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

ASHA SMITH and EMMA NEDLEY, individually and on behalf of all others similarly situated, *Plaintiffs*, v. UNIVERSITY OF PENNSYLVANIA, *Defendant*.	Case No. 2:20-cv-02086

JOINT DECLARATION OF ROY T. WILLEY, IV AND EDWARD W. CIOLKO IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND CASE CONTRIBUTION AWARDS FOR THE CLASS REPRESENTATIVES

We, Roy T. Willey, IV and Edward W. Ciolko, as Class Counsel, declare as follows:

1. I, Roy T. Willey, am a partner at Poulin | Willey | Anastopoulo, and I am Co-Lead counsel for Plaintiffs in the above captioned matter. I have been admitted *Pro Hac Vice* in this action (ECF No. 9).

2. I, Edward W. Ciolko, am a partner at Lynch Carpenter, LLP, and I am Co-Lead counsel for Plaintiffs in the above captioned matter. I am a member in good standing of the Bar of the District of Columbia. I have been admitted *Pro Hac Vice* in this action. (ECF No. 5, Consolidated Docket No. 2:20-cv-02086-TJS).

3. This Joint Declaration is submitted in support of the accompanying Motion for Final Approval of Class Action Settlement, Approval of Manner of Distribution of Net Settlement Fund, An Award of Attorneys' Fees and Expenses and An Award to Plaintiffs,

which seeks an order that, among other things, grants Final approval of the Settlement, awards fees and expenses to Class Counsel and case contribution awards to Named Plaintiffs, and directs that the Claims Administrator may implement the distribution of the Net Settlement Fund ("Distribution") in the manner provided for in the Settlement.

4. The Settlement will resolve all claims asserted in above-captioned Action in this Court.

5. We have overseen all material aspects of the litigation of this Action. In addition, we were involved in the negotiation of the terms of the Settlement. Accordingly, we have personal knowledge of the facts and if called upon to testify, we could and would testify competently thereto.

6. We have been preliminarily appointed as Class Counsel by this Court in its Order granting Preliminary Approval to the proposed Settlement ("Preliminary Approval Order"). *See* ECF No. 103. The Preliminary Approval Order also provided that the Named Plaintiffs were preliminarily appointed as Settlement Class Representatives. In addition, the Preliminary Approval Order also preliminarily certified the following proposed Class: "All students enrolled in any Penn program who were assessed Spring 2020 Fees, with the exception of: (i) any person who withdrew from Penn on or before March 17, 2020; (ii) any person enrolled for the Spring 2020 semester solely in a program that, at the beginning of the Spring 2020 semester, was intended to be delivered as an online program; (iii) any person who properly executes and files a proper and 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.*

7. In brief, Co-Lead Counsel engaged in extensive investigation and other litigation efforts throughout the prosecution of the Action, including, inter alia: (1) researching and drafting the initial complaints in the Action and the Consolidated Complaint; (2) researching the applicable law with respect to the claims in the Action and the potential defenses thereto; and (3) engaging in extensive settlement discussions with Counsel for Defendant University of Pennsylvania ("Penn").

8. On both August 20, 2021 and May 12, 2022, the Parties engaged in Mediation with Hon. Diane M. Welsh (Ret.) serving as neutral Mediator. (*See* Declaration of Hon. Diane M. Welsh). The Parties participated in two mediation sessions, numbering six and eight hours each respectively. Also, these mediation sessions involved e-mail and telephonic conferences before and after each mediation session. *Id.* at ¶ 5.

9. After extensive arm's length negotiations, the Parties reached an agreement to settle the Action for the amount of $4,500,000.

10. The Parties then documented the terms of the Settlement in the Settlement Agreement. *See* ECF No. 97-1.

11. We can state as of record that there was no collusion of any kind between Co-Lead Counsel and Penn's Counsel and that all negotiations culminating in the proposed Settlement were at arm's length and hard fought.

I. FACTS

12. On April 30, 2020, Plaintiff Asha Smith filed a class action complaint in the United States District Court for the Eastern District of Pennsylvania styled *Asha Smith* v. *University of Pennsylvania*, Case No. 2:20-CV-2086 (the "First Action"). Three months

later, the First Action was consolidated with another, *Nedley v. University of Pennsylvania*, No. 2:20-cv-03109.

