UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

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

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

Dated: April 27, 2022

BURSOR & FISHER, P.A.
Joseph I. Marchese, #4475983
888 Seventh Avenue
New York, NY 10019
Telephone: (646) 837-7150
Facsimile: (212) 989-9163
Email: jmarchese@bursor.com

Settlement Class Counsel

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INTRODUCTION

On January 6, 2022, this Court preliminarily approved the class action settlement between Plaintiff Dylan Martin ("Plaintiff") and Defendant Lindenwood University ("LU" or "Defendant") and directed that notice be sent to the Settlement Class (ECF No. 41). The settlement administrator has implemented the Court-approved notice plan and direct notice has reached **99.9%** of the certified Settlement Class. The reaction from the class has been overwhelmingly positive. Specifically, of the approximately 6,000 class members, thus far **none** have objected and only **one** has requested to be excluded.[1] The Settlement is an excellent result for the class and the Court should grant final approval.

The Settlement's strength speaks for itself: it creates a $1.65 million non-reversionary common fund from which Settlement Class Members will **automatically** receive a *pro rata* cash award as a percentage of their out-of-pocket expenditure for the Spring 2020 Semester at LU. And despite the significant litigation risks presented, Plaintiff estimates that the $1.65 million recovery represents approximately half of the maximum possible damages Settlement Class Members may have suffered, and a significantly larger proportion of maximum damages from Lindenwood's position.

For these reasons, and as explained further below, the Settlement is fair, reasonable, and adequate, and warrants this Court's final approval.

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

[1] The deadline for Settlement Class Members to object or request exclusion was March 21, 2021. (ECF No. 40-1 at 20).

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 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. (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 December 7, 2020, Plaintiff filed a Notice of Supplemental Authority, attached four motion to dismiss opinions in similar tuition refund cases. (ECF No. 14). On January 29, 2021, LU filed its own Notice of Supplemental Authority, attached two decisions that rejected Plaintiff's arguments and granted a motion to dismiss similar to LU's. (ECF No. 15). On April 14, 2021, Plaintiff filed a Second Notice of Supplemental Authority, attached nine motion to dismiss opinions in similar tuition refund cases. (ECF No. 17). On April 16, 2021, LU filed its Second Notice of Supplemental Authority, attached five motion to dismiss opinions that rejected Plaintiff's arguments and granted a motion to dismiss similar to LU's. (ECF. No. 18). 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. Declaration of Joseph I. Marchese, dated April 27, 2022 ("Marchese Decl.") ¶ 10. 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. ¶¶ 10-11. The

parties also provided lengthy, detailed mediation statements, airing their respective legal arguments and theories on potential damages. *Id.* ¶ 11. 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. *Id.* ¶ 12. 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

[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.

to that Settlement Class Member's Out-of-Pocket Percentage multiplied by the Available Settlement Fund. Payments to current students will be made directly 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 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. *Id.*

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, Attorneys' Fees, Costs, And Expenses

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. Mr. Martin's initiative, time, and effort were essential to the successful prosecution of the case. He: (1) worked with Settlement Class Counsel to initiate, investigate and litigate the case; (2) provided input for the complaint; (3) participated in preliminary discovery and provided counsel with necessary documents, communications, and information; and (4) conferred with Settlement Class Counsel during litigation and settlement negotiations. Martin Decl. ¶¶ 4-8 (ECF 45-2). LU will not oppose any request limited to this amount. Settlement ¶ 8.3. LU has also 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. *Id.* ¶ 8.1. Class Counsel has agreed to petition the Court for no more than one-third of the Settlement Fund. *Id*. These awards are subject to this Court's approval, which Plaintiff has moved for separately. (*See* ECF No. 45). That motion is assented to, and, to date, there are no objections to it. Payment of attorneys' fees, costs, and expenses is due within 10 business days after entry of Final Judgment. Settlement ¶ 8.2.

