UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

KRYSTIAN WNOROWSKI, individually and on behalf of others similarly situated, Plaintiff, v. UNIVERSITY OF NEW HAVEN, Defendant.	No. 3:20-cv-01589 (MPS) April 21, 2023

PLAINTIFF'S UNOPPOSED MOTION TO PRELIMINARILY APPROVE CLASS ACTION SETTLEMENT, CERTIFY CLASS, APPOINT CLASS COUNSEL, APPROVE PROPOSED CLASS NOTICE, AND SCHEDULE FINAL APPROVAL HEARING

PLEASE TAKE NOTICE THAT, upon the Declaration of Paul Doolittle , sworn to on April 21, 2023, and the accompanying exhibits and memorandum of law, and upon all prior proceedings, pleadings, and filings in the above-captioned action, Named Plaintiff Krystian Wnorowski will move this Court at the United States District Court for the District of Connecticut, 450 Main Street, Hartford, Connecticut 06103, before the Honorable Michael P. Shea for an Order under Federal Rule of Civil Procedure 23: (1) preliminarily approving the proposed Settlement on behalf of the Settlement Class Members according to the terms of the Stipulation of Settlement; (2) provisionally certifying, for purposes of the Settlement only, the following Settlement Class:

> All UNH students who were enrolled in any UNH course as of March 24, 2020, with the exception of: (i) any non-matriculated high school student who took a UNH course; (ii) any person who properly executes and files a proper and timely opt-out request to be excluded from the Settlement Class; and (iii) the legal representatives, successors or assigns of any such excluded person.

(3) preliminarily appointing Named Plaintiff Krystian Wnorowski as Settlement Class Representative; (4) preliminarily appointing the law firm of Poulin | Willey | Anastopoulo, LLC as

Class Counsel to act on behalf of the Settlement Class and the Settlement Class Representative with respect to the Settlement; (5) approving the Parties' proposed settlement procedure, including approving the Parties' selection of JND Legal Administration as Settlement Administrator and approving the Parties' proposed schedule; (6) entering the proposed Order Preliminarily Approving the Proposed Settlement and Provisionally Certifying the Proposed Settlement Class, attached as Exhibit B to the Settlement Agreement, which is attached as Exhibit 1 to the Declaration of Paul Doolittle; and (7) granting such other and further relief as may be just and appropriate.

Oral argument is requested to the extent desired by the Court.

Dated: April 21, 2023

Respectfully submitted,

/s/ Paul Doolittle

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KRYSTIAN WNOROWSKI, individually and on behalf of others similarly situated, Plaintiff, v. UNIVERSITY OF NEW HAVEN, Defendant.	No. 3:20-cv-01589 (MPS) April 21, 2023

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION TO PRELIMINARILY APPROVE CLASS ACTION SETTLEMENT, CERTIFY THE SETTLEMENT CLASS, APPOINT CLASS COUNSEL, APPROVE PROPOSED CLASS NOTICE, AND SCHEDULE A FINAL APPROVAL HEARING

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I. INTRODUCTION

Plaintiff[1], individually and on behalf of all others similarly situated, by and through his counsel, hereby respectfully move the Court for preliminary approval of the proposed class action settlement ("Settlement") set forth in the Settlement Agreement ("Settlement Agreement" or "SA") (attached as **Exhibit 1** to the contemporaneously filed Declaration of Paul Doolittle ("Counsel Decl."")). Plaintiff, with consent of Defendant, the University of New Haven ("UNH" or the "University"), request that the Court enter the proposed Preliminary Approval Order that would:

1. Have the Class Action Complaint (ECF 9), serve as the operative complaint in this Litigation;
2. Grant preliminary approval of the proposed Settlement;
3. Certify, for settlement purposes only, the Settlement Class which consists of all UNH students who were enrolled in any UNH course as of March 24, 2020, with the exception of: (i) any non-matriculated high school student who took a UNH course; (ii) any person who properly executes and files a proper and timely opt-out request to be excluded from the Settlement Class; and (iii) the legal representatives, successors or assigns of any such excluded person.
4. Approve the form and content of, and direct the distribution of, the proposed Short and Long Form class notices ("Notices");
5. Appoint the law firm of Poulin | Willey | Anastopoulo, LLC ("PWA") as Class Counsel for the Settlement Class;
6. Appoint Plaintiff Krystian Wnorowski as Class Representative; and

[1] All capitalized terms used throughout this brief shall have the meanings ascribed to them in the Settlement Agreement.

7. Set a date for the Final Approval Hearing no less than seventy-five (75) days after the Short Form Notice is disseminated (SA ¶ 36).

Plaintiff, on behalf of himself and a proposed class of individuals, have agreed to settle all claims against UNH as to tuition and fees paid during the Spring 2020 semester. Plaintiff alleged that UNH breached a contract when it transitioned to remote learning and closed on-campus services in response to the COVID-19 pandemic. Plaintiff also alleged that these changes gave rise to claims of unjust enrichment. Plaintiff sought on behalf of himself and others similarly situated, a refund of a portion of his tuition and fees for the Spring 2020 semester. UNH denies all allegations of liability on any basis and has denied and continues to deny that it committed, or threatened or attempted to commit, any wrongful act or violation of law or duty alleged in the Action. As set forth in the Settlement Agreement, all students who do not opt out of the Settlement will receive a payment under the Settlement in consideration for the release of their claims against UNH. All Settlement Class Members will receive an equal amount of the Net Settlement Fund. Further, Settlement Class Members who enroll in a UNH course commencing in September 2023, or later, shall be eligible for a one-time, non-cash $200 tuition credit from UNH and will receive such credit directly into his or her UNH student account upon notifying UNH's Bursar's Office of his or her eligibility for the credit.

As set forth below, the proposed Settlement is the product of fully informed, arms-length settlement negotiations, including multiple mediation sessions with the Hon. S. Dave Vatti. The Settlement satisfies all of the prerequisites for preliminary approval and certification of the Settlement Class. The proposed Settlement is fair, reasonable, and adequate as it recognizes the risks of continued litigation, while providing sufficient relief to the Settlement Class Members. For these reasons, and those fully articulated below, Plaintiff respectfully requests that the Court

preliminarily approve the Settlement and enter the proposed Preliminary Approval Order.[2]

II. BACKGROUND AND STATUS OF THE LITIGATION

On October 22, 2020, Plaintiff Krystian Wnorowski filed a putative class action complaint in the United States District Court for the District of Connecticut styled *Krystian Wnorowski, on behalf of himself and others similarly situated v. University of New Haven*, Case No. 3:20-cv-1589 (the "Action").