13. Upon consolidation, a new Consolidated Class Action Complaint was filed (ECF No. 18). This Complaint alleged that Named Plaintiffs and putative class members are entitled to refunds of tuition, fees, and other charges because, beginning in March 2020, Penn provided classes remotely in response to the COVID-19 pandemic. The Consolidated Complaint ˙alleged, *inter alia,* that Named Plaintiffs and all other Penn students who paid tuition and fees for the Spring 2020 semester had an implied and express contract with Penn that entitled them to in-person instruction, and that by switching to remote education in response to the pandemic, Penn breached the contracts. Plaintiffs also alleged causes of action for conversion and unjust enrichment.

14. On September 21, 2020, Penn filed its Motion to Dismiss (ECF No. 26).

15. On April 20, 2021, the Court dismissed Plaintiffs' tuition claims, unjust enrichment claims, and conversion claims but refused to dismiss Plaintiffs' fee claim to the extent it was based on an express contract (ECF No. 55).

16. Following this dismissal, discovery began and throughout this period, the Court adjusted and rescheduled all sorts of deadlines through modified scheduling orders.

17. Discovery in this matter progressed and resulted in a Protective Order being granted by the Court. (ECF No. 75).

18. After this, both Parties began filing motions. In February of 2022, Plaintiffs filed their Motion for Class Certification (ECF No. 78).

19. Shortly thereafter, Penn filed their own Motion for Summary Judgment (ECF No. 82).

20. Almost two weeks after Defendant filed the above motion, Plaintiffs filed their opposition on March 7, 2022 (ECF No. 87).

21. Four days after this filing, Plaintiffs filed their own Reply Memorandum in Support of their motion for class certification (ECF No. 88).

22. Two days after the above filing, on March 13, 2022, Penn filed its own Reply in Support of its Motion for Summary Judgment (ECF No. 89).

23. After the above filing, both Parties reached an agreement to settle.

24. After Plaintiffs filed their unopposed Motion for Preliminary Approval of Class Action Settlement (ECF No. 96), both the Motion for Class Certification and Motion for Summary Judgment were dismissed without prejudice. (ECF Nos. 100, 101).

25. The value of the Settlement in the above paragraph is $4,500,000.00.

II. NOTICE WAS ISSUED AS ORDERED

26. Rule 23 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 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).

27. The Notice and the method used to disseminate the Notice to potential Settlement Class Members satisfy these standards (ECF No. 97-4). The Court-approved Long Form 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 Named Plaintiffs.

28. The Notice also provides specific information regarding the date, time, and place of the Settlement 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 Named Plaintiffs.

29. Notice programs such as the one proposed by Class Counsel have been frequently approved by Courts around the county as adequate under the Due Process Clause and Rule 23.

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

30. As set forth in the Notice, the proposed manner of distribution is based on the same methodology underlying Named Plaintiffs' measure of damages. This is a fair method to apportion the Net Settlement Fund among the Settlement Class, as it is based on, and consistent with, the claims alleged. The manner of distribution is set forth as follows:

> 4. A portion of the Net Settlement Fund will be allocated pro rata to each Settlement Class Member based on the ratio of (a) the total number of Potential Settlement Class Members to (b) the total Net Settlement Fund. The resulting ratio will be multiplied by the Net Settlement Fund to determine each Settlement Class Member's Settlement Benefit.
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> 5. To the extent that a Potential Settlement Class Member properly executes and files a timely opt-out request to be excluded from the Settlement Class, the amount that would have been distributed to such Potential Settlement Class Member had they not filed an opt-out request will instead be distributed to Settlement Class Members, in equal amounts to each Settlement Class Member.

