

**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.

Civil Action No. 1:23-cv-00663-DLF

**PLAINTIFF’S MOTION FOR FINAL
APPROVAL OF CLASS ACTION SETTLEMENT**

Plaintiff Chanel Adavenaixx, by and through her undersigned counsel, respectfully moves this Court for an Order under Federal Rule of Civil Procedure 23: (i) finally approving the proposed class action Settlement on behalf of the Settlement Class Members according to the terms of the Class Action Settlement Agreement and Release (“Settlement” or “Agreement”) between Plaintiff and Defendant Howard University (“Howard,” “University,” or “Defendant”)¹; (ii) certifying, for purposes of the Settlement only, the following Settlement Class:

All Howard students enrolled in the Spring 2020 Semester who did not withdraw by March 16, 2020 for whom any amount of tuition and/or fees was paid to Howard from any source other than a scholarship, grant, or tuition remission from Howard, or any other source that did not require repayment, and whose tuition and/or fees have not been fully refunded.²

¹ All capitalized terms shall have the same meaning as set forth in the Settlement Agreement unless otherwise noted. ECF No. 33-3.

² Excluded from the Settlement Class are (i) any students who received full scholarships or tuition remission from Howard or who did not themselves ultimately pay any tuition or fees for the Spring 2020 Semester (*i.e.*, those whose tuition and fees were paid for by institutional aid, tuition benefits, federal/state/local grants, GI/Yellow Ribbon benefits, outside scholarships, and/or third-party sponsorships); (ii) the University and its officers, trustees and their family members;

(iii) appointing the law firms of Gainey McKenna & Egleston and Bursor & Fisher, P.A. as Class Counsel to act on behalf of the Settlement Class with respect to the Settlement; (iv) appointing Named Plaintiff Chanel Adavenaixx as Settlement Class Representative; (v) finding that the Class Members have been provided the best notice practicable of the Settlement and that such notice fully satisfies all requirements of law as well as all requirements of due process; (vi) directing the Claims Administrator to disburse the Net Settlement Fund pursuant to the terms of the Settlement Agreement; and (vii) entering the Proposed Order Granting Final Approval of Class Action Settlement, submitted herewith.

Dated: September 20, 2024.

Respectfully submitted,

GAINEY McKENNA & EGLESTON

Thomas J. McKenna

Thomas J. McKenna
Gregory M. Egleston
260 Madison Avenue, 22nd Fl.
New York, NY 10016
Telephone: (212) 983-1300
Facsimile: (212) 983-0383
Email: tjmckenna@gme-law.com
Email: gegleston@gme-law.com

**SILVERMAN THOMPSON SLUTKIN &
WHITE, LLC**

William N. Sinclair
400 East Pratt Street, Suite 900
Baltimore, MD 21201
Email: bsinclair@silvermanthompson.com

(iii) Class Counsel; (iv) the Judge presiding over the Action; and (v) all persons who properly execute and file a timely opt-out request to be excluded from the Settlement Class.

BURSOR & FISHER, P.A.

L. Timothy Fisher

Neal J. Deckant

1990 North California Blvd., Suite 940

Walnut Creek, CA 94596

Email: ltfisher@bursor.com

Email: ndeckant@bursor.com

Attorneys for Plaintiff and the Putative Class

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION
FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

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INTRODUCTION

On June 18, 2024, this Court preliminarily approved the class action settlement (the “Settlement”) between Plaintiff Chanel Adavenaixx (“Plaintiff” or “Settlement Class Representative”),¹ and Defendant Howard University (“Howard” or “Defendant”) and directed that notice be sent to the Settlement Class Members (ECF No. 38). The Claims Administrator has now implemented the Court-approved notice plan and the reaction from the class has been overwhelmingly positive. To date, no Settlement Class Members have objected to the Settlement, and none have asked to be excluded. The Settlement’s strength speaks for itself: it creates a \$2,073,680 non-reversionary common fund from which Settlement Class Members will automatically receive a *pro rata* cash award.

For these reasons, and as explained further below, the Settlement is fair, reasonable, and adequate, and warrants this Court’s final approval.

FACTUAL AND PROCEDURAL BACKGROUND

I. Plaintiff’s Allegations

Plaintiff filed a putative 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 mid-semester transition to remote instruction in response to the COVID-19 pandemic, she alleges 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

¹ All capitalized terms herein have the same meaning of those set forth in the Parties’ Settlement Agreement and Release (“Stipulation” or Stip.”). ECF No. 33-3.

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 majoring in Communications, with a concentration in television and film and a minor in Business. Plaintiff is now an alumna of Howard, 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 alleged in the Class Action Complaint, Plaintiff and the Class reasonably expected to receive campus-based, in-person educational services from Howard. However, on March 16, 2020, Howard announced via letter from Howard's President Wayne A.I. Frederick, M.D., MBA, that Howard would suspend "face-to-face instruction of courses at Howard University for the remainder of the Spring 2020 Semester and courses [would] continue to transition to remote and online instruction following the scheduled Spring Break." *Id.* ¶ 43.

II. The Litigation And Work Performed

Adavenaixx I And The Payne Action

On October 7, 2020, Plaintiff filed a putative class action against 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*").

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. Plaintiff Adavenaixx and Gainey McKenna & Egleston agreed to work cooperatively with plaintiff Payne and Bursor & Fisher, P.A. in prosecuting the first-filed *Payne* Action. Then, on December 4, 2020, Plaintiff voluntarily dismissed *Adavenaixx I* without prejudice before Howard filed its responsive pleading. *Adavenaixx I*, at ECF No. 9. See Joint Declaration of Thomas J. McKenna and L. Timothy Fisher (“Joint Decl.”) ¶ 8.

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-cv-7040 (D.C. Cir.), and *Qureshi v. American University*, No. 21-cv-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 those plaintiffs had pleaded 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 ECF No. 40-2 ¶ 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 *id.*, ¶ 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 id.* ¶ 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, to avoid duplication, that some of the discovery previously exchanged in the *Payne* Action could be used in this action. ECF No. 21. *See* Joint Decl. ¶ 9.

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 the Court's approval. *See* Joint Decl. ¶ 10.

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* Joint Decl. ¶¶ 36-37, 39-41.

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 transitioning to remote instruction in response to the COVID-19 pandemic. *See* ECF No. 40-2 ¶ 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 decided 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* Joint Decl. ¶ 41.

Class 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 about 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* Joint Decl. ¶¶ 11, 12.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 23(e), to grant final approval of a class settlement, the Court must find that “the settlement is fair, adequate and reasonable and is not the product of collusion between the parties.” *Thomas v. Albright*, 139 F.3d 227, 231 (D.C. Cir. 1998); *see also Greenberg v. Colvin*, 2015 WL 4078042, at *3 (D.D.C. July 1, 2015); Fed. R. Civ. P. 23(e)(2). In this Circuit, there is no single test for evaluating a proposed class settlement under Rule 23(e). *Stephens v. US Airways Group, Inc.*, 102 F.Supp.3d 222, 226 (D.D.C. 2015). “District courts consider the facts and circumstances of the case, and examine the following factors: (a) whether the settlement is the result of arms-length negotiations; (b) the terms of the settlement in relation

to the strength of plaintiffs' case; (c) the stage of the litigation proceedings at the time of settlement; (d) the reaction of the class; and (e) the opinion of experienced counsel." *Id.* (quotations and citation omitted).

In analyzing these factors, the Court's role is a limited one when reviewing a proposed class action settlement. *Osher v. SCA Realty I, Inc.*, 945 F. Supp. 298, 304 (D.D.C. 1996) (quotations and citations omitted). Courts favor the resolution of disputes through voluntary compromise, and, therefore, strongly encourage settlements. *Id.* In the context of class actions, settlement is particularly appropriate given the litigation expenses and judicial resources required in many such suits. "Absent evidence of fraud or collusion, such settlements are not to be trifled with." *Granada Investments, Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992).

ARGUMENT

I. Certification Of The Proposed Settlement Class Is Appropriate

The Court may certify a class for settlement purposes. Certifying a class for settlement purposes satisfies the Rule 23 requirements more easily than a contested motion for class certification. The Court should determine, for settlement purposes only, that the proposed Settlement Class satisfies Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation, and at least one of the subsections of Rule 23(b), *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); *Newberg on Class Actions* § 11:27 (4th ed. 2002) (citing *In re Gen. Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.* ("In re GMC"), 55 F.3d 768 (3d Cir. 1995)), and certify the Settlement Class, appoint Gainey McKenna & Egleston and Bursor & Fisher, P.A. as Class Counsel, and Plaintiff Chanel Adavenaixx as the Settlement Class Representative.

Importantly, courts across the country, including this Court, have granted certification

when evaluating class settlements of analogous claims. *See, e.g., Qureshi v. American University*, No. 1:20-cv-01141-CRC, ECF No. 98 (D.D.C. May 7, 2024) (final approval certifying the proposed class for settlement purposes);² *Shaffer v. George Wash. Univ.*, No. 1:29-cv-01145-RJL, ECF No. 78 (D.D.C. May 13, 2024) (same); *In re Columbia Univ. Tuition and Fee Action*, No. 1:20-cv-03208, ECF No. 115 at 3 (JMF) (S.D.N.Y. Mar. 29, 2022) (same); *Kincheloe v. The University of Chicago*, No. 1:20-cv-03015, ECF No. 122 (N.D. Ill. May 23, 2024) (same). Moreover, at preliminary approval, this Court found that “it will likely certify the Settlement Class ... and preliminarily certifie[d] the Settlement Class.” ECF No. 38 at ¶ 16.

To certify a class, a plaintiff must meet all the requirements under Fed. R. Civ. P. 23(a), otherwise known as (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation, as well as the requirements of either Fed. R. Civ. P. 23(b)(1), (2), or (3). *Amchem Prods.*, 521 U.S. at 614 (1997).

A. Rule 23(a) Requirements Are Satisfied

“Settlement-only class certification nevertheless obligates a Court to consider whether the proposed class meets the requirements of Federal Rule of Civil Procedure 23, although the Court need not determine whether the case, if tried, would present management problems.” *Cohen v. Chilcott*, 522 F.Supp.2d. 105, 113 (D.D.C. 2007) (citing *Amchem Prods.*, 521 U.S. at 620). Thus, Plaintiff must show that the proposed Settlement Class meets all four requirements of Fed. R. Civ. P. 23, which “are referred to as numerosity, commonality, typicality, and adequacy of representation. In addition, Plaintiff must demonstrate that the class is maintainable under Rule 23(b).” *Id.* Here, as this Court found at the preliminary approval stage (*see* ECF No. 38, ¶¶ 15-16),

² All unreported cases cited herein, and not previously submitted to this Court, are attached to the Joint Decl. as Exhibits A-C.

Plaintiff clearly satisfies all elements of Fed. R. Civ. P. 23.

1. Rule 23(a)(1) - “Numerosity”

The Settlement 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. “There is no specified or minimum number of plaintiffs needed to maintain a class action.” *Thorpe v. District of Columbia*, 303 F.R.D. 120, 144 (D.D.C. 2014). However, “Courts in this District have generally found that the numerosity requirement is satisfied and that joinder is impracticable where a proposed class has at least forty members.” *Cohen*, 522 F.Supp.2d. at 114 (internal citations omitted); *Garnett v. Zeilinger*, 301 F. Supp. 3d 199, 205 (D.D.C. 2018). Here, numerosity is satisfied because the Settlement Class contains approximately 8,766 Howard students. Therefore, the numerosity requirement of Rule 23(a) is readily satisfied.

2. Rule 23(a)(2) - “Commonality”

The Settlement Class satisfies the commonality requirement. 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 Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011). “The commonality test is met when there is at least one issue, the resolution of which will affect all or a significant number of the putative class members.” *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 26 (D.D.C. 2001). However, “factual variations among the class members will not defeat the commonality requirement, so long as a single aspect or feature of the claim is common to all proposed class members.” *Bynum v. District of Columbia*, 214 F.R.D. 27, 33 (D.D.C. 2003) (internal citations omitted).

Here, Plaintiff easily satisfies the commonality hurdle. Common issues here include, but are not limited to: (1) whether Defendant accepted money from Settlement Class Members in

exchange for the promise to provide in-person educational services; (2) whether Defendant provided the services for which Settlement Class Members contracted; (3) whether Settlement Class Members are entitled to a refund for that portion of the tuition and certain mandatory fees that was contracted for services which Defendant did not provide; and (4) whether Defendant is liable to Plaintiff and the Settlement Class for unjust enrichment. *See* ECF No. 1, ¶ 54. These common questions, which target the same alleged misconduct by Howard, satisfy Rule 23(a)(2).

3. 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. “The typicality requirement aims at ensuring ‘that the class representatives have suffered injuries in the same general fashion as absent class members.’” *Cohen*, 522 F.Supp.2d. at 115 (citing *In re Vitamins Antitrust Litigation*, 209 F.R.D. 251, 260 (D.D.C.2002)). “The typicality requirement is satisfied ‘if each class member’s claim arises from the same course of events that led to the claims of the representative parties and each class member makes similar legal arguments to prove the defendant’s liability.’” *Cohen*, 522 F. Supp. 2d. at 115 (internal citations omitted). While “[t]he facts and claims of each member of the class need not be identical ... the class representatives should have suffered injuries in the same general fashion as absent class members.” *In re APA Assessment Fee Litig.*, 311 F.R.D. 8, 15 (D.D.C. 2015) (internal quotations and citations omitted). Indeed, the typicality requirement “has been liberally construed.” *Bynum*, 214 F.R.D. at 34. “Typicality is not destroyed merely by factual variations.” *Wagner v. Taylor*, 836 F.2d 578, 591 (D.C. Cir. 1987) (internal quotations and citations omitted).