On November 12, 2020, Plaintiff filed an Amended Class Action Complaint and Jury Demand (ECF 9) (the "Complaint"). The Complaint alleged that Named Plaintiff and putative class members are entitled to refunds of certain amounts of tuition, fees, and other charges because, beginning in March 2020, UNH provided classes remotely in response to the COVID-19 pandemic and closed on-campus services. The Complaint alleged that Named Plaintiff and all other UNH students who paid tuition and/or fees for the Spring 2020 semester had express and implied contracts with UNH that entitled them to in-person instruction, and that, by switching to remote education and closing on-campus services in response to the pandemic without reducing or refunding tuition or fees, UNH was liable for breach of contract. (Compl. at ¶¶ 59, 97, 126-129.) The Complaint also included two claims for unjust enrichment in the alternative to Plaintiff's two breach of contract claims. (*Id.* at ¶¶ 105-119, 132-145.) Named Plaintiff sought damages representing the "difference between the fair market value of the online learning provided versus the fair market value of the live, in-person instruction in a physical classroom on a physical campus with all the attendant benefits for which they contracted." *Id.* ¶ 104.

On February 1, 2021, UNH filed a Motion to Dismiss the Complaint in its entirety (ECF

[2] While UNH denies liability, it does not oppose this Motion, and supports preliminary approval of the Settlement Agreement, certification of the proposed Settlement Class for settlement purposes only, and dissemination of the Class Notice to the students.

18). The Court denied UNH's Motion to Dismiss on August 3, 2021. (ECF 37.) On February 16, 2022, Named Plaintiff moved to certify two putative classes of plaintiffs comprising of:

> **The Tuition Class:**
>
> All persons whom paid tuition for or on behalf of students enrolled in classes at the University for the Spring 2020 Semester and were denied live in-person instruction from March 9, 2020 until the end of the Semester.
>
> **The Fees Class:**
>
> All persons whom paid fees for or on behalf of students enrolled at the University of New Haven who were charged fees for services, facilities, resources, events, and/or activities for the Spring 2020 Semester that were not provided in whole or in part.

(ECF 52 at 1.) Named Plaintiff also moved for the court to appoint him as class representative and to appoint the Anastopoulo Law Firm, LLC (now known as Poulin | Willey | Anastopoulo, LLC) as class counsel. (*Id.*) UNH filed an Opposition to Plaintiff's Motion for Class Certification on April 1, 2022. (ECF 53.) Plaintiff replied on April 15, 2022. (ECF 57.)

The parties also engaged in substantial class-related and merits discovery, including issuing and responding to written discovery requests, collecting and producing responsive documents, and deposing Plaintiff and certain representatives from UNH.

On July 15, 2022, Plaintiff moved for summary judgment on its two breach of contract claims. (ECF 66.) UNH opposed Plaintiff's Motion for Partial Summary Judgment on August 22, 2022; (ECF 82); and Plaintiff filed a reply on September 9, 2022. (ECF 90.) On July 18, 2022, UNH moved for summary judgment on all counts of Plaintiff's Complaint. (ECF 70.) Plaintiff opposed UNH's Motion for Summary Judgment on August 22, 2022; (ECF 85); and UNH filed a reply on September 9, 2022. (ECF 91.) On September 15, 2022, at the request of the Parties, the Court referred the case for mediation with the Honorable Magistrate Judge S. Dave Vatti. The Court also denied without prejudice the Plaintiff's Motion to Certify Class and indicated that the Plaintiff had the plenary right to renew the

motion if the mediation did not result in settlement.

Thereafter, the Parties participated in several mediation sessions with Judge Vatti. The first mediation session took place virtually on November 9, 2022 after the Parties submitted detailed statements analyzing the case to Judge Vatti. This initial session lasted over four hours but did not result in a settlement. The Parties returned for a second virtual mediation session with Judge Vatti on December 16, 2022. This second session lasted for over three hours but still did not result in a settlement. The Parties participated in a third mediation session on January 10, 2023, followed by a fourth on January 30, 2023; however, a settlement still was not reached. Thereafter, counsel for each Party participated multiple ex parte conversation with Judge Vatti in an effort to reach a settlement. On March 1, 2023, following their ex parte discussions with Judge Vatti, the Parties agreed upon the essential terms of a settlement and the case was reported settled, pending a fairness hearing by the Court. In light of this, the Court denied without prejudice the Parties' motions for summary judgment. (ECF 126.) The Parties then worked towards drafting and finalizing the Settlement Agreement, which is presented herewith for the Court's consideration and approval.

Based upon their independent analysis, and recognizing the risks of continued litigation, counsel for Plaintiff believe that the proposed settlement is fair, reasonable, and is in the best interest of Plaintiff and UNH students. Although UNH denies liability, it likewise agrees that settlement is in the Parties' best interests. For those reasons, and because the Settlement is contingent on Court approval, the Parties submit their Settlement Agreement to the Court for its review.

III. SUMMARY OF THE TERMS OF THE PROPOSED SETTLEMENT

The key components of the Settlement are set forth below, and a complete description of its terms and conditions are contained in the Settlement Agreement.

A. The Proposed Settlement Class

Through the Settlement Agreement, the Parties stipulate to the certification of the Settlement Class for settlement purposes only. The Settlement Class is comprised of the following:

> All UNH students who were enrolled in any UNH course as of March 24, 2020, with the exception of: (i) any non-matriculated high school student who took a UNH course; (ii) any person who properly executes and files a proper and timely opt-out request to be excluded from the Settlement Class; and (iii) the legal representatives, successors or assigns of any such excluded person.

Should the Court grant final approval of the Settlement, by operation of law and as set forth in Paragraph 10 of the Settlement Agreement: (a) the Releasing Settlement Class Parties shall be deemed to have released any and all Released Settlement Class Parties' Claims (as defined in the Settlement Agreement) against the Released UNH Parties, and (b) shall forever be barred and enjoined from prosecuting any or all of the Released Settlement Class Parties' Claims against any of the Released UNH Parties.