> 7. With respect to Settlement Class Members who are Continuing Penn Students, the Settlement Administrator will calculate the amount of the Settlement Benefit and provide this information to Penn, which will issue a credit in this amount to each Settlement Class Member's student account. Penn will not impose a charge to issue this credit. Except as otherwise stated in this paragraph, the remaining Settlement Class Members will be paid by a check issued by the Settlement Administrator, and the check will be mailed by first class U.S. Mail by the Settlement Administrator to the Settlement Class Member's last known mailing address on file with the University Registrar. For these remaining Settlement Class Members, the Settlement Administrator will also provide a form on the Settlement Website that such Settlement Class Members may visit to (a) provide an updated address for sending a check; or (b) elect to receive the Settlement Benefit by Venmo or PayPal instead of a paper check. These remaining Settlement Class Members must provide an updated address or elect to receive the Settlement Benefit by Venmo or PayPal no later than sixty (60) days after the Effective Date.
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> 8. No later than seven (7) days after the Effective Date, Penn will send to the Settlement Administrator the names of the Potential Settlement Class Members. No later than thirty (30) days after the Effective Date, Penn will produce to the Settlement Administrator the address of Settlement Class Members who are not Continuing Penn Students. No charge to the Settlement Class or Settlement Fund will be made by Penn for collection, correction, and provision of this information.

ECF No. 97-1 (footnote omitted).

31. Here, by dividing the Net Settlement Fund across every student, this Settlement creates fairness for every potential Class Member in that all Members receive the same treatment, and no biases are created.

32. The above-mentioned settlement scheme is directly in line with other settlements in directly analogous matters. Further, the payment value directly to class members is relatively high. *See Rocchio et al. v. Rutgers, The State University of New Jersey*, No. MID-L-003039-20 (N.J. Super. Ct.) (granting final approval of settlement providing each settlement class member with payment of approximately $52); *Choi et al. v. Brown University*, No. 1:20-cv-00191 (D.R.I.) (pending final approval of settlement providing each settlement class member with payment of approximately $104).

33. The proposed settlement is much aligned with other recent settlements. As follows, the holdings in all of the following cases all support the current proposed Settlement: *See, e.g.*, *Fittipaldi v. Monmouth Univ.*, No. 3:20-cv-05526 (D.N.J.) ($1,300,000 common fund); *D'Amario v. Univ. of Tampa*, No. 7:20-cv-03744 (S.D.N.Y.) ($3,400,000 common fund); *Rosado v. Barry Univ., Inc.*, No. 1:20-cv-21813 (S.D. Fla.) ($2,400,000 common fund); *Wright v. S. New Hampshire Univ.,* No. 1:20-cv-00609 (D.N.H.) ($1,250,000 common fund); *D'Amario v. Univ. of Tampa,* No. 7:20-cv-03744 (S.D.N.Y.) which resulted in settlement with a common fund of $3.4 million dollars; *Martin v. Lindenwood Univ.*, No. 4:20-cv-01128 (E.D. Mo.), which resulted in the creation of a common fund of $1.65 million dollars. And, although currently not finally approved, the settlement value of $2,500,000 in *Metzner v. Quinnipiac*, No. 3:20-cv-00784 (D. Conn. 2022) falls directly in line with the proposed Settlement.

34. Named Plaintiffs and Class Counsel believe that the proposed Distribution is fair and reasonable, and respectfully submit it should be approved by the Court. Indeed, notably, there have been only three opt-outs to the distribution proposal to date, which supports the Court's approval.

IV. STANDARDS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS

A. The Settlement Must Be Procedurally and Substantively Fair, Adequate, and Reasonable

35. 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 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).

36. In addition to the foregoing factors, the Third Circuit considers additional sets of factors (the *Girsh* and *Prudential* factors) which overlap with the Rule 23(e)(2) factors when determining whether to approve a class action settlement.

37. The *Girsh* factors are: (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.

38. In addition to the *Girsh* factors, the Third Circuit considers the following *Prudential* factors to be quite relevant: (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.

39. And, as stated by the Third Circuit, not every factor listed above need be satisfied.

B. Named Plaintiffs and Class Counsel Have Adequately Represented the Settlement Class

40. Named Plaintiffs' interests are not antagonistic to, and in fact are directly aligned with, the interests of other Members of the Settlement Class. Additionally, Named 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 complaints in the Action and the amended complaints; (2) researching the applicable law with respect 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 suffered by the Class.

41. Through each step of the Action, Named Plaintiffs and Class Counsel have strenuously advocated for the best interests of the Settlement Class. Named Plaintiffs and Class Counsel therefore satisfy Rule 23(e)(2)(A) for purposes of final approval.

