

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Susan E. Cullen, Mary Beth Phelps	:
and Monica Davis, individually	:
and as representatives of a Class	:
of Students of Ultrasound Diagnostic Schools,	:
	: CIVIL ACTION
Plaintiffs,	:
	: NO. 98-CV-4076
and	:
	:
Melissa Mann and Kelly Smith,	:
intervenor plaintiffs, individually and as	:
representatives of a Class of Students of	:
Ultrasound Diagnostic Schools	:
	:
vs.	:
	:
	:
Whitman Medical Corporation d/b/a	:
	:
Whitman Education Group, Inc.; Ultrasound	:
Technical Services; Phillip Frost; Richard C.	:
Pfenninger; Randy Proto; Fernando L. Fernandez;	:
Richard B. Salzman; Joseph Lichtenstein;	:
Milton Gallant; and William Speir	:
	:
Defendants.	:

Brody, J.

October 3, 2000

MEMORANDUM AND SETTLEMENT APPROVAL ORDER AND FINAL JUDGMENT

Before me are class counsel's petitions for final approval of the settlement agreement, for special incentive awards for class representatives and persons initiating suit, and for attorneys' fees and reimbursement of costs. On September 15, 2000, I held a hearing on these petitions.

I. Background

On August 5, 1998, named plaintiffs filed this class action complaint on behalf of themselves and a proposed class. The class action was brought against a vocational school and its parent company for fraudulently misrepresenting to the students the education they would receive. The named plaintiffs as well as the unnamed class members were students at the Ultrasound Diagnostic School (“UDS”), a vocational school operated by Ultrasound Technical Services, Inc. (“UTS”), which is a subsidiary of the Whitman Educational Group (“Whitman”), a publically traded corporation. UDS holds itself out as a provider of education in the field of diagnostic medical sonography. Plaintiffs claimed that defendants employed a fraudulent scheme of misrepresenting the nature of the ultrasound program, and failed to provide the education represented. Plaintiffs also contended that the defendants misrepresented the graduation and placement rates of students to the Accrediting Bureau of Health Education Schools (“ABHES”), the institutional accrediting body, in order to qualify for federally guaranteed student loans. Plaintiffs claimed that the defendants had no meaningful admissions criteria for students and that they hired unqualified administrative personnel who turned over annually. In sum, plaintiffs asserted that while UDS held itself out as a school to prepare students for entry level sonography positions, the school was a sham that failed to meet even the most minimal and basic standards for an ultrasound program. Throughout the litigation, defendant vigorously contested all of the allegations.

On July 22, 1999, I issued an opinion certifying the class. The class was certified based upon the “complete sham” theory. Following the certification, there was extensive briefing on the form and content of the notice to the class. On December 27, 1999, I ordered that plaintiffs

mail notice to all class members by January 4, 2000. Class counsel filed an affidavit that the notice was mailed. The notice included an opportunity to opt-out of the class.

On March 3, 1999, I ordered the parties to participate in a settlement conference before Magistrate Judge Welsh. Several settlement conferences took place between April and December of 1999, but no agreement was reached. Throughout this period, both parties actively pursued discovery. Plaintiffs posit that a major turning point in the case was the October 29, 1999 oral argument. On that day, I heard argument on several of plaintiffs' pending motions to compel. I ordered immediate production of certain documents and I made myself available for weekly conferences to assure there would be no further discovery abuses. As an offshoot of the conference program, on January 31, 2000 I began a series of settlement conferences with the parties.

Finally, on May 4, 2000, working with the parties the entire day and into the evening, a settlement sum was reached. Subsequently, the parties worked together to negotiate the non-monetary terms of the settlement agreement.

On June 22, 2000, upon stipulation of the parties, I modified the definition of the class to include students who did not finance their classes with student loans and students who were enrolled in the Noninvasive Cardiovascular Technology program. The definition of the class is now:

All persons who attended the UDS Diagnostic Medical Ultrasound Program or the UDS Noninvasive Cardiovascular Technology Program at any time during the period of August 1, 1994 through August 1, 1998.

The class consists of approximately 5,300 members.

In July, class counsel filed motions for preliminary approval of the settlement agreement,

a proposed plan of distribution of the settlement fund, and a motion for attorneys fees and costs. On July 21, 2000, I granted preliminarily approval of the parties' settlement agreement and the proposed plan of distribution. I also ordered class counsel to mail notice of the proposed settlement and settlement hearing to the potential class members no later than July 26, 2000. The notice stated that class counsel would request an award of attorneys' fees to the court of up to one third of the net settlement. The notice also provided an opportunity for class members to opt out of the class. It further instructed class members to file any objections with the court prior to the Fairness Hearing.

