**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF MISSOURI**

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| DYLAN MARTIN, on behalf of himself and all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>LINDENWOOD UNIVERSITY,<br><br>Defendant. | Civil Action No. 4:20-cv-01128-RLW<br><br>Hon. Ronnie L. White |

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S ASSENTED TO MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

Dated: January 5, 2022

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## INTRODUCTION

In this putative class action, Plaintiff Dylan Martin ("Plaintiff") alleges that Defendant Lindenwood University ("LU" or "Defendant") breached a contractual agreement to provide an in-person educational experience when it transitioned Spring Semester 2020 classes to remote learning in light of the COVID-19 pandemic. Plaintiff seeks a variety of damages, including a *pro rata* refund for himself and all other similarly situated students for services he and class members paid for that LU did not provide. Since filing the Complaint, the Parties have been involved in extensive settlement discussions and disclosures, which ultimately culminated in a mediation with The Honorable Wayne Andersen (Ret.), formerly of the Northern District of Illinois, and now with JAMS Chicago. The mediation was successful and the Parties have negotiated an exceptional agreement that delivers immediate relief to class members. The resulting Class Action Settlement Agreement (the "Settlement") creates a $1,650,000 settlement fund, which will be used to pay all approved claims by class members, notice and administration expenses, Court-approved incentive awards to Plaintiff, and attorneys' fees and costs to proposed Class Counsel to the extent awarded by the Court. Moreover, the approximately 6,000 Settlement Class Members will automatically receive a *pro rata* settlement payment as a percentage of the total amount of tuition and fees he or she paid to LU for the Spring Semester 2020, including sub-terms thereof, unless he or she excludes him or herself from the Settlement. In other words, Settlement Class Members will not be required to submit a claim form in order to receive their *pro rata* settlement payment.

This Court should preliminarily approve the proposed Settlement in accordance with the Eighth Circuit's stance of "strongly favor[ing] settlements." *Liddell by Liddell v. Bd. of Educ. Of City of St. Louis*, 126 F.3d 1049, 1056 (8th Cir. 1997) (quoting *Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1*, 921 F.2d 1371, 1383 (8th Cir. 1990)). The motion and

accompanying exhibits demonstrate that the Settlement represents the optimal outcome, especially given the substantial risks and delays associated with continued litigation. The Court should therefore authorize notice to Class Members for their feedback on the Settlement. *See, e.g.*, Exhibits A-C to Exhibit 1 of the Marchese Declaration. (Proposed Class Notices).[1]

To effectuate the Settlement and resolution of this action, Plaintiff respectfully requests that the Court enter the Proposed Order Granting Preliminary Approval and preliminarily certify the proposed Class for settlement purposes under Rule 23 (b)(3) of the Federal Rules of Civil Procedure; appoint Bursor & Fisher, P.A. as Class Counsel and Plaintiff Dylan Martin as Settlement Class Representative; preliminarily approve the Settlement Agreement as potentially coming within the range of reasonableness; approve the dissemination of the Class Notice to Class Members; and schedule a final approval hearing.

## I. FACTUAL AND PROCEDURAL BACKGROUND

### A. Factual Background

Plaintiff and Class Members are current and/or former students of Defendant Lindenwood University. Plaintiff alleges that "Defendant has not delivered the educational services, facilities, access and/or opportunities that Mr. Martin and the putative class contracted and paid for [when it transitioned Spring Semester 2020 classes to remote learning in light of the COVID-19 pandemic]." Complaint ¶ 6. Plaintiff further alleges that "[t]hrough the admissions agreement and payment of tuition and fees, Plaintiff and each member of the Class entered into a binding contract with Defendant." *Id.* ¶ 39. "As part of the contract, and in exchange for the aforementioned consideration, Defendant promised to provide certain services, all as set forth," in the Complaint. *Id.* ¶ 40. "Plaintiff, Class, and Subclass members fulfilled their end of the bargain when they paid monies due for Spring Semester 2020 tuition. Tuition and fees for

[1] Unless otherwise noted, all "Ex. __" citations are to the Declaration of Joseph I. Marchese ("Marchese Decl."), filed concurrently herewith.

Spring Semester 2020 was intended to cover in-person educational services from January through May 2020. In exchange for tuition and fee monies paid, Class members were entitled to in-person educational facilities and services through the end of the Spring Semester. But those services have not been provided and/or have diminished in value." *Id.*

Plaintiff also alleges that as "a result of the closure of Defendant's facilities, Defendant has not delivered the educational services, facilities, access and/or opportunities that Mr. Martin and the putative class contracted and paid for." *Id.* ¶ 6. Plaintiff and putative class members allegedly "lost the benefit of the education for which they paid, and/or services or facilities for which their fees were paid, without having their tuition and fees refunded to them." *Id.* ¶ 1. LU has denied that it breached any contract, or that any such contract exists, with its students or that it was unjustly enriched as a result of the change in learning modalities during the Spring 2020 Semester.

