IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DAVE MCCORMICK, T'LANI ROBINSON, DENNIS MAGANA, SCOTT SWINDELL, DAVID TOROSYAN, and ROBBY BROWN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

ADTALEM GLOBAL EDUCATION, INC., formerly known as DEVRY EDUCATION GROUP, INC., a Delaware corporation, DEVRY UNIVERSITY, INC., a Delaware corporation,

Defendants.

No. 2018-CH-4872

Honorable Michael T. Mullen

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARDS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Circuit Court of Appeals Cases

United States District Court Cases

State Supreme Court Cases

State Appellate Court Cases

State Circuit Court Cases

Miscellaneous Authority

I. INTRODUCTION

Defendants Adtalem Global Education Inc. and DeVry University, Inc. (collectively, "DeVry") operated one of the country's largest for-profit colleges: DeVry University. As early as 2008, DeVry began a nationwide advertising campaign centered on two key claims about its graduates—one that boasted a higher rate of job placements overall (the "90% Placement Claim") and another highlighting above-average salaries at the jobs that they secured (the "Higher Income Claim," together, the "Claims").[1] DeVry allegedly used these Claims to persuade prospective students to enroll at its institutions rather than other similar colleges and also to justify charging prices over and above what students would pay at those other schools. DeVry's advertising campaigns were astoundingly successful. Hundreds of thousands of students relied on the Claims and enrolled in DeVry's higher education programs, which ultimately raked in millions of dollars in tuition as a result. In early 2016, it came to light that DeVry's Claims were allegedly inaccurate, having been based on various manipulations of available data in order to paint a far rosier picture than what was reality for the school's graduates.

Plaintiffs filed some of the first lawsuits in the country against DeVry on these issues, alleging that, like thousands of others, they would not have enrolled in DeVry's programs, or at least not paid as much to do so, had they known the Claims were inaccurate.[2] With a history of less than favorable outcomes in similar cases against educational institutions as the backdrop, over the ensuing four years Plaintiffs and Class Counsel engaged DeVry in extensive motion practice and discovery in courts across the country, as well as two years' worth of informational

[1] Unless otherwise specified, all capitalized terms are defined in the parties' Stipulation of Class Action Settlement (the "Settlement"), which is attached as Exhibit 1.

[2] In order to consolidate litigation to effectuate the Settlement, certain of Plaintiffs' later-filed cases pending in other jurisdictions were dismissed without prejudice so that they could join this matter as Class Representatives.

exchanges, negotiations and mediations with the assistance of respected neutral Hon. Layn R. Phillips (Ret.). It was these efforts that resulted in the Settlement that this Court preliminarily approved in May.

The Settlement—the largest DeVry has reached with any private litigants regarding the Claims—is exceptional. It creates a $44,950,000 Settlement Fund, from which claiming Settlement Class Members stand to receive cash payments based on the number of credit hours that they paid for, along with $500 or $1,000 additional payments for each graduate that did not find a job within their field of study. The non-monetary benefits are equally impressive: Settlement Class Members will have any DeVry-reported negative credit events deleted from their credit reports, and graduates who were unable to find a job in their field of study within six months will be entitled to use DeVry's career counseling services, even if they do not submit a Claim Form. Perhaps most important, these benefits were secured without Settlement Class Members waiving their right to seek loan forgiveness based on the Claims through the Department of Education's Borrower Defense to Repayment program.

On the basis of this relief, Settlement Class Counsel now respectfully move the Court for an award of attorneys' fees and expenses in the amount of 35% of the Settlement Fund. When considered in light of the results achieved for the Settlement Class, the years' worth of effort and resources required to achieve them, and the very real risk that there might not be any recovery at all, it is clear that the requested fee award is both reasonable and squarely in line with awards in other similar cases.

For their efforts assisting in the investigation and prosecution of these cases, and their other work on behalf of the Settlement Class in reaching the Settlement, Plaintiffs each seek an incentive award of $10,000. This request is also reasonable and in line with those in other cases

of this nature; incentive awards in similar class actions frequently exceed $10,000. *See* Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303 (2006) (finding that "[t]he average award per class representative was $15,992"); *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 917 (1st Dist. 1995) (noting approval of $10,000 incentive award to two plaintiffs).

For all of these reasons and as explained further below, Plaintiffs respectfully request that the Court enter an order awarding: (i) Settlement Class Counsel attorneys' fees and expenses, and (ii) incentive awards for the Class Representatives.

II. BACKGROUND

While detailed in Plaintiffs' Memorandum of Law in Support of Preliminary Approval, a brief summary of the underlying facts and litigation history will lend context to the instant motion, and demonstrate the reasonableness of the requested fees and incentive award.

A. DeVry's Business, the Claims, and the Plaintiffs' Allegations.

Defendants collectively operate one of the country's largest for-profit colleges, offering both online and in-person classes throughout the country. (Third Amended Complaint ("TAC") ¶¶ 1, 18.) As early as 2008, DeVry began a nationwide advertising campaign centered on two key selling points: First, that 90% of DeVry graduates actively seeking employment had careers in their fields of study within six months of graduation (the "90% Placement Claim"); and second, that one year after graduation, DeVry University bachelor's degree graduates earned on average 15% higher incomes than graduates of other colleges or universities (the "Higher Income Claim"). (*Id.* ¶¶ 3, 48–49.) DeVry touted these Claims in print, television, radio, and internet ads. (*Id.* ¶ 49.) They publicized the Claims in their admissions materials. (*Id.* ¶¶ 51–52, 58–60, 65, 69–70, 78–79.) They even built the Claims into admissions pitches that recruiters

gave to high school students. (*Id.* ¶ 2.) The wide dissemination of these Claims had a singular goal: to induce prospective students to enroll at DeVry, where they would pay a premium over the tuition charged at other schools. (*Id.* ¶ 3.) Students relied on these Claims, enrolling at and paying tuition to DeVry. (*Id.* ¶¶ 4, 54, 63, 65, 69, 78, 87.)

By early 2016 and in conjunction with various governmental investigations, it was publicly revealed that these Claims were inaccurate. (*Id.* ¶ 4, 25, 28, 29 n.4.) These investigations, which evolved into lawsuits against DeVry, subsequently uncovered how the Claims were created. (*Id.* ¶¶ 29, 36.) The 90% Placement Claim was allegedly built on heavily-manipulated statistics, arrived at by, *inter alia*, including graduates into the equation who should have been excluded, and by counting jobs as being in graduates' fields of study notwithstanding the fact that they were often unrelated. (*Id.* ¶¶ 33–34.) The Higher Income Claim was also allegedly manipulated, and DeVry artificially inflated the average annual compensation of its graduates to create the Claim. (*Id.* ¶¶ 39–40.) By the time the Claims' alleged falsity came to light, Plaintiffs, like tens of thousands of others, had already reasonably relied on the Claims and enrolled at DeVry and purchased millions in educational services and products from Defendants at inflated rates. (*Id.* ¶¶ 54–55, 63, 67, 75–76, 82, 85, 92, 94.) Had they known otherwise, they would not have enrolled at DeVry or paid the rates that they did. (*Id.* ¶¶ 55, 63, 67, 76, 85, 94.)

B. The Procedural Posture of This Matter and the Related Litigation.

The revelation of DeVry's allegedly-deceptive practices spawned litigation across the nation. While several Plaintiffs were recently added to this lawsuit in order to effectuate the Settlement in a single forum, the named Plaintiffs here have been litigating against DeVry regarding the 90% Placement and Higher Income Claims for years in numerous forums. These

efforts were critical to reaching the Settlement. The procedural posture of this action and those that have been consolidated here (the "Related Actions") are briefly summarized below:

1. *McCormick, et al. v. Adtalem Global Education, Inc., et al.*, 2018-CH-04872 (Cir. Ct. Cook Cty., Ill.)

This case was originally filed with a different named Plaintiff, Nicole Versetto, in 2018. Following a mediation with the Hon. Layn R. Phillips (Ret.) later that year that, while productive, did not result in a resolution, the parties returned to litigation. Mr. McCormick substituted in for Ms. Versetto as a plaintiff in early 2019, when the parties briefed and argued a motion to dismiss. Shortly thereafter, the Court granted DeVry's motion without prejudice. (July 29, 2019 Order Granting Defendants' Motion to Dismiss.) Plaintiffs then filed an amended complaint addressing the deficiencies the Court identified. DeVry filed another motion to dismiss the claims, which the parties fully briefed and scheduled for argument. In December 2019, before argument was heard, the parties requested that the Court hold off on ruling on the pending motion to dismiss while they revisited a possible settlement, aided once again by Judge Phillips. This process ultimately resulted in an agreement in principle that, through several months of further negotiation, developed into the Settlement that the Court preliminarily approved. In order to effectuate this global Settlement, this action was amended to add Plaintiffs Robinson, Brown, Magana, Swindell, and Torosyan as putative Class Representatives, who had all been pursuing their own putative class actions against DeVry.[3] Importantly, in addition to this

[3] Notably, shortly after news broke that the Claims were allegedly inaccurate, Settlement Class Counsel and several Class Representatives litigated the matter *Robinson, et al. v. DeVry Education Group, Inc. et al.*, No. 1:16-cv-07447 (N.D. Ill.) in the Northern District of Illinois. As Plaintiff McCormick described in his opposition to Defendants' motion to dismiss, the dismissal order in Robinson led Plaintiffs Robinson, Magana, and Brown to file in the jurisdictions in which they lived, rather than where DeVry was headquartered. *See Robinson v. DeVry Educ. Grp., Inc.*, No. 16 CV 7447, 2018 WL 828050, at *3 (N.D. Ill. Feb. 12, 2018). Nevertheless, prior to dismissal in *Robinson*, the Plaintiffs issued Freedom of Information Act requests in connection with the action and were able to gain important

case being the earliest active matter against DeVry filed by any of the Plaintiffs, it also took place in Illinois—DeVry's corporate home. (TAC ¶ 16.)

2. *Brown v. Adtalem Global Education, Inc., et al.*, No. 19-cv-00250 (W.D. Mo.)

In March 2019, Plaintiff Robby Brown filed his case in the Western District of Missouri. DeVry sought dismissal of the Complaint in its entirety, which Plaintiff Brown opposed. While the motion to dismiss was pending, Brown issued formal discovery to DeVry requesting documents regarding the substantiation of the 90% Placement and Higher Income Claims, and asked DeVry to identify the methodology it used to calculate the Claims. The Court ultimately granted in part and denied in part the motion to dismiss, notably allowing Brown's key fraud claims to proceed past the pleading stage. *Brown v. Adtalem Global Education, Inc.*, No. 4:19-cv-00250, dkt. 28 (W.D. Mo. Oct. 9, 2019). After achieving this ruling, Plaintiff Brown also participated in the December 2019 mediation with Judge Phillips and was added to this action as a Settlement Class Representative.

3. *Robinson v. Adtalem Global Education, Inc., et al.*, No. 19-cv-01505 (N.D. Ga.)

In April 2019, Plaintiff T'lani Robinson filed her Complaint against DeVry in the Northern District of Georgia. DeVry promptly moved to dismiss the Complaint, which the parties fully briefed. Following the *Brown* court's lead, the *Robinson* court also granted in part and denied in part DeVry's motion, again allowing the main fraud claims to move forward. *Robinson v. Adtalem Global Education, Inc.*, No. 19-cv-01505, dkt. 28 (N.D. Ga. Nov. 25,

insights from the dismissal that allowed them to successfully defeat DeVry's attempts at dismissal in later actions, as described herein.

2019). Following the December 2019 mediation with Judge Phillips, Ms. Robinson also signed onto the Settlement and was added here as a Settlement Class Representative.

4. *Magana, et al. v. Adtalem Global Education, Inc., et al.*, No. 19-cv-01505 (E.D. Cal.)

In August 2019, Plaintiffs Dennis Magana, Scott Swindell, and David Torosyan filed their Complaint against DeVry in the Eastern District of California. After filing, the parties agreed to hold DeVry's deadline to answer or otherwise plead in abeyance while they attempted to resolve their dispute through the mediation with Judge Phillips. After that proved successful, Plaintiffs Magana, Swindell, and Torosyan joined the instant action as Settlement Class Representatives.

C. Securing the Settlement.

As the foregoing makes clear, the Settlement is the product of years' worth of time and effort in fora across the country. After the parties briefed the first motion to dismiss in this case, in mid-2018, the parties first discussed the possibility of a resolution. (Declaration of Benjamin H. Richman ("Richman Decl."), attached as Exhibit 2, ¶ 4.) The parties spent several months—in the context of Plaintiffs' pending written discovery—exchanging information and relevant data relating to the makeup of a potential settlement class, including a decade's worth of data regarding the number of DeVry students who had paid tuition, the total amount in tuition that they were charged, and the total amount of loan funding—and the types of loans—that was provided to DeVry students. (*Id.*) These initial discussions involved several in-person meetings and telephone conferences to address this information and to preliminarily discuss potential settlement frameworks. (*Id.*)

Satisfied that they had exchanged the information necessary to evaluate any proposed resolution, the parties agreed to attend a private, in-person mediation with respected third-party

mediator, Hon. Layn R. Phillips (Ret.) in New York. (*Id.* ¶ 5.) The parties submitted detailed mediation briefs in advance of the in-person mediation session that set forth their respective views of the case, their perceived strengths and weaknesses, and potential frameworks for a resolution, all of which they had been discussing at length during the preceding months of informational exchanges. (*Id.*) The parties likewise participated in several teleconferences with Judge Phillips to discuss their submissions and respective views of potential settlement (and impediments thereto) in advance of the mediation. (*Id.*)

In late 2018, the parties attended a full-day, in-person mediation. (*Id.* ¶ 5.) Judge Phillips' oversaw the mediation process, which included a series of back-and-forth, arms'-length negotiations throughout the day. (*Id.*) These efforts were productive, and at the close of the day, Plaintiffs tendered a settlement proposal to DeVry that it intended to deliberate over internally in the coming days. (*Id.*) As DeVry considered Plaintiffs' proposal, a court in a different putative class action asserting causes of action regarding the Claims granted DeVry's motion to dismiss that plaintiff's case. *See Polly v. Adtalem Global Educ., Inc.*, No. 16-cv-9754, 2019 WL 587409, at *2–3 (N.D. Ill. Feb. 13, 2019). With this opinion in hand, DeVry decided not to proceed with any settlement at that time, and stated its intention to return to litigation. (Richman Decl. ¶ 6.)

Thus, in 2019, after months of efforts geared toward resolution, Plaintiffs and their counsel shifted their focus back toward pressing their cases against DeVry. (*Id.* ¶ 7.) This included filing the *Brown*, *Magana*, and *Robinson* actions, and arguing the first motion to dismiss that was pending in this matter. (*Id.* ¶¶ 7–8.) As described above, Plaintiffs in the *Brown* and *Robinson* courts successfully obtained key denials of DeVry's motions to dismiss, and Plaintiffs' fraud claims were allowed to proceed there. In this case, Plaintiff McCormick saw DeVry's motion to dismiss granted, but was given leave to replead. McCormick did so, and

DeVry again moved to dismiss. After this motion to dismiss was fully briefed and argument scheduled, the parties discussed the possibility of restarting settlement negotiations. (*Id.* ¶ 9.) To this end, they scheduled a second in-person mediation with Judge Phillips. (*Id.*)

Before the second mediation, DeVry supplemented and otherwise updated the discovery it had previously produced, and the parties discussed their views on a potential resolution in light of the then-current posture of the litigation. (*Id.* ¶ 10.) Like the first mediation, the parties held multiple teleconferences with Judge Phillips to address all of this in advance of the in-person mediation session. (*Id.*)

The parties' representatives met with Judge Phillips again for a full day in December 2019 (this time in California). (*Id.*) Following several rounds of individual caucuses with Judge Phillips and meetings between the parties and their representatives, the parties ultimately reached an agreement in principle on a proposed global settlement of all claims regarding the 90% Placement and Higher Income Claims. (*Id.*) Thereafter, the parties spent months drafting and finalizing the actual Settlement Agreement and supporting documents that the Court preliminarily approved. (*Id.* ¶ 11.) This finalization process included reaching out to other counsel involved in litigating similar lawsuits against DeVry to give them an opportunity to participate. (*Id.*) Ultimately, Settlement Class Counsel secured preliminary approval of the Settlement from this Court. (May 28, 2020 Prelim. App. Order.)

D. Carrying Out the Settlement's Terms and Defending It from Objectors.

Pursuant to the Court's Preliminary Approval Order, Settlement Class Counsel has worked with DeVry to effectuate its terms. Specifically, Settlement Class Counsel has ensured that timely Notice went out to the Settlement Class. (Richman Decl. ¶ 12.) After Notice was disseminated, Settlement Class Counsel and their colleagues have spoken with dozens of

Settlement Class Members regarding the Settlement, the benefits it secures, how to obtain relief under it, and the scope of the release. (*Id.*) Settlement Class Counsel also helped Settlement Class Members access important case documents and have helped them to submit claim forms electronically and through the mail. (*Id.*)

In addition, Settlement Class Counsel has also defended the Settlement from objectors, including opposing a motion to substitute judge, which would interfere with the currently-scheduled Claims deadline and Final Approval Hearing. (*See* July 24, 2020 Opp. to Motion for Substitution of Judge.) Settlement Class Counsel has likewise taken steps to limit efforts to drive down the claims rate and encourage opt-outs by ensuring that only Court-approved Notice is disseminated. (*See* Aug. 3, 2020 Motion for Protective Order.) As these efforts make clear, Settlement Class Counsel remains dedicated to seeing the Settlement through to Final Approval.

To that end, Settlement Class Counsel anticipates expending significant additional attorney and staff time in advance of Final Approval Hearing and, if the Settlement is finally approved, distribution of relief to the Settlement Class. (Richman Decl. ¶ 13.) In particular, Settlement Class Counsel must still draft a final approval motion, prepare for and attend the Final Approval Hearing, contend with objections, continue to defend against any further attempts to derail the Settlement, and handle any issues related to the Settlement's administration. (*Id.*)

E. The Settlement Secures Exceptional Relief for the Settlement Class.

The relief to the Settlement Class is outstanding. Foremost, it calls for a $44,950,000.00 Settlement Fund to be established. (Settlement § 1.34.) After first deducting Notice and Administration expenses, any Fee Award, Incentive Awards, and Graduate Payments, each eligible Settlement Class Member who submits a Claim Form will be entitled to a *pro rata* payment of the Fund based on the number of credit hours that they paid for while attending

DeVry's institutions. (*Id.* § 2.1.a.i.) In addition, Settlement Class Members that graduated from DeVry, but were unable to find a job in their field of study within six months of graduation are entitled to an additional Graduate Payment, amounting to an extra $500 for DeVry's associate's or master's degree graduates and $1,000 for DeVry's bachelor's degrees graduates. (*Id.* § 2.1.a.ii.) All told, Settlement Class Members can expect to receive hundreds, if not thousands, in monetary benefits under the Settlement.

The Settlement also includes critical non-monetary benefits. It obligates DeVry to provide career counseling services to all Settlement Class Members that graduated but did not obtain jobs within their fields of study within six months of graduation. (*Id.* § 2.2.) No Claim Form will be required to receive this service. Additionally, DeVry will request the deletion of negative credit events that it reported to major credit institutions from Settlement Class Members' credit reports that it reported. (*Id.* § 2.3.) This will also be accomplished without a Claim Form. And Settlement Class Members may obtain all of this relief without waiving their rights to seek forgiveness of their federal student loans through a Borrower Defense to Repayment application with the Department of Education. (*Id.* § 1.24.) That is, the Settlement's narrow release allows Settlement Class Members to receive critical relief now, while still preserving their right to obtain additional loan forgiveness in the future. As discussed further in Section III.B.2, *infra*, this Settlement package is unprecedented, and fully justifies the requested fee.

III. THE REQUESTED ATTORNEYS' FEES AND EXPENSES ARE REASONABLE AND CAN APPROPRIATELY BE APPROVED.

Settlement Class Counsel took this case on a contingent basis. Now that Settlement Class Counsel has achieved the exceptional results that they did for the Settlement Class, they

respectfully request 35% of the Settlement Fund.[4] This request is well within the range of fee awards in similar class action cases. It is especially warranted in light of Settlement Class Counsel's significant uncompensated outlay of time bringing the litigation and successfully negotiating the Settlement in the face of substantial hurdles to any recovery whatsoever.

A. Percentage-of-the-Recovery Should be Used to Determine Fees Here.

Illinois has adopted the "common fund doctrine" for the payment of attorneys' fees in class action cases. *Wendling v. S. Ill. Hosp. Servs.*, 242 Ill. 2d 261, 265 (2011). "The doctrine provides 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." *Id.* (internal quotations omitted). The basis of the doctrine is the equitable principle that "successful litigants would be unjustly enriched if their attorneys were not compensated from the common fund created for the litigants' benefit." *Brundidge v. Glendale Fed. Bank F.S.B.*, 168 Ill. 2d 235, 238 (1995). Consequently, this approach "spreads the costs of litigation proportionately among those who will benefit from the fund." *Id.* (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)).

In calculating a reasonable fee award in a common fund case, this Court has discretion to apply one of two methods: percentage-of-the-recovery or lodestar. *Brundidge*, 168 Ill. 2d at 243–44. Under the percentage-of-the-recovery approach, as the name suggests, a reasonable attorneys' fee is awarded "based upon a percentage of the amount recovered on behalf of the plaintiff class." *Id.* at 238. Under the lodestar approach, on the other hand, a fee award is

[4] Settlement Class Counsel has collectively incurred a total of $53,496.33 in hard costs that they advanced in furtherance of the litigation and Settlement, including filing fees and mediation costs. (Richman Decl. ¶ 16; Declaration of Robert L. Teel, attached as Exhibit 3, ¶ 3.) However, Settlement Class Counsel is not seeking reimbursement of these costs separately from their requested fee award, despite that the Settlement otherwise allows them to. (Settlement § 9.1.)

determined by taking the reasonable value of the services rendered (based on the hours devoted to the matter by class counsel), and increasing that amount by "a weighted multiplier representing the significance of other pertinent considerations," such as the contingent nature of the litigation, its complexity, and the benefit conferred upon class members. *Id.* at 239–40.

Applying the percentage-of-the-recovery approach to Settlement Class Counsel's request for fees makes the most sense for this case. The percentage-based method has been touted as "overall, a fair and expeditious method that reflects the economics of legal practice and equitably compensates counsel for the time, effort, and risks associated with representing the plaintiff class." *Id.* at 244. The lodestar method, on the other hand, has been roundly criticized as:

> [I]ncreas[ing] the workload of an already overtaxed judicial system, . . . creat[ing] a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law, . . . le[ading] to abuses such as lawyers billing excessive hours, . . . not provid[ing] the trial court with enough flexibility to reward or deter lawyers so that desirable objectives will be fostered, . . . [and being] confusing and unpredictable in its administration.

Ryan, 274 Ill. App. 3d at 923 (summarizing findings of a Third Circuit task force appointed to compare the respective merits of the percentage-of-the-recovery and lodestar methods); *see also Brundidge*, 168 Ill. 2d at 242–43 (criticizing lodestar method because "[e]valuating the hours actually expended is a laborious, burdensome, and time-consuming task that may be biased by hindsight[,]" and "[t]he risk multiplier is little short of a wild card in the already uncertain game of assessing fees under the lodestar calculation.").

In addition to the logistical benefits, percentage-of-the-recovery is most in-line with the agreement the class members would have struck *ex ante*, making it the preferred calculation method in class actions. As the court explained in *Wright v. Nationstar Mortgage LLC* when it adopted the percentage-of-the-recovery approach:

> [W]hen considering the market rate for counsel's services in an ex ante position,

> 'the normal practice in consumer class actions' is to 'negotiate[ ] a fee arrangement based on a percentage of the recovery.' 'This is so because fee arrangements based on the lodestar method require plaintiffs to monitor counsel and ensure that counsel are working efficiently on an hourly basis, something a class of . . . plaintiffs likely would not be interested in doing.' Similarly, because of the coordination problems with so many plaintiffs, it is unlikely that class members would want to pay attorneys' fees in advance.

No. 14 C 10457, 2016 WL 4505169, at *14 (N.D. Ill. Aug. 29, 2016) (citations omitted); *see also In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015) ("[T]he court believes that the class would have negotiated a fee arrangement based on a percentage of the recovery, consistent with the normal practice in consumer class actions. An *ex ante* agreement based on lodestar requires a client to monitor counsel, and the class-member 'clients' here had little incentive to do so."); *see Pfeiffer v. Begley*, 2015 IL App (2d) 140271, ¶ 21 ("Typically, when a plaintiff's efforts . . . result in the creation of a quantifiable common fund, the court will use a percentage-of-the-benefit approach in determining an award of attorney fees and costs.").[5]

In step with this general preference in class actions, percentage-of-the-recovery method is preferred in consumer fraud class actions specifically. *See e.g.*, *Price v. Philip Morris Inc.*, No. 00-L-112, 2003 WL 22597608, at *27 (Ill. Cir. Ct. Mar. 21, 2003), *rev'd on other grounds*, 219 Ill. 2d 182 (2005) (finding percentage-of-the-fund method appropriate in consumer fraud class action case); *Follansbee v. Discover Fin. Servs., Inc.*, No. 99 C 3827, 2000 WL 804690, at *7 (N.D. Ill. June 21, 2000) (finding the percentage-of-recovery method appropriate in a class action regarding misleading and deceptive business practices and "advantageous in its simplicity"). Consequently, this Court should not hesitate in applying the percentage-of-the-

[5] "It is settled that [Illinois courts] may consider federal case law for guidance on class action issues because the Illinois class action statute is patterned on Rule 23 of the Federal Rules of Civil Procedure." *Ballard RN Ctr., Inc. v. Kohll's Pharmacy & Homecare, Inc.*, 2015 IL 118644, ¶ 40.

recovery method here.[6] *See Ryan*, 274 Ill. App. 3d at 925 ("The circuit court did not abuse its discretion in determining attorneys' fees based upon percentage rather than lodestar analysis.").

B. 35% Is a Reasonable Fee Award Here.

Under Illinois law, "an attorney is entitled to an award from the fund for the reasonable value of his or her services." *Id.* at 922. The requested 35% fee award here falls comfortably within the range of typical fee awards in Illinois, with courts commonly awarding even higher percentages in fees. *See, e.g.*, *Taubenfeld v. AON Corp.*, 415 F.3d 597, 600 (7th Cir. 2005) (noting with approval the district court's reliance on "a table of thirteen cases in the Northern District of Illinois where counsel was awarded fees amounting to 30-39% of the settlement fund"); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 503 (N.D. Ill. 2015) (awarding 36% of fund); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) ("A customary contingency fee would range from 33 1/3% to 40% of the amount recovered."); *Prelipceanu v. Jumio Corportion*, No. 2018-CH-15833 (Cir. Ct. Cook Cty. Jul. 21, 2020) (Mullen, J.) (awarding 40% of settlement fund as requested in Feb. 5, 2020 filing); *Mocek, et al. v. AllSaints USA Ltd.*, No. 2016-CH-10056 (Cir. Ct. Cook Cty. Apr. 5, 2019) (Reilly, J.) (approving award of 35% of common fund); *Zepeda v. Kimpton Hotel & Rest.*, No. 2018-CH-02140 (Cir. Ct. Cook Cty. Dec. 5, 2018) (awarding 40% of common fund); *Willis, et al. v. iHeartMedia, Inc.*, No. 2016 CH 02455 (Cir. Ct. Cook Cty. June 24 and Aug. 11, 2016) (Atkins, J.) (awarding 40% of common fund); *see also* Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 15.83 (William B. Rubenstein ed., 5th ed.) (noting that, generally,

[6] The Court need not "cross-check" the reasonableness of the fee award as determined by the percentage method against the fee award calculated using the lodestar method. *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 59. However, should the Court request, Settlement Class Counsel is more than willing to provide their lodestar and the relevant case law on the reasonableness of the figures and determining an appropriate risk multiplier to be applied thereto.

"50% of the fund is the upper limit on a reasonable fee award from any common fund"). Accordingly, the requested award is more than appropriate.

In addition to falling within the range of typical fee awards, the 35% requested here is further justified—as explained below—in light of both (1) the risk Settlement Class Counsel undertook in pursuing this litigation on a contingency basis, and (2) the excellent relief it ultimately obtained for the Settlement Class. *See Ryan*, 274 Ill. App. 3d at 924 (affirming district court's attorneys' fee award in part due to the "extreme contingency risk" of pursuing the litigation).[7]

1. This case presented serious obstacles to recovery, and Settlement Class Counsel litigated the case mindful of the possibility that the Class might recover nothing.

When considering the appropriateness of a fee award, it is relevant to consider the probability of success at the outset of the litigation and the risks that counsel undertook in pursuing it. *See Taubenfeld*, 415 F.3d at 600. Here, Settlement Class Counsel accepted this litigation on a contingent-fee basis, fronting costs and expenses, foregoing other work, and accepting the risk that should they be ultimately unsuccessful, they would receive no

[7] The lone objector to date devotes a single paragraph—without citation to any authority—to contesting the requested fee award. (Jose Valderrama's Objection to Settlement at 14.) Though this objection, and any others, will be more fully addressed in Plaintiffs' forthcoming final approval papers, a brief response to the two points Objector Valderrama makes in his papers is worth providing here. First, Valderrama accuses the parties of engaging in "improper collision [sic]" because DeVry is entitled to offset from any payments to individual Settlement Class Members (with an aggregate cap of 1/3 of the Settlement Fund) payments that those same Settlement Class Members *already received* in other DeVry-related settlements. This isn't collusion. This is a mechanism to prevent double recovery. *See, e.g.*, *Wilson v. Hoffman Grp., Inc.*, 131 Ill. 2d 308, 321 (1989) ("[D]ouble recovery is a result which has been condemned[.]"). Similarly, the 35% fee request is not unreasonable because the Settlement was reached prior to class certification, as Valderrama contends. As discussed herein, years' worth of work and resources deployed across the country made the Settlement possible. This more than justifies the requested fee and indeed, courts, including in Cook County, regularly award higher percentages of a fund even where less litigation has taken place. *See, e.g.*, *Zepeda*, No. 2018-CH-02140 (Cir. Ct. Cook Cty., Ill. Dec. 5, 2018) (awarding 40% of fund where settlement was reached without even motion to dismiss briefing).

compensation for their work. (Richman Decl. ¶ 15.) Although these risks are inherent to a degree in any contingent-fee litigation, they are particularly acute here, in a space where suits brought by graduates against their schools have rarely made it even past the pleading stage—including cases brought against DeVry. *See Petrizzo v. DeVry Educ. Grp. Inc.*, No. 16 CV 9754, 2018 WL 827995, at *5 (N.D. Ill. Feb. 12, 2018). Were this litigation to continue, Plaintiffs would have faced a number of potentially major obstacles that might substantially or fully deprive them of any relief whatsoever. Although Plaintiffs are confident that they ultimately would have prevailed had this matter continued in litigation, there were not-insignificant hurdles to doing so. In that context, the exceptional monetary and prospective relief available are a strong result for the Class, to say the least. For these reasons, as detailed below, this factor supports awarding the requested attorneys' fees. *See In re Capital One*, 80 F. Supp. 3d at 792 (holding it is relevant to consider not only the exceptional relief settlement provided Plaintiffs, but also the fact that it was negotiated in light of "[plaintiff's] uphill battle proceeding to trial and, once there, obtaining relief").

First, at the time the parties reached the Settlement, a motion to dismiss was pending in this action. While Plaintiffs were confident that they had addressed the concerns the Court previously expressed—appropriately identifying the claimed damages, the allegedly-fraudulent advertisements that were relied upon, and clarifying the theory of the case—and had additional authority endorsing their theories, *see Robinson*, No. 1:19-cv-01505, dkt. 28 (N.D. Ga. Nov. 25, 2019); *Brown*, No. 4:19-cv-00250, dkt. 28 (W.D. Mo. Oct. 9, 2019), there was still the possibility that the Court would dismiss the amended complaint with prejudice, as had occurred in other litigation over these claims, *see Polly*, 2019 WL 587409, at *3. At that point, Plaintiffs would have had to decide whether to appeal the dismissal or walk away. In either case, Plaintiffs

would receive no immediate relief, much less the putative Class they sought to represent.

Second, Plaintiffs had yet to brief and argue the issue of class certification. Plaintiffs were confident that they would achieve adversarial certification of a nationwide fraud class. *See, e.g.*, *Pella Corp. v. Saltzman*, 606 F.3d 391, 393 (7th Cir. 2010) (discussing that, "while consumer fraud class actions present problems that courts must carefully consider before granting certification, there is not and should not be a rule that they never can be certified[,]" and upholding nationwide certification); *Clark v. TAP Pharm. Prod., Inc.*, 343 Ill. App. 3d 538, 553 (2003) (affirming certification of nationwide class in fraud case). But differences in states' laws and formulation of fraud claims could have precluded such a class. *See Siegel v. Shell Oil Co.*, 256 F.R.D. 580, 586 (N.D. Ill. 2008), *aff'd*, 612 F.3d 932 (7th Cir. 2010) (denying certification of nationwide consumer fraud case); *Fisher v. Bristol-Myers Squibb Co.*, 181 F.R.D. 365, 374 (N.D. Ill. 1998) (same). Even moving forward with a statewide class, however, presented its own challenges, as the Court could have nevertheless found that individual inquiries regarding reliance on the fraudulent statements or whether they caused injury predominated over any common questions. *See Oshana v. Coca-Cola Bottling Co.*, 225 F.R.D. 575, 586 (N.D. Ill. 2005) *aff'd sub nom. Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006). Indeed, at least one court considering the damages that graduates incurred because of a school's false advertising held that they could not be resolved on a class-wide basis. *Harnish v. Widener Univ. Sch. Of Law*, 833 F.3d 298, 308 (3d Cir. 2016).

Had Settlement Class Counsel achieved adversarial class certification, there was also no assurance that they would have succeeded on the merits. For example, the chance existed that DeVry could show that its graduate outcome statistics were not fraudulent, or otherwise not actionable. As discussed at the preliminary approval hearing, one of the primary disputes here is

whether the graduate statistics at issue were manipulated to the point of inaccuracy (as Plaintiffs allege) or were based on reliable, verifiable data (as DeVry contends). Of course, the ultimate answer to that question would be in the hands of the jury, and only after hearing testimony and other evidence from both sides, including the parties' respective experts. And even if Plaintiffs did ultimately win at trial, the likely-substantial damages award would surely result in DeVry appealing, further delaying any relief to the Class.

In the end, there was a real risk that Settlement Class could have been defeated on any number of these issues—either at the class certification stage, on the merits, or on appeal—and that years of extensive litigation would have been for naught. In that light, the many risks Settlement Class Counsel faced combine to further support a finding that the requested attorneys' fees and expenses here are reasonable. *See Ryan*, 274 Ill. App. 3d at 924.

2. Settlement Class Counsel achieved significant relief for the Settlement Class.

Given the substantial risks outlined above, coupled with the real possibility that the Settlement Class might recover nothing at all, the relief secured by Settlement Class Counsel is exceptional. As explained in Plaintiffs' motion for preliminary approval, the relief is multi-faceted, including: (i) a $44.95 million Settlement Fund from which Settlement Class Members will receive payment based on the number of credits they paid for, plus additional Graduate Payments for those who graduated but did not find a job within their field of study within six months of graduation; (ii) career placement assistance; (iii) the deletion of DeVry-reported negative credit events; and (iv) a carveout from the release of Settlement Class Members' Borrower Defense to Repayment claims, which allows them to pursue loan forgiveness through the Department of Education. Thus, the relief that Settlement Class Counsel obtained for the Settlement Class—and the substantial effort Settlement Class Counsel undertook to do so—

further justify the 35% fee requested here. *See Taubenfeld*, 415 F.3d at 600 (noting that courts may "consider[] the quality of legal services rendered" in determining a reasonable fee).

Many cases involving a school's alleged failure to accurately present its post-graduates' outcomes have failed to withstand motions to dismiss. *See Polly*, 2019 WL 587409, at *1; *Phillips v. DePaul Univ.*, 2014 IL App (1st) 122817, ¶ 1; *Gomez-Jimenez v. New York Law Sch.*, 36 Misc. 3d 230, 260 (Sup. Ct. 2012). Settlement Class Counsel secured some of the first favorable rulings in this space, successfully defeating—twice—DeVry's bids to dismiss allegations that the Claims were fraudulent or misleading. *See Robinson*, No. 1:19-cv-01505, dkt. 28 (N.D. Ga. Nov. 25, 2019); *Brown*, No. 4:19-cv-00250, dkt. 28 (W.D. Mo. Oct. 9, 2019).

The Settlement that Class Counsel negotiated is equally groundbreaking. It stands out not only among similar settlements that for-profit institutions have entered into regarding their graduate statistics, but also above comparative settlements that DeVry has entered into with regulators and private litigants regarding the Claims. Critically, the Settlement Fund provides cash relief, as opposed to just debt forgiveness (although, again, it preserves Settlement Class Members' rights to assert a Borrower Defense to Repayment through the Department of Education). *See Attorney General Madigan Reaches $493.7 Million Settlement With For-Profit Education Company*, Illinois Attorney General (Jan. 3, 2019), https://illinoisattorneygeneral.gov/pressroom/2019_01/2019103.html (reporting that a total of forty-nine Attorneys General reached settlement with Career Education Corporation to provide Illinoisans approximately $48 million in debt relief).

Compared to other settlements that DeVry agreed to regarding the Claims, this Settlement stands out as the largest non-governmental settlement—nearly $20 million more than its closest comparator. *See Pension Trust Fund for Operating Engineers v. DeVry Education*

Group, Inc., et al., No: 1:16-cv-05198, dkt. 151 (N.D. Ill. Nov. 1, 2019) (settling securities lawsuit regarding the Claims and creating a $27.5 million settlement fund). It is millions more than most settlements DeVry agreed to with governmental regulators. *See In the Matter of Investigation by Eric T. Schneiderman, Attorney General of the State of New York, of DeVry Education Group, Inc., et al.*, Assurance No. 17-009 (requiring DeVry to pay $2.25 million for, among other items, consumer restitution); *In the Matter of DeVry University, Inc.*, No. 17-cv-2073-H, (Suffolk Superior Court Jun. 30, 2017) (requiring DeVry to pay $435,000 for, in part, consumer restitution). And, in terms of the sizes of its cash fund, it is just behind the settlement DeVry entered into with the Federal Trade Commission. *Federal Trade Commission v. DeVry Education Group, Inc., et al.*, No. 2:16-cv-00579, dkt. 97 (C.D. Cal. Dec. 15, 2016) (requiring DeVry to provide $49.4 million in cash to be redistributed to students). Standing alone, the monetary and prospective relief recovered on behalf of the Class under this Settlement warrants approving the requested 35% of the Settlement's monetary benefits as attorneys' fees as reasonable.

The non-monetary benefits created by a class action settlement are properly considered for purposes of determining fees. *See Hall v. Cole*, 412 U.S. 1, 5 n.7 (1973) (noting that the common fund doctrine "must logically extend, not only to litigation that confers a monetary benefit on others, but also to litigation which corrects or prevents an abuse which would be prejudicial to the rights and interests of those others") (internal quotations omitted). Here, in addition to the hundreds (or thousands) of dollars that Settlement Class Members can reasonably expect to receive, Settlement Class Members may also: (i) receive assistance from DeVry's career services department if they graduated from DeVry but did not find a job within their field of study, regardless of whether these Settlement Class Members submit a Claim Form; (ii) have

any negative credit events that DeVry reported deleted from their credit reports; and (iii) retain the right to seek federal student loan forgiveness predicated on the Claims through a Borrower Defense to Repayment application with the Department of Education.

For all of these reasons, and considering the results, awarding Settlement Class Counsel a 35% share of the common fund "equitably compensates counsel for the time, effort, and risks associated with representing the plaintiff class." *Brundidge*, 168 Ill. 2d at 244.

IV. THE COURT SHOULD APPROVE THE REQUESTED INCENTIVE AWARD.

The Settlement also provides for an incentive award of $10,000 to each Plaintiff for serving as a Class Representative. Incentive awards are appropriate in class actions because a class representative's efforts benefit absent class members and serve to encourage the future filing of beneficial litigation. *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 497 (1st Dist. 1992).

Here, Plaintiffs' participation was critical to the case's ultimate resolution. Stretching back to 2016, Plaintiffs' willingness to commit time to this litigation and undertake the responsibilities involved in representative matters resulted in a substantial benefit to the Settlement Class that fully justifies the requested incentive awards. (*See* Richman Decl. ¶¶ 17–19.) Settlement Class Counsel relied on Plaintiffs throughout the proceedings; Plaintiffs provided documentation of school attendance, records—including enrollment agreements—that Plaintiffs used to demonstrate that DeVry represented that the Claims could be relied upon as accurate, examples of DeVry's at-issue advertisements, and information about how DeVry pitched the Claims to students as part of its recruiting efforts. (*Id.* ¶ 18.) Plaintiffs remained integrally involved in the years'-long proceedings, where they reviewed various versions of complaints, participated in discovery activities, took part in multiple rounds of settlement negotiations

spanning two years, and ultimately reviewed and signed off on the final Settlement. (*Id.*)

In exchange for these efforts, Plaintiffs' requested incentive awards are eminently reasonable: $10,000 for each Plaintiff is squarely in line with awards made by this Court, *Prelipceanu*, No. 2018-CH-15833 (Cir. Ct. Cook Cty., Ill. Jul. 21, 2020) (Mullen, J.) (awarding $10,000 to class representative), and other courts in Illinois and elsewhere. *See Spano v. Boeing Co.*, No. 06-cv-743-NJR-DGW, 2016 WL 3791123, at *4 (S.D. Ill. Mar. 31, 2016) (approving incentive awards of $25,000 and $10,000 for class representatives); *Ryan*, 274 Ill. App. 3d at 917 (noting that the trial court had awarded $10,000 incentive awards to each of two plaintiffs); Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303 (2006) (finding that "[t]he average award per class representative was $15,992").

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order (1) granting Settlement Class Counsel's request for an award of attorneys' fees of 35% of the Settlement Fund; (2) awarding each Plaintiff a $10,000 incentive award; and (3) providing such other and further relief as the Court deems reasonable and just.

Respectfully submitted,

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Dated: August 7, 2020

By: /s/ Benjamin H. Richman
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CERTIFICATE OF SERVICE

I, Benjamin H. Richman, an attorney, hereby certify that on August 7, 2020, at Chicago, Illinois, I filed ***Plaintiffs' Memorandum of Law in Support of Motion for Attorneys' Fees and Incentive Award*** by electronic means with the Clerk of the Circuit Court of Cook County, and that I served same upon counsel of record using the Odyssey File & Serve Electronic Filing System.

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this certificate of service are true and correct.

/s/ Benjamin H. Richman