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

RAFAEL FIGUEROA, KAHLIL CABBLE, TY'ANTHONY SCOTT, and RYAN PETTY *on behalf of themselves and all others similarly situated,*	)	Case No. 2:20-CV-01484-LPL
Plaintiffs,	)	
v.	)	
POINT PARK UNIVERSITY,	)	
Defendant.	)	

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

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs Rafael Figueroa, Kahlil Cabble, Ty'Anthony Scott, and Ryan Petty (collectively "Plaintiffs"), on behalf of themselves and the Settlement Class, respectfully submit this memorandum of law in support of their motion for final approval of the $1.25 million dollar settlement (the "Settlement Amount") reached in this action (the "Action") and approval of the manner of distribution of the Net Settlement Fund (the "Distribution"). The terms of the settlement are set forth in the Settlement Agreement, dated June 30, 2023 (the "Settlement Agreement"). Dkt. No. 77-2.

I. INTRODUCTION

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

The settlement represents a fair and reasonable result for the Settlement Class and thus satisfies each of the Rule 23(e)(2) factors, as well as the factors set forth in the Third Circuit decisions of *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975) and *Krell v. Prudential Ins. Co. of Am. (In re Prudential)*, 148 F.3d 283 (3d Cir. 1998). When compared to comparable settlements, the settlement at issue here provides above-average benefits. *See supra* section IV(3)(c). The settlement is especially beneficial to the Settlement Class considering the substantial litigation risks Plaintiffs faced. Plaintiffs and Class Counsel had a thorough understanding of the strengths

and weaknesses of the case before reaching the settlement as they had conducted significant factual investigation into the merits of their claims, engaged in briefing in connection with Defendant's motions to dismiss and request for interlocutory appeal, engaged in protracted settlement negotiations, and exchanged damages information with Defendant as part of the settlement process. Lynch Decl. ¶¶ 6, 10, 18.

Given the risks to proceeding with litigation and that the settlement achieved a satisfactory resolution relative to the damages sustained, the $1.25 million settlement and the proposed Distribution are fair and reasonable in all aspects. Accordingly, Plaintiffs respectfully request the Court grant final approval of the settlement under Rule 23(e) of the Federal Rules of Civil Procedure.

II. FACTUAL BACKGROUND

On October 1, 2020, Plaintiffs Rafael Figueroa, Kahlil Cabble, Ty'Anthony Scott, and Ryan Petty brought suit against PPU in the United States District Court for the Western District of Pennsylvania, Case No.: 2:20-cv-01484. *See* Dkt. No. 1. On their own behalf, and on behalf of a putative class, Plaintiffs asserted claims for breach of contract, unjust enrichment, and conversion. *See id.*

PPU filed a motion to dismiss on February 3, 2021 (Dkt. No. 25), which was fully briefed on March 11, 2021 (Dkt. No. 28). On August 11, 2021, this Court issued an Order and Opinion granting in part, and denying in part, PPU's motion to dismiss. Dkt. Nos. 36, 37. This Court dismissed Plaintiffs' claim for conversion, but allowed Plaintiffs' claim for breach of contract and unjust enrichment to enter discovery. *Id.* On September 2, 2021, Point Park filed a motion to amend the Court's order to include a certification required for Point Park to seek an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Dkt. No. 40. Plaintiffs filed their opposition on September 16,

2021. Dkt. No. 46. The Court denied Point Park's motion on October 26, 2021 (Dkt. No. 52), and Point Park filed an answer to the complaint on November 1, 2021 (Dkt No. 54).

After written discovery commenced, the Parties attended a mediation with Carole Katz on February 3, 2022, which was unsuccessful. Dkt. No. 63. After further written discovery and document production began, the Parties attended a second mediation with David White on September 1, 2022, and came to an agreement in principle. Dkt. No. 74. The Parties then worked towards drafting and finalizing the Settlement Agreement, which was presented to the Court (Dkt No. 77-2), and which received preliminary approval on July 25, 2023. Dkt. No. 85.

