

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION – BERGEN COUNTY**

STEVEN DOVAL, MELISSA CUELLO, and  
CEANA CUELLO, on behalf of themselves  
and all others similarly situated,

Plaintiffs,

v.

FAIRLEIGH DICKINSON UNIVERSITY,

Defendant.

Case No. BER-L-004966-20

Hon. Nicholas Ostuni

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR  
ATTORNEYS' FEES, COSTS, EXPENSES, AND INCENTIVE AWARDS**

Dated: June 28, 2024

**BURSOR & FISHER, P.A.**

Philip L. Fraietta

Alec M. Leslie

1330 Avenue of the Americas

New York, NY 10019

Telephone: (646) 837-7150

Facsimile: (212) 989-9163

Email: pfraietta@bursor.com

aleslie@bursor.com

**VOZZOLO LLC**

Antonio Vozzolo

345 Route 17 South

Upper Saddle River, New Jersey 07458

Telephone: (201) 630-8820

Facsimile: (201) 604-8400

Email: avozzolo@vozzolo.com

**LAW OFFICES OF RONALD A.**

**MARRON, APLC**

Ronald A. Marron (pro hac vice)

651 Arroyo Drive

San Diego, California 92103

Telephone: (619) 696-9006

Facsimile: (619) 564-6665

Email: ron@consumersadvocates.com

*Class Counsel*

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## INTRODUCTION

In August 2020, Plaintiffs Steven Doval, Melissa Cuello, and Ceana Cuello filed this class action alleging that Fairleigh Dickinson University (“FDU” or “Defendant”) breached an agreement to provide an in-person, on-campus educational experience when it transitioned Spring 2020 Semester classes to online learning due to the COVID-19 pandemic. Plaintiffs sought reimbursement of tuition and fees paid to FDU by approximately 8,100 class members in return for an in-person, on-campus experience.

After extensive arms’ length negotiations, including two full-day mediation sessions before a third-party neutral, Hon. Frank A. Buczynski, Jr. (Ret.) to resolve this action, the Parties reached a Class Action Settlement Agreement<sup>1</sup> (the “Settlement”). The Settlement—preliminarily approved by this Court on May 14, 2024—creates a \$1.5 million common fund that will be used to pay Settlement Class Members’ claims, notice and administration costs, incentive awards to Plaintiffs, and attorneys’ fees, costs, and expenses to Class Counsel.

On a dollar-per-student basis, this Settlement falls squarely within the range established by previous, similar settlements that have been finally approved in the COVID-19 tuition and fee refund context. *See, e.g., Fittipaldi v. Monmouth University*, No. 3:20-cv-05526 (D.N.J.) (\$1.3MM Fund); *Rosado v. Barry Univ., Inc.*, No. 1:20-cv-21813-JEM (S.D. Fla.) (\$2.4MM common fund); *Choi v. Brown University*, No. 1:20-cv-00191 (D.R.I.) (\$1.5MM common fund); *Wright v. S. New Hampshire Univ.*, No. 1:20-cv-00609 (D.N.H.) (\$1.25MM common fund); *Martin v. Lindenwood*

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<sup>1</sup> The Parties’ Settlement is attached as Exhibit A to the Certification of Philip L. Fraietta in Support of Plaintiffs’ Motion for Attorneys’ Fees, Costs, Expenses, and Incentive Awards (“Fraietta Cert.”). *See* Fraietta Cert. ¶ 2. Unless otherwise noted, capitalized terms have the same meaning as set forth in the Settlement.

*Univ. (E.D. Mo.)* (\$1.65MM common fund).

In light of this exceptional result, Plaintiffs respectfully request, pursuant to Rule 4:32-2(h) of the New Jersey Rules of Court, that the Court approve attorneys' fees, costs, and expenses of one-third of the Settlement Fund, or \$500,000.00, as well as incentive awards of \$5,000 each to Plaintiffs for their service as class representatives (collectively, the "Fee Petition"). Plaintiffs' request for one-third of the Settlement Fund is consistent with what was requested and approved in the above-referenced COVID-19 tuition and fee refund settlements and is supported by New Jersey law.

For these reasons, and as explained further below, this Court should approve the Fee Petition.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **I. PLAINTIFFS' ALLEGATIONS**

Plaintiffs and Settlement Class Members are current or former students and/or payors of tuition and fees for the Spring 2020 Semester at FDU. Plaintiffs allege that they and Settlement Class Members "entered into a contractual agreement where Plaintiffs would provide payment in the form of tuition and fees and Defendant, in exchange, would provide in-person educational services, experiences, opportunities, and other related services." *See* Class Action Complaint and Demand for Jury Trial ("Complaint") filed on August 25, 2020, ¶ 2. In light of the COVID-19 pandemic, Defendant transitioned Spring 2020 Semester classes to remote learning on March 16, 2020 and any "[c]lasses that continued were only offered in an online format, with no in-person instruction." Complaint ¶¶ 10-11. Plaintiffs further allege "[t]he remote learning options were in no way the equivalent of the in-person education that Plaintiffs and the putative class members contracted and paid for." *Id.* ¶ 12. Accordingly, through this lawsuit Plaintiffs have sought for



themselves and the Class a refund of tuition and fees for the in-person educational services, facilities, access and/or opportunities that Defendant did not provide when FDU's campuses remained closed for the entire remainder of the Spring 2020 Semester. *See id.* ¶¶ 14-15.

Defendant has vigorously denied that it breached any express or implied contract with its students or that it was unjustly enriched because of the change to remote learning and services required during the Spring 2020 Semester to comply with Governor Murphy's order requiring all New Jersey institutions of higher education to cease in-person instruction to reduce the spread of COVID-19.

## **II. THE LITIGATION AND WORK PERFORMED TO BENEFIT THE CLASS**

On August 25, 2020, Steven Doval, Melissa Cuello and Cean Cuello filed a putative class action complaint in the Superior Court of New Jersey – Bergen Civil Division. *See generally* Complaint. In response to the Complaint, on October 29, 2020, Defendant filed a motion to dismiss arguing, among other points, that the Complaint alleges impermissible educational malpractice claims and failed to identify any promise to provide in person instruction or any duty owed by FDU to provide a refund to students. On December 4, 2020, Plaintiffs filed their opposition to Defendant's motion to dismiss. On February 5, 2021, following oral argument, the Court denied Defendant's motion to dismiss.