B. The Proposed Class Notice

The Settlement Agreement provides for dissemination of a Short Form Class Notice. The Short Form Class Notice will provide Potential Settlement Class Members with pertinent information regarding the Settlement as well as directing them to the Long Form Class Notice, the Settlement Website, and the contact information for Class Counsel. Within fourteen (14) days after entry of the Preliminary Approval Order, UNH shall provide the Settlement Administrator with a list from the University Registrar's records that includes the names and last known email address and, if no e-mail address is available, a postal address, to the extent available, belonging to all Potential Settlement Class Members. *See* SA ¶ 17.

Shortly after receiving the Class List, the Settlement Administrator will send the Short Form Notice (attached to the SA as **Exhibit C**) via email or U.S. Mail. *See id.* ¶ 18. The Short

Form Notice shall advise the Potential Settlement Class Members of their rights under the Settlement, including the right to be excluded from and/or object to the Settlement or its terms. The Short Form Notice shall also inform Potential Settlement Class Members that they can access the Long Form Notice at the Settlement Website. *See* SA ¶ 19. The Long Form Notice shall advise the Potential Settlement Class Members of the procedures specifying how to request exclusion from the Settlement or submit an objection to the Settlement. *Id.*

Before the issuance of the Short Form Notice, the Settlement Administrator shall also establish a Settlement Website, which will include the Settlement Agreement, relevant pleadings, the Long Form Notice, any relevant Court orders regarding the Settlement, and a list of frequently asked questions mutually agreed upon by the Parties. *See* SA ¶ 20. Contact information for the Settlement Administrator, including a Toll-Free number, as well as Settlement Class Counsel's contact information will be provided. The form and method of Class Notice agreed to by the Parties satisfies all due process considerations and meets the requirements of Federal Rule of Civil Procedure 23(e)(1)(B). The proposed Long Form Class Notice describes plainly: (i) the terms and effect of the Settlement Agreement; (ii) the time and place of the Final Approval Hearing; (iii) how the recipients of the Class Notice may object to the Settlement; (iv) the nature and extent of the release of claims; (v) the procedure and timing for objecting to the Settlement; and (vi) the form and methods by which Potential Settlement Class Member may either participate in or exclude themselves from the Settlement. *See* SA ¶¶ 19, 23-27, 28-30.

C. Monetary Terms

The proposed Cash Settlement Amount is a non-reversionary cash payment of One Million Dollars ($1,000,000.00). *See* SA ¶ 38. In accordance with the Settlement Agreement, the Settlement Administrator shall make deductions from the Settlement Amount for court-approved

attorneys' fees and reasonable litigation costs, fees, and expenses for the Settlement Administrator, and any court-approved Service Award to the Plaintiff, in recognition of the risks and benefits of their participation and substantial services they performed. *See id.* ¶ 39. After all applicable fees and expenses are deducted, the Net Settlement Fund will be divided and distributed equally among all Settlement Class Members.

Should the Court grant preliminary approval of the Settlement, UNH shall pay the Settlement Amount into an escrow account with the Settlement Administrator within ten (10) business days. *See id.* ¶ 38. Within sixty (60) days after Final Approval, the Settlement Administrator will send Settlement Class Members their portion of the Settlement Benefit by check. *See* SA ¶¶ 5-6, 8. The Settlement Administrator will pay all legally mandated Taxes pursuant to the Escrow Agreement prior to distributing the settlement payments to Settlement Class Members. *See id.* ¶ 42.

Settlement Class Members shall have one hundred and eighty (180) days from the date of distribution of the checks to cash their check for the Settlement Benefit. All funds for Uncashed Settlement Checks shall be donated, as a *cy pres* award, to a fund to be created by UNH for the express benefit of UNH students and to be used for the purpose of improving or adding services for UNH students at the Beckerman Recreation Center at UNH's West Haven campus and/or for the purpose of making capital improvements to the same, which improvements would benefit UNH students. *See* SA ¶ 8.

D. Non-Cash Tuition Credit

In addition to the Cash Settlement Amount, all Settlement Class Members who enroll in a UNH course commencing in September 2023 or later shall be eligible for a one-time non-cash $200 credit from UNH that will be used solely to reduce the tuition for enrollment. *See* SA ¶ 9.

Upon notifying UNH's Bursar's Office of his or her eligibility for the credit, each eligible Settlement Class Member will receive the credit directly into his or her UNH student account. *Id.* The Non-Cash Tuition Credit will be in addition to any other credits or scholarships award by UNH to Settlement Class Members. The Non-Cash Tuition Credit is available only to the Settlement Class Members and may not be assigned, conveyed, or otherwise transferred to anyone else. *See* SA ¶ 1(r). When the value of the Non-Cash Tuition Credit is taken into account, the value of the overall gross settlement fund and benefit to all Potential Settlement Class Members (of which there are approximately 6428) is approximately $2,285,600.

E. Dismissal and Release of Claims

Upon the Settlement becoming Final, the Releasing Settlement Class Parties (as defined in the Settlement Agreement) shall be deemed to have forever released any and all suits, claims, controversies, rights, agreements, promises, debts, liabilities, accounts, reckonings, demands, damages, judgments, obligations, covenants, contracts, costs (including, without limitation, attorneys' fees and costs), losses, expenses, actions or causes of action of every nature, character, and description, in law or in equity, that any Releasing Settlement Class Party ever had, or has, or may have in the future, against the Released UNH Parties upon or by reason of any matter, cause, or thing whatever from the beginning of the world to the Effective Date, arising out of, concerning, or relating in any way to UNH's transition to remote education or other services during and following the COVID-19 pandemic through the end of Spring 2020 semester, or the implementation or administration of such remote education or other related educational or University services. This definition includes but is not limited to all claims that were brought or could have been brought in the Action. This definition includes but is not limited to both so called "tuition" and "fees." Further, the Releasing UNH Parties (as defined in the Settlement Agreement)

shall be deemed to have, and by operation of law and of the Final Judgment shall have, fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, and discharged any and all claims the Releasing UNH Parties may have, had, or discover against the Released Settlement Class Parties arising of or related to in any way the Released Settlement Class Parties' investigation, filing, prosecution, or settlement of this Action.. *See* SA ¶¶ 10-15.

