IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHANEL ADAVENAIXX, individually and on behalf of all similarly situated, *Plaintiff*, v. HOWARD UNIVERSITY, *Defendant*.	No. 1:23-cv-00663-DLF

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES, AND INCENTIVE AWARD

DATED: September 9, 2024

Respectfully submitted,

/s/ William N. Sinclair

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INTRODUCTION

Plaintiff Chanel Adavenaixx ("Plaintiff" or the "Class Representative") was an undergraduate student enrolled at Defendant Howard University ("Howard" or "Defendant") for the Spring 2020 Semester. Plaintiff alleged that Howard breached its contract with students to provide an in-person, on-campus experience when it shut down midway through the Spring 2020 Semester and moved to online learning in response to COVID-19. After extensive arms' length negotiations, including a full-day mediation with Magistrate Judge G. Michael Harvey and numerous discussions thereafter, the parties reached a Class Action Settlement[1] (the "Agreement" or "Settlement Agreement"). The Settlement Agreement—preliminarily approved by this Court on June 18, 2024 (ECF No. 38)—creates a $2,073,680 million non-reversionary common fund that will be used to pay Settlement Class Members,[2] notice and administration costs, a service award to the named Plaintiff, and attorneys' fees, costs, and expenses to Class Counsel.

This Settlement falls squarely within the range established by previous, similar settlements that have been finally approved in the COVID-19 tuition and fee refund context. *See, e.g.*, *Ninivaggi et al. v. University of Delaware*, Case No. 1:20-cv-01478-SB (D. Del. 2023) ($6.3MM common fund); *Smith v. The University of Pennsylvania*, No. 2:20-cv-02086-TJS, 2023 U.S. Dist. LEXIS 9094 (E.D. Pa. Jan. 18, 2023) ($4.5MM common fund); *D'Amario v. The University of Tampa*, No. 7:20-cv-03744-CS (S.D.N.Y.) ($3.4MM common fund); *Metzner v. Quinnipiac University*, 3:20-cv-00784-KAD (D. Conn.) ($2.5MM common fund); *Rosado v. Barry Univ., Inc.*, No. 1:20-cv-21813-JEM, 2021 U.S. Dist. LEXIS 169196 (S.D. Fl. 2021) ($2.4MM common

[1] The Parties' Class Action Settlement Agreement is attached as Exhibit A to the Declaration of L. Timothy Fisher in Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award.

[2] Unless otherwise noted, capitalized terms have the same meaning as set forth in the Agreement.

fund); *Martin v. Lindenwood Univ.*, No. 4:20-cv-01128-RLW (E.D. Mo.) ($1.65MM common fund); and *Wright v. S. New Hampshire Univ.*, 651 F. Supp. 3d 211 (D.N.H. 2021) ($1.25MM common fund).[3] What is more, Settlement Class Members will *automatically* receive a *pro rata* share of the Settlement Amount from the Settlement Fund, unless they exclude themselves from the Settlement.

In light of this exceptional result, Plaintiff respectfully requests, pursuant to Federal Rule of Civil Procedure 23(h), that the Court approve attorneys' fees of one-third of the Settlement Fund, or $691,226.66, attorneys' costs and expenses of $4,606.56, as well as an incentive award of $5,000 to Plaintiff for her service as the Class Representative.

FACTUAL AND PROCEDURAL BACKGROUND

I. PLAINTIFF'S ALLEGATIONS

Plaintiff filed a class action lawsuit on behalf of all people who paid tuition and fees for the Spring 2020 academic semester at Howard, and who, because of Howard's transition to remote instruction in response to the COVID-19 pandemic, lost the benefit of the education for which they paid, and/or the services for which certain of their fees paid, without having any portion of their tuition or those fees refunded to them. ECF No. 1, at ¶ 1.

Howard is a private, federally chartered historically black university ("HBCU") in Washington, D.C. During the Spring 2020 semester, it had an enrollment of approximately 9,000 students. It offers more than 120 areas of study within 14 schools and colleges.

Plaintiff was an undergraduate student at Howard University majoring in Communications, with a concentration in television and film and a minor in Business. Plaintiff is now an alumna of

[3] All unreported cases cited herein are attached to the Declaration of Thomas J. McKenna ("McKenna Decl.") as Exhibits B–O, submitted herewith.

Howard University, having completed her undergraduate degree requirements and graduating at the end of the Spring 2022 Semester. Plaintiff paid Defendant tuition and fees for the Spring 2020 Semester.

