UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

MARK SHAFFER, MARGARET MAULDIN, CHARAFEDDINE ZAITOUN, and MARC LESSIN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

THE GEORGE WASHINGTON UNIVERSITY and THE BOARD OF TRUSTEES OF GEORGE WASHINGTON UNIVERSITY,

Defendants.

No. 1:20-cv-01145-RJL

Hon. Richard J. Leon

PLAINTIFFS' RESPONSE TO OBJECTIONS AND REPLY IN SUPPORT OF SERVICE AWARDS, ATTORNEYS' FEES & COSTS

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I. INTRODUCTION

In accordance with the Settlement Agreement and the Court's Preliminary Approval Order, Epiq Class Action and Claims Solutions, Inc. issued Email Notice to 35,740 emails (many of the Settlement Class Members had more than one valid email address) and 447 Short Form Notices by U.S. Mail (for those Settlement Class Members who did not have a valid email address or email address bounced-back). Supplemental Declaration of Cameron R. Azari, Esq. Regarding Implementation and Adequacy of Settlement Notice Plan and Notices ("Supp. Azari Decl.") ¶ 9. Because of such efforts, an Email Notice and/or Short Form Notice was delivered to 19,659 of the 19,875 unique, identified Settlement Class Members, or 98.9% of the identified Settlement Class Members. *Id.* ¶ 15.

Despite the breadth of the individual, direct notice campaign here (and direct notice was not the only notice method used), Class Counsel received no objections to the request for approval of the settlement itself. And for good reason: if final approval is granted, the $5,400,000 all-cash, common fund settlement will give direct, automatic payments to Settlement Class Members without reversion to Defendant. Class Counsel received just two objections from three objectors focusing on Plaintiffs' Motion for Attorneys' Fees, Costs, and Class Representative Service Awards (ECF No. 68): (1) an Objection to Plaintiffs' Motion for Attorneys' Fees, Costs, and Class Representative Service Awards from Objectors Benjamin Heidloff and Matthew West (ECF No. 70),[1] and (2) a Memorandum in Opposition in Part to

[1] To submit a valid objection, the Preliminary Approval Order required members of the Class to submit "documents sufficient to establish the person's standing as a Settlement Class Member (such as, for example, the person's Spring 2020 tuition invoice)… ." ECF No. 67 ¶ 21. Objectors Heidloff and West did not submit this material with their filed objection. *See generally* ECF No. 70. However, they appear to have attempted to submit that information (see ECF No. 70 at 1 ("Copies of objectors proof of enrollment are attached in **Exhibit A** as evidence of class membership.")) and represent that they are class members (with Plaintiffs' counsel

Class Counsel Motion for Attorneys' Fees, Costs and Class Representative Service Awards from Objector Susan Aledort (ECF No. 71).[2] *Cf.* Supp. Kurowski Decl. ¶ 4. As to the limited objections at hand, no objector disputes that an attorneys' fee should be awarded,[3] but they believe the award should be limited. And as to service awards, only Objectors Heidloff and West object to the request for service award payments to the Plaintiffs/Class Representatives. Objector Aledort explicitly notes no objection to the service award request.

Ultimately, as discussed in their opening motion and as detailed further below in response to the particular objections, the requested fee award of $1,799,820.00, representing one-third of the all-cash, non-reversionary common fund, is reasonable and merits approval. The Court should also approve service awards as requested to each Plaintiff who came forward to represent the interests of other people who paid tuition for the Spring 2020 semester at George Washington. Accordingly, Plaintiffs respectfully request that the Court deny the objections and reassert their requests that the Court (1) approve attorneys' fees, costs, and expenses in the amount of one-third of the settlement fund ($1,799,820.00) and (2) grant each Plaintiff a service award of $10,000 each in recognition of their efforts on behalf of the class.

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separately verifying their class membership with the settlement administrator, Epiq). Accordingly, Plaintiffs will respond on the merits to their objections.

[2] As a result, Class Counsel did not receive any objections (let alone fee/service award objections) from the remaining 19,872 unique, identified Settlement Class Members, and only one request for exclusion. *See* Supplemental Declaration of Daniel J. Kurowski in Support of Plaintiffs' Motion for Final Approval and Motion for Attorneys' Fees, Costs, and Class Representative Service Awards ("Supp. Kurowski Decl.") ¶ 4; Supp. Azari Decl. ¶¶ 9, 27.

[3] *See* ECF No. 70 at 12 ("Objectors [Heidloff and West] respectfully request that this Court limit Attorneys' fees to $1,530,000.00, representing 28.33% of the all-cash common fund"); ECF No. 71 at 8 ("Class Member Aledort respectfully request that the Court deny plaintiffs' attorneys motion for fees in part: (1) deny attorneys' fees, costs, and expenses in the amount of one-third of the settlement fund ($1,799,820.00), and instead award a lower attorneys' fee using either loadstar or nor more than 20% of the settlement fund.") (*sic* throughout) [Plaintiffs' lodestar is $1,111,428 and 20% of the settlement fund is $1,080,000].

II. BACKGROUND

The Settlement Agreement states that Class Counsel may petition the Court for an award of attorneys' fees, costs, and expenses of up to one-third of the Settlement Fund:

> The amount of the Fee Award shall be determined by the Court based on petition from Class Counsel. Class Counsel has agreed, with no consideration from Defendant, to limit their request for attorneys' fees, costs, and expenses to no more than thirty-three percent (33%) of the Settlement Fund (i.e. $1,799,820.00). Payment of the Fee Award shall be made from the Settlement Fund and should the Court award less than the amount sought by Class Counsel, the difference in the amount sought and the amount ultimately awarded pursuant to this Paragraph shall remain in the Settlement Fund.