F. Proposed Schedule Following Preliminary Approval

EVENT TIMING	
Mailing of Class Notices	Within fourteen (14) calendar days after entry of Preliminary Approval, UNH will produce a list of Potential Settlement Class Members to the Settlement Administrator (SA ¶ 16). Within thirty (30) calendar days after entry of Preliminary Approval, the Settlement Administrator will send the Short Form Notice to Potential Settlement Class Members (SA ¶ 17)
Deadline for Filing Objections to the Settlement	Within forty-five (45) days after the issuance of the Short Form Notice (SA ¶¶ 22, 27)
Deadline for Submitting Requests for Exclusion from the Settlement	Within forty-five (45) days after the issuance of the Short Form Notice (SA ¶ 22)
Final Approval Hearing	No less than seventy-five (75) days after the Short Form Notice is disseminated (SA ¶ 35)

IV. ARGUMENT

A. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED BY THE COURT

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval for the settlement of class actions. "A class action settlement is generally approved in two stages . . . . At the preliminary approval stage, a court makes an initial evaluation of fairness prior to notifying the class; at the final approval stage, notice of a hearing is given to the class members, and class members and settling parties are provided the opportunity to be heard on the question of final court approval." *Rosenfeld v. Lenich*, No. 18CV6720NGGPK, 2021 WL 508339, at *3 (E.D.N.Y. Feb. 11, 2021) (internal quotation marks omitted). "In considering whether to grant preliminary approval, the court must review the proposed terms of settlement and make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." *Id.* "[D]istrict courts must determine whether 'giving notice is justified by the parties' showing that the court *will likely be able to*: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal.'" *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D.N.Y. 2019) (quoting Fed. R. Civ. P. 23(e)(1)(B)(i-ii)) (emphasis in original).

"[T]o grant preliminary approval the court must consider the factors relevant to final approval and certification, and it must conclude that it is likely to find that those factors are satisfied." *Rosenfeld*, 2021 WL 508339, at *3. A court may grant final approval only after a hearing and finding that it is fair, reasonable, and adequate by considering four factors: "(1) adequacy of representation, (2) existence of arm's-length negotiations, (3) adequacy of relief, and (4) equitableness of treatment of class members." *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019); *Rosenfeld*, 2021 WL 508339, at *3. These factors were

incorporated into Rule 23 as part of the 2018 amendments to the Rule and they are intended to complement the "*Grinnell* factors" that courts in this circuit have traditionally considered in evaluating the fairness, reasonableness, and adequacy of a proposed settlement. *See Rosenfeld*, 2021 WL 508339, at *3 (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000) and *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001)). The *Grinnell* factors are:

> (1) the expense, complexity, and likely duration of the litigation;
> (2) the class's reaction to the settlement;
> (3) the stage of the proceedings and amount of discovery completed;
> (4) the risks of establishing damages;
> (5) the risks of establishing liability;
> (6) the risks of maintaining the class throughout the litigation;
> (7) defendants' ability to withstand greater judgment;
> (8) the range of reasonableness of the settlement amount considering the best possible recovery; and
> (9) the range of reasonableness of the settlement amount given the risks of litigation.

Id. As set forth below, preliminary approval of this proposed Settlement is appropriate as it satisfies all criteria for preliminary approval. Accordingly, Plaintiff requests that the Court grant the requested relief.

1. Plaintiff and Class Counsel Have Adequately Represented the Settlement Class.

"In determining the adequacy of class representatives and counsel, courts consider 'whether (1) plaintiff's interests are antagonistic to the interests of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation.'" *Rosenfeld*, 2021 WL 508339, at *4 and n.3 (quoting *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007) and noting appropriateness of relying on class certification adequacy requirements of Rule 23(a)(4) to guide Rule 23(e)(2)(A) analysis because the requirements are nearly identical). "An adequate class representative is one who has 'an interest

in vigorously pursuing the claims of the class' and 'no interests antagonistic to the interests of other class members.'" *Id.* (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006)). "A conflict or potential conflict alone will not . . . necessarily defeat class certification—the conflict must be fundamental." *Id.*

First, Plaintiff has no interests adverse or "antagonistic" to absent Settlement Class Members. Instead, Plaintiff and the other Settlement Class Members share the same interest in seeking a refund of the Spring 2020 semester tuition and or fees from UNH because UNH was forced to transition to remote education and close on-campus services in response to the pandemic. Further, Plaintiff has demonstrated allegiance and commitment to the Litigation. As such, Plaintiff has adequately represented the Settlement Class.

Second, Class Counsel have adequately represented the Plaintiff and the Settlement Class as required by Rule 23(e)(2)(A) by diligently prosecuting this Action on behalf of the Settlement Class Representative and the Settlement Class. Class Counsel engaged in extensive investigation in preparing the initial complaint and subsequent amended complaint, conducted substantial discovery, including the depositions of several UNH representatives, and fully briefed Plaintiff's motion for class certification and motion for summary judgment and Plaintiff's opposition to UNH's motion to dismiss and motion for summary judgment. Class Counsel also represented Plaintiff and the Settlement Class in lengthy and detailed settlement negotiations. As a result of Class Counsel's initial investigatory work, and efforts in discovery and throughout litigating this Action, Settlement Class Representative and Class Counsel were in a position to intelligently weigh the strengths and weaknesses of their case. Based on its comprehensive evaluation of the case, Class Counsel believes that the Settlement is in the best interests of the Settlement Class. Courts recognize that counsel's judgment is entitled to significant weight. *In re Flag Telecom*

Holdings, *Ltd. Sec. Litig.*, Master File No. 02-CV-3400 (CM) (PED), 2010 WL 4537550, at *13 (S.D.N.Y. Nov. 8, 2010) ("[G]reat weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation.") (internal quotation marks omitted). As a result, this factor weighs in favor of preliminary approval.

2. The Settlement Is Presumptively Fair Because It Was Achieved Through Extensive Arm's-Length Negotiations.

"If a class settlement is reached through arm's-length negotiations between experienced, capable counsel knowledgeable in complex class litigation, "the Settlement will enjoy a presumption of fairness." *In re GSE Bonds Antitrust Litig.*, 2019 WL 6842332, at *2 (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-74 (S.D.N.Y. 2000), *aff'd sub nom., D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001)). After conducting substantial discovery and fully briefing argument on the Plaintiff's motion for class certification and each Party's respective motion for summary judgment, the Parties participated in multiple mediation sessions before Judge Vatti. Because the Parties had conducted thorough discovery and fully analyzed the central issues in the case, both Parties were both in good positions to make intelligent and well-informed assessments of the strengths and weaknesses of their cases before agreeing to mediation and throughout the mediation itself. With Judge Vatti's assistance, the Parties reached a fair, reasonable, and adequate Settlement. Judge Vatti's participation ensured that the settlement negotiations were conducted at arm's length and without collusion between the Parties. *See e.g.*, *D'Amato v. Deutsche Bank*, 236 F.3d at 85 (2d Cir. 2001) ("[A] court-appointed mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure."). Therefore, this factor weighs in favor of preliminary approval.

