submitted,

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