**B. Procedural History**

Plaintiff filed his Complaint on August 24, 2020, which is the operative complaint in this matter. ECF No. 1. On October 30, 2020, Defendant filed a motion to dismiss Plaintiff's Complaint, and its accompanying memorandum of law. ECF No. 9. On November 13, 2020, Plaintiff filed his opposition to Defendant's motion to dismiss, which comprised of a 15-page memorandum of law. ECF No. 11. On November 23, 2020, Defendant filed its reply memorandum of law in support of its motion to dismiss. ECF No. 13. On July 21, 2021, the Court denied Defendant's motion in part, and granted it in part by dismissing the conversion claim. ECF No. 27.

**C. Settlement**

The Parties are mindful that, as with any litigation, there is significant risk to both sides. For this reason, from the outset of the case, the Parties engaged in direct communications, and as

part of their obligations under Fed. R. Civ. P. 26, discussed the prospect of early resolution. To that end, the Parties exchanged relevant information surrounding the alleged claims in furtherance of resolving the matter. Ultimately, after Defendant's motion to dismiss had been denied, the Parties agreed to participate in a mediation with former United States District Judge Wayne Andersen (of the U.S. District Court for the Northern District of Illinois), who is a neutral mediator affiliated with JAMS Chicago. Marchese Decl. ¶ 5. In advance of this mediation, the Parties exchanged formal and informal discovery, including discovery related to the class size and total out-of-pocket amount paid for in-person tuition and fees for the Spring Semester 2020. Marchese Decl. ¶¶ 6, 9 & 10. The parties also provided lengthy, detailed mediation statements, airing their respective legal arguments and theories on potential damages. *Id.* ¶ 6. Given that this information was the same or largely similar to discovery that would be produced in full formal discovery related to class certification and summary judgment, the Parties were able to assess the strengths and weaknesses of their cases sufficiently. *Id.*

On September 23, 2021, the Parties participated in a full-day mediation before Judge Andersen. Marchese Decl. ¶ 7. At the conclusion of the mediation, the Parties began working on finalizing the details of a Term Sheet, which was fully executed on November 4, 2021. *Id.*

## II. KEY TERMS OF THE SETTLEMENT

The key terms of the Class Action Settlement Agreement ("Settlement"), attached as Exhibit A, are briefly summarized as follows:

### A. Class Definition

The "Settlement Class" or "Settlement Class Members" is defined as:

> All people who paid Defendant tuition or fees in the Spring 2020 Semester (including in connection with any school terms or courses offered in the Spring 2020) for educational services that,

> absent the COVID-19 pandemic, would have been provided in-person, and whose tuition and fees have not been refunded.[2]

Settlement ¶ 1.29.

**B. Monetary Relief In The Form Of A Non-Reversionary Common Fund**

Each Settlement Class Member will automatically receive a *pro rata* Cash Award from the Settlement Fund. The *pro rata* Cash Award for each Settlement Class Member will be equal to that Settlement Class Member's Out-of-Pocket Percentage multiplied by the Available Settlement Fund. Payments to current students will be made via a credit to the student's institutional account with Defendant. If there is a positive balance when a student later leaves LU (for example, by graduating or withdrawing), then the positive balance will be paid to the student in the normal course of Defendant's operations. Payments to inactive students will occur in the following order and method: first, by reducing the student's debt to Defendant, if any, by the *pro rata* payment amount the student is entitled to; second, to the extent any remaining *pro rata* payment is due to the student after the debt reduction is made, then via check. The Notice will give Settlement Class Members the ability to opt to receive the Cash Award by check, Venmo, or PayPal, but in the event a Settlement Class Member does not select an option, the default payment method will be check mailed to the Settlement Class Member's last known address. Settlement ¶ 2.1(b). Settlement Class Members will not be required to submit a claim form in order to receive their *pro rata* Cash Awards.

**C. Release**

In exchange for the relief described above, the obligations incurred pursuant to this

[2] Excluded from the Settlement Class are (1) any Judge or Magistrate presiding over this Action and members of their families; (2) the Defendant, Defendant's subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendant or its parents have a controlling interest and their current or former officers, directors, agents, attorneys, and employees; (3) persons who properly execute and file a timely request for exclusion from the class; and (4) the legal representatives, successors or assigns of any such excluded persons.

