

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA**

RAFAEL FIGUEROA, KAHLIL CABBLE,
TY' ANTHONY SCOTT, and RYAN PETTY,
on behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

POINT PARK UNIVERSITY,

Defendant.

Case No.: 2:20-cv-01484-LPL

**PLAINTIFFS' SUPPLEMENTAL BRIEF
IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES**

Plaintiffs Rafael Figueroa, Kahlil Cabble, Ty' Anthony Scott, and Ryan Petty (collectively, "Plaintiffs") respectfully submit this Supplemental Brief in Support of their Motion for Award of Attorneys' Fees to address the Court's concerns identified in the Order dated October 11, 2023 (ECF No. 88) (the "Order"). In light of the Court's Order, and the nature of the Settlement Class that will benefit from the Settlement (*i.e.*, students), Class Counsel respectfully proposes to decrease the requested fee award from 35 percent to 30 percent of Settlement Fund (a decrease in the requested fee from \$437,500 to \$375,000). The new fee request of \$375,000 represents a lodestar cross-check multiplier of 1.48—well within the range previously approved in this District, and the Third Circuit generally, particularly given the liability risks which were present when this litigation was commenced and resolved. As discussed below, the hourly rates used for the lodestar crosscheck are consistent with rates which have been approved in this District in similar class litigation. And in any event, any reasonable downward adjustment of such hourly rates will not materially impact the reasonableness demonstrated by the lodestar cross-check. For these reasons,

as set forth in more detail below, Class Counsel's requested fee of 30 percent of the Settlement Fund is reasonable and should therefore be approved.

I. Class Counsel's Blended Hourly Rate Is Reasonable When Compared to Rates Approved in this District and Results in a Reasonable Lodestar Cross-Check of the Proposed Percentage of the Fund Fee Award

In its Order, this Court indicated that it would be more comfortable approving Plaintiffs' requested attorneys' fees if Plaintiffs could demonstrate that hourly rates such as those submitted by Class Counsel had been previously approved in this District. This District has routinely approved such hourly rates in complex litigation. *See Copley v. Evolution Wells Services, LLC*, Case No. 2:20-cv-01442 (W.D. Pa.) (final approval granted on July 14, 2023) (Judge Wiegand approved Class Counsel's rates between \$400 and \$900 per hour and support staff rates of \$250 per hour. *See id.* (ECF No. 159-1 & 165)); *Lewandowski v. Family Dollar Stores, Inc.*, Case No. 2:19-cv-858 (W.D. Pa.) (Judge Horan approved attorney rates between \$250 and \$950 per hour and support staff rates of \$250 per hour); *In re All-Clad Metalcrafters, LLC, Cookware Mktg. & Sales Pracs. Litig.*, No. 21-MC-491-NR, 2023 WL 2071481, at *11–12 (W.D. Pa. Feb. 17, 2023) (Judge Ranjan approved attorney rates between \$372 and \$899 and support staff hourly rates of \$203); *In re: Railway Industry Employee No-Poach Antitrust Litig.*, No. 2:18-MC-00798 (W.D. Pa.) (ECF No. 313 & 272–300) (Judge Conti approved rates for attorneys ranging from \$275 to \$1,100); *Calhoun v. Invention Submission Corp.*, No. 2:19-CV-01396, 2023 WL 2403917, at *7 (W.D. Pa. Mar. 8, 2023) (Magistrate Judge Dodge approved attorney rates between \$500 and \$930 and support staff rates up to \$400); *Howard v. Arconic Inc. et al*, Case No. 2:17-cv-1057-MRH (W.D. Pa.) (Judge Hornak approving attorney rates from \$325 to \$1,375 and a lodestar multiplier of 3.54).

Plaintiffs respectfully submit that the most pertinent hourly rate for purposes of performing the lodestar cross-check is Class Counsel's blended hourly rate because it reflects Class Counsel's

efficient distribution of work, with most hours performed by junior attorneys with lower hourly rates than Class Counsel's most senior partners. Indeed, the Third Circuit has indicated that the relevant hourly rate analysis for a lodestar cross-check is the blended billing rates that approximate the fee structure of individuals who work on a matter, not each individual's hourly rate. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005), *as amended* (Feb. 25, 2005); *see also* The Manual for Complex Litigation (Fourth) § 21.724 (2004) ("a statement of the hourly rates for *all attorneys and paralegals* who worked on the litigation . . . can serve as a 'cross-check' on the determination of the percentage of the common fund that should be awarded to counsel") (emphasis added).