42. Named Plaintiffs satisfy Rule 23(e)(2)(B) because the Settlement is the product of arm's-length negotiations between the parties' counsel, with no hint of collusion.

43. In her Declaration, Hon. Diane M. Welsh (Ret.) stated that "Both sides vigorously advocated for the interests of their respective clients." *See* Welsh Declaration ¶ 5. Further, Judge Welsh stated that the negotiations "appeared to be fair, at arms' length, and in good faith." *Id.* at ¶ 7. And finally, Judge Welsh stated: "I have no cause to believe that there was any kind of improper collusion between the parties." *Id.*

C. The Risks of Establishing Liability

44. Named Plaintiffs expect that, were the Action to proceed, Penn would continue to vigorously contest all elements of Named Plaintiffs' surviving claims during the remaining stages of the Action, including during discovery, class certification and summary judgment. The outcome of the Action cannot be certain, and if it proceeded to trial, it would be a lengthy and complex affair: even if Named Plaintiffs could establish liability, they would still have to prove damages on their claim for a partial refund of fees and certify a litigation class.

45. Evaluated against these risks, a $4.5 million recovery now is an excellent result for the Settlement Class as it is an above-average settlement—when compared to comparable settlements. In this Action, the Settlement Class Members will receive a meaningful and

tangible present recovery from the Settlement. With final Court approval, these funds will be distributed in a matter of months, rather than years (or never), which is particularly important given the additional hardships imposed by the COVID-19 pandemic.

46. Although Named Plaintiffs and Class Counsel firmly believe that the claims asserted in the Action are meritorious and that they would prevail at trial, further litigation against Defendant posed numerous risks which made any recovery uncertain.

D. The Risks of Establishing Damages At Trial

47. The risks of establishing liability apply with equal force to establishing damages. Had litigation continued, Named Plaintiffs would have relied 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 Named Plaintiffs' experts should be excluded from testifying at trial, Named Plaintiffs' case would become much more difficult to prove. Thus, in light of the significant risks Named Plaintiffs faced at the time of the Settlement with regard to establishing damages, this factor weighs heavily in favor of final approval.

48. And, according to the Mediator who oversaw the matter on multiple occasions, Judge Diane M. Welsh: the "proposed Settlement reflects the risks and potential rewards of the claims being settled." *See* Welsh Decl. at ¶ 11.

E. The Settlement Eliminates The Additional Costs and Delay of Continued Litigation

49. The anticipated complexity, cost, and duration of the Action would be considerable. Indeed, if not for the Settlement, there was a high likelihood of even more expensive, protracted, and contentious litigation. Such would consume significant funds and expose Named Plaintiffs and the Class to risk and uncertainty. The subsequent motion for class

certification and summary judgment, as well as the preparation for what would likely be a multi-week trial, would have caused the Action to persist for 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. Accordingly, the Rule 23(e)(2)(C)(i) factor, as well as the first, fourth, fifth, and eighth, *Girsh* factors weigh in favor of final approval. And further, the first *Prudential* factor weighs in favor of final approval.

F. The Proposed Method For Distribution

50. With respect to Rule 23(e)(2)(C)(ii), Named Plaintiffs and Class Counsel have taken appropriate steps to ensure that the Settlement Class is notified about the Settlement. Pursuant to the Preliminary Approval Order (ECF No. 100), the Court directed the following:

> "No later than October 19, 2022, before the issuance of the Short Form Notice, the Settlement Administrator shall establish the Settlement Website, which shall include, in downloadable format, the following:
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> a. the Long Form Notice;
> b. the Preliminary Approval Order;
> c. the Settlement Agreement, including all exhibits;
> d. a Question and Answer section, agreed to by the Parties, anticipating and answering Settlement related questions from prospective class members;
> e. contact information for the Settlement Administrator, including a Toll Free number, and Settlement Class Counsel;
> f. all preliminary and final approval motions filed by the Parties and any orders ruling on such motions; and
> g. any other materials agreed upon by the Parties and/or required by the Court.
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> The Settlement Website shall allow Settlement Class Members who are not Continuing Penn Students to provide an updated mailing address to receive a paper check or to elect to receive their Settlement Benefit via Venmo or PayPal."