Settlement Agreement shall be a full and final disposition of the Action and any and all Released Claims, as against all Released Parties. Settlement ¶ 3.1-3.2. Upon the Effective Date, the Releasing Parties, and each of them, shall be deemed to have, and by operation of the Final Judgment shall have, fully, finally, and forever released, relinquished, and discharged all Released Claims against the Released Parties, and each of them.

**D. Notice And Administration Expenses**

The Settlement Fund will be used to pay the cost of Settlement Administration Expenses, which includes sending the Notice set forth in the Agreement and any other notice as required by the Court, as well as all costs of administering the Settlement. Settlement ¶ 1.31.

**E. Incentive Award**

In recognition for his efforts on behalf of the Settlement Class, LU has agreed that Plaintiff Martin may receive, subject to Court approval, an incentive award of $5,000 from the Settlement Fund, as appropriate compensation for his time and effort serving as Class Representative and as a party to the Action. LU will not oppose any request limited to this amount. Settlement ¶ 8.3.

**F. Attorneys' Fees And Expenses**

LU has agreed that the Settlement Fund may also be used to pay Class Counsel reasonable attorneys' fees and to reimburse expenses in this action, in an amount to be approved by the Court. Settlement ¶ 8.1. Class Counsel has agreed to petition the Court for no more than one-third of the Settlement Fund. *Id*.

## ARGUMENT

### I. THE COURT SHOULD CERTIFY THE PROPOSED CLASS FOR PURPOSES OF SETTLEMENT, APPOINT PLAINTIFF AS SETTLEMENT CLASS REPRESENTATIVE, AND APPOINT BURSOR & FISHER, P.A. AS CLASS COUNSEL

#### A. General Standards

Before granting preliminary approval, the Court should determine whether the class proposed for settlement purposes is appropriate under Rule 23. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); *Manual* § 21.632. The practical purpose of certification is to facilitate notice of settlement terms to the class and provide them with the date and time of the final approval hearing. *See id.* at § 21.632; *see also In re Zurn Pex Plumbing*, 2012 WL 5055810, at *5 ("Conditionally certifying a class in connection with preliminary approval allows notice to the class.") (D. Minn. Oct. 18, 2012). The court may certify a class solely for purposes of settlement after making a "determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b)." *Simmons v. Enter. Holdings, Inc.*, 2012 WL 718640, at *1 (quoting *Manual* § 21.632) (E.D. Mo. Mar. 6, 2012).

Here, the action focuses on LU's common course of conduct in allegedly breaching a contract with students for an in-person educational experience for the Spring Semester 2020. Any issues regarding damages (which, as a general matter, are not a proper basis for denying certification) are fully resolved by the Settlement—which not only provides adequate collective relief but establishes a fair, equitable, and manageable basis for determining each Class Member's share.[3]

[3] While LU does not object to the Court granting the relief requested by Plaintiff's motion, it has reserved all of its rights regarding the propriety of certification. It does not agree or concede certification is appropriate except in connection with settlement. As part of the Settlement Agreement, the Parties have agreed a Settlement Class maybe certified, but that such certification shall not be binding or have any legal effect should the Settlement Agreement be terminated, the settlement ultimately not approved, or if the approval is reversed or modified on appeal.

### B. Rule 23(a) Requirements Are Satisfied

The four prerequisites of Rule 23(a) "are otherwise known as (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation." *In re Aquila ERISA Litig.*, 237 F.R.D. 202, 207 (W.D. Mo. 2006).[4] These requirements are easily met.

#### 1. Numerosity Is Satisfied

"Rule 23(a)(1) requires that the proposed class be 'so numerous that joinder of all members is impracticable.'" *In re Aquila ERISA Litig.*, 237 F.R.D. at 207 (quoting Fed. R. Civ. P. 23(a)(1)). Here, the settlement class consists of approximately 6,000 current and former students, so the numerosity requirement is easily satisfied. Marchese Decl. ¶ 9; *See Knowlton v. Anheuser-Busch Companies, LLC*, 2014 WL 2009076, at *2 (E.D. Mo. May 16, 2014) (certifying class of "[s]ome 800 persons" because "[r]equiring each of those individuals to bring his or her own legal action undoubtedly would be inconvenient and costly to both individuals and the legal system."); *Jones v. NovaStar Fin., Inc.*, 257 F.R.D. 181, 186 (W.D. Mo. 2009) (holding that class of over "one thousand persons" satisfied numerosity requirement); *Bradford v. AGCO Corp.*, 187 F.R.D. 600, 604 (W.D. Mo. 1999) ("This Court finds that a class of twenty to sixty-five members is sufficiently numerous under Rule 23.").

