UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ALINA FLATSCHER,

Plaintiff,

v. 20 Civ. 4496 (KPF)(SDA)

THE MANHATTAN SCHOOL OF MUSIC,

Decision

Defendant.

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New York, N.Y.
September 8, 2023
11:10 a.m.

Before:

HON. KATHERINE P. FAILLA,

District Judge

APPEARANCES

GAINEY & McKENNA
Attorneys for Plaintiff
BY: GREGORY M. EGLESTON

BOND, SCHOENEK & KING
Attorneys for Defendant
BY: GREGORY BERTRAM REILLY III

(Case called)

MR. EGLESTON: Good evening, Greg Egleston from Gainey & McKenna LLC.

THE COURT: Good morning. Thank you.

And representing the defendant?

MR. REILLY: Greg Reilly from Bond, Schoenek & King.

THE COURT: All right. Thank you as well.

Most often when I have fairness hearings of this type of I have the attorneys and no one else. There was one hearing I had years ago when it was a full courtroom of objectors. I always happen to walk out and not see anyone so thank you.

I do appreciate your patience. I was consulting with another judge on another matter a moment ago. I appreciate your patience.

I want to make sure I have the appropriate documents. I have a motion for final approval of a class action settlement, memorandum of law, a declaration and proposed final judgment, and relatedly, I have a motion for attorneys' fees, a memorandum of law, a declaration, a proposed order, and then I have a defendant letter indicating a lack of opposition.

Mr. Egleston, from your perspective, sir, is there anything else I should have?

MR. EGLESTON: No, your Honor. That's everything. I think my office sent you everything by mail.

THE COURT: All right. There you have it.

Mr. Reilly, is there anything else I should have?

MR. REILLY: No, your Honor.

THE COURT: Thank you.

Just one other question, my recollection of the papers that I reviewed, was that there were no objectors and that there was one opt out. That was as of the date of the materials I have.

Has there been any change in that?

MR. EGLESTON: I spoke to the claims' administrator. It's only one exclusion. I also emailed Mr. Reilly yesterday. He hasn't received anything. We haven't received anything. There's 951 class members, and we have one exclusion and no objections to the settlement or the motion for the attorney fees and expenses of the case contribution award. Notice went out. 802 members were emailed the short form notice and 149 class members were mailed the short form notice. There were only 13 email bounce backs out of the 802, and they were then sent by mail, and those were delivered. Out of the 149, there were only nine undeliverable mailings where the claims administrator did an advanced search to see if they could find their addresses, and they could not. I spoke with Mr. Reilly earlier --

THE COURT: I just need you to be a little closer to the microphone, sir.

MR. EGLESTON: I spoke to Mr. Reilly a little earlier,

and we will do our best to try to locate those nine people that did not receive the notice.

THE COURT: Thank you.

For the 13 email bounce backs for which there was a subsequent mailing of the notice, were any of those returned as undeliverable?

MR. EGLESTON: No.

THE COURT: So we are down to nine people about with whom we have some concern about notice.

MR. EGLESTON: Yes.

THE COURT: Understood. Thank you so much. All right. Mr. Reilly, is there anything you want to add to either the notice or objection questions that I've been asking of?

MR. REILLY: No, your Honor.

THE COURT: OK. Thank you.

All right. Well, I could keep you here all morning, but I will not because there are no objections.

There is an oral decision that I will read into the record, and spoiler alert, I'm finding the settlement to be fair and awarding attorneys' fees as requested. But I'll just ask you to listen, and I thank you in advance for your indulgence as I read this into the record.

This action stems from an allegation that Defendant Manhattan School of Music's cessation of in-person instruction, restriction of access to school facilities, and transition to

online learning during the COVID-19 pandemic caused injuries to plaintiff, Alina Flatscher and other students at the school. On March 8th of 2023, the parties notified the Court that they had reached an agreement in principle to settle this action on a class-wide basis. On May 15 of 2023, after granting two extensions of the deadline to file a motion for preliminary approval of the settlement, this Court certified a settlement class comprised of all students enrolled at the Manhattan School of Music ("MSM") who were assessed and paid spring semester 2020 tuition, except for those students who "withdrew from MSM prior to March 15 of 2020," and any student who "properly executed and files a timely opt-out request to be excluded from the settlement class." In the same order, the Court granted the plaintiff's motion for preliminary approval of the settlement agreement.

