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

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO PRELIMINARILY APPROVE CLASS ACTION SETTLEMENT; APPROVE PROPOSED CLASS NOTICE; AND SCHEDULE FINAL APPROVAL HEARING

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I. INTRODUCTION

Plaintiff Chanel Adavenaixx brought the above-captioned class action lawsuit against Howard University ("Howard," "Defendant," or the "University") on behalf of all people who paid tuition and fees for the Spring 2020 academic semester at Howard, and who allege that, because of Howard's transition to remote instruction in response to the COVID-19 pandemic, they lost the benefit of the education for which they paid, and/or the in-person services for which their fees paid, without having any portion of their tuition and fees for those services refunded to them (the "Action").[1] Plaintiff sought a partial refund on behalf of herself and the Settlement Class for in-person educational services for which they paid and allege Defendant did not provide. The Parties have engaged in significant discovery over the years of ongoing litigation in this Action and a prior related action.[2] The Parties ultimately agreed to participate in a mediation before Magistrate Judge G. Michael Harvey on November 7, 2023. The Parties negotiated for a full day at arm's-length with the help of Magistrate Judge Harvey and reached an agreement to settle the Action.

In the following months, the Parties worked together to memorialize a settlement Term Sheet, and the Class Action Settlement Agreement ("Settlement" or "Agreement") and accompanying proposed notice and settlement administration documents. The Agreement, if approved by this Court, will provide immediate relief to the Settlement Class Members. It creates a $2,073,680 settlement fund which, after fees and expenses, will be distributed on an equal basis to all Settlement Class Members who were affected by the involuntary transition from in-person to remote educational services in the Spring 2020 semester.

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

[2] A different plaintiff (represented by proposed Class Counsel) filed an action against Howard initially, in the case captioned *Payne v. Howard Univ.*, Case No. 1:20-cv-03792-DLF (D.D.C.). The *Payne* Action was subsequently dismissed after engaging in discovery. Following this, the present Action was filed and the Parties agreed that much of the discovery previously exchanged in the *Payne* Action could be used in this Action. (ECF No. 21).

Pursuant to FRCP 23(e), Plaintiffs move the Court for an Order (i) preliminarily 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 ("Agreement") between Plaintiff and the University, a copy of which has been attached as Exhibit A to the accompanying Declaration of Thomas J. McKenna ("McKenna Decl."); (ii) provisionally 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.[3]

(iii) authorizing the transmission of the notice of the proposed Settlement to the proposed Settlement Class Members (*see* Exhibits A-1 and A-2 attached to the Agreement); (iv) preliminarily appointing Plaintiff as Settlement Class Representative; (v) preliminarily 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; (vi) approving the Parties' proposed settlement procedure, including approving the Parties' selection of Epiq Class Action & Claims Solutions, Inc. ("Epiq") as Claims Administrator, and approving the Parties' proposed schedule, including dates for providing notice to Settlement Class Members and for Settlement Class Members to opt out or file objections; (vii) entering the Proposed Order Granting Preliminarily Approval of Class Action Settlement; and (viii) scheduling a Final Approval Hearing of the proposed class action Settlement.

II. FACTUAL AND PROCEDURAL BACKGROUND

[3] 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) 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.

A. Factual Background

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

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

Plaintiff was an undergraduate student at Howard University majoring in Communications, with a concentration in television and film and a minor in Business. Plaintiff is now an alumna of Howard University, having completed her undergraduate degree requirements and graduated at the end of the Spring 2022 Semester. Plaintiff paid Defendant tuition and fees for the Spring 2020 Semester.

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

B. Procedural Background

Adavenaixx I and the Payne Action

On October 7, 2020, Plaintiff filed a putative class action against Howard University ("Howard"), seeking a partial refund of tuition and certain mandatory fees paid for the second

half of the Spring 2020 semester following Howard's transition from in-person to remote educational instruction as a result of the Novel Coronavirus Disease 2019 ("COVID-19") pandemic. Plaintiff asserted claims for breach of contract and unjust enrichment, among others. See *Adavenaixx v. Howard Univ*., No. 1:20-cv-02872-TJK (D.D.C) (ECF No. 1) ("*Adavenaixx I*"). On December 4, 2020, Plaintiff voluntarily dismissed *Adavenaixx I* without prejudice before Howard filed its responsive pleading. *Adavenaixx I*, at ECF No. 9.