As detailed in the Class Action Complaint, Plaintiff and the Class reasonably expected to receive campus-based, in-person educational services when she formed her contract with Howard. However, on March 16, 2020, Howard announced via letter from Howard's President Wayne A.I. Frederick, M.D., MBA, that Howard was to suspend "face-to-face instruction of courses at Howard University for the remainder of the Spring 2020 Semester and courses will continue to transition to remote and online instruction following the scheduled Spring Break." *Id.* ¶ 43.

II. THE LITIGATION AND WORK PERFORMED TO BENEFIT THE CLASS

Adavenaixx I and the Payne Action

On October 7, 2020, Plaintiff filed a putative class action against Howard University ("Howard"), seeking a partial refund of tuition and certain mandatory fees paid for the second half of the Spring 2020 semester following Howard's transition from in-person to remote educational instruction as a result of the Novel Coronavirus Disease 2019 ("COVID-19") pandemic. Plaintiff asserted claims for breach of contract and unjust enrichment, among others. *See Adavenaixx v. Howard Univ.*, No. 1:20-cv-02872-TJK (D.D.C) (ECF No. 1) ("*Adavenaixx I*"). On December 4, 2020, Plaintiff voluntarily dismissed *Adavenaixx I* without prejudice before Howard filed its responsive pleading. *Adavenaixx I*, at ECF No. 9. *See* Fisher Decl. ¶ 4.

Adavenaixx I was filed four (4) months after a different plaintiff (also represented by Class Counsel in this case), filed *Payne v. Howard Univ.*, Case No. 1:20-cv-01314 (D. Md.), later transferred to this District and assigned Case No. 1:20-cv-03792-DLF (D.D.C) ("*Payne* Action"), another putative class action asserting similar claims and seeking tuition and fee refunds for the

second half of the Spring 2020 semester. After the Court denied in part Howard's Rule 12(b)(6) motion in the *Payne* Action, the Parties entered into a brief stay pending the outcome of appeals in other COVID-19 tuition litigation (*Shaffer v. George Washington University*, No. 21-7040 (D.C. Cir.), and *Qureshi v. American University*, No. 21-7064 (D.C. Cir.)). Thereafter, per the appellate court's orders, the dismissals of the complaints in the *George Washington* and *American University* actions were reversed and the matters remanded to the lower court for further proceedings, with the Circuit holding that the plaintiffs had pled claims for breach of implied contract and, in the alternative, for unjust enrichment. *Shaffer v. George Washington University*, 27 F.4th 754 (D.C. Cir. 2022). Following this, the *Payne* Action proceeded to discovery. *See* Fisher Decl. ¶ 5.

On August 4, 2022, Howard provided written responses to Plaintiff Payne's first set of twenty (20) interrogatories and first set of twenty-six (26) document requests. On January 23, 2023, after several meet-and-confers addressing Howard's written responses, Howard made its initial production of documents. *See* Fisher Decl. ¶ 6.

On January 25, 2023, Howard served its first set of interrogatories and document requests on Mr. Payne. Mr. Payne did not respond to Howard's discovery requests, and instead, on April 10, 2023, moved to voluntarily dismiss his case because he had filed a petition for bankruptcy and obtained a bankruptcy discharge during the pendency of the proceedings. On April 12, 2023, the Court granted Payne's motion to dismiss. *See* Fisher Decl. ¶ 7.

This Action

On March 10, 2023, Plaintiff filed this putative class action against Howard for similar claims as asserted in *Adavenaixx I* and the *Payne* Action. ECF No. 1. On June 5, 2023, Howard filed its Answer in this Action. ECF No. 12. Following this, the Parties started to engage in formal

discovery and entered into Confidentiality Agreements and Discovery Agreements. ECF Nos. 16-17. The Parties to this Action subsequently agreed, in order to avoid duplication, that some of the discovery previously exchanged in the *Payne* Action could be used in this action. ECF No. 21. *See* Fisher Decl. ¶ 8.

On September 27, 2023, this Action was referred to mediation (ECF No. 22), and on November 7, 2023, the Parties engaged in a full day mediation with the assistance of Magistrate Judge G. Michael Harvey. At the conclusion of the mediation session, the Parties agreed to a $2,073,680 payment to settle the Action, subject to Court approval. *See* Fisher Decl. ¶ 9.

Plaintiff believes that the claims asserted in the Action have merit. Nonetheless, Plaintiff and her counsel recognize that Howard raised factual and legal defenses in the Action that present a risk that Plaintiff may not prevail at class certification, at summary judgment, at trial, or on appeal. Plaintiff and her counsel have also taken into account the costs, risks, and delays associated with the continued litigation of the Action, including litigating any appeals issued by this Court. Therefore, Plaintiff and her counsel believe that it is desirable that the Released Claims be fully and finally compromised, settled, and resolved with prejudice, and barred under the terms and conditions set forth in the Settlement. *See* Fisher Decl. ¶ 10.