ECF No. 103. *See also* Declaration of Mark Cowen of A.B. Data, setting forth the details concerning the notice dissemination, publication, and requests for exclusion or objections received to date ("Cowen Declaration").

51. In his Declaration, Mark Cowen set forth the Notice Plan for potential class members. *See* Cowen Declaration at ¶ 9.

52. In this Notice Plan, Mark Cowen of A.B. Data states that the objective of the Notice Plan is to "provide notice" to potential class members. *Id.* at ¶ 5. A.B. Data states that it will provide notice via First Class Mail and E-mail. 5,135 notices were mailed due to email address availability issues. *See* Cowen Decl. at ¶ 11.

53. Further, Class members were mailed and/or emailed notices and Class forms after a thorough email validation process. *See* Cowen Decl. at ¶¶ 9 and 10. There were 32,879 emails sent, with 32,842 confirmed as delivered, which is a 99.89% delivery rate. *See* Cowen Decl. at ¶ 9.

54. Additionally, a settlement specific website was created where key Settlement documents were posted, including (i) the Long Form Notice; the Court's Order (ECF No. 97-2); and (iii) the Settlement Agreement (including all of its exhibits) (ECF No. 97-1). Settlement Class Members have until December 19, 2022 to object to the Settlement or request exclusion from the Settlement Class. While that date has not yet passed, to date there have been no objections to the Settlement. This factor therefore supports final approval.

55. And in addition to the above website, A.B. Data has created a toll-free number to contact regarding any questions regarding the Settlement. This system includes an option to speak to a live operator. *Id.* at ¶ 4.

56. These sorts of proposed notice systems have been approved in similar matters, *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).

57. And, to reiterate, the sort of proposed Settlement has been approved or agreed upon in the following cases: *Fittipaldi v. Monmouth Univ.*, No. 3:20-cv-05526 (D.N.J.) ($1,300,000 common fund); *D'Amario v. Univ. of Tampa*, No. 7:20-cv-03744 (S.D.N.Y.) ($3,400,000 common fund); *Rosado v. Barry Univ., Inc.*, No. 1:20-cv-21813 (S.D. Fla.) ($2,400,000 common fund); *Wright v. S. New Hampshire Univ.,* No. 1:20-cv-00609 (D.N.H.) ($1,250,000 common fund); *D'Amario v. Univ. of Tampa,* No. 7:20-cv-03744 (S.D.N.Y.) which resulted in settlement with a common fund of $3.4 million dollars; *Martin v. Lindenwood Univ*., No. 4:20-cv-01128 (E.D. Mo.), which resulted in the creation of a common fund of $1.65 million dollars. And, although currently not finally approved, the settlement value of $2,500,000 agreed to in *Metzner v. Quinnipiac*, No. 3:20-cv-00784 (D. Conn. 2022), falls directly in line with the proposed Settlement.

G. The Settlement Ensures Settlement Class Members are Treated Equitably

58. Rule 23(e)(2)(D), the final factor, considers whether Class Members are treated equitably. As reflected in the proposed manner of distribution, *see* ECF No. 97-1, the proposed Settlement treats Settlement Class Members equitably relative to each other, and all Settlement Class Members will be giving Penn the same release. Named 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.

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

H. The Settlement Satisfies the Remaining *Girsh* and *Prudential* Factors

60. While the deadline to submit objections and opt-outs has not yet passed, no objections or opt-outs have been received to date. And no objections or requests for exclusion been received to date. This positive reaction of the Settlement Class supports approval of the Settlement.

I. Named Plaintiffs Had Sufficient Information To Make an Informed Decision Regarding The Settlement

61. Class Counsel are sufficiently well informed of the strengths and weaknesses of the claims. Class Counsel researched the potential causes of actions thoroughly, researched the facts, reviewed the underlying documents exchanged between Named Plaintiffs and that comprised the alleged contract documents, drafted three separate pleadings and survived in part a motion to dismiss, engaged in protracted settlement negotiations with Defendant and exchanged non-public information regarding the alleged damages. Class Counsel also spoke with potential merits and damages experts concerning the strengths and weaknesses of the case, as well as the strengths and weaknesses of Penn's arguments and defenses. Moreover, the information exchanged during settlement negotiations permitted Class Counsel to learn the relevant facts and circumstances in an efficient and cost-effective manner. The Parties also exchanged further information through written correspondence

and phone calls. As a result, Class Counsel was well-positioned to evaluate the strengths of Named Plaintiffs' claims, Penn's defenses, and prospects for success.