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

III. STANDARDS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS

A. The Law Favors and Encourages Settlements

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

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

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

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

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

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

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

- (i) the costs, risks and delay of trial and appeal;
- (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
- (iii) the terms of the proposed award of attorneys' fees, including timing of payment; and
- (iv) any agreement required to be identified under Rule 23(e)(3); and

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

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

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

(1) the complexity, expense and likely duration of the litigation;
(2) the reaction of the class to the settlement;

> (3) the stage of the proceedings and the amount of discovery completed;
> (4) the risks of establishing liability;
> (5) the risks of establishing damages;
> (6) the risks of maintaining the class action through the trial;
> (7) the ability of the defendant to withstand a greater judgment;
> (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and
> (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. Importantly, no single *Girsh* factor is dispositive. The Third Circuit has explained: "a court may approve a settlement even if it does not find that each of [the *Girsh*] factors weigh in favor of approval." *In re N.J. Tax Sales Certificate Antitrust Litig.*, 750 F. App'x 73, 77 (3d Cir. 2018).

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

In addition to the *Girsh* factors, the Third Circuit, in *Krell v. Prudential Ins. Co. of Am. (In re Prudential),* 148 F.3d 283 (3d Cir. 1998), elaborated on additional factors that reviewing courts should consider when deciding whether to approve a settlement. These factors were also given clarity in *In re Pet Food Prods. Liab. Litig.* 629 F.3d 333, 350 (3d Cir. 2010). These factors, the *Prudential* factors, overlap with the *Girsh* factors and are non-exclusive. But, importantly, on the factors relevant to the litigation need to be addressed. *In re Prudential*, 148 F.3d at 323–24. As follows, the *Prudential* factors are:

> (1) the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages;
> (2) the existence and probable outcome of claims by other classes and subclasses;

(3) the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved or likely to be achieved for other claimants;
(4) whether class or subclass members are accorded the right to opt-out of the settlement;
(5) whether any provisions for attorneys' fees are reasonable; and
(6) whether the procedure for processing individual claims under the settlement is fair and reasonable.

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

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

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

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

Under Rule 23, certification of a class requires the Court to determine both Plaintiffs and Class Counsel's adequacy. "The adequacy requirement encompasses two distinct inquiries designed to protect the interests of absentee class members: it considers whether the named plaintiffs' interests are sufficiently aligned with the absentees', and it tests the qualifications of the counsel to represent the class." *Ripley v. Sunoco, Inc.*, 287 F.R.D. 300, 309 (E.D. Pa. 2012); *see also Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 182 (3d Cir. 2012). This test "assures that the named plaintiffs' claims are not antagonistic to the class and that the attorneys for the class representatives are experienced and qualified to prosecute the claims on behalf of the entire class." *Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir. 2006) (citation and quotation marks omitted). Here both prongs of the adequacy test are met. All Plaintiffs attended PPU during the spring 2020 semester and paid tuition and fees to do so. The qualifications of Class Counsel are set forth in the Firm Resumé. *See* Dkt. No. 77-6.

Additionally, Plaintiffs and Class Counsel have adequately represented the Settlement Class by zealously prosecuting this action, including by, among other things, extensive investigation and other litigation efforts throughout the prosecution of the Action, including, *inter alia*: (1) researching and drafting the initial complaint in the Action; (2) researching the applicable law with respects to the claims in the Action and the potential defenses thereto; (3) reviewing, researching and opposing Defendant's motion to dismiss; (4) actively participating in similar College and University Class Actions filed across the country and (5) engaging in extensive settlement discussions with Defendant's counsel and the exchange of information pertaining to the damages allegedly suffered by the Class. *See generally* Lynch Decl. ¶¶ 6, 10, 18. Through each step of the Action, Plaintiffs and Class Counsel have strenuously advocated for the best interests of the Settlement Class. Plaintiffs and Class Counsel therefore satisfy Rule 23(e)(2)(A) for purposes of final approval.