#### 2. Commonality Is Satisfied

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality is met where the issues raised have "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of litigation." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (emphasis in original). The

[4] In certifying a settlement class, the court is not required to determine whether the action, if tried, would present intractable management problems, "for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620.

threshold for commonality is low, requiring only that the issue "linking the class members is substantially related to the resolution of the litigation." *In re Zurn Pex Plumbing*, 2013 WL 716088, at *3 (internal citations and quotations omitted) (D. Minn. Feb. 27, 2013). That is, Plaintiff's "claims must depend on a common contention…that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2551. "[T]he presence of differing legal inquiries and factual discrepancies will not preclude class certification." *Glen v. Fairway Indep. Mortgage Corp.*, 265 F.R.D. 474, 478 (E.D. Mo. 2010).

Plaintiff believes this action presents many questions common to the Class, and answering each question will resolve an issue that is central to the validity of each one of the claims in one stroke. *See, e.g., Claxton v. Kum & Go, L.C.*, 2015 WL 3648776, at *3 (W.D. Mo. June 11, 2015) ("Here, there are multiple questions of law or fact common to the class—i.e. whether Defendant misrepresented the gasoline sold; whether the marketing/labeling of the gasoline was false, misleading, deceptive, or unfair; whether Defendant knew or should have known of the contamination prior to the relevant time period; whether the sale of contaminated fuel constituted a breach of an express or implied warranty; etc."). Plaintiff asserts common questions include: (a) whether Defendant accepted money from Class and Subclass members in exchange for the promise to provide services; (b) whether Defendant has provided the services for which Class and Subclass members contracted; (c) whether Class and Subclass members are entitled to a refund for that portion of the tuition and fees that was allegedly contracted for services that Defendant did not provide; (d) whether Defendant has unlawfully converted money from Plaintiff, the Class and Subclass; and (e) whether Defendant is liable to Plaintiff, the Class, and Subclass for unjust enrichment. *See also* Complaint ¶ 32. These common questions, which target the same alleged misconduct by LU, satisfy Rule 23(a)(2).

### 3. The Class Representative's Claims Are Typical Of The Class

"Typicality requires the plaintiff to show 'the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]'" *Claxton*, 2015 WL 3648776, at *3 (quoting Fed. R. Civ. P. 23(a)(3)). "The burden of demonstrating typicality is fairly and easily met so long as other class members have claims similar to the named plaintiff." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995); *accord In re Aquila ERISA Litigation*, 237 F.R.D. at 209. Typicality exists when there are "other members of the class who have the same or similar grievances as the plaintiff." *In re Zurn Pex Plumbing*, 2013 WL 716088 at *3. Class representatives "need not share identical interests with every class member, but only 'common objectives and legal and factual positions.'" *Claxton*, 2015 WL 3648776, at *3 (quoting *In re Uponor, Inc.*, 716 F.3d at 1064).

Here, Plaintiff asserts the Class Representative pursues the same claims as the Class based on the same legal theories and the same alleged course of conduct: that Plaintiff and Class Members paid Spring Semester 2020 tuition in exchange for an in-person educational experience that they did not fully receive. Because, Plaintiff believes, the Class Representative has experienced the same type of injury as the Class Members and proceed under the same legal theory, typicality is satisfied.

### 4. Rule 23(a)(4) And Rule 23(g) Are Satisfied Because Class Representative And Counsel Will Fairly And Adequately Protect The Class' Interests

The fourth and final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23 (a)(4). "The adequacy requirement is met where "1) the representatives and their attorneys are able and willing to prosecute the action competently and vigorously, and 2) each representative's interests are

sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge." *Barfield v. Sho-Me Power Elec. Co-op.*, 2013 WL 3872181, at *3 (W.D. Mo. July 25, 2013) (quoting *Carpe v. Aquila, Inc.*, 224 F.R.D. 454, 458 (W.D. Mo. 2004)). Adequacy focuses on whether Plaintiffs' attorneys are "qualified, experienced, and generally able to conduct the proposed litigation," and whether Plaintiff has "interests antagonistic to those of the class." *Claxton*, 2015 WL 3648776, at *4 (quoting *Lane v. Lombardi*, 2012 WL 5462932, at *3 (W.D. Mo. Nov. 8, 2012)).

First, Plaintiff asserts there are no conflicts between the Class Representatives and the Class. Throughout the pendency of this action, the Class Representative has adequately and vigorously represented his fellow Class Members. He has spent significant time assisting his counsel, providing information regarding LU's policies and practices, providing pertinent documents, and assisting in settlement negotiations. Marchese Decl. ¶ 16.