Settlement Agreement ¶ 8.1. Similarly, the Settlement provides a vehicle for asking for approval of service awards:

> Class Representatives shall each request to be paid a service award in the amount of Ten Thousand Dollars ($10,000.00) from the Settlement Fund, in addition to any recovery pursuant to this Settlement Agreement and in recognition of their efforts on behalf of the Settlement Class, subject to Court approval. Should the Court award less than this amount, the difference in the amount sought and the amount ultimately awarded pursuant to this Paragraph shall remain in the Settlement Fund.

Settlement Agreement ¶ 8.3. Thus, any fee or service award less than the requested amount does not call for denial of final approval as any differences between the such requests and the amounts ultimately awarded by the Court simply remain in the Settlement Fund.

III. ANALYSIS

A. The Requested Fee Award Is Reasonable.

1. The D.C. Circuit uses the percentage-of-the-fund methodology to determine attorneys' fees in common fund cases, the Objectors' efforts to apply lodestar methodologies and invoke lodestar-based criticisms run counter to binding law.

"Courts have recognized that 'a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'" *In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d 14, 16 (D.D.C. 2003) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The "common fund doctrine" allows an attorney whose efforts created, increased or preserved a fund to recover from the fund the costs of his litigation, including attorneys' fees." *Id.* (quotation omitted). In *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1263 (D.C. Cir. 1993), the D.C. Circuit addressed questions regarding "the reasonable calculation of contingent counsel fees in class actions resulting in the creation of a common fund payable to plaintiffs." *Id.* at 1263. For many reasons discussed in its ruling, the D.C. Circuit answered such questions as follows: "We hold that the proper measure of such fees in a common fund case is a percentage of the fund." *Id.*; *cf. Blum v. Stenson*, 465 U.S. 886, 900 (1984) (describing "the calculation of attorney's fees under the 'common fund doctrine'" as "a reasonable fee … based on a percentage of the fund bestowed on the class"). Because the case before this Court involves contingent counsel fees in a class action which resulted in the creation of a common fund payable to the class, *Swedish Hospital* is controlling. Thus, the proper measure of attorneys' fees is a percentage of the fund, not lodestar.

Still, Objector Aledort argues that the lodestar figure represents a reasonable fee such that "[t]he court can stop with that and award Class Counsel its lodestar." ECF No. 71 at 2.[4] But neither of Objector Aledort's two citations undermine Plaintiffs' position that a percentage-of-the-fund approach is the proper method for determining the fee award in the D.C. Circuit. First, *DL v. D.C.*, 256 F.R.D. 239, 242 (D.D.C. 2009), involved no settlement, let alone a common fund one. Instead, it involved fee shifting under Fed. R. Civ. P. 37 following discovery disputes and ensuing motion to compel practice such that lodestar was the proper method of calculating fees. As a result, *DL* provides no basis for overriding the D.C. Circuit's directive to use the percentage-of-the-fund method here. As to Objector Aledort's second case (*Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)), and its caution against extensive fee litigation, that case further ***validates*** use of the percentage-of-the-fund method here. The D.C. Circuit specifically flagged the caution identified in *Hensley* as supporting use of the percentage-of-the-fund approach over of the lodestar approach:

> Additionally, a percentage-of-the-fund approach is less demanding of scarce judicial resources than the lodestar method. The lodestar method makes considerable demands upon judicial resources since it can be exceptionally difficult for a court to review attorney billing information over the life of a complex litigation and make a determination about whether the time devoted to the litigation was necessary or reasonable. This Court has reiterated the Supreme Court's warning that "'[a] request for attorney's fees should not result in a second major litigation.'" *Bebchick, supra*, at 401 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983)). It is much easier to calculate a percentage-of-the-fund fee than to review hourly billing practices over a long, complex litigation.

[4] Objectors Heidloff and West do not dispute that a percentage of the fund should be used, requesting that the Court limit fees to 28.33% of the common fund instead of the requested 33% (ECF No. 70 at 2), but use lodestar-based arguments in support of their proposed 15% reduction (*id*. at 3-3-6, 7-8).

See Swedish Hosp., 1 F.3d at 1269–70. Thus, Objector Aledorf's request to apply a lodestar approach over the percentage of the fund approach must be rejected as inconsistent with D.C. Circuit precedent. Because the proper measure of contingent attorneys' fees in this common fund case is a percentage of the fund, objections to the contrary must be denied.

2. The requested 33% award, which would cover attorneys' fees *and* out-of-pocket case expenses, is reasonable.

Next, Objector Aledorf contends that, "if a percentage is to be applied," the cases cited in Plaintiffs' opening fee/service award motion do not support a 33% award. ECF No. 71 at 4. Objectors Heidloff and West do not dispute that a percentage of the fund should be used, asking for the Court to limit fees to 28.33% of the common fund instead of the requested 33% (ECF No. 70 at 2). Plaintiffs respectfully disagree and cases within the D.C. Circuit and university COVID-19 settlements specifically support the requested fee award.

