In the United States Court of Appeals for the First Circuit

No. 21-1032

AMY COHEN; EILEEN ROCCHIO; NICOLE A. TURGEON; KAREN A. MCDONALD; MELISSA KURODA; LISA C. STERN; JENNIFER HSU; JENNIFER E. CLOUD; DARCY SHEARER, individually and on behalf of all others similarly situated; JODY BUDGE; MEGAN HULL,

Plaintiffs – Appellees,

CATHERINE LUKE; KYLE HACKETT, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

BROWN UNIVERSITY; CHRISTINA PAXSON, as successor to VARTAN GREGORIAN; JACK HAYES, as successor to DAVID ROACH,

Defendants – Appellees,

ABIGAIL WALSH; LAUREN LAZARO; ROSE DOMONOSKE; MEI LI COSTA; ELLA POLEY; ALYSSA GARDNER; LAUREN MCKEOWN; ALLISON LOWE; TINA PAOLILLO; EVA DURANDEAU; MADELINE STOCKFISH; SONJA BJORNSON,

Objectors – Appellants.

Appeal from the United States District Court for the District of Rhode Island, Case No. 1:92-cv-00197-JJM, Judge John J. McConnell, Jr.

BRIEF OF OBJECTORS-APPELLANTS

ROBERT J. BONSIGNORE
(No. 1146643)
LISA SLEBODA
Bonsignore Trial Lawyers, PLLC
23 Forest St.
Medford, MA 02155
Telephone: (781) 350-0000
Facsimile: (702) 852-5726
rbonsignore@classactions.us

ANTHONY J. GIANFRANCESCO
(No. 121074)
GIANFRANCESCO & FRIEDMANN LLP
214 Broadway
Providence, RI 02903
Telephone: (401) 270-0070
Facsimile: (401) 270-0073
anthony@gianfrancescolaw.com

CORPORATE DISCLOSURE STATEMENT

No corporate disclosure statement is required for Objector-Appellants because no such party is a corporate entity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

Rules

Treatises

Regulations

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellant Procedure 34(a) and Local Rule 34(a), Appellants respectfully request oral argument. This appeal raises critical questions regarding the ability of parties, whose class membership expired over twenty years ago, to speak for and bind current class members to an amended settlement agreement negotiated decades after approval of the original settlement.

The appeal focuses on whether it is permissible for former class members who no longer have a stake in the case or the relief as to the amended settlement agreement to represent absent class members by eliminating, altering and watering-down material terms of the original settlement agreement in exchange for terms that favor some subsets of identically-situated class members while at the same time disparately treating others by stripping them of participation, protection and all rights.

In addition to having direct ramifications upon the rights and interests of current and future female athlete class members at Brown University, the district court's approval could have far-reaching implications by serving as the template for future abuse by educational institutions seeking to avoid their Title IX obligations. Oral argument, therefore, would greatly assist the Court in its consideration of the important issues raised in this appeal.

PRELIMINARY STATEMENT

This appeal arises within a landmark class action case regarding gender equity in collegiate athletics under Title IX of the Education Amendments Act of 1972 ("Title IX"), and its implementing regulations. Originally instituted in 1992, this action was brought by female then-members of university-funded varsity sports at Brown University ("Brown") to challenge gender disparities in funding and opportunities for participation in varsity sports. After years of hard-fought litigation, including multiple appeals, a settlement agreement was reached in 1998 (the "Joint Agreement"). That Joint Agreement secured critical rights for the class, including objective benchmarks against which Brown's compliance with its Title IX obligations could be measured. Notably, the Agreement was indefinite in duration and provided a swift and cost-effective mechanism for the enforcement of Brown's obligations in the event of its non-compliance.

In May 2020, Brown announced that it was eliminating multiple varsity sports, consisting of both female and male teams, and publicly blamed the Joint Agreement for the need to eliminate, in particular, three male sports with high minority athlete participation. Three days later, it reinstated those three men's teams after public outcry. Discovery secured as a result of an emergency motion to enforce the Joint Agreement objectively revealed that Brown had knowingly and intentionally violated the Joint Agreement in order to generate public resentment by

pitting race and gender interests against each other, with the express and ultimate goal of ridding itself of the Joint Agreement, referred to internally as that "pestilential thing."

Despite the continued validity and demonstrable effectiveness of the Joint Agreement in securing Brown's Title IX compliance over the years, including the ability to quickly establish and remedy breaches, Class Counsel agreed to a settlement of its enforcement motion proceedings (the "Class Settlement") that needlessly sacrificed and forfeited critical rights and benefits to the class under the Joint Agreement, including trading its continuing duration for an August 2024 end date.