Second, Class Counsel is highly experienced and well-versed in complex class action litigation, including representing college students in other COVID-19 refund actions against universities. Marchese Decl. ¶ 11. Courts across the country have recognized Bursor & Fisher's experience in complex class litigation and its skilled and effective representation. *Id.* Thus, Class Counsel is "qualified, experienced, and generally able to conduct the proposed litigation." *Claxton*, 2015 WL 3648776, at *4. Accordingly, both Rule 23(a)(4) and Rule 23(g) are satisfied.

**C. The Requirements Of Rule 23(b)(3) Are Satisfied**

The proposed Settlement Class also meets the requirements of Rule 23(b)(3), which authorizes class certification where "questions of law or fact common to class members predominate over any questions affecting only individual members;" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Claxton*, 2015 WL 3648776, at *4; Fed. R. Civ. P. 23(b)(3). This inquiry examines "whether

proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Both aspects of Rule 23(b)(3) are met here.

**1. Common Issues Predominate**

Predominance only requires "a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013). "The fact that some individual questions will be involved in the case does not preclude a finding that the common issues will predominate." *Carpe*, 224 F.R.D. at 458; *see also Clark v. Bally's Park Place, Inc.*, 298 F.R.D. 188, 199 (D.N.J. 2014) ("That common issues must be shown to predominate does not mean that individual issue[s] need be non-existent. All class members need not be identically situated upon all issues, so long as their claims are not in conflict with each other.") (internal quotations omitted). As the Supreme Court stated:

> When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23 (b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.

*Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778, pp. 123-124 (3d ed. 2005)).

Plaintiff believes predominance is met here because the determination of whether LU breached a contract with students to provide an in-person education for the Spring Semester 2020 is the central question common to each and every Class Member's claim. Moreover, the alleged conduct at issue here is common to all Class Members. Because these overriding questions focus on Defendant's conduct—and not on Plaintiff's or class members conduct—and because they concern the core question of liability, they predominate over any individualized questions. *See Jones v. CBE Grp., Inc.*, 215 F.R.D. 558, 569 (D. Minn. 2003) ("The

predominance inquiry focuses primarily on common questions regarding liability.") (citing cases); *In re McDonnell Douglas Corp. Sec. Litig.*, 98 F.R.D. at 616 (E.D. Mo. 1982) ("[I]n determining whether common questions predominate, courts focus on the liability issues.") (citing authorities).

Here, Plaintiff believes common questions of liability predominate over individualized issues, such as whether LU breached a contract to provide an in-person educational experience for Spring Semester 2020, or whether LU has been unjustly enriched at Plaintiff's and Class Members' expense. And while class members may not have sustained identical damages, this does not defeat predominance under Eighth Circuit law.[5]

**2. Class Treatment Is Superior To Alternate Methods of Adjudication**

The superiority requirement in Rule 23(b)(3) "aims to provide for the 'vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court.'" *In re Puerto Rican Cabotage Antitrust Litig.*, 269 F.R.D. at 140 (D.P.R. 2010) (quoting *Amchem*, 521 U.S. at 617). Rule 23(b)(3) sets forth a non-exclusive list of factors pertinent to the superiority of a class action, including: whether individual class members wish to bring, or have already brought, individual actions; the desirability of concentrating the litigation of the claims in the particular forum; and manageability concerns. Fed. R. Civ. P. 23(b)(3). Significantly, the manageability factor weighs strongly in favor of settlement because there is no more manageable form of adjudication than a voluntary settlement with an efficient and equitable extrajudicial claims process. *Cf. Amchem*, 521 U.S. at 620 ("Confronted with a

[5] "[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by the individuals within the class." Advisory Committee's 1966 Notes on Fed. R. Civ. P. 23, 28 U.S.C. App. at 141; *see also* Wright, Miller, & Kane, Fed. Prac. & Proc. Civ. § 1781, at 235-37; W. Ruberstein, Newberg on Class Actions § 4:54 at 205 (5th ed. 2012) ("individual damage[s] calculations should not scuttle class certification under Rule 23(b)(3)"); *accord Cromeans v. Morgan Keegan & Co.*, 303 F.R.D. 543, 559 (W.D. Mo. 2014).

request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.").

Here, Plaintiff believes class treatment is superior to other methods of adjudication. The maintenance of individual lawsuits by Class Members would be unmanageable, costly, and an inefficient use of judicial resources. A class action here "avoid[s] potential duplicative litigation and … save[s] the parties time and legal costs to adjudicate common legal questions and factual issues," and thus, is superior to other available methods for fairly and efficiently adjudicating the controversy." *Claxton*, 2015 WL 3648776, at *5.