Howard denies all allegations of wrongdoing, fault, liability or damage to the Class Representative and the Settlement Class, and denies that it acted improperly or wrongfully in any way in temporarily transitioning to remote instruction in response to the COVID-19 pandemic. *See* Fisher Decl. ¶ 11.

Nevertheless, taking into account the uncertainty and risks inherent in litigation generally and the benefits that current and former students will receive from a negotiated settlement, Howard considers it desirable to resolve the Action on the terms and conditions stated herein to avoid

further expense, inconvenience, and burden, and therefore has determined that the Settlement on the terms and conditions set forth herein is in Howard's best interests. *See* Fisher Decl. ¶ 12.

Based on their comprehensive examination and evaluation of the law and facts relating to the matters at issue in the Action, Class Counsel and Howard's Counsel have concluded that the terms and conditions of the Settlement are fair, reasonable, and adequate to resolve the alleged claims of the Settlement Class Members, and that it is in the best interests of the Settlement Class Members to settle the claims raised in the Action under the terms and conditions set forth in the Settlement. *See* Fisher Decl. ¶ 13.

Counsel prepared and filed their motion for preliminary approval of the Settlement Agreement. On June 18, 2024, the Court granted preliminary approval of the Settlement Agreement. ECF No. 38. During and since that time, Class Counsel has worked with the Settlement Administrator to administer the Notice Plan, has communicated with numerous Class Members on their rights, and has working towards the Fairness Hearing that is scheduled before the Court on October 1, 2024 at 11:00 a.m. at the U.S. District Court for the District of Columbia, 333 Constitution Avenue N.W., Washington D.C. 20001. *See* Fisher Decl. ¶ 14.

SUMMARY OF THE SETTLEMENT

Class Counsel's efforts resulted in an outstanding settlement. The Settlement Agreement provides an exceptional result for the Settlement Class by delivering immediate cash to Class Members without requiring any action on their part. The Settlement creates a non-reversionary $2,073,680 Settlement Fund, from which class members will *automatically* receive an equal Cash Award from the Available Settlement Fund, unless they exclude themselves from the Settlement. Fisher Decl., Ex. A, ¶¶ II.3-6. The equal payment for each Settlement Class Member will be calculated by dividing the Net Settlement Fund by the number of Settlement Class Members, as

determined by the Settlement Administrator based on the Class List provided by Defendant. *Id.*

ARGUMENT

I. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE AND SHOULD BE APPROVED

The requested fee award of $691,226.66, representing one-third of the cash common fund, is reasonable and merits approval. Under Federal Rule of Civil Procedure 23(h), courts may award "reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Here, the Settlement Agreement provides that Class Counsel may petition the Court for an award of attorneys' fees of up to one-third of the Settlement Fund ($2,073,680). Fisher Decl., Ex. A, ¶ X.2.

A. The Percentage-Of-Recovery Method Should Be Used To Calculate Fees

"While the commonly used 'lodestar' method represents one way of calculating reasonable attorneys' fees, this circuit has indicated that in cases involving a common fund that has been established for the benefit of the plaintiffs, the 'percentage of the fund' method 'is the appropriate mechanism for determining the attorney fees award.'" *In re Black Farmers Discrimination Litigation*, 953 F. Supp. 2d 82, 87-88 (D. D.C. 2013) (quoting *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993)); *see also In re Lorazepam & Clorazepate Antitrust Litigation*, 2003 WL 22037741 at *7 (D. D.C. June 16, 2003) ("The D.C. Circuit has joined other circuits in 'concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases.'") (quoting *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993)). "This percentage-of-the-fund approach helps to align more closely the interests of the attorneys with the interests of the parties … by discouraging inflation of attorney hours and promoting efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system." *In re Black Farmers Discrimination Litig.*, 953 F. Supp.

2d at 87 (internal citation and quotations omitted).

Using this methodology, "[f]ee awards in common-fund cases may range from fifteen to forty-five percent." *Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1, 6 (D. D.C. 2008). However, in this Circuit, fee awards of one-third are routinely accepted. *In re Nifedipine Antitrust Litig.*, 2011 WL 13392312, at *2 (D. D.C. Jan. 21, 2011) (approving 33.3% award); *Radosti v. Envision EMI, LLC*, 760 F. Supp. 2d 73, 78 (D. D.C. 2011) (approving 33.3% award); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *10 (D. D.C. July 16, 2001) (approving 34% award); *Wells*, 557 F. Supp. 2d at 7 (approving 45% award).