In *Swedish Hospital,* the D.C. Circuit opined that the district court acted within its discretion in setting the percentage of the fund award at 20%. *Swedish Hosp.*, 1 F.3d at 1272. In its 1993 review, it noted the existence of a "***range*** of reasonable fees in common fund cases," with "a review of similar cases reveals that a ***majority*** of common fund class action fee awards fall between twenty and thirty percent." *Id.* (emphases added); *cf. Equal Rts. Ctr. v. Washington Metro. Area Transit Auth.,* 573 F. Supp. 2d 205, 215 (D.D.C. 2008) ("This court has previously held that reasonable fee awards may range from fifteen to forty-five percent of the total class award.") (citation omitted).[5] And consistent with the recognition that fee awards in common fund

[5] "Larger common funds are typically associated with smaller percentage awards, however, because even a small percentage of a very large fund yields 'a very large fee award.'" *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 39 (D.D.C. 2011), *as amended* (Nov. 10, 2011) (quoting *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 122 (2d Cir. 2005)). This is not a megafund case.

cases fall within a range, courts within the D.C. Circuit have repeatedly approved fee awards of 33% as reasonably and customarily awarded. *See, e.g.*, *Radosti v. Envision EMI, LLC*, 760 F. Supp. 2d 73, 78–79 (D.D.C. 2011) ("Finally, a 33% award is consistent with the award in other common fund cases from this district. Accordingly, the Court finds that Class Counsel's request for fees is reasonable and should be approved.") (citations omitted); *Bynum v. D.C.*, 412 F. Supp. 2d 73, 85 (D.D.C. 2006) ("A 1/3 fee is within the range of what is customarily awarded in this District" and awarding 33% of $12 million fund) (citation omitted); *In re Vitamins Antitrust Litig.*, No. MDL 1285, 2001 WL 34312839, at *12 (D.D.C. July 16, 2001) ("Moreover, the Court notes that a one-third recovery is a common percentage arrived at in contingency fee cases. Since the percentage of recovery method is meant to simulate awards that would otherwise prevail in the market, the Court finds a one-third attorneys' fees recovery in this case to be reasonable.") (citations omitted). And as noted in Plaintiffs' opening motion, the requested 33% award requested here follows the attorneys' fee awards approved in COVID-19 university litigation specifically. *See* ECF No. 68 at 4 (collecting cases approving one-third fee awards); *In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d at 19 (reviewing award percentages from other districts in determining fee reasonableness). The brief of Objectors Heidloff and West is silent as to the fee percentage awarded in other COVID-19 university litigation settlements (*see generally* ECF No. 70) as is Objector Aledort's brief (see ECF No. 71), though her declaration identifies one readily distinguishable settlement that awarded less, Rutgers.[6]

[6] *See* ECF No. 71-1 ¶ 6. Rutgers involved a different procedural posture than that before this Court confirming the outlier nature of the fee award there. In Rutgers, the trial court "dismissed the lawsuit in December 2020, but the decision was appealed and the parties entered mediation, which resulted in the settlement." ECF No. 71-2 at Exhibit 4. By contrast, Plaintiffs here continued with the appeal and successfully obtained a remand to this Court, continued with discovery, deposed GW employees, defended the depositions of Plaintiffs (and where applicable Plaintiffs' student-children), conducted expert discovery, and moved for class certification before

3. Lodestar-based criticisms must be rejected.

Despite the central role that the percentage-of-the-fund methodology plays in the D.C. Circuit, in opposing the fee request, the Objectors offer various arguments regarding the lodestar and time records submitted by Plaintiffs' counsel as support for their percentage-of-the-fund based request under the lodestar cross-check.[7] *See generally* ECF No. 68 at 12-14. As Plaintiffs note, unrebutted by Objectors, courts applying the lodestar method may apply a multiplier to consider the contingent nature of the fee, the risks of non-payment, the quality of representation, and the results achieved. *See Lorazepam*, 2003 WL 22037741, at *9 (noting multiples ranging up to four are frequently awarded in common fund cases when the lodestar method is applied); *In re Baan Co. Sec. Litig.*, 288 F. Supp. 2d at 19–20 (reviewing counsel's reported lodestar and finding "that a multiplier of 2.0 or less falls well within a range that is fair and reasonable"); *Meyer v. Panera Bread Co.*, No. 17-cv-2565(EGS/GMH), 2019 WL 11271381, at *10 (D.D.C. Mar. 6, 2019) (noting that a fee award of up to twice the lodestar amount has been recognized in this District as "unremarkable in common fund cases"); *Swedish Hosp. Corp.*, 1 F.3d at 1263, 1272 (approving fee award approximately 3.3 times the lodestar amount). *See also* 5 Newberg and Rubenstein on Class Actions § 15:86 (6th ed.) (noting that "the lodestar cross-check guards against windfalls by providing a court with information about the relationship of the percentage award to class counsel's aggregate billing for the case," adding "[p]ositive multipliers from 1–3

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the parties entered the mediation which resulted in the settlement. In addition, while Rutgers students would receive between $50 and $70 each from the $5,000,000 settlement (ECF No. 71-2 at Exhibit 4), GW students will receive greater awards per student under the Settlement here.