Here, Plaintiff’s claims are typical because they arise from the same events and course of conduct by Howard and are based on the same legal theories. Plaintiff’s and the Settlement Class Members’ claims arise from a contract with Howard that they allege provided for in-person

education and on-campus services. Plaintiff alleges Howard billed Plaintiff and the Settlement Class Members, and Plaintiff and the Settlement Class Members paid, for tuition and fees for in-person courses to be provided on campus. Plaintiff also alleges that, in its response to the COVID-19 pandemic, in mid-semester, Howard stopped providing the promised in-person instruction and access to campus facilities and in-person resources for all students. Yet Plaintiff alleges that Howard, however, retained the full price paid for tuition and certain mandatory fees. Plaintiff alleged Howard must refund a portion of the tuition and those fees for campus access and in-person education that Howard did not provide when it closed its campus and transitioned all courses online. Plaintiff has met the typicality requirement.

4. 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. In this District, “[t]wo criteria for determining the adequacy of representation are generally recognized: (1) the named representative must not have antagonistic or competing interests with the unnamed members of the class, and (2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel.” *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997) (citing *Nat’l Ass’n of Reg’l Med. Programs, Inc. v. Mathews*, 551 F.2d 340, 345 (D.C. Cir. 1976)). The first criterion focuses on conflicts of interest, which defeat adequacy “only if they are fundamental to the suit and ... go to the heart of the litigation. *Nat’l Veterans Legal Servs. Program v. United States*, 235 F. Supp. 3d 32, 41 (D.D.C. 2017). “Speculative or hypothetical conflicts will not defeat the adequacy requirement.” *Id.*

First, Plaintiff and Settlement Class Members have the same interest in obtaining a partial refund that will provide each with the benefit of their bargain. In addition to these aligned interests,

Plaintiff has no conflicts with the class.

Second, Plaintiff has shown her commitment to vigorously prosecuting this litigation and will continue to advocate for the best interests of the Settlement Class. *See* ECF No. 40-5, ¶¶ 5-17. Proposed Class Counsel is also well-qualified and will also continue to vigorously represent the Settlement Class. Both Gainey McKenna & Egleston and Bursor & Fisher, P.A. have handled countless complex class action cases, recovered millions of dollars for classes they represented, and showed significant experience in these specific claims. *See* ECF No. 40-2, Ex. L; *see also* ECF No. 40-3, Ex. A (firm resumes).

During the past several years, Plaintiff and Class Counsel have investigated and zealously pursued claims on behalf of the proposed Settlement Class against Howard, briefed and argued the motion to dismiss, conducted discovery resulting in voluminous production, conducted substantial research regarding the legal issues, and attended a mediation under the auspices of this Court. They have no conflicts of interest and will continue to prosecute this action vigorously on behalf of the Settlement Class. Since Plaintiff and Class Counsel have demonstrated their commitment to representing the Settlement Class Members and neither have interests antagonistic to the Settlement Class Members, the adequacy requirement is satisfied.

B. The Settlement Class Satisfies The Rule 23(b) Requirements

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 available methods of fairly and efficiently adjudicating the controversy. These elements are commonly referred to as “predominance” and “superiority.” *See Barnes v. District of Columbia*, 242 F.R.D. 113, 123 (D.D.C. 2007).

Predominance “tests whether proposed classes are sufficiently cohesive to warrant

adjudication by representation.” *Amchem Prods.*, 521 U.S. at 594, 623 (1997). “There is no definitive test for determining whether common issues predominate, however, in general, predominance is met when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class members’ individual position.” *Cohen*, 522 F. Supp. 2d at 116 (internal citations omitted).

1. Common Issues Predominate Over Any Individual Issues

Rule 23(b)(3)’s predominance requirement focuses on whether the defendant’s liability is common enough to be resolved on a class basis (*Dukes*, 564 U.S. at 359) and whether the proposed class is “sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods.*, 521 U.S. at 623.

Here, Howard is alleged to have engaged in a common course of conduct applicable to all Settlement Class Members when it transitioned all in-person classes to online classes. Moreover, the central legal issues presented by this case would predominate over individualized issues and injury can be proven on a class-wide basis without conducting individualized inquiries. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252–53 (D.C. Cir. 2013). For example, all Settlement Class Members would have to address the same core issues of (i) whether a contract existed with Howard for in-person educational instruction and service; (ii) if such contract did exist, whether Howard breached the alleged contract with Plaintiff and Settlement Class Members when Howard transitioned to remote educational instruction and closed on-campus services as its response to the COVID-19 pandemic during the Spring 2020 semester; and (iii) whether there was any difference in value between online distance learning and live in-person instruction. These material issues would be resolved using class-wide proof for the Settlement Class Members and these and other common issues to the class are more substantial than those issues requiring

individualized proof.

2. A Class Action Is The Superior Method

Rule 23(b)(3) requires a class action to be “superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b). “The superiority requirement of Rule 23(b) is met when a court determines that a class action is superior to other available means of adjudication.” *In re Vitamins Antitrust Litig.*, 209 F.R.D. at 270 (D.D.C. 2002). “The superiority requirement ensures that resolution by class action will ‘achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable consequences.’” *Kinard v. East Capitol Family Rental, L.P.*, 331 F.R.D. 206, 215 (D.D.C. 2019) (internal citations omitted). A class action is superior where many individuals have small claims, but it is not economically feasible to pursue them individually. *In re Livingsocial Mktg. & Sales Practice Litig.*, 298 F.R.D. 1, 10 (D.D.C. 2013).

Here, in light of the common legal and factual questions at issue for all Settlement Class Members and the relatively small amount of damages compared to the enormous investment of time and money that it will take to litigate them, individual Settlement Class members have a very limited interest in individually controlling the prosecution of this Action and would gain little practical benefit from initiating separate actions. Moreover, Plaintiff and the Settlement Class Members have limited financial resources with which to prosecute individual actions, and Plaintiff’s counsel is unaware of any individual lawsuits filed by Settlement Class Members arising from the same allegations. Class certification for settlement purposes will permit thousands of students to resolve their common claims in a single forum simultaneously, effectively, and efficiently without the duplication of effort and expense that many individual actions would

require. *See Hanlon*, 150 F.3d at 1023. A class action is the most suitable mechanism to resolve the putative Settlement Class Members' claims fairly, adequately, and efficiently.

Accordingly, with Plaintiff having easily satisfied the requirements of Rule 23(a) and Rule 23(b), the Court should finally certify the proposed Class for settlement purposes.

II. The Settlement Is Fair, Reasonable, And Adequate

When reviewing whether a class action settlement “is fair, reasonable, and adequate, courts in this Circuit have examined the following factors: (a) whether the settlement is the result of arms-length negotiations; (b) the terms of the settlement in relation to the strength of the case; (c) the stage of the litigation proceedings at the time of settlement; (d) the reaction of the class; and (e) the opinion of experienced counsel.” *Trombley v. Nat’l City Bank*, 826 F.Supp.2d. 179, 194 (D.D.C. 2011) (citing *In re Lorazepam*, 205 F.R.D. 369, 375 (D.D.C. 2002); *In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d 100, 104 (D.D.C. 2004)). As this Court has preliminarily found, “the Settlement Agreement is fair, reasonable, and adequate ... and thus likely to be approved, subject to further consideration at the Final Approval Hearing.” ECF No. 38, ¶ 12. For the reasons set forth at the preliminary approval stage, and for those set forth herein, this Settlement is undoubtedly fair, adequate, and reasonable and should be finally approved.

A. The Settlement Is The Result Of Arms-Length Negotiations

“A ‘presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm’s length negotiations between experienced, capable counsel after meaningful discovery.’” *In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d at 104 (D.D.C. 2001) (citing *Manual for Complex Litig.*, at § 30.42). Here, over the course of several years, the Parties had engaged in meaningful discovery in the *Payne* Action and this Action which resulted in voluminous production and responses to interrogatories and discovery requests. Joint Decl. ¶ 22. The Parties

also regularly met and conferred with each other to discuss the litigation, settlement, and the strengths of their respective cases. *Id.*

Settlement was only reached in principle after the full-day arm's-length mediation before Magistrate Judge G. Michael Harvey. *Dew v. Mindfinders, Inc.*, 2021 U.S. Dist. LEXIS 197732, at *12 (D.D.C. Oct. 14, 2021) (“the parties’ negotiations culminated in mediation supervised by an experienced and respected mediator ... “which further bolsters the arm’s length nature of the negotiations.””) (quoting *Sarceno v. Choi*, 78 F. Supp. 3d 446, 451 (D.D.C. 2015)). Throughout the litigation and the mediation, the Parties zealously advocated their positions and relative strengths and weaknesses of their cases to reach a resolution which provides substantial benefits for the Settlement Class. The Parties then worked collaboratively to memorialize the Settlement. The Settlement has no obvious deficiencies, and the terms are reasonable. This factor supports final approval, and the Court should find this Settlement fair and reasonable.

B. The Amount Of The Settlement In Relation To The Strength Of Plaintiff’s Claims

“The Court must evaluate the relief provided in the proposed settlement against the relative strength of plaintiffs’ case, including their ability to obtain recovery at trial.” *Trombley*, 826 F.Supp.2d. at 194 (citing *Equal Rights Ctr. v. Wash. Metro. Area Transit*, 573 F. Supp. 2d 205, 211 (D.D.C. 2008)). Although each Party believe that they have a strong case, neither side is without risk.

Significant work has been done so far in this Action, including but not limited to engaging in discovery, reviewing documents, legal research, and comparison of analogous cases, and preparation for and participation in mediation. Through this, the Parties have analyzed the strengths and weaknesses of their respective positions and the risks, time, and expense of continued

litigation. The Settlement provides definite relief to the proposed class, while continued litigation might result in a less favorable outcome, or no recovery at all. The proposed settlement eliminates this risk, expense, and delay.

Further, Howard is represented by formidable defense counsel, and Howard has indicated that it would continue to assert many defenses on the merits. *See, e.g.*, ECF No. 12. Plaintiff and Class Counsel are also aware that Howard would oppose class certification vigorously and would likely seek summary judgment at the close of discovery. Howard would, moreover, prepare a competent defense at trial, as needed, and could appeal the merits of any adverse decision, thus further delaying any potential recovery for the Class. The central legal issues in this case are largely questions of first impression in the context of the COVID-19 pandemic, and reaching a final resolution at the appellate level on class certification issues, the merits, and the proper measure of damages is uncertain and difficult to predict. Plaintiff recognizes that continued litigation “entails substantial risks,” and that victory “certainly cannot be assumed.” *In re Lorazepam & Clorazepate Antitrust Litig.*, 2003 WL 22037741, at *4 (D.D.C. June 16, 2003).

Indeed, achieving the Settlement in this case is an exceptional result given the unprecedented and uncertain nature of these cases nationwide. *See Shaffer v. George Wash. Univ.*, 27 F.4th at 760 (D.C. Cir. 2022) (noting the “novel and challenging issues that these cases present”). Although the *Payne* Action and this Action were litigated for approximately three and a half years leading up to the settlement negotiations, including partial success on a motion to dismiss and later success defeating a motion for judgment on the pleadings, Plaintiff still had the obstacle of certifying a class, which was far from certain.³ Furthermore, Class Counsel is not

³ 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.

aware of any case that has gone to trial or that has made a determination on the proper method of calculating damages (especially in light of the impossibility defense). While numerous courts around the country have considered the issues in the context of summary judgment, class certification, and/or motions to dismiss, the case law is uncertain as to the precise measure of damages had this matter been tried by a jury – under either a contract or quasi-contract theory. *See e.g., Rynasko v. New York Univ.*, 63 F.4th 186, 199 (2d Cir. 2023) (under New York law, “While the presence of a price differential between courses offered online versus in-person classes may be highly relevant for showing damages, we cannot conclude that a differential between in-person and online classes is necessary condition for plausibly alleging an implied contract for in-person courses and services.”); *In re Pepperdine Univ. Tuition & Fees COVID-19 Refund Litig.*, 659 F. Supp. 3d 1086, 1095 (C.D. Cal. 2023) (in denying summary judgment in part under California law, “Moreover, Plaintiffs have proffered portions of an expert report that purports to calculate Plaintiffs’ damages by determining the objective value of an in-person education relative to an online-only education ... which creates a triable issue as to Pepperdine’s contention that calculation of restitution would necessarily require an assessment of the quality of the education provided to the Plaintiffs specifically. This argument does not bar Plaintiffs’ quasi-contract claim.”); *Arredondo v. Univ. of La Verne*, 618 F. Supp. 3d 937, 947-48 (C.D. Cal. 2022) (in granting summary judgment for the student class on liability under California law, determining that issues of fact exist as to damages and holding, “An appropriate damages calculation takes into account tuition offsets for the calculation of in-person and online tuition costs. Plaintiff’s expert appropriate accounts for these costs.”); *Michal v. Yale Univ.*, 2023 U.S. Dist. LEXIS 15825, at *18

Cal. 2022) (granting class certification); *with In re Suffolk Univ. Covid Refund Litig.*, 2022 WL 6819485 (D. Mass. Oct. 11, 2022) (denying class certification).

(D. Conn. Jan. 30, 2023) (granting Yale’s summary judgment, noting “there is only one Yale University in downtown New Haven” and that “attempting to divine a difference in market value from competitors is unavailing.”). Thus, while Plaintiff believes she would have succeeded in establishing damages here at trial, she cannot say with certainty that she would do so without undue risk.