Adavenaixx I was filed four (4) months after a different plaintiff (also represented by Class Counsel in this case), filed *Payne v. Howard Univ*., Case No. 1:20-cv-01314 (D. Md.), later transferred to this District and assigned Case No. 1:20-cv-03792-DLF (D.D.C) ("*Payne* Action"), another putative class action asserting similar claims and seeking tuition and fee refunds for the second half of the Spring 2020 semester. After the Court denied in part Howard's Rule 12(b)(6) motion in the *Payne* Action, the Parties entered into a brief stay pending the outcome of appeals in other COVID-19 tuition litigation (*Shaffer v. George Washington University*, No. 21-7040 (D.C. Cir.), and *Qureshi v. American University*, No. 21-7064 (D.C. Cir.)). Thereafter, per the appellate court's orders, the dismissal of the complaints in the *George Washington* and *American University* actions was reversed and the matters remanded to the lower court for further proceedings, with the Circuit holding that the plaintiffs had pled claims for breach of implied contract and, in the alternative, for unjust enrichment. *Shaffer v. George Washington University*, 27 F.4th 754 (D.C. Cir. 2022). Following this, the *Payne* Action proceeded to discovery.

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.

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.

This Action

On March 10, 2023, Plaintiff filed this putative class action against Howard for similar claims as asserted in *Adavenaixx I* and the *Payne* Action. ECF No. 1. On June 5, 2023, Howard filed its Answer in this Action. ECF No. 12. Following this, the Parties started to engage in formal discovery and entered into Confidentiality Agreements and Discovery Agreements. ECF Nos. 16-17. The Parties to this Action subsequently agreed, in order to avoid duplication, that some of the discovery previously exchanged in the *Payne* Action could be used in this action. ECF No. 21.

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

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.

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

Nevertheless, taking into account the uncertainty and risks inherent in litigation generally and the benefits that current and former students will receive from a negotiated settlement, Howard considers it desirable to resolve the Action on the terms and conditions stated herein to avoid further expense, inconvenience, and burden, and therefore has determined that the Settlement on the terms and conditions set forth herein is in Howard's best interests.

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

III. ARGUMENT

A. Legal Standards for Preliminary Approval of the Settlement

Generally, preliminary approval of a class action settlement will be granted if it appears to fall "within the range of possible approval" and "does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys." *Trombley v. Nat'l City Bank*, 759 F. Supp. 2d 20, 23 (D.D.C. 2011) (internal quotation marks omitted). While the Court must "scrutinize the terms of the settlement carefully … the discretion of the Court to reject a settlement is restrained by the 'principle of preference' that encourages

settlements." *Pigford v. Glickman*, 185 F.R.D. 82, 103 (D.D.C. 1999), aff'd, 206 F.3d 1212 (D.C. Cir. 2000). A trial court "must keep in mind that private resolution of claims is strongly favored over litigation." *Equal Rights Ctr. v. Wash. Metro. Area Transit Auth*., 573 F. Supp. 2d 205, 211 (D.D.C. 2008).

In reviewing a class action settlement, "[t]he court is charged with determining that the settlement is fair, that the parties and their counsel have adequately represented all class members, and that the relief agreed upon is reasonable." *Id*. (citing *In re Vitamins Antitrust Litig*., 305 F. Supp. 2d 100, 104 (D.D.C. 2004)). A court is to consider numerous factors in determining the fairness of a class action settlement, including "a) the terms of the settlement in relation to the strength of plaintiffs' and defendants' arguments; b) the existence of arms' length negotiations; c) the status of the litigation at the time of the Agreement; d) the representations of experienced counsel; and e) the class reaction to the Agreement." *Id.* (the "*Vitamins* factors"). These factors, and Rule 23(e)(2), weigh heavily in favor of preliminarily approving the proposed Settlement.