That new Class Settlement, operating as amendments to the Joint Agreement, was presented for approval in the name of the original class representatives, who had ceased being members of the class for approximately twenty-five years. Those former named plaintiffs no longer shared a commonality of interests with the current absent class of female athletes, which included active members of Brown's varsity teams and women entering Brown who were subjected to Brown's changes or entire removal of the athletic programs upon which they based their decision to attend Brown.

To state it bluntly, in point of fact, not a single named class representative will be directly affected by the new Class Settlement, and not a single female athlete who

will be directly affected by the new Class Settlement is included as a class representative. As a matter of indisputable fact, the settlement proposed to and approved by the court is a new and different settlement from that approved nearly twenty-five years ago with new terms. And, the specific injuries suffered by the group of former class members is different than the injuries suffered by the current class members -- who were entitled to rely upon the existing Joint Agreement and all of its benefits and rights. A clearer case of unaligned and inadequate representation is harder to imagine.

Adequate representation of absent class members by named representatives with aligned interests and claims is an inviolate cornerstone of due process. Multiple current female Brown varsity athletes (the "Appellant Objectors") negatively impacted by the changes objected on various grounds, challenging as inadequate the former class members' qualifications as class representatives, and the Class Settlement as unfair and unreasonable, all in violation of Federal Rule of Civil Procedure 23. Nevertheless, the district court gave its final approval to the Class Settlement over those objections.

Thus, in the end, Brown achieved its goal of shortening and eliminating the Joint Agreement. Subsequent to August 2024, no current class member will have the benefit of the rights they previously possessed under the Joint Agreement. While Brown's flagrant breach of the Joint Agreement and related conduct is as

unquestionably clear as it is unconscionable, it successfully and directly served to rid the university of direct oversight and accountability and eradicated the Plaintiff class's ready mechanism of bringing Brown's penchant for noncompliance to light and obtaining redress.

Inadequate representation is a fatal defect as a matter of law. The affected absent class members are guaranteed adequate representation and constitutional due process. Those guarantees were not satisfied here. Only vacation of the order and remand to appoint adequate representatives with a stake in the litigation will provide the class with an opportunity to have their interests zealously represented and prevent this circumvention of Title IX and class members' constitutionally protected rights.

BASIS FOR APPELLATE JURISDICTION

This class action was brought pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688, and its implementing regulations, 34 C.F.R. §§ 106.1–106.71. The United States District Court for the District of Massachusetts had original jurisdiction to hear the matter under 28 U.S.C. § 1331.

At the December 15, 2020 Fairness Hearing, the district court announced its final approval of the proposed settlement at issue, and on December 21, 2020, it

entered an order approving the Joint Motion for Final Approval. ADD1-10.[1] Appellants timely filed a notice of appeal on January 7, 2021. A723-24.[2] Accordingly, this Court has jurisdiction over this appeal under 28 U.S.C. § 1291, because approval of a class action settlement is a final, appealable order of the district court which disposes of all claims.

STATEMENT OF THE ISSUES

1. Whether the district court erred when it approved a settlement agreement negotiated and entered into on behalf of a class by unaffected named class representatives who had all ceased being members of the class for over two decades?

2. Whether the district court erred in failing to appoint class representatives who held a stake in the outcome prior to its approval of a class settlement agreement?

3. Whether the district court erred in denying the absent class members due process by not appointing named representatives who possessed an actual interest in the provision and funding of each women's sport offered by Brown prior to its recent manipulations, particularly where there was no evidence of actual

[1] "ADD__" refers to the Addendum appearing at the end of this brief.

[2] "A__" refers to the Joint Appendix accompanying this brief.

participation, commonality of interests, common injury or vigorous representation by the named class representatives?

4. Whether the district court erred when it approved an amended settlement agreement as fair, reasonable and adequate pursuant to Federal Rule of Civil Procedure 23(e) that forfeited substantial material rights possessed by the female athlete class members under the original court-approved Joint Agreement in exchange for no meaningful or equivalent relief and rewarded Brown's intentionally violative conduct admittedly undertaken with the intent to rid itself of that Joint Agreement?

5. Whether the district court erred when it approved an amended settlement agreement as fair, reasonable and adequate pursuant to Federal Rule of Civil Procedure 23(e) that forfeited substantial material rights possessed by the female athlete class members under the original court-approved Joint Agreement by exchanging the rights of previously unified class and creating conflicting subsets by favoring some under the settlement and eliminating others?

