

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF DELAWARE**

MICHAEL NINIVAGGI, JAKE MICKEY,
CAILIN NIGRELLI, and HANNAH RUSSO,
individually and on behalf of all others
similarly situated,

Civil Action No. 20-cv-1478-SB

Plaintiffs,

v.

UNIVERSITY OF DELAWARE,

Defendant.

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

Dated: September 5, 2023

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INTRODUCTION

Plaintiffs Michael Ninivaggi, Jake Mickey, Cailin Nigrelli, Hannah Russo, and Sean Griffin (“Plaintiffs” or the “Class Representatives”) were undergraduate students enrolled at Defendant University of Delaware (“Delaware,” “UD” or “Defendant”) for the Spring 2020 semester. Plaintiffs alleged that Delaware breached its contract with students to provide an in-person, on-campus experience when it shut down midway through the Spring 2020 Semester and moved to online learning due to COVID-19. After extensive arms’ length negotiations, including a full-day mediation with the Honorable Sue L. Robinson (Ret.), the parties reached a Class Action Settlement¹ (the “Agreement” or “Settlement”). The Settlement—preliminarily approved by this Court on June 23, 2023 (ECF No. 152)—creates a \$6.3 million non-reversionary common fund that will be used to pay Settlement Class Members², notice and administration costs, incentive awards to the named Plaintiffs, and attorneys’ fees, costs, and expenses to Class Counsel.

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., Smith v. The University of Pennsylvania*, No. 2:20-cv-02086-TJS (\$4.5MM common fund); *Wright v. S. New Hampshire Univ.*, No. 1:20-cv-00609-LM (D.N.H.) (\$1.25MM common fund); *Rosado v. Barry Univ., Inc.*, No. 1:20-cv-21813-JEM (S.D. Fla.) (\$2.4MM common fund); *Martin v. Lindenwood Univ.*, No. 4:20-cv-01128-RLW (E.D. Mo.) (\$1.65MM common fund); *D’Amario v. The University of Tampa*, No. 7:20-cv-03744-CS (S.D.N.Y.) (3.4MM

¹ The Parties’ Class Action Settlement Agreement is attached as Exhibit A to the Declaration of Joshua D. Arisohn in Support of Plaintiffs’ Motion for Attorneys’ Fees, Costs, Expenses, and Incentive Awards (“Arisohn Decl.”). *See* Arisohn Decl. ¶ 2.

² Unless otherwise noted, capitalized terms have the same meaning as set forth in the Agreement.

common fund) (\$3.4MM common fund); and *Metzner v. Quinnipiac University*, 3:20-cv-00784-KAD (D. Conn.) (\$2.5MM common fund). What is more, Settlement Class Members will automatically receive a *pro rata* cash payment unless they exclude themselves from the Settlement.

In light of this exceptional result, Plaintiffs respectfully request, pursuant to Federal Rule of Civil Procedure 23(h), that the Court approve attorneys' fees of one-third of the Settlement Fund, or \$2,100,000.00, attorneys' costs and expenses of \$245,240.19, as well as incentive awards of \$5,000 each to Plaintiffs for their service as class representatives.

FACTUAL AND PROCEDURAL BACKGROUND

I. PLAINTIFFS' ALLEGATIONS

Plaintiffs and Settlement Class Members are current and/or former students, who paid tuition and fees for the Spring 2020 Semester at UD. Plaintiffs allege that Delaware failed to "issue appropriate refunds for the Spring 2020 term after cancelling in-person classes and changing all classes to an online/remote format ... as a result, of the Novel Coronavirus Disease." Consolidated Class Action Complaint (ECF No. 19) ("CAC"), ¶ 1. They also allege that Delaware "deprived Plaintiffs and other members of the Classes from recognizing the benefits of on-campus enrollment ... in exchange for which they had already paid ... tuition." *Id.* ¶ 2. The CAC further alleges that Delaware breached a contract with Plaintiffs when failing to provide Plaintiffs with refunds for tuition. *See, e.g., id.* ¶¶ 120, 158. Plaintiff Griffin additionally alleges that Delaware breached its contractual obligations with students when it cancelled seven days of the Spring 2020 Semester without making them up. Class Action Compl. in *Griffin v. University of Delaware*, 1:23-cv-00385-SB.

Delaware denies that it breached any contract, express or implied, with its students or that

it was unjustly enriched as a result of the change in learning modalities required during the Spring 2020 Semester.