[7] While this is not a fee-shifting case, out of an abundance of caution, Plaintiffs' counsel also included detailed, contemporaneous time records in support of their hours as the usefulness of submitting actual time charges to support a fee request has been recognized by this and other courts. *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, n.12 (D.C. Cir. 1982) (citing *Pete v. UMW Welfare & Retirement Fund*, 517 F.2d 1275, 1292 (D.C. Cir. 1975)).

are the norm."). Here, at $1,111,428.00, the lodestar submitted supports the reasonableness of the requested fee under the cross-check and falls squarely in the range of what D.C. courts have recognized as fair and reasonable. At its least conservative construction, the requested award reflects a 1.62 multiplier, thus is within the 2.0 or less multiplier reported in the case law.[8] *See also* 5 Newberg and Rubenstein on Class Actions § 15:87 (6th ed.) ("[I]t is worth pausing to consider why class counsel would ever get a positive multiplier, that is, more than their hourly rates. The simple answer is that most class action lawyers undertake class suits on a contingent fee basis. That means that they do not charge their clients (the class representative or the class) for the costs of the lawsuit or for their fees during the course of the lawsuit; and if the lawsuit fails, they recover nothing. The contingent fee lawyer is therefore investing her resources and time in her clients' suit, forestalling payment to a future date, and sharing the risk of losing that case with the client… Given the risk of nonpayment that contingent fee lawyers face, it should not be surprising—nor necessarily problematic—if a lodestar cross-check yields a multiplier above 1, that is, a multiplier showing that the lawyers are getting paid more than their hourly billing rates."). Moreover, the Objectors do not challenge the further work that has and will be done on their behalf that counsel has and will incur to implement the settlement, increasing the hours worked on behalf of the class and further reducing any multiplier. ECF No. 69 at 14 (citing Kurowski Decl. ¶ 18).

As further detailed in the following sections, the attacks on the lodestar and time entries submitted to support the Court's application of a lodestar cross check do not call for the requested fee reductions made by the Objectors.

[8] That multiplier drops further to 1.45 if counsel's out-of-pocket costs are added to the equation as the 1/3 of the fund requested in Plaintiffs' motion covers not only fees *but also* out-of-pocket costs incurred.

a. Counsel's billing records are sufficiently detailed to support application of the lodestar cross-check, moreover, they reflect the actual time spent in litigation of this case.

Objectors Heidloff and West assert that purported vagaries in their selected billing entries also supports a reduction of the requested attorneys' fee in this case. ECF No. 70 at 3. They take particular issue with the research and drafting of Plaintiffs' appellate briefing and Plaintiffs' motion to dismiss opposition, which were structured to avoid the need for redaction and disclosure of attorney work product. Relatedly, Objector Aledorf declares that counsel were "exceedingly generous in logging time," with a "significant amount of attorney duplication." ECF No. 71 at 4.

However, the Objectors identify no deficiencies which were so "systemic or egregious" that the Court cannot generally assess the reasonableness of the hours actually spent as part of a lodestar cross-check. *Wye Oak Tech., Inc. v. Republic of Iraq*, 557 F. Supp. 3d 65, 90 (D.D.C. 2021). Indeed, "fee application[s] need not present the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney.'" *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982) (citation and quotation omitted omitted). The Objectors' focus on specific time entries reflect the precise reason the D.C. Circuit favors the percentage-of-the-fund methodology over lodestar evaluations. *Swedish Hosp. Corp.*, 1 F.3d at 1269–70 ("Additionally, a percentage-of-the-fund approach is less demanding of scarce judicial resources than the lodestar method. The lodestar method makes considerable demands upon judicial resources since it can be exceptionally difficult for a court to review attorney billing information over the life of a complex litigation and make a determination about whether the time devoted to the litigation was necessary or reasonable."); *id.* at 1266 (citing the *Third Circuit Task Force Report*'s observation

that the lodestar process "'creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law'").

b. Use of current rates in the lodestar calculation.

Even though Plaintiffs do not seek fees under the lodestar methodology (rather a percentage of the fund is the proper method with a lodestar cross-check to support the reasonableness), Objectors Heidloff and West object to using current rates that Plaintiffs' counsel submitted as part of the optional lodestar cross-check. ECF No. 70 at 7-8. In doing so, they cite past, lower, historic hourly rates used as part of the lodestar cross-check applied in other COVID-19 university settlements in which Hagens Berman represented settlement classes. ECF No. 70 at 7.[9] However, the Objectors' brief omits that in each of the two settlements identified, *Metzner v. Quinnipiac* and *Choi v. Brown University,* the court awarded Plaintiffs' counsel one-third of the common fund as the attorneys' fee under the typical percentage-of-the-fund methodology, not fees based on the lodestar method.

In any event, the Supreme Court has held that a "reasonable attorney's fee" awarded under a fee-shifting statute should account for delay in payment. *See Missouri v. Jenkins*, 491 U.S. 274, 282 (1989). Plaintiffs' counsel have received no compensation for four years of work. "Clearly, compensation received several years after the services were rendered—as it frequently is in complex litigation —is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed...." *Id*. at 283. Thus, courts make "an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise." *Id*. at 284. The D.C. Circuit has followed the Supreme Court's lead.

[9] *See, e.g.*, Kurowski Decl. ¶ 31 (ECF No. 68-1) (noting use of time based "on their current hourly rates" and explaining that the "firm's rates are set based on periodic analysis of rates used by firms performing comparable work and that have been approved by courts").