Here, the benefits of the Settlement, which will enable Class Members to receive a *pro rata* share of the Net Settlement Fund via check, Venmo, or a pre-paid Visa card, weighed against the aforementioned risks of continued litigation, clearly supports final approval of the Settlement.

Moreover, comparison of settlements in similar cases can be relevant when evaluating the fairness, adequacy, and reasonableness of a proposed settlement. *See Trombley v. Nat’l City Bank*, 759 F. Supp. 2d 20, at 24–25 (D.D.C. 2011). This Settlement is well within the settlement range for COVID-19 college tuition refund litigation, thus further supporting a finding that this Settlement is fair, adequate, and reasonable. *See, e.g., Flatscher v. The Manhattan School Of Music*, No. 20-cv-4496 (S.D.N.Y.) (\$399,999); *Miranda v. Xavier Univ.*, 2023 U.S. Dist. LEXIS 178072 (S.D. Ohio) (\$750,000); *Wright v. S. New Hampshire Univ.*, 561 F. Supp. 3d 211 (D.N.H.) (\$1.25mm); *Fittipaldi v. Monmouth Univ.*, No. 3:20-cv-5526 (D.N.J.) (\$1.3mm); *Pfeifer, et al. v. Loyola Univ. of Chicago*, No. 20-cv-03116 (N.D. Ill. 2023) (\$1.375mm); *Choi v. Brown Univ.*, No. 1:20-cv-001914 (D.R.I.) (\$1.5mm); *Martin v. Lindenwood Univ.*, No. 4:20-cv-01128 (E.D. Mo.) (\$1.65mm); *Porter v. Emerson College*, No. 1:20-cv-11897 (D. Mass.) (\$2.06mm); *Rosado v. Barry Univ.*, 2021 U.S. Dist. LEXIS 169196 (S.D. Fl. Sept, 7, 2021) (\$2.4mm); *D’Amario v. The Univ. of Tampa*, No. 7:20-cv-03744 (S.D.N.Y.) (\$3.4mm); *Smith v. Univ. of Pennsylvania*, 2023 U.S. Dist. LEXIS 9094 (E.D. Pa. Jan. 18, 2023) (\$4.5mm); *Rocchio v. Rutgers, The State Univ. of N.J.*, No. MID-L-3039-20 (N.J. Super. Ct.) (\$5mm); *Shaffer v. George Washington*

University, et al., No. 1:20-cv-01145 (D.D.C.) (\$5.4mm); and *Qureshi v. American University*, No. 1:20-cv-1141 (D.D.C.) (\$5.439mm).

C. The Status Of The Litigation At The Time Of The Settlement

In the D.C. Circuit, courts have routinely considered the “status of litigation at the time of settlement” as a factor in determining whether a proposed settlement warrants final approval. *See, e.g., Equal Rights Ctr.*, 573 F. Supp. 2d at 212; *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 565 F. Supp. 2d 49, 57–58 (D.D.C. 2008). “Courts ... consider whether counsel had sufficient information, through adequate discovery, to reasonably assess the risks of litigation vis-à-vis the probability of success and range of recovery.” *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. at 377 (D.D.C. 2002) (citing *Ressler v. Jacobson*, 822 F. Supp. 1551, 1554–55 (M.D. Fla. 1992)).

Here, the Parties have ample information about the case after engaging in extensive motion practice, ESI and written discovery through both the *Payne* Action and the present Action. During the several years of litigation, Class Counsel conducted an in-depth investigation and analysis into the facts and legal issues of the Action, drafted a comprehensive complaint and amended complaint in both this Action and the *Payne* Action, successfully defended against Howard’s Rule 12(b)(6) and (c) motions, conducted discovery which resulted in a voluminous production and received responses to interrogatories and discovery requests, regularly met and conferred with Howard’s Counsel, and prepared for and participated in the mediation. Joint Decl. ¶ 31. As a result, Class Counsel is well informed of the strengths and weaknesses of the claims and is well positioned to evaluate the prospects for success. This factor supports final approval. *See Ceccone v. Equifax Info. Servs. LLC*, 2016 U.S. Dist. LEXIS 127942, at *25 (D.D.C. Aug. 29, 2016) (finding this factor to weigh in favor of final approval where “the parties engaged in extensive discovery and

even some motions practice before reaching a settlement” because the parties “represented that they had sufficient information to assess the case’s range of probably [sic] outcomes and that they chose to settle to avoid the significant expense (and risk) of summary judgment motions, class certifications, and trial.”).

D. Reaction Of The Settlement Class

“The attitude of the members of the class, as expressed directly or by failure to object, after notice, to the settlement, is a proper consideration for the trial court.” *Ceccone*, 2016 U.S. Dist. LEXIS 127942, at *25-26 (internal citations omitted). Overall, the reaction of the class has been overwhelmingly positive, “which weighs in favor of approval.” *Trombley*, 826 F.Supp.2d at 200.

As courts in this Circuit have noted, “[t]he existence of even a relatively few objections certainly counsels in favor of approval.” See *In re Lorazepam*, 2003 WL 22037741, at *6. To date, no objections have been received by Class Counsel, Howard’s Counsel, or filed on this Court’s docket. Joint Decl. ¶ 33.⁴ Likewise, no Class Member has requested that they be excluded from the Settlement. Accordingly, at this stage, “this factor “unambiguously weighs in favor of approval.”” *Ceccone*, 2016 U.S. Dist. LEXIS 127942, at *26 (quoting *Alvarez v. Keystone Plus Constr. Corp.*, 303 F.R.D. 152, 164 (D.D.C. 2014)).

E. Opinions Of Experienced Counsel

“Opinion of experienced and informed [counsel] should be afforded substantial consideration.” *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. at 380 (citing *New York v. Reebok Int’l. Ltd.*, 903 F. Supp. 532 (S.D.N.Y. 1995)).

⁴ The Opt-Out and Objection Deadline is September 23, 2024, after this Motion will be filed. Thus, Plaintiff shall file a supplement following the Opt-Out and Objection Deadline to further discuss this factor.

As noted in Plaintiff's Motion for Preliminary Approval and in the Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award (ECF Nos. 33, 40), Class Counsel have extensive experience in litigating these types of complex class actions and have been recognized by courts around 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 222697 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.").

In addition, Class Counsel have successfully litigated and obtained settlements for students in many of the actions brought against colleges and universities for transitioning to remote instruction and denying students access to campus facilities in response to the COVID-19 pandemic. *See* ECF No. 40-2, Ex. L; *see also* ECF No. 40-3, Ex. A (firm resumes); *see also, e.g., 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.). Joint Decl. ¶ 35.

Class Counsel believes that this Settlement is the best result achievable in the circumstances of the case and recommend that it be finally approved. Class Counsel base their recommendation on the risks of certification, trial, especially trial of damages, and appeal if necessary. Moreover, even if Plaintiff was to win at trial and on appeal, the protracted litigation would result in considerable delay to Plaintiff's and the Class' recovery. A (possibly) lower, guaranteed sum today over the possibility of getting a larger amount (with risk of getting nothing) in the future is a rational balance, especially in today's economic environment. There exists a risk that the Court might not certify the class as to damages, which would necessitate Settlement Class Members to come forward and prove damages in mini-trials, is a significant factor in Class Counsel's opinion – or worse, pursue their claims individually and be required to establish their damages own their own (or incur their own costs of an economic expert to perform a hedonic, market, or conjoint analysis). *See e.g., In re Pepperdine Univ. Tuition & Fees COVID-19 Refund Litig.*, 659 F. Supp. 3d at 1095 (referring to the conjoint analysis of the student's expert); *see also Omori v. Brandeis Univ.*, 673 F. Supp. 3d 21, 29 (D. Mass. 2023) (denying class certification where “it is apparent that separate calculations would be necessary to determine which individuals sustained any damage at all.”). Therefore, this factor weighs in favor of final approval.

F. The Relief Provided To The Settlement Class Is Adequate Under The Rule 23(e)(2)(C) Factors

In evaluating the adequacy of the relief to the Settlement Class, the Court must take in 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, if required;
- (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
- (iv) any agreement required to be identified under Rule 23(e)(3).

Fed. R. Civ. P. 23(e)(2)(C); *In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d 10, 17 (D.D.C. 2019).

1. The Costs, Risks, And Delay Of Trial And Appeal

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 Howard documents produced, legal research and comparison of analogous cases, analysis of numerous course catalogs and materials, dispositive motion practice, and participation in a mediation session with an experienced mediator and Magistrate Judge. Joint Decl. ¶ 39. Had this case not settled, class certification and summary judgment would have been fully briefed and ruled upon, and depending upon the results, further discovery and litigation would have commenced before starting a jury trial. Furthermore, any decision made by the Court adverse to a Party likely would have been appealed; thus, significantly delaying reaching a final judgment in this case. Joint Decl. ¶ 40.

However, at this stage in the litigation, the Parties were able to make an informed decision concerning the risks and costs involved. The risks and costs involved in continuing this litigation render settlement at this juncture the prudent course of action. *See Vista Healthplan, Inc. v. Warner Holdings Co. III, Ltd.*, 246 F.R.D. 349, 362 (D.D.C. 2007) (“It is obvious that Plaintiffs faced significant risks in establishing both liability and damages and in continuing to trial, and that the fairness, adequacy, and reasonableness of the settlement must be viewed in light of these considerations.”). Accordingly, given the risks with pursuing litigation and the benefits obtained through this Settlement, this factor warrants the granting of final approval.

2. The Proposed Method Of Distributing Funds To The Settlement Class Is Effective, Fair, And Adequate

Rule 23(e)(2)(C) next requires a consideration of the effectiveness of any proposed method

of distributing relief to the class, including the method of processing class-member claims. Fed. R. Civ. P. 23(e)(2)(C)(ii). “As with settlement agreements, courts consider whether distribution plans are fair, reasonable, and adequate.” *In re Lorazepam*, 2003 WL 22037741, at *7. “A plan of distribution is thus sufficient where, as here, there is ‘a rough correlation’ between the settlement distribution and the relative amounts of damages recoverable by Class Members.” *Id.* (citing *In re Chicken Antitrust Litig.*, 669 F.2d 228, 240 (5th Cir.1982)).

Here, the Settlement divides the Settlement Fund equally among all students who qualify for payment, for their lost access to an in-person educational experience for a portion of the Spring 2020 Semester. By treating all students equally who were all similarly affected, and excluding those who withdrew prior to March 16, 2020 and were thus not impacted, the allocation plan evidently has “a reasonable, rational basis,” thus warranting approval. *In re Fannie Mae Sec., Deriv., and ERISA Litig.*, 4 F. Supp. 3d 94, 108 (D.D.C. 2013). This method of distributing the Net Settlement Fund on an equal basis has been approved as fair and reasonable in analogous cases, including in this Court. *See e.g., Qureshi v. American University*, No. 1:20-cv-01141-CRC (D.D.C.), ECF No. 98 at 3-4; *Shaffer v. George Wash. Univ.*, No. 1:20-cv-01145-RJL (D.D.C.), ECF No. 78 at 4; *see also Metzner v. Quinnipac Univ.*, No. 3:20-cv-00784-KAD (D. Conn.), ECF No. 130 at 4-6.

Moreover, Settlement Class Members will not need to make a claim to receive an award, rather, each Settlement Class Member will *automatically* receive an award, unless they opt-out, meaning that there are fewer barriers for Class Members to reap the benefits of this Settlement, which has been a concern for courts across the country.⁵

⁵ *See, e.g., Deatricks v. Securitas Security Servs. USA, Inc.*, 2016 WL 729622, at *8 (N.D. Cal. Feb. 24, 2016) (denying preliminary approval where the court did not see “that claim forms

Therefore, the proposed method of distribution is effective, fair, and adequate and this factor weighs in favor of final approval.

3. The Parties Have No Additional Agreements To Be Disclosed Under Rule 23(e)(3)

Besides the Settlement itself, as defined at ¶ 3 of the Settlement Agreement (inclusive of the *In Camera* Supplement), there are no additional agreements other than a Term Sheet the Parties negotiated and signed at the conclusion of mediation, which is consistent with (and replaced by) the Settlement Agreement. Joint Decl. ¶ 44.

G. The Settlement Treats Settlement Class Members Equally

The final factor, Rule 23(e)(2)(D), looks at whether class members are treated equitably. As reflected in the plan of allocation, and as discussed above, the proposed Settlement treats Settlement Class Members equitably as they all will receive the same amount of the Net Settlement Fund. Furthermore, Settlement Class Members will provide Howard with the same release in return for receiving the benefits provided under the Settlement. Therefore, this factor weighs in favor of final approval.

III. The Class Administration Costs Should Be Paid

The Settlement Agreement provided that no more than \$150,000 be paid to the Claims Administrator and those payments have already been made by the Defendant or are in process for payment. Furthermore, the Claims Administrator, Epiq, has submitted a declaration detailing their administration. *See* ECF No. 41. In Class Counsel’s experience, these Administration Expenses

are necessary to the administration of the settlement.”); *Rubio-Delgado v. Aerotek, Inc.*, 2015 WL 3623627, at *6 (N.D. Cal. Jun. 10, 2015) (denying preliminary approval, noting that a claim form “is likely to significantly reduce the number of class members who receive a settlement payment.”).

were reasonable and part of a bidding process to ensure that competitive prices were achieved. Joint Decl. ¶ 46.