B. One-Third Of The Common Fund Is A Reasonable Fee

"Courts have a duty to ensure that claims for attorneys' fees are reasonable." *Trombley v. National City Bank*, 826 F.Supp.2d 179, 204 (D. D.C. 2011). The District of Columbia has identified the following factors to consider in determining whether attorney's fees are reasonable under the percentage-of-the-recovery approach:

> (1) the size of the fund created and the number of persons benefitted, (2) the presence or absence of substantial objections by class members to the settlement terms or fees requested by counsel, (3) the skill and efficiency of the attorneys involved, (4) the complexity and duration of litigation, (5) the risk of non-payment, (6) the time devoted to the case by plaintiffs' counsel, and (7) awards in similar cases.

Id.; *see also In re Lorazepam*, 2003 WL 22037741 at *8 (same); *Cohen v. Chilcott*, 522 F. Supp. 2d 105, 122 (D. D.C. 2007) (same); *In re Black Farmers Disc. Litig.*, 953 F. Supp. 2d at 88 (same); *Wells*, 557 F. Supp. 2d at 6 (D. D.C. 2008) (same).

Here, each of these factors weighs in favor of finding the requested fee reasonable.

1. The size of the fund created and the number of persons benefitted

If final approval is granted, the Settlement will result in a substantial common fund of

$2,073,680 for the benefit of Class Members who otherwise would potentially receive nothing. As described below, the Settlement Agreement thus provides an excellent result for Class Members as compared to other similar cases. This substantial recovery, which will be shared with all Class Members alike who paid any tuition or fees during the Spring 2020 Semester, weighs in favor of approving the requested fee. As detailed in the Agreement, each Class Member will receive a check or an electronic payment, unless they opt out.

2. The presence or absence of substantial objections by class members to the settlement terms or fees requested by counsel

As of the filing of this motion, no Class Member has filed an objection to the Settlement Agreement and the response from Class Members has been positive in communications with Class Counsel. *See* Fisher Decl. ¶ 25; Declaration of Thomas J. McKenna in Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award ("McKenna Decl.") ¶ 5. This positive reaction from the Class speaks to the strength of the Settlement and weighs in favor of approving the requested fee. *Wells*, 557 F. Supp. 2d at 7 ("As noted, no class member has objected to the settlement, including the provision for attorneys' fees."); *In re Bann Co. Securities Litig.*, 288 F. Supp. 2d 14, 17 (D. D.C. 2003) ("Also noteworthy is the fact that only one objection to counsel's application for attorneys' fees has been filed.").

3. The skill and efficiency of the attorneys involved

Class action litigation presents unique challenges, especially when asserting claims in the wake of an unprecedented worldwide pandemic, and—by achieving an exceptional settlement—Class Counsel proved that they have the ability and resources to litigate this case zealously and effectively for the benefit of the Class. In addition, Class Counsel are well-respected attorneys with significant experience litigating consumer class actions of similar size, scope, and complexity. Fisher Decl. ¶¶ 36-41 and Ex. L (Bursor & Fisher, P.A., Firm Resume); McKenna Decl. ¶¶ 6-7

and Ex. A (Gainey McKenna & Egleston Firm Resume).

Indeed, in the college tuition refund context, Class Counsel successfully obtained settlements for students in *Wright v. Southern New Hampshire Univ.*, 561 F. Supp. 3d 211 (D.N.H. 2021), *Martin v. Lindenwood Univ.*, 4:20-cv-01128-RLW (E.D. Mo.), *D'Amario v. The University of Tampa*, 7:20-cv-03744-CS (S.D.N.Y.), *Metzner v. Quinnipiac University*, 3:20-cv-00784-KAD (D. Conn.); *Fittipaldi v. Monmouth University*, Case No. 3:20-cv-05526-MAS-RLS (D.N.J.); *Ninivaggi et al. v. University of Delaware*, Case No. 1:20-cv-01478-SB (D. Del.); *In re Columbia University Tuition Refund Action*, Case No. 1:20-cv-03208-JMF (S.D.N.Y.); and *Espejo, et al. v. Cornell University*, Case No. 3:20-cv-00467-MAD-MIL (N.D.N.Y.); *Kincheloe v. University of Chicago*, *et al.*, No. 20-cv-03015 (N.D. Ill.); *Flatscher v. The Manhattan School Of Music*, Case No.: 20-cv-4496 (S.D.N.Y.). McKenna Decl. ¶ 6.