See, e.g., *Murray v. Weinberger*, 741 F.2d 1423, 1433 (D.C. Cir. 1984) ("Current market rates have been used in numerous cases to calculate the lodestar figure when the legal services were provided over a multiple-year period and when use of the current rates does not result in a windfall for the attorneys."); *Copeland v. Marshall*, 641 F.2d 880, 893 n. 23 (D.C. Cir. 1980) (en banc) (noting that lodestar may be "based on present hourly rates, rather than the lesser rates applicable to the time period in which the services were rendered," to reduce or eliminate "harm resulting from delay in payment"). Other courts confirm the standard nature of current rates, including in common fund cases. *See, e.g., LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998) (noting "current rates, rather than historical rates, should be applied in order to compensate for the delay in payment"); *In re Elec. Carbon Prod. Antitrust Litig.*, 447 F. Supp. 2d 389, 410 (D.N.J. 2006) (explaining that an "adjustment to the current rates [is] typically required for the lodestar calculation" in a common fund case); *In re Churchfield Mgmt. & Inv. Corp.*, 98 B.R. 838, 871 (Bankr. N.D. Ill. 1989) (noting firm "was involved in the case for almost five years working on a wholly contingent basis, and the firm has not received any compensation to date. It will be awarded its lodestar at current rates to account for the long delay in payment, in accord with standards generally applied to class action litigators outside of bankruptcy whose work is wholly contingent."). Plaintiffs' counsel appropriately submitted their current rates under this standard practice.

4. The Objectors' other miscellaneous arguments are readily addressed.

a. The class members will automatically benefit from the settlement.

Objectors Heidloff, West, and Aledorf dispute the value or benefits that class members will automatically receive under the settlement relative to other metrics. ECF No. 70 at 2; ECF No. 71 at 5-6. However, by comparing the settlement award to the value of a GW credit hour (ECF No. 70 at 2) or the cost of a semester's tuition (ECF No. 71 at 5, 7), the Objectors are

comparing apples to oranges. Here, Plaintiffs sought refunds based on "the difference in value between the live in-person classes" compared to the online experience provided since mid-March 2020 to the end of the Spring 2020 semester, not a complete refund of all tuition and fees paid for the whole semester. ECF No. 17 at ¶ 8. At all times, GW has disputed that any difference in value existed between such experiences. Thus, "[a]lthough fully litigating the claims through trial could possibly result in a higher recovery, the settlement represents a necessary compromise between inherent risks of doing so and a guaranteed cash recovery." *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 394 (D.D.C. 2002). This objection does not support denial of the requested attorneys' fee and cost request.

b. Complexity of the case supports the requested fee award.

Objector Aledorf objects to the characterization of this case as complex to support the requested fee award, declaring that "[j]ust asserting complexity does not make it so" and "[c]omplex litigation this was not." ECF No. 71 at 6. But Plaintiffs' counsel's position that this case was in fact complex does not reflect mere rhetoric by counsel. Rather, in reviewing the appeal here, the D.C. Circuit recognized "the novel and challenging issues that these cases present." *Shaffer v. George Wash. Univ.*, 27 F.4th 754, 760 (D.C. Cir. 2022). Moreover, class actions are quintessential complex litigation cases, presenting many unique legal issues simply not present in ordinary cases. The Federal Judicial Center specifically includes an entire section dedicated to class actions in its Manual for Complex Litigation, Fourth (2004). Class actions are complex litigation cases, and this one was no different. Likewise, this objection does not support denial of the requested attorneys' fee and cost request.

c. The skill and efficiency of class counsel.

Objector Aledorf does not object to "[t]he experience, skill and professionalism of counsel and the performance and quality of opposing counsel," which are all considered in

evaluating a requested fee. *In re Vitamins*, 2001 WL 34312839, at *11. Instead, Objector Aledorf suggests that "there are strong arguments to dispute that Class counsel were efficient," inaccurately describing the case as "a single copycat case that had not completed discovery and had not even reached summary judgment." ECF No. 71 at 6. While the case did not reach summary judgment, it passed through many other important and novel case milestones. For example, counsel succeeded before the D.C. Circuit to revive this case from its complete dismissal and moved forward through the discovery necessary to prepare for and submit a motion for class certification, including taking numerous depositions, and defending depositions. The description of this case as a "copycat" case is not justified. While the case themes resonated with students across the country, the law generally and the facts particularly are unique to each case of this type. To the extent the themes here were reflected in other cases brought by Plaintiffs' counsel, that only increased the efficiency of counsel's work here. While similar legal themes ultimately required unique legal research under the D.C. Circuit, such similarities bolstered by counsel's general knowledge of the common themes and issues in this novel area of law allowed them to more quickly address, and rebut, common arguments and defenses GW made like other university defendants. This objection does not support denial of the requested attorneys' fee and cost request.

d. Reasonable likelihood of payment.

Objectors Heidloff and West also downplay the substantial risk of non-payment as "dubious at best." ECF No. 70 at 6. Similarly, Objector Aledorf asserts that "the risk of nonpayment for these litigants is actually LOWER" because counsel filed other cases on behalf of other students against other universities. ECF No. 71 at 6. That Plaintiffs' counsel filed other cases on behalf of other students similarly affected by the COVID-19 transition to remote learning does not mean that Plaintiffs, the class, and their counsel did not have risk in *this case*.