3. The Relief Provided to the Settlement Class is Adequate under the Rule 23(e)(2)(C) Factors.

In evaluating the adequacy of the relief to the Settlement Class, the court must take in account:

(i) the costs, risks, and delay of trial and appeal;
(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required;
(iii) the terms of any proposed award of attorney's fees, including timing of payment; and
(iv) any agreement required to be identified under Rule 23(e)(3).

Fed. R. Civ. P. 23(e)(2)(C).

a. The Costs, Risks, And Delay Of Trial And Appeal

"The first factor set forth under Rule 23(e)(2)(C), the costs, risks, and delay of trial and appeal, subsumes several *Grinnell* factors, including the complexity, expense and likely duration of litigation, the risks of establishing liability, the risks of establishing damages, and the risks of maintaining the class through trial." *Rosenfeld*, 2021 WL 508339, at *5 (internal quotation marks omitted). Courts use these *Grinnell* factors to guide their assessment of whether the Rule 23(e)(2) factor will weigh in favor of granting final approval. *See, e.g.*, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 36 (E.D.N.Y. 2019). As explained in the following subsections (a)(i) through (iii), these four *Grinnell* factors all demonstrate that the risks, costs, and delay of trial and appeal would be significant and that, therefore, preliminary approval of the proposed settlement is favorable.

i. *Grinnell Factor 1*: Complexity, Expense, And Likely Duration Of The Litigation

This case has been diligently litigated by both sides. Significant work has been done, including but not limited to: written discovery, review of a significant volume of documents produced, legal research and comparison of analogous cases, depositions, analysis of numerous

catalogs and materials, and participation in multiple mediation sessions with an experienced mediator and magistrate judge. Had this case not settled, class certification and summary judgment would have been ruled upon, and depending upon the results, further discovery and litigation would have commenced before starting a jury trial. Accordingly, this factor warrants the granting of preliminary approval.

ii. *Grinnell Factors 2 & 3:* Risks Of Establishing Liability And Damages

With respect to liability, "the duty of this Court is not merely to determine the risks of establishing liability *at this time.* Rather, the Court must determine the risks of establishing liability should the settlement be rejected and the case go to trial at some future date." *McBean v. City of New York*, 233 F.R.D. 377, 387 (S.D.N.Y. 2006). "The determination of damages, like the determination of liability, is a complicated and uncertain process, typically involving conflicting expert opinions . . . ." *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 162 (S.D.N.Y. 2011).

In this case, seeking summary judgment against Plaintiff's claims, UNH produced evidence that there was no difference in the tuition charged for its online courses and its in-person courses and argued that it would thus be impossible for Plaintiff to prove damages. UNH further argued that after the transition to remote learning caused by the pandemic, UNH continued to offer services and activities supported by the fees at issue in this case. UNH also argued in support of summary judgment that there was no contract between the Parties guaranteeing on-ground instruction and services, that there was no breach of any express or implied contract, and that Plaintiff's contract claims were barred by impossibility and frustration of purpose, and that Plaintiff cannot prove all the elements of unjust enrichment. While Plaintiff vigorously opposed each of these arguments, Plaintiff cannot foreclose the possibility that this Court could grant

UNH's Motion for Summary Judgment if it were to be re-filed in the absence of this settlement. Therefore, it is Class Counsel's considered opinion that settlement on the proposed terms at this juncture in the Litigation, given all the risks involved, is the most prudent course.

iii. *Grinnell Factor 4:* Risks Of Maintaining The Class Action Through The Trial

The risks associated with class certification increase the risk of maintaining the proposed class, and therefore supports settlement. *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004) (concluding that settlement was appropriate as there was "appreciable risk to the class members' potential for recovery"); *see also In re Marsh ERISA Litig.*, 265 F.R.D. 128, 140 (S.D.N.Y. 2010) ("[U]ncertainty surrounding class certification supports approval of the Settlement.")

Here, along with the Party's respective motions for summary judgment, pending before the Court was Plaintiff's motion to certify the class, which the Court dismissed without prejudice to the Plaintiff re-filing such motion had mediation no resulted in settlement. Even if Plaintiff were to re-file his motion to certify the class, a number of courts have denied certification. *See, e.g.*, *Evans v. Brigham Young Univ.*, No. 1:20-CV-100-TS, 2022 WL 596862, at *4 (D. Utah Feb. 28, 2022) (denying plaintiff's motion for class certification). As such, there is no guarantee that certification will be granted in this action. At this stage of the Litigation, the Parties were able to make an informed decision concerning the risks involved. The risks render settlement at this juncture the prudent course.

In sum, the foregoing *Grinnell* factors also show that this Rule 23(e)(2)(C) factor weighs heavily in favor of preliminary approval of the proposed settlement, which will provide for an adequate and tangible present recovery for the Settlement Class Members. *See Rosenfeld*, 2021 WL 508339, at *5 ("Courts favor settlement when it results in substantial and tangible present

recovery, without the attendant risk and delay of trial.") (internal quotation marks omitted).

b. The Proposed Method of Distributing Funds to the Settlement Class is Effective, Fair, and Adequate.