IV. Attorneys' Fees and Incentive Awards

A. Plaintiff's Request For Attorney's Fees Is Reasonable

Finally, "the terms of [the] proposed award of attorney's fees," Fed. R. Civ. P. 23(e)(2)(C)(iii), do not undermine the adequacy of the relief provided to the Settlement Class. Significantly, to date, no Settlement Class Member has objected to Plaintiff's attorneys' fee request. Joint Decl. ¶ 33. As detailed in Plaintiff's Motion for Attorney's Fees, Costs, Expenses, and Incentive Award (*see* ECF No. 40), the requested Fee and Expense Amount is reasonable and aligns with similar actions of the type and case law in this District. Accordingly, this Rule 23(e)(2)(C) factor supports final approval of this Settlement.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully submits that this Court enter the proposed and agreed-upon Final Judgment and Order after the conclusion of the Fairness Hearing on October 1, 2024.

Dated: September 20, 2024

Respectfully Submitted,

GAINEY McKENNA & EGGLESTON

Thomas J. McKenna

Thomas J. McKenna
Gregory M. Egleston
260 Madison Avenue, 22nd Fl.
New York, NY 10017
Telephone: (212) 983-1300
Facsimile: (212) 983-0383
Email: tjmckenna@gme-law.com
Email: gegleston@gme-law.com

**SILVERMAN THOMPSON SLUTKIN &
WHITE, LLC**

William N. Sinclair
400 East Pratt Street, Suite 900
Baltimore, MD 21201
Email: bsinclair@silvermanthompson.com

BURSOR & FISHER, P.A.

L. Timothy Fisher
Neal J. Deckant
1990 North California Blvd., 9th Floor
Walnut Creek, CA 94596
Email: ltfisher@bursor.com
Email: ndeckant@bursor.com

Attorneys for Plaintiff and the Settlement Class

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.

Civil Action No. 1:23-cv-00663-DLF

**JOINT DECLARATION OF THOMAS J. McKENNA AND L. TIMOTHY FISHER IN
SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION
SETTLEMENT**

We, THOMAS J. McKENNA and L. TIMOTHY FISHER, hereby declare that:

1. I, Thomas J. McKenna, am a member of the law firm of Gainey McKenna & Egleston, counsel for Plaintiff Chanel Adavenaixx. I am a member in good standing of the Bar of the State of New York and have been admitted *pro hac vice* in the instant Action. ECF No. 18. I respectfully submit this declaration in support of Plaintiff's Motion for Final Approval of Class Action Settlement in the above-captioned action.¹

2. I, L. Timothy Fisher, am a Partner of the law firm Bursor & Fisher, P.A., counsel for Plaintiff Chanel Adavenaixx. I am an attorney at law licensed to practice in the State of California. I was admitted *pro hac vice* in the related matter *Payne v. Howard University*, Case No. 1:23-cv-00663-DLF. I respectfully submit this declaration in support of Plaintiff's Motion for Final Approval of Class Action Settlement in the above-captioned action.

¹ All capitalized terms shall have the same meaning as set forth in the Settlement Agreement unless otherwise noted.

3. We have overseen all material aspects of the litigation of the Action. In addition, we were personally involved in all mediation efforts and in all of the negotiations as to the terms of the Settlement. Accordingly, we have personal knowledge of the following facts and if called upon to testify, we could and would testify competently thereto.

4. As we were personally involved in the negotiation of the terms of the Settlement, we can confidently state that the Settlement in this matter was reached only after hard fought, arm's-length negotiations between Defendant and its counsel on one hand, and Plaintiff and Plaintiff's Counsel on the other hand under the auspices of the Mediator. There was no collusion of any sort.

Factual and Procedural Background

5. A full recitation of the factual and procedural background of this Action can be found in the Declaration of L. Timothy Fisher in Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award (ECF No. 40-2, ¶¶ 3-9) and the Declaration of Thomas J. McKenna in Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award (ECF No. 40-3, ¶¶ 8-15), as well as in the Memorandum of Law in Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award (ECF No. 40-1, at 2-6).

6. This is a class action lawsuit on behalf of all people who paid tuition and fees for the Spring 2020 academic semester at Howard University ("Howard"), and who, because of Howard's 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 and those fees refunded to them. ECF No. 1, at ¶ 1.

7. On October 7, 2020, Plaintiff filed a putative class action against 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 in response to 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*").

8. *Adavenaixx I* was filed four (4) months after a different plaintiff (represented by Co-Lead 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. Plaintiff Adavenaixx and our law firm agreed to work cooperatively with Plaintiff Payne and Co-Lead Counsel in prosecuting the first-filed *Payne Action*. Accordingly, on December 4, 2020, Plaintiff voluntarily dismissed *Adavenaixx I* without prejudice before Howard filed its responsive pleading. *Adavenaixx I*, at ECF No. 9.

9. On March 10, 2023, after engaging in substantive litigation in both *Adavenaixx I* and the *Payne Action*, including litigating a motion to dismiss and engaging in formal discovery, and following Mr. Payne's voluntary dismissal of the *Payne Action* (*see* ECF No. 40-2, ¶¶ 4-5, 7), Plaintiff filed this putative class action against Howard. ECF No. 1. On June 5, 2023, Howard filed its Answer in this case. 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, to avoid duplication, that some of the discovery previously exchanged in the *Payne Action* could be used in this action. ECF No. 21.

10. 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 Magistrate Judge G.

Michael Harvey. At the conclusion of the mediation session, Howard agreed to pay \$2,073,680 to settle the Action, subject to Court approval.

11. 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.

12. Since then, 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.

Class Certification

13. To certify a class, a plaintiff must meet all the requirements under Fed. R. Civ. P. 23(a), otherwise known as (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation, as well as the requirements of either Fed. R. Civ. P. 23(b)(1), (2), or (3). In granting preliminary approval of this Settlement, this Court found that Plaintiff satisfies the four elements of Fed. R. Civ. P. 23(a). *See* ECF No. 38, ¶¶ 15-16.

14. **First**, numerosity is satisfied because the Settlement Class contains over 9,000 Howard students.

15. **Second**, Plaintiff easily satisfies the commonality hurdle as common issues here include, but are not limited to: (1) whether Defendant accepted money from Settlement Class Members in exchange for the promise to provide in-person educational services; (2) whether Defendant provided the services for which Settlement Class Members contracted; (3) whether Settlement Class Members are entitled to a refund for that portion of the tuition and fees that was

contracted for services that Defendant did not provide; and (4) whether Defendant is liable to Plaintiff and the Settlement Class for unjust enrichment.

16. **Third**, Plaintiff's claims are typical because they arise from the same events and course of conduct by Howard and are based on the same legal theories. Plaintiff's and the Settlement Class Members' claims arise from a contract with Howard for the provision of in-person education and on-campus services. Plaintiff alleges that Howard billed Plaintiff and the Settlement Class Members, and Plaintiff and the Settlement Class Members paid, for tuition and fees for in-person courses to be provided on campus. Plaintiff alleges that, in response to the COVID-19 pandemic, Howard stopped providing the promised in-person instruction and access to campus facilities and in-person resources for all students. Plaintiff alleges that Howard then retained the full price paid for tuition and certain fees. Plaintiff alleges Howard must refund the prorated fees for campus access and in-person resources that Howard did not provide when it closed its campus and transitioned all courses online.

17. **Fourth**, Plaintiff and Settlement Class Members have the same interest in obtaining a refund that will provide each with the benefit of their bargain. In addition to these aligned interests, Plaintiff has no conflicts with the class. In addition, Plaintiff has shown her commitment to vigorously prosecuting this litigation and will continue to advocate for the best interests of the Settlement Class. Proposed Class Counsel is also well-qualified and will also continue to vigorously represent the Settlement Class. Indeed, During the past several years, Plaintiff and Class Counsel have investigated and zealously pursued claims on behalf of the proposed Settlement Class against Howard, briefed and argued the motion to dismiss, conducted discovery resulting in voluminous productions, conducted substantial research regarding the legal issues, and

attended a mediation under the auspices of this Court. They have no conflicts of interest and will continue to prosecute this action vigorously on behalf of the Settlement Class.

18. Also, in granting preliminary approval of the Settlement, the Court found that Rule 23(b)(3) was satisfied. ECF No. 38, ¶¶ 15-16.

19. As to predominance, Howard is alleged to have engaged in a common course of conduct applicable to all Settlement Class Members when it transitioned all in-person classes to online classes. Moreover, the central legal issues presented by this case would predominate over individualized issues and injury can be proven on a class-wide basis without conducting individualized inquiries. For example, all Settlement Class Members would have to address the same core issues of (i) whether a contract existed with Howard for in-person educational instruction and service; (ii) if such contract did exist, whether Howard breached the alleged contract with Plaintiff and Settlement Class Members when Howard transitioned to remote educational instruction and closed on-campus services in response to the COVID-19 pandemic during the Spring 2020 semester; and (iii) whether there was any difference in value between online distance learning and live in-person instruction. These material issues would be resolved using class-wide proof for the Settlement Class Members and these and other common issues to the class are more substantial than those issues requiring individualized proof.

20. As to superiority, in light of the common legal and factual questions at issue for all Settlement Class Members and the relatively small amount of damages compared to the enormous investment of time and money that it will take to litigate them, individual Settlement Class members have a very limited interest in individually controlling the prosecution of this Action and would gain little practical benefit from initiating separate actions. Moreover, Plaintiff and the Settlement Class Members have limited financial resources with which to prosecute individual

actions, and Plaintiff's counsel is unaware of any individual lawsuits filed by Settlement Class Members arising from the same allegations. Class certification for settlement purposes will permit thousands of students to resolve their common claims in a single forum simultaneously, effectively, and efficiently without the duplication of effort and expense that many individual actions would require. A class action is the most suitable mechanism to resolve the putative Settlement Class Members' claims fairly, adequately, and efficiently.

The Settlement is Fair, Reasonable and Adequate

21. When reviewing whether a class action settlement is fair, reasonable, and adequate, courts in this Circuit have examined the following factors: (a) whether the settlement is the result of arms-length negotiations; (b) the terms of the settlement in relation to the strength of the case; (c) the stage of the litigation proceedings at the time of settlement; (d) the reaction of the class; and (e) the opinion of experienced counsel.

The Settlement is the Result of Arm's-Length Negotiations

22. Here, over the course of several years, the Parties had engaged in meaningful discovery, both formal and informal, in the *Payne* Action and this Action which resulted in voluminous productions and responses to interrogatories and discovery requests. The Parties also regularly met and conferred with each other to discuss the litigation, settlement, and the strengths of their respective cases. Settlement was only reached in principle after the full-day arm's-length mediation before Magistrate Judge G. Michael Harvey.

23. Throughout the litigation and the mediation, the Parties zealously advocated their positions and relative strengths and weaknesses of their cases to reach a resolution which provides substantial benefits for the Settlement Class. The Parties then worked collaboratively to

memorialize the Settlement. The Settlement has no obvious deficiencies, and the terms are reasonable.

The Amount of the Settlement in Relation to the Strength of Plaintiff's Claims

24. Significant work has been done so far in this Action, including but not limited to engaging in discovery, reviewing documents, legal research, and comparison of analogous cases, and preparation for and participation in mediation. Through this, the Parties have analyzed the strengths and weaknesses of their respective positions and the risks, time, and expense of continued litigation. The Settlement provides certain relief to the proposed class, while continued litigation might result in a less favorable outcome. The proposed settlement eliminates this risk, expense, and delay and supports preliminary approval.

25. Further, Howard is represented by formidable defense counsel, and Howard has indicated that it would continue to assert many defenses on the merits. *See, e.g.*, ECF No. 12. Plaintiff and Class Counsel are also aware that Howard would oppose class certification vigorously and would likely seek summary judgment at the close of discovery. Howard would, moreover, prepare a competent defense at trial, as needed, and could appeal the merits of any adverse decision, thus further delaying any potential recovery for the Class. The central legal issues in this case are largely questions of first impression in the context of the COVID-19 pandemic, and reaching a final resolution at the appellate level is uncertain and difficult to predict.

26. Achieving the Settlement in this case is an exceptional result given the unprecedented and uncertain nature of these cases nationwide.

27. Although this case has been litigated for approximately three and a half years leading up to the settlement negotiations, including partial success on a motion to dismiss and later

success defeating a motion for judgment on the pleadings, Plaintiff still had the obstacle of certifying a class, which was far from certain.

28. Furthermore, Class Counsel is not aware of any case that has gone to trial where a determination was made on the proper method of calculating damages (especially in light of the impossibility defense). While numerous courts around the country have considered the issues in the context of summary judgment, class certification, and/or motions to dismiss, the case law is uncertain as to the precise measure of damages which could be awarded by a jury – under either a contract or quasi-contract theory. Thus, while Plaintiff believes she would have succeeded in establishing damages here at trial, she cannot say with certainty that she would do so without undue risk.

29. Here, the benefits of the Settlement, which will enable Class Members to receive a *pro rata* share of the Net Settlement Fund via check, Venmo, or a pre-paid Visa card, weighed against the aforementioned risks of continued litigation, clearly supports final approval of the Settlement.

Status of Litigation at the Time of Settlement

30. At the time the Settlement was reached, the Parties had ample information about the case from engaging in extensive motion practice, ESI and written discovery through both the *Payne* Action and the present Action.

31. During the several years of litigation, Class Counsel has conducted in-depth investigation and analysis into the facts and legal issues of the Action, drafted a comprehensive complaint and amended complaint in both this Action and the *Payne* Action, successfully defended against Howard's Rule 12(b)(6) and (c) motions, conducted discovery which resulted in voluminous productions and responses to interrogatories and discovery requests, regularly met and

conferred with Howard's Counsel, and prepared for and participated in the mediation. As a result, Class Counsel is well informed of the strengths and weaknesses of the claims and is well positioned to evaluate the prospects for success.