Moreover, Class Counsel has been recognized by courts across the country for their experience. *See, e.g., Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 566 (S.D.N.Y. Feb. 25, 2014) ("Bursor & Fisher, P.A., are class action lawyers who have experience litigating consumer claims. … The firm has been appointed class counsel in dozens of cases in both federal and state courts, and has won multi-million dollar verdicts or recoveries in five class action jury trials since 2008."); *Harris v. Amgen Inc.*, 2017 U.S. Dist. LEXIS, at *14 (C.D. Cal. Apr. 4, 2017) ("Here, [Gainey McKenna & Egleston] have extensive experience in class action litigation … and have litigated a number of noteworthy … class actions."). Furthermore, Class Counsel achieved an exceptional result in this case while facing well-resourced and highly experienced defense counsel. *See In re Vitamins*, 2001 WL 34312839, at *11 ("The experience, skill and professionalism of counsel and the performance and quality of opposing counsel all weigh in favor of the requested fee.").

Thus, together, Class Counsel is acutely aware of the risks of these cases and has achieved

a settlement here in the upper range of settlements across the country. Class Counsel litigated this case efficiently, effectively, and civilly. The excellent result is a function of the high quality of that work, which supports the requested fee award.

4. The complexity and duration of the litigation

This factor captures the "probable costs, in both time and money, of continued litigation." *Bryan v. Pittsburgh Plate Glass Co. (PPG Indus.)*, 494 F.2d 799, 801 (3d Cir. 1974).

Here, the complex nature of this litigation further favors the requested fee award. The claims and legal theories at issue in this case arise from an unprecedented global event and are thus novel, complicated, and unsettled. *See Shaffer v. George Wash. Univ.*, 27 F.4th 754, 760 (D.C. Cir. 2022) (noting the "novel and challenging issues that these cases present"). Through the *Adavenaixx I, Payne*, and *Adavenaixx II* matters, Class Counsel litigated against Defendant for approximately three and a half years leading up to the settlement negotiations, including success on a motion to dismiss and later success defeating a motion for judgment on the pleadings. However, looking forward, Plaintiff still had the obstacle of certifying a class, which was far from certain.[4] Moreover, Defendant would likely file a motion for summary judgment as well as motions to strike any expert testimony. In addition, even if Plaintiff's motion for class certification was granted, Defendant would likely file a Petition for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f). As such, continued litigation would be time consuming, expensive and risky. As one court explained:

> Class counsel have participated in court hearings and mediation sessions and submitted a number of well-researched filings to the Court. Absent settlement, litigation would likely continue for well

[4] Indeed, courts across the country have both granted and denied class certification in similar COVID-19 college closure cases. *Compare Arredondo v. Univ. of La Verne*, 341 F.R.D. 47 (C.D. Cal. 2022) (granting class certification); *with In re Suffolk Univ. Covid Refund Litig.*, No. CV 20-10985-WGY, 2022 WL 6819485 (D. Mass. Oct. 11, 2022) (denying class certification).

> over a year and would require both plaintiffs and defendants to incur considerable expert witness fees and other expenses. I find that the complexity and duration of the litigation weigh in favor of the requested award of fees.

Alexander v. Washington Mut., Inc., 2012 WL 6021103, at *2 (E.D. Pa. Dec. 4, 2012). The same is true here. Almost certainly as other decisions in this action would have been subject to additional appeals from either side.

In light of the foregoing, this factor weighs strongly in favor of the requested award of fees.

5. The risk of nonpayment

This case presented a substantial risk of non-payment for Class Counsel, especially due to the novelty of the claims and the lack of any indication as to whether these claims would succeed or fail. For approximately three and a half years, Class Counsel invested significant time, effort, and resources to the litigation without any compensation. Fisher Decl. ¶¶ 26-27; McKenna Decl. ¶ 3. Cognizant of the risk of nonpayment, Class Counsel nonetheless took this case on a pure contingency basis and committed substantial resources of attorney and staff time towards investigating and litigating this action. *Id.*

Class Counsel further recognizes that Plaintiff faced risks in certifying a class, defeating a likely forthcoming motion for summary judgment, and trial. *In re Lorazepam*, 2003 WL 22037741, at *8 ("The risk of nonpayment through either an award of summary judgment or loss at trial was significant and real in this case."). For example, summary judgment has been granted for the defendant in a number of other college-tuition cases. *Id.* ¶ 21 (citing cases). Class Counsel also assumed the risk of the significant delay associated with achieving a final resolution through trial and any appeals. That Class Counsel undertook this representation, despite the significant risk of nonpayment, strongly supports the requested fee award.