Rule 23(e)(2)(C) next requires a consideration of the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims. Fed. R. Civ. P. 23(e)(2)(C)(ii). "Approval of a plan of distribution for a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole, i.e., the distribution plan must be fair, reasonable and adequate." *In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 316 (S.D.N.Y. 2020). "[A]n allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent Class counsel." *Id.* Here, by dividing the Net Settlement Fund equally among Settlement Class Members, the settlement promotes equity to the Settlement Class as a whole. *See Park v. Thomson Corp.*, No. 05 Civ. 2931, 2008 WL 4684232, at *5 (S.D.N.Y. Oct. 22, 2008). In addition, any Settlement Class Member who enrolls in a UNH course commencing in September 2023 or later shall be eligible for a one-time, non-cash $200 tuition credit from UNH and will receive such credit directly into his or her UNH student account upon notifying UNH's Bursar's Office of his or her eligibility for the credit. Class member claims also will be processed and distributed by a professional settlement administrator with experience handling similar class action matters, which will increase the overall effectiveness of the distribution. Therefore, the proposed method of distribution is effective, fair, and adequate and this factor weighs in favor of preliminary approval.

c. Attorneys' Fees and Expenses are Reasonable

Class Counsel will apply for an award of attorneys' fees and expenses for any services to

Settlement Class Representative and will receive any applied-for fees and expenses only upon this Court's order regarding attorneys' fees and costs. Class Counsel will apply to the Court for a Fee Award not to exceed $500,000. This represents only approximately 22% of the overall value of the gross settlement fund. Such a request for attorneys' fees is reasonable in comparison to other common-fund settlements. *See e.g.*, *In re Lloy'd Am. Trust Fund Litig.*, 96 Civ. 1262 (RWS), 2002 WL 31663577, at *26 (S.D.N.Y. Nov. 26, 2002) (noting "scores of common fund cases where fees . . . were awarded in the range of 33-1/3% of the settlement fund."); *Spicer v. Pier Sixty, LLC*, 08 Civ. 10240 (PAE), 2012 WL 4364503, at *4 (S.D.N.Y. Sept. 14, 2021). Similar percentages have been approved in other COVID-19 tuition refund actions. *See, e.g.*, *Wright v. S. New Hampshire Univ.*, No. 1:20-cv-00609-LM, Order (D.N.H. Aug. 22, 2021); *see also Rosado v. Barry Univ., Inc.*, No. 1:20-cv-21813-JEM, Order (S.D. Fla. Sept. 7, 2021).

d. The Parties Have No Additional Agreements to be Disclosed Under Rule 23(e)(3)

There are no side agreement to identify under this factor.

4. The Settlement Treats Settlement Class Members Equitably Relative to Each Other

The final factor, Rule 23(e)(2)(D), looks at whether class members are treated equitably. As reflected in the plan of allocation, *see supra* Part I.D.1, the proposed Settlement treats Settlement Class Members equitably relative to each other as they all will receive the same amount of the Net Settlement Fund and they all will be eligible for the same $200 Non-Cash Tuition credit, and all Settlement Class Members will be giving UNH the same release in return for the benefits provided under the Settlement. As such, this factor weighs in favor of preliminary approval.

5. The Remaining *Grinnell Factor* Weigh in Favor of Preliminary Approval

i. *Grinnell Factor 5:* Stage Of The Proceedings And The Amount Of Discovery Completed

"When considering this *Grinnell* factor, the question is whether the parties had adequate information about their claims . . . such that counsel possessed a record sufficient to permit evaluation of the merits of Plaintiffs' claims, the strengths of the defenses asserted by Defendants, and the value of Plaintiffs' causes of action for purposes of settlement." *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 161 (S.D.N.Y. 2011).

As noted above, the Parties engaged in significant discovery and fully briefed the central issues in the Action. UNH produced significant marketing, enrollment, and financial information which allowed Plaintiff to develop a comprehensive picture of the value of the available evidence regarding keys issues like whether there was a contract between the parties for in-person instruction and services and whether there was a difference in value between remote classes and in-person classes. Plaintiff deposed several UNH representatives and UNH deposed the Plaintiff. Both parties fully briefed their respective summary judgment motions and Plaintiff's motion for class certification. The Parties then elected to participate in mediation with Judge Vatti who helped them reached a fair, reasonable, and adequate Settlement. For these reasons, this factor also weighs in favor of preliminary approval of the Settlement.

ii. *Grinnell Factor 6:* Ability Of Defendant To Withstand A Greater Judgment

A "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Flores v. Anjost Corp.*, No. 11 Civ. 1531 (AT), 2014 WL 321831, at * 6 (S.D.N.Y. Jan. 29, 2014) (citation omitted). This factor alone is not an impediment to settlement when other factors favor the settlement. *See In re Vitamin C Antitrust Litig.*, No. 06–

MD–1738 (BMC)(JO), 2021 WL 5289514, at * 6 (E.D.N.Y. Oct. 23, 2021) (acknowledging that "in any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and . . . this fact alone does not undermine the reasonableness of the instant settlement."). UNH does not have the ability to withstand a greater judgment in this case and, even if it did, the outstanding result—a $1 million cash settlement—is still fair, reasonable, and adequate to compensate the proposed Settlement Class, and weighs in favor of preliminary approval. Notably, courts have found settlements for comparable amounts in factually similar matters to be fair, reasonable, and adequate. *See Choi v. Brown University*, No. 1:20-cv-00191 (D.R.I., 2022) (Court approving settlement for $1.5 million) (**Exhibit 2** to Counsel Decl.); and *Fittipaldi v. Monmouth University,* No. 3:20-cv-05526, (D. N.J., 2022) (Court approving settlement for $1.3 million).

iii. *Grinnell Factors 7 & 8:* Range Of Reasonableness Of The Settlement Fund In Light Of The Best Possible Recovery And All The Attendant Risks Of Litigation

"Typically, courts evaluate the[se] . . . two *Grinnell factors together*. . . . Determining whether a settlement amount is reasonable does not involve the use of a mathematical equation yielding a particularized sum. . . . Settlement should be in a "'range of reasonableness ... recogniz[ing] the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 315 (S.D.N.Y. 2020) (citations and internal quotation marks omitted). "'[T]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.'" *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,* No. 05MD1720MKBJO, 2019 WL 6875472, at *29 (E.D.N.Y. Dec. 16, 2019)

(quoting *Grinnell Corp.*, 495 F.2d at 455), *aff'd sub nom. Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704 (2d Cir. 2023).

