

**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-TJS

**MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' MOTION FOR AWARD
OF ATTORNEYS' FEES AND
REIMBURSEMENT OF EXPENSES**

TABLE OF CONTENTS

I. INTRODUCTION1

II. ARGUMENT.....2

A. The Percentage of the Recovery Approach Is the Proper Standard to Apply in Awarding Attorneys’ Fees in Common Fund Cases2

B. The Requested Fee Is Fair and Reasonable Under the Third Circuit’s *Gunter/Prudential* Factors4

1. The Size and Nature of the Common Fund Created and Number of Persons Benefited by the Settlement.....4

2. The Absence of Objections to the Settlement and Requested Fee.....6

3. The Skill and Efficiency of Attorneys Involved.....6

4. The Complexity and Duration of the Litigation8

5. The Risk of Non-Payment9

6. The Amount of Time Devoted to the Litigation by Plaintiffs’ Counsel.....9

7. The Fee Request Is Comparable to Awards in Similar Cases10

8. The Settlement Benefits Are Attributable Solely to the Efforts of Plaintiffs’ Counsel11

9. The Percentage Fee Approximates the Fee that Would Have Been Negotiated in the Private Market11

10. Innovative Terms of the Settlement.....12

C. The Lodestar Cross-Check Confirms the Fee Request Is Reasonable.....12

D. Plaintiffs’ Counsel’s Request for Reimbursement of Expenses Is Reasonable.....15

E. The Requested Service Awards Are Reasonable.....16

III. CONCLUSION.....17

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Barel v. Bank of Am.</i> , 255 F.R.D. 393 (E.D. Pa. 2009)	17
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472 (1980)	2
<i>Bredbenner v. Liberty Travel, Inc.</i> , 2011 WL 1344745 (D.N.J. Apr. 8, 2011).....	17
<i>Brown v. Progressions Behavioral Health Servs., Inc.</i> , 2017 WL 2986300 (E.D. Pa. July 13, 2017)	11, 17
<i>Choi et al. v. Brown University</i> , No. 1:20-cv-00191 (D.R.I.)	5, 11
<i>Evans v. Brigham Young Univ.</i> , 2022 WL 596862 (D. Utah Feb. 28, 2022).....	9
<i>Fittipaldi v. Monmouth University</i> , No. 3:20-cv-05526 (D. N.J.).....	5, 11
<i>Gunter v. Ridgewood Energy Corp.</i> , 223 F.3d 190 (3d Cir. 2000)	3, 4, 12
<i>Harshbarger v. Penn Mut. Life Ins. Co.</i> , 2017 WL 6525783 (E.D. Pa. Dec. 20, 2017).....	3, 11
<i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983)	4, 12
<i>Hickey v. Univ. of Pittsburgh</i> , 535 F. Supp. 3d 372 (W.D. Pa. 2021)	9
<i>Huffman v. Prudential Ins. Co. of Am.</i> , 2019 WL 1499475 (E.D. Pa. Apr. 5, 2019).....	10
<i>In re AT & T Corp., Sec. Litig.</i> , 455 F.3d 160 (3d Cir. 2006)	3
<i>In re Cendant Corp. Litig.</i> , 264 F.3d 201 (3d Cir. 2001)	6, 12

In re Cigna-Am. Specialty Health Admin. Fee Litig.,
 No. 2:16-cv-03967-NIQA, 2019 WL 4082946 (E.D. Pa. Aug. 29, 2019) 10, 13

In Re Columbia University Tuition Refund Action,
 No.: 1:20-cv-03208 (S.D.N.Y. 2021) 8

In re Diet Drugs,
 582 F.3d 524 (3d Cir. 2009) 3, 4

In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,
 55 F.3d 768 (3d Cir. 1995) 10

In re Ikon Office Sols., Inc. Sec. Litig.,
 194 F.R.D. 166 (E.D. Pa. 2000) 8, 11, 13

In re Merck & Co., Inc. Vytorin ERISA Litig.,
 2010 WL 547613 (D.N.J. Feb. 9, 2010) 11, 14

In re Ocean Power Techs., Inc., Sec. Litig.,
 2016 WL 6778218 (D.N.J. Nov. 15, 2016) 9, 11, 15, 16

In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,
 148 F.3d 283 (3d Cir. 1998) 15

In re Rite Aid Corp. Sec. Litig.,
 396 F.3d 294 (3d Cir. 2005) 12

In re Schering-Plough Corp. Enhance ERISA Litig.,
 2012 WL 1964451 (D.N.J. May 31, 2012) 9

In re Schering-Plough Corp. Enhance Sec. Litig.,
 2013 WL 5505744 (D.N.J. Oct. 1, 2013) 13

In re Viropharma Inc. Sec. Litig.,
 2016 WL 312108 (E.D. Pa. Jan. 25, 2016) 4, 7, 14