The claims and legal theories—at issue in the motion to dismiss and in the case more generally—are complicated and unsettled. Notably, this matter presents one of the few times that a plaintiff's quasi-contractual claim seeking a tuition refund under the standard set forth in *Beukas v. Bd. of Trs. of Fairleigh Dickinson Univ.*, 605 A.2d 776 (NJ. Super. Ct. Law Div. 1991) successfully overcame a motion to dismiss. *See, e.g., Mitelberg v. Stevens Inst. of Tech.*, 2021 WL 2103265, at \*3 (D.N.J. May 25, 2021) (“This Court finds that Defendant did not deviate from its

responsibility to act in good faith and deal fairly with its students amidst the unprecedented COVID-19 pandemic.”); *Dougherty v. Drew Univ.*, 534 F. Supp. 3d 363, 376 (D.N.J. 2021), reconsideration denied sub nom. *Dougherty v. Univ.*, 2021 WL 2310094 (D.N.J. June 7, 2021) (“The Complaint does not allege facts that plausibly show the University failed to meet its obligations under *Beukas*.”). In successfully overcoming the motion to dismiss hurdle as to Plaintiffs’ and Class Members’ tuition-based claims, Class Counsel achieved an outstanding result for Plaintiffs and Class Members. Despite securing a rare victory on the tuition-based claims at the motion to dismiss stage, Class Counsel continued to face substantial risk at summary judgment and trial.

Following the Order denying the Motion to Dismiss, on February 19, 2021, Defendant filed an answer to the Complaint, denying the allegations and asserting 24 affirmative defenses. The Parties then engaged in significant formal discovery, including propounding and responding to requests to produce documents and interrogatories. *See Fraietta Cert.* ¶¶ 17-18. FDU produced approximately 4,788 pages of documents for Plaintiffs’ review. *See id.* ¶ 19. During the discovery phase, Plaintiffs’ Counsel and counsel for FDU initiated settlement discussions to resolve the litigation, and on June 3, 2022, the Parties requested a stay of all case management deadlines to allow the Parties to focus their efforts on facilitating a potential resolution. *See id.* ¶¶ 20-27.

On May 25, 2022 and February 15, 2023, the Parties participated in full-day mediation sessions before a third-party neutral and former New Jersey Superior Court Judge for over 25 years, Hon. Frank A. Buczynski, Jr. (Ret.) to resolve this action. *See id.* ¶¶ 26-28. Though both mediation sessions proved unsuccessful, the Parties maintained an open dialogue regarding resolution. *See id.* In the ensuing months, the Parties continued their settlement dialogue directly. *See id.* ¶ 29. After extensive, vigorous discussions and arm’s-length negotiations, and numerous

exchanges of information and settlement proposals, the Parties were able to reach an agreement to resolve the Action, which Plaintiffs and their Counsel believe is fair, reasonable and adequate, and in the best interests of Plaintiffs and Settlement Class Members. *See id.* ¶ 30.

On April 16, 2024, Plaintiffs filed the Motion for Preliminary Approval, and on May 14, 2024, the Court granted preliminary approval of the Settlement. Since that time, Class Counsel has worked with the Settlement Administrator to administer the Notice Plan and monitor the claims process. *See id.* ¶ 34. The Court's Order requires Plaintiffs to file this Fee Petition with the Court on or before June 28, 2024.

### **ARGUMENT**

#### **III. THE REQUESTED ATTORNEYS' FEES, COSTS, AND EXPENSES ARE REASONABLE AND SHOULD BE APPROVED**

Rule 4:32-2(h) of the New Jersey Rules of Court provides that class counsel may make an “application for the award of attorney’s fees and litigation expenses, if fees and costs are authorized by law, rule, or the parties’ agreement . . . .” R. 4:32-2(h); *see also* R. 4:42-9(a) (authorizing attorney’s fees in eight instances, including “[o]ut of a fund in court.”). Under the Settlement, Defendant agrees that Class Counsel may apply for an award of attorneys’ fees, costs, and expenses from the Settlement Fund not to exceed one-third (33 1/3%) of the Settlement Fund (or five hundred thousand dollars (\$500,000.00)). Settlement, Ex. A to Fraietta Cert., § 10.1. Payment of the Fee and Expense Award shall be made from the Settlement Fund and should the Court award less than the amount sought by Class Counsel, the difference in the amount sought and the amount ultimately awarded shall remain in the Settlement Fund. *Id.* Thus, the Fee Petition is expressly authorized by the Parties’ Settlement.

There are two different potential methods for determining the attorneys’ fees – the lodestar method and the percentage-of-recovery method—each with “distinct attributes suiting them to particular types of cases.” *See Sutter v. Horizon Blue Cross Blue Shield of New Jersey*, 2012 WL 2813813, at \*15 (N.J. Super. Ct. App. Div. July 11, 2012) (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tanks Prod. Liab. Litig.*, 55 F.3d 768, 820-21 (3d Cir. 1995)).<sup>2</sup> A “court making or approving a fee award should determine what sort of action the court is adjudicating and then primarily rely on the corresponding method of awarding fees.” *Id.* (quoting *In re Gen. Motors*, 55 F.3d at 821). Where a common fund has been created for the benefit of a class as a result of counsel’s efforts, counsel’s fees should be determined as a percentage of the fund. *See Blum v. Stensen*, 465 U.S. 886, 900 n.16 (1984) (“[U]nder the ‘common fund doctrine,’ . . . a reasonable fee is based on a percentage of the fund bestowed on the class.”); *In re Valeant Pharms. Int’l Sec. Litig.*, No. 3:15-CV-07658-MAS-LHG, 2020 U.S. Dist. LEXIS 103675, at \*60 (D.N.J. June 15, 2020), (“The percentage-of-recovery method . . . is generally favored in common fund cases.”), *report and recommendation adopted*, 2021 U.S. Dist. LEXIS 18894, at \*33 (D.N.J. Jan. 31, 2021).

In addition, “[i]n a common fund case, the trial court should consider certain factors in determining the percentage of fees awarded.” *Sutter v. Horizon Blue Cross Blue Shield of N.J.*, 406 N.J. Super. 86, 105 (Super. Ct. App. Div. 2009) (citing *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n. 1 (3d Cir. 2000)). The *Gunter* factors include: “(1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and

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<sup>2</sup> “[I]t is common for New Jersey courts to refer to congruent federal law when interpreting New Jersey’s class action rules.” *New York Career Guidance Servs., Inc. v. Wells Fargo Fin. Leasing, Inc.*, No. BER-L-1705-03, 2006 WL 224000, at \*3 (N.J. Super. Ct. Law Div. Jan. 27, 2006) (citing cases).

efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases." *Gunter*, 223 F. 3d at 195, n. 1.