Counsel is unaware of any individual actions that have been instituted by Class Members. Marchese Decl. ¶ 17. In addition, there is "desirability…of concentrating the litigation of claims in this forum." *Claxton*, 2015 WL 3648776, at *5. Moreover, the class action vehicle provides class members with the opportunity for an expeditious resolution as opposed to protracted litigation that may or may not result in any benefit at all.

Accordingly, the Court should grant certification for settlement purposes.

### 3. The Court Should Appoint Plaintiff Martin As Class Representative And Bursor & Fisher, P.A. As Class Counsel Under Rule 23(g)

The Court should appoint Mr. Martin as Class Representative. Mr. Martin has actively developed this case and vigorously represented the interests of the Class. He has provided Counsel with information to help prepare and advance the case, responded to multiple information requests, and represented the Class in settlement discussions. Accordingly, the Court should appoint Mr. Martin as Class Representative.

The Court should also appoint Bursor & Fisher, P.A. as Class Counsel under Fed. R. Civ. P. 23(g). Bursor & Fisher has substantial experience in successfully prosecuting class actions

throughout the country. Marchese Decl. ¶ 11; Ex. 1. Both before and throughout this litigation, Class Counsel has conducted a full and thorough investigation of this matter. Marchese Decl. ¶ 4. Class Counsel has zealously represented the interests of the Class and committed substantial resources to the resolution of the class claims. Marchese Decl. ¶ 18.

## II. THE PROPOSED SETTLEMENT IS PRESUMPTIVELY FAIR AND SHOULD BE PRELIMINARILY APPROVED UNDER RULE 23(e)

"The law strongly favors settlements. Courts should hospitably receive them." *Liddell by Liddell v. Bd. of Educ. of City of St. Louis*, 126 F.3d 1049, 1056 (8th Cir. 1997) (quoting *Little Rock School Dist.*, 921 F.2d at 1383). "The policy in federal court favoring the voluntary resolution of litigation through settlement is particularly strong in the class action context." *In re Zurn Pex Plumbing Products Liability Litigation*, 2013 WL 716088, at *6. "Class actions, in general, 'place an enormous burden of cost and expense upon [] parties.'" *Marshall v. Nat'l Football League*, 787 F.3d 502, 512 (8th Cir. 2015) (quoting *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 535 (8th Cir. 1975)). Settlement avoids protracted litigation and conserves resources. *See In re Uponor, Inc., F1807 Plumbing Fittings Products Liab. Litig.*, 716 F.3d 1057, 1063 (8th Cir. 2013) (expense of continued litigation "weigh[s] in favor of" approving settlement).

Approval of a class action settlement involves a two-step process. The court first makes a preliminary fairness evaluation. *See Manual for Complex Litigation* § 21.632 (4th ed.) (hereafter "*Manual*"). If the preliminary evaluation does not disclose grounds to doubt fairness or other obvious deficiencies, and appears to fall within the range of possible approval, the court directs that notice be given to class members and sets a fairness hearing, at which arguments and evidence may be presented in support of or against the settlement. *See Manual* § 21.633. The Notice should tell class members how to make their views known to the court. *Id.*

Under this framework, "the goal of preliminary approval is for a court to determine whether notice of the proposed settlement should be sent to the class, not to make a final determination of the settlement's

fairness. Accordingly, the standard that governs the preliminary approval inquiry is less demanding than the standard that applies at the final approval phase." 4 Newberg on Class Actions § 13:13 (5th ed.) (citing cases).[6] Thus, the Settlement should be submitted to the Class for their input and potential endorsement.

### A. The Settlement Is Presumptively Fair And Should Be Preliminarily Approved

Given that "[a] strong public policy favors agreements…courts should approach them with a presumption in their favor." *Little Rock School Dist.*, 921 F.2d at 1388; *accord Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148-49 (8th Cir. 1999) ("judges should not substitute their own judgment as to optimal settlement terms for the judgments of the litigants and their counsel.") (internal quotation marks omitted). The Eighth Circuit "begin[s] with the guiding principle that 'a class action settlement is a private contract negotiated between the parties.'" *Marshall*, 787 F.3d at 509 (quoting *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 934 (8th Cir. 2005)). The court's role in reviewing a negotiated class settlement is "to ensure that the agreement is not the product of fraud or collusion and that, taken as a whole, it is fair, adequate, and reasonable to all concerned." *Id.* (quoting *In re Wireless*, 396 F.3d at 934). Thus, Class Members should be given notice of the Settlement and an opportunity to weigh in on its terms.