Objectors ignore the appellate history, a significant omission since the D.C. Circuit identified many risks to this case proceeding. To start, while Plaintiffs asserted claims for tuition and fees, the D.C. Circuit affirmed the dismissal of all but one of the fees in the litigation. *Shaffer v. George Washington Univ.*, 27 F.4th 754, 766 (D.C. Cir. 2022). After describing the "novel and challenging issues" presented in this case, the D.C. Circuit highlighted other risks involved in this case after remand:

> We hold that Plaintiffs plausibly allege that the Universities breached implied-in-fact contracts to provide in-person instruction in exchange for tuition for on-campus degree programs. It is for the District Courts to resolve in the first instance whether the parties contracted for in-person education as alleged. If the District Courts conclude that the Universities made such promises – and that the legality of providing in-person instruction was a basic assumption on which the contracts were made – the Universities may still have strong arguments that the pandemic and resulting government-issued shutdown orders discharged their duties to perform.

Shaffer, 27 F.4th at 760, 765. The Objectors collectively ignore the risks that this Court could have denied class certification (like other courts in these types of cases have ruled) and that the Court could have granted summary judgment in favor of GW (again, like other courts in these types of cases have ruled). Thus, the risk of non-payment to the class was real and supports the requested fee award.

e. Public policy favors reasonable fee awards.

Objector Aledorf offers a brief public policy argument, writing that "[p]ublic policy does NOT favor awards of excessive attorneys' fees, especially at the expense of recovery for the aggrieved students." ECF No. 71 at 7. However, while courts can also consider the public interest (although it is not always considered in the fee-award determination, see *Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1, 8 (D.D.C. 2008)), the asserted fee request is not excessive, it is directly in line with other approved fee awards repeatedly approved in this exact type of case.

See supra at III.A.2. And the reasonableness is further supported by the lodestar cross-check method, which confirms that Plaintiffs seek a fee award of less than 2.0. *See supra* at III.A.3. Public policy encourages settlements of class action matters. *See Little v. Washington Metro. Area Transit Auth.*, 313 F. Supp. 3d 27, 34 (D.D.C. 2018) (noting "courts favor the resolution of disputes through voluntary compromise, and, therefore, strongly encourage settlements," adding "[i]n the context of class actions, settlement is particularly appropriate given the litigation expenses and judicial resources required in many such suits"). Additionally, Plaintiffs' counsel were the only counsel to step forward to advance the interests of GW students arising out of the COVID-19 transition to remote learning. Public policy directs that they be reasonably compensated for their efforts.

B. The Requested Service Awards Are Reasonable and Appropriate.

1. The requested service awards are not inequitable.

Only Objectors Heidloff and West object to service awards.[10] For their first argument, they contend that "the requested service awards are not equitable and should be denied," pointing to the mathematical difference between the service award amounts requested and individual class member payment amounts. ECF No. 70 at 9. However, as Plaintiffs noted in their opening brief (ECF No. 68 at 15-16), the requested award amounts are in accord with other service awards approved as reasonable within the D.C. Circuit specifically, and in other COVID-19 university refund litigation settlements. In response, Objectors Heidloff and West suggest an approach that would call on this Court to divide the service award by the expected individual class recovery in fashioning a service award to identify a multiplier. *See* ECF No. 70 at 10. But they identify no

[10] ECF No. 71 at 2 (Objector Aledorf: "No objection to the $10,000 service fee to the named Plaintiffs is made.").

basis in the case law for implementing this unique and novel methodology (whether in the D.C. Circuit or elsewhere). And even if it were a proper and utilized methodology (a point Plaintiffs do not concede), that difference does not mean the requested service awards would be unreasonable. The service awards asked for here are in line with, or less generous than, several other settlements in COVID-19 university litigation where courts approved class representative service awards with even greater differences between service awards and class member awards. *See, e.g.*, *In re Columbia Univ. Tuition Refund Action,* No. 20-cv-3208 (S.D.N.Y.) (approving $25,000 service award amount in $12,500,000 settlement on behalf of about 28,079 class members); *Smith, et. al. v. Univ. of Penn.,* No. 20-cv-5526 (E.D. Pa.) (approving $10,000 service award amount in $4,500,000 settlement on behalf of about 26,000 class members); *Faber v. Cornell Univ.*, No. 20-cv-467 (N.D.N.Y.) (approving $10,000 service award amount in $3,000,000 settlement on behalf of about 24,000 class members). Accordingly, the requested $10,000 service award is not "highly unusual," as Objectors Heidloff and West would have the Court find. ECF No. 70 at 10. Rather, $10,000 service awards reflect an amount often negotiated and awarded in the very types of university refund settlements like that before the Court now. *See, e.g.*, *D'Amario v. Univ. of Tampa*, No. 7:20-cv-03744-CS (S.D.N.Y. Oct. 18, 2022) (approving $10,000 service award request); *Faber v. Cornell Univ.*, 3:20-cv-00467-MAD-MIL (N.D.N.Y. Dec. 13, 2023) (approving $10,000 service award request); *Wnorowski v. Univ. of New Haven*, 3:20-cv-01589 (D. Conn. Oct. 11, 2023) (approving $10,000 service award request); *Ford v. Rensselaer Polytechnic Institute*, 1:20-cv-00470-DNH-CFH (N.Y.N.D. Jan. 9, 2024) (approving $10,000 service award request). *See also Hubbard v. Donahoe*, 958 F. Supp. 2d 116, 123 (D.D.C. 2013) (granting final approval of class action settlement under which each class representative would receive $10,000 where class representatives had "spent hours working on

behalf of absent class members and made valuable contributions"); *Wells v. Allstate Ins. Co*., 557 F. Supp. 2d 1, 9 (D.D.C. 2008) (awarding $10,000 service award to each plaintiff who had been deposed and produced documents). And as discussed in Plaintiffs' opening brief, the class representatives did an extensive amount of work in stepping forward to represent the class, evidencing the reasonableness of the service award here.