So now before this Court is an unopposed application for final approval of the parties' settlement agreement, which involves principally the creation of a settlement fund totaling $399,999 to compensate each settlement class member for spring 2020 tuition and fees, the settlement the class member paid or had paid on his or her behalf, and as well an unopposed application for attorneys' fees and expenses. After considering these submissions, the Court approves the settlement agreement and grants the fee petition.

I'm about to give law that I know the parties are

intimately familiar with. It's important that I say it, nonetheless.

Federal Rule of Civil Procedure 23(e)(2) provides that where "a proposed settlement" of a class action "would bind class members, the Court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate," that is Rule 23(e)(2) of the Federal Rules of Civil Procedure. And in determining whether to approve such a class action settlement, "a court must review the negotiating process leading up to the settlement for procedural fairness, to ensure that the settlement resulted from an arm's length, good faith negotiation between experienced and skilled litigators." I'm quoting here from Second Circuit's 2013 decision in *Charron v. Weiner*, 731 F.3d 241.

The Court must also evaluate substantive fairness of the settlement, considering the nine factors set forth in *Detroit v. Grinnell Corporation*, 495 F.2d 448, a Second Circuit decision of 1994 that was abrogated on other grounds like *Goldberger v. Integrated Resource Inc.*, 209 F.3d 43 (2d Cir. 2000).

The questions before the Court at this hearing, as presented in plaintiff's briefing are three: Whether the settlement agreement is procedurally fair, whether it is substantively fair, and whether the class notice was fair. The history of this case confirms that the settlement agreement is

procedurally fair. The Second Circuit recognizes the presumption of fairness, reasonableness, and advocacy as to a settlement where a class settlement is reached in arm's length negotiations between experienced, capable counsel after meaningful discovery. I'm quoting here from two different cases from the Second Circuit, the 2009 decision in *McReynolds v. Richards-Cantave*, 588 F.3d 790. And that attorney is quoting *Wal-Mart Stores, Inc. v. Visa U.S.A.*, Inc. 396 F.3d 96 (2d Cir. 2005).

Here the settlement is non-collusive inclusive and is the result of arm's length negotiations between parties in, I believe at least four, settlement conferences before Magistrate Judge Stewart Aaron. Judge Aaron's involvement helps to ensure that the proceedings were free from collusion and undue pressure and these negotiations took place following the motion to dismiss and other opportunities for class counsel to investigate plaintiff's claims and to become familiar with their strengths and weaknesses.

Further, the class notices adequately advised the settlement class about the existence of the class action; the terms of the proposed settlement, the benefits to each settlement class member; the proposed fees and costs to class counsel; and each settlement class members' right to object or opt out of the settlement.

And because plaintiff has established that the

settlement agreement is procedurally fair, and no party provides any reason to think that the presumption of reasonableness should not apply in this case, the Court find that the settlement agreement is procedurally accurate.

We turn now to the *Grinnell* factors in assessing substantive reasonableness. And they are, the complexity, expense and likely duration of the litigation; the reaction of the class to the settlement; the stage of the proceedings and the amount of discovery completed; the risks of establishing liability; the risks of establishing damages; the risks of maintaining a class action through the trial; the ability of the defendants to withstand a greater judgment; the range of reasonableness of the settlement fund in light of the best possible recovery, and the range of reasonableness of the settlement fund to a possible recovery in light of all of the attendant risks of litigation.

In finding that the settlement is fair, not every factor must weigh in favor but rather the Court should consider the totality of these factors in light of the particular circumstances. I'm quoting here from a colleague's decision, *In re Global Crossing Securities and Erisa Litigation*, 225 F.R.D. 436.

So going through these factors and beginning with the complexity, expense, and likely duration of litigation, here plaintiff argues that this would be considerable.

Specifically, the plaintiff identifies the remaining thresholds of class certification and summary judgment, as well as preparation for what would likely be a multi-week trial and that would have caused this litigation to persist for an extended period of time. Plaintiff maintains that even if she were to establish liability, she would still have to prove damages on her claim for a partial refund of tuition and to certify litigation class.