In re Wilmington Tr. Sec. Litig.,
 2018 WL 6046452 (D. Del. Nov. 19, 2018) 16, 17

Krimes v. JPMorgan Chase Bank, N.A.,
 2017 WL 2262998 (E.D. Pa. May 24, 2017) 14

Maldonado v. Houstoun,
 256 F.3d 181 (3d Cir. 2001) 13

<i>Martin v. Foster Wheeler Energy Corp.</i> , 2008 WL 906472 (M.D. Pa. Mar. 31, 2008)	15
<i>Martin v. Lindenwood Univ.</i> , No. 4:20-cv-01128 (E.D. Mo.)	5
<i>McDonough v. Toys “R” Us, Inc.</i> , 80 F. Supp. 3d 626 (E.D. Pa. 2015).....	10
<i>McKenna v. City of Phila.</i> , 582 F.3d 447 (3d Cir. 2009)	12
<i>Mo. v. Jenkins by Agyei</i> , 491 U.S. 274 (1989)	13
<i>Moore v. GMAC Mortg.</i> , 2014 WL 12538188 (E.D. Pa. Sept. 19, 2014).....	14
<i>Rosado v. Barry Univ., Inc.</i> , No. 1:20-cv-21813-JEM (S.D.N.Y. Mar. 30, 2021)	5, 8
<i>Ryan v. Temple Univ.</i> , 535 F. Supp. 3d 356 (E.D. Pa. 2021).....	9
<i>Sullivan v. DB Invs. Inc.</i> , 667 F.3d 273 (3d Cir. 2011)	3, 16
<i>Wallace v. Powell</i> , 288 F.R.D. 347 (M.D. Pa. 2012)	11
<i>Wright v. S. New Hampshire Univ.</i> , 2021 WL 1617145 (D.N.H. Apr. 26, 2021)	5, 8
Rules	
Fed. R. Civ. P. 23	2
Fed. R. Civ. P. 23(e)	1
Fed. R. Civ. P. 23(h)	1, 2
Fed. R. Civ. P. 54(d)(2).....	1
Other Authorities	
Annotated Manual for Complex Litigation §21.62.....	16

I. INTRODUCTION

Plaintiffs¹ Asha Smith and Emma Nedley (collectively, “Plaintiffs”) move under Rules 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure for an award of attorneys’ fees, reimbursement of expenses, and approval of a Service Award for each Plaintiff in connection with the proposed class action Settlement entered into with Defendant University of Pennsylvania (“Defendant” or “Penn”). The Court preliminarily approved the Settlement on October 5, 2022. ECF No. 103. Contemporaneously with this motion, Plaintiffs are filing a motion for Final Approval of the Settlement and certification of the Settlement Class under Rule 23(e).

Counsel for Plaintiffs have not received any compensation for their prosecution of this Litigation, which required more than two-and-a-half years of vigorous advocacy. Plaintiffs prevailed in part on the motion to dismiss. Further, the parties commenced fact discovery, and Plaintiffs’ Counsel reviewed thousands of pages of party and third-party documents, defended depositions of Plaintiffs, moved for class certification, and vigorously opposed Penn’s motion for summary judgment. Under the Settlement, Penn will pay \$4,500,000.00 into a non-reversionary fund in exchange for a release of all claims against Defendant arising from the switch to online remote-only education and services caused by the Covid-19 pandemic in the Spring 2020 semester. If approved, the Settlement will resolve all pending claims in this consolidated action and provide monetary relief to a class of students enrolled during the Spring 2020 semester. The Settlement is an excellent result in a complex, high-risk, hard-fought case that provides a substantial financial recovery for all such students. Thus, Class Counsel respectfully request that the Court approve an award of 33 1/3% of the Settlement Fund (including any interest earned thereon), or approximately

¹ Unless otherwise defined herein, all capitalized terms have the same definitions as those set forth in the Settlement Agreement and Release (“Agreement” or “SA”) (ECF No. 97-1).

\$1,500,000.00 in attorneys' fees, \$16,429.48 as reimbursement of litigation expenses, and \$20,000 as Service Awards for Plaintiffs. Where Plaintiffs' Counsel's lodestar is approximately \$1,118,625.80, this represents a 1.34 multiplier, which supports the reasonableness of the requested attorneys' fee award.

As discussed below and in the Joint Declaration,² it is respectfully submitted that the requested fee is reasonable when considered under the Third Circuit applicable standards, particularly in view of the substantial risks of pursuing this Litigation, considerable litigation efforts, and results achieved for the Settlement Class. Moreover, the expenses requested are reasonable in amount and were necessarily incurred for the successful prosecution of this Litigation. Finally, the requested Service Award for each Plaintiff is customary and warranted to compensate the Plaintiffs for their participation in this Litigation on behalf of the Settlement Class. Thus, Class Counsel respectfully request that the Court award 33 1/3% of the Settlement Fund (including interest earned thereon) as attorneys' fees, \$16,429.48 as reimbursement of litigation expenses, and \$20,000 as Service Awards for Plaintiffs.