Recently, the Third Circuit highlighted two considerations in assessing a fee award, namely, "how the amount awarded stacks up against the benefit given to the class, using either the amounts paid or the sums promised" and "whether side agreements between class counsel and the defendant suggest an unreasonable attorney's fee award." *In re Wawa, Inc. Data Sec. Litig.*, 85 F.4th 712, 718-19 (3d Cir. 2023). Moreover, New Jersey Rule of Professional Conduct 1.5(a) sets forth eight factors to be considered in determining the reasonableness of a fee.

Here, the requested Fee and Expense Award of \$500,000.00, representing one-third of the cash common fund, is reasonable and merits approval<sup>3</sup> because, for the reasons set forth below, the result was exceptional and will benefit the Class and because Class Counsel expended considerable effort and time litigating this difficult, novel and complex case on a contingent fee basis.

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<sup>3</sup> The requested fee award also encompasses unreimbursed litigation expenses. Settlement, Ex. A, § 10.1. Reasonable litigation-related expenses are customarily awarded in common fund cases and include costs such as document preparation and travel. *See, e.g., In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 135 (D.N.J. 2002) ("Counsel for a class action is entitled to reimbursement for expenses adequately documented and reasonably and appropriately incurred in the prosecution of the class action."); *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 226 F.R.D. 207, 256 (D.N.J. 2005) (approving a fee and expense award where expenses included: "(1) litigation fund contributions, (2) class notice expenses, (3) court reporters, (4) Lexis/Westlaw/online library research, (5) experts/consultants/investigators, filing/document fees, (6) witness fee/service of process, (7) meals, hotels and transportation, (8) messengers and express services, (9) photocopying, document imaging/scanning/coding, (10) postage, (11) special secretarial/word processing, and (12) telephone and facsimile. Such fees have been held to be reasonably incurred in the prosecution of such litigation."). Thus, included in the requested fee award, Class Counsel respectfully seeks reimbursement of \$4,343.97 for out-of-pocket expenses in these standard categories. *See Fraietta Cert.* ¶ 53.

**A. Class Counsel are Entitled to Compensation from the Common Fund**

It is well settled that an attorney who maintains a lawsuit that results in the creation of a fund or benefit in which others have a common interest may obtain fees from that common fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole”). This “common fund” doctrine regarding the award of attorneys’ fees is well established in New Jersey jurisprudence, where it is sometimes referred to as the “fund in court” exception to the general rule that litigants bear their own attorneys’ fees. *See* R. 4:42-9(a)(2); *Henderson v. Camden Cnty. Municipal Util. Auth.*, 176 N.J. 554, 564 (2003) (“The fund in court exception generally applies when a party litigates a matter that produces a tangible economic benefit for a class of persons that did not contribute to the cost of the litigation.”). Awards of fair attorneys’ fees from a common fund ensure that “competent counsel continue to be willing to undertake risky, complex, and novel litigation.” *Gunter*, 223 F.3d at 198 (citations omitted).

Class Counsel request the Court award a fee based on the percentage of the common fund obtained for the Settlement Class and use a lodestar cross-check to confirm that the fee is reasonable. Class Counsel’s efforts resulted in an outstanding settlement. The Settlement creates a \$1,500,000.00 Settlement Fund, from which Class Members may submit a claim for a *pro rata* cash payment from the Settlement Fund up to \$155 per student. Settlement, § 3.1. The Settlement benefits students and their family members who, like Plaintiffs, were denied an in-person, on-campus educational experience by FDA’s closure during the Spring 2020 Semester. Specifically, the Settlement permits “all people who paid Defendant Spring 2020 Semester tuition and fees or who benefitted from the payment, and whose tuition and fees have not been refunded” to make a

claim for a cash award. *Id.* § 2.37. “The settlement therefore creates a substantial benefit for a large group of class members.” *Bredbenner v. Liberty Travel, Inc.*, 2011 WL 1344745, at \*19 (D.N.J. Apr. 8, 2011).

In sum, Class Counsel achieved an exceptional result for the Settlement Class in this complex class action case while facing well-resourced and highly experienced defense counsel. Class Counsel litigated this case efficiently, effectively, and civilly. The benefit to the Class is a function of the high quality of Class Counsel’s work, which supports the requested fee award.

**B. The Requested Fee is Reasonable Under the Percentage-of-Recovery Method**

Under the percentage of recovery method, “a court must (1) value the proposed settlement and (2) decide what percentage of the proposed settlement should be awarded as attorney's fees.” *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 128 (D.N.J. 2002); *see also Sutter*, 406 N.J. Super. at 105. Courts have shown a preference for the percentage of recovery method in common fund cases because it most closely aligns the interests of counsel and the class, and rewards counsel directly based on the results they achieve. *See Sullivan v. DB Invs.*, 667 F.3d 273, 330 (3d Cir. 2011) (method “allows courts to award fees from the [common] fund ‘in a manner that rewards counsel for success and penalizes it for failure.’”); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) (same). Here, each of the *Gunter* factors supports the requested fee under the percentage approach.

**1. The Size of the Common Fund Created and the Number of Persons Benefited Support Approval of the Fee Request**

Courts have consistently recognized that the result achieved is a significant factor to be considered in making a fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (“most critical factor is the degree of success obtained”). Here, Class Counsel has secured a Settlement

that provides \$1,500,000 for the benefit of the Settlement Class, and allows any funds remaining in the fund after all valid claims are processed to create scholarships to benefit students in need. Settlement § 3.1(e).

The United States Supreme Court explained in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980), that “absentee class members[?] . . . right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel.” The Third Circuit has held that courts have the discretion to consider the size of the fund in relation to the fee award using either the amounts made available to the class or the amounts claimed. *See In re Wawa*, 85 F.4th at 718-19. This inquiry is “case-by-case” and “may consider, among other things, the claims rate.” *Id.*, 85 F.4th at 722-23 (internal quotation marks omitted) (quoting *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013)).