This is because in common fund cases, the lodestar method only serves to cross-check the reasonableness of the *results* of a percentage-of-recovery method. *See In re Rite Aid*, 396 F.3d at 306–07; *Milliron v. T-Mobile USA, Inc.*, 423 Fed. App'x 131, 136 (3d Cir. 2011) (explaining that when used as a cross-check, the lodestar method is not to be used to demand "mathematical precision" or engage in "bean-counting"); *see also In re AT & T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006) ("The lodestar cross-check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method."). In other words, because the amount of Class Counsel's fee request was not initially computed using Class Counsel's lodestar and hourly rates, the Court does not need to necessarily endorse each individual biller's rate in order to find that Class Counsel's overall fee request is reasonable. Rather, the Court should holistically consider *all* of the following: the percentage of the fund requested, the total lodestar, Class Counsel's blended rate, individual biller rates, and, critically, the lodestar multiplier yielded by dividing the total fee request by the lodestar. Other courts have agreed with this approach:

The court takes no position on whether or not Attorney Carson's and Attorney Head's hourly rates are reasonable and finds instead that the multiplier is low

enough to take into account a range of hourly rates below those billed that would still warrant the court's approval even if this reduction would result in a higher multiplier. As the court has repeated in several instances, the court views this to be an excellent settlement and would not hesitate to approve a multiplier above 1.3. The fact that the multiplier is so near the requested fees speaks directly to the skill and efficiency of the attorneys involved in this case, on both sides. Accordingly, the court will approve the requested 31.6667% percentage-of-recovery rate for attorneys' fees.

Acevedo v. Brightview Landscapes, LLC, No. CV 3:13-2529, 2017 WL 4354809, at *20 (M.D. Pa. Oct. 2, 2017); *Jackson v. Wells Fargo Bank, N.A.*, 136 F. Supp. 3d 687, 715 (W.D. Pa. 2015) (“As this rate would be clearly excessive, the sixth *Gunter* factor weighs against approving the fee request. This factor is not dispositive, however, given the weight of the remaining factors in favor of approval.”) (approving fee award of 2.83 lodestar multiplier).

Here, Class Counsel’s blended hourly rate of \$726.36 is reasonable.¹ As explained in the Declaration of Gary F. Lynch in support of the motion (ECF No. 86-1) (“Lynch Decl.”), Class Counsel expended 349.9 hours litigating this action. Lynch Decl., ¶ 11. When each individual biller’s hours are multiplied by that biller’s rate, and then all billers are added together, the total lodestar value is \$254,155. *Id.* When that total lodestar is divided by the total hours of 349.9, Class Counsel’s blended hourly rate is \$726.36.

When Class Counsel’s lodestar is used to evaluate their amended fee request of 30 percent of the Settlement Fund, the result is a lodestar cross-check multiplier of 1.48. This multiplier falls much closer to the low end of multipliers typically approved in common fund cases in the Third Circuit. *See Kapolka v. Anchor Drilling Fluids USA, LLC*, No. 2:18-CV-01007-NR, 2019 WL 5394751, at *11 (W.D. Pa. Oct. 22, 2019) (“Multiples ranging from one to four are frequently

¹ Class Counsel’s blended hourly rate is a product of taking a weighted average of partner, associate, and support staff rates of those individuals who have worked on this litigation.

awarded in common fund cases when the lodestar method is applied.”) (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998)).

Class Counsel’s requested multiplier is reasonable in light of the risks undertaken by handling this matter on a contingent basis, the time and resources expended litigating the case and negotiating a settlement, and the positive result obtained for the putative class. When this litigation commenced, there was no clear guidance regarding the viability of an implied contract claim by students against a university under Pennsylvania law. Indeed, many courts that addressed similar claims in the wake of the Covid-19 pandemic had dismissed them under Fed. R. Civ. P. 12. This Court was one of the first to interpret Pennsylvania law in support of Plaintiffs’ implied contract claim. Class Counsel has since handled an appeal to the Third Circuit in a similar action which resulted in a validation of Plaintiffs’ liability theory. *Hickey v. Univ. of Pittsburgh*, No. 21-2013, 2023 WL 5159578 (3d Cir. Aug. 11, 2023). But, to be certain, that outcome was far from certain at the time Plaintiffs commenced and resolved this action.