The parties' settlement agreement provides for payment of \$5.97 million in cash and approximately \$1.3 million in loan forgiveness of delinquent obligations owned by students to the schools. It also provides for certain non-monetary relief enforceable by the Court. For example, over the next four years, UTS agrees to maintain certain admissions criteria and to adhere to those criteria. Additionally, the agreement provides that I will appoint an ombudsman who will report directly to me annually regarding UTS's adherence to its admission requirements in its actual admissions of students.¹ Various other non-monetary relief includes increased screening of faculty, reform of the method in which the entrance examination is given to potential students, certain disclosures, and a cooling-off period for admitted students allowing them to withdraw at no penalty.

On July 24, 2000 plaintiffs filed motions for final approval of the settlement agreement, for attorneys fees and costs, and for incentive awards for class representatives and persons initiating suit. On September 15, 2000, I held a hearing on these motions. No persons who were

¹By stipulation of the parties, I have appointed Anne Markey Jones as ombudsman.

mailed the July notice opted out of the class, and only one objection to the settlement was filed. I provided an additional opportunity for objections to be voiced at the hearing. No other objections were raised.

II. Discussion

A. Final Approval of Settlement

Class plaintiffs seek a final order approving the proposed settlement with all defendants. Approval is sought in accordance with Federal Rule of Civil Procedure 23(e), which provides that: “A class action shall not be dismissed or compromised without the approval of the court. . .” For the following reasons, I will grant final approval.

Approval of a proposed class action settlement is within the discretion of the court. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 299 (3rd Cir. 1998). “In determining whether settlement should be approved, the court must decide whether it is fair, reasonable, and adequate under the circumstances and whether the interests of the class as a whole are being served if the litigation is resolved by the settlement rather than pursued.” *Manual for Complex Litigation*, §30.42, at 238 (3d ed. 1995). The Third Circuit applies a nine prong test when determining the fairness of a proposed settlement (1) adequacy of settlement in light of best possible recovery; (2) adequacy of settlement in light of all risks of litigation; (3) complexity of suit; (4) reaction of class; (5) stage of proceedings; (6) risks of establishing liability; (7) risks of maintaining class status; and (9) ability to withstand greater judgment. *See Girsh v Jepson*, 521 F.2d 153, 157 (3rd Cir 1975). I find that the settlement reached satisfies the Girsh factors.

The last of the Girsh factors is the dominant consideration favoring settlement in this

case. There was great risk that even if the class were able to obtain a successful verdict, it would have resulted in an uncollectible judgment. A favorable judgment for the class would have rendered the defendant insolvent and would have immediately disqualified it from the federal financial aid programs. This would have effectively ended defendant's existence as a going concern. Defendant lacked significant hard assets or cash against which the class could have levied. There was a substantial question as to whether any insurance exists that would provide coverage for the claims asserted by the class had the claims been tried.

The remaining eight factors, addressed here in order, lend additional support to my approval of the settlement. First, in light of the best possible recovery, the proposed settlement is fair and reasonable. Even if the proposed settlement only amounts to "a fraction of the potential recovery," it does not necessarily follow that the settlement "is grossly inadequate and should be disapproved." *In re Sunrise Sec. Litig.*, 131 F.R.D. 450, 457 n.13. Here, assuming total tuition to the class would represent an appropriate measure of damages, single damages to the class approached forty-two million dollars. The settlement that was achieved represents approximately seventeen percent of single damages to the class, an amount significantly higher than the proportion of damages obtained in settlement agreements approved by other courts. *See, e.g., In re Crzy Eddie Sec. Litig.*, 824 F.Supp. 320, 324 (E.D.N.Y. 1993).

Second, the settlement must also be balanced against all of the risks of further litigation. There was a considerable risk that plaintiffs would not prevail under the "complete sham" theory, which required the most extreme measure of proof. They faced significant obstacles to success, including consistent inaction by government agencies, positive student satisfaction surveys, and testimony by employers who had hired some of defendant's graduates. The legal and factual

difficulties inherent in this type of case, together with the unpredictability of a lengthy trial, the appellate process that would follow a victory for plaintiffs at trial, and the ultimate virtual certainty of defendants' insolvency were plaintiffs to have succeeded at each of these levels make the fairness of the settlement readily apparent.

Third, even if plaintiffs would have been able to collect a judgment, the complexity, expense and possible duration of the litigation would have significantly depleted the limited funds available to the class members. By the time of the settlement, it had become apparent that continued costs and fees would have substantially limited the ultimate fund. There was every reason to believe that there would have been very high additional costs if the case proceeded to litigation.

Also, the reaction of the class to the proposed settlement was overwhelmingly positive. Out of over 5,250 persons who received notice of the settlement, not a single class member chose to opt out of the Settlement Agreement, and there was only one objector. His objection related to his desire for a higher award because of severe hardship allegedly experienced that he attributed to defendant.