62. Class Counsel also considered the many other cases arising out of COVID-19 school-related closures, of which Class Counsel are at the forefront. *See* ECF Nos. 97-8 & 97-9 (providing Class Counsel's Firm Resumes). Class Counsel's unique insight into this type of litigation, combined with the information obtained from Penn in this case, fortified Named Plaintiffs' appreciation of the risks ahead should they proceed with further litigation. Thus, by the time of the Settlement, Named Plaintiffs were well versed in the strengths and weaknesses of the case. This factor weighs in favor of final approval.

J. Maintaining Class-Action Status Through Trial Presents a Substantial Risk

63. Named Plaintiffs' ability to maintain class-action status through trial presented a substantial risk in this Action. Although Named Plaintiffs believe they would have prevailed on a motion to certify the class, Defendant was poised to vigorously oppose the motion. Moreover, even if the motion had been granted, Defendant could still have moved to decertify the class or trim the class before trial or on appeal, as class certification may be reviewed at any stage of the litigation.

K. Defendant's Ability To Withstand A Greater Judgment

64. Although Penn may possibly have the ability to withstand a greater judgment, the settlement is a substantial percentage of the liability for any alleged damages sustained by the proposed Settlement Class as to fees paid and not refunded (the only undismissed claim remaining in the Action) and such weighs in favor of approval.

65. As stated in the Memorandum in Support of Final Approval, this factor is often deemed irrelevant by courts within this circuit.

66. To be clear, 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).

L. The Settlement Amount Is Reasonable In View Of The Best Possible Recovery And The Risks Of Litigation

67. The Settlement here presents an excellent result, as Named Plaintiffs have obtained a substantial amount of the alleged potential damages for unrefunded fees that are at issue in what remains of the Action. This Settlement thus falls at the very high end of recoverable damages. Additionally, the Settlement Amount provides a significant and immediate payment to the Settlement Class.

68. And, as stated earlier, the above argument is supported by Hon. Diane M. Welsh (Ret.), stating: "the proposed Settlement reflects the risks and potential rewards of claims being settled." *See* Welsh Declaration at ¶ 11.

69. Notably, a few other directly analogous cases have reached settlement for less than the Proposed Settlement Amount of $4,500,000.[1] As such, the Settlement Amount should be considered a great recovery.

[1] *See, e.g.*, *Fittipaldi v. Monmouth Univ.*, No. 3:20-cv-05526 (D.N.J.) ($1.3MM common fund); *D'Amario v. Univ. of Tampa*, No. 7:20-cv-03744 (S.D.N.Y.) ($3,400,000 common fund); *Rosado v. Barry Univ., Inc.*, No. 1:20-cv-21813 (S.D. Fla.) ($2,400,000 common fund); *Wright v. S. New Hampshire Univ.,* No. 1:20-cv-00609 (D.N.H.) ($1,250,000 common fund); *D'Amario v. Univ. of Tampa,* No. 7:20-cv-03744 (S.D.N.Y.) which resulted in settlement with a common fund of $3.4 million dollars; *Martin v. Lindenwood Univ*., No. 4:20-cv-01128 (E.D. Mo.), which resulted in the creation of a common fund of $1.65 million dollars; *Metzner v. Quinnipiac*, No. 3:20-cv-00784 (D. Conn. 2022).

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

70. In their motion for preliminary approval of the Settlement, Named Plaintiffs requested that the Court certify the Settlement Class for settlement purposes only so that notice of the Settlement, the Final Fairness Hearing, and the rights of Settlement Class Members to object to the Settlement, request exclusion from the Settlement Class, or submit new payment instructions, could be issued. In the Preliminary Approval Order, the Court addressed the requirements for class certification as set forth in Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. The Court found that Named Plaintiffs had met the requirements for certification of the Settlement Class for purposes of settlement and that Named Plaintiffs "will fairly and adequately protect the interests of the Settlement Class." *See* ECF No. 103 at ¶ 34. Specifically, in the Preliminary Approval Order, the Court preliminarily certified a class of "All students enrolled in any Penn program who were assessed Spring 2020 Fees, with the exception of: (i) any person who withdrew from Penn on or before March 17, 2020; (ii) any person enrolled for the Spring 2020 semester solely in a program that, at the beginning of the Spring 2020 semester, was intended to be delivered as an online program; (iii) any person who properly executes and files a proper and 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 ¶ 3.