Given that the lodestar cross-check results in a multiplier of only 1.48, Class Counsel is seeking the equivalent of a 48% premium above their standard rates, which is quite modest compared to the double, triple, and quadruple premiums that are very commonly awarded in common fund cases in the Third Circuit.²

² See *AT & T Corp.*, 455 F.3d at 173 (“[W]e approved of a lodestar multiplier of 2.99 in *Cendant PRIDES*, in a case we stated ‘was neither legally nor factually complex’” and that settled in 4 months); *McDermid v. Inovio Pharms., Inc.*, No. CV 20-01402, 2023 WL 227355, at *13 (E.D. Pa. Jan. 18, 2023) (finding “a lodestar multiplier of 2.69 is acceptable and [did] not require the Court to reduce the requested fees”); *Stevens v. SEI Invs. Co.*, No. CV 18-4205, 2020 WL 996418, at *13 (E.D. Pa. Feb. 28, 2020) (awarding multiplier of approximately 6.16); *Arrington v. Optimum Healthcare IT, LLC.*, No. CV 17-3950, 2018 WL 5631625, at *10 (E.D. Pa. Oct. 31, 2018) (approving lodestar multiplier of 5.3 that was “certainly on the higher end of the range of reasonable multipliers”); *Yedlowski v. Roka Bioscience, Inc.*, 2016 WL 6661336, at *18 (D.N.J. Nov. 10, 2016) (3.4 multiplier awarded); *Schuler v. Medicines Co.*, 2016 WL 3457218, at *9-10 (lodestar multiplier of 3.57 reasonable in case that settled before decision on motion to dismiss);

Because the percentage-of-recovery method is the more appropriate analysis for determining a reasonable fee in common fund cases such as this one, and the lodestar cross-check confirms the reasonableness of the requested fee, Plaintiffs submit the proposed fee request is reasonable and should be approved.

II. Class Counsel’s Rates are Comparable and Reasonable in Light of Rates Approved in Similar Cases

As demonstrated above, Plaintiffs respectfully suggest that the proposed fee award in this case is reasonable based upon the lodestar cross-check using Class Counsel’s blended hourly rate for the work performed, and that Class Counsel’s hourly rates are similar to those that have been previously approved in this District. Additionally, however, Plaintiffs submit that in applying the “forum rate” rule, the Court is not confined to its geographic area when determining the appropriate market for comparison. In order to determine the prevailing market rates, the Court must assess the “experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *ThermoLife Int’l, LLC v. D.P.S. Nutrition, Inc.*, No. 15-273, 2016 WL 6916777, at *4 (W.D. Pa. Feb. 5, 2016) (citing *Berkoben v. Aetna Life Ins. Co.*, No. 2:12-cv-1677, 2014 WL 3565959, at *18 (W.D. Pa. July 18, 2014)). “[T]he attorney’s normal billing rate is an appropriate baseline for assessing the reasonableness of the rate requested.” *Id.* (quoting *Chaney*

In re Ocean Power Techs., Inc., No. 3:14-CV-3799, 2016 WL 6778218, at *26 (D.N.J. Nov. 15, 2016) (awarding multiplier of 2.51 in a case that “was settled before the adjudication of the motion to dismiss, was not legally or factually complex, [and] involved limited discovery”); *Demnick v. Cellco P’ship*, No. CV 06-2163 (JLL), 2015 WL 13643682, at *17 (D.N.J. May 1, 2015) (awarding lodestar multiplier of 3.83); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 750 (E.D. Pa. 2013) (awarding multiplier of 2.99); *Meijer, Inc. v. 3M*, No. 04–5871, 2006 WL 2382718 at *24 (E.D. Pa. Aug. 14, 2006) (approving a percentage fee award that translated to a 4.77 multiplier); *Rouse v. Comcast Corp.*, No. CIV.A. 14-1115, 2015 WL 1725721, at *14 (E.D. Pa. Apr. 15, 2015) (finding lodestar cross-check confirmed the reasonableness of the requested fee award when the multiplier was 2.08).