Reaction of the Class

32. The Opt-Out and Objection Deadline (*i.e.*, the date by which any Class Member must file their objection or request exclusion from the Settlement by) is September 23, 2024. As such, Class Counsel will submit a supplement following that Deadline to address any objections, requests for exclusion, or lack thereof.

33. To date, we can confirm that our firms have not received any objections from Class Members, nor have any objections been filed on this Court's docket. We can also confirm that no objections have been received by Howard's Counsel.

34. Similarly, our firms have not received, nor have we been informed by the Claims Administrator of, any requests for exclusion by any Class Member.

Opinions of Class Counsel

35. As noted in Plaintiff's Motion for Preliminary Approval and Motion for Attorneys' Fees, Expenses, and a Service Award (ECF Nos. 33, 40), Class Counsel have extensive experience in litigating these types of complex class actions and have been recognized by courts around the country for their experience. In addition, Class Counsel have successfully litigated and obtained settlements for students in many of the actions brought against colleges and universities for transitioning to remote instruction and denying students access to campus facilities in response to the COVID-19 pandemic. *See* ECF No. 40-2, Ex. L; *see also* ECF No. 40-3, Ex. A. (firm resumes).

36. We can state that, based upon the considered risks of certification, trial, especially trial of damages, and appeal, if necessary, as well as our experience in litigating these types of

complex class actions, this Settlement is the best result achievable in the circumstances of the case and we recommend that it be finally approved.

37. Even if Plaintiff were to win at trial and on appeal, the protracted litigation would result in considerable delay to Plaintiff's and the Class' recovery. Further, there exists a risk that the Court might not certify the class as to damages which would necessitate Settlement Class Members to come forward and prove damages in mini-trials is a significant factor in Class Counsel's opinion – or worse, pursue their claims individually and be required to establish their damages own their own (or incur their own costs of an economic expert to perform a hedonic, market, or conjoint analysis).

38. Thus, a (possibly) lower, guaranteed sum today over the possibility of getting a larger amount (with risk of getting nothing) in the future is a rational balance, especially in today's economic environment).

The Costs, Risks, and Delay of Trial and Appeal

39. 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, analysis of numerous catalogs and materials, dispositive motion practice, and participation in a mediation session with an experienced mediator and Magistrate Judge.

40. Had this case not settled, class certification and summary judgment would have been fully briefed and ruled upon, and depending upon the results, further discovery and litigation would have commenced before starting a jury trial. Furthermore, any decision made by the Court adverse to a Party likely would have been appealed; thus, significantly delaying reaching a final judgment in this case.

41. However, at this stage in the litigation, the Parties were able to make an informed decision concerning the risks and costs involved. The risks and costs involved in continuing this litigation render settlement at this juncture the prudent course of action.

The Proposed Distribution Plan is Effective, Fair, and Adequate

42. Here, the Settlement divides the Settlement Fund equally among all students who qualify for payment, for their lost access to an in-person educational experience for a portion of the Spring 2020 Semester. By treating all students equally who were all similarly affected, and excluding those who withdrew prior to March 16, 2020 and were thus not impacted, the allocation plan evidently has a reasonable, rational basis, thus warranting approval.

43. Moreover, Settlement Class Members will not need to make a claim to receive an award, rather, each Settlement Class Member will *automatically* receive an award, unless they opt-out, meaning that there are fewer barriers for Class Members to reap the benefits of this Settlement.

The Parties Have No Side Agreements

44. Besides the Settlement itself, as defined at ¶ 3 of the Settlement Agreement (inclusive of the *In Camera* Supplement), there are no additional agreements other than a Term Sheet the Parties negotiated and signed at the conclusion of mediation, which is consistent with (and replaced by) the Settlement Agreement.

The Settlement Treats Class Members Equally

45. As reflected in the plan of allocation, the proposed Settlement treats Settlement Class Members equitably as they all will receive the same amount of the Net Settlement Fund. Furthermore, Settlement Class Members will provide Howard with the same release in return for receiving the benefits provided under the Settlement. Therefore, this factor weighs in favor of final approval.

Class Administration Costs Should Be Paid

46. The Settlement Agreement provided that no more than \$150,000 will be paid to the Claims Administrator. Furthermore, the Claims Administrator, Epiq, has submitted a declaration detailing their administration. *See* ECF No. 41. In our experience, these Administration Expenses were reasonable and part of a bidding process to ensure that competitive prices were achieved.

Attorneys' Fees, Expenses, and Service Award

47. As detailed in Memorandum of Law in Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award (ECF No. 40-1, at 2-6), the requested Fee and Expense Amount is reasonable and aligns with similar actions of the type and case law in this District and does not "undermine the adequacy of the relief provided to the Settlement Class." Fed. R. Civ. P. 23(e)(2)(C)(iii).

EXHIBITS

48. Attached hereto as **Exhibit A** is a true and correct copy of the Order Granting Final Approval of Settlement in *Ninivaggi et al. v. University of Delaware*, Case No. 1:20-cv-01478-SB (D. Del.).

49. Attached hereto as **Exhibit B** is a true and correct copy of the Order Granting Final Approval of Settlement in *Qureshi v. American University*, No. 1:20-cv-1141 (D.D.C. May 7, 2024).

50. Attached hereto as **Exhibit C** is a true and correct copy of the Order Granting Final Approval of Settlement in *Shaffer v. George Washington University, et al.*, No. 1:20-cv-01145 (D.D.C. May 13, 2024).

51. A true and correct copy of the firm résumé of Gainey McKenna & Egleston is attached to the Declaration of Thomas J. McKenna in Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award (ECF No. 40-3, Ex. A).

52. A true and correct copy of the firm résumé of Bursor & Fisher, P.A. is attached to the Declaration of L. Timothy Fisher in Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award (ECF No. 40-2, Ex. L).

53. A true and correct copy of the Order Granting Final Approval of Settlement in *Espejo, et al. v. Cornell University*, Case No. 3:20-cv-00467-MAD-MIL (N.D.N.Y.) is attached to the Declaration of Thomas J. McKenna in Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award (ECF No. 40-3, Ex. H).

54. A true and correct copy of the Order Granting Final Approval of Settlement in *Choi v. Brown Univ.*, No. 1:20-cv-001914 (D.R.I. Jan. 10, 2023) is attached to the Declaration of Thomas J. McKenna in Support of Plaintiff's Motion to Preliminarily Approve Class Action Settlement; Approve Proposed Class Notice; and Schedule Final Approval Hearing (ECF No. 33-2, Ex. E).

55. A true and correct copy of the Order Granting Final Approval of Settlement in *D'Amario v. The Univ. of Tampa*, No. 7:20-cv-03744 (S.D.N.Y. Oct. 18, 2022) is attached to the Declaration of Thomas J. McKenna in Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award (ECF No. 40-3, Ex. C).

56. A true and correct copy of the Order Granting Final Approval of Settlement in *Fittipaldi v. Monmouth Univ.*, No. 3:20-cv-5526 (D.N.J. Dec. 30, 2022) is attached to the Declaration of Thomas J. McKenna in Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award (ECF No. 40-3, Ex. F).

57. A true and correct copy of the Order Granting Final Approval of Settlement in *Flatscher v. The Manhattan School Of Music*, No.: 20-cv-4496 (S.D.N.Y. Sep. 8, 2023) is attached to the Declaration of Thomas J. McKenna in Support of Plaintiff's Motion to Preliminarily Approve Class Action Settlement; Approve Proposed Class Notice; and Schedule Final Approval Hearing (ECF No. 33-2, Ex. H).

58. A true and correct copy of the Order Granting Final Approval of Settlement in *In re Columbia Univ. Tuition Refund Action*, No. 1:20-cv-03208 (S.D.N.Y. Mar. 29, 2022) is attached to the Declaration of Thomas J. McKenna in Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award (ECF No. 40-3, Ex. G).

59. A true and correct copy of the Order Granting Final Approval of Settlement in *Kincheloe v. University of Chicago, et al.*, No. 20-cv-03015 (N.D. Ill. 2024) is attached to the Declaration of Thomas J. McKenna in Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award (ECF No. 40-3, Ex. I).

60. A true and correct copy of the Order Granting Final Approval of Settlement in *Martin v. Lindenwood Univ.*, No. 4:20-cv-01128 (E.D. Mo. May 11, 2022) is attached to the Declaration of Thomas J. McKenna in Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award (ECF No. 40-3, Ex. E).

61. A true and correct copy of the Order Granting Final Approval of Settlement in *Metzner v. Quinnipiac Univ.*, No. 3:20-cv-00784-KAD (D. Conn. Apr. 10, 2023) is attached to the Declaration of Thomas J. McKenna in Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award (ECF No. 40-3, Ex. D).

62. A true and correct copy of the Order Granting Final Approval of Settlement in *Pfeifer, et al. v. Loyola Univ. of Chicago*, No. 20-cv-03116 (N.D. Ill. Jan. 23, 2024) is attached to

the Declaration of Thomas J. McKenna in Support of Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, and Incentive Award (ECF No. 40-3, Ex. O).

63. A true and correct copy of the Order Granting Final Approval of Settlement in *Porter v. Emerson College*, No. 1:20-cv-11897 (D. Mass. Nov. 29, 2022) is attached to the Declaration of Thomas J. McKenna in Support of Plaintiff's Motion to Preliminarily Approve Class Action Settlement; Approve Proposed Class Notice; and Schedule Final Approval Hearing (ECF No. 33-2, Ex. N).

64. A true and correct copy of the Order Granting Final Approval of Settlement in *Rocchio v. Rutgers, The State Univ. of N.J.*, No. MID-L-3039-20 (N.J. Super. Ct. Feb. 4, 2021) is attached to the Declaration of Thomas J. McKenna in Support of Plaintiff's Motion to Preliminarily Approve Class Action Settlement; Approve Proposed Class Notice; and Schedule Final Approval Hearing (ECF No. 33-2, Ex. P).

We declare under the penalty of perjury that the foregoing is true to the best of our knowledge.

Dated: September 20, 2024

/s/ Thomas J. McKenna
Thomas J. McKenna

/s/L. Timothy Fisher
L. Timothy Fisher

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PENNY NINIVAGGI, MICHAEL
NINIVAGGI, TODD MICKEY, JAKE
MICKEY, JAMES NIGRELLI, CAILIN
NIGRELLI, and HANNAH RUSSO,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

No. 20-cv-1478-SB

UNIVERSITY OF DELAWARE,

Defendant.

ORDER

Plaintiffs and Defendant University of Delaware have entered into a Class Action Settlement Agreement which sets forth the terms for settling this case and dismissing it with prejudice. On June 23, 2023, I preliminarily approved this class-action settlement, conditionally certifying a Class under FED. R. CIV. P. 23(b)(3) of “all UD undergraduate and graduate students for whom any amount of tuition and fees were paid from any source ... to Defendant for the Spring 2020 Semester, and whose tuition or fees have not been refunded in their entirety prior to this Settlement.” D.I. 152 at ¶ 9.

Having considered the Agreement (D.I. 150-3), Plaintiffs’ motion to finally approve the class-action settlement, Plaintiffs’ motion for attorney’s fees, costs, expenses, and incentive awards (D.I. 155 & 156), all their exhibits and supplemental briefing (D.I.

159 & 160), the arguments and authorities presented at the final approval hearing on October 23, 2023, and the record,

I HEREBY ORDER, DECREE, AND ADJUDGE:

1. Terms and phrases in this Final Judgment shall have the same meaning that they do in the Class Action Settlement Agreement.

2. The Court has jurisdiction over the subject matter of the Action and over all Parties to the Action, including all Settlement Class Members.

3. The notice provided to the Settlement Class under the Agreement and order granting preliminary approval (D.I. 152 & 154) fully complied with the requirements of FED. R. CIV. P. 23 and due process and was reasonably calculated under the circumstances to apprise the Settlement Class of this pending Action, their right to object to or to exclude themselves from the Agreement, and their right to appear at the final approval hearing.

4. One timely request for exclusion has been submitted and granted. So there is only one exclusion from the Settlement Class.

5. The Defendant properly and timely notified the appropriate government officials of the Agreement. Class Action Fairness Act of 2005, 28 U.S.C. § 1715. Having reviewed the Defendant's notice, I find that it complied with all applicable substantive requirements. This final approval is also timely: more than ninety days have elapsed since Defendant provided notice, as required by the statute and Settlement Agreement.

6. I find that the Agreement is fair, reasonable, adequate, and in the Class's best interests. The settlement consideration provided under the Settlement Agreement is fair value given in exchange for the release of the Released Claims against the Released Parties. The Agreement is the result of arm's-length negotiations between the Parties. This case is legally and factually complex, as extensive discovery has shown. Given this complexity and the total value of the claims, the consideration that the class members will get is reasonable and in their best interests when balanced against (i) the disputed factual and legal circumstances of the Action, (ii) affirmative defenses asserted in the Action, and (iii) the potential risks and likelihood of success of pursuing litigation on the merits. I find that these facts and my own observations throughout the litigation show that the parties did not collude in reaching the Agreement.

7. I have also considered the factors relevant to approving a class-action. *See* FED. R. CIV. P. 23(e)(2); *see also Girsh v. Jepsen*, 521 F.2d 153, 157 (3d Cir. 1975).

8. I find that Counsel and Class Representatives adequately represented the Class.

9. So I APPROVE the Settlement Agreement in all respects.

10. As I ruled at the hearing, I DIRECT the Parties to implement the Agreement according to its terms and provisions. The Agreement is incorporated into this Final Judgment in full and shall have the full force of an Order of this Court.