6. The amount of time devoted to the case by Class Counsel

Since Class Counsel began investigating this matter in May 2020, 955.1 hours have been devoted to the successful pursuit of this matter. Fisher Decl. ¶ 27. That time was spent investigating the underlying claims and factual allegations, drafting the complaints, briefing and/or arguing the motion to dismiss and motion for judgment on the pleadings, and requesting discovery and reviewing responses. McKenna Decl. ¶ 31. These significant efforts, and counsel's diligence, resulted in this excellent Settlement for the Class. Importantly, no time spent on Class Counsel's fee request is included in the hours spent preparing this motion or the motion for final approval. Class Counsel anticipate spending substantial time and resources overseeing the final stages of the Settlement Agreement – no fees are being requested for these services either. Given the duration, complexity of the legal issues, complexity of the factual issues, and the need for expert guidance, the time invested by Class Counsel was reasonable. This factor supports approving Class Counsel's fee request.

7. The awards in similar cases

The requested fee award comports with awards in similar cases. First, as explained above, courts in this Circuit routinely approve requests for one-third of a common fund for attorneys' fees. *In re Nifedipine Antitrust Litig.*, 2011 WL 13392312, at *2 (D. D.C. Jan. 21, 2011) (approving 33.3% award); *Radosti v. Envision EMI, LLC,* 760 F. Supp. 2d 73, 78 (D. D.C. 2011) (approving 33.3% award); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *10 (D. D.C. July 16, 2001) (approving 34% award); *Wells*, 557 F. Supp. 2d at 7 (approving 45% award).

Second, courts in other college tuition and fee refund cases have awarded one-third of the common fund for attorneys' fees. *See, e.g.*, *Metzner v. Quinnipiac University*, 3:20-cv-00784-KAD, ECF No. 130 at ¶ 16 (D. Conn. Apr. 10, 2023); *In re Columbia University Tuition Refund*

Action, Case No. 20-cv-03208-JMF, ECF No. 115 at ¶ 10 (S.D.N.Y. Mar. 29, 2022); *Rosado v. Barry Univ.*, No. 20-cv-21813-JEM, 2021 U.S. Dist. LEXIS 169196, at *23 (S.D. Fla. Sept. 7, 2021); *Wright v. Southern New Hampshire Univ.*, 561 F.Supp.3d 211, 214 (D.N.H. Sept. 22, 2021); *D'Amario v. Univ. of Tampa*, No. 7:20-cv-03744-CS (S.D.N.Y. Oct. 18, 2022); *Pfeifer, et al. v. Loyola University of Chicago*, Case 20-cv-03116 (N.D. Ill. 2024); *Flatscher v. The Manhattan School of Music*, 20-cv- 4496 (KPF) (SDA) (S.D.N.Y.); *Fittipaldi v. Monmouth University*, No. 3:20-cv-5526 (D.N.J.); *Botts v. The John Hopkins University*, No. 1:20-cv-01335-JRR (D. Md.); *Kincheloe v. University of Chicago, et al.*, No. 20-cv-03015, ECF No. 122 at ¶ 23 (N.D. Ill. May 23, 2024); *Qureshi, et al. v. American Univ.*, No. 1:20-CV-01141-CRC, ECF No. 99 at ¶ 2 (D.D.C. May 7, 2024). Accordingly, this factor weighs strongly in favor of granting Plaintiff's request of one-third of the common fund for attorneys' fees.

C. The Requested Attorneys' Fees Are Also Reasonable Under A Lodestar Cross-Check

Although not required in this Circuit, a lodestar cross-check further supports granting Plaintiffs' request of one-third of the common fund for attorneys' fees. *See In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 101 (D. D.C. 2013) ("In this circuit, such a lodestar cross-check is not required … although district courts are free to employ such a cross-check at their discretion to confirm the reasonableness of an award.") (internal citations omitted). Courts applying the lodestar method generally apply a multiplier to account for the contingent nature of the fee, the risks of non-payment, the quality of representation, and the results achieved. *See In re Lorazepam*, 2003 WL 22037741, at *9 ("[M[ultiples ranging up to 'four are frequently awarded in common fund cases when the lodestar method is applied.'") (quoting *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 341 (3d Cir. 1998)).