As for the stage of the proceedings, courts generally recognize that a proposed class action settlement is presumptively valid where, as in this case, the parties engaged in arm's length negotiations after meaningful discovery. *See, e.g., Grier v. Chase Manhattan Automotive Finance Co.*, 2000 U.S. Dist LEXIS 1339 (E.D. Pa. Feb. 16, 2000). "The professional judgment of counsel involved in the litigation is entitled to significant weight." *Fisher Bros. v. Cambridge-Lee Industries, Inc.*, 639 F. Supp. 482, 488 (E.D. Pa. 1985). The settlement in this case was reached at a stage when the litigation was significantly advanced so that all parties were

fully informed of the strengths and risks in their positions.

As already discussed, the risks of establishing liability under the “complete sham” theory were substantial. Finally, considering that this was a fraud case against an educational enterprise, the possibility of decertification was present. The settlement is the largest recovery ever obtained against a trade school in a reported class action brought by students. It achieves an immediate recovery for the members of the class that substantially exceeds the likely recovery to the class had the case proceeded to judgment, while avoiding the considerable risks and expenses inherent in trial. In addition, I personally participated in the settlement negotiations and had extensive communication with counsel. Through my participation, I gained great confidence that this settlement agreement is in the best interest of the class. Considering all of the circumstances, I find this settlement to be fair, reasonable and adequate.

B. Incentive Awards

The class representatives and students initiating the case seek an incentive award from the fund equaling their tuition paid. The contribution of each of these plaintiffs to the action has been well documented by class counsel. Because each of the persons seeking an incentive award played a significant role in achieving the ultimate result, I will grant their request for an incentive award equal to their tuition paid.

Incentive awards are “not uncommon in class action litigation and particularly where, as here, a common fund has been created for the benefit of the entire class.” *In re: Southern Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997). In fact, “[c]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.” *Id.*(citing numerous cases in

which incentive awards were granted). Judges of this district have not hesitated to assure that those undertaking class litigation are not penalized for placing a class's interest above their own. *See, e.g., In re SmithKline Beckman Corp. Securities Litigation*, 751 F.Supp. 525 (E.D.Pa. 1990); *Perod v. McKenzie Check Advance of Pennsylvania*, No. 98-CV-6787 (E.D. Pa. Order June 5, 2000).

Seeking incentive awards are: Ruth Dillon, Deborah Dougherty, Susan Cullen, Monica Davis, Kelly Smith, Melissa Mann.

Ruth Dillon and Deborah Dougherty initiated these lawsuits through individual actions in 1996. Although their allegations sounded at first incredible, they ultimately persuaded counsel to file their actions by presenting a tape recording of a meeting they had with school officials, which they had ingeniously obtained permission from the school to record. The individual suits by Ms. Dillon and Ms. Dougherty were ultimately stayed to allow the class action to proceed, but the seeds of the class action were sewn in the individual cases. Both women spent many hours investigating and accumulating information to support the case, describing the case to counsel, assembling documents, and sitting for depositions.

Mary Beth Phelps was a model class representative for this case. She experienced virtually all of the abuses alleged by the class and remained wholly committed to the effort throughout the case. She was a single mother who was admitted to the school without the requisite credentials and without an entrance exam. She was ultimately granted her degree even though she had failed the clinical portion of the program. Subsequently, unable to find a job she went on public assistance for which she was required to document her job search, which she did very meticulously. She had also maintained all of her documentation from the school and from

every stage of her experience. She produced all of these materials to counsel and risked the embarrassment of her records becoming public. She also spent days assembling material, helping prepare and review the complaint, and prepared for and sat through a lengthy and grueling deposition.

Susan Cullen was also a model class representative, but for different reasons. Prior to being admitted to the school, she took the admissions examination and failed. At the time she was admitted, she was a certified radiology technician and had been employed by a highly respected hospital for years. She was able to assist counsel early in the litigation by explaining how UDS failed to prepare her as sonographer by comparing her education in radiology to her education at UDS. She also knew what was required to work with patients in a radiology department (in which ultrasound scans are generally taken) and could describe why, upon completion of her course at UDS, she was not competent to perform sonograms. In addition, through her connections with area hospitals and other individuals who attended UDS, she was able to furnish counsel with numerous vital witnesses. Ms. Cullen spent days assisting counsel, making calls to her contacts, and collecting documents. She also reviewed the complaint many times, sat for a full day deposition, and maintained her efforts throughout the case.

Monica Davis only seeks a modest incentive award because she only attended UDS for a brief period. Ms. Davis met with counsel and reviewed the complaint before it was filed. She also gathered her documents in response to document requests and was deposed for a full day.