Here, for multiple reasons, it is appropriate to consider the full value of the \$1.5 million Settlement Fund in assessing the reasonableness of the requested fee award. First, this is not a case where Defendant’s liability is contingent. To the extent there are any funds remaining in the Settlement Fund after payment of Class Member claims, the costs of Notice and Settlement Administration, the Fee and Expense Award and Incentive Awards, any such remaining funds must be used to create scholarships to benefit students in need as *cy pres*. Settlement § 3.1(e). Thus, FDU’s liability is fixed at \$1.5 million, regardless of how many Settlement Class Members ultimately file a claim. Moreover, each Class Member is entitled to a “logically ascertainable share[?]” of the Settlement Fund in the form of a cash award (rather than a coupon or similar credit) upon filing a simple claim form, requiring only that they select a method of payment (cash or electronic), confirm their contact information, and sign attesting to their Classmembership. *See*



Settlement Ex. A (Claim Form). *See Boeing Co.*, 444 U.S. at 480 (“To claim their logically ascertainable shares . . . absentee class members need prove only their membership in the injured class”). Moreover, pursuant to the Notice Plan, the Claims Administrator has distributed direct notice by either email or U.S. mail to 6,604 unique Settlement Class Members with contact information provided by FDU. Declaration of Jessie Montague, ¶¶ 5, 9. While the claim-submission deadline is not until October 1, 2024, the Claims Administrator has received and processed 883 Claim Forms as of only June 25, 2024. *Id.*, ¶14. Thus, the claims rate is robust and will undoubtedly increase given the extended claims period and reminder email notice. *See, e.g., Nyby v. Convergent Outsourcing, Inc.*, No. 15-886 (ES) (MAH), 2017 U.S. Dist. LEXIS 122056, at \*18 (D.N.J. Aug. 3, 2017) (noting claims rate of over 10% is “above average” in consumer class action).

Given these considerations, the full \$1,500,000 common fund benefiting approximately 8,100 current and former FDU students and others who paid FDU Spring 2020 Semester tuition and fees should be referenced by the Court in assessing the Fee and Expense Award. The right of absentee Settlement Class Members to share in the fund, “whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel.” *Boeing*, 444 U.S. at 480.

Based on the settlement value of \$1.5 million, the requested Fee and Expense Award is one-third of the settlement value. The requested 33 1/3% fee, inclusive of Class Counsel’s costs and expenses, is reasonable under the percentage-of-recovery method. While there is no benchmark for the percentage of fees to be awarded in common fund cases, the Third Circuit has noted that reasonable fee awards in percentage-of-recovery cases generally range from nineteen to forty-five percent of the common fund. *In re Ocean Power Techs., Inc.*, No. 3:14-CV-3799, 2016

WL 6778218, at \*29, 2016 U.S. Dist. LEXIS 158222, at \*90 (D.N.J. Nov. 15, 2016) (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995)). Fees most commonly range from 25% to 33% of the recovery in common fund cases. *See In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 155 (D.N.J. 2013) (in common fund cases, courts typically award “fees of 25% to 33% of the recovery”); *La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, 2009 WL 4730185, at \*8 (D.N.J. Dec. 4, 2009) (same).

The requested fee of one-third of the Settlement Fund is in line with fees granted in comparable class actions. *See, e.g., Kirsch v. Delta Dental of New Jersey*, 534 F. App’x 113, 115-17 (3d Cir. 2013) (approving as reasonable percentage fee of 33% of class action settlement where value of settlement exceeded \$1.6 million); *Lincoln Adventures LLC v. Those Certain Underwriters at Lloyd's, London Members*, No. CV 08-00235 (CCC), 2019 WL 4877563, at \*6 (D.N.J. Oct. 3, 2019) (“Courts in the Third Circuit, including this one, have viewed fee percentages of 33% as reasonable.”) (citing cases); *Demnick v. Cellco P’ship*, No. CV 06-2163 (JLL), 2015 WL 13643682, at \*17, 2015 U.S. Dist. LEXIS 192723, at \*59 (D.N.J. May 1, 2015) (“33 1/3% is a standard figure for recovery in a consumer class action of the contingent-fee variety.”); *In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 152-56 (D.N.J. 2013) (*Gunter* factors weighed strongly in favor of fee award of 33% of settlement fund in class action); *id.* at 155 (“Courts within the Third Circuit often award fees of 25% to 33% of the recovery.”) (citing cases); *Milliron v. T-Mobile USA, Inc.*, 2009 WL 3345762 (D. N.J. Sept. 14, 2009) (awarding 33% of \$13.5 million settlement).

The requested fee is also consistent with fee awards granted in similar cases. *See Wright v. S. N.H. Univ.*, 561 F. Supp. 3d 211, 214 (D.N.H. 2021) (awarding fee of 33% (\$416,666 from settlement of \$1,250,000) in class action challenging university’s failure to refund student

tuition and fees for remote learning); *Rosado v. Barry University, Inc.*, No. 20-cv-21813, 2021 U.S. Dist. LEXIS 169196, at \*21 (S.D. Fla. Sept. 7, 2021) (awarding fee of 33.33% (\$800,000 from settlement of \$2,400,000) in class action challenging university's failure to refund tuition and fees for remote learning); *Miranda v. Xavier Univ.*, No. 1:20-cv-539, 2023 U.S. Dist. LEXIS 178072, at \*23 (S.D. Ohio Oct. 3, 2023) (awarding class counsel \$250,000 in attorneys' fees, which was 1/3 of the \$750,000 settlement fund).

## **2. The Reaction of the Settlement Class Members Supports Approval of the Fee Request**

A direct Class Notice was sent to each Class Member which explicitly stated that Class Counsel would seek an award of fees and expenses up to one-third of the Settlement Fund or five hundred thousand dollars (\$500,000). *See* Settlement, Exs. B-C. The Settlement Website provides a long-form Notice with the same language. Moreover, the long-form Notice set out the procedure for objecting to the fee request. Settlement (Ex. A to Fraietta Cert.), Ex. D. While the July 12, 2024 objection deadline has not yet passed, to date, there have been no objections to the settlement terms generally or to the fee request and only two (2) opt-outs have been received. The absence of any objection weighs in favor of the fee request.