The Court also notes plaintiff has already faced mixed results in this litigation -- with respect I say that -- including the dismissal of two of her claims pursuant to defendants' motion to dismiss. Where this litigation to continue, there is no doubt that plaintiff would face additional hard-fought battles. And given these facts, the Court finds that when compared to the risk, expenses, and delays associated with future litigation -- we haven't even yet talked about appeal -- the first *Grinnell* factor weighs in favor of settlement approval.

Turning now to the reaction of the class to the settlement. I just now confirmed with plaintiff's counsel that there has been one opt out and no objectors. And I'm also confident that all but nine members of the settlement class have been notified of the proposed settlement. If only a small number of objections are received that fact can be reviewed as indicative of the adequacy of the settlement. I'm quoting here

from the *Walmart Stores* case I mentioned earlier. So this lack of dissent counsels in favor of approval. That was discussed in one of this Court's own decisions *Oleniak v. Time Warner Cable, Inc*. 2013 WL 12447094 and so that counsels in favor of approval.

In terms of the stage of the proceedings and the amount of discovery completed, this is designed to ensure that counsel for plaintiffs have weighed their position based on full consideration of the possibilities facing them. I'm quoting here from a colleague's decision *In re Citigroup Inc. Bond Litig*., 296 F.R.D. 147. It is not the case of formal discovery is required and, in fact, courts in this circuit routinely approve early class settlements so long as the parties have completed enough investigation to agree on a reasonable settlement. The Court recognizes that the instant settlement was reached only after class counsel reviewed the underlying documents exchanged between the named plaintiff and MSM, which would include the alleged contract documents -- also after named plaintiff drafted multiple separate pleadings, survived in part motion to dismiss, engaged in discovery, engaged in multiple depositions and, their words, not mine, protracted settlement negotiations with defendant, and exchange of nonpublic information regarding the alleged damages. This factor therefore counsels in favor of approval.

The next would be risk establishing liability,

establishing damages, or maintaining the class action through trial. In this setting the Court balances the benefits afforded to members of the class and the immediacy and certainty of a substantial recover for them against the continuing risks of litigation. I'm quoting from a colleague's decision in *Maley v. Del Global Tech. Corp.*, 186 F. Supp. 2d 358. On the liability damages factors, plaintiff asserts that defendant's intention to continue to contest all elements of named plaintiff surviving claims combined with the language and complexity of the case, make further litigation inherently risky. Plaintiff notes that even were she to establish liability, she would still have to prove damages on her claim for a partial refund of tuition. She observes that any effort to establish damages would have relied heavily on expert testimony, likely leading to a battle of the experts at trial and *Daubert* challenge and correctly acknowledges that success in such a battle is uncertain, and were her experts to be restricted or excluded from testifying, her case would become that much more difficult to prove.

Plaintiff also notes that any pay out from a trial would potentially be delayed for years with the appeals process and that the certainty of a prompt pay out is particularly important given the additional hardships imposed by the COVID-19 pandemic.

On this factor plaintiff asserts that had the matter

not reached a settlement, class certification would have been litigated vigorously. Defendant would have opposed class certification. Defendant could still have moved later to decertify the class or trim the class before trial or on appeal. Therefore, all of these factors weigh in favor of approval.

On the issue of the ability of defendant to withstand a greater judgment, I don't believe I have evidence on that point. But I also believe that that factor is not one that I would need to consider even if it were demonstrated it would not outweigh the many factors in favor of approval.

Turning to the range of reasonableness of the settlement fund. In light of the best possible recovery and in light of the attempted risks of litigation. These are the final two *Grinnell* factors and they are typically combined. Here the settlement agreement secures monetary compensation for class members whose education was impacted by the COVID-19 pandemic. The Court recognizes the universe of cases involving similar types of claims identified by plaintiff and benchmarks for recovery that those cases represent. And the Court finds that this guaranteed recovery for all class members is a reasonable disposition of the claims remaining in this case. Particularly in light of the fact that it can be difficult to quantify the value of injuries caused by data breaches.

In addition, this Court has already reviewed the

litigation risks inherent in the case, and it finds that the settlement agreement is a fair resolution in light of those risks.

And therefore for all of these reasons, the Court finds that the unopposed motion for final approval of the settlement is to be granted because the settlement is both substantively and procedurally fair.