Here, the proposed Settlement confers a sufficient and real benefit on the Settlement Class Members in one of a series of novel breach of contract cases arising out of the COVID-19 pandemic higher learning's and society's response to it. Hundreds of similar cases have been filed across the country and the law regarding everything from what is a college student's contract with a University to if and how can one accurately value the economic differences between in person, online, and hybrid-delivered educational services is being weighed, considered, and changed in real time as the Court considers this motion. To get a real return for affected UNH students in the near term is something the undersigned feels is an achievement given the quite possible recovery of zero. Settlement will result in Settlement Class Members receiving a *pro rata* share of the Net Settlement Fund based on the ratio of (a) the total number of Potential Settlement Class Members to (b) the total Net Settlement Fund. SA ¶ 4. The resulting ratio will be multiplied by the Net Settlement Fund to determine each Settlement Class Member's Settlement Benefit. *Id.* Consequently, preliminary approval is warranted.

iv. *Grinnell Factor 9:* Reaction Of The Class To The Settlement

Class Notice has not yet been disseminated. Consequently, students have not yet had the opportunity to consider or opine on the Settlement. As such, Class Counsel will address this factor at the Final Approval Hearing. However, Plaintiff supports the Settlement.

Because the proposed Settlement satisfies both the Rule 23(e)(2) factors and the *Grinnell* factors applied in this Circuit, the proposed Settlement should be preliminarily approved.

B. THE COURT SHOULD CERTIFY THE PROPOSED CLASS FOR SETTLEMENT PURPOSES

1. The Settlement Class Should Be Certified As Provided For In The Settlement Agreement

Plaintiff requests that the Court certify the proposed Settlement Class for settlement purposes only. These proposed settlement class plainly satisfies the four elements of Rule 23(a), and one or more of the requirements of Rule 23(b). Importantly, courts across the country have granted certification when evaluating settlement of analogous claims. *See In re Columbia Univ. Tuition and Fee Action*, Case No. 1:20-cv-03208, Dkt. No. 115 at 3 (JMF) (S.D.N.Y. Mar. 29, 2022) (final judgment certifying the proposed class for settlement purposes); *Choi et al v. Brown University,* Case No. 1:20-cv-00191-JJM-LDA, Dkt. No. 78 at 2 (D.R.I. Sept. 6, 2022) (preliminarily approving the proposed settlement and conditionally certifying the proposed class); *Wright v. S. New Hampshire Univ.*, 565 F. Supp. 3d 193, 210 (D.N.H. 2021) (granting preliminary approval of the parties' proposed class action settlement and preliminarily certifying the proposed class for settlement purposes). Moreover, UNH does not oppose certification of the Settlement Class for settlement purposes only.

2. Rule 23(a) Requirements Are Satisfied

To certify a class under Rule 23, a plaintiff must establish that the proposed Settlement Class meets each of the four requirements of subsection (a) of the Rule. These four elements are referred to as (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 238 (2d Cir. 2012). Here, all four elements are clearly satisfied.

a. 23(a)(1) - "Numerosity"

The proposed Settlement Class is sufficiently numerous. Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23. Here,

there are approximately 6,428 students in the proposed Settlement Class. *See* Counsel Decl. ¶ 10. *See also* **Exhibit 3** to Counsel Decl. The numerosity requirement is therefore amply satisfied.

b. Rule 23(a)(2) – "Commonality"

The proposed Settlement Class also satisfies the commonality requirement. *See generally Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 357-360 (2011). Rule 23(a)(2) requires that there be "questions of law or fact common to the class," and that the class members "have suffered the same injury." *Wal-Mart*, 564 U.S. at 349-50. "The commonality requirement is met if there is a common question of law or fact shared by the class." *Mendez v. Pizza on Stone, LLC*, No. 11 CIV. 6316 DLC, 2012 WL 3133547, at *3 (S.D.N.Y. Aug. 1, 2012) (quoting *Brown v. Kelly*, 609 F.3d 467, 475 (2d Cir. 2010)). Here, commonality exists because the Settlement Class members' claims are predicated on common core issues:

a. Whether UNH engaged in the conduct alleged;

b. Whether there is a difference in value between online distance learning and live in-person instruction;

c. Whether UNH had a contract for in-person learning and services with Plaintiff and the other members of the Settlement Class;

d. Whether UNH breached any alleged contract with Plaintiff and the other members of the Settlement Class by switching to remote education and closing on-campus services in response to the pandemic without reducing or refunding tuition or fees;

e. Whether certification of the Settlement Class proposed herein is appropriate under Fed. R. Civ. P. 23;

f. Whether Class members are entitled to declaratory, equitable, or injunctive relief, and/or other relief; and

g. The amount and nature of relief awarded to Plaintiff and the other Class members.

As such, the commonality requirement is satisfied because the Settlement Class raises

common questions of law and fact with respect to their claims against Defendant.

c. Rule 23(a)(3) – "Typicality"

Rule 23(a)(3) requires that a representative plaintiff's claims be "typical" of those of other class members. Fed. R. Civ. P. 23. "Typicality requires that the claims of the class representatives be typical of those of the class, and is satisfied when each member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Barrows v. Becerra*, 24 F.4th 116, 131 (2d Cir. 2022). Here, Plaintiff's claims and those of the Settlement Class arise from the same course of events and they all would make similar legal arguments to prove UNH's alleged liability. Plaintiff and every member of the Settlement Class were enrolled in at least one UNH class as of March 24, 2020, were transitioned to remote classes and were unable to access on-campus services when UNH closed its campus in Spring 2020 in response to the Covid-19 pandemic.

The Settlement Class members would also all make similar legal arguments to those that the Plaintiff has made in an effort to prove UNH's alleged liability. Specifically, they would argue, as Plaintiff has, that UNH students who paid tuition and/or fees for the Spring 2020 semester had express and implied contracts with UNH that entitled them to in-person instruction and services, and that, by switching to remote education and closing on-campus services in response to the pandemic without reducing or refunding tuition or fees, UNH was liable for breach of contract or, alternatively, unjust enrichment. Moreover, the members of the proposed Class have no individual interests in controlling the litigation because, unlike a tort claim, all of their claims share a common set of facts. As such, the Plaintiff's claims are typical of the claims of members of the proposed class.

d. Rule 23(a)(4) – "Adequacy"

The final requirement of Rule 23(a) requires that "the representative parties will fairly

and adequately protect the interests of the class." Fed. R. Civ. P. 23. "[A]dequacy of representation entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). "The focus is on uncovering conflicts of interest between named parties and the class they seek to represent. In order to defeat a motion for certification, however, the conflict must be *fundamental*." *Carr v. Becerra,* No. 3:22CV988(MPS), 2023 WL 1280172, at *13 (D. Conn. Jan. 31, 2023) (quoting *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009)) (emphasis added).