ARGUMENT

I. CLASS CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE

A. General Standards

The Court may certify a class for settlement purposes. Certifying a class for settlement purposes satisfies the Rule 23 requirements more easily than a contested motion for certification. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 619 (1997) ("Settlement is relevant to a class

certification."); 4 Newberg on Class Actions § 13:18 (5th ed.) ("The obvious implication…is that the standards for certification are laxer at settlement, as that is the only reading that makes sense of the sentence's second clause noting the need for a suitable record."). 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 (D. Minn. Oct. 18, 2012) ("Conditionally certifying a class in connection with preliminary approval allows notice to the class."). 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 (E.D. Mo. Mar. 6, 2012) (quoting *Manual* § 21.632). The Eighth Circuit routinely certifies classes for settlement purposes. *See Pollard v. Remington Arms Company, LLC*, 320 F.R.D. 198 (W.D. Mo. Mar. 14, 2017).

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] Indeed, in granting preliminary approval this Court already determined that class certification for settlement purposes is warranted. (*See* ECF No. 41).

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[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. Numerosity Is Satisfied

"To satisfy the numerosity requirement, Plaintiffs must show the class of plaintiffs is so large that joinder of all members would be impracticable." *Pollard*, 320 F.R.D. at 206 (citing Fed. R. Civ. P.23(a)(1)). Here, the settlement class consists of approximately 6,000 current and former students. Marchese Decl. ¶ 14. Because joinder of the thousands of class members would be impracticable the numerosity requirement is easily satisfied.

C. 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 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 (D. Minn. Feb. 27, 2013) (internal citations and quotations omitted). 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 including: (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).

D. 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 Aquila ERISA Litig.*, 237 F.R.D. at 209 (W.D. Mo. 2006). 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 (8th Cir. 2013)).

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.

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

Plaintiff believes the adequacy requirement is also satisfied. 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 Representative 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. ¶¶ 31-33.

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. *Id.* ¶ 26. 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.

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

1. <u>Common Issues Predominate</u>

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. Secs. 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).

Notably, the need for "separate determination of the damages suffered by the individuals within the class" does not defeat predominance. *See* 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).

2. Class Settlement 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 P.R. 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 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. In addition, there is “desirability…of concentrating the litigation of claims in this forum.” *Claxton*, 2015 WL 3648776, at *5. 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. ¶¶ 26-27; Ex. B. Both before and throughout this litigation, Class Counsel has conducted a full and thorough investigation of this matter. *Id*. ¶¶ 4-

13. Class Counsel has zealously represented the interests of the Class and committed substantial resources to the resolution of the class claims. *Id.* ¶ 27.

II. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE UNDER RULE 23(e)(2)

At the final approval stage, the fairness analysis is guided by Rule 23(e), which states that a district court should approve a class settlement "only after a hearing and only on finding that it is fair, reasonable, and adequate considering whether:

> (A) The class representatives and class counsel have adequately represented the class;
>
> (B) The proposal was negotiated at arm's length;
>
> (C) 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 any proposed attorneys' fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equally relative to each other.

Fed. R. Civ. P. 23(e)(2).[4] The Eighth Circuit has identified the following four factors in determining whether a settlement is fair, reasonable, and adequate under Rule 23(e): "(1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement." *In re UnitedHealth Group Inc. Shareholder Derivative Litigation*, 631 F.Supp.2d 1151, 1156 (D. Minn. July 6, 2009) (quoting *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005). "Ultimately, the court must examine whether the interests of the class are better served by settlement than by further litigation."

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[4] There are no separate agreements to be identified pursuant to Rule 23(e)(3). Marchese Decl. ¶ 30.

Casey v. Coventry Healthcare of Kansas, Inc., 2012 WL 860395 (W.D. Mo. Mar. 13, 2012). However, "[t]he 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 Prods. Liab. Litig.*, 2013 WL 716088, at *6 (D. Minn. Feb. 27, 2013).

At the preliminary approval stage, this Court held that, "the Settlement Agreement is fair, reasonable, and adequate." (ECF No. 41 ¶ 4). This Court should grant final approval and find the Settlement is fair, reasonable, and adequate pursuant to Fed. R. Civ. P. 23(e).