We turn now to the issue of fees and costs. On that front, plaintiff's counsel seeks $142,873.52, in attorney fees and expenses, which includes counsel's unreimbursed litigation costs and expenses of $11,203.52. Plaintiff's counsel represents that the attorneys' fees requested represent approximately 33 percent of the value of the total settlement, but plaintiff's counsel seeking as well a $10,000 service award for Ms. Flatscher, the lead plaintiff in this action. As noted, defendant does not oppose either request.

Let me turn then to the evaluation if the attorneys' fees and costs. Courts may award attorneys' fees in common fund cases under either the lodestar method or the percentage of the fund method. That's discussed in the Second Circuit's *Walmart* case of earlier. The trend in this circuit is towards the percentage method, which directly aligns the interest of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation. Neither the lodestar, nor the percentage of fund approach to

awarding attorneys' fees in common fund case is without problems, and, accordingly, the Second Circuit has left the decision as to the appropriate method to the district court, which is intimately familiar with the nuances of the case. I'm quoting here from the Second Circuit's decision in the *McDaniel v. County of Schenectady* from 2010. It in turn is quoting the *Goldberger* case I mentioned earlier. Here, plaintiff's counsel advocating for a percentage of the fund method, defendant does not object.

And therefore I'm considering whether this fee is reasonable in light of the *Goldberger* factors. They include the time and labor expended by counsel, the magnitude and complexities of the litigation, the risk of the litigation, the quality of representation, the requested fee in relation to the settlement, and public policy considerations. And there is a degree, as the Court noted, that these factors overlap with the *Grinnell* factors I mentioned earlier.

Speaking first about time and labor expended by counsel, I'm advised by plaintiff's counsel that there is a total of 470.95 attorney and professional hours on this case, and I have been given a record of Mr. Egleston's fee declaration. Defendant does not dispute plaintiff's counsel's representation of the time spent working on this matter, nor have the events of this litigation provided this Court with any reason to believe that plaintiff counsel expended an

unreasonable amount of time litigating this case. I also considered the Lodestar as well as what my colleagues refer to as a sanity check to ensure that an otherwise reasonable percentage fee would not lead to a windfall. Here, I'm advised that given the lodestar report and the 470.95 attorney and professional hours, plaintiff's counsel incurred approximately $384,522.25 worth of attorney's fees. Therefore the requested amount is a significant downward departure from the lodestar amount. I'm also crediting that plaintiff's counsel will be committing significant ongoing time and resource to this litigation after settlement. And I'm also aware that counsel is here now, and every moment I spend reading this decision, ever so slightly less the amount he is going to receive.

Turning now to the magnitude and complexities of the litigation and the risks of litigation, these also weigh in favor of a significant award. Plaintiff's counsel notes that the claims and legal theories were novel, complicated, and unsettled, and identified a number of cases in which motions to dismiss were granted by other federal courts across the country. This Court recognizes those cases. I've seen them in connection with the motion to dismiss. And I've seen as well the risks associated with this litigation, plaintiff's success and class certification at trial was far from guaranteed, and plaintiff's counsel assumed these risks by taking the case on contingency.

Turning to the quality of representation, the Court recognizes the comparable cases identified by plaintiff's counsel in the memorandum of law and supported final approval of the settlement. And those cases indicate that each student's average recovery of $445 in this matter would fall at the high end of the spectrum of recovery in this subject area. And that reflects class counsel's quality representation.

I'm also to consider the experience and background of plaintiff's counsel. I have here the firm is an experienced class action firm with a history of representing plaintiffs in complex cases including a similar tuition refund case involving Columbia University. The submissions reflect their experience in class actions and their expertise in the area. And I credit, as well, plaintiff counsel's observation that this case was litigated against a sophisticated and able opponent in the Bond Schoenek firm. Excuse me for mangling the last name.