II. THE LITIGATION AND WORK PERFORMED TO BENEFIT THE CLASS

On August 14, 2020, Plaintiffs Michael Ninivaggi, Jake Mickey and Cailin Nigrelli, along with their parents Penny Ninivaggi, Todd Mickey, and James Nigrelli (the “Parent Plaintiffs”) filed a putative class action complaint in the Superior Court of the State of Delaware. ECF No. 1-1.³ On October 29, 2020, Delaware removed the action to this Court. ECF No. 1.

In response to the *Ninivaggi* initial complaint, on November 19, 2020, Defendant filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). ECF No. 5. On December 11, 2020, the *Ninivaggi* Plaintiffs filed an opposition to the motion to dismiss. ECF No. 7. On December 18, 2020, Delaware filed a reply in support of its motion to dismiss in *Ninivaggi*. ECF No. 8. On August 18, 2020, Plaintiff Hannah Russo filed a putative class action complaint against Delaware in the Superior Court of the State of Delaware. *Russo v. University of Delaware*, 1:20-cv-01693-SB, ECF No. 1-1. On December 14, 2020, Delaware removed the *Russo* action to federal court and it was related to the *Ninivaggi* action. *Russo* ECF No. 1.

In response to the *Russo* initial complaint, on January 8, 2021, Delaware filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Russo* ECF Nos. 6-7. On February 3, 2021, Plaintiff Russo filed her opposition brief to the motion to dismiss. *Russo* ECF No. 9. On February 17, 2021, Delaware filed a reply in support of its motion to dismiss in *Russo*. *Russo* ECF No. 11. On May 18, 2021, this Court held oral argument on the motions to dismiss in *Ninivaggi* and *Russo*. ECF No. 12. On August 20, 2021, this Court issued an Order granting in

³ On May 27, 2022, the Parent Plaintiffs voluntarily dismissed their claims. ECF No. 62.

part and denying in part the motion to dismiss. ECF Nos. 15-16.

Following this Court's denial of Defendant's motion to dismiss, the Court entered a scheduling order. ECF No. 18. Following entry of the scheduling order, the parties engaged in extensive written discovery. Arisohn Decl. ¶ 17. The parties exchanged interrogatories as well as searched for and produced documents. *Id.* Following review of a substantial production of documents by Defendant, Plaintiffs served a 30(b)(6) deposition notice on Defendant. *Id.* Class Counsel took the deposition of multiple witnesses for the Defendant, including their 30(b)(6) witness. *Id.* Class Counsel also defended the depositions of the Class Representatives that were deposed. *Id.*

On September 3, 2021, Plaintiffs Michael Ninivaggi, Jake Mickey, Cailin Nigrelli, and Hannah Russo filed a consolidated class action complaint in the *Ninivaggi* action. ECF No. 19. On September 17, 2021, UD filed an answer to the consolidated class action complaint, denying the allegations generally and asserting thirteen affirmative and other defenses. ECF No. 20.

On October 5, 2021, Delaware filed a petition for certification of a novel and undecided issue of Delaware law to the Delaware Supreme Court. ECF No. 22. On October 19, 2021, Plaintiffs filed their opposition to Delaware's petition for certification. ECF No. 29. Delaware filed its reply in support of its petition for certification on October 26, 2021. ECF No. 30. The Court, on December 3, 2021, denied Delaware's petition for certification. ECF No. 34.

On July 1, 2022, Plaintiffs filed a motion for class certification. ECF No. 75. Delaware filed its opposition to Plaintiffs' motion for class certification on August 26, 2022. ECF No. 94. Plaintiffs filed their reply in support of their motion for class certification on September 30, 2022. ECF No. 102. On March 24, 2023, the Court held oral argument on Plaintiffs' motion for class certification. ECF No. 132. On March 31, 2023, this Court issued an order granting

Plaintiffs' motion and certified a class defined as "All undergraduate students enrolled in classes at the University of Delaware during the Spring 2020 semester who paid tuition." ECF Nos. 138-139. On April 14, 2023, Delaware filed a Petition for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f). On April 24, 2023, Plaintiffs filed an opposition to the petition. That petition remains pending.

On April 14, 2023, Delaware filed a motion to stay the case pending appeal of the Court's order granting Plaintiffs' motion for class certification. ECF No. 141. Plaintiffs filed a response to Delaware's motion to stay on April 18, 2023. ECF No. 143. Delaware filed a reply in support of its motion to stay on April 25, 2023. ECF No. 144. This Court issued an order denying Delaware's motion to stay the case pending appeal on April 26, 2023. ECF No. 146.