## **3. The Skill and Efficiency of Class Counsel Support Approval of the Fee Request**

The efforts and skill of Class Counsel have results in a favorable outcome for the benefit of the Settlement Class. *See In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 132 (D.N.J. 2002) (“[T]he single clearest factor reflecting the quality of class counsels’ services to the class are the results obtained.”). The recovery obtained for the Settlement Class is the direct result of significant efforts of highly skilled and specialized attorneys with substantial experience in prosecuting complex class actions. Fraietta Cert., ¶¶ 67-68, Ex. N (Bursor & Fisher Firm Resume), Vozzolo

Cert., Ex. A (Vozzolo LLC Firm Resume) and Marron Cert., Ex. A (Law Offices of Ronald A. Marron Firm Resume). Class Counsel is particularly experienced in the litigation, certification, trial, and settlement of consumer class action cases like the instant action. *See id.* Class Counsel's success in overcoming Defendant's motion to dismiss in a case with substantial risks, and its efforts in obtaining substantial discovery, created the circumstances in which Plaintiff was able to obtain the \$1.5 million cash Settlement. Moreover, as noted *supra*, Class Counsel's success is particularly significant given that this matter presents one of the few times that a plaintiff's quasi-contractual claim seeking a tuition refund under the standard set forth in *Beukas*, 605 A.2d 776, successfully overcame a motion to dismiss. *See, e.g., Mitelberg*, 2021 WL 2103265, at \*3 (finding defendant "did not deviate from its responsibility to act in good faith and deal fairly with its students amidst the unprecedented COVID-19 pandemic"); *Dougherty v. Drew Univ.*, 534 F. Supp. 3d 363, 376 (D.N.J. 2021), *reconsideration denied sub nom. Dougherty v. Univ.*, 2021 WL 2310094 (D.N.J. June 7, 2021) (finding complaint did "not allege facts that plausibly show the University failed to meet its obligations under *Beukas*"). Given Plaintiffs' success on the motion to dismiss and the discovery obtained, Class Counsel were well positioned to negotiate this favorable settlement. In negotiating this settlement, Class Counsel had the benefit of years of relevant experience and familiarity with the facts of this case and the substantive case law at issue. As such, this factor supports awarding the fees as requested.

#### **4. The Complexity and Duration of the Litigation Support Approval of the Fee Request**

Had this Action continued without settling, Plaintiffs and Class Counsel would have been required to advance their case through the completion of discovery, including written and oral discovery, summary judgment and then trial, and then through appeal. Here, significant time,

effort, and expense would be incurred to brief complex substantive motions (including a motion to certify the class), resolve discovery disputes and dispositive motions, prepare for and complete trial, and submit post-trial submissions. Even if the Class were to recover a larger judgment after trial, which is far from certain, the additional delay, through summary judgment, trial, post-trial motions, and appeals, would deny the Class any recovery for years. Consumer class actions are inherently complex and this case presents particular challenges regarding establishing liability and damages. *See Miranda v. Xavier Univ.*, No. 1:20-cv-539, 2023 U.S. Dist. LEXIS 178072, at \*11 (S.D. Ohio Oct. 3, 2023) (noting even where the specific facts underlying an action where students received online instead of in-person instruction may not be particularly complex, “there would likely be intense dispute over the application of those facts” including university’s “alleged liability, and any damages resulting therefrom”); *see also Rosado v. Barry Univ.*, No. 20-21813-CIV, 2021 U.S. Dist. LEXIS 169196, at \*22-23 (S.D. Fla. Sep. 7, 2021) (noting “case involved difficult factual and legal issues arising from a global pandemic,” including due to “evolving law on disputes arising from COVID-19” and “strong defenses” presented by university). Accordingly, this factor weighs in favor of the fee request.

#### **5. The Risk of Non-Payment Supports Approval of the Fee Request**

Class Counsel entered this litigation on a contingency basis, and committed substantial resources of attorney and staff time towards investigating and litigating this action. To date, for four years, Plaintiffs’ attorneys have forgone payment of their legal fees and expenses in furtherance of Plaintiffs’ claims. *Fraietta Cert.*, ¶ 39. Class Counsel bore the risk of the case being dismissed at the pretrial stage, of losing at trial, or of failing to prove damages. Class Counsel recognizes Plaintiffs faced considerable risks in establishing class-wide liability, obtaining certification of the proposed class, and establishing damages. *Id.* ¶ 45. Class Counsel also assumed

the risk of the significant delay associated with achieving a final resolution through trial and any appeals and a significant risk of not recovering anything at all. Class Counsel are aware of a number of adverse rulings based on similar claims.<sup>4</sup> As noted by one court approving attorneys' fees in a similar action, "Given the evolving law on disputes arising from COVID-19, Class Counsel faced a significant risk of nonpayment. . . . The Court also recognizes that suing a university for adjusting to the COVID-19 pandemic to safeguard the health of its students and faculty is not the most desirable case." *Rosado*, 2021 U.S. Dist. LEXIS 169196, at \*22-23 (awarding attorneys' equivalent to 33.33% of the Settlement Fund). Where, as here, lead counsel undertook this action on a contingency basis and faced a significant risk of non-payment, this factor weighs more heavily in favor of rewarding litigation counsel.

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<sup>4</sup> Several courts across the country—including in New Jersey—have granted motions to dismiss tuition refund claims. *See, e.g., Moore v. Long Island Univ.*, 2022 WL 203988 (E.D.N.Y. Jan. 24, 2022); *Croce v. St. Joseph's College*, 73 Misc.3d 632 (Sup. Ct. Suffolk Cnty. Oct. 1, 2021); *Fedele v. Marist College*, 2021 WL 3540432 (S.D.N.Y. Aug. 10, 2021); *Hewitt v. Pratt Institute*, 2021 WL 2779286 (E.D.N.Y. July 2, 2021); *Rynasko v. New York Univ.*, 2021 WL 1565614, at \*4 (S.D.N.Y. Apr. 21, 2021); *Burt v. Bd. Of Trustees of Univ. of Rhode Island*, 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); *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). Other courts have denied class certification, *see De León v. New York University*, 2022 WL 2237452 (S.D.N.Y. June 22, 2022), and others have granted summary judgment in favor of the university defendants. *See Randall v. University of the Pacific*, 2022 WL 1720085 (N.D. Cal. May 28, 2022); *Choi v. Brown University*, 594 F. Supp. 3d 452 (D.R.I. Mar. 22, 2022), appeal dismissed, No. 22-1294, 2023 WL 3151103 (1st Cir. Jan. 11, 2023); *Berlanga et al v. University of San Francisco*, Case No. CGC-20-584829 (Ca. Super. Ct. San Fran. Cnty.) (July 19, 2022 Order, granting summary judgment for defendant on all counts except California's UCL); *Zwiker v. Lake Superior State Univ.*, 986 N.W.2d 427, 2022 WL 414183 (Mich. Ct. App. Feb. 10, 2022) (affirming trial court grant of motions for summary disposition in three consolidated matters).

## **6. The Significant Time Devoted to this Case by Class Counsel Supports Approval of the Fee Request**

Since the inception of this Action, Class Counsel has expended over 685 hours in prosecuting this Action for the benefit of the Settlement Class. *Fraietta Cert.*, ¶ 53. This amount of attorney time is proportionate to the request for one-third of the settlement fund in fees given Class Counsel's lodestar and the work performed to achieve the Settlement. The amount of time devoted to this case weighs in favor of the percentage of recovery requested as a fee in this case.