A. The Class Representative And Class Counsel Have Adequately Represented The Class (Rule 23(e)(2)(A))

As set forth above, Class Counsel and the Class Representative have adequately and vigorously represented the Class. *See supra* § I.E. Bursor & Fisher has extensive experience litigating and settling class actions. *See* Marchese Decl. Ex. B. (Firm Resume). "The views of the parties to the settlement must also be considered" as well as judgements 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 arms'-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. Moreover, there are no objections to the proposed Settlement. Courts in the Eighth Circuit routinely find that the adequacy of representation requirement is satisfied where the interests of the class representative is not antagonistic to the interests of the class. *See In re Uponor, Inc., F1807 Plumbing Fittings Prod. Liab. Litig.*, 716 F.3d 1057, 1064 (8th Cir. 2013) ("Since there is no indication that the class representatives' interest was antagonistic to the objectors interests, we

agree with the district court that the representatives are adequate.") (internal quotations omitted); *Bachman v. A.G. Edwards, Inc.*, 344 S.W.3d 260, 268 (E.D. Mo. May 31, 2011) (same).

B. The Settlement Is Based On Arms' Length Negotiations Conducted After Extensive Investigation And The Exchange Of Ample Information (Rule 23(e)(2)(B))

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 through several weeks of additional negotiations and other extensive communications. Marchese Decl. ¶ 13. Where, as here, the Settlement is the product of a mediation with an experienced mediator, there is a presumption of fairness and arms' 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. ¶¶ 4-13. 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 weaknesses of the case, as well as the strengths and weaknesses of LU's arguments and defenses. *Id.* ¶ 11. 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. The Settlement Provides Adequate Relief To The Class (Rule 23(e)(2)(C))

1. **The Complexity And Expense Of Continued Litigation Supports Settlement**

The complexity, expense, and likely duration of this case clearly favors approval. *See* Fed. R. Civ. P. 23(e)(2)(C)(i) (at final approval, courts should take into account "the costs, risks, and delay of trial and appeal"). Discovery in this case would likely be protracted, expensive, and burdensome. The vast number of witnesses, reporting parties, administrators, faculty, and staff alleged to have knowledge of the events giving rise to this litigation would require the Parties to take and defend dozens of depositions and collect and review documents from dozens of custodians. The Parties would also be required to incur significant expert costs. The scope of discovery would likely drive this litigation to continue for several years while multiplying the costs for all Parties. *In re Wireless Telephone Federal Cost Recovery Fees Litigation*, 396 F.3d at 933 ("Indeed, this case had yet to complete discovery, much less the inevitable appeals that would have been necessary before a final resolution. The district court properly explained that, barring settlement, this case would likely drag on for years, require the expenditure of millions of dollars, all the while class members would receive nothing.") (internal quotations omitted); *In re UnitedHealth Group Inc. Shareholder Derivative Litigation*, 631 F.Supp.2d at 1158 (finding third factor met where "[t]here would unquestionably be cross-motions for summary judgment, motions to exclude expert testimony, and other motions in limine, all leading to a lengthy trial, post-trial motions, and eventual appeal."). The complexity and expense of continued litigation weigh in favor of the settlement.

2. <u>The Merits Of The Case Weighed Against The Terms Of The Settlement Support The Settlement</u>