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

Plaintiff satisfies Rule 23(e)(2)(B) because the settlement is the product of arm's-length negotiations between the parties' counsel. Lynch Decl., ¶¶ 6, 18. Further, it is well settled that in the Third Circuit class action settlements enjoy a presumption of fairness under review when: "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Nat'l Football League Players Concussion Inj. Litig*., 821 F.3d 410, 436 (3d Cir. 2016), *as amended* (May 2, 2016). Given the above and the Declaration attached hereto, Rule 23(e)(2)(B) is satisfied.

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

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

(1) The Risks of Establishing Liability

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

Moreover, issues regarding responsibility for university closure are very apparent given the governmental orders for class cancellation and campus closure. In addition, PPU likely would have filed a motion for summary judgment in which it would argue that (1) the descriptions of the fees at issue cannot support a contract claim; (2) there was never a promise to provide in-person education in exchange for tuition; (3) it was impossible to perform under Covid-19 governmental orders; and (4) Plaintiffs and members of the Class still received education and obtained credits. PPU would also likely file a comprehensive opposition to class certification in which it would argue that Plaintiffs would not be able to show a material class wide breach. PPU would also argue that: (1) Plaintiffs could not satisfy Rule 23(a)'s typicality requirement for several reasons; (2)

Plaintiffs' proposed Rule 23(b)(3) class was not ascertainable; (3) Plaintiffs could not show causation or the existence or terms of a contract on class-wide bases; and (4) that class litigation was not superior to individual litigation. While Plaintiffs would not concede the validity of any of PPU's arguments, Plaintiffs acknowledge that PPU could raise legitimate arguments.

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

(2) The Risks of Establishing Damages at Trial

The risks of establishing liability apply with equal force to establishing damages. If this litigation were to continue, Plaintiffs would rely heavily on expert testimony to establish damages, likely leading to a battle of the experts at trial and a *Daubert* challenge. If the Court were to determine that one or more of Plaintiffs' experts should be excluded from testifying at trial, Plaintiffs' case would become much more difficult to prove. Moreover, while Defendant did shift to distance learning and requested that most students leave campus, these steps were due to Covid-19 and the accompanying government orders. Plaintiffs have never disputed the necessity of these actions; the issue is whether plaintiffs were entitled to a refund of tuition and fees paid to PPU. For these reasons, there is a risk in establishing damages. Further, some students were given scholarships for all or some tuition and fees. Thus, in light of the significant risks Plaintiffs faced at the time of the settlement with regard to establishing damages, including the possibility that plaintiffs would not be able to establish direct damages to each student, this factor weighs heavily in favor of final approval.

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

The anticipated complexity, cost, and duration of the Action would be considerable, and these factors are critical in a Court's evaluation of proposed settlements. *See Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975) (holding that the complexity, expense, and likely duration of litigation are critical factors in evaluating the reasonableness of a settlement). Indeed, if not for the settlement, litigation will continue, and there is a high likelihood it will be expensive, protracted, and contentious litigation. Lynch Decl., ¶ 8, 10-12. As stated previously, this would consume significant funds and expose Plaintiffs and the Class to many risks and uncertainties. The preparation for what would likely be a multi-week trial and possibly appeals, would cause the Action to persist for likely several more years before the Settlement Class could possibly receive any recovery. Such a lengthy and highly uncertain process would not serve the best interests of the Settlement Class compared to the immediate, certain monetary benefits of the settlement. *Id*. Accordingly, this Rule 23(e)(2)(C)(i) factor, as well as the analogous *Girsh* factors, all weigh in favor of final approval.

d. The Proposed Method for Distributing Relief is Effective

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

Settlement Class Members will receive a portion of the Net Settlement Fund to be allocated pro rata to each Settlement Class Member based on the ratio of (a) the total amount of Spring 2020 Tuition and Fees assessed to Potential Settlement Class Members enrolled at PPU during the Spring 2020 semester to (b) the total amount of Spring 2020 Tuition and Fees assessed to Potential