11. I DISMISS this case on the merits with prejudice, as identified in the Agreement.

12. Upon the effective date of this Judgment, Plaintiffs and every Class Member who did not opt out of the Class, as well as anyone who could conceivably sue on their behalf, shall be deemed to have released Defendant, and anyone against whom someone could bring suit due to Defendant's actions, from any legal action related to or arising out of any aspect of Defendant's actions or decisions with respect to the Spring 2020 academic term, as further specified in the Agreement.

13. This release of claims and the Agreement will have preclusive effect on all lawsuits and proceedings maintained by or on behalf of Plaintiffs and all other Settlement Class Members and Releasing Parties. All Class Members are barred and enjoined from taking part in any way in any legal action in any jurisdiction based on or arising out of any of the Released Claims, as further specified in the Agreement.

14. I also considered Plaintiffs' motion for attorney's fees, costs, expenses, and incentive awards, as well as the supporting memorandum of law and declarations (D.I. 155, 156). The payment of attorney's fees and costs in the amount of \$2,100,000.00 is reasonable in light of the multi-factor test used to evaluate fee awards in the Third Circuit. *See Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000). Such payment shall be made under the terms of the Settlement Agreement.

At the final approval hearing, I found that the bills submitted by both Bursor & Fisher and Cross & Simon were reasonable, and I commend the firms for their thoroughness, transparency, and precision. They can still proudly claim that their bills have never been reduced. The same cannot be said of the other two firms.

First, the hours of Poulin Willey Anastopoulo were significantly inflated by a plethora of 0.1-hour entries for each professional who merely received an email. Plus, the firm billed out Paul Doolittle at \$997 per hour. Though I make no judgment about whether such a rate is reasonable in general, it is excessive here. Mr. Doolittle practices in Charleston, South Carolina, and his expertise is in tort class actions, not contract class actions. I therefore asked for supplemental briefing to correct the hour entries and his billing rate.

In that briefing, the firm removed all 0.1-hour entries for email communications that did not require some other action to be taken. D.I. 160. It also reduced the billing rate for Mr. Doolittle to \$800, as I had requested. Together, these changes reduce the firm's submissions from \$794,041.10 to \$344,232.70. I am satisfied with the corrections that the firm made in its supplemental briefing.

Second, Chimicles Schwartz Kriner & Donaldson-Smith neglected to submit any timesheets with its declaration of fees. It also billed out Robert Kriner at \$1,300 per hour. I make no judgment about whether such a rate is reasonable for the mergers-and-acquisitions work that is Mr. Kriner's specialty. But for a class-action settlement based on a contract dispute, I found this rate excessive.

I asked for supplemental briefing, letting Mr. Kriner include supplemental non-frivolous hours that he had removed before submitting his original declaration. Though the Chimicles supplement did not present a clear recalculated lodestar submission for the firm, it did include its full timesheet, adding almost 100 hours that had been omitted from the previous submission. D.I. 159. I appreciate that Mr. Kriner

so significantly reduced his firm's hours prior to his original submission to make up for his work mentoring younger lawyers in his practice. But I still conclude that his rate was excessive. I therefore reduce his rate to \$850 and accept the second submission of \$229,692.50 as the lodestar for the Chimicles firm.

So the overall lodestar here is \$1,568,327.70. The requested fee of \$2.1 million thus reflects a 1.34 multiplier. This remains within an acceptable range.

15. I also considered Plaintiffs' motion for attorney's fees, costs, expenses, and incentive awards, as well as the supporting memorandum of law and declarations (D.I. 155, 156). I find that the reimbursement of attorney's costs and expenses in the amount of \$245,240.19 is reasonable. Such payment shall be made according to the terms of the Settlement Agreement.

16. I have also considered Plaintiffs' motion, memorandum of law, and supporting declarations for incentive awards to the Class Representatives: Michael Ninivaggi, Jake Mickey, Cailin Nigrelli, Hannah Russo, and Sean Griffin. D.I. 156, at 17–18. These incentive awards compensate them for their efforts and commitment on behalf of the Class, including as the named plaintiffs and Griffin's development of a record in his parallel case. I agree that the payment of \$5,000 to each Representative is fair, reasonable, and justified under the circumstances. Such payment shall be made according to the terms of the Settlement Agreement.

17. Except as otherwise set forth in this Order, the Parties shall bear their own costs and attorney's fees.

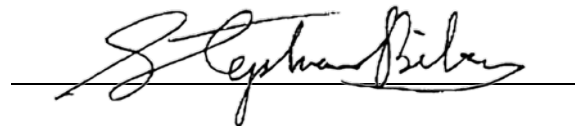
18. The Parties, without further approval from the Court, may agree to and adopt amendments, modifications, and expansions of the Settlement Agreement and its implementing documents so long as they are consistent in all material respects with this Final Judgment and do not limit the rights of the Class Members.

19. Without affecting the finality of this Final Judgment for appeal purposes, the Court shall retain jurisdiction over all matters relating to administration, consummation, enforcement, and interpretation of the Agreement until the Effective Date.

20. I DIRECT entry of this Final Judgment under FED. R. CIV. P. 58 based on my finding that there is no just reason for delay.

21. I direct the Clerk to CLOSE the case.

IT IS SO ORDERED, this 7th day of November 2023.

A handwritten signature in black ink, reading "Stephanos Bibas", is written over a horizontal line.

The Honorable Stephanos Bibas
United States Circuit Judge

EXHIBIT B

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MAAZ QURESHI, MATTHEW RABINOWITZ,
DANISH ARIF et al., individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

AMERICAN UNIVERSITY,

Defendant.

Case 1:20-cv-01141-CRC

**FINAL JUDGMENT AND ORDER APPROVING
CLASS SETTLEMENT AND CERTIFYING THE CLASS**

This matter came before the Court for hearing pursuant to this Court’s Order Preliminarily Approving Class Settlement and Certifying the Class dated January 10, 2024 (“Preliminary Approval Order”), on the application of the Parties¹ for approval of the settlement among Plaintiffs Maaz Qureshi, Matthew Rabinowitz, and Danish Arif (“Plaintiffs”), individually and on behalf of all others similarly situated, and Defendant American University (“American” or “Defendant”). The Court having considered all papers filed and proceedings held herein, and having received declarations attesting to the mailing of the notice and the publication of the notice on the Settlement Website in accordance with the Preliminary Approval Order, and good cause appearing therefore,

IT IS HEREBY ADJUDGED, DECREED, AND ORDERED:

¹ Capitalized terms not defined in this order have the meanings set forth in the Settlement Agreement (“Agreement”).

I. JURISDICTION AND VENUE

1. The Court has jurisdiction over the subject matter, the parties to this proceeding, and all Settlement Class Members, pursuant to 28 U.S.C. § 1332.

2. Venue is proper in this District.

II. FINAL CERTIFICATION OF THE CLASS

3. The Court finds that the requirements of Federal Rule of Civil Procedure 23 are satisfied, and that certification of the proposed Settlement Class is appropriate. The Court therefore grants final certification of the following Settlement Class (which includes terms defined in the Settlement Agreement):

All American University undergraduate students enrolled during the Spring 2020 Semester for whom any amount of tuition and fees were paid from any source other than a scholarship/grant from American (*e.g.* the student's own funds, funding from a parent, or other family member, loan, or non-American scholarship/grant) to Defendant for the Spring 2020 Semester, and whose tuition or fees have not been refunded in their entirety prior to this Settlement. For the avoidance of doubt, any students who received full scholarships from AU or otherwise were not obligated to make contributions, payments, or third-party arrangements towards tuition or fees for the Spring 2020 Semester are excluded from the Settlement Class.

4. The Settlement Class excludes those persons who timely and validly filed requests for exclusion from the Settlement Class pursuant to the notice and as provided in the Court's Preliminary Approval Order. There were no objections to the settlement.

5. The Court finds that the Class satisfies the following requirements under Federal Rule of Civil Procedure 23:

- (a) the members of the Settlement Class are so numerous that joinder of all members is impracticable;
- (b) there are questions of law and fact common to the Settlement Class;
- (c) the claims and defenses of the Plaintiffs are typical of the Settlement Class;

- (d) the Plaintiffs and Class Counsel will fairly and adequately protect the interests of the Settlement Class; and
- (e) the Action satisfies the requirements of Fed. R. Civ. P. 23(b)(3) in that there are questions of law and fact common to the members of the Settlement Class that predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

6. For the purpose of this settlement, the Court hereby finally certifies Plaintiffs Maaz Qureshi, Matthew Rabinowitz, and Danish Arif as Class Representatives, and the law firms of Poulin | Willey | Anastopoulo, LLC, Bursor & Fisher, P.A., and Leeds Brown Law, P.C. as Class Counsel.

III. FINAL APPROVAL OF THE SETTLEMENT

7. Pursuant to Fed. R. Civ. P. 23(e), this Court finds that the settlement is, in all respects, fair, reasonable, and adequate, and is in the best interests of all Settlement Class Members, for the following reasons: *First*, the Parties negotiated the settlement fairly and honestly at arms' length and with the assistance of experienced counsel and upon the recommendation of experienced neutral Judge Suzanne H. Segal (Ret.). *Second*, serious questions of law and fact exist, including those asserted in Defendant's affirmative defenses in their answer to the complaint. *Third*, an immediate recovery is valuable to the Class, given the potential need for protracted litigation to resolve all factual and legal disputes among the Parties. *Fourth*, the Parties have offered their reasoned and well-supported judgment that the settlement is fair and reasonable to the Class. *Fifth*, the settlement was well-received by the Settlement Class.

8. The Court also finds that the plan for distribution of the Available Settlement Fund, as set forth in the Settlement Agreement, is fair and equitable. The Settlement

Administrator shall perform the distribution to Settlement Class Members following the process set forth in Section 3 of the Agreement without further order of this Court.

9. The Court therefore finally approves the settlement, and the exhibits appended to the Agreement, as fair, reasonable, and adequate, and the Plaintiffs, Defendant, Settlement Administrator, and Settlement Class Members shall consummate the Settlement according to the terms of the Agreement.

10. The Parties, without further approval from the Court, are hereby permitted to agree and adopt such amendments, modifications, and expansions of the Settlement Agreement and its implementing documents (including all exhibits to the Settlement Agreement) so long as they are consistent in all material respects with this Final Judgment and do not materially alter the rights of the Settlement Class Members.

IV. ADEQUACY OF NOTICE

11. The Court finds that the Settlement Class Members have been given due and adequate notice of the settlement and Class Counsel's application for attorneys' fees and request for a service award for the Plaintiffs, in the manner directed by this Court's Preliminary Approval Order.

12. The Court further finds that the notice program approved in the Court's Preliminary Approval Order and implemented in accordance with that Order was the best practicable under the circumstances. The notice program was reasonably calculated under the circumstances to apprise the Class of (a) the pendency of the Action; (b) the Court's preliminary certification of the Settlement Class; (c) the terms of the Settlement Agreement and the Settlement Class Members' rights to opt-out of the Settlement Class or to object to the settlement; (d) and the maximum amounts of Class Counsel's expected application for attorneys' fees and request for a Service Award for the Plaintiffs. The notice program provided sufficient

notice to all persons entitled to notice. The notice program satisfied all applicable requirements of law, including Federal Rule of Civil Procedure 23 and the constitutional requirement of Due Process.

V. ATTORNEYS FEES AND INCENTIVE AWARD

13. Class Counsel is entitled to reasonable attorneys' fees, which the Court finds to be \$1,812,818.70. This sum shall be paid out of the Settlement Fund in accordance with the provisions of the Settlement Agreement.

14. Class Counsel is entitled to reimbursement of litigation-related costs and expenses, which the Court finds to be \$157,285.34. This sum shall be paid out of the Settlement Fund in accordance with the provisions of the Settlement Agreement.

15. The Class Representatives in this action initiated their respective lawsuits, acted to protect the Settlement Class, and assisted their counsel. Class Representatives Maaz Qureshi, Matthew Rabinowitz, and Danish Arif are each entitled to a service award of \$7,500. These sums shall be paid out of the Settlement Fund in accordance with the provisions of the Settlement Agreement.

VI. CLAIMS ADMINISTRATION COST AND EXPENSES

16. The Court authorizes disbursement of \$57,283 to the Settlement Administrator, Epiq Class Action & Claims Solutions, Inc, to be paid in accordance with the Settlement Agreement, to compensate the Settlement Administrator for the tasks performed in connection with class notice and administration of the settlement, as set forth in the Agreement, the Preliminary Approval Order, and this Order.

VII. RELEASES AND FINAL JUDGMENT

17. Pursuant to Federal Rule of Civil Procedure 23(c)(3) and the Agreement, all Settlement Class Members who have not filed timely, completed, and valid requests for

exclusion from the Settlement Class are Settlement Class Members who are bound by this final judgment and by the terms of the Settlement Agreement.

18. The Released Parties are hereby released and forever discharged from any and all of the Released Claims. All Settlement Class Members are hereby forever barred and enjoined from asserting, instituting, or prosecuting, directly or indirectly, any Released Claim in any court or other forum against any of the Released Parties.

19. Neither the settlement nor any act performed or document executed pursuant to or in furtherance of the settlement: (a) may be deemed to be or may be used as an admission of, or evidence of, the validity of any Released Claim, or of any wrongdoing or liability of the Released Parties; or (b) may be used as an admission of, or evidence of, any fault or omission of any of the Released Parties in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal; or (c) may be admissible in any proceeding except an action to enforce or interpret the terms of the Settlement Agreement or any other documents executed in connection with the performance of the agreements embodied therein. The Released Parties may file this settlement and/or this final judgment and order in any action that may be brought against them in order to support a defense or counterclaim based on the principles of res judicata, collateral estoppel, full faith and credit, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

20. The Court finds that during the course of the Action, the Parties and their respective counsel at all times complied with the requirements of Federal Rule of Civil Procedure 11.