The hourly billing rate to be applied is the hourly rate that is normally charged in the

community where the counsel practices, *i.e.*, the "market rate." *See Kattan by Thomas v. District of Columbia*, 995 F.2d 274, 278 (D.C. Cir. 1993) ("[A]n attorney's usual billing rate is presumptively the reasonable rate, provided that the rate is 'in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.") (quoting *Blum v. Stenson*, 465 U.S. 886, 895-96 n.11 (1984)). Here, the hourly rates used by Class Counsel are comparable to rates charged by attorneys with similar experience, skill, and reputation, for similar services in their respective legal markets. *See* Fisher Decl. ¶¶ 33-37.[5]

Here, Plaintiff's counsel spent a total of 955.1 hours on this matter for a lodestar of $720,798.25. Accordingly, the requested fee of $691,226.66 represents a multiplier of just 0.96, which is well within the accepted range in this Circuit. *In re Lorazepam*, 2003 WL 22037741 at *9 (D. D.C. June 16, 2003) ("In contrast to the multipliers of 1.15 or 1.36 in this case, multiples ranging up to 'four are frequently awarded in common fund cases when the lodestar method is applied.'") (quoting *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 341 (3d Cir. 1998)); *In re Baan Co. Securities Litig.*, 288 F. Supp. 2d at 19-20 ("The Court has also reviewed Plaintiffs' Counsel reported lodestar … and finds that a multiplier of 2.0 or less falls within a range that is fair and reasonable."). [6]

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[5] The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Missouri v. Jenkins by Agyei*, 491 U.S. 274, 284 (1989) (recognizing "an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise"); *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990) ("Generally, a reasonable hourly rate is to be calculated according to the prevailing market rates in the relevant community.")

[6] Class Counsel's requested Fee Award results in a so-called negative multiplier which further underscores the reasonableness of Class Counsel's request. *See Pettit v. P&G*, 2019 U.S. Dist. LEXIS 232217, at *17 (N.D. Cal. Mar. 28, 2019) ("The fact that Plaintiffs' counsel are seeking substantially less in fees than they reasonably incurred further demonstrates the reasonableness of the fee award.") (collecting cases); *see also Domann v. Summit Credit Union*, No. 18-CV-167, 2020 WL 1847868, at *2 (W.D. Wis. Apr. 13, 2020) ("The fact that the lodestar

Class Counsel's requested fee award is also well-below the multipliers awarded in other college tuition and fee refund settlements. *See, e.g., In re Columbia University Tuition Refund Action*, Case No. 20-cv-03208-JMF, ECF No. 115 at ¶ 10 (S.D.N.Y. Mar. 29, 2022) (approving attorneys' fees representing 4.3 times multiplier on Class Counsel's regular hourly rates); *Kincheloe v. University of Chicago, et al*., No. 20-cv-03015, ECF No. 122 at ¶ 23 (N.D. Ill. May 23, 2024) (approving attorneys' fees representing 1.92 times multiplier).

II. THE REQUESTED REIMBURSEMENT OF COSTS AND EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

The Settlement Agreement also provides that Class Counsel may petition the Court for reimbursement of costs and expenses. Fisher Decl., Ex. A, ¶¶ X.2. "In addition to attorneys' fees, class counsel may request reimbursement for reasonable litigation expenses from the common fund." *Trombley*, 826 F. Supp.2d at 208. Courts in the D.C. Circuit have granted the reimbursement of attorney costs and expenses in addition to the granting of a percentage of the fund for attorneys' fees. *In re Nifedipine Antitrust Litig.*, 2011 WL 13392312, at *1-2 (D. D.C. Jan. 21, 2011); *Radosti v. Envision EMI, LLC*, 760 F. Supp. 2d 73, 79 (D. D.C. 2011); *Wells*, 557 F. Supp. 2d at 8. For the reasons detailed below, Class Counsel seeks reimbursement of costs and expenses in the amount of $4,606.56.

Here, Class Counsel has incurred approximately $4,606.56 in costs and expenses. Fisher Decl. ¶ 31; McKenna Decl. ¶ 34. These expenses are the type that adequately reflect costs reasonably incurred in furnishing effective and competent representation—filing fees; copying costs; research costs; investigation expenses; and mediation fees. *Id.*; McKenna Decl. ¶ 35; *see also Trombley*, 826 F. Supp.2d at 208 ("The other fees and expenses—including for example,

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method produces a 'negative multiplier' is also a factor in supporting the reasonableness of the fee request.").

travel, meals, and lodging; legal research; court fees; photocopies; and telephone calls … are the kinds of expenses expected and anticipated during the ordinary course of litigation."). Moreover, Class Counsel has adequately documented these costs and expenses in an expense report, which is supported by a declaration by Class Counsel. Fisher Decl. ¶ 31; *see also In re Lorazepam*, 2003 WL 22037741 at *10 ("After careful review of the Petition for Fees detailing the costs, and the affidavits submitted and representations of counsel in support thereof, the Court finds that Class Counsel reasonably expended the claimed amounts on experts, depositions and transcripts, travel, photocopying and postage, long distance telephone charges, legal research charges, litigation fund assessments, etc."). Accordingly, Class Counsel respectfully requests the reimbursement of costs and expenses in the amount of $4,606.56.