### B. The Settlement Is Based On Arm's Length Negotiations Conducted After Extensive Investigation And The Exchange Of Ample Information

The Parties engaged in a full day of private mediation with the Honorable Wayne Andersen (Ret.), an experienced and renowned mediator to assist them in reaching the proposed Settlement. Following this mediation session, the Parties finalized the settlement though several

[6] At the conclusion of the Notice period, and after any objections have been resolved, the Court will address whether final approval is warranted.

weeks of additional negotiations and other extensive communications. Marchese Decl. ¶ 8. Where, as here, the Settlement is the product of mediation with an experienced mediator, there is a presumption of fairness and arm's length negotiations. *See DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995) ("It also warrants mention that a Magistrate Judge presided over the settlement negotiations and that the district court had prior experience with this type of litigation. Such multiple layers of scrutiny further mitigate in favor of the settlement and against [objectors'] claims of collusion."); *Claxton*, 2015 WL 3648776, at *6 (approving settlement as "a product of extensive negotiation conducted over a period of several months and requiring the services of a mediator.").

Additionally, the Parties have engaged in sufficient investigation and discovery "to a point at which an informed assessment of its merits and the probable future course of the litigation can be made." *E.E.O.C. v. McDonnell Douglas Corp.*, 894 F. Supp. at 1334 (E.D. Mo. 1995). Indeed, the Parties exhaustively investigated the facts underlying Plaintiff's allegations before and during this litigation. Marchese Decl. ¶¶ 4-6. LU also provided extensive financial records detailing tuition and fees collected for the Spring Semester 2020. Plaintiff's counsel also spoke with potential merits and damages experts concerning the strengths and weakness of the case, as well as the strengths and weaknesses of LU's arguments and defenses. *Id*. ¶ 6. The Parties exchanged further information through written correspondence; phone calls; detailed mediation statements and exhibits submitted by the Parties; and a full-day mediation.

### C. Counsel Is Highly Experienced In Similar Litigation And Its Considered Opinion Regarding The Settlement Is Entitled To Significant Weight

Bursor & Fisher has extensive expertise litigating and settling complex class actions. "The views of the parties to the settlement must also be considered" as well as the judgments of experienced class counsel. *DeBoer*, 64 F.3d at 1178. Courts give "'great weight' to and

may 'rely on the judgment of experienced counsel in its evaluation of the merits of a class action settlement.'" *In re Zurn Pex Plumbing*, 2013 WL 716088, at *6 (quoting *Welsh v. Gardebring*, 667 F. Supp. 1284, 1295 (D. Minn. 1987)) (citations omitted). The terms of the settlement here reached by arm's-length negotiation between attorneys familiar with the legal and factual issues of the case and who are well versed in litigating similar class claims. The parties and their respective counsel, having taken the risks and benefits into consideration, agree that the Settlement is fair and reasonable.

### D. The Settlement Falls Well Within The Range Of Possible Approval

The Settlement "brings real and immediate benefits to the settlement class while they may well not get anything if the case were to go forward or, if they did receive some benefits, may well not receive anything until years into the future after millions of dollars have been spent." *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 2004 WL 3671053, at *10-11 (W.D. Mo. Apr. 20, 2004). "It is the surety of settlement that makes it a favored policy in dispute resolution as compared to unknown dangers and unforeseen hazards of litigation." *Id.* (citing *In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 701 (E.D. Mo. 2002) (recognizing it is often "proper to take the bird in the hand instead of a prospective flock in the bush.")); *see also Albright v. Bi-State Dev. Agency of Missouri-Illinois Metro. Dist.*, 2013 WL 4855308, at *3 (E.D. Mo. Sept. 11, 2013) ("If the case were to proceed, the resulting motion practice, trial and appeals, could have been lengthy, involved, and expensive, presenting a substantial risk that Plaintiffs and the Settlement Classes would not ultimately prevail on their claim…the Settlement Agreement eliminates a substantial risk that the Class Members would walk away 'empty-handed.'").[7]

[7] "[A] settlement is a product of compromise and the fact that a settlement prides only a portion of the potential recovery does not make such settlement unfair, unreasonable or inadequate." *In*

The Settlement provides for substantial monetary relief to Class Members. *See supra* § II.B (detailing the benefits provided by the Settlement). In the absence of settlement, the complexity of this case and the novel legal theories make continued litigation an inherently risky, costly, and timely undertaking. Because the proposed Settlement was negotiated at arm's length by experienced counsel, is neither illegal nor collusive nor obviously deficient, and falls within the range of possible final approval, it should be preliminarily approved and submitted to the Class for its feedback.

## III. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED

### A. The Content Of The Proposed Class Notice Complies With Rule 23(c)(2)

Pursuant to Rule 23(c)(2)(B), the notice must provide:

> the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through counsel if the member so desires; that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and the binding effect of a class judgment on class members under Rule 23(c)(3).