On October 28, 2022, Delaware filed a motion for summary judgment. ECF No. 117. Plaintiffs filed their opposition to Delaware's motion for summary judgment on December 5, 2022. ECF No. 126. Delaware filed its reply in support of its motion for summary judgment on December 22, 2022. ECF No. 128. That motion remains pending.

On September 30, 2022, Delaware moved to strike the expert testimony of Steven P. Gaskin and Colin B. Weir. ECF Nos. 103-104. On October 21, 2022, Plaintiffs opposed those motions. ECF Nos. 112-113. On November 30, 2022, Delaware filed its replies. ECF No. 123, 125. On October 25, 2022, Plaintiffs moved to strike the expert testimony of Benjamin S. Wilner. ECF No. 114. On November 30, 2022, Delaware opposed that motion, ECF No. 124, followed by Plaintiffs reply on December 16, 2022, ECF No. 127. These motions remain pending.

On April 5, 2023, Plaintiff Sean Griffin filed an action captioned *Griffin v. University of Delaware*, 1:23-cv-00385-SB, alleging claims for breach of contract and unjust enrichment

arising out of cancelled classes during the Spring 2020 semester. *Griffin*, ECF No. 1.

On January 23, 2023, the parties participated in a mediation with the Hon. Sue L. Robinson (Ret.). Arisohn Decl. ¶ 46. The parties did not reach a resolution at the mediation, but through further negotiations, over the next few months, reached agreement on all material terms of a class action settlement and executed a term sheet. *Id.* In the weeks following, the parties negotiated and finalized the full-form Settlement Agreement. *Id.* On June 23, 2023, the Court granted preliminary approval of the Settlement. ECF No. 152. During and since that time, Class Counsel has worked with the Settlement Administrator to administer the Notice Plan. Arisohn Decl. ¶ 49.

SUMMARY OF THE SETTLEMENT

Class Counsel's efforts resulted in an outstanding settlement. The Settlement provides an exceptional result for the Settlement Class by delivering immediate cash to class members. The Settlement creates a non-reversionary \$6,300,000.00 Settlement Fund, from which class members will automatically receive a *pro rata* cash payment, unless they exclude themselves from the Settlement. Arisohn Decl., Ex. A, ¶ 2.1.

ARGUMENT

I. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE AND SHOULD BE APPROVED

The requested fee award of \$2,100,000, representing one-third of the cash common fund, is reasonable and merits approval. Under Federal Rule of Civil Procedure 23(h), courts may award "reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Here, the Settlement Agreement provides that Class Counsel may petition the Court for an award of attorneys' fees of up to one-third of the

Settlement Fund (\$2,100,000.00). Arisohn Decl., Ex. A, ¶ 8.1.

A. The Percentage-Of-Recovery Method Should Be Used To Calculate Fees

The Third Circuit “has expressed a preference for the percentage-of-recovery method in common fund cases.” *In re AremisSoft Corp.*, 210 F.R.D. 109, 128 (D.N.J. 2002) (citing *In re Gen. Motors Corp.*, 55 F.3d at 821–22); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005), *as amended* (Feb. 25, 2005) (“The percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.”) (citation and internal quotation marks omitted). Using this methodology, attorney’s fees of one-third of a common fund are “unremarkable.” *Moon v. E.I. du Pont de Nemours & Co.*, 2023 WL 1765565, at *4 (D. Del. Feb. 3, 2023) (Bibas, J.); *Brumley v. Camin Cargo Control, Inc.*, 2012 WL 1019337, at *9 (D.N.J. Mar. 26, 2012) (“[T]he Court finds the attorneys’ fees (requested-one-third of the common fund amount-reasonable under the percentage-of-recovery method...”); *Rossini v. PNC Fin. Servs. Grp., Inc.*, 2020 WL 3481458, at *19 (W.D. Pa. June 26, 2020) (“a percentage award of 33.3% falls squarely within the range of awards found to be reasonable by the courts.”).

B. One-Third Of The Common Fund Is A Reasonable Fee

The Third Circuit has identified the following factors to consider in determining whether attorney’s fees are reasonable under the percentage-of-the-recovery approach:

- (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 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, (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies

conducting investigations, (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained, and (10) any innovative terms of settlement.