71. In addition, the Court preliminarily certified Named Plaintiffs as "Class Representatives" and Counsel as Class Counsel. *Id.* at ¶ 1. 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. Thus, for all of the reasons stated in Named Plaintiffs' motion for preliminary approval (incorporated

herein by reference), Named 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 Named Plaintiffs as class representatives and Class Counsel as class counsel.

VI. THE REQUESTED AWARD OF FEES AND EXPENSES IS WARRANTED

72. As detailed in the accompanying Memorandum, Class Counsel believes that Class Counsel's request for attorneys' fees readily meets the standards set forth in *Girsh v. Jepson*, 521 F.2d 153 (3d. Cir. 1975) and merits the Court's approval.

73. This was a vigorously prosecuted case which involved considerable time and resources investigating the action, successfully opposing the motion to dismiss, responding to Defendants' motion for summary judgment, briefing Plaintiffs' motion for class certification, and negotiating an excellent result for the Settlement Class.

74. The recovery of $4,500,000 in this case was achieved through the skill, work, dedication, and effective advocacy of Class Counsel who leaned on their decades of experience with complex class action litigation of this type.

75. In this action, attorneys' fees equaling one third of the Settlement Fund result in a fair and reasonable fee, especially given that the monetary result provides a benefit to the Settlement Class, and society has as an interest that the breach of contract alleged is prevented in the future.

76. Plaintiffs' Co-Lead Counsel faced substantial risk at every stage of this Action. Indeed, even having partially survived Defendant's motion to dismiss, most of the issues Defendant raised would likely have continued to pose hurdles at trial. Moreover, in the

absence of the Settlement, Co-Lead Counsel would also have faced significant litigation risks on both liability and damages. In addition, various developments in the relevant case law nationwide and recently enacted legislation in other jurisdictions designed to extinguish student claims for partial refunds threatened to undercut certain of Plaintiffs' theories of the case.

77. In sum, victory was far from assured at any stage, with meaningful hurdles to overcome to certify a class, overcome motions for summary judgment, win at trial, and preserve a favorable judgment on appeal. The requested fee reflects the risks that Plaintiffs' Co-Lead Counsel undertook in pursuing this case on a contingency basis for approximately two and a half (2.5) years.

78. Moreover, any assessment of the percentage recovery must account not only for the litigation uncertainties detailed above —including with respect to class certification, summary judgment, trial, and any appeal—but also the certainty of delay as Plaintiffs prepared for trial and inevitable appeals. Plaintiffs' Co-Lead Counsel should be rewarded for achieving this excellent recovery for Class Members without imposing on them the cost of potentially years of additional litigation toward an uncertain outcome.

79. The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work. Plaintiffs' Co-Lead Counsel faced top-flight defense attorneys, who were also able to draw on Defendant's vast resources. The high quality of the lawyers opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement.

80. Furthermore, the Long Form Notice informed all members of the Settlement Class that Co-Lead Counsel would seek a fee award of up to one-third of the gross settlement

amount. *See* Long-Form Notice at 8. In response to that notice and in response to the Settlement itself, not a single Class Member out of approximately 29,000 lodged an objection to the requested fee to date.

81. The public interest is well served by this Action, which sought to hold Penn accountable for allegedly shifting part of their financial burden arising out of the novel coronavirus pandemic on to their students.

82. A 33 and 1/3 percent fee would, moreover, compensate Plaintiffs' Co-Lead Counsel at a level commensurate with the benefits they have conferred on the Class, the substantial investment of time and money they devoted to litigating this unique case and bringing about the Settlement, as well as the contingent nature of their representation. Public policy favors this fee request.