6. Whether the district court erred when it approved the Class Settlement where the new agreement allowed for the elimination of certain existing women's varsity sports and the elevation of the club sailing program to varsity status, where that program manipulation did not satisfy Title IX's requirements?

STANDARD OF REVIEW

A district court's approval of a class-action settlement is reviewed for an abuse of discretion. *City Pshp. Co. v. Atlantic Acquisition Ltd. Pshp.*, 100 F.3d 1041, 1043 (1st Cir. 1996), *citing Greenspun v. Bogan*, 492 F.2d 375, 381 (1st Cir. 1974). "[A] court abuses its discretion if it ignores a material factor deserving significant weight, relies upon an improper factor, or assesses only the proper mix of factors but makes a serious mistake in evaluating them." *Gomez v. Rivera Rodriguez*, 344 F.3d 103, 112 (1st Cir. 2003). Notably, "mistakes of law . . . always constitute abuses of a court's discretion." *Id.* (citation omitted).

STATEMENT OF THE CASE

I. The Underlying Litigation

On April 9, 1992, this action was instituted by then-members of Brown's women's gymnastics and volleyball teams (the "Named Plaintiffs") against Brown and its then-president and then-athletic director. A17. The action was filed in response to the university's elimination of the Named Plaintiffs' teams as varsity, school-funded programs and their demotion to donor-funded varsity status in violation of Title IX, and its implementing regulations. *See Cohen v. Brown Univ.*, 991 F.2d 888, 892 (1st Cir. 1993). As a result of that demotion, those teams lost both university funding and most of the privileges afforded to Brown's varsity-status

teams.[3] *Id.* Through their putative class action, the Named Plaintiffs alleged Brown had engaged in discriminatory treatment of women in the administration of its varsity athletics program and challenged gender disparities in both funding and opportunities for participation in such programs. *Id.* at 892-93.

On May 12, 1992, the district court certified a class that included all present, future and potential women students at Brown, who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics that are funded by Brown. *Id.* at 893; A18. The Named Plaintiffs were appointed as the class representatives at that time. A673-74. There has never been any adjustment or substitution of any named plaintiffs or class representatives in this action since that certification in 1992. *Id.*

On December 22, 1992, the district court granted a preliminary injunction, finding that Brown's intercollegiate athletics program violated Title IX and discriminated against women. *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993). It ordered that Brown restore the eliminated women's gymnastics and volleyball teams and prohibited it from

[3] The privileges received by university-funded varsity teams included, *inter alia*, priority in practice time and in access to medical trainers. The university had also eliminated privileges such as office space, long-distance telephone service and clerical support for the coaches of those women's teams. The teams at issue further lost admission preferences in recruiting freshman. *Id.*

eliminating or reducing the status or funding of any women's varsity program pending resolution of the action on the merits. *Id.* at 1001. On April 19, 1993, this Circuit affirmed the preliminary injunction, finding the district court had properly held that Brown had acted in violation of Title IX if it ineffectively accommodated its students' interests and abilities in athletics. *Brown v. Cohen*, 991 F.2d 888 (1st Cir. 1993). It further held that Brown had not provided participation opportunities to females in substantial proportion to their enrollment. *Id*. The case was remanded.

Trial on the merits occurred between September 26 and December 16, 1994. A32. On March 29, 1995, the district court issued its opinion, finding that Brown was in violation of Title IX and that intercollegiate level participation opportunities should be provided in numbers substantially proportionate to their respective enrollment. *Cohen v. Brown Univ.*, 879 F. Supp. 185 (D.R.I. 1995), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996). It then ordered Brown to submit a compliance plan within 120 days. *Id.* After issuing a subsequent modified order on May 4, 1995, requiring submission of a compliance plan within 60 days, the district court found that Brown's proposed plan was not comprehensive and ordered specific measures to be taken, including the elevation and maintenance of four women's teams as university-funded varsity sports. A35. Brown appealed. A36.

On November 21, 1996, this Court affirmed in part and reversed in part the district court's ruling. *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996), *cert.*

denied, 520 U.S. 1186 (1997). It upheld the district court's interpretation and application of the law and its findings that Brown had violated Title IX in its allocation of athletic resources between men's and women's programs and had failed to fully and effectively accommodate the interests and abilities of its female athletes. *Id.* at 184-85. However, it held that the district court had erroneously substituted its own specific compliance plan and remanded for further proceedings. *Id.* at 187-88.

II. The Joint Agreement and Settlement

On June 23, 1998, the parties entered into a settlement of all class claims (the "Joint Agreement"). A101-18. That Joint Agreement required Brown's compliance with, *