2. Nearly every circuit court of appeals has recognized that Supreme Court precedent from 1882 and 1885 does not prevent service awards.

Objectors Heidloff and West also ask for the Court to completely deny service award payments to the class representatives on another ground. They declare that Supreme Court precedent (*Trustees v. Greenough,* 105 U.S. 527 (1882), and *Central Railroad & Banking Co. of Ga. v. Pettus,* 113 U.S. 116 (1885)), as construed in a non-binding Eleventh Circuit case (*Johnson v. NPAS Sols., LLC,* 975 F.3d 1244, 1255 (11th Cir. 2020)), 'likely' precludes service awards. ECF No. 70 at 11. They do not.

Far from taking "the lead in this sphere," ECF No. 70 at 11, the Eleventh Circuit's decision in *Johnson* is a non-binding outlier. It is contrary to both D.C. Circuit precedent generally and the consensus of authority specifically.[11] To start, the Eleventh Circuit's decision in *Johnson* has never been cited in this Circuit and for good reason. As four dissenting Eleventh Circuit judges aptly explained in the subsequent appellate history:

> In the panel decision in this case, the majority held that two Supreme Court cases decided in the 1880s prohibit district courts from approving, under any circumstances, incentive or service

[11] Moreover, the Eleventh Circuit's decision in *Johnson* reflected an about-face from just the prior year in an opinion that was subsequently vacated pending an *en banc* review which ultimately focused not on *Greenough* or *Pettus* but on standing issues. *Cf. Muransky v. Godiva Chocolatier, Inc*., 922 F.3d 1175, 1196 (11th Cir. 2019) (considering *Greenough* and *Pettus*: "We are not persuaded by this argument…We do not view granting a monetary award as an incentive to a named class representatives as categorically improper."), *reh'g granted by, vacated by*, 939 F.3d 1279 (11th Cir. 2019).

> awards for class representatives in class action settlement agreements. *See Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1255 (11th Cir. 2020). According to the majority opinion, these two cases dictate that such awards—despite the parties having agreed to them and district courts having approved them as reasonable and fair to the entire class under Federal Rule of Civil Procedure 23—are simply barred. *See Trustees v. Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1881); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915 (1885).
>
> By holding that incentive awards are unlawful *per se*, the majority opinion broke with decisions from this and every other circuit allowing these awards when properly approved under the strictures of Rule 23. Indeed, the majority opinion adopted a position that had never been embraced by any court. Of course, the mere fact that an argument has never been accepted before does not mean it is wrong. One circuit has expressly rejected the novel *Greenough-Pettus* argument, however,[12] and since the majority opinion in this case issued, every court outside this circuit to have considered it has declined to follow it.[13] And no wonder. In *Greenough* and *Pettus*, decided long before modern class actions were born, the Supreme Court applied equitable trust principles in the absence of any authority for compensating creditors who through litigation benefitted a common fund. Operating in that now-superseded legal landscape, the Court rejected compensation for a creditor's expenses that were—as the panel majority opinion candidly acknowledged—only "roughly analogous" to today's incentive awards approved under Rule 23. *Johnson*, 975 F.3d at 1257. So it

[12] *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir. 2019).

[13] *See Knox v. John Varvatos Enters. Inc*., 520 F. Supp. 3d 331, 349 (S.D.N.Y. 2021); *Somogyi v. Freedom Mortg. Corp.*, 495 F. Supp. 3d 337, 353–54 (D.N.J. 2020); *Halcom v. Genworth Life Ins. Co.*, No. 3:21-cv-19, 2022 WL 2317435, at *10, *13 (E.D. Va. June 28, 2022); *Grace v. Apple, Inc.*, No. 17-cv-00551, 2021 WL 1222193, at *7 (N.D. Cal. Mar. 31, 2021); *In re Apple Inc. Device Performance Litig*., No. 5:18-md-02827, 2021 WL 1022866, at *11 (N.D. Cal. Mar. 17, 2021); *Wickens v. Thyssenkrupp Crankshaft Co., LLC*, No. 1:19-cv-6100, 2021 WL 267852, at *2 (N.D. Ill. Jan. 26, 2021); *Vogt v. State Farm Life Ins. Co*., No. 2:16-cv-04170, 2021 WL 247958, at *3–4 (W.D. Mo. Jan. 25, 2021);*Wood v. Saroj & Manju Invs. Phila. LLC*, No. 19-cv-2820, 2020 WL 7711409, at *5 n.8 (E.D. Penn. Dec. 28, 2020*); Izor v. Abacus Data Sys., Inc.*, No. 19-cv-01057, 2020 WL 12597674, at *8 (N.D. Cal. Dec. 21, 2020); *Hunter v. CC Gaming, LLC*, No. 19-cv-01979, 2020 WL 13444208, at *7–8 (D. Colo. Dec. 16, 2020); *In re Lithium Ion Batteries Antitrust Litig*., No. 13-MD-02420, 2020 WL 7264559, at *24 n.24 (N.D. Cal. Dec. 10, 2020); *see also Hart v. BHH, LLC*, No. 15-cv-4804, 2020 WL 5645984, at *5 n.2 (S.D.N.Y. Sept. 22, 2020) (noting that Second Circuit precedent prevented the court from following *Johnson* but calling on Congress to address the validity of incentive awards).