In the Eighth Circuit settlements are encouraged when "the outcome of the litigation would be far from certain." *In re Wireless Telephone Federal Cost Recovery Fees Litigation*, 396 F.3d at 933. Actions such as this one, which is based on a purported breach of contract for tuition and fees related to the COVID-19 Spring 2020 closure, are novel and unique—and thus an inherently complex and risky undertaking. *See In re Tyco Int'l, Ltd. Multidistrict Litig*, 535 F. Supp. 2d 249, 260 (D.N.H. 2007) (Approving settlement where it was "a risky case for both sides" due to "an uncertain legal environment" and a case theory that put plaintiffs "at the cutting edge of a rapidly changing" and "still-developing" area of law). Because "the law remains in flux," it is "by no means certain that [P]laintiffs would have prevailed if they had taken the case to trial and attempted to defend any favorable verdict on appeal." *Id.* Although Plaintiff defeated LU's Motion to Dismiss, numerous federal courts across the country have granted substantially similar dismissal motions. *See*, *e.g.*, *Burt v. Bd. of Trustees of Univ. of Rhode Island*, 2021 WL 825398, at *10 (D.R.I. Mar. 4, 2021); *Choi et al. v. Brown Univ. et al.*, 2021 WL 825398, at *10 (D.R.I. Mar. 4, 2021); *Alexander et al. v. Johnson & Wales Univ.*, 2021 WL 825398, at *10 (D.R.I. Mar. 4, 2021); *Simmons Telep v. Roger Williams Univ.*, 2021 WL 825398, at *10 (D.R.I. Mar. 4, 2021); *Crista v. Drew Univ.*, 2021 WL 1422935, at *12 (D.N.J. Apr. 14, 2021), *reconsideration denied sub nom.*, 2021 WL 2310094 (D.N.J. June 7, 2021); *Rynasko v. New York Univ.*, 2021 WL 1565614, at *4 (S.D.N.Y. Apr. 21, 2021); *Mitelberg v. Stevens Inst. of Tech.*, 2021 WL 2103265, at *5-6 (D.N.J. May 25, 2021); *Ryan v. Temple Univ.*, 2021 WL 1581563, at *11 (E.D. Pa. Apr. 22, 2021). This presented great risk of continued litigation, including at summary judgment.

Absent settlement, the parties could likely resolve these ongoing disputes only through additional motion practice, discovery, and, potentially, trial." *In re Colgate-Palmolive Softsoap*

AntibacterialHand Soap Mktg. & Sales Practices Litig., 2015 WL 7282543, at *11 (D.N.H. Nov. 16, 2015). Plaintiff faces considerable risks in establishing class-wide liability and in obtaining certification of the proposed class action. The Parties would have to litigate class certification (and likely decertification) motions, as well as dispositive motions. If liability is established, Plaintiff would also have to establish damages. But for the Settlement, Defendant would strongly dispute the propriety of Rule 23 certification. *See* Marchese Decl. ¶ 19. Even if the Court were to grant certification, maintaining certification through trial could continue to present challenges. *Id*. These facts strongly support final approval of the Settlement. Absent a settlement agreement, LU was prepared to continue to litigate Plaintiff's claims, including at the class certification and summary judgment stage. The $1,650,000.00 class recovery is an excellent result given the uncertainty and longevity of continued litigation. Such uncertainties weigh in favor of the result obtained. *See Grunin v. International House of Pancakes*, 513 F.2d 114, 125 (8th Cir. 1975).

3. Defendant's Financial Condition Has Not Been Put Into Question

Another factor considered by the Eighth Circuit is whether Defendant's "financial condition would prevent it from raising the settlement amount." *In re Wireless Telephone Federal Cost Recovery Fees Litigation*, 396 F.3d at 933. LU is a private university with an estimated nine-figure endowment. LU's financial condition nor its ability to fund the settlement amount has been called into question. Therefore, this factor weighs in favor of settlement. *In re Wireless Telephone Federal Cost Recovery Fees Litigation*, 396 F.3d at 933 ("As to the second factor, there is no indication that [defendant's] financial condition would prevent it from raising the settlement amount."); *In re UnitedHealth Group Inc. Shareholder Derivative Litigation*, 631 F.Supp.2d at 1157 (finding second factor met where "defendants can meet their settlement obligations.")

D. The Settlement Falls Well Within The Range Of Approval (Rule 23(e)(2)(C))

Another consideration at the final approval stage is whether "the relief provided for the class is adequate." Fed. R. Civ. P. 23(e)(2)(C). 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.'").[5]

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,

[5] "[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 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).

costly, and timely undertaking. Because the proposed Settlement was negotiated at arms' length by experienced counsel, is neither illegal nor collusive nor obviously deficient, and falls within the range of possible final approval, and is overwhelmingly supported by the Class, it should be approved.