Kelly Smith is the intervener class representative for the Noninvasive Cardiovascular Technology Program (CVT) class. While she only became formally involved in the case at a late stage, she had, in fact, been much involved in the litigation earlier. Ms. Smith worked for one of

the medical staffing agencies (in Yardley near the Trevoise location of UDS) upon which class counsel had served a subpoena calling for all records relating to UDS students. Because she herself had attended UDS she agreed, with permission from her employer, to take the time to teach class counsel her employer's complex computer system. The system tracked every comment from a health care provider contacted regarding a UDS student. As a result of her extensive efforts, class counsel was able to obtain the names of numerous major providers who either recorded adverse experiences with UDS students or who refused to accept them for interviews outright. In addition, Ms. Smith had sought counsel earlier to represent her when she learned of the suit on behalf of ultrasound students. She agreed to defer bringing suit pending the outcome of settlement discussions, and she agreed to serve as a class representative when the appropriate time arrived.

Melissa Mann intervened on behalf of those ultrasound students who had paid all of their own tuition without the benefit of government aid. Ms. Mann approached class counsel after the notice had been mailed because she did not understand why people like her were excluded from the class. She was also the sole representative who did not attend the Trevoise location. Without her assistance, class counsel would never have been able to file the intervention motion and subsequent renewed motion to certify a mandatory class encompassing the full universe of ultrasound students. Class counsel believes that the latter motion was crucial to achieving the final settlement. In addition, Ms. Mann carefully reviewed the intervener complaint, took time to gather all of her documents relating to the program, and to describe her experiences at UDS to counsel.

In sum, the assistance of these plaintiffs provided the foundation upon which this case

was built. They were not in any sense figurehead plaintiffs as is sometimes the case in class action suits. They were active clients. As a result of their having come forward, thousands of passive class members will receive significant benefit from the settlement fund.

C. Attorneys' Fees

Class counsel jointly request an attorneys' fee of \$2,395,241.00, representing one-third of the net settlement, plus one third of the interest accrued on the fund as of the date of disbursement. Additionally, class counsel seek reimbursement of costs in the amount of \$84,277.04. For the following reasons I will grant class counsel's petition.

A thorough judicial review of fee applications is required in all class action settlements. *See In re: The Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 333 (3rd Cir. 1998) (citations omitted). There are two methods for calculating attorneys' fees, the percentage-of-recovery method and the lodestar method. *See id.* The Third Circuit has explained that "[t]he percentage-of-recovery method is generally favored in cases involving a common fund, and is designed to allow courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" *Id.* (citations omitted). Whereas, "[t]he lodestar method is more commonly applied in statutory fee-shifting cases, and is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation." *Id.* The lodestar method is also "applied in cases where the nature of the recovery does not allow the determination of the settlement's value necessary for application of the percentage-of-recovery method." *Id.* The Third Circuit has stated that "it is sensible for a court to use a second method of fee approval as a cross check." *Id.* (citation omitted). Because this case is a common

fund case, I find that the percentage-of-recovery method provides a more appropriate basis for evaluating class counsel's fee petition.

In applying the percentage-of-recovery method I must begin by making a reasonable estimate of the settlement value. *See id.* at 334. The settlement fund in this case involves cash and forgiveness of debt. There is no question that the \$5.97 million in cash is appropriately considered in determining the value of the settlement. The relevant issue is the appropriate value of the \$1.3 million in loan forgiveness. Class counsel attach a decision by Judge O'Neill where he awarded attorneys' fees based on a net settlement including cash and debt forgiveness. *See Perod v. McKenzie Check Advance of Pennsylvania, LLC*, No. 98-CV-6787 (E.D. Pa. Order July 6, 2000) (attached as Ex. A to Class Counsel's Pet.). Debt forgiveness for students who are already delinquent in paying back their loans arguably does not have the same value as cash in hand. In addition to the debt forgiveness, however, students credit reports will be cleared of this default. Moreover, the fee sought by class counsel is based solely upon the cash and debt forgiveness and does not include the non-monetary benefits to the class. The non-monetary relief includes appointment of an ombudsman by the court and other remedial measures to provide future students with a better educational experience at UTS. Therefore, I find it reasonable to include debt forgiveness in the total settlement value.

In common fund cases courts should consider several factors in setting a fee award:

- (1) the size of the fund created and the number of persons benefitted;
- (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel;
- (3) the skill and efficiency of the attorneys involved;
- (4) the complexity and duration of the litigation;
- (5) the risk of nonpayment;
- (6) the amount of time devoted to the case by plaintiffs' counsel; and
- (7) the awards in similar cases.