Halley v. Honeywell Int'l, Inc., 861 F.3d 481, 496 (3d Cir. 2017) (internal citations and quotation marks omitted); *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 (3d Cir. 2000) (these factors “need not be applied in a formulaic way”). In addition, the Third Circuit has “recommended that district courts use the lodestar method to cross-check the reasonableness of a percentage-of-recovery fee award.” *In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006). Still, a “lodestar cross-check, while useful, should not displace a district court’s primary reliance on the percentage-of-recovery method.” *Id.* Here, each of these factors weighs in favor of finding the requested fee here reasonable.

1. The size of the fund created and the number of persons benefitted

If final approval is granted, the Settlement will result in a substantial common fund of \$6,300,000.00 for the benefit of approximately 21,000 Class Members who otherwise would receive nothing. This provides a return of \$300 per Class Member before reductions for attorneys’ fees and costs, administrative costs and incentive awards. As described below, the Settlement thus provides an excellent result for Class Members as compared to other similar cases. This substantial recovery, which will be shared with all undergraduate and graduate students alike who paid any tuition or fees during the Spring 2020 semester, weighs in favor of approving the requested fee.

2. The presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel

As of the filing of this motion, no Class Member has filed an objection to the Settlement Agreement. “The absence of any objection weighs in favor of the fee request.” *Bredbenner v.*

Liberty Travel, Inc., 2011 WL 1344745, at *20 (D.N.J. Apr. 8, 2011).

3. The skill and efficiency of the attorneys involved

“[T]he percentage awarded, should, and generally does, increase commensurate with increased quality of representation. The quality of representation can be rewarded by considering the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.” *In re Computron Software, Inc.*, 6 F. Supp. 2d 313, 323 (D.N.J. 1998).

Class action litigation presents unique challenges and—by achieving an exceptional settlement—Class Counsel proved that they have the ability and resources to litigate this case zealously and effectively. In addition, Class Counsel are well-respected attorneys with significant experience litigating consumer class actions of similar size, scope, and complexity. *Arisohn Decl.* ¶¶ 69-72; *see also* Ex. N (Bursor & Fisher, P.A. Firm Resume). In the college tuition refund context, Class Counsel successfully obtained settlements for students in *Wright v. Southern New Hampshire Univ.*, 1:20-cv-00609-LM (D.N.H.), *Martin v. Lindenwood Univ.*, 4:20-cv-01128-RLW (E.D. Mo.), *D’Amario v. The University of Tampa*, 7:20-cv-03744-CS (S.D.N.Y.), *Metzner v. Quinnipiac University*, 3:20-cv-00784-KAD (D. Conn.) and *Fittipaldi v. Monmouth University*, Case No. 3:20-cv-05526-MAS-RLS (D.N.J.).

Moreover, Class Counsel has been recognized by courts across the country for its expertise. *See id.*; *see also* *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 566 (S.D.N.Y. Feb. 25, 2014) (“Bursor & Fisher, P.A., are class action lawyers who have experience litigating consumer claims. ... The firm has been appointed class counsel in dozens of cases in both federal and state courts, and has won multi-million dollar verdicts or recoveries in five class action jury trials

since 2008.”). Furthermore, Class Counsel achieved an exceptional result in this case while facing well-resourced and highly experienced defense counsel. Class Counsel litigated this case efficiently, effectively, and civilly. The excellent result is a function of the high quality of that work, which supports the requested fee award.

4. The complexity and duration of the litigation

This factor captures the “probable costs, in both time and money, of continued litigation.” *Bryan v. Pittsburgh Plate Glass Co. (PPG Indus.)*, 494 F.2d 799, 801 (3d Cir. 1974); *see also In re Gen. Motors Corp.*, 55 F.3d at 812; *In re Ocean Power Techs., Inc.*, 2016 WL 6778218, at *28.

Here, the complex nature of this litigation further favors the requested fee award. The claims and legal theories at issue in this case are novel, complicated, and unsettled. Plaintiffs litigated the case against Defendant for approximately two and a half years leading up to the settlement negotiations. Defendant was successful in several of its arguments on the motion to dismiss. Moreover, Defendant had filed a motion for summary judgment as well as motions to strike the expert testimony of Steven P. Gaskin and Colin B. Weir — motions which remain pending. In addition, although Plaintiffs’ motion for class certification was granted, Defendant had filed a Petition for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f) — which also remains pending. As such, continued litigation would be time consuming, expensive and risky.