Settlement Class Members enrolled at PPU during the Spring 2020 semester, less Financial Aid, unpaid balances related to the Spring 2020 term as reflected on the Settlement Class Member's account with PPU, and any refunds already distributed related to Spring 2020 semester. The amounts to be distributed to Potential Settlement Class Members who properly execute and file a timely opt-out request to be excluded from the Settlement Class will be added together and distributed following the same pro rata method. Each Settlement Class Member's Settlement Benefit will be distributed to that Settlement Class Member automatically, with no action required by that Settlement Class Member.

By default, the Settlement Administrator will send the Settlement Benefit to each Settlement Class Member by check mailed to the Settlement Class Member's last known mailing address on file with the University Registrar.

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

Funds for Uncashed Settlement Checks shall, subject to Court approval, be allocated by PPU student government for the benefit of students in a manner determined by student government and consistent with applicable University policies.

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

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

award. This Court granted Class Counsels request for attorneys' fees and expenses on October 24, 2023. Dkt. No. 90.

f. The Settlement Ensures Settlement Class Members are Treated Equitably

Rule 23(e)(2)(D), the final factor, considers whether Class Members are treated equitably. As reflected in the Settlement Agreement, the proposed settlement treats Settlement Class Members equitably relative to each other, and all Settlement Class Members will be giving PPU the same release. *See* Settlement Agreement ¶¶ 4, 10. Plaintiffs will be subject to the same formula for distribution of the Net Settlement Fund as every other Settlement Class Member. This factor therefore merits granting final approval of the settlement.

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

2. The *Girsh* Factors Favor Settlement

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

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

b. The Reaction of the Class to the Settlement

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

This factor is met as there have been zero opt-outs and no objections among class members, after being given notice of such settlement. *See* Cowen Decl. at ¶¶ 11, 12.

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

The third *Girsh* factor "captures the degree of case development that class counsel [had] accomplished prior to settlement." *In Re Cendant*, 264 F.3d at 235. In assessing this third factor, courts must evaluate the procedural stage of the case at the time of the proposed settlement to assess whether counsel adequately appreciated the merits of the case while negotiating, as proclaimed by *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004). The matter at hand has been subject to discovery, formal and information for mediation purposes. The parties each participated in substantial fact discovery, including fact discovery relating to class certification and damages, and the service of discovery responses. At its current stage, the litigation is ripe for settlement.

d. The Risks of Establishing Liability

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

e. The Risks of Establishing Damages

The fifth *Girsh* factor, working in combination with the fourth factor, in short: "attempts to measure the expected value of litigating the action rather than settling it at the current time." *In re Cendant*, 264 F.3d at 238–39. This factor weighs in favor of settlement as well. Much aligned with the directly previous factor, the risk of establishing damages is apparent—for all the reasons set forth *infra*.

f. The Risks of Maintaining the Class Action Through Trial

Maintaining the current class action could be risky. Based upon the factors included in Rule 23 of the Federal Rules of Civil Procedure, this class could be subject to challenges by Defendant. Actions similar to the one at hand have been dismissed, decertified, and also multiple classes have been refused certification by courts.[1] Given such refusals to certify, this *Girsh* factor weighs in favor of settlement.

[1] *See, e.g., Evans v. Brigham Young Univ.*, No. 22-4050, 2023 WL 3262012 (10th Cir. 2023).

g. The Ability of Defendant to Withstand a Greater Judgment

In the matter at hand, there is no contention that Defendant could not stand a greater judgment. The seventh *Girsh* factor requires the Court to consider "whether the defendant could withstand a judgment for an amount significantly greater than the settlement." *Warfarin*, 391 F.3d at 537–38. The Third Circuit has noted, "in any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 323 (3d Cir. 2011). This is because, "when there is no 'reason to believe that Defendant face any risk of financial instability[,] . . . this factor is largely irrelevant.'" *In re: Nat'l Football League Players Concussion Injury Litig.*, 307 F.R.D. 351, 394 (E.D. Pa. 2015) (quoting *Reibstein v. Rite Aid Corp.*, 761 F.Supp.2d 241, 254 (E.D. Pa. 2011)). Thus, "the settling defendant's ability to pay greater amounts [may be] outweighed by the risk that the plaintiffs would not be able to achieve any greater recovery at trial." *In re: Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 632 (E.D. Pa. 2004). As such, this factor's weight is irrelevant.