v. HVL, LLC, No. 11-0833, 2012 WL 5990124, at *1 (W.D. Pa. Nov. 30, 2012)). However, “community” does not necessarily mean the local market area. Courts have explained that “[i]t would be just as consistent . . . to read the word as referring to a community of practitioners; particularly when . . . the subject matter of the litigation is one where the attorneys practicing it are highly specialized and the market for legal services in that area is a national market.” *Jeffboat, LLC v. Dir., Off. of Workers’ Comp. Programs*, 553 F.3d 487, 490 (7th Cir. 2009). Thus, in cases such as this one, “[a] national market or a market for a particular legal specialization may provide the appropriate market.” *Little Rock Sch. Dist. v. Arkansas*, 674 F.3d 990, 997 (8th Cir. 2012).

Indeed, Class Counsel respectfully submit that with advances in modern technology, a lawyer’s “community” or “market” is no longer limited to a home geographic market as it once was. Rather, many attorneys’ practices (Class Counsel included) are truly part of a nationwide market that are best understood in terms of substantive and procedural specialties, rather than geographical location. Class Counsel would not have developed class action expertise if its practice were limited to this District, because only a limited number of class actions arise out of events in this District and remain here for the life of the litigation. Class Counsel’s class action practice therefore necessitates a nationwide presence and the resources required to follow class cases to whichever forum is most appropriate for each particular case. Class Counsel certainly prefers to litigate locally as much as possible, and devotes significant effort towards directing national class litigation to this District at every opportunity. But on many occasions, Class Counsel bring cases that must originate elsewhere or are transferred out of Western Pennsylvania, for reasons entirely beyond Class Counsel’s control, such as when cases are joined and transferred into multidistrict litigation by the Judicial Panel on Multidistrict Litigation. Without such a national footprint, Class Counsel would not be able to focus its practice as it does. Accordingly,

when the Court evaluates Class Counsel's rates, it is appropriate to consider the rates approved in similar *types* of cases across the country, because those cases represent the true market in which Class Counsel practices.

As a prime example, the rates approved for plaintiffs' class action attorneys in other Covid-19 university refund litigation are highly relevant to the reasonableness of Class Counsel's fee request here. This is because the work performed by those attorneys (and the financial resources required to do that work) more closely resembles Class Counsel's practice than, for instance, a Pittsburgh-based attorney who does not litigate class or complex cases. And in this type of litigation, numerous courts have approved hourly rates that are in line with Class Counsel's rates here. *See e.g., Choi et al v. Brown University*, Case No. 1:20-cv-00191-JJM-LDA (D.R.I.) (ECF No. 81 & 79) (approving hourly rates ranging from per hour; others range from \$100 to \$1,125); *Botts v. Johns Hopkins University*, Case No. 1:20-cv-01335 (D. Md.) (approving attorney rates ranging from \$425 to \$1,005 and support staff hourly rates of \$305); *In re Columbia University Tuition Refund Action*, Case No. 1:20-cv-03208 (S.D.N.Y.) (ECF No. 115 & 98-101) (approving hourly rates ranging from \$208 to \$919); *Porter v. Emerson College*, Case No. 1:20-cv11897-RWZ (D. Mass.) (approving hourly rates ranging from \$150 to \$925) (ECF No. 87, 83-85); *Fittipaldi v. Monmouth University*, Case No. 3:20-cv-05526-RLS (D.N.J.) (approving hourly rates ranging from \$270 to \$1,000) (ECF No. 80 & 77); *Metzner et al v. Quinnipiac University*, Case No. 3:20-cv-00784-KAD (D. Conn.) (approving hourly rates from \$100–\$1,075) (ECF No. 129 & 127).

III. Conclusion

For the foregoing reasons, and those discussed in Plaintiffs' Motion for Award of Attorneys' Fees, Plaintiffs respectfully request that the Court approve the requested attorneys' fees of \$375,000 in conjunction with their forthcoming Motion for Final Approval.

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Respectfully Submitted,

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