As one court explained:

Class counsel have participated in court hearings and mediation sessions and submitted a number of well-researched filings to the Court. Absent settlement, litigation would likely continue for well over a year and would require both plaintiffs and defendants to incur considerable expert witness fees and other expenses. I find that the complexity and duration of the litigation weigh in favor of the requested award of fees.

Alexander v. Washington Mut., Inc., 2012 WL 6021103, at *2 (E.D. Pa. Dec. 4, 2012). The same is true here. Class Counsel participated in several court hearings and briefed oppositions to Defendant's motion to dismiss, motion for summary judgment, and motions to exclude the expert testimony of Steven P. Gaskin and Colin B. Weir. Class Counsel also briefed Plaintiffs' motion for class certification. As noted above, Class Counsel secured rare victories on the tuition-based claims at both the motion to dismiss and motion for class certification stages but continued to face substantial risk. Indeed, absent settlement, litigation likely would have continued for several years and would have required Class Counsel to overcome the hurdles of Defendant's pending motion for summary judgment, motions to strike expert testimony, and petition to appeal the Court's order granting class certification. These pending motions and petition, as well as trial, would have required Class Counsel to incur considerable expenses. In light of the foregoing, this factor weighs strongly in favor of the requested award of fees.

5. The risk of nonpayment

This factor recognizes the risk of non-payment in cases prosecuted on a contingency basis where claims are not successful, which can justify higher fees. "Any contingency fee includes a risk of non-payment." *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 309 (E.D. Pa. 2003); *see also In re Lucent Techs., Inc., Sec. Litig.*, 327 F. Supp. 2d 426, 438 (D.N.J. 2004) ("[C]ourts have recognized that the risk of non-payment is heightened in a case of this nature where counsel accepts a case on a contingent basis."); *id.* ("the intrinsically speculative nature of this contingent fee case enhances the risk of non-payment and bolsters the Court's analysis under this factor").

This case presented a substantial risk of non-payment for Class Counsel. For

approximately two and a half years, Class Counsel invested significant time, effort, and resources to the litigation without any compensation. Arisohn Decl. ¶¶ 59-62. 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.* ¶¶ 59-60. Class Counsel further recognizes that Plaintiffs faced considerable risks in opposing a Rule 23(f) petition, a motion for summary judgment, a motion to strike expert testimony, and trial. For example, summary judgment has been granted for the defendant in a number of other college-tuition cases. *Id.* ¶ 55 (citing cases). Class Counsel also assumed the risk of the significant delay associated with achieving a final resolution through trial and any appeals. That Class Counsel undertook this representation, despite the significant risk of nonpayment, strongly supports the requested fee award.

6. The amount of time devoted to the case by plaintiffs' counsel

Since plaintiffs' counsel began investigating this matter in March 2020, 3,232.60 hours have been devoted to the successful pursuit of this matter. Arisohn Decl. ¶ 60. That time was spent investigating the underlying claims and factual allegations, drafting the complaints, briefing and/or arguing the motion to dismiss, class certification, summary judgment, motions to strike experts, requesting discovery and reviewing responses, and taking and defending numerous depositions. These significant efforts, and counsel's diligence, resulted in this excellent Settlement for the Class. Importantly, no time spent on Class Counsel's fee request is included in the hours spent preparing this motion. Class Counsel anticipate spending substantial time and resources overseeing the final stages of the Settlement – no fees are being requested for these services either. Given the duration, complexity of the legal issues, complexity of the factual issues, and the need for expert guidance, the time invested by Class Counsel was reasonable.

This factor supports approving Class Counsel's fee request.

7. The awards in similar cases

The requested fee award comports with awards in similar cases. First, as explained above, courts in the Third Circuit routinely approve requests for one-third of a common fund for attorneys' fees. *Moon*, 2023 WL 1765565, at *4; *Brumley*, 2012 WL 1019337, at *9; *Rossini*, 2020 WL 3481458, at *19. Second, courts in other college tuition and fee refund cases have awarded one-third of the common fund for attorneys' fees. *See, e.g., Metzner v. Quinnipiac University*, 3:20-cv-00784-KAD, ECF No. 130 at ¶ 16 (D. Conn. Apr. 10, 2023); *In re Columbia University Tuition Refund Action*, Case No. 20-cv-03208-JMF, ECF No. 115 at ¶ 10 (S.D.N.Y. Mar. 29, 2022); *Rosado v. Barry Univ.*, No. 20-cv-21813-JEM (S.D. Fla. Sept. 7, 2021); *Wright v. Southern New Hampshire Univ.*, No. 1:20-cv-00609-LM (D.N.H. Sept. 22, 2021); *D'Amario v. Univ. of Tampa*, No. 7:20-cv-03744-CS (S.D.N.Y. Oct. 18, 2022). Accordingly, this factor weighs strongly in favor of granting Plaintiffs' request of one-third of the common fund for attorneys' fees.