B. The Court Should Preliminarily Approve the Proposed Settlement

(1) First Factor: Terms of the Settlement in Relation to the Strengths of Arguments Supports Approval

In evaluating a proposed settlement, the Court's primary role is to evaluate the relief provided in the settlement against the relative strength of Plaintiff's case, including Plaintiff's ability to obtain recovery at trial. *Equal Rights Ctr. v. Washington Metro. Area Transit*, 573 F. Supp. 2d 205, 211 (D.D.C. 2008). Although Plaintiff believes in the strength of her case, it is not 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 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.

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. 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).

Here, the total settlement value is $2,073,680, and proposed Class Counsel projects that students in the Settlement Class are expected to directly receive approximately two hundred and thirty dollars ($230) each in cash (via check, Venmo, or a pre-paid Visa card) before subtraction of expenses. In addition, this all-in amount will serve to pay notice and administration costs, and, if approved by the Court following a forthcoming motion, an individual Class Representative Award to Plaintiff as well as reasonable attorneys' fees and case expense reimbursements for Plaintiff's counsel. Settlement at § X. *See Radosti v. Envision EMI, LLC*, 760 F. Supp. 2d 73, 79 (D.D.C. 2011) ("[I]ncentive awards are not uncommon in common-fund-type class actions and are used to compensate plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation."). Weighing the benefits of the Settlement against the risks associated with proceeding in litigation and in

collecting on any judgment, the Settlement is more than reasonable. Thus, this factor supports preliminary approval.

(2) Second Factor: The Existence of Arm's-Length Negotiations Supports Approval

A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms' length negotiations between experienced, capable counsel after meaningful discovery." *In re Vitamins Antitrust Litig*., 305 F. Supp. 2d at 104 (quoting Manual for Complex Litigation § 30.42). Here, the Parties had engaged in meaningful discovery, both formal and informal, in the *Payne* Action and this Action, and the Settlement was only reached in principle after the full-day arm's-length mediation before Magistrate Judge G. Michael Harvey. 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 preliminary approval, and the Court should find this Settlement fair and reasonable.

Moreover, comparison of settlements in similar cases can be relevant when evaluating the fairness, adequacy, and reasonableness of a proposed settlement. *See Trombley*, 759 F. Supp. 2d at 24–25. 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*, Case 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.*, 651 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.*, 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. 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. 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).

(3) Third Factor: Status of Litigation Supports Approval

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). Counsel should have "sufficient information, through adequate discovery, to reasonably assess the risks of litigation vis-à-vis the probability of success and range of recovery." *Meijer*, 565 F. Supp. 2d at 57.

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, proposed 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 production and responses to interrogatories and discovery requests, regularly met and conferred with Howard's Counsel, and prepared for and participated in the mediation. McKenna Decl. at ¶¶ 7–14. As a result, Class Counsel is sufficiently well informed of the strengths and weaknesses of the claims and is well-positioned to evaluate the prospects for success. This factor supports preliminary approval.

(4) Fourth Factor: The Representation of Experienced Counsel Supports Approval

"Opinion of … experienced and informed counsel should be afforded substantial consideration by a court in evaluating the reasonableness of a proposed settlement." *In re Lorazepam & Clorazepate Antitrust Litig.*, 2003 WL 22037741, *6 (D.D.C. June 16, 2003).

Here, proposed Class Counsel are experienced and well-established class action litigators and have served as class counsel in an assortment of complex class actions, including 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* McKenna Decl., Exs. B and C. As a result of their experience in this type of litigation, Class Counsel were able to efficiently and effectively develop the claims in this matter and reach a class-wide resolution that provides significant relief for the Class. Class Counsel have also shepherded numerous other cases in this context through settlement, including in this Court, with all receiving preliminary and/or final approval and a finding that the settlements presented were fair, reasonable and adequate. *See, e.g.*, *Qureshi v. American University*, No. 1:20-cv-1141 (D.D.C) (Bursor & Fisher, P.A.); *Flatscher v. The Manhattan School Of Music*, Case No.: 20-cv-4496 (S.D.N.Y.) (Gainey McKenna & Egleston); *In re Columbia Univ. Tuition Refund Action*, No. 1:20-cv-03208 (S.D.N.Y) (Gainey McKenna & Egleston); *Kincheloe v. University of Chicago*, *et al.*, No. 20-cv-03015 (N.D. Ill.) (Gainey McKenna & Egleston); *D'Amario v. The Univ. of Tampa*, No. 7:20-cv-03744-CS (S.D.N.Y.) (Bursor & Fisher P.A.). Accordingly, this factor supports preliminary approval.