II. ARGUMENT

A. The Percentage of the Recovery Approach Is the Proper Standard to Apply in Awarding Attorneys' Fees in Common Fund Cases

It is well settled that attorneys who represent a class and whose efforts achieve a benefit for class members are "entitled to a reasonable attorney's fee from the fund as a whole" as compensation for their services. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Rule 23 also permits a court to award "reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). As courts recognize, in addition to providing just

² All "Joint Declaration" or "Joint Decl." references are to the Joint Declaration of Edward Ciolko and Roy Willey concurrently filed in support hereof and in support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

compensation, awards of fair attorneys' fees from a common fund "ensur[e] that competent counsel continue to be willing to undertake risky, complex, and novel litigation." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000).³

In awarding attorneys' fees, the Third Circuit has held that such requests are "generally assessed under one of two methods: the percentage-of-recovery [] approach or the lodestar scheme." *Sullivan v. DB Invs. Inc.*, 667 F.3d 273, 330 (3d Cir. 2011). The percentage-of-recovery approach "applies a certain percentage to the settlement fund," while the lodestar method "multiplies the number of hours class counsel worked on a case by a reasonable hourly billing rate for such services." *Id.* (quoting *In re Diet Drugs*, 582 F.3d 524, 540 (3d Cir. 2009)). The percentage-of-recovery approach is more appropriate where, as here, there is a common fund. *In re AT & T Corp., Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006) (stating that the percentage method is "generally favored" in common fund cases "because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure" (internal quotations omitted)); *see also Harshbarger v. Penn Mut. Life Ins. Co.*, No. 12-6172, 2017 WL 6525783, at *2 (E.D. Pa. Dec. 20, 2017) ("The reasonableness of attorneys' fee awards in common fund cases . . . is generally evaluated using a [percentage of recovery] approach followed by a lodestar cross-check."). The ultimate determination of the proper amount of attorneys' fees, of course, rests within the sound discretion of the district court. *See Gunter*, 223 F.3d at 195; *AT & T*, 455 F.3d at 168-69.

Class Counsel respectfully submit that their requested fee is fair and reasonable under the percentage-of-the-fund method, as supported by the lodestar cross check, as discussed below.

³ Unless otherwise indicated, internal citations are omitted.

B. The Requested Fee Is Fair and Reasonable Under the Third Circuit's *Gunter/Prudential* Factors

The Third Circuit requires district courts to consider the following ten factors, commonly referred to as the *Gunter/Prudential* factors, when evaluating whether a fee request is fair and reasonable:

(1) the size of the fund created and the number of beneficiaries, (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel, (3) the skill and efficiency of the attorneys involved, (4) the complexity and duration of the litigation, (5) the risk of nonpayment, (6) the amount of time devoted to the case by plaintiffs' counsel, (7) the awards in similar cases, (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations, (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained, and (10) any innovative terms of settlement[.]

Diet Drugs, 582 F.3d at 541. These fee award factors “need not be applied in a formulaic way[,] . . . and in certain cases, one factor may outweigh the rest.” *Gunter*, 223 F.3d at 195 n.1. Each of these factors supports the requested fee.

1. The Size and Nature of the Common Fund Created and Number of Persons Benefited by the Settlement

Courts have consistently recognized that the result achieved is a major factor to be considered in awarding fees. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (“the most critical factor is the degree of success obtained”); *In re Viropharma Inc. Sec. Litig.*, No. 12-2714, 2016 WL 312108, at *16 (E.D. Pa. Jan. 25, 2016). If approved, the Settlement will provide substantial monetary relief to a nationwide class of harmed students. *See Cowen Decl.*⁴ . The Settlement exceeds the per-student amounts obtained for class members in approved settlements in at least one other similar case. Based on a review of AB Data's data, the projected payments to

⁴ Declaration of Mark Cowen of AB Data, attached hereto as Exhibit B. (“Cowen Decl.”)

Settlement Class Members likely will be around \$110 per student. *See* Cowen Decl.⁵. This relief compares favorably with settlements negotiated by plaintiffs in the *Rutgers*⁶ class action. That settlement—which received final approval—provided students with approximately \$77.50 each.⁷ Further, as held in *Choi et al. v. Brown University*, No. 1:20-cv-00191 (D.R.I.) (pending final approval of settlement), the settlement fund provided each settlement class member with payment of approximately \$104).⁸

Moreover, there many other settlements that support the proposed Settlement. 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.) (\$1.3MM 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

⁵ Declaration of Mark Cowen of AB Data, the Settlement Administrator, attached hereto as Exhibit N. (“Mark Cowen of A.B. Data Decl.”)