8. The value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations

The result here is attributable entirely to the work of class counsel. There are no other lawsuits pending against Defendant on similar grounds and no known government agencies conducting investigations. Accordingly, this factor weighs heavily in favor of approving the requested fee award.

9. The percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained

This factor "directs the Court to estimate what percentage fee would have been

negotiated had the case been subject to a private contingent fee arrangement from the start.”
Huffman v. Prudential Ins. Co. of Am., 2019 WL 1499475, at *7 (E.D. Pa. Dec. 20, 2017).

Given that “Plaintiffs’ counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery,” *id.*, this factor supports the reasonableness of the requested fee award.

10. Any innovative terms of settlement

This factor does not weigh one way or another in the analysis.

C. The Requested Attorneys’ Fees Are Also Reasonable Under A Lodestar Cross-Check

A lodestar cross-check further supports granting Plaintiffs’ request of one-third of the common fund for attorneys’ fees. Courts applying the lodestar method generally apply a multiplier to account for the contingent nature of the fee, the risks of non-payment, the quality of representation, and the results achieved. *See In re Rite Aid Corp.*, 396 F.3d at 305–06 (“The multiplier is a device that attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys’ work.”).

The hourly billing rate to be applied is the hourly rate that is normally charged in the community where the counsel practices, *i.e.*, the “market rate.” *See In re Rite Aid Corp.*, 396 F.3d at 305 (“The lodestar award is calculated by multiplying the number of hours reasonably worked on a client’s case by a reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of the attorneys.”). Here, the hourly rates used by Class Counsel are comparable to rates charged by attorneys with similar experience, skill, and reputation, for similar services in their respective legal markets.

See Arisohn Decl. ¶¶ 64-69.⁴

Here, Plaintiffs’ counsel spent a total of 3,232.60 hours on this matter for a lodestar of \$1,991,703.60. Accordingly, the requested fee of \$2.1 million represent a multiplier of just 1.06, which is well within the accepted range in this Circuit. *Saint v. BMW of North America, LLC*, 2015 WL 2448846, at *16 (D.N.J. May 21, 2015) (explaining that in the Third Circuit, courts “routinely find in complex class action cases that a lodestar multiplier between one and four is fair and reasonable”); *Demnick v. Cellco P’ship*, 2015 WL 13646311, at *1 (D.N.J. May 1, 2015) (awarding a multiplier of 3.97); *Schuler v. Medicines Co.*, 2016 WL 3457218 at *10 (D.N.J. June 24, 2016) (approving multiplier of 3.57); *In re Valeant Pharms. Int’l., Inc. Secs. Litig.*, 2021 WL 358611, at *8 (D.N.J. Feb. 1, 2021) (approving multiplier of 3.16, but also noting that “[e]ven if the lodestar multiplier was 4.4, however, it would still fall within the common range”); *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 226 F.R.D. 207, 256 (D.N.J. 2005) (awarding a 2.83 multiplier). Class Counsel’s requested fee award is also consistent with multipliers awarded in other college tuition and fee refund settlements. See *In re Columbia University Tuition Refund Action*, Case No. 20-cv-03208-JMF, ECF No. 115 at ¶ 10 (S.D.N.Y. Mar. 29, 2022) (approving attorneys’ fees representing 4.3 times multiplier on Class Counsel’s regular hourly rates).

⁴ The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. See *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 284 (1989) (recognizing “an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise”); *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990) (“Generally, a reasonable hourly rate is to be calculated according to the prevailing market rates in the relevant community.”)