(5) Fifth Factor: The Class Reaction to the Agreement

Since Notice of the Settlement has not yet been issued to the Class, it is not possible to gauge the precise reaction of the Class at this time. Prior similar settlements in the COVID-19 tuition refund context suggest that the Class will react favorably.

C. <u>The Remainder of the Rule 23(e)(2) Factors Support Preliminary Approval</u>

To approve the proposed Settlement, the Court must determine that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In evaluating the adequacy of relief, the Court must take into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, 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).

(1) The Costs, Risks, and Delay of Trial and Appeal

As detailed, *supra*, this Action has been diligently litigated by both sides and significant work has been done during the several years of litigation. Had this case not settled, additional fact discovery would have been conducted, class certification and summary judgment would have been fully briefed and ruled upon, and depending upon the results, further discovery and litigation, including expensive and contested expert discovery, would have been conducted before starting a jury trial. Furthermore, any decision made by the Court adverse to a Party likely would have likely been appealed; thus, significantly delaying reaching a final judgment in this case.

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 preliminary approval.

(2) The Allocation Plan is Fair and Reasonable

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 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. Dec. 5. 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*, 1:20-cv-01141-CRC (D.D.C.); *Shaffer v. The George Washington University*, 1:20-cv-01145-RJL (D.D.C.) (preliminary approval granted December 12, 2023; final approval motion pending); *see also Metzner v. Quinnipac Univ.*, No. 3:20-cv-00784-KAD (D. Conn.).

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. As noted below, the University has mailing and email addresses for all students. Furthermore, a professional Claims Administrator with experience in handling class action settlements will increase the overall effectiveness of distribution by sending checks or

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

(3) The Proposed Form and Method of Providing Notice to the Proposed Settlement Class Are Appropriate

"The court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Due process "does not require actual notice to all class members who may be bound by the litigation, notice is adequate … if it 'fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *In re Domestic Airline Travel Antitrust Litigation*, 322 F. Supp. 3d 64, 68 (D.D.C. 2018).

Proposed Class Counsel respectfully submit that the proposed plan for notice is fair, reasonable, and adequate. The Parties already have the direct mailing and email addresses for Settlement Class Members. As recited in the Settlement, the proposed notice program will inform Settlement Class Members of the Settlement's substantive terms. It will advise Settlement Class Members of their options for remaining part of the Settlement Class or for opting out of the Settlement; for receiving their Settlement benefits; for objecting to the Settlement, Class Counsel's attorneys' fee application and request for a service award to the named Plaintiff; and how to obtain additional information about the Settlement. The Short Form Notice will be sent via email within thirty (30) days of Preliminary Approval to all persons on the Class List. If an email address is not available for a Settlement Class Member, then the Short Form Notice shall be sent via U.S. mail to that Settlement Class Member's last known mailing address. Within ten (10) days of Preliminary Approval, and before the issuance of the Short Form Notice, the Claims Administrator shall establish the Settlement Website which shall include, *inter alia*, the Long Form Notice for the Settlement Class Members to review. Settlement at ¶¶ IV.2–IV.4.

The proposed plan for notice is designed to directly reach a high percentage of Settlement Class Members by email, and by U.S. mail if the email notice is undeliverable. Notice programs such as the one proposed by Class Counsel have been approved in other similar COVID-19 refund actions, all of which provided direct notice to students based on contact information kept by the university in the ordinary course of business. *See, e.g., Rocchio v. Rutgers, the State Univ. of New Jersey*, No. MID-L-003039-20 (Middlesex County, NJ); *Metzner v. Quinnipiac Univ.*, No. 3:20-cv-00784-KAD (D. Conn.); *Choi v. Brown Univ.*, No. 1:20-cv-00191 (D.R.I.); *Kincheloe v. University of Chicago*, *et al.*, No. 20-cv-03015 (N.D. Ill.).