Turning now to the requested fee in relation to this settlement. I do consider that to ensure that the percentage awarded does not constitute a windfall. And where the size of the fund is relatively small, courts typically find that requests for a greater percentage of the fund are reasonable. Here the plaintiff submits that the requested fee award, $131,670 exclusive of expenses represents 33 percent of the settlement fund. The defendant does not contest the value of the settlement, nor the percentage calculation. And this Court

recognizes that in similar cases brought before sister courts in this district, Judge Furman and Judge Seibel each awarded 33 percent of attorneys' fees to the settlement fund. For Judge Furman that was Columbia University tuition refund action. And for Judge Seibel it was an action brought against the University of Tampa. There is no reason for this Court in this case to merit a different result, and the Court therefore find the requested fee award to be reasonable in relation to this settlement.

The final *Goldberger* factor, public policy considerations also support a substantial attorney's fee. Courts are to consider here the social and economic value of the class action, the need to encourage experience and able counsel to undertake such litigation, and class actions are a safeguard for public rights. Awarding plaintiff's counsel the requested fee supports the public policy of encouraging meritorious class action suits so that students with low-value individual claims may vindicate their legal rights especially in novel and unprecedented actions such as the one before this Court. That's discussed at some length in the *Walmart* decision I mentioned earlier.

For all of these reasons and given all of the factors weighing in favor of plaintiff's requested fee, the Court will award fees in the amount of $131,670. Courts also normally grant expense requests in common fund cases as a matter of

course. Here there is a request for $11,203.52 in fees, including deposition transcripts, expert fees, and filing fees. The defendant does not challenge the reasonableness of these fees, and this Court does not either.

And then there is a $10,000 service award for Ms. Flatscher, and the Court recognizes Judge Seibel's similar award of $10,000 to the named plaintiff in the settlement of the University of Tampa case and Judge Furman's even greater awarding of $25,000 in the Columbia University case. Here the named plaintiff devoted significant hours to this litigation. She subjected herself to deposition and she assumed significant reputational risk by suing her former university and facing potential criticism from peers, professors, future employers, and future alumni. And therefore the service award for Ms. Flatscher is reasonable and appropriate.

I do have copies of proposed orders regarding the final judgment and regarding the fees, expense, and service award.

Mr. Egleston, if you have not sent them to me in Word, could you do that?

MR. EGLESTON: I will, your Honor.

THE COURT: Thank you.

Yes, I've approved the settlement. I'm approving the fees award. I will be entering judgment in this case, and I will be entering the award with respect to fees and expenses.

Let me just please ask a couple of questions because I'm just interested. If I'm not supposed to know, you'll tell me I'm not supposed to know.

Mr. Egleston, what happened to Ms. Flatscher? What is she doing now?

MR. EGLESTON: I believe Ms. Flatscher is now -- she was going to graduate school in California. And I think she is back over in Austria at the moment.

THE COURT: OK.

MR. EGLESTON: We were on the phone, you know, I could tell you this, she has this little ski hut in Austria. My wife is German so we go to Austria all the time. I never met her in person. I met her over Zoom. But that's what she doing right now. I think she is finishing up a graduate degree. I'm not really sure if she is back in the States at this moment, but for the summer I think she was in Austria.

THE COURT: She is pursuing a career here?

MR. EGLESTON: She is. And she loves it and she's very happy.

THE COURT: We wish her success. Thank you.

Separately, if I may know the, significance of the settlement fee, one dollar less than $400,000. If I'm not allowed to know, I'm not allowed to know. In my mind it's an insurance issue or something like that. But maybe it's just a number that everyone can stomach.

MR. EGLESTON: I could speak to that. That's what Magistrate Aaron proposed. So it was either that or litigate.

THE COURT: I talked to Judge Aaron only to know there were conferences. I don't get to know the gory details. Maybe some day in the future I'll ask him how he came up with the number.

Mr. Reilly, anything else I should know today, sir?

MR. REILLY: No, I'll just say, and I think Mr. Egleston agrees, Magistrate Judge Aaron was very helpful.

THE COURT: He always is. He is a real benefit to me as colleague and as friend. I'm glad to hear that and, if I may, I'll pass on your regards to him.

MR. REILLY: Very patient.

THE COURT: Yes, with all of us actually. So yes, thank you very much.

Mr. Egleston, anything else?

MR. EGLESTON: I will say the same. It was a pleasure working with Magistrate Aaron, and it always a pleasure to be before you. I've been before you in other case, not a lot, but it's always a pleasure.

THE COURT: I thank you both very much. We are adjourned. Thanks so much.

(Adjourned)