II. THE REQUESTED REIMBURSEMENT OF COSTS AND EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

The Settlement Agreement also provides that Class Counsel may petition the Court for reimbursement of costs and expenses not to exceed \$250,000.00. Arisohn Decl., Ex. A, ¶ 8.1. In common fund cases, counsel is “entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case.” *In re Cendant Corp., Derivative Action Litigation*, 232 F. Supp.2d 327, 343 (D.N.J. 2002). Courts in the Third Circuit have granted the reimbursement of attorney costs and expenses in addition to the granting of one-third of the fund for attorneys’ fees. *See, e.g., Dartell*, 2017 WL 2815073, at *11 (awarding reimbursement of expenses in addition to one-third of the fees); *Brumley*, 2012 WL 1019337, at *3 (Approving counsel’s request for “attorneys’ fees in the amount of one-third (33.33%) of the settlement fund plus costs”). For the reasons detailed below, Plaintiffs’ counsel seeks reimbursement of costs and expenses in the amount of \$245,240.19.

Here, Plaintiffs’ counsel has incurred approximately \$245,240.19 in costs and expenses. Arisohn Decl. ¶ 63. These expenses are the type that adequately reflect costs reasonably incurred in furnishing effective and competent representation—filing fees; copying costs; travel, and lodging expenses associated with out-of-town hearings, depositions and mediation; research costs; expert witness fees; and mediation fees rendered to the Honorable Sue. L. Robinson (Ret.). Arisohn Decl. Ex. C. Moreover, plaintiffs’ counsel has adequately documented these costs and expenses in expense reports, which is supported by declarations of plaintiffs’ counsel. *See* Arisohn Decl. Ex. C; Declaration of Paul J. Doolittle Ex. B; Declaration of Christopher P. Simon Ex. B; Declaration of Robert J. Kriner ¶ 4.; *see also In re Cendant Corp.*, 232 F.Supp.2d at 343 (“The affidavits and submissions of counsel demonstrate that the requested expenses were

adequately documented...”). Accordingly, Class Counsel respectfully requests the reimbursement of costs and expenses in the amount of \$245,240.19.

III. THE REQUESTED INCENTIVE AWARD REFLECTS PLAINTIFFS’ ACTIVE INVOLVEMENT IN THIS ACTION AND SHOULD BE APPROVED

Service 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 as a whole. 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 the drafting of the complaints; (b) participating in discovery by answering written interrogatories and searching for and producing documents; (c) overseeing the prosecution of the litigation; (d) having their depositions taken when requested; (e) consulting with counsel during the litigation; and (f) participating in the settlement process. Arisohn Decl. ¶¶ 74-76; *see also* Declaration of Michael Ninivaggi in Support of Plaintiffs’ Motion for Attorneys’ Fees, Costs, Expenses, and Incentive Awards, ¶¶ 2-7; Declaration of Jake Mickey in Support of Plaintiffs’ Motion for Attorneys’ Fees, Costs, Expenses, and Incentive Awards, ¶¶ 2-7; Declaration of Cailin Nigrelli in Support of Plaintiffs’ Motion for Attorneys’ Fees, Costs, Expenses, and Incentive Awards, ¶¶ 2-7; Declaration of Hannah Russo in Support of Plaintiffs’ Motion for Attorneys’ Fees, Costs, Expenses, and Incentive Awards, ¶¶ 2-7; Declaration of Sean Griffin in Support of Plaintiffs’ Motion for Attorneys’ Fees, Costs, Expenses, and Incentive Awards, ¶¶ 2-6.

A \$5,000.00 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 federal courts in the Third Circuit and elsewhere. *Hall v. Best Buy Co., Inc.*, 274 F.R.D. 154, 173 (E.D. Pa. Mar. 24, 2011) (awarding \$5,000.00 each to three class representatives as an incentive award); *In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 263 F.R.D. 226, 245 (E.D. Pa. 2009) (awarding representative plaintiffs incentive payments in the amounts of \$10,500.00 and \$5,000.00, for a total of \$115,000.00, finding those amounts to be “reasonable compensation considering the extent of the named plaintiffs’ involvement and the sacrifice of their anonymity”); *In re SmithKline Beckman Corp. Securities Litigation*, 751 F.Supp. 525, 535 (E.D. Pa. Oct. 29, 1990) (“The representatives for each plaintiff class therefore will be awarded \$5000 from the common fund.”). Plaintiffs and Class Counsel respectfully request that the incentive awards of \$5,000 per Plaintiff be approved.

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 \$2,100,000.00, and reimbursement of costs and expenses, in the amount of \$245,240.19; (2) grant each Plaintiff an incentive award of \$5,000 in recognition of their efforts on behalf of the class; and (3) award such other and further relief as the Court deems reasonable and just.

Dated: September 5, 2023

Respectfully submitted,

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