21. Without affecting the finality of this Final Judgment in any way, this Court hereby reserves and retains continuing jurisdiction over: (a) implementation and enforcement of any award or distribution from the Settlement Fund; (b) disposition of the Settlement Fund or Available Settlement Fund, including *cy pres* distribution of any funds remaining at the completion of the distribution to Settlement Class Members; (c) payment of taxes from the Settlement Fund; (d) all parties hereto for the purpose of construing, enforcing, and administering the Settlement Agreement; and (e) any other matters related to finalizing the settlement and distribution of the proceeds of the settlement.

22. This Court finds, for purposes of Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay and expressly directs entry of judgment as set forth herein.

DATED: May 7, 2024.

BY THE COURT:

The Honorable Christopher R. Cooper,
United States District Judge

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK SHAFFER, MARGARET)
MAULDIN, CHARAFEDDINE)
ZAITOUN, and MARC LESSIN,)
Individually and on Behalf of All Others)
Similarly Situated,)

Plaintiffs,)

v.)

Civil Case No. 20-1145 (RJL)

THE GEORGE WASHINGTON)
UNIVERSITY and THE BOARD OF)
TRUSTEES OF GEORGE)
WASHINGTON UNIVERSITY,)

Defendants.)

MEMORANDUM ORDER

(May 13, 2024) [Dkt. ## 68, 74]

Pending before the Court are [68] Plaintiffs’ Motion for Attorneys’ Fees, Costs, and Class Representative Service Awards and [74] Plaintiffs’ Motion for Final Approval of Class Settlement. Upon consideration of the motions, the entire record herein, and the final fairness hearing conducted on April 2, 2024, the Court will GRANT plaintiffs’ motion for final approval and GRANT IN PART and DENY IN PART plaintiffs’ request for attorneys’ fees, costs, and class representative service awards.

I. Motion for Final Approval

Plaintiffs Mark Shaffer, Margaret Mauldin, Charafeddine Zaitoun, and Marc Lessin brought this putative class action against The George Washington University and The Board of Trustees of George Washington University (“defendants”), seeking to recover a

portion of the tuition and fees that they and other students and parents paid for the Spring 2020 semester before in-person classes and activities were halted due to the COVID-19 pandemic. Consolidated Class Action Compl. [Dkt. #17]. After multiple years of litigation, the parties have entered into a Class Action Settlement Agreement pursuant to which defendants will pay \$5.4 million to resolve the action (the “Settlement Agreement”) [Dkt. # 66-1]. On December 12, 2023, the Court entered its Order granting preliminary approval of the Class Action Settlement, conditionally certifying the Settlement Class pursuant to Federal Rule of Civil Procedure 23(b)(3), appointing class representatives, appointing class counsel, and approving the proposed notice plan (“Preliminary Approval Order”) [Dkt. # 67]. The Settlement Class was defined as: “All Students and Payors who paid or incurred tuition and/or fees to the George Washington University in connection with the Spring 2020 semester and whose tuition and/or fees have not been refunded in their entirety.”¹ *Id.* ¶ 9.

The Court held a final approval hearing on April 2, 2024, giving the parties and any Settlement Class Members present an opportunity to be heard. Two timely filed objections from three objectors were received, but they only related to plaintiffs’ request for attorneys’ fees, costs, and class representative service awards. *See* Benjamin Heidloff and Matthew

¹ “Excluded from the Settlement Class are (1) any Judge or Magistrate Judge presiding over this Action and members of their families; (2) Defendants; (3) Persons who properly execute and file a timely request for exclusion from the class; (4) the legal representatives, successors or assigns of any such persons; (5) GW Students or Payors who did not pay any tuition or fees for the Spring 2020 Semester, i.e., tuition and fees were paid for by institutional aid, tuition benefits, federal/state/local grants, GI/Yellow Ribbon benefits, outside scholarships, and/or third party sponsorships; and (6) any Persons enrolled in Defendant’s entirely online or continuous enrollment programs at the start of the Spring 2020 Semester.” Preliminary Approval Order ¶ 9.

West's Obj. to Pls.' Mot. for Att'ys' Fees, Costs, and Class Representative Service Awards [Dkt. #70] ("Heidloff and West Objection"); Susan Aledort's Mem. in Opp'n in Part to Pls.' Mot. for Att'ys' Fees, Costs, and Class Representative Service Awards [Dkt. #71] ("Aledort Objection"). No Settlement Class Member objected to the Settlement itself. Accordingly, pursuant to Federal Rule of Civil Procedure 23(e), the Court now gives final approval to the Settlement Agreement.

First, now that the Notice Plan has been implemented, the Court concludes that the notice provided to the Settlement Class—including (i) individual, direct notice to the Settlement Class via email and/or direct U.S. mail based on the Settlement Class List provided by the defendants, (ii) publication notice via The New York Times and The Washington Post, (iii) an internet digital notice campaign, (iv) sponsored search listings, (v) a press release issued nationwide over PR Newswire, and (vi) the creation of the Settlement Website—complied with the requirements of Federal Rule of Civil Procedure 23(c)(2) and was reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the action, their right to object to or to exclude themselves from the Settlement Agreement, and their right to appear at the final approval hearing. One individual, Zaniya Lewis, submitted a request for exclusion and will therefore be excluded from the Settlement Class.

Second, pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3), the Court finds that: (a) the Settlement Class is so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the Settlement Class; (c) the claims of plaintiffs are typical of the claims of the Settlement Class; (d) plaintiffs have

fairly and adequately represented the interests of the Settlement Class; (e) questions of law and fact common to class members predominate over any questions affecting only individual class members; and (f) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Accordingly, the Court confirms as final its conditional certification of the Settlement Class as stated in the Preliminary Approval Order. *See* Preliminary Approval Order ¶ 9.

Third, after consideration of the factors in Federal Rule of Civil Procedure 23(e)(2), the Court finds that the Settlement Agreement is fair, reasonable, adequate, and in the best interests of the Settlement Class. The Class Representatives and Class Counsel adequately represented the Settlement Class for the purposes of litigating this matter and entering into and implementing the Settlement Agreement. The Settlement Agreement was the product of arms' length negotiations between the parties, including a full day of mediation before a retired federal judge. Finally, the consideration to be paid to the Settlement Class is reasonable, considering the novel legal issues raised by the context of the COVID-19 pandemic and the potential risks and likelihood of success of pursuing litigation on the merits. Accordingly, the Court confirms as final its approval of the Settlement Agreement as stated in the Preliminary Approval Order. *See* Preliminary Approval Order ¶¶ 4, 10.

II. Motion for Attorneys' Fees, Costs, and Class Representative Service Awards

Class Counsel asks the Court to award attorneys' fees, costs, and expenses in the amount of one-third of the Settlement Fund (*i.e.*, \$1,799,820). *See* Pls.' Mot. for Att'ys' Fees, Costs, and Class Representative Service Awards [Dkt. #68] ("Mot. for Att'ys' Fees"). Class Counsel also seeks individual service awards of \$10,000 each for the four Class

Representatives. *Id.* However, the Settlement Agreement makes clear that the decision to award the Class Counsel fee and the Class Representative service awards is committed to the “sole discretion” of the Court, and if the Court awards a lesser amount, the Settlement Agreement shall remain fully enforceable. Settlement Agreement ¶¶ 8.1, 8.3.

The Court has examined the request for representative service awards and finds it reasonable. Courts routinely approve service awards to compensate named plaintiffs for their efforts during the course of class action litigation, and an award of \$10,000 is in line with other awards that have been provided by courts in this Circuit. *See, e.g., Trombley v. Nat’l City Bank*, 826 F. Supp. 2d 179, 207–08 (D.D.C. 2011); *Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1, 8–9 (D.D.C. 2008).

The requested fee award for Class Counsel, however, is a tougher issue. When evaluating the reasonable calculation of counsel fees in class action settlements with a common fund, “the proper measure of such fees in a common fund case is a percentage of the fund.” *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1263 (D.C. Cir. 1993). However, it is also within the Court’s discretion to use a lodestar cross-check in deciding upon the appropriate percentage amount. *See, e.g., Nat’l Veterans Legal Servs. Program v. United States*, No. 16-cv-745, 2024 WL 1206458, at *15 (D.D.C. Mar. 20, 2024). The range of reasonable attorneys’ fees recognized in this Circuit generally runs from 20 to 30 percent of the common fund. *See Randle v. SunTrust Bank, Inc.*, No. 18-cv-1525, 2024 WL 706807, at *10 (D.D.C. Feb. 21, 2024).

Here, Class Counsel originally reported that they, along with their co-counsel, incurred \$1,111,428 in uncompensated professional fees and \$122,729.57 in

uncompensated professional costs while litigating this action. Mot. for Att'ys' Fees at 1. However, one of the class members who objected to the requested attorneys' fees and spoke at the final approval hearing pointed out that this fee amount was calculated using current billing rates, rather than the historical billing rates that were in effect at the time the work was performed. *See* Heidloff and West Objection at 7–8. When historical rates are applied, the uncompensated professional fees decrease to \$946,722.50. *See* Pls.' Notice of Filing Updated Summ. Charts of Fees [Dkt. #76] (reporting fees of \$632,887.50 for Hagens Berman and \$293,955 for Berger Montague); Decl. of Andrew S. Levetown [Dkt. #68-8] (reporting fees of \$19,880 for Levetown Law using an already discounted rate). When combined with the uncompensated professional costs, this amounts to approximately 20% of the Settlement Fund.


Although the lodestar calculation is not determinative, the Court finds that it is a good indication of the appropriate fee and cost award in this case. Given the large number of class members, “this is a relatively small common fund from which to award [over] 30% to attorneys' fees.” *Hubbard v. Donahoe*, 958 F. Supp. 2d 116, 126 (D.D.C. 2013); *see also* *Shaffer v. George Washington University, Frequently Asked Questions*, <https://www.gwsettlement.com/Home/FAQ> (estimating that each class member will receive \$193). The requested Class Counsel award will therefore be reduced from the requested 33% of the Settlement Fund to 20% of the Settlement Fund.

Accordingly, it is hereby ORDERED that the Settlement is finally approved; it is FURTHER ORDERED that Class Counsel shall receive attorneys' fees and costs in the amount of 20% of the Settlement Fund, for a total award of \$1,080,000; it is

FURTHER ORDERED that the four Class Representatives shall receive service awards in the amount of \$10,000 each out of the Settlement Fund, in addition to their recovery from the Settlement; and it is

FURTHER ORDERED that the action is dismissed with prejudice.

SO ORDERED.



RICHARD J. LEON
United States District Judge

**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.

Civil Action No. 1:23-cv-00663-DLF

[PROPOSED] FINAL JUDGMENT AND ORDER

Chanel Adavenaixx (“Settlement Class Representative,” and, collectively, with the members of the Settlement Class, the “Settlement Class Members”), on the one hand, and Howard University (“Howard” or the “University”), on the other hand, entered into a Class Action Settlement Agreement and Release as of May 6, 2024 (the “Settlement” or “Settlement Agreement”) to resolve the above-captioned litigation (the “Action”).¹ On June 18, 2024, the Court granted preliminary approval of the Settlement, provisionally approving certification of a class for settlement. *See* Order Granting Preliminary Approval of Class Action Settlement (ECF No. 38) (“Preliminary Approval Order”).

On October 1, 2024, the Court held a Final Approval Hearing on (1) Plaintiff’s Motion for Final Approval of Class Action Settlement (ECF No. __) and (2) Plaintiff’s Motion for Attorneys’ Fees, Expenses, and a Service Award (ECF No. 40). Through the briefs, exhibits, and argument

¹ Unless defined differently herein, this Final Judgment and Order incorporates the definitions in the Settlement Agreement. The Settlement Agreement is adopted by the Court and made part of this Final Judgment and Order as if set out in full herein. *See* Settlement Agreement (ECF No. 33-3).

at the Final Approval Hearing, the Court has thoroughly examined and considered the Settlement and Settlement Agreement and the requests for Attorneys' Fees, Expenses, and a Service Award.

Having reviewed the motions and all related pleadings and filings and having also heard the evidence and argument presented at the Final Approval Hearing, which are incorporated herein by reference, THE COURT HEREBY FINDS, CONCLUDES, AND ORDERS THE FOLLOWING:

I. FINAL JUDGMENT AND ORDER

A. Certification Of The Settlement Class

1. The Court certifies, for settlement purposes only, the following class (hereinafter and for purposes of this Final Judgment and Order, the "Settlement Class"):

All Howard students enrolled in the Spring 2020 Semester who did not withdraw by March 16, 2020 for whom any amount of tuition and/or fees was paid to Howard from any source other than a scholarship, grant, or tuition remission from Howard, or any other source that did not require repayment, and whose tuition and/or fees have not been fully refunded.

Specifically excluded are the following Persons:

- (i) Any students who received full scholarships or tuition remission from Howard or who did not themselves ultimately pay any tuition or fees for the Spring 2020 Semester (*i.e.*, those whose tuition and fees were paid for by institutional aid, tuition benefits, federal/state/local grants, GI/Yellow Ribbon benefits, outside scholarships, and/or third-party sponsorships);
- (ii) The University and its officers, trustees and their family members;
- (iii) Class Counsel;
- (iv) The judges who have presided over the Action; and
- (v) All persons who properly execute and file a timely opt-out request to be excluded from the Settlement Class.