III. THE REQUESTED INCENTIVE AWARD REFLECTS PLAINTIFF'S ACTIVE INVOLVEMENT IN THIS ACTION AND SHOULD BE APPROVED

Service awards for class representatives promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits and rewarding them for ensuring that the best interests of the class as a whole are protected. Service awards are also routinely approved to compensate class representatives for actively participating in a case, as was the case here. *See Cobell v. Jewell*, 802 F.3d 12, 25 (D.C. Cir. 2015) ("Incentive awards have often been used to compensate a class representative...."). Courts often approve service awards "to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Lorazepam*, 2003 WL 22037741, at *10.

The efforts of the Class Representative were instrumental in achieving the Settlement on behalf of the Class and justify the awards requested here. The Class Representative came forward to prosecute this litigation for the benefit of the class as a whole. She sought successfully to remedy what she believed to be a university-wide wrong and has conferred valuable benefits upon

her fellow class members. The Class Representative provided a valuable service to the class by: (i) reviewing and investigating claims against the University; (ii) communicating with Class Counsel in connection with the investigation of the claims and the preparation of the original class action complaint, the second filed complaint, and the filing of each one; (iii) reviewing public records and other documents such as University-related documents and other materials in connection with the case against Defendant; (iv) following news stories about the University and the closure of the campus and alerting Class Counsel to any that seemed relevant; (v) reviewing and approving all complaints filed on her behalf and other pleadings and documents filed in the action and discussions with Class Counsel in connection therewith; (vi) cooperating in the prosecution of the Payne Action (vii) regular update communications with counsel concerning the status and strategy of the action; (viii) searching her own files for University-related documents and sending what she found to Class Counsel; (ix) communications with Class Counsel about the settlement negotiations and mediation efforts Class Counsel were conducting with the University's counsel in an to attempt to settle this action; (x) review and approval of the terms of the proposed settlement; and (xi) review of the written settlement documents and the motion papers to this Court to give preliminary approval to this settlement. Fisher Decl. ¶¶ 43-45; McKenna Decl. ¶¶ 36-37; Declaration of Chanel Adavenaixx ("Adavenaixx Decl.") ¶ 11.

A $5,000 incentive award for the Class Representative in recognition of her services to the Class is modest under the circumstances, and well in line with awards approved by federal courts in the D.C. Circuit. *In re Lorazepam*, 2003 WL 22037741 at *10 (awarding $20,000 each to the class representatives as incentive awards); *Wells*, 557 F.Supp.2d 1, 9 (awarding $10,000 each to the class representatives as incentive awards); *Cohen v. Chilcott*, 522 F.Supp.2d 105, 124 (D. D.C. 2007) (awarding $7,500 each to the class representatives as incentive awards).

In addition, the requested inventive award is in line with awards granted in similar COVID-19 tuition and fee refund settlements. *See In re Columbia Univ. Tuition Refund Action*, No. 1:20-cv-03208 (JMF) (S.D.N.Y. Mar. 29, 2022) (approving $25,000 service award request); *Botts v. Johns Hopkins Univ.*, No. 1:20-cv-01335-JRR (D. Md. April 20, 2023) (approving $12,500 service award request); *D'Amario v. Univ. of Tampa*, No. 7:20-cv-03744-CS (S.D.N.Y. Oct. 18, 2022) (approving $10,000 service award request); *Espejo, et al. v. Cornell Univ.*, No. 3:20-cv-00467-MAD-MIL (N.D.N.Y. Dec. 13, 2023) (approving $10,000 service award request); *Wnorowski v. Univ. of New Haven*, No. 3:20-cv-01589 (D. Conn. Oct. 11, 2023) (approving $10,000 service award request); *Ford v. Rensselaer Polytechnic Institute*, No. 1:20-cv-00470-DNH-CFH (N.D.N.Y. Jan. 9, 2024) (approving $10,000 service award request); *Flatscher v. The Manhattan School of Music*, No. 20-cv-4496 (KPF) (SDA) (S.D.N.Y.) (approving service award of $10,000).

Plaintiff and Class Counsel respectfully request that the incentive award of $5,000 to Plaintiff be approved.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully request that the Court (1) approve attorneys' fees, costs, and expenses in the amount of one-third of the settlement fund, or $691,226.66, and reimbursement of costs and expenses, in the amount of $4,606.56; (2) grant Plaintiff an incentive award of $5,000 in recognition of her efforts on behalf of the class; and (3) award such other and further relief as the Court deems reasonable and just.

DATED: September 9, 2024

Respectfully submitted,

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