⁶ *Rocchio, et al. v. Rutgers, The State University of New Jersey*, Dkt. No. L-003039-20, in the Superior Court of New Jersey, Middlesex County

⁷ (amount calculated by dividing the common fund of \$5,000,000 by the number of class members—64,533—before distribution of settlement administrator expenses, attorneys’ fees and costs, and service award to plaintiff) *See* Settlement Agreement found at: <https://www.rutgersstudentfeesettlement.com/documents>.

⁸ As is the case here, both the Brown and Rutgers settlements involve a release of all claims for both tuition and fee refunds. To the best of undersigned counsel’s knowledge, this will be the third settlement of COVID-19 tuition and fee refund claims in which each member of the settlement class will receive a pro rata portion of the settlement benefit. To be sure, other class settlements involving COVID-19 tuition and refund claims exist but are not comparable because those settlements either (1) failed to disclose the amount each settlement class member would receive or (2) distributed settlement benefits pursuant to formulas resulting in students at the same university receiving payments of varying amounts.

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.

In light of the aforementioned settlements, both those approved and not-yet approved, and the Settlement Class's overly favorable reaction supports that the Settlement is an excellent result. And further, the proposed Settlement's value falls directly in line with other mentioned settlements. As such, the proposed Settlement should be approved.

2. The Absence of Objections to the Settlement and Requested Fee

The deadline for Settlement Class Members to object to or opt-out of the Settlement is December 19, 2022. ECF No. 103 at 27. The Settlement Administrator fully implemented the Court-approved Notice Program, sending Notice directly to approximately 30,000 Settlement Class Members and creating the Settlement Website and toll-free assistance number. *See* Cowen Decl. at ¶ 10. The Notice apprised Settlement Class Members that Plaintiffs' Counsel would seek an award "of not more than one-third of the Settlement" as well as reimbursement for all expenses. ECF No. 97-2 at 17; *see also* ECF No. 97-4. The Notice also advised Settlement Class Members how and when to object to or opt out of the Settlement. *Id.* at 12-15.

As the Third Circuit has noted, "[t]he vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement[.]" *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001). Plaintiffs reserve the right to respond to any objection received.

3. The Skill and Efficiency of Attorneys Involved

Plaintiffs' Counsel's skill and efficiency is "measured by the 'quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and

expertise of counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.” *Viropharma*, 2016 WL 312108, at *16.

Plaintiffs’ Counsel have extensive and significant experience in the field of class action litigation, and have significant experience in Covid-19 litigation analogous to this action. The favorable Settlement is attributable, in large part, to the diligence, determination, hard work, and skill of Plaintiffs’ Counsel, who developed, litigated, and successfully settled this Litigation. As set forth in the Joint Declaration, Plaintiffs’ Counsel are highly experienced attorneys in this type of litigation and have a strong track record of leading these relatively unique cases and obtaining favorable results for plaintiffs. Joint Decl. ¶74. These skills were put to the test in this Litigation, as it involved novel issues and a defense team led by equally skilled and experienced attorneys.

In all phases of the case, Plaintiffs’ Counsel performed with a high level of skill. Though this Litigation never reached disposition at the class certification stage, Plaintiffs’ Counsel’s work on motions practice and extensive discovery led the parties to engage in two mediation sessions overseen by Honorable Diane M. Welsh (Ret.) to reach the final Settlement. Plaintiffs’ Counsel’s skill and experience in the areas of complex Covid-19 matters, as well as in large-scale class actions, were directly responsible for the favorable Settlement. Specifically, Class Counsel crafted a novel and efficient case management schedule that allowed development of discrete factual and legal issues that drove the litigation forward and permitted the parties to refine their positions so as to facilitate productive settlement negotiations. Joint Decl. ¶ 16 This also set the stage for a class certification motion that was pending when the case settlement. *Id.* Plaintiffs’ Counsel developed a productive relationship with opposing counsel and worked collaboratively with them to streamline and appropriately sequence discovery, motions practice and mediation efforts. Plaintiffs’ Counsel also worked efficiently among themselves, coordinating the work to avoid

duplication or overlap and their lodestar reflects the intensity with which this Litigation was handled, as expected in a consolidated, and highly complex, class action.

The quality and vigor of opposing counsel is also relevant in evaluating the quality of the services rendered by Plaintiffs' Counsel. *See, e.g., In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000). Here, Penn was represented by undeniably experienced and skilled attorneys at a prominent, nationally recognized law firm, Hogan Lovells US LLP. The ability of Plaintiffs' Counsel to obtain a favorable outcome for the Settlement Class in the face of formidable legal opposition further confirms the quality of Plaintiffs' Counsel's representation and supports the reasonableness of the requested attorneys' fee award.