83. The lodestar fee calculation method has fallen out of favor particularly because it encourages bill-padding and discourages early settlements. Accordingly, the lodestar method is used in this Circuit only as a sanity check to ensure that an otherwise reasonable percentage fee would not lead to a windfall. The primary purpose of the lodestar cross-check is to ensure that counsel are not enjoying an unwarranted windfall.

84. The cross-check in this case makes it abundantly clear that there is no windfall. Plaintiffs' Co-Lead Counsel has collectively spent over 2032 hours on this matter as of February 3, 2022. Additional time will be incurred in the future to obtain final approval and ensure the Net Settlement Fund is distributed according to this Court's orders. At customary current rates, these hours translate into $1,118,625.80 in total. Co-Lead Counsel's request for $1,500,000 in attorneys' fees for plaintiffs' counsel thus represents a total multiplier of approximately 1.34. This is an appropriate multiplier, especially for a

case of this size and complexity. And it is squarely within the range awarded by courts in this District, as well as across the country.

85. Here, the multiplier of 1.34 is eminently justified given the factors discussed herein, and especially the fact that Plaintiffs' counsel was able to secure the Settlement representing a substantial amount of the liability for the only claim remaining undismissed. To reduce a fee award because settlement was achieved at a relatively early stage would discourage efficient litigation.

86. Co-Lead Counsel should be rewarded for settling when they did, as well as for their success in the face of great risk. As a result of Co-Lead Counsel's work and willingness, the Class will receive significant and immediate financial redress for wrongs they have already waited too long to see a remedy.

VII. PLAINTIFFS' COUNSEL REQUEST FOR REIMBURSEMENT OF LITIGATION EXPENSES, INCLUDED SERVICE AWARDS, SHOULD BE GRANTED

A. Plaintiff's Co-Lead Counsel's Expenditures On The Class's Behalf Were Reasonable

87. Plaintiffs' Counsel spent $16,429.48 in out-of-pocket costs in prosecuting and resolving this Action. Relative to the Settlement amount in this matter, this is an entirely modest number. This request for reimbursement should be granted in full.

88. Although described in heavier detail in the accompanying fee memorandum, it is worth noting that Plaintiff's Co-Lead Counsel meticulously tracked every expense and almost one quarter of the above expenses were devoted solely to travel related expenses. The remaining portion of fees were related to discovery, legal research, factual research, mediators' fees, court reporting fees, transcript costs, postage, and photocopying.

B. Service Awards To The Settlement Class Representatives Are Warranted Given Their Dedication To The Class, Which Helped Achieve This Extraordinary Result

89. The requested awards in this case are fully consistent with these recognized rationales. First, the Settlement Class Representatives invested significant time providing information to Plaintiffs' Co-Lead Counsel during the investigation of the Class's claims, reviewing case materials (pleadings, discovery responses, interrogatory responses, settlement agreement, etc.), and communicating with Co-Lead Counsel. Further, they assumed significant reputational risks by suing their current or former university and by facing the potential criticisms of their peers, professors, future employers and future alumni. Though the Named Plaintiffs were understandably fearful that there might be negative repercussions as to them personally for their participation in this Action, Penn assures us that they would never retaliate against one of the students.

90. Finally, the amount of the requested awards is also in line with the amounts awarded in other cases in this jurisdiction.

91. Attached hereto as Exhibit A is the Declaration of Hon. Diane M. Welsh (Ret.).

92. Attached hereto as Exhibit B is the Declaration of Mark Cowen of A.B. Data.

93. Attached hereto as Exhibit C is are the Attorneys' Fees and Expense Reports for Poulin | Willey | Anastopoulo and Lynch Carpenter, LLP.

Executed this 7th day of December 2022, in Charleston, South Carolina.

/s/ Roy T. Willey, IV
Roy T. Willey, IV

Executed this 7th day of December 2022, in Pittsburgh, Pennsylvania.

/s/ Edward W. Ciolko
Edward W. Ciolko

CERTIFICATE OF SERVICE

I hereby certify that on December 7th, 2022, I caused a true and correct copy of the foregoing to be served on counsel of record by electronic filing it with the Clerk of Court using the ECF system, which will send notification of such filing to the registered participants.

/s/ Edward W. Ciolko
Edward W. Ciolko