Here, as noted in Section IV.A.1 above in the analysis of Rule 23(e)(2)(A), adequacy is readily met. Plaintiff's interests are aligned with the interests of the absent Class members, thereby meeting the first adequacy prong. Second, as explained more fully in Section D. below, Class Counsel is qualified, experienced, and competent in complex litigation, and have an established, successful track record in class litigation – including analogous cases to that here. *See* Counsel Decl. ¶ 3 and Section IV.D, *infra*. Accordingly, the adequacy requirement is satisfied.

e. Rule 23(b) Requirements Are Satisfied Here

Under Rule 23(b)(3), a class action should be certified when the court finds that common questions of law or fact predominate over individual issues and a class action would be superior to other available methods of fairly and efficiently adjudicating the controversy. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 594, 623 (1997). "To show predominance, a party must show that (1) resolution of any material legal or factual questions can

be achieved through generalized proof, and (2) the issues common to the class are more substantial than the issues requiring individualized proof." *Headly v. Liberty Homecare Options, LLC*, No. 3:20-CV-00579 (OAW), 2022 WL 2181410, at *16 (D. Conn. June 16, 2022) (citing *In re Petrobras Sec.*, 862 F.3d 250, 270 (2d Cir. 2017)). "Calculating damages will raise some questions of an individual nature, but this fact is insufficient to prevent class certification where questions of liability are common to all members of the proposed class." *Id.*

"In determining whether the superiority requirement is satisfied, courts should look to the four factors laid out in Rule 23(b)(3): the class members' interests in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already begun by or against class members; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the likely difficulties in managing a class action." *Id.*; *see* Fed. R. Civ. P. 23(b)(3). "[M]anageability 'is, by the far, the most critical concern in determining whether a class action is a superior means of adjudication.'" *Id.* (quoting *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 82 (2d Cir. 2015)). Here, Plaintiff satisfies both requirements.

First, with respect to predominance, the common issues that exist in this case; *see* Section IV.B.2.b, *supra*; predominate over any individual issues that may exist. For example, all Settlement Class members would have to address the same core issues of 1) whether a contract existed between Plaintiff and UNH for in-person instruction and service; 2) if such contract did exist, whether UNH breached the alleged contract with Plaintiff and the members of the Settlement Class when it was forced to transition to remote educational instruction and close on-campus services in response to the pandemic during the Spring 2020 semester; and 3) whether there was any difference in value between online distance learning and live in-person instruction. These

material issues could likely be resolved through the use of generalized proof for the Settlement Class and these and other common issues to the class are more substantial than those issues requiring individualized proof. Thus, the Court can conclude that the predominance requirement has been satisfied.

Second, with respect to superiority, each factor to be considered under Rule 23(b)(3) weighs in favor of resolving this Action as a class action for settlement purposes only. In light of the common legal and factual questions at issue for all Settlement Class Members and the relatively small amount of damages compared to the enormous investment of time and money that it will take to litigate them, individual Settlement Class members have a very limited interest in individually controlling the prosecution of this Action and would gain little benefit from initiating separate actions. Individual lawsuits would also needlessly waste judicial resources as each lawsuit would likely involve the same evidence concerning the common issues central to this case, as noted in the preceding paragraph and in Section IV.B.2.b. The common issues and evidence would make resolving this Action as a class action for settlement purposes manageable and the proposed settlement would resolve approximately 6,430 students' potential claims. There also is no other pending litigation against UNH concerning the controversy at issue in this Action. Accordingly, the Court can conclude that resolving this Action as a class action for settlement purposes is a superior method to fairly and efficiently resolving the controversy.

As such, for all the foregoing reasons, the Court should enter an order certifying the Settlement Class for settlement purposes only.

C. THE PROPOSED SETTLEMENT NOTICE TO THE SETTLMENT CLASS SHOULD BE APPROVED.

"Rule 23(e)(1)(B) requires the Court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise. "

Manual for Complex Litigation, § 21.312. "The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, No. 20-339, 2023 WL 2506455, at *7 (2d Cir. Mar. 15, 2023). "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Id.* (internal quotation marks omitted). "Notice is adequate if it may be understood by the average class member." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 113–14 (2d Cir. 2005). (internal quotation marks omitted). "Notice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members." *In re Merrill Lynch & Co., Inc. Rsch. Reps. Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *8 (S.D.N.Y. Feb. 1, 2007) (citing *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988)).

Here, the Parties proposed notice plan includes email (where available), direct mail (where email is not available), publication of the Short Form Notice in UNH's school newspaper, and posting a link to the Settlement Website on UNH's own website. Information can likewise be found by calling the toll-free number or visiting the Settlement Website. This comprehensive notice plan is intended to fully inform Potential Settlement Class Members of the proposed Settlement, and the information they require in order to make informed decisions about their rights. The proposed Short Form and Long Form Class Notices contain simple and straightforward language such that it can be understood by the average class member.

Therefore, this Court should approve the form of notice and the method of publication that Plaintiff proposes as they satisfy the due process requirements of Fed. R. Civ. P. 23.

D. POULIN WILLEY ANASTOPOULO, LLC SHOULD BE APPOINTED AS CLASS COUNSEL

Fed. R. Civ. P. 23(g) requires the Court to examine the capabilities and resources of counsel to determine whether they will provide adequate representation to the class. Class Counsel –Poulin | Willey | Anastopoulo, LLC – easily meet the requirements of Rule 23(g). *See* Firm Resumes of Poulin | Willey | Anastopoulo, LLC, **Exhibit 4** to Counsel Decl. Importantly, Plaintiff is represented by counsel experienced in class action litigation including directly analogous cases. Indeed, this firm was appointed class counsel in substantially similar matters. *See* Counsel Decl. ¶ 3. Moreover, Class Counsel's work in this case on behalf of the Plaintiff and the proposed class and collective has been substantial. As such, this Court should not hesitate in appointing Poulin | Willey | Anastopoulo, LLC as Class Counsel.

V. CONCLUSION

The proposed Settlement is fair, reasonable, and adequate. Thus, for all the reasons set forth above, preliminary approval should be, respectfully, granted and the Preliminary Approval Order entered so as to permit the Parties to effectuate notice to the Potential Settlement Class Members.

Dated: April 21, 2023

Respectfully submitted,

/s/ Paul Doolittle

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