E. The Proposed Settlement Treats Class Members Equitably And Utilizes A Fair And Reasonable Allocation Plan That Strongly Supports Approval (Rule 23(e)(2)(D) and Rule 23(e)(2)(C)(ii))

The proposed allocation and method of distribution relief treats Class Members equitably relative to each other and does not impermissibly favor some members over others. *See* Fed. R. Civ. P. 23(e)(2)(D). The plan distributes compensation to class members in a *pro rata* manner with payments that will be proportionate to the out-of-pocket expenditures of each Class Member. *See supra* § II.B. And Class Members are not required to submit a claim to receive payment. *See id.* This factor for final approval is therefore satisfied as well.

F. Class Members Overwhelmingly Support The Settlement

Final approval is warranted where, as here, "the overwhelming majority of [class members]…have offered no objection." *In re UnitedHealth Group Inc. Shareholder Derivative Litigation*, 631 F.Supp.2d at 1158. Here, the Class Members have overwhelmingly affirmed the Court's judgment at preliminary approval that the Settlement is fair, reasonable, and adequate. Direct notice was delivered to 99.9% of the Class Members, and, to date, **zero** have objected to the settlement and only **one** class member has requested to be excluded. Declaration of Ryan Bahry ("Bahry Decl.") ¶¶ 12, 18, 20. In endorsing the Settlement, Class Members had easy access to information regarding the Settlement, including important documents such as the Settlement Agreement and Fee Petition, and a summary of the settlement terms and the claims being released. *Id.* ¶¶ 13-14. Class Members' responses to the Notice demonstrates their

support for the Settlement, including the benefits to the Class, the incentive award, and proposed attorneys' fees, costs, and expenses.

The lack of objections supports a finding that the Settlement is fair, reasonable, and adequate, and should be approved. *See Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1152 (8th Cir. 1999) (finding fourth factor met where "fewer than 4 percent of the class members objected to the settlement, significantly fewer than the number of objectors to other settlements that have been approved."); *DeBoer*, 64 F.3d at 1178 (finding "[t]he fact that only a handful of class members objected to the settlement similarly weighs in its favor."); *Wireless*, 396 F.3d at 933 (finding fourth factor met where "court concluded that only .00068% of the class objected to the settlement and only .0024% of the class opted out."); *In re UnitedHealth Group*, 631 F. Supp. 2d at 1158.

G. The Settlement's Provision For Attorneys' Fees Is Fair, Reasonable, And Appropriate Under The Circumstances (Fed. R. Civ. P. 23(e)(2)(C)(iii))

Finally, "the terms of [the] proposed award of attorney's fees," Fed. R. Civ. P. 23(e)(2)(C)(iii), do not undermine the adequacy of the relief provided to the Class. Significantly, to date, no class member has objected to Plaintiffs' attorneys' fee request. Bahry Decl. ¶ 20.

As discussed in Plaintiff's Motion for Attorneys' Fees, Costs, Expenses, And Incentive Award (the "Fee Petition) (ECF No. 45), Plaintiff's request for attorneys' fees is fair, reasonable, and appropriate under the circumstances. The Fee Petition was filed on March 7, 2022 and was uploaded to the Settlement website shortly thereafter on or about March 9, 2022. Marchese Decl. ¶ 25. Class Counsel seeks one-third of the $1.65 million Settlement Fund in attorneys' fees, costs, and expenses. *Id.* This percentage is within the established norms of class litigation. *See*, *e.g.* Fee Petition (ECF No. 45) at Section III.B (citing cases for the proposition that Class

Counsel's fee request for one-third of the Settlement Fund represents a reasonable percentage in the Eighth Circuit and nationwide).

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court grant his Motion for Final Approval of the Settlement and enter Final Judgment in the form submitted herewith.

Dated: April 27, 2022

Respectfully submitted,

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

BURSOR & FISHER, P.A.
Joseph I. Marchese, #4475983
888 Seventh Avenue
New York, NY 10019
Telephone: (646) 837-7150
Facsimile: (212) 989-9163
Email: jmarchese@bursor.com

Settlement Class Counsel