## **7. The Requested Fee of One Third of the Settlement Fund is within the Range of Fees Typically Awarded**

As discussed herein, the requested fee of one third of the Settlement Fund is within the range of fees awarded in comparable cases, under either a percentage-of-the-fund and considering Class Counsel's lodestar. *See* §§ III.B.1, III.D. Thus, this factor supports approval of the requested fee.

## **C. There Are No Side Agreements**

There are also no side agreements that would undermine Class Counsel's fee request. "The Third Circuit Court of Appeals defines a clear-sailing agreement as an agreement by the defense 'not to contest class counsel's request for attorneys' fees up to an agreed amount.'" *In re Wawa, Inc. Data Sec. Litig.*, No. 19-6019, 2024 U.S. Dist. LEXIS 65200, at \*27-28 (E.D. Pa. Apr. 9, 2024) (quoting *Wawa*, 85 F.4th at 717 n.3)). Here, there is no clear sailing agreement. Instead, the Parties simply negotiated a cap to the size of the Fee and Expense Award that Class Counsel would seek. *See* *Fraietta Cert.*, ¶ 48; *In re Wawa, Inc. Data Sec. Litig.*, 2024 U.S. Dist. LEXIS 65200, at \*34-35 (E.D. Pa. Apr. 9, 2024) ("[T]he hallmark of a clear-sailing provision is that it removes the defendant's right to *contest* the fee request. Parties may agree to the amount that will be requested without further agreeing that the defendant will forfeit their right to contest that request . . . . Here,

the parties agreed to a cap on the fees class counsel could request . . . . A defendant in this position may have negotiated class counsel down as far as possible but could still appeal to the Court for a further reduction.”) (emphasis in original). Moreover, here there is no “fee reversion,” “whereby a reduction in court-ordered attorney’s fees would return to [defendant] instead of being awarded to the class,” which “would deter class members from challenging fee awards ‘because the excessive fees wind up back in the *defendant’s* pockets,’ not class members’ pockets.” *In re Wawa, Inc. Data Sec. Litig.*, 2024 U.S. Dist. LEXIS 65200, at \*25 (quoting *Wawa*, 85 F.4th at 726) (emphasis in original). Rather, in this case “should the Court award less than the amount sought by Class Counsel, the difference in the amount sought and the amount ultimately awarded . . . shall remain in the Settlement Fund.” Settlement § 10.1. Once payment is made from the Settlement Fund of all Class Member claims, the costs of Notice and Settlement Administration, the Fee and Expense Award and Incentive Awards, to the extent there are any remaining funds, they must be used to create scholarships to benefit students in need as *cy pres*. Settlement § 3.1(e).

**D. The Lodestar Method Confirms the Requested Fee is Reasonable**

The requested fee is also reasonable under the lodestar method. *See, e.g., Educ. Station Day Care Ctr. Inc. v. Yellow Book USA, Inc.*, Nos. A-1653-05T1, A-1834-05T1, A-1693-05T1, 2007 N.J. Super. Unpub. LEXIS 1607, at \*19 (Super. Ct. App. Div. May 1, 2007) (noting “the lodestar method is more typically applied in statutory fee-shifting cases, and that the alternate method may be used to cross-check the reasonableness of the fee”); *Khona v. Subaru of Am., Inc.*, No. CV 19-9323 (RMB/AMD), 2021 WL 4894929, at \*1 (D.N.J. Oct. 20, 2021) (“The Court of Appeals for the Third Circuit has expressly stated that counsel’s lodestar is to be used as a ‘cross-check’ on any request percentage fee award.”) (citations omitted). “[A] court determines the lodestar by multiplying the number of hours counsel reasonably worked on a client’s case by a



reasonable hourly billing rate for such services in a given geographical area provided by a lawyer of comparable experience.” *Gunter*, 223 F.3d at 199.

From the inception of this lawsuit through June 27, 2024, Class Counsel has spent more than 685 hours on this case. *See Fraietta Cert.* ¶ 53. Class Counsel’s lodestar – which is derived by multiplying the hours spent on the litigation by each firm’s current hourly rates for attorneys, paralegals, and other professional support staff – is \$478,655. *See id.* Accordingly, the requested 33 1/3% fees, which equates to \$500,000, inclusive of costs, is aligned with the work performed by Class Counsel and represents a modest multiplier of 1.045. *See id.* ¶ 70.

As reflected in the accompanying Certification, the hours recorded were incurred on matters for the benefit of the litigation and representation of Plaintiffs and the Class. Such tasks include: investigation of the case and claims; preparing the Complaint; opposing Defendant’s motion to dismiss; requesting and reviewing discovery; conducting settlement discussions; preparing for and attending two mediation sessions; documenting the Settlement; moving for preliminary approval of the Settlement; documenting and implementing the Settlement Class Notice Plan; corresponding with Settlement Class Members regarding the Settlement; and overseeing the administration of the Settlement. *Fraietta Cert.* ¶ 40.<sup>5</sup>

Moreover, based on experience with consumer class actions, including managing the settlement process of such matters, it is estimated that Class Counsel will spend an additional

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<sup>5</sup> “The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records.” *In re Rite Aid Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005) (citation and footnotes omitted). However, daily time records supporting Class Counsel’s submissions are available for review should the Court wish to examine them. *Fraietta Cert.* ¶ 50.

approximately 50-75 hours between now and the conclusion of the Action working on future necessary activities. *Id.* ¶ 56. The necessary future anticipated work may include interacting with Settlement Class Members seeking guidance and posing questions via phone and email as to the Settlement terms; overseeing the claims process and safeguarding the rights and remedies of Settlement Class Members going forward under the Settlement; monitoring the status of submitted claims; providing assistance with curing any deficient claims; overseeing the administrative appeal process and reviewing claim denials; assisting class members requesting exclusion; addressing objections, if any, with respect to the Settlement; coordinating with defense counsel and the Settlement Administrator as to issues concerning claims and payments; reviewing and addressing miscellaneous administrative issues that are certain to occur; overseeing the final distributions and administration; filing for final approval of the Settlement; and, preparing for and attending the final approval hearing before the Court. *Id.*

When the lodestar is used as a cross-check on the reasonableness of the percentage award, a positive multiplier (commonly up to four times the lodestar) is generally awarded. *See In re Prudential Ins. Co. of America*, 148 F.3d 283, 341 (3d Cir. 1998) (noting that “multiples ranging from one to four are frequently awarded in common fund cases”). A multiplier here of 1.045 is well within the range of reasonableness. Positive lodestar multipliers are used in common fund cases to “compensate counsel for the risk of assuming the representation on a contingency fee basis.” *Stevens v. SEI Invs. Co.*, No. 18-4205, 2020 U.S. Dist. LEXIS 35471, at \*40 (E.D. Pa. Feb. 26, 2020) (approving multiplier of 6.16); *see also Demaria v. Horizon Healthcare Servs.*, No. 2:11-cv-07298 (WJM), 2016 U.S. Dist. LEXIS 143941, at \*13, 2016 WL 6089713, at \*5 (D.N.J. Oct. 18, 2016) (“A multiplier of 4.3 is consistent with the considerable risks that counsel faced in taking on this litigation, and the sophisticated legal work required to achieve success.”). Notably,

as Class Counsel dedicate additional hours to administering and overseeing the Settlement, the lodestar multiplier will only decrease.

To compute the lodestar, the court must also determine the reasonableness of the hourly rates charged by the successful party's attorney in comparison to rates "for similar services by lawyers of reasonably comparable skill, experience and reputation." *Rendine v. Pantzer*, 141 N.J. 292, 337 (1995). "The [New Jersey Supreme Court has] recognized that there is "no such thing as a market hourly rate in contingent litigation.'" *Sutter v. Horizon Blue Cross Blue Shield of New Jersey*, No. A-5725-09T1, 2012 WL 2813813, at \*8 (N.J. Super. Ct. App. Div. July 11, 2012) (quoting *Rendine*, 141 N.J. at 342). In addition, the Supreme Court of New Jersey has declared that to compensate for the delay in payment, the calculation of a reasonable hourly rate should be based on the current rates at the time of the fee application, rather than the rates in effect at the time the services were rendered. *Sutter*, 2012 N.J. Super. Unpub. LEXIS 1661, at \*20.<sup>6</sup>

Here, the hourly rates used to calculate Class Counsel's lodestar are the standard hourly rates for their attorneys and other professionals and are reasonable for the work in complex class actions. *See Monteleone v. Nutro Co.*, Civil Action No. 14-801 (ES) (JAD), 2016 U.S. Dist. LEXIS 85154, at \*8 (D.N.J. June 30, 2016) (relying upon examples from other decisions to find that rates "fall within ranges approved by other courts in similar geographic areas for comparable cases"). Class Counsel's blended hourly rate of \$606.56, as reflected in the concurrently filed Fraietta, Vozzolo, and Marron certifications is reasonable. The background and experience of Class Counsel is set forth in the firm resumes of Bursor & Fisher, P.A., Vozzolo LLC and the Law

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<sup>6</sup> In most circumstances, the State of New Jersey is considered a single market for purposes of determining a reasonable prevailing rate in the community. *See Pub. Int. Rsch. Grp. of New Jersey, Inc. v. Windall*, 51 F.3d 1179, 1186-88 (3d Cir. 1995).

Offices of Ronald A. Marron, APLC, and the Fraietta Certification. Class Counsel have an excellent reputation as class action litigators, with significant experience class action law. *See* Fraietta Cert., Ex. N (Bursor & Fisher, P.A. Firm Resume), Vozzolo Cert., Ex. A (Vozzolo LLC Firm Resume) and Marron Cert., Ex. A (Law Offices of Ronald A. Marron Firm Resume). The hourly rates of Class Counsel are also well within the range of rates billed by comparable attorneys in this market and are the standard rates they charge to all their clients. Moreover, comparable, and higher rates have been found reasonable by other courts for New Jersey attorneys practicing complex litigation. *See Talone v. Am. Osteopathic Ass’n*, 2018 WL 6318371 (D.N.J. Dec. 3, 2018) (approving blended rate of \$601 per hour in 2018 class action); *P. Van Hove BVBA v. Universal Travel Grp., Inc.*, 2017 WL 2734714, at \*13 (D.N.J. June 26, 2017) (finding a “blended hourly rate of \$644” to be “based upon a reasonable hourly rate for such services given the geographical area”); *Dartell v. Tibet Pharms., Inc.*, 2017 WL 2815073, at \*11 (D.N.J. June 29, 2017) (approving a “blended hourly rate of \$670”); *In re Wawa, Inc. Data Sec. Litig.*, 2024 U.S. Dist. LEXIS 65200, at \*81 (observing “courts in the Third Circuit have accepted blended hourly rates in this \$600+ range”).

This case presented a substantial risk of non-payment for Class Counsel. For approximately four years, Class Counsel invested significant time, effort, and resources to the litigation without any compensation. Fraietta Cert. ¶ 52. Cognizant of the risk of nonpayment, Class Counsel nonetheless took this case on a pure contingency basis and committed substantial resources of attorney and staff time towards investigating and litigating this action. *Id.* ¶ 4. Class Counsel further recognizes that Plaintiffs faced considerable risks in establishing class-wide liability, obtaining certification of the proposed class action (and perhaps opposing a motion for decertification), and establishing damages. Indeed, class certification has been denied in numerous

other cases and summary judgment has been granted for the defendant in other cases as well. *Id.* ¶ 37 (citing cases). Class Counsel also assumed the risk of the significant delay associated with achieving a final resolution through trial and any appeals.

Considering the several factors discussed above, including the economic benefits of the Settlement, the complexity and risk of the litigation, and the skill and experience of counsel, Class Counsel's time and rates are reasonable in this case. That Class Counsel undertook this representation on strictly a contingent basis, and achieved remarkable results which have been supported by the Class, the fee is reasonable and appropriate.

Accordingly, the 33 1/3% fee requested here is reasonable under both the percentage-of-the-fund approach and the lodestar approach.

**E. The Requested Fee is Fair and Reasonable Based on RPC 1.5**

Finally, attorneys' fees requests should also be reviewed for reasonableness under the factors set forth New Jersey Rule of Professional Conduct 1.5(a):

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; [and]
- (8) whether the fee is fixed or contingent.

RPC 1.5(a). Consideration of all these factors supports the 33 1/3% fee requested by Class Counsel.