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

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

3. **The *Prudential* Factors are Satisfied**

a. Maturity of the substantive issues;

The substantive issues in this matter are quite mature. Given that the case has proceeded through motion to dismiss briefing (and decision), and substantial class certification and damages discovery, both parties are in a position to fully evaluate their own strengths and weaknesses. This advanced stage lends itself in favor of approval of the settlement.

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

Since no class members have elected to be excluded, this factor weighs heavily in favor of approval. *See* Cowen Decl. at ¶ 12. Further, even if these claims were to be brought on an individual basis, the same dismissals would likely be met. As such, the results are relatively the same.

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

This settlement is fair and reasonable and provides PPU students with a higher than average settlement benefit. Through the proposed Distribution, Settlement Class Members will receive an average payment of approximately $300.[2] This amount exceeds the payments in certain other comparable class action settlements. *See Rocchio et al. v. Rutgers, The State University of New Jersey*, No. MID-L-003039-20 (N.J. Super. Ct.) (approximately $52 per student); *Choi et al. v. Brown University*, No. 1:20-cv-00191 (D.R.I.) (approximately $104 per student); *Smith v. University of Pennsylvania*, No. 20-2086 (E.D. Pa.) (approximately $110 per

[2] This expectation is based on the following calculations: After deducting attorney's fees, expenses, and Service Payments, $846,646.61 would be remaining. When distributed pro rata across the estimated number of class members (2,815), the expected pro rata settlement benefit will be approximately $300 for each class member.

student); *Levin v. Board of Regents of the University of Colorado*, No. 2020cv31409 (Colo. Dist. Ct., Denver Cnty.) (approximately $54 per student). In comparison, the estimated $300 settlement benefit here is greater than all of those settlements.

Given the risks of litigation, this value is fair and proportional. It is unlikely that Plaintiffs could bring these claims on their own, given the imbalance between the cost of litigation and the limited ability to recover damages. These claims also would be subject to the same defenses that are outlined above. As such, this factor weighs heavily in favor of settlement.

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

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

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

The provision for attorney's fees is reasonable, and has been granted by this Court. Dkt. No. 90. As such, this *Prudential* factor weighs in favor of settlement.

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

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

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

The standard for approval of a proposed distribution of settlement funds to a class is the same as the standard for approving the settlement as a whole. Plaintiffs and Class Counsel believe that the proposed manner of distribution is fair and reasonable, and respectfully submit it should be approved by the Court. Indeed, as noted above, the manner of distribution could not be any

simpler; each settlement class member will automatically receive their settlement benefit, without the need for taking any action. Notably, there have been no objections to the distribution proposal to date, which supports the Court's approval.

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

In their motion for preliminary approval of the settlement, Plaintiffs requested that the Court certify the Settlement Class for settlement purposes only so that notice of the settlement, the Final Approval Hearing, and the rights of Settlement Class Members to object to the settlement, request exclusion from the Settlement Class could be issued. For purposes of effectuating this settlement, the Court should finally certify the Class. As mentioned in the Court's Order, dated July 25, 2023, the Court preliminarily certified the proposed class (Dkt. No. 85). The class, as preliminary certified is:

> All students enrolled at PPU who paid tuition and/or the mandatory fees for a student to attend in-person class(es) during the Spring 2020 semester at the University but had their class(es) moved to online learning, with the exception of; (i) any person who withdrew from PPU on or before March 12, 2020; (ii) any person enrolled solely in a program for the Spring 2020 semester that was originally delivered as an online program without regard to any changes in modality resulting from the COVID-19 pandemic; (iii) any person who properly executes and files a timely opt-out request to be excluded from the Settlement Class; and (iv) the legal representatives, successors or assigns of any such excluded person.