4. The Complexity and Duration of the Litigation

There is no question that during the more than two-and-a-half years of litigation, Plaintiffs faced, and Plaintiffs' Counsel resisted, vociferous defenses to liability and damages. Although Plaintiffs prevailed in part at the motion to dismiss stage, Penn continues to vehemently deny liability and there is no assurance that Plaintiffs would have prevailed at class certification or summary judgment. Covid-19 tuition and fee litigation faces significant legal hurdles related to, *inter alia*, causation and damages. In short, this was not a simple, familiar type of case with a clear path to liability and judgment, and this Litigation could have continued for several years had it not settled.

Recent precedents in similar cases have had mixed outcomes for plaintiff students. Some similar cases have ended in settlements, such as *Rutgers*, *Southern New Hampshire*, *Barry*, and *Columbia*,⁹ but others have been dismissed in whole or substantial part, *e.g., Univ. of Pittsburgh*

⁹ *Rocchio, et. al. v. Rutgers*, Case No. MID-L-003039-20; *Wright v. S. New Hampshire Univ.*, No. 20-cv-609-LM, 2021 WL 1617145, at *2 (D.N.H. Apr. 26, 2021); *also Rosado v. Barry Univ., Inc.*, No. 1:20-cv-21813-JEM, Order, (S.D.N.Y. Mar. 30, 2021); *In Re Columbia University Tuition Refund Action*, Case No.: 1:20-cv-03208 (S.D.N.Y. 2021).

and *Temple Univ.*¹⁰, and class certification has been denied in others. *E.g., Evans v. Brigham Young Univ.*, No. 1:20-cv-100, 2022 WL 596862 (D. Utah Feb. 28, 2022) (denying class certification because class was not ascertainable). Plaintiffs' Counsel worked diligently to achieve a significant result for the Settlement Class in the face of very real litigation risks. Accordingly, this factor supports the reasonableness of the requested attorneys' fee award.

5. The Risk of Non-Payment

“Courts routinely recognize that the risk created by undertaking an action on a contingency fee basis militates in favor of approval.” *In re Schering-Plough Corp. Enhance ERISA Litig.*, No. 08-1432 (DMC)(JAD), 2012 WL 1964451, at *7 (D.N.J. May 31, 2012). Plaintiffs' Counsel undertook this action on an entirely contingent fee basis, shouldering the risk that this Litigation would yield no recovery and leave them wholly uncompensated for their time, as well as for their out-of-pocket expenses. A dispositive ruling at any stage of this prolonged Litigation could mean a zero recovery for the Settlement Class. Penn asserted several substantial defenses that could have eliminated any possibility of recovery for the Settlement Class, as well as non-payment for Plaintiffs' Counsel. Courts within this Circuit have accordingly recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. *See In re Ocean Power Techs., Inc., Sec. Litig.*, No. 3:14-CV-3799, 2016 WL 6778218, at *28 (D.N.J. Nov. 15, 2016).

6. The Amount of Time Devoted to the Litigation by Plaintiffs' Counsel

Plaintiffs' Counsel have received no compensation for their efforts during the course of this Litigation for more than two-and-a-half years. They risked non-payment of \$16,429.48 in out-of-

¹⁰ *Hickey v. Univ. of Pittsburgh*, 535 F. Supp. 3d 372 (W.D. Pa. 2021).; *Ryan v. Temple Univ.*, 535 F. Supp. 3d 356 (E.D. Pa. 2021).

pocket expenses and for the nearly 2100 hours they worked in this Litigation, knowing that if their efforts were not successful, no fee would be paid. Joint Decl. ¶ 77. Plaintiffs' Counsel vigorously litigated and defended this Litigation. This includes, *inter alia*, the time spent in the initial investigation of the case; researching complex issues of law; preparing and filing the complaints; researching and briefing the issues in connection with Penn's motion to dismiss; drafting, responding to, and meeting and conferring about objections to discovery; working with experts; reviewing and analyzing documents produced by Penn; defending depositions; preparing and moving for class certification; defending against Penn's motion for summary judgment; and preparing for and participating in mediations. *Id.* at ¶ 89. At all times, Plaintiffs' Counsel conducted their work with skill and efficiency, conserving resources and avoiding duplication of effort. The foregoing unquestionably represents a substantial commitment of time, personnel, and out-of-pocket expenses by Plaintiffs' Counsel, while taking on the substantial risk of recovering nothing for their efforts. The financial risk to Plaintiffs' Counsel was significant. This factor thus supports the requested attorneys' fee award.