2. For the reasons stated in its Preliminary Approval Order and as summarized below, the Court finds that the Settlement Class meets the requirements of Rule 23 for certification for settlement purposes only:

a. Rule 23(a)(1) Numerosity: The Settlement Class is too numerous to practicably join all members because it includes thousands of students who have not already settled and/or released their claims.

b. Rule 23(a)(2) Commonality: “Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury,’” and that the claims arising from that injury depend on a “common contention . . . of such a nature that it is capable of classwide resolution.” Wal-Mart Stores, Inc. v. Dukes, U.S., 564 U.S. 338, 359 (2011). Here, Settlement Class Members allegedly paid tuition and fees for in-person instruction for the Spring 2020 Semester and received remote instruction during the Spring 2020 Semester, and, thus, suffered the same alleged injury. Central questions of fact and law common to all Settlement Class Members include, *inter alia*, whether the University promised to provide in-person instruction during the Spring 2020 Semester.

c. Rule 23(a)(3) Typicality: the Settlement Class Representative’s claims are typical of the members of the Settlement Class because they challenge the same conduct — the University’s provision of remote instruction instead of in-person instruction beginning in the Spring 2020 Semester — and make the same legal arguments.

d. Rule 23(a)(4) Adequacy: Both the Settlement Class Representative and Class Counsel have adequately represented the Settlement Class throughout the Action and for the purposes of entering into and implementing the Settlement.

e. Rule 23(b)(3) Predominance: Under Rule 23(b)(3), a class action may be maintained if the Court finds that questions of law or fact common to the

class members predominate over any questions affecting individual members. Here, all Settlement Class Members share a common alleged legal grievance arising from the University’s provision of remote education beginning in the Spring 2020 Semester, when Settlement Class Members had allegedly agreed to pay tuition and fees for in-person instruction. Common legal and factual questions — including whether the University promised to provide in-person instruction during the Spring 2020 Semester — are central to all Settlement Class Members’ claims and predominate over any individual questions that may exist.

f. Rule 23(b)(3) Superiority: A class action is superior to many individual actions. Members of the proposed Settlement Class received educational instruction during the Spring 2020 Semester and may not have suffered sufficient damages to justify the costs of litigation. The Settlement ensures that all Settlement Class Members will have the opportunity to be compensated through a Cash Award.

3. The Court hereby appoints the Settlement Class Representative as the representative of the Settlement Class. The Court hereby appoints Thomas J. McKenna and Gregory M. Egleston of Gainey McKenna & Egleston and L. Timothy Fisher and Neal J. Deckant of Bursor & Fisher, P.A. as Class Counsel for the Settlement Class.

B. Notice

4. The Court affirms the appointment of Epiq Class Action & Claims Solutions, Inc. (“Epiq”) as Claims Administrator.

5. In accordance with the Settlement Agreement and Preliminary Approval Order, the Claims Administrator launched the Settlement Website on June 28, 2024.

6. Pursuant to the terms of the Settlement Agreement and the Preliminary Approval Order, Epiq emailed the Court-approved Notice to all valid email addresses of Settlement Class

Members within thirty (30) days of receiving the Class List. Epiq accordingly emailed the Court-approved Notice to 8,646 Settlement Class Members. Only 600 Notices were unable to be delivered via email.

7. Pursuant to the terms of the Settlement Agreement and the Preliminary Approval Order, Epiq mailed the Court-approved Notice to all Settlement Class Members for whom an email address was not available within thirty (30) days of receiving the Class List. Epiq accordingly mailed the Court-approved Notice to 114 Settlement Class Members. After 20 Notices were returned as undeliverable, Epiq successfully re-mailed the undeliverable Notices for which it could identify new addresses through skip tracing.

8. There were no Settlement Class Members whose information was subject to a FERPA Block. As such, Howard was not required to send Notice to any Class Member.

9. Direct notice was therefore sent to at least 93.03% of Settlement Class Members.

10. [No Settlement Class Member has filed an objection to the Class Notice Program.]

11. The Class Notice Program, together with all included and ancillary documents thereto, (a) constituted reasonable notice; (b) constituted notice that was reasonably calculated under the circumstances to apprise members of the Settlement Class of the pendency of the Action, of their right to object to or exclude themselves from the proposed Settlement, of their right to appear at the Final Approval Hearing and of their right to seek relief; (c) constituted reasonable, due, adequate and sufficient notice to all Persons entitled to receive notice; and (d) met all applicable requirements of due process and any other applicable law.

12. The Court finds that Settlement Class Members have been provided the best notice practicable of the Settlement and that such notice fully satisfies all requirements of law as well as all requirements of due process.

13. The Court also finds that notice to appropriate federal and state officials pursuant to the federal Class Action Fairness Act has been timely sent and that such notice fully satisfies the requirements of the federal Class Action Fairness Act, 28 U.S.C. § 1715. *See* ECF No. 40, Ex. A.

C. Final Approval Of Settlement

14. At the Final Approval Hearing held on October 1, 2024, the Court fulfilled its duties to independently evaluate the fairness, reasonableness, and adequacy of, *inter alia*, the Settlement and the notice provided to Settlement Class Members, considering the pleadings and argument of the parties and their counsel and the interests of all absent members of the Settlement Class. After thoroughly considering the briefing and arguments of the parties and considering the factors required by Rule 23 and the D.C. Circuit, this Court concludes that this Settlement is fair, reasonable, and adequate, consistent and in compliance with all requirements of due process and applicable law and in the best interests of all Parties, and the Court grants final approval to the Settlement.

15. Specifically, the Court determines that (a) the Settlement Class Representative and Class Counsel have adequately protected the Settlement Class, (b) the Settlement was negotiated at arm's-length, (c) the relief to the Settlement Class is adequate, taking into account: (i) the costs, risks and delay of trial and appeal; (ii) the effectiveness of the proposed method of distributing relief to the Settlement Class; (iii) the terms of the proposed award of attorneys' fees, including the timing of payment; (iv) any agreement required to be identified under Rule 23(e)(3) of the Federal Rules of Civil Procedure, and (d) the Settlement treats Settlement Class Members equitably relative to each other because, all members of the proposed Settlement Class are eligible to receive a Cash Award on a *pro rata* basis. Accordingly, the Court finds the Settlement to be fair, reasonable, and adequate. The Court finds that the Settlement is the result of extended, arm's-length negotiations

among experienced counsel, including with the aid of Magistrate Judge G. Michael Harvey, and is non-collusive.

16. The Parties have represented that no agreements exist between the Parties aside from those referred to in the Settlement or otherwise submitted to the Court.

17. [All timely objections filed by members of the Class have been fully considered by the Court and are overruled].

18. The Court finds that the Settlement Agreement is in all respects fair, reasonable, adequate and in the best interest of the Settlement Class.

D. Implementation Of Settlement For Settlement Class Members

19. The Court directs the Parties and their counsel to implement and consummate the Settlement Agreement in accordance with its terms and provisions.

20. No amounts remaining in the Escrow Account following the distribution of the Net Settlement Fund shall revert back to the University for its own use. The remainder, if any, shall be provided to the University to be deposited in and used to make payments for a specially authorized Howard scholarship fund or charitable cause as agreed upon by the Parties (“*Cy Pres Award*”). The Court further determines that this *Cy Pres Award*, with its mission closely aligned to helping students manage unexpected costs during their academic career, will ensure that the distribution of amounts remaining in the Escrow Account following the distribution of the Net Settlement Fund will be for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of Settlement Class Members, and the interests of those similarly situated.

E. Exclusions From The Settlement Class

21. [The Claims Administrator has received, from certain Settlement Class Members, requests for exclusion from the Settlement Class, and the Claims Administrator has provided Class Counsel and Counsel for the University copies of those requests. A list of the Persons who have

timely and properly requested to be excluded from the Settlement Class has been submitted to the Court. *See* Opt-Out List (ECF No. [____]). All Persons named in the list submitted to the Court as having filed timely requests for exclusions with the Claims Administrator are excluded from the Settlement Class and will not be bound by the terms of the Settlement. Each individual or entity that otherwise falls within the definition of the Settlement Class shall be bound by the terms of the Settlement].

F. Releases

22. The Court adjudges that in consideration of the Settlement and as set forth in the Settlement Agreement, the Releasing Parties, and each of them, shall be deemed to have, and by operation of the Final Judgment shall have, fully, finally, and forever released, relinquished, and discharged all Released Claims against each and every one of the Released Parties and their respective heirs, executors, administrators, predecessors, successors, insurers and assigns.

23. With respect to the Released Claims, the Releasing Parties stipulate and agree that, upon the Effective Date, they shall be deemed to have, and by operation of the Final Judgment shall have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights, and benefits of Section 1542 of the California Civil Code, or any other similar provision under federal or state law.

G. Settlement Agreement As Exclusive Remedy For Released Claims

24. The Settlement Agreement and this Final Judgment and Order shall be binding on and have *res judicata* and preclusive effect in all pending and future lawsuits or other proceedings encompassed by the Release maintained by or on behalf of the Releasing Parties. As of the Effective Date, enforcement of the Settlement Agreement shall be the exclusive remedy for the Settlement Class Representative and all Settlement Class Members who have not been excluded from the Settlement Class, all of whom are bound by all proceedings, orders and judgments in the

Action and are permanently barred and enjoined from instituting, asserting, commencing, prosecuting, or continuing to prosecute, or causing to be commenced or prosecuted, either directly or indirectly, any of the Released Claims against the University or any of the Released Parties in any action or other proceeding. Members of the Settlement Class who have not been excluded from the Settlement Class and who are prosecuting or asserting any of the Released Claims are ordered to take whatever measures are necessary to effectuate dismissal of their claims.

25. This Final Judgment and Order bars and permanently enjoins all Settlement Class Members who have not been properly excluded from the Settlement Class from (a) filing, commencing, prosecuting, intervening in or participating (as class members or otherwise) in, or causing to be filed, commenced, or prosecuted, any other lawsuit, administrative, or regulatory action, arbitration, or other proceeding in any jurisdiction based on, relating to or arising out of the Released Claims or the facts and circumstances giving rise to the Action or the Released Claims, or in any way related to tuition, fees, and/or costs paid or incurred by or on behalf of any Settlement Class Member to any Released Party, in connection with the Spring 2020 Semester and Howard's transition to remote instruction in response to the COVID-19 global pandemic, including without limitation all claims that were brought or could have been brought in the Action, and (b) organizing Settlement Class Members, regardless of whether or not they have been excluded from the Settlement Class, into a separate class for purposes of pursuing as a purported class action any lawsuit or arbitration or other proceeding (including by seeking to amend a pending complaint to include class allegations or seeking class certification in a pending action) based on, relating to or arising out of the claims and causes of action or the facts and circumstances giving rise to the Action or the Released Claims.

H. Effect Of This Final Judgment and Order

26. If for any reason this judgment is reversed, vacated, or materially modified on appeal or by collateral attack (and, in the event of material modification, which shall not include any modification to an award of Attorneys' Fees and Costs or to the Service Awards, if either party elects to terminate the Settlement), this Order shall be null and void, the Settlement Agreement shall be deemed terminated (except for any paragraphs that, pursuant to the terms of the Settlement, survive termination of the Settlement), and the Parties shall return to their positions without prejudice in any way, as provided for in the Settlement.

I. No Admission Of Liability

27. The Settlement Agreement and the Settlement provided for herein and any proceedings taken pursuant thereto are not and should not in any event be offered or received as evidence of, a presumption, concession, or an admission of liability or of any misrepresentation or omission in any statement or written document approved or made by the University or any Released Parties or of the suitability of these or similar claims to class treatment in active litigation and trial; provided, however, that reference may be made to this Settlement Agreement and the Settlement provided for herein in such proceedings as may be necessary to effectuate the Settlement Agreement and the Final Judgment and Order.

28. The Court dismisses the Action on the merits and with prejudice and without fees or costs except as provided herein. The Court orders the entry of, and enters, this Final Judgment and Order on all claims, counts, and causes of action alleged in the Action by the Settlement Class Representative, on behalf of herself, the Settlement Class, or both. In entering this Final Judgment and Order with the provisions stated herein and other limiting provisions, this Court specifically refers to and invokes the Full Faith and Credit Clause of the United States Constitution and the doctrine of comity, and requests that any court in any other jurisdiction reviewing, construing, or

applying this Final Judgment and Order implement and enforce its terms and limitations in their entirety.

29. The Court has and retains personal jurisdiction over the Settlement Class Representative and all Settlement Class Members and has subject matter jurisdiction to approve this Settlement and Settlement Agreement and all exhibits thereto. Without affecting the finality of this Final Judgment and Order in any way, this Court reserves jurisdiction over the University, the Settlement Class Representative, Class Counsel, and the Settlement Class Members as to all matters relating to the administration, consummation, enforcement and interpretation of the terms of the Settlement Agreement and Final Judgment and Order and for any other necessary purposes.

30. The Court authorizes the Parties, without further approval from the Court, to agree to and adopt such amendments, modifications and expansions of the Settlement Agreement and all exhibits thereto as (a) shall be consistent in all material respects with this Final Judgment and Order and (b) do not limit the rights of the Parties or Settlement Class Members.

31. Pursuant to Rule 54 of the Federal Rules of Civil Procedure, the Court finds that there is no reason for delay in the entry of this Final Judgment and Order as a final order and final judgment, and the Court further expressly directs the Clerk of the Court to file this Final Judgment and Order as a final order and final judgment.

IT IS SO ORDERED this ____ day of _____, 2024.

Dabney L. Friedrich
United States District Judge