Id. at ¶ 5. Since the Court's entry of the Preliminary Approval Order, nothing has changed to alter the propriety of the Court's preliminary certification of the Settlement Class for settlement purposes. Lynch Decl., ¶ 13. Thus, for all of the reasons stated in Plaintiffs' motion for preliminary approval (incorporated herein by reference), Plaintiffs respectfully request that the Court affirm its preliminary certification and finally certify the Settlement Class for purposes of carrying out the settlement pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3) and make a final appointment of Plaintiffs as class representatives and Class Counsel as class counsel.

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

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

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

The Notice and the method used to disseminate the Notice to potential Settlement Class Members satisfy these standards. The Court-approved Notice (the "Notice") amply informs Settlement Class Members of, among other things: (i) the pendency of the Action; (ii) the nature of the Action and the Settlement Class's claims; (iii) the essential terms of the settlement; (iv) the proposed manner of distribution of the Net Settlement Fund; (v) Settlement Class Members' rights to request exclusion from the Settlement Class or object to the settlement, the manner of distribution, or the requested attorneys' fees or expenses; (vi) the binding effect of a judgment on Settlement Class Members; and (vii) information regarding Class Counsel's motion for an award of attorneys' fees and expenses and incentive awards for Plaintiffs. The Notice also provides specific information regarding the date, time, and place of the Final Approval Hearing, and sets forth the procedures and deadlines for: (i) requesting exclusion from the Settlement Class; and (ii)

objecting to any aspect of the settlement, including the proposed distribution plan and the request for attorneys' fees and expenses and case awards for Plaintiffs.

Class members were mailed and/or emailed notices after a thorough email validation process. *See* Cowen Decl. at ¶¶ 5-10. Emails were sent to 2,799 Class Members, with 2,695 confirmed as delivered, which is a 96.28% delivery rate. *See* Cowen Decl. at ¶¶ 5-6. There were 104 Notices mailed via first class mail because an email address was not available, or the email failed to deliver for that Class Member. *See* Cowen Decl. at ¶ 9.

Additionally, a settlement-specific website was created where key settlement documents were posted, including the Long Form Notice. *See* Cowen Decl. at ¶ 3. Furthermore, a toll-free telephone number has been set up to respond to frequently asked questions and a dedicated email address was created to further respond to Class Member inquiries. *Id*. Settlement Class Members had until October 23, 2023, to object to the settlement or request exclusion from the Settlement Class. There have been no objections to the settlement, and no requests for exclusion.

Notice programs, such as the one deployed by Class Counsel, have been approved as adequate under the Due Process Clause and Rule 23. *See In re CertainTeed Corp. Roofing Shingle Prod. Liab. Litig.*, 269 F.R.D. 468 (E.D. Pa. 2010). And in other COVID-19 refund actions against other universities, substantially similar methods of notice have been preliminarily approved. *See, e.g.*, *Wright v. S. New Hampshire Univ.*, No. 20-cv-609-LM, 2021 WL 1617145, at *2 (D.N.H. Apr. 26, 2021); *see also Rosado v. Barry Univ., Inc.*, No. 1:20-cv-21813-JEM, Order, (S.D.N.Y. Mar. 30, 2021).

VIII. CONCLUSION

The $1.25 million settlement obtained by Plaintiffs and Class Counsel represents an excellent recovery for the Settlement Class, particularly in light of the significant litigation risks

the Settlement Class faces, including the very real risk of the Settlement Class receiving no recovery at all. For the foregoing reason, Plaintiffs respectfully request that the Court approve the proposed settlement and the proposed manner of distribution of the Net Settlement Fund as fair reasonable, and adequate.

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Respectfully submitted,

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