*First*, “the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,” RPC 1.5(a)(1), all amply support the requested fee. *Second*, the hours and resources Class Counsel dedicated to the prosecution of the Action precluded them from certain other employment over the course of the approximately four years that they devoted to this Action. RPC 1.5(a)(2). *See* Fraietta Cert. ¶¶ 4, 57. *Third*, the “fee customarily charged in the locality for similar legal services,” RPC 1.5(a)(3), also supports the fee award, both as a percentage fee award which is well within the range awarded in other class actions and on a lodestar basis. *See supra* §§ III.B.1, III.D. *Fourth*, “the amount involved and the results obtained” also strongly support the reasonableness of the fee. RPC 1.5(a)(4). The \$1,500,000 common fund benefiting approximately 8,100 current and former FDU students and others who paid FDU Spring 2020 Semester tuition and fees is a very favorable outcome. The *fifth* and *sixth* factors, “the time limitations imposed by the client or by the circumstances” and “the nature and length of the professional relationship with the client” weigh neutral as they are not particularly relevant to the inquiry. *Seventh*, “the experience, reputation, and ability of the lawyer or lawyers performing the services” supports the fee request. *See* Fraietta Cert., Ex. N (Bursor & Fisher, P.A. Firm Resume), Vozzolo Cert., Ex. A (Vozzolo LLC Firm Resume) and Marron Cert., Ex. A (Law Offices of Ronald A. Marron Firm Resume). Last, the *eighth* factor, “whether the fee is fixed or contingent,” supports the reasonableness of the fee. As discussed above, Class Counsel have actively litigated this Action for over four years, on a contingency basis with no guarantee of receiving any payment.

In sum, all relevant factors support a finding that Class Counsel’s requested fee of 33 1/3% of the Settlement Fund is fair and reasonable.

#### **IV. CLASS COUNSEL SHOULD BE REIMBURSED FOR THEIR REASONABLY INCURRED LITIGATION EXPENSES**

Litigation expenses are properly recovered by Class Counsel. Expenses are recovered if they are adequately documented and reasonable in nature. *In re Safety Components, Inc. Securities Litigation*, 166 F. Supp. 2d at 108 (“Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action.”). Here, Class Counsel incurred expenses in the amount of \$3,674.52, which primarily is comprised of filing fees and mediation expenses. *See* Fraietta Cert., ¶ 58; *see also* Ex. C. Expenses are included within Class Counsel’s fee request. Since these expenses are adequately documented and reasonable, they should be granted by this Court.

#### **V. THE INCENTIVE AWARDS SHOULD BE APPROVED**

Incentive awards for class representatives promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits. The efforts of the Class Representatives were instrumental in achieving the Settlement on behalf of the Class and justify the awards requested here. The Class Representatives came forward to prosecute this litigation for the benefit of the class. They sought successfully to remedy a widespread wrong and have conferred valuable benefits upon their fellow class members. The Class Representatives provided a valuable service to the class by: (a) providing information and input in connection with drafting the complaint; (b) searching for documents and providing information in response to discovery requests; (c) overseeing the prosecution of the litigation; (d) consulting with counsel; and (e) offering advice and direction at critical junctures, including the Settlement of the litigation. *See* Fraietta Cert. at ¶¶ 72-75; *see also, e.g.*, Declaration of Steven Doval in Support of Plaintiffs’ Motion for Attorneys’ Fees, Costs, Expenses, and Incentive Awards, Declaration of Melissa

Cuello in Support of Plaintiffs' Motion for Attorneys' Fees, Costs, Expenses, and Incentive Awards, and Declaration of Ceaná Cuello in Support of Plaintiffs' Motion for Attorneys' Fees, Costs, Expenses, and Incentive Awards.

A \$5,000 incentive award for each of the Class Representatives in recognition of their services to the Class is modest under the circumstances, and well in line with awards approved by courts in New Jersey and elsewhere. *Bernhard v. TD Bank, N.A.*, 2009 WL 3233541, at \*2 (D.N.J. Oct. 5, 2009) (“[C]ourts routinely approve incentive awards to compensate named plaintiffs for services they provided and the risks they incurred during the course of the class action litigation.”) (quoting *Cullen*, 197 F.R.D. at 145); *Fittipaldi*, No. 3:20-cv-05526 (awarding \$5,000 incentive award each to two class representatives); *McGee v. Cont'l Tire N. Am., Inc.*, 2009 WL 539893, at \*52 (D.N.J. Mar. 4, 2009) (awarding \$3,500.00 incentive award); *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92 (D.N.J. 2012) at 125 (approving incentive awards of \$5,000 to all seventeen class representatives); *Miranda v. Xavier Univ.*, No. 1:20-cv-539, 2023 U.S. Dist. LEXIS 178072, at \*20-21 (S.D. Ohio Oct. 3, 2023) (approving \$5,000 service award to plaintiff in tuition refund litigation where she “stayed informed,” “was involved in settlement negotiations, approved of the settlement demand . . . and final settlement amount, and remained engaged throughout the litigation”).

Moreover, the Class Representatives were willing to take on the risk of drawing potential negative attention and compromising their standing within the FDU community by being named Plaintiffs in this litigation given the highly divisive atmosphere and volatile politics associated with the Covid-19 pandemic. *See Fraietta Cert.* ¶ 75; *see also Rosado*, 2021 U.S. Dist. LEXIS 169196, at \*22-23 (feeling bound by Eleventh Circuit precedent to deny service award, but in granting fee request, “recogniz[ing] that suing a university for adjusting to the COVID-19



pandemic to safeguard the health of its students and faculty is not the most desirable case.”).

Accordingly, Plaintiffs and Class Counsel respectfully request that the incentive awards provided for in the Settlement of \$5,000 each be approved.

## **VI. CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court (1) approve attorneys’ fees, costs, and expenses in the amount of one-third of the settlement fund, or \$500,000.00; (2) grant each Plaintiff an incentive award of \$5,000 in recognition of their efforts on behalf of the class (for a total of \$15,000); and (3) award such other and further relief as the Court deems reasonable and just.

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Respectfully submitted,

/s/ Philip L. Fraietta

**BURSOR & FISHER, P.A.**

Philip L. Fraietta  
Alec M. Leslie  
1330 Avenue of the Americas  
New York, NY 10019  
Telephone: (646) 837-7150  
Facsimile: (212) 989-9163  
Email: [pfraietta@bursor.com](mailto:pfraietta@bursor.com)  
[aleslie@bursor.com](mailto:aleslie@bursor.com)

**VOZZOLO LLC**

Antonio Vozzolo  
345 Route 17 South  
Upper Saddle River, New Jersey 07458  
Telephone: (201) 630-8820  
Facsimile: (201) 604-8400  
Email: [avozzolo@vozzolo.com](mailto:avozzolo@vozzolo.com)

**LAW OFFICES OF RONALD A.  
MARRON, APLC**

Ronald A. Marron (pro hac vice)  
651 Arroyo Drive  
San Diego, California 92103

Telephone: (619) 696-9006  
Facsimile: (619) 564-6665  
Email: [ron@consumersadvocates.com](mailto:ron@consumersadvocates.com)

*Class Counsel*