The Notice provides detailed information about the Settlement, including: 1) a comprehensive summary of its terms; 2) Class Counsel's intent to request attorneys' fees, reimbursement of expenses, and incentive awards for the Named Plaintiffs; and 3) detailed information about the Released Claims. *See* Settlement Exhibits A-C (attached to Exhibit 1 of Marchese Decl.). In addition, the Notice provides information about the Fairness Hearing date,

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*In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 708 (E.D. Mo. 2002); *see also Holden v. Burlington N., Inc.*, 665 F. Supp. 1398, 1414 (D. Minn. 1987) ("A case settlement amounting to only a fraction of the potential cash recovery (and the present proposed settlement is not such a recovery) does not itself render the settlement unfair or inadequate. In fact, there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.") (internal citations and quotations omitted).

the right of Class Members to seek exclusion from the Class or to object to the proposed Settlement (as well as the deadlines and procedure for doing so), and the procedure to receive additional information. *Id.* In short, the Notice is intended to fully inform Class Members of the lawsuit, the proposed Settlement, and the information they need to make informed decisions about their rights. The very detailed information in this proposed notice goes well beyond the requirements of the Federal Rules. Indeed, courts have approved class notices even when they provided only general information about a settlement. This information is adequate to put Class Members on notice of the proposed Settlement and is well within the requirements of Rule 23(c)(2)(B).

### B. The Plan For Distribution Of The Class Notice Will Comply With Rule 23(c)(2)

The Parties have agreed upon a notice plan that easily satisfies the requirements of both Rule 23 and Due Process. First, no later than thirty-five (35) days from the execution of this Settlement Agreement, LU shall produce an electronic list from its records that includes the names, last known U.S. Mail addresses, belonging to Persons within the Settlement Class. Settlement ¶ 4.1(a). This electronic document shall be called the "Class List," and shall be provided to the Settlement Administrator with a copy to Class Counsel for the purpose of giving notice to the Settlement Class Members and shall not be used for any other purpose. *Id.*[8]

Next, the Settlement Administrator shall send Notice via email substantially in the form attached as Exhibit A to all Settlement Class Members for whom a valid email address is in the Class List. In the event transmission of email notice results in any "bounce-backs," the

[8] Consistent with the requirements of the Family Educational Rights and Privacy Act, 20 U.S.C.A. § 1232g (West) ("FERPA"), the annexed proposed preliminary approval order constitutes a "court order" sufficient to permit LU to disclose name and address information to the Settlement Administrator and Class Counsel. *See* Proposed Preliminary Approval Order ¶ 17; 34 C.F.R. § 99.37. Furthermore, the Proposed Notice Plan includes the requisite notice and opt-out procedure to permit LU to disclose the financial information needed to calculate the *pro rata* distribution at the appropriate time. *See* Settlement Agreement Ex. A at pp. 1; Ex. B at pp. 2; Ex. C at pp. 3-4; *see also* 34 C.F.R. § 99.31(a)(9)(i)-(ii).

Settlement Administrator shall, if possible, correct any issues that may have caused the "bounce-back" to occur and make a second attempt to re-send the email notice. Settlement ¶ 4.1(b). The Settlement Administrator shall send notice substantially in the form attached as Exhibit B via First Class U.S. Mail to all Settlement Class Members who did not receive an email pursuant to Paragraph 4.1(b), above. Settlement ¶ 4.1(c).

Additionally, within fourteen (14) days from entry of the Preliminary Approval Order, Notice shall be provided on a website at an available settlement URL (such as, for example, www.lindenwooduniversitysettlement.com) which shall be obtained, administered and maintained by the Settlement Administrator and shall provide Settlement Class Members with ability to select the method of payment for the Cash Award, and to update their mailing addresses. Copies of this Settlement Agreement, the long-form Notice, and other pertinent documents and Court filings pertaining to the Settlement (including the motion for attorneys' fees upon its filing), shall be provided on the Settlement Website. Settlement ¶ 4.1(d). Finally, the Settlement Administrator shall cause to be served upon the Attorneys General of each U.S. State in which Settlement Class members reside, the Attorney General of the United States, and other required government officials, notice of the proposed settlement as required by law. Settlement ¶ 4.1(e).

In sum, the proposed methods for providing notice to the Class comports with both Rule 23 and Due Process, and thus, should be approved by the Court.

## CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court grant his Motion for Preliminary Approval of the Settlement. A Proposed Order granting preliminary approval, certifying the Settlement Class, appointing Class Counsel, and approving the Proposed Notice of Settlement, is submitted herewith.

Dated: January 5, 2022

Respectfully submitted,

By: */s/ Joseph I. Marchese*
Joseph I. Marchese

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