Gunter v. Ridgewood Energy Corp., No. 00-5053, 2000 WL 1038142, at *11 n.1 (3rd Cir. July 27, 2000). Additionally, the Third Circuit recommends cross-checking percentage award by the lodestar award method. *See id.* The Third Circuit has cautioned that “[t]he eight factors [seven enumerated factors and the lodestar cross-check] listed above need not be applied in a formulaic way. Each case is different, and in certain cases, one factor may outweigh the rest. . . . what the district court is required to do before reaching such a conclusion is principally to explain way.” *Id.* Additionally, “whatever approach district courts choose to adopt they must safeguard the plaintiffs and class members’ interests, because as is often the case (and as it was here), an attorneys’ fee motion filed by successful counsel in a common fund award case goes unopposed. Therefore, the plaintiffs’ rights need special protection.” *Id.* at *11 n.6.

1. The complexity and duration of the litigation²

The Third Circuit has instructed district courts that “[t]he complexity and duration of the litigation is the first factor a district court can and should consider in awarding fees.” *Id.* at *7.

The complexity and duration of this litigation weigh in favor of granting class counsel’s petition. A complaint was filed on August 5, 1998. Therefore, this litigation continued for over two years. Because of a multitude of discovery problems I was heavily involved in monitoring this litigation. Virtually nothing about his case was simplistic. Plaintiffs based their complaint on alleged Racketeer Influenced and Corrupt Organization Act (“RICO”), 18 U.S.C. § 1964, violations as well as pendent causes of action for violations of state consumer protection statutes,

² While the complexity and duration of the litigation is listed as the fourth factor for consideration in footnote 1 of the Third Circuit’s opinion in *Gunter*, the text of the opinion indicates that this factor should be considered first. *See Gunter v. Ridgewood Energy Corp.*, No. 00-5053, 2000 WL 1038142, at *7, *11 n.1 (3rd Cir. July 27, 2000).

and for breach of contract and fraud. Numerous discovery motions were filed and I eventually had to make myself available for weekly conferences with the parties, in order to assure that the litigation moved along. This litigation consisted of motions to dismiss, class certification motions, a multitude of discovery motions, many oral arguments and numerous settlement conferences.

The complexity of litigating this case was increased because of few similar cases for counsel to rely on as precedent. As class counsel explains “[n]o reported decision had ever certified a national class against a trade school having more than one location before this Court did so.” Class counsel’s Mem. in Support of Final Approval of the Proposed Settlement at 33. Class counsel attach an affidavit from a class member, Yehudis Golombeck, describing how she was unable to find any attorney who would bring her case against defendants. *See* App. Decl. in Support of Pet. for Att’y’s Fees, Ex. 4. Additionally, this litigation involved fifteen schools in eight states along with voluminous documents. In sum, this case is the paradigm of complex litigation. Both the legal theories and litigation process were complex.

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

As class counsel indicates in their petition “[t]he settlement is believed to be the largest recovery ever obtained against a trade school in a civil suit brought by students.” Pet. at 1. The class consists of approximately 5,300 people. If every member returns his claim form, this allows for a potential recovery of seventeen percent of total tuition paid per person.³

In general, as the size of the settlement fund increases the percentage award decreases.

³ This percentage as high as approximately 20% depending upon how many members actually file claims. To date, approximately 2,000 members have filed claims.

See In re: Prudential Ins., 148 F.3d at 339. This case, however, does not involve a settlement award that is so large as to necessitate an automatic reduction in the percentage award. *See Gunter*, 2000 WL 1038142, at *1, *11 n.1 (\$9.5 million settlement is not considered “extremely large” and is a “mainstream case.”). The size of the fund and the number of people, in addition to the monetary amount each class member will recover, militates in favor of approving this fee petition.

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

Class members were alerted through the class notice that attorneys’ fees may amount to as much as one-third of the gross settlement fund (cash and debt relief). Out of the over 5,250 class members that received the notice, there was only one objector. Therefore, this factor weighs in favor of approving the fee petition.

4. The skill and efficiency of the attorneys involved

As class counsel notes “[t]he single clearest factor reflecting the quality of class counsels’ services to the class are the results obtained. The class will receive the largest recovery ever obtained against a trade school.” Pet. at 11-12. The skill and expertise of class counsel allowed for a substantial settlement. Howard Langer, Esq., co-lead counsel for the class, is a partner with Sandals, Langer & Taylor. Sandals, Langer & Taylor, as well as Mr. Langer himself, has extensive experience in class actions. *See* App. of Decl. Langer at Ex. C. Mr. Langer was lead counsel in *Robinson v. Countrywide Credit Industries*, No. 97-2747, 1997 WL 634502 (E.D. Pa. Oct. 8, 1997), and *In re Marine Midland Auto Leasing Litigation*, 155 F.R.D. 416 (N.D.N.Y. 1994). Mr. Langer was also co-lead counsel in *In re Carbon Dioxide Antitrust Litigation*, 149 F.R.D. 229 (M.D. Fla. 1993), and is currently co-lead counsel in *In re Commercial Tissue*

