

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

<p><b>XIMENA MIRANDA, <i>on behalf of herself and those similarly situated,</i></b></p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p><b>XAVIER UNIVERSITY,</b></p> <p style="text-align: center;">Defendant.</p>	<p>Case No. 1:20-cv-00539</p> <p>Judge Timothy S. Black</p>
--	---

**PLAINTIFF’S MOTION FOR ATTORNEYS’ FEES, EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARD**

Under Fed. R. Civ. P. 23(h) and 54(d)(2), Plaintiff Ximena Miranda (“Plaintiff”),<sup>1</sup> on behalf of herself and the Class, respectfully moves this Court to enter the proposed Order to be attached as Exhibit 1 to Plaintiff’s forthcoming Motion for Final Approval of Class Action Settlement. The requested Order would approve the following distributions from the Common Fund: (1) attorneys’ fees to Class Counsel in the amount of \$250,000.00 (one-third of the \$750,000 non-reversionary Settlement Fund); (2) \$12,747.75 in litigation expenses that Class Counsel incurred in connection with this action; (3) \$33,300 in Administrative and Notice Expenses associated with the Settlement (minus amounts already paid); and (4) Class Representative Service Award in the amount of \$5,000 to Plaintiff. Class Counsel consulted with counsel for Defendant before filing this Motion under Local Rule 7.3 and determined that Defendant takes no position on this Motion. The grounds for

---

<sup>1</sup> Capitalized terms not defined herein are as stated in the Settlement Agreement and Release (“Settlement Agreement”) (Doc. 27-2).

the Court's potential granting of this unopposed Motion are included in the accompanying memorandum.

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF HER MOTION FOR ATTORNEYS' FEES, EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARD**

**I. PRELIMINARY STATEMENT**

Plaintiff Ximena Miranda reached a class action settlement with Defendant Xavier University ("Defendant" or "Xavier") providing pro rata cash payments to roughly 494 Class Members from the \$750,000 non-reversionary Settlement Fund. The Settlement defines the Class as follows:

**All natural persons identified on the Xavier Class List who were enrolled as a student in Xavier University's College of Nursing Accelerated Bachelor of Science in Nursing Program in any city in Ohio who paid tuition and fees to Xavier during the Spring 2020 and Summer 2020.**

Settlement Agreement, ¶ 37. The Class consists of approximately 494 individuals nationwide who enrolled in a total of 816 impacted semesters. Coates Preliminary Approval Declaration, ¶ 6 (Doc. 27-3). Under the Settlement, the Settlement Fund will be used to make payments to Class Members without requiring a claim for Settlement benefits to be filed and for the costs of Settlement Administration, attorneys' fees and expenses, and a Service Award to Plaintiff. Defendant paid the costs associated with CAFA Notice separately, subject to a \$1,075.00 cap. Settlement Agreement, ¶ 10.

The Settlement Fund will provide monetary relief directly to Class Members on a *pro rata* distribution after payment of the Fee Award and Expenses, Notice and Administration Expenses, and Service Award. The *pro rata* payments will be made on a semester basis, meaning some Class Members will receive payments for both semesters if enrolled during both semesters, while other Class Members will receive payment for one semester if enrolled for only one semester. *Id.*, ¶

49(ii). To the extent any funds remain, there will be a second *pro rata* distribution to Class Members. *Id.*, ¶ 49(iii).

### III. ARGUMENT

#### A. The Court Should Approve the Requested Attorneys' Fees Based Upon the Percentage of the Fund Method.

The “common fund doctrine,” or percentage-of-recovery method, has been recognized by the Sixth Circuit as an appropriate formula by which to calculate attorneys’ fees in common fund cases. *Johnson v. Midwest Logistics Sys., Ltd.*, No. 2:11-CV-1061, 2013 WL 2295880, at \*6 (S.D. Ohio May 24, 2013) (citing *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993)); *see also Dillow v. Home Care Network, Inc.*, No. 1:16-cv-612, 2018 WL 4776977, at \* 4 (S.D. Ohio Oct. 3, 2018) (recognizing percentage of fund as preferred method over lodestar for common fund). When using the percentage method, “courts in this Circuit generally approve of awards that are 1/3 of the total settlement.” *Borders v. Alternate Sol. Health Network, LLC*, No. 2:20-CV-1273, 2021 WL 4868512, at \*4 (S.D. Ohio May 17, 2021).

In evaluating the reasonableness of the requested fee award, the Sixth Circuit requires district courts to consider the six “*Ramey*” factors:

- (1) The value of the benefits rendered to the class;
- (2) Society’s stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others;
- (3) Whether the services were undertaken on a contingency fee basis;
- (4) The value of the services on an hourly basis (the lodestar cross-check);
- (5) The complexity of the litigation; and
- (6) The professional skill and standing of the counsel on both sides.

*Johnson*, 2013 WL 2295880, at \*6 (citing *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188,

1196 (6th Cir. 1974)).

**B. All Ramey Factors Weigh in Favor of the Requested Fee**

Class Counsel's request for fees in the amount of one-third of the Settlement Fund is consistent with the Settlement Agreement (Doc. 27-2 at Page ID # 522) as well as the Court-approved Notices. No Class Member has objected to date to Class Counsel's request, which is well within the range of reasonableness and should be approved. And, as discussed below, all *Ramey* factors support the requested fee.

**1. The Value of the Benefits to the Class**

Class Counsel's efforts resulted in a \$750,000.00 non-reversionary Settlement Fund from which pro rata cash payments will be automatically sent to Class Members without having to submit a claim form. This simplified and direct distribution of cash payments to Class Members will result in the distribution of approximately \$448,000 to approximately 494 Class Members for 816 semesters due to those Class Members' enrollment in Xavier's ABSN program for the Spring 2020 and Summer 2020 semesters. Coates Preliminary Approval Decl., ¶ 6. This breaks down to roughly \$1,518 per the 494 Class Members, although some Class Members will receive payment for being enrolled for one semester while others will receive payment for attending both semesters. *Id.*, ¶ 8. The average per Class Member value of \$1,518 is a higher per student settlement than the following cases: *Smith v. University of Pennsylvania*, No. 2:20-cv-2086 (E.D. Pa.) (\$4.5 million settlement for 26,311 students for a value of \$171 per student); *Choi v. Brown University*, No. 1:20-cv-191 (D.R.I.) (\$1,500,000 settlement for 9,650 students for a value of \$155 per student); *Martin v. Lindenwood University*, No. 4:20-cv-1128 (E.D. Mo.) (\$1,650,000 settlement for 6,000 students for a value of \$275 per student); *D'Amiro v. University of Tampa*, No. 7:20-cv-03744 (S.D.N.Y.) (\$3,400,000 settlement fund for 9,085 students for a value of \$374 per student); and,

*Wright v. Southern New Hampshire University*, No. 1:20-cv-609 (D.N.H.) (\$1,250,000 settlement fund for 3,067 students for a value of \$407 per student). *Id.* This factor supports the requested fee.

## **2. Society's Stake in Rewarding Attorneys**

Class Counsel was able to make monetary relief available for roughly 494 former students who were unable to receive in-person clinical education during the pandemic. Without this lawsuit, these former Xavier ABSN students would likely not have been aware that they were charged a price premium, and in any case would be unlikely to make an individual claim. Class actions such as this “have a value to society more broadly, both as deterrents to unlawful behavior—particularly when the individual injuries are too small to justify the time and expense of litigation—and as private law enforcement regimes that free public sector resources.” *Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 287 (6th Cir. 2016). This factor supports the requested fee.

## **3. The Case was Taken on a Contingency Basis**

Class Counsel took this case on a contingency fee basis, and therefore “undertook the risk of not being compensated, a factor that cuts significantly in favor of awarding them a significant recovery here.” *Carr v. Guardian Healthcare Holdings, Inc.*, No. 2:20-CV-6292, 2022 WL 501206, at \*10 (S.D. Ohio Jan. 19, 2022) (citing *Kritzer v. Safelite Sols., LLC*, No. 2:10-CV-0729, 2012 WL 1945144, at \*9 (S.D. Ohio May 30, 2012)); Coates Preliminary Approval Decl., ¶ 14. This factor supports the requested fee.

## **4. The Lodestar Cross-Check**

When using the percentage method, a lodestar cross-check is optional. *Ganci v. MBF Inspection Servs., Inc.*, No. 2:15-CV-2959, 2019 WL 6485159, at \*7 (S.D. Ohio Dec. 3, 2019). Were the Court to apply a cross-check, however, it also supports the requested fee. Class Counsel have in the aggregate billed 686.20 hours, for a lodestar of \$330,353.50. *See* Declaration of

Terence R. Coates in Support of Plaintiff's Motion for Attorneys' Expenses and Class Representative Service Award ("Coates Second Decl."), ¶ 6 (attached as **Exhibit 1**). Class Counsel will continue to spend time on this matter including overseeing settlement administration and preparing for and attending the Final Approval Hearing. Coates Second Decl., ¶ 7; *see also* *Arp v. Hohla & Wyss Enterprises, LLC*, No. 3:18-CV-119, 2020 WL 6498956, at \*7 (S.D. Ohio Nov. 5, 2020) (recognizing that Class Counsel's work does not end at final approval). But even at the current lodestar, Class Counsel's fee request is less than Class Counsel's lodestar. This indicates that Class Counsel's fee request is reasonable considering that Class Counsel's fee request includes a multiplier of less than 1 when courts within this Circuit often award positive multipliers of "between approximately 2.0 and 5.0." *See Koenig v. USA Hockey, Inc.*, No. 2:09-cv-1097, 2012 WL 12926023, at \*10 (citing *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 381 (S.D. Ohio 2016)). Class Counsels' lodestar were reasonably accrued at their customary hourly rates. Coates Second Decl., ¶ 6. This factor supports the requested fee.

### **5. The Complexity of the Litigation**

Generally, "[m]ost class actions are inherently complex and settlement avoids the costs, delays, and multitude of other problems associated with them." *Ganci v. MBF Inspection Servcs., Inc.*, No. 2:15-cv-2959, 2019 WL 6485159, at \*3 (S.D. Ohio Dec. 3, 2019) (quoting *Wright v. Premier Courier, Inc.*, No. 2:16-cv-420, 2018 WL 3966253, at \*3 (S.D. Ohio Aug. 17, 2018)) (quotation omitted). This case is no exception. In fact, typical class action complexity is amplified by the nature of the case. Plaintiff brought a difficult COVID-19 tuition reimbursement case that is unique for pandemic reimbursement cases because it includes promises from Defendant and in person clinicals were guaranteed to ABSN students, but yet were not provided during the pandemic. This case would have involved competing price premium and/or COVID-10 pandemic

experts. *Hawes v. Macy's Stores W., Inc.*, No. 1:17-CV-754, 2022 WL 194407 (S.D. Ohio Jan. 22, 2022) (including extensive discussion of multiple attacks by defendant regarding plaintiff's price premium theory). This factor supports the requested fee.

#### **6. Skill and Standing of Counsel**

This District has already recognized that Class Counsel are knowledgeable in the applicable law and experienced in litigating class actions and other complex matters. *Bechtel v. Fitness Equip. Servs., LLC*, 339 F.R.D. 462, 486 (S.D. Ohio 2021) (Class Counsel "have appeared before this Court many times and have substantial experience litigating class actions and other complex matters."); *Shy v. Navistar Int'l Corp.*, No. 3:92-CV-00333, 2022 WL 2125574, at \*4 (S.D. Ohio June 13, 2022) ("Class Counsel, the law firm of Markovits, Stock & DeMarco, LLC, are qualified and are known within this District for handling complex cases including class action cases such as this one."). Defendant was represented by Taft Stettinius & Hollister LLP, a well-established Cincinnati-based law firm. The skill and standing of counsel "on both sides" of the litigation supports the requested fee. *See In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 538 (E.D. Mich. 2003).

#### **C. The Requested Fees are Comparable to Fees Awarded in Similar Common Fund Cases**

Finally, although not one of the *Ramey* factors, comparing the fees requested in this matter to fees awarded in similar common fund cases further supports the reasonableness of Class Counsel's request. An award of one-third of a common fund is well within the range of fees approved in class actions within the Sixth Circuit. *See, e.g., Karpik v. Huntington Bancshares Inc.*, No. 2:17-CV-1153, 2021 WL 757123, at \*9 (S.D. Ohio Feb. 18, 2021) (approving one-third fee of fund); *Garner Properties & Mgmt., LLC v. City of Inkster*, No. 17-CV-13960, 2020 WL 4726938, at \*10 (E.D. Mich. Aug. 14, 2020) (same); *Bailey v. Black Tie Mgmt. Co. LLC*, No. 2:19-

CV-1677, 2020 WL 4673163, at \*5 (S.D. Ohio Aug. 12, 2020) (Sargus, J.) (same); *Hosp. Authority of Metropolitan Gov't of Nashville v. Momenta Pharms., Inc.*, No. 3:15-CV-01100, 2020 WL 3053468, at \*1 (M.D. Tenn. May 29, 2020) (same); *Johansen v. One Planet Ops, Inc.*, No. 2:16-CV-00121, 2020 WL 7062806, at \*4 (S.D. Ohio Mar. 25, 2020) (same); *Allan v. Realcomp II, Ltd.*, No. 10-CV-14046, 2014 WL 12656718, at \*2 (E.D. Mich. Sept. 4, 2014) (same).

**D. The Court Should Award Class Counsel's Out-of-Pocket Expenses, Authorize Settlement Administration Costs, and Approve the Requested Service Awards**

The notices state that Class Counsel will seek litigation expenses not to exceed \$13,000. (e.g., Doc. 27-2 at PageID # 522). Class Counsel seek reimbursement of \$12,747.75 for out-of-pocket costs incurred in litigation, which is below the \$13,000.00 cap within the Settlement Agreement. Each of these expenses were advanced with the risk of no recovery and on behalf of the Class. Coates Second Decl., ¶ 6. These expenses include expenses related to mediation, filing fees, and copy costs. *Id.* The largest of these expenses are for the mediation services of Ret. Judge Denlow (\$10,876.52). *Id.* All of these expenses were reasonable and necessary in connection with litigation and resolving this case and are reimbursable. *See Feiertag v. DPP Holdings, LLC*, 2016 WL 4721208, at \*8 (S.D. Ohio Sept. 9, 2016) (approving reimbursement of costs for court-filing fees, legal research, photocopies, postage, process service, and travel and accommodation for mediation) (citing *In re Packaged Ice Antitrust Litig.*, 2012 WL 5493613, at \*8 (E.D. Mich. Nov. 13, 2012)). The requested expenses are reasonable, were necessary to achieve the Settlement, and should be approved.

Class Counsel received bids from various settlement administrator firms, ultimately choosing Settlement Services, Inc. (“SSI”). Coates Preliminary Approval Decl., ¶ 9. Class Counsel ultimately recommended SSI because it was offering the best settlement administration and notice



services at the best price for the Class. *Id.* Plaintiff requests that the Court approve \$33,300 for SSI's services as the Settlement Administrator in this case.

Finally, Class Counsel request that the Court approve the Service Award to Class Representative Ximena Miranda in the amount of \$5,000 each as set forth in the notices. (*e.g.*, Doc. 27-2 at Page ID # 521-522). Defendant does not oppose this request, and Class Members have been put on notice that this amount would be requested and have not objected. *Id.* Providing class representative service awards is "an efficacious way of encouraging members of a class to become class representatives and rewarding individual efforts taken on behalf of the class." *Feiertag*, 2016 WL 4721208, at \*8 (quoting *Hadix v. Johnson*, 322 F.3d 895, 897 (6th Cir. 2003)).

Plaintiff Miranda has taken an active part in the litigation. Coates Preliminary Approval Decl., ¶ 11; *see also* Declaration of Ximena Miranda in Support of Plaintiff's Motion for Attorneys' Fees, Expenses, and Class Representative Service Award, ¶ 4 (attached as **Exhibit 2**). The modest service award requested here reflects compensation for her time and effort in prosecuting the claims asserted in this action on behalf of the Class. It is well within the range of awards approved in this Circuit and represents a small reduction in the \$750,000 Settlement Fund. *See, e.g., Graybill v. Petta Enters., LLC*, No. 2:17-cv-418, 2018 WL 4573289, at \*8-9 (S.D. Ohio Sept. 25, 2018) (approving service award of \$5,500 to the named plaintiff from a \$97,500 settlement); *Wright v. Premier Courier, Inc.*, 2018 WL 3966253, at \*8 (S.D. Ohio Aug. 17, 2018) (approving service awards of \$5,000 each to two named plaintiffs from a \$600,000 settlement); *Johnson*, 2013 WL 2295880, at \*5 (approving \$12,500 service award to the named plaintiff from a \$452,380 settlement).

#### IV. CONCLUSION

For all of the foregoing reasons, Class Counsel respectfully requests that the Court grant Plaintiff's Motion for Attorneys' Fees, Expenses, and Class Representative Service Award, and enter the proposed Order that will be attached to Plaintiffs' upcoming Motion for Final Approval of Class Action Settlement.

Respectfully submitted,

/s/ Terence R. Coates

W.B. Markovits (0018514)

Justin C. Walker (0080001)

Terence R. Coates (0085579)

Dylan J. Gould (0097954)

MARKOVITS, STOCK & DEMARCO, LLC

119 East Court Street, Suite 530

Cincinnati, OH 45209

Phone: (513) 651-3700

Fax: (513) 665-0219

*bmarkovits@msdlegal.com*

*jwalker@msdlegal.com*

*tcoates@msdlegal.com*

*dgould@msdlegal.com*

Joseph M. Lyon (0076050)

THE LYON FIRM

2754 Erie Avenue

Cincinnati, OH 45208

Phone: (513) 381-2333

Fax: (513) 766-9011

*jlyon@thelyonfirm.com*

*Class Counsel*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of August 2023, I served a copy of the foregoing document via electronic filing in the ECF system.

/s/ Terence R. Coates  
Terence R. Coates (0085579)