(4) The Requested Attorneys' Fees and Expenses are Reasonable

Pursuant to the Settlement Agreement, Class Counsel will apply to the Court for a Fee and Expense Award not to exceed one-third of the Settlement Fund and reimbursement of costs and expenses in an amount not to exceed thirty thousand dollars, which includes expert and mediation costs. In the D.C. Circuit "a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases." *Swedish Hosp. Corp. v. Shalala*, 1 F.3d. 1261, 1271 (D.C. Cir. 1993). "While fee awards in common fund cases may range from fifteen to forty-five percent, the normal range of fee recovery in antitrust suits is twenty to thirty percent of the common fund." *In re Lorazepam*, 2003 WL 22037741, at *7 (internal citations omitted). This same percentage of attorneys' fees from the Settlement fund has been approved in analogous COVID-19 College and University Tuition and Fee Refund litigation. *See, e.g.*, *Pfeifer, et al. v. Loyola University of Chicago*, No. 20-cv-03116 (N.D. Ill.) (awarding attorneys' fees of one-third of the settlement fund); *In re Columbia Univ. Tuition Refund Action*, No. 20-cv-03208 (JMF) (S.D.N.Y.) (same); *Flatscher v. The Manhattan School of Music*, No. 20-cv-4496 (KPF) (SDA) (S.D.N.Y.) (same); *D'Amario v. The Univ. of Tampa*, Case No. No. 7:20-cv-03744 (S.D.N.Y.) (same); *Martin v. Lindenwood Univ.*, No. 20-cv-01128-RLW (E.D. Mo.) (same); *Wright v. S. New Hampshire Univ.*, 561 F. Supp. 3d 211,

214 (D.N.H. 2021) (same); *Fittipaldi v. Monmouth University*, No. 3:20-cv-5526 (D.N.J.) (same); *Botts v. The John Hopkins University*, No. 1:20-cv-01335-JRR (D. Md.) (same); *Rosado v. Barry Univ.*, Inc., 2021 U.S. Dist. LEXIS 169196 (S.D. Fla. 2021) (same). Therefore, the proposed Fee and Expense Award is reasonable, and this factor weighs in favor of preliminary approval.

(5) The Parties Have No Additional Agreements

Besides the Settlement itself, as defined at ¶ 3 of the Settlement Agreement, 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.

(6) Proposed Settlement Class Members are Treated Equitably

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

IV. CERTIFICATION OF THE PROPOSED SETTLEMENT CLASS IS APPROPRIATE

Plaintiff respectfully requests that the Court certify the Settlement Class for purposes of effectuating the Settlement. The Settlement Class is defined to mean 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. 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) 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. *See* Ex. A at ¶ 34.

A. The Rule 23(a) Requirements are Satisfied

To certify a class, Plaintiff must first 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. v. Windsor*, 521 U.S. 591, 614 (1997).

(1) Numerosity

Fed. R. Civ. P. 23(a)(1) requires that the "class is so numerous that joinder of all members is impracticable." "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 found forty or more members enough to satisfy Rule 23(a)(1). *Garnett v. Zeilinger*, 301 F. Supp. 3d 199, 205 (D.D.C. 2018). Here, numerosity is satisfied because the proposed class contains approximately 9,000 Howard students as members. Therefore, the numerosity requirement of Rule 23(a) is readily satisfied.

(2) Commonality

Next, the commonality element of Fed. R. Civ. P. 23(a)(2) requires only that "there are questions of law or fact common to the class." The key to commonality is that class members' claims "must depend upon a common contention … of such a nature that it is capable of class wide resolution-which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "Even a single common question" will support a

commonality finding, *id*. at 359 (alterations omitted), so long as its resolution will "generate common answers for the entire class." *Thorpe*, 303 F.R.D. at 146–47. Factual differences "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).

This case satisfies the low 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 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. *See* ECF No. 1, at ¶ 54. These common questions, which target the same alleged misconduct by Howard, satisfy Rule 23(a)(2).

(3) Typicality

The third requirement is "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). 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). The typicality requirement exists when the claims of the representative plaintiffs are based on the same legal theory and arise from the same course of conduct that gives rise to the claims of the other class members. *Bynum*, 214 F.R.D. at 35. 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).

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 for the provision of in-person education and on-campus services. 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. 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. 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. Plaintiff has met the typicality requirement.

(4) Adequacy

Finally, Rule 23 requires "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Plaintiff satisfies the D.C. Circuit's two-part "adequacy" test: "(1) the named representative must not have antagonistic or conflicting 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) (quoting *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 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. 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. McKenna Decl. Exs. B and C.

During the past several years, Plaintiff and proposed 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 proposed 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

Rule 23(b)(3) permits class certification if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). 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). Certification under Rule 23(b)(3) will allow class members to opt out of the settlement and preserve their right to seek damages independently. *Cf. Brown v. Title Ticor*

Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992). This approach protects class members' due process rights. See *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 846-48 (1999).

(1) Common Issues Predominate Over Any Individual Ones

Rule 23(b)(3)'s predominance requirement focuses on whether the Defendant's liability is common enough to be resolved on a class basis, *Wal-Mart*, 564 U.S. at 359, and whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Where plaintiffs are "unified by a common legal theory" and by common facts, the predominance requirement is satisfied. *McBean v. City of New York*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005). The predominance requirement "is designed to determine whether 'proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 183 (W.D.N.Y. 2005) (quoting *Amchem*, 521 U.S. at 623).

Here, there allegedly was a common course of conduct engaged in by Howard. Moreover, the central legal issues presented by this case would predominate over individualized issues. Common issues predominate because Plaintiff can prove injury 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).

(2) A Class Action is the Superior Method

Rule 23(b)(3) also 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 is intended to "ensure 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.'" *Vista Healthplan, Inc. v. Warner Holdings Co. III, Ltd*., 246 F.R.D. 349, 359–60 (D.D.C. 2007) (quoting *Amchem Prods. v. Windsor*, 521 U.S. 591, 615 (1997)). A class action is superior to

numerous individual actions. Class actions are 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 v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998). A class action is the most suitable mechanism to resolve the putative Settlement Class Members' claims fairly, adequately, and efficiently.

V. GAINEY McKENNA & EGLESTON AND BURSOR & FISHER, P.A. SHOULD BE APPOINTED AS CLASS COUNSEL

Upon certifying a class, Rule 23 requires that a court appoint class counsel who will "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B), (2), (4). Under Rule 23(g), a court must consider: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources class counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv); *Nio v. United States Dep't of Homeland Sec.*, 323 F.R.D. 28, 33 (D.D.C. 2017).

Proposed Class Counsel each satisfy Rule 23(g)'s criteria. Proposed Class Counsel have devoted substantial time, effort, and resources to this litigation, beginning with their initial investigation of Plaintiff's allegations, continuing through a motion to dismiss and discovery, and ending with mediation and settlement negotiations that resulted in a non-reversionary settlement fund for the benefit of the Settlement Class, while taking into account the strengths and weaknesses of the case.

Additionally, proposed Class Counsel have extensive experience in complex and class action litigation and have served as class counsel in an assortment of complex class actions, including 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* McKenna Decl., Exs. B and C; *see also Qureshi v. American University*, No. 1:20-cv-1141 (D.D.C) (Bursor & Fisher, P.A); *Flatscher v. The Manhattan School Of Music*, No.: 20-cv-4496 (S.D.N.Y.) (Gainey McKenna & Egleston); *In re Columbia Univ. Tuition Refund Action*, No. 1:20-cv-03208 (S.D.N.Y) (Gainey McKenna & Egleston); *Kincheloe v. University of Chicago, et al.*, No. 20-cv-03015 (N.D. Ill.) (Gainey McKenna & Egleston); *D'Amario v. The Univ. of Tampa*, 7:20-cv-03744 (S.D.N.Y.) (Bursor & Fisher P.A.). In short, it is clear that proposed Class Counsel have the experience, resources, and expertise to adequately represent the Class. Accordingly, Gainey McKenna & Egleston and Bursor & Fisher, P.A. should be appointed as Class Counsel here, with Silverman Thompson Slutkin & White, LLC as liaison counsel.

VI. PLAINTIFF SHOULD BE APPOINTED AS CLASS REPRESENTATIVE

The Court should also appoint Plaintiff as Class Representative. Plaintiff has spent significant time and effort representing the Class, including, *inter alia*, time assisting counsel, providing information regarding Defendant's policies and practices, reviewing and approving complaints before filing, and consulting with counsel during the extensive settlement

negotiations. Moreover, as averred *supra*, Plaintiff is an adequate Class Representative because her interests are not antagonistic to those of the Settlement Class. Like members of the Settlement Class, Plaintiff alleged that she purchased Howard's in-person educational product, was deprived of that in-person product following Howard's transition to remote education, and now seeks a partial refund for the lost benefit of the bargain that she did not receive. Accordingly, the Court should appoint Plaintiff as the Settlement Class Representative.

VII. THE COURT SHOULD APPROVE THE PROPOSED NOTICE PLAN

Under Rule 23(c)(2) and Rule 23(e) of the Federal Rules of Civil Procedure, the Court "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Due process "does not require actual notice to all class members who may be bound by the litigation, notice is adequate … if it 'fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Domestic Airline Travel*, 322 F. Supp. 3d at 68.

The form of the various proposed methods of notice proposed here complies with all of these requirements. *See* McKenna Decl., Exs. A-1 and A-2. The proposed notice plan provides detailed information about the Settlement, including: (i) a comprehensive summary of the terms; (ii) Class Counsel's intent to request attorneys' fees, reimbursement of expenses, and a Class Representative Award for Plaintiff; and (iii) detailed information about the Released Claims. *See Id.* It will also provide information about the Final Approval Hearing date, the rights of Settlement Class Members to seek exclusion from the Class or to object (and the deadlines and procedure for doing so), the way to receive additional information, and the procedure to receive a share of the Settlement Fund via different proposed methods of payment. *Id.* It fully informs Settlement Class Members of the lawsuit, the proposed Settlement, and the information they need to make informed decisions, in excess of Rule 23's requirements.

The agreed-upon notice plan also satisfies the requirements of Rule 23(c)(2)(B). The University will provide the Claims Administrator with the Class List containing the names and last known physical addresses and email addresses of each potential Settlement Class Member, other than those whose contact information is subject to an unrescinded FERPA Block. Settlement at ¶ IV.1. The Settlement Administrator will send the proposed Short Form Notice, substantially in the form attached to the Settlement as Exhibit A-2 via email and U.S. mail, first-class postage prepaid, to persons listed on the Class List. Settlement at § IV. The University will do the same as to Settlement Class Members with an unrescinded FERPA block.[4] The Notice will advise the potential Settlement Class Members of their rights under the Settlement, including the right to be excluded from and/or object to the Settlement or its terms, and will inform the potential Settlement Class Members that they can access the Long Form Notice on the dedicated Settlement Website. The proposed Notice will advise the potential Settlement Class Members of the procedures outlined at §§ V-VI of the Settlement Agreement, specifying how to request exclusion from the Settlement or submit an objection to the Settlement. *See* Exhibits A-1 and A-2.

The Settlement Administrator will also establish a dedicated Settlement Website that will enable Settlement Class Members to (i) update their addresses to receive a paper check; or (ii) elect to receive their Settlement Benefit via Venmo or a pre-paid Visa card. Settlement at ¶ IV.4. The Settlement Website will also include, in downloadable format, all case and Settlement documents. *Id.*

Accordingly, the proposed notice plan is reasonable and adequate and conforms to the requirements of due process and Rule 23.

VIII. CONCLUSION

[4] The University will send Notice to members of the Settlement Class whose last-known physical address and email address are subject to an unrescinded FERPA Block. *See* Settlement at ¶ IV.1, n.2.

For the reasons set forth above, Plaintiff respectfully requests that the Court grant her Motion and enter the Proposed Order granting preliminary approval to the proposed Settlement, attached as Exhibit A-3 to the Settlement Agreement.

DATED: May 17, 2024

Respectfully submitted,

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