Products Antitrust Litigation, 183 F.R.D. 589, 595 (N.D. Fla. 1998). *See id.* Mr. Langer was assisted by attorneys from his own firm (Ms. Kay Sickles, Esq., Ms. Melinda deLisle, Esq. and Mr. Scott Lempert, Esq.) as well as Mr. Ruben Honik, Esq. and Ms. Roberta Liebenberg, Esq.. Both Mr. Honik and Ms. Liebenberg also provided declarations and descriptions of their practices. *See App. Decl. in Support of Pet. for Att’ys Fees.* The skill of each of these attorneys is reflected both in settlement and in the aggressive manner in which they pursued this litigation from start to finish. As class counsel notes, at one conference, I stated the following, in reference to Mr. Langer: “[I]t seems to me, that you may have to . . . go the extra step and it seems to me that if there’s anyone who is . . . going to be able to do that, you will be able to do it . . . you go after it and you don’t let it go . . .”. Pet. at 21 (quoting Tr. Jan. 20, 2000 at 22). In sum, the highly skilled class counsel provided excellent representation both for named plaintiffs and absent class members.

In each of their declarations, class counsel provided a total of the amount of hours they worked on this litigation. Given the complexity of the case and the number of motions filed, I find that the time counsel spent on this case is a demonstration of their efficiency. Additionally, the fact that this case settled as opposed to proceeding to trial “in and of itself, is never a factor that the district court should rely upon to reduce a fee award. To utilize such a factor would penalize efficient counsel, encourage costly litigation, and potentially discourage able lawyers from taking such cases.” *Gunter*, 2000 WL 1038142 at *7. Therefore, I find that the skill and efficiency of counsel militate in favor of approving class counsel’s petition.

5. The risk of nonpayment

The risk of nonpayment in this case was acute. The settlement represented more than

Whitman Medical Corporation's total profits over the past five years. *See* Mem. in Support of Final Approval of the Proposed Settlement at 23. Whitman lacked significant unencumbered hard assets against which plaintiffs could levy had a judgment been obtained. *See id.*

Additionally, Whitman represented to the Court that the amount it was contributing to the settlement was the maximum it could contribute without violating the Secretary of Education's financial responsibility regulations under Title IV. *See id.* at 24.

Whitman had two relevant insurance carriers. Both policies excluded coverage for deliberate acts. *See id.* Additionally, one of the insurance carriers claimed that Whitman had failed to disclose pending litigation when applying for insurance coverage. *See id.* at 25. The other insurance policy was a wasting policy meaning a maximum amount was allocated for coverage regardless of whether the case proceeded or settled. *See id.* In sum, Whitman's insurance carriers had a multitude of defenses and the risk that the wasting policy would run out by the time a trial was over added further concern to the potential for recovery.

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

In class counsel's declarations they provide summaries of the amount of time spent on this litigation. Mr. Langer leads the group of attorneys with 1,573.2 hours. In total, class counsel afforded 3,899.84 hours to this litigation. The time class counsel devoted to this case represents a substantial commitment to this litigation.

7. The awards in similar cases

As described above, this was the first case certifying a system-wide class action against a trade school. I looked to other attorneys' fee awards in class actions in this district to determine the reasonableness of class counsel's request. As class counsel describe, the award of one-third

of the fund for attorneys' fees is consistent with fee awards in a number of recent decisions within this district. *See* Pet. at 9. For example, in *Perod*, Judge O'Neill award one-third of the settlement fund for attorneys' fees. *See* No. 98-CV-6787. *Perod* was a class action brought against a check-cashing company alleging violations of the Truth in Lending Act, RICO, Pennsylvania's Loan Interest and Protection Law, Pennsylvania's Unfair Trade Practices and Consumer Protection Law, and Pennsylvania common law prohibiting fraud. Class counsel also attaches to their petition an exhibit listing cases where courts have awarded attorneys' fees of 33 1/3% or more from the recovery achieved. *See id.* Ex. C. Therefore, I conclude that an award of one-third of the settlement fund is reasonable in consideration of other courts' awards.