> seems to me more than a stretch to hold that these cases prohibit incentive awards in all cases, no matter that the parties and the district court agree the awards are fair and appropriate.

Johnson v. NPAS Sols., LLC, 43 F.4th 1138, 1139–40 (11th Cir. 2022) (Pryor, J., dissenting) (footnoted citations collecting and describing authorities in original without alteration).

As to the D.C. Circuit, the Objectors' request to categorically bar service awards contradicts D.C. Circuit precedent, which recognizes the appropriateness of such awards for their work undertaken on behalf of absent class members. *See, e.g.*, *Keepseagle v. Perdue*, 856 F.3d 1039, 1056 (D.C. Cir. 2017) ("Lastly, Appellant Tingle takes aim at the 'incentive fees' (or service awards) provided by the Agreement for the class representatives' work in negotiating the Agreement and its modification. However, 'incentive awards have often been used to compensate a class representative,' *Cobell v. Jewell*, 802 F.3d 12, 25 (D.C. Cir. 2015), and nothing in the record of this case suggests that the service awards served any nefarious purposes.") (first citation omitted). As to the consensus of other circuits, every circuit court to have considered the issue outside the Eleventh Circuit has rejected the argument.[14] Accordingly, *Greenough* nor *Pettus* provides a basis to categorically bar service awards under the facts here.

[14] *See Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340, 352 (1st Cir. 2022) ("We begin by considering whether the Supreme Court has already rejected incentive awards for named plaintiffs in Rule 23 class actions. It has not."); *Moses v. New York Times Co.*, 79 F.4th 235, 254 (2d Cir. 2023) ("Isaacson argues that we should adopt the Eleventh Circuit's approach and reverse our established precedent. We decline to depart from Rule 23's mandate, which permits fair and appropriate incentive awards. Neither *Greenough* nor *Pettus* compel a different conclusion.") (citation omitted); *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785 (9th Cir. 2022) ("The Feldman objectors contend that our twenty-first century precedent allowing such awards conflicts with Supreme Court precedent from the nineteenth century—[*Greenough* and *Pettus*]. To the contrary, we have previously considered this nineteenth century caselaw in the context of incentive awards and found nothing discordant.").

C. The Expert Costs Identified Reflected Actual, Out-of-Pocket Payments by Counsel.

Finally, Objector Aledorf objects to the verification costs line item for $87,007.36 and says this amount should "not be reimbursed." ECF No. 71 at 7. These costs were directly related to the work by Plaintiffs' expert Hal J. Singer, Ph.D., which resulted in his expert report filed in this case at ECF No. 58-4. Contemporaneously with this reply, Plaintiffs submit the supporting records, which confirm the actual out-of-pocket expenses incurred by counsel in connection with this lawsuit. *See* Supplemental Kurowski Decl. ¶ 7. Objector Aledorf's request to wipe away this significant out-of-pocket cost central to Plaintiffs' showing at class certification that damages could be calculated on a class-wide basis should be denied.

IV. CONCLUSION

For the reasons provided above and for good cause shown, Plaintiffs respectfully request that the Court deny the objections and reassert their requests that the Court (1) approve attorneys' fees, costs, and expenses in the amount of one-third of the settlement fund ($1,799,820.00), (2) grant each Plaintiff a service award of $10,000 each in recognition of their efforts on behalf of the class. Plaintiffs further request that the Court grant them all such other relief that the Court deems necessary and appropriate.

Dated: March 19, 2024

Respectfully submitted,

/s/ Daniel J. Kurowski

Daniel J. Kurowski (*pro hac vice*)
Whitney K. Siehl (*pro hac vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
455 N. Cityfront Plaza Dr., Suite 2410
Chicago, IL 60611
(708) 628-4949
dank@hbsslaw.com
whitneys@hbsslaw.com

Steve W. Berman (*pro hac vice*)
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Avenue, Suite 2000
Seattle, WA 98101
(206) 623-7292
steve@hbsslaw.com

Class Counsel

Andrew S. Levetown (Bar No. 422714)
LEVETOWN LAW LLP
717 D Street NW, Suite 306
Washington, DC 20004
(703) 618-2264
andrew@levetownlaw.com

E. Michelle Drake (*pro hac vice*)
BERGER MONTAGUE PC
43 SE MAIN STREET, SUITE 505
Minneapolis, MN 55414
Tel: (312) 594-5999
Email: emdrake@bm.net

Daniel J. Walker (Bar No. 219439)
BERGER MONTAGUE PC
2001 Pennsylvania Avenue, NW, Suite 300
Washington, DC 20006
Tel: (202) 559-9745
Email: dwalker@bm.net

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on March 19, 2024 a true and correct copy of the foregoing, together with all attachments thereto was filed electronically via CM/ECF, which caused notice to be sent to all counsel of record. In addition, a copy was posted on the settlement website at GWsettlement.com, and courtesy copies were emailed to Objectors West, Heidloff and Aledorf.

/s/ Daniel J. Kurowski
Daniel J. Kurowski