7. The Fee Request Is Comparable to Awards in Similar Cases

The Third Circuit has observed that fee awards generally range from 19% to 45% of the settlement fund when the percentage-of-the-fund method is used. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995); *McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 653 (E.D. Pa. 2015). The percentage requested here, 33 1/3%, is well within that range and comparable percentages often have been awarded in the Third Circuit. *See, e.g., In re Cigna-Am. Specialty Health Admin. Fee Litig.*, No. 2:16-cv-03967-NIQA, 2019 WL 4082946, at *15 (E.D. Pa. Aug. 29, 2019) (approving fee award of one-third of settlement fund); *Huffman v. Prudential Ins. Co. of Am.*, No. 2:10-CV-05135, 2019 WL 1499475, at *7 (E.D. Pa. Apr. 5, 2019) (explaining that the award of one-third of the fund for attorneys' fees is consistent

with fee awards in a number of recent decisions in the district); *Brown v. Progressions Behavioral Health Servs., Inc.*, No. 16-6054, 2017 WL 2986300, at *6 (E.D. Pa. July 13, 2017) (approving common fund fee of 33%); *In re Merck & Co., Inc. Vytorin ERISA Litig.*, No. 08-CV-285 (DMC), 2010 WL 547613, at *9 (D.N.J. Feb. 9, 2010) (approving common fund fee of 33 1/3%).

In addition to the cases listed above, three more directly analogous cases have recently been settled. All of which deal with almost identical facts and virtually the same settlements. The first of which is *Rocchio et al. v. Rutgers, The State University of New Jersey*, No. MID-L-003039-20 (N.J. Super. Ct.). The court in the above matter allowed for similar fees as put forth herein. The second analogous case is *Choi et al. v. Brown University*, No. 1:20-cv-00191 (D.R.I.), which allotted a similar portion of the settlement fund to pay attorney's fees. Moreover, the court in *Fittipaldi v. Monmouth University*, No. 3:20-cv-05526 (D. N.J.) allowed for one-third of the settlement fund to be allocated to attorneys' fees.

8. The Settlement Benefits Are Attributable Solely to the Efforts of Plaintiffs' Counsel

Plaintiffs' Counsel were the only ones investigating and pursuing the claims at issue in this Litigation on behalf of students, and they alone actively litigated the proceedings. This factor thus supports the fee request. *See Harshbarger*, 2017 WL 6525783, at *5 (“Because Class Counsel were the only ones pursuing the claims at issue in this case, this factor weighs in favor of approval.”).

9. The Percentage Fee Approximates the Fee that Would Have Been Negotiated in the Private Market

Private contingency fee agreements customarily range between 30% and 40% of the recovery. *See Ocean Power*, 2016 WL 6778218, at *29 (“If this were an individual action, the customary contingent fee would likely range between 30 and 40 percent of the recovery.”); *Wallace v. Powell*, 288 F.R.D. 347, 375 (M.D. Pa. 2012) (same); *Ikon*, 194 F.R.D. at 194 (same).

Here, Plaintiffs' Counsel's requested percentage of 33 1/3% is commensurate with customary percentages in private contingent fee agreements. Consequently, this factor also supports the requested fee.

10. Innovative Terms of the Settlement

The Settlement does not contain any particularly "innovative" terms – beyond being a quality part of an initial wave of settlements of a unique type of university/student breach of contract action. This factor is thus neutral as it neither weighs in favor of nor against approval.

On balance, the *Gunter/Prudential* factors demonstrate that Plaintiffs' Counsel's requested fee is reasonable and, therefore, should be approved.

C. The Lodestar Cross-Check Confirms the Fee Request Is Reasonable

The Third Circuit has suggested that fees awarded under the percentage method be cross-checked against the lodestar. *See, e.g., Gunter*, 223 F.3d at 195 n.1. The purpose of that cross-check is to ensure that the percentage approach does not result in an "extraordinary" lodestar multiple or a windfall. *See Cendant*, 264 F.3d at 285. The Third Circuit has stated that a lodestar crosscheck entails an abridged lodestar analysis that requires neither "mathematical precision nor bean-counting." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005). The Court "need not" receive or "review actual billing records" when conducting this analysis. *Id.* at 307.

Under the lodestar method, a court begins the process of determining the reasonable fee by calculating the "lodestar"; *i.e.*, "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433; *see also McKenna v. City of Phila.*, 582 F.3d 447, 455 (3d Cir. 2009). Once the lodestar is determined, the court must then determine whether additional adjustments are appropriate. *McKenna*, 582 F.3d at 455. A reasonable hourly rate in the lodestar calculation is "[g]enerally . . . calculated according to the prevailing market rates in the relevant community[.]" taking into account "the experience and skill

of the . . . attorneys and compar[ing] their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d Cir. 2001).

Plaintiffs’ Counsel’s combined “lodestar” is approximately \$1,118,625.80 for work throughout the litigation, meaning that the requested fee, if awarded, would represent a “multiplier” of 1.34 of Plaintiffs’ Counsel’s combined lodestar. Joint Decl. ¶84. Plaintiffs’ Counsel’s lodestar represents nearly 2032.1 hours of work at their current hourly rates.¹¹ *Id.* Plaintiffs’ Counsel’s rates range from \$676 to \$950 for partners and \$208 to \$500 for other attorneys and support staff. *Id.* ¶84. The reasonableness of Plaintiffs’ Counsel’s rates is supported by Plaintiffs’ Counsel’s declarations, which establish that the rates are the same as their standard hourly rates charged to paying clients on non-contingent matters and are in accord with the prevailing rates for class action and complex commercial litigation in the relevant legal markets, where the principal attorneys are respectively located, and in consideration of the fact that all of Plaintiffs’ Counsel maintain national practices. *Id.* These rates have been approved in other class action cases. Joint Dec. ¶ 84 *see also Morrow v. Ann, Inc.*, No. 1:16-cv-03340, ECF Nos. 70-71, 94 (S.D.N.Y.) (approving Lynch Carpenter’s rates); *In re Vizio, Inc. Consumer Privacy Litig.*, No. 8:16-ml-02693, ECF Nos. 308-11, 308-16, 308-18, 308-19, 337 (C.D. Cal. Apr. 12, 2019) (approving Lynch Carpenter’s rates). Further, Plaintiffs’ Counsel’s rates are within the ranges that have been approved by other district courts in this Circuit overseeing class settlements. *See Cigna-*

¹¹ The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Mo. v. Jenkins by Agyei*, 491 U.S. 274, 283-84 (1989); *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744, at *33 n.28 (D.N.J. Oct. 1, 2013) (citing *Jenkins*, 491 U.S. at 283-88); *Ikon*, 194 F.R.D. at 195 (“attorney’s hourly rates were appropriately calculated by reference to current rather than historic rates”).

Am. Specialty, 2019 WL 4082946, at *15 (approving hourly rates between \$175 and \$995); *Krimes v. JPMorgan Chase Bank, N.A.*, No. 15-5087, 2017 WL 2262998, at *10 (E.D. Pa. May 24, 2017) (approving hourly rates ranging from \$125 (for a paralegal) to \$750 (for a senior partner)); *Viropharma*, 2016 WL 312108, at *18 (approving hourly rates ranging from \$350 to \$925); *Moore v. GMAC Mortg.*, No. 07-4296, 2014 WL 12538188, at *2 (E.D. Pa. Sept. 19, 2014) (approving hourly rates ranging from \$325 to \$860); *Merck & Co.*, 2010 WL 547613, at *13 (approving hourly rates ranging from \$320 to \$835). Given Plaintiffs' Counsel's experience, work, and the complex and relatively specialized nature of this Litigation, their rates are reasonable.

Plaintiffs' Counsel in this Litigation have submitted summaries of the number of hours expended by attorneys and staff and descriptions of the type of work each firm performed. Joint Dec. ¶ 84 The hours billed were spent drafting pleadings and briefs, litigating numerous discovery disputes, defending depositions, responding to discovery requests, producing documents, reviewing document productions, working with experts, and negotiating the Settlement. *Id.*¹² Class Counsel also collected from all Plaintiffs' Counsel detailed billing records and have reviewed such records to make sure they are: (1) consistent with the summaries provided; and (2) reflective of and consistent with the work performed in the case. Joint Decl. ¶ 84. The tasks performed are typical in litigation and were necessary to the successful prosecution and resolution of the claims against Penn.

¹² Moreover, additional work will be required of Class Counsel on an ongoing basis, including: correspondence with Settlement Class Members; preparation for, and participation in, the Final Approval Hearing; supervision of the Claims Administration process conducted by the Settlement Administrator; and supervision of the distribution of the Settlement Fund to Settlement Class Members. However, Class Counsel will not seek payment for this additional work. Plaintiffs' Counsel are able to provide itemized billing records setting forth time spent on particular tasks if the Court so requests.

The requested attorneys' fee of \$1,500,000.00 represents a multiplier of 1.34 of Plaintiffs' Counsel's lodestar. Courts often approve fees in class actions that correspond to multiples of one to four times lodestar. *See, e.g., Martin v. Foster Wheeler Energy Corp.*, No. 3:06-CV-0878, 2008 WL 906472, at *8 (M.D. Pa. Mar. 31, 2008) ("Lodestar multiples of less than four (4) are well within the range awarded by district courts in the Third Circuit."); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998) ("[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied" (alteration in original)). Given the quality of Plaintiffs' Counsel's work and results achieved in these circumstances, the lodestar comparison supports the reasonableness of the requested fee award.

D. Plaintiffs' Counsel's Request for Reimbursement of Expenses Is Reasonable

"Counsel in common fund cases is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case." *Ocean Power*, 2016 WL 6778218, at *29. Plaintiffs' Counsel seek reimbursement of \$16,429.48 for the reasonable expenses incurred to advance this Litigation. Joint Decl. ¶ 87. Plaintiffs' Counsel have scrupulously documented their expenses, by category, in their respective accompanying declarations. Joint Decl. ¶ 87 The schedule of expenses shows that Plaintiffs' Counsel litigated the case efficiently, with no unreasonable or unjustified expenditures. *Id.* Moreover, the expenditures were of the type typically charged to hourly paying clients. *Id.*

As explained in the Joint Declaration, a vast amount of fact discovery was taken in this Litigation and experts were engaged to consult on liability and develop a class-wide damages model in preparation for the filing of motions for class certification and summary judgment and to facilitate the mediation process. Joint Decl. ¶88. Thus, discovery-related fees represent approximately 2.5% of the expenses incurred, travel expenses to attend depositions, mediations,

and hearings represent approximately 23.4%, *Id.* ¶88. The remainder of the expenses include online legal and factual research, mediators' fees, court reporting fees, transcript costs, postage, and photocopying. *Id.* Such categories of expenses are commonly reimbursed in common fund cases. *See In re Wilmington Tr. Sec. Litig.*, No. 10-cv-0990-ER, 2018 WL 6046452, at *10 (D. Del. Nov. 19, 2018) (approving expenses related to management of documents, expert fees, computerized research, photocopying, transcripts, postage, travel, and discovery expenses); *Ocean Power*, 2016 WL 6778218, at *29 (approving expenses for costs of plaintiff's private investigator, photocopying, postage, messengers, filing fees, travel, long distance telephone, telecopier, mediation fees, and the fees and expenses of plaintiff's damages expert). In sum, all of Plaintiffs' Counsel's expenses, in an aggregate amount of \$16,429.48, are typical in litigation, were necessary to the successful prosecution and resolution of the claims against Penn, and should be approved.

E. The Requested Service Awards Are Reasonable

The purpose of service awards is to compensate named plaintiffs for the services they provided, risks they incurred during the course of a class action, and to reward their public service for contributing to the enforcement of the law. *See Sullivan*, 667 F.3d at 333 n.65; *see also* Annotated Manual for Complex Litigation §21.62 n.971 (4th ed. 2019) (incentive awards may be "merited for time spent meeting with class members, monitoring cases, or responding to discovery").

The Agreement permits Plaintiffs to seek Service Awards of \$10,000 to each of the Plaintiffs, or a total of \$20,000, to compensate them their efforts in this Litigation and commitment on behalf of the Settlement Class. SA ¶ 53. Any Service Awards approved by the Court will be paid from the Settlement Fund. *Id.* Plaintiffs responded to numerous document requests, reviewed the complaints and certain briefs, prepared and sat for depositions, and participated in the settlement discussions that resulted in the excellent recovery to the Settlement Class. Joint Decl.

¶ 89. Plaintiffs were highly cooperative in making themselves available for document production and/or deposition testimony. *Id.* ¶ 89. Additionally, Plaintiffs actively communicated with Plaintiffs' Counsel for purposes of advising and consulting with regard to the consequences of the transition to online remote-only education and services and the resulting damages. *Id.* These communications were crucial to the development of a workable damage model to facilitate the mediation process. *Id.* Other courts in this Circuit have routinely approved service awards in amounts similar to those requested for each Plaintiff here. *See Wilmington*, 2018 WL 6046452, at *10 (approving service awards of greater than \$7,500 to plaintiffs whose employees were active in the litigation); *Brown*, 2017 WL 2986300, at *7 (awarding \$10,000 to each named plaintiff because they “were actively involved in the litigation since before it was commenced, they provided the information and documents that formed the basis for the lawsuit, . . . and because the service award payments represent a small fraction of the \$542,586 Settlement Fund”); *Barel v. Bank of Am.*, 255 F.R.D. 393, 403 (E.D. Pa. 2009) (\$10,000 award to each class representative); *Bredbenner v. Liberty Travel, Inc.*, No. 09-905 (MF), 2011 WL 1344745, at *24 (D.N.J. Apr. 8, 2011) (same).

Thus, the requested Service Awards should be approved.

III. CONCLUSION

Plaintiffs respectfully request that the Court grant Plaintiffs' motion for an award of 33 1/3% of the Settlement Fund (including interest earned thereon) as attorneys' fees, \$16,429.48 as reimbursement of litigation expenses, and \$20,000 as Service Awards for Plaintiffs.

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Respectfully submitted,

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