8. Lodestar cross-checking

The lodestar is determined "by multiplying the number of hours counsel reasonably worked on a client's case by a reasonable hourly billing rate for such services in a given geographic area provided by a lawyer of comparable experience."⁴ *Gunter*, 2000 WL 1038142, at *8. The Third Circuit explained that "[t]o examine the lodestar factor properly, a Court should make explicit findings about how much time counsel reasonably devoted to a given matter, and what a reasonable hourly fee would be for such service." *Id.* at *9. In explaining lodestar multipliers the Third Circuit reasoned that "[m]ultipliers may reflect the risks of nonrecovery facing counsel, may serve as an incentive for counsel to undertake socially beneficial litigation, or may reward counsel for extraordinary result. By nature they are discretionary and not susceptible to objective calculation." *In re: Prudential Ins.*, 148 F.3d at 340. The Third Circuit

⁴ *See* affidavit of Alan Black and Arlin M. Adams submitted by plaintiff, testifying to the reasonableness of the rates charged by class counsel based on the hourly rates of lawyers of similar skill and experience in the Philadelphia area.

has also recognized that “multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.” *Id.* at 341 (quoting 3 H. Newberg & A. Conte, *NEWBERG ON CLASS ACTIONS*, § 14.03 at 14-5).

The multiplier in this case is 2.04.⁵ The declarations of class counsel provide an account of the number of hours counsel worked on this litigation and counsel’s hourly rates. For example, Mr. Langer attributes 1,573.2 hours to this litigation and his hourly rate is \$390. Mr. Langer and members of his firm worked a total of 2,751.9 hours on this litigation, reaching a sum of \$810,418.00. Mr. Honik and others with his firm accounted for 973.7 hours totaling \$314,562.50. Finally, Ms. Liebenberg, along with another attorney and a paralegal calculated 174.24 hours for a total cost of \$48,798.75. In sum, class counsel dedicated 3,899.84 hours to this litigation. The total number of hours multiplied by the various attorneys’ and paralegals’ rates equals \$1,173,779.25. Resulting in a lodestar multiplier of 2.04.⁶ I find that given the stage of this litigation and the numerous motions, conferences, and oral arguments that preceded settlement, 3,899.84 hours dispersed over eleven attorneys and four paralegals is reasonable.⁷ I also find that counsel charge reasonable hourly fees.⁸

⁵ In calculating the loadstar multiplier class counsel used their historic rates over the course of the litigation, instead of counsel’s current rates.

⁶ The loadstar multiplier is calculated by dividing the attorneys’ fees class counsel seek by the total amount of hours class counsel expended on the litigation times class counsel’s hourly rates.

⁷ It should also be noted that prior to granting preliminary approval of the settlement agreement, I required numerous re-drafts of the agreement and insisted upon greater and greater specificity.

⁸ *See* affidavit of Arlin M. Adams.

There is ample reason to apply a multiplier of 2.04 in this case. First, class counsel achieved an extremely favorable settlement for the class. Class members will receive cash and/or debt forgiveness in addition to non-monetary relief that will impact future students of UTS. Second, this case was risky because of the lack of similar cases and the chance of no recovery. Third, counsel engaged in almost two years of arduous arms-length litigation.⁹ Additionally, this litigation has social value. UTS schools in numerous states will be required to reform their practices to comply with this settlement agreement. Finally, multipliers ranging from one to four are frequently awarded. Given the years spent on this litigation, the skill of class counsel and the favorable result achieved for class members I find that a multiplier of 2.04 is reasonable.

C. Costs

Class counsel has also requested reimbursement of litigation costs in the amount of \$84,277.04. A non-exhaustive list of these expenses includes: copying, expert witnesses, transcripts, depositions fees, on-line research, travel and meals, postage and delivery services, subpoena service and witness fees and telephone. A large percentage of these litigation costs are attributable to copying and expert witness costs. I find these expenses to be adequately documented, proper and reasonable. See App. of Decl. in Support of the Pet. for Att'ys Fees. Therefore, I will award counsel a reimbursement of these expenses from the gross amount of the settlement Fund.

E. Conclusion

⁹ The complaint was filed in August, 1998 and a settlement sum was reached on May 4, 2000. For weeks after May 4, 2000, however, the parties continued to negotiate the non-monetary terms of the settlement. Additionally, class counsel filed several versions of the proposed settlement and supporting documents before I preliminarily approved of the settlement in July, 2000.

For all of the foregoing reasons, I will grant class counsel's petition for final approval of the settlement agreement, for incentive awards for class representatives and persons initiating the suit, and for attorneys' fees and costs.

SETTLEMENT APPROVAL ORDER AND FINAL JUDGMENT

1. On July 21, 2000, the Settlement Agreement and Proposed Plan of Distribution were preliminarily approved.
2. Notice of the settlement was mailed by first class mail to all known potential members of the Class on July 25, 2000 pursuant to the terms of the Preliminary Approval Order.
3. A hearing was held on September 15, 2000, at which time the parties and all other interested persons were heard in support of and in opposition to the proposed settlement. I offered to consider any written comments submitted to the Clerk of the Court by absent members of the Class, but none were submitted.
4. Based on the papers filed and the presentations made to the Court by the parties and by other interested persons at the hearing, it appears to the Court that the Settlement Agreement is fair, adequate, and reasonable.
5. The Court has jurisdiction over the subject matter of this litigation and over all parties to this litigation, including all Class members, as defined in the Court's Order of June 22, 2000.
6. The Class Representatives, Susan E. Cullen, Mary Beth Phelps, Monica Davis, Melissa Mann and Kelly Smith, adequately represent the Class.
7. The notice of the settlement mailed first class postage prepaid to all known potential members of the Class as defined in the Order of June 22, 2000, fully and accurately informed potential members of the Class of all material elements of the proposed settlement and

constituted valid, due, and sufficient notice to all potential members of the Class.

8. The persons who in response to the notice of certification filed timely and valid requests for exclusion from the Class and who are not bound by this Settlement Approval Order and Final Judgment are set forth in Exhibit 1 attached hereto.¹⁰

9. The sums requested for attorneys' fees and costs are fair and reasonable.

10. The sums requested for incentive awards are fair and reasonable.

It is ORDERED AND DECREED:

1. Pursuant to Rule 23(e), Fed. R. Civ. P., the Settlement Agreement and the proposed Plans of Allocation (attached as Exhibit 2) and the terms of the settlement as described in the Settlement Agreement, are approved and confirmed as being fair, reasonable and adequate to all Class members. The parties and their counsel are directed to implement the Settlement Agreement and Plans of Allocation in accordance with their terms.

2. The Amended Class Action Complaint and the Intervenor Complaints of Melissa Mann and Kelly Smith, and all claims and causes of action asserted, are dismissed with prejudice, as to the Class representatives and all members of the Class. These dismissals are without cost to any party, except as specifically provided in the Settlement Agreement.

3. As of the Effective Date set forth in the Settlement Agreement, the Class representatives and all members of the Class who did not request exclusion shall, to the extent

¹⁰ A significant number of individuals selected to opt-out of this action when the class was first certified in December, 1999. These individuals listed in Exhibit 1 are not bound by this Order and Final Judgment. In contrast, no members of the class selected to opt out of the Settlement Agreement.

permitted by law, conclusively be deemed to have fully, finally and forever released, acquitted and discharged the defendants (as that term is used in the Settlement Agreement) and all persons and entities from any and all settled claims and causes of action to the extent provided in the Settlement Agreement.

4. To the extent permitted by law, any Class member who did not request exclusion is barred and permanently enjoined from asserting, instituting, or prosecuting, either directly, indirectly, individually, or in a representative or derivative capacity, the released claims, as set forth in the Settlement Agreement.

5. Without affecting the finality of this Settlement Approval Order and Final Judgment in any way, the Court retains exclusive jurisdiction over implementation, enforcement and performance of the Settlement Agreement.

6. Anne Markey Jones, as ombudsman, shall report to the court annually, in accordance with the terms of the Settlement Agreement.

7. This Order and Final Judgment is not a finding of the validity or invalidity of any claims in this action nor a determination of any wrongdoing by the defendants.

8. The following attorneys' fees and costs are awarded:

Attorneys' fees: **\$2,395,241.00**

Costs: **\$84,277.04**

These awards should include **41.5%** of the interest earned on the settlement fund up to the date of disbursement of the fee to counsel.¹¹ Counsel for plaintiffs may petition for award of

¹¹This percentage represents the total combined attorneys' fees and costs (\$2,479,518.04) divided by \$5.97 million, that portion of the settlement fund in cash that has been invested.

additional fees and reimbursement of expenses relating to the consummation and administration of the settlement. Such supplemental petitions may be made without notice to the Class.

The award of fees and costs shall be distributed to the firm of Sandals & Langer, LLP for allocation among plaintiffs' counsel. The Court reserves jurisdiction over the fees and costs in the event agreement cannot be reached among plaintiffs' counsel on allocation of the fees.

13. The following incentive awards are granted:

Susan Cullen:	\$10,000.00
Mary Beth Phelps:	\$10,413.50
Monica Davis:	\$1,939.75
Melissa Mann:	\$10,599.03
Kelly Smith:	\$9,701.03
Ruth A. Dillon:	\$10,000.00
Deborah L. Dougherty:	\$10,000.00

13. The Clerk of the Court is directed to enter this Memorandum, Order, and Final Judgment as a final judgment with respect to each Plaintiff and Class member. The Court's reservation of continuing jurisdiction pursuant to the preceding paragraph shall not affect in any way the finality of this Order and Final Judgment.

Dated: _____

Anita B. Brody, J.

Copies FAXED on ____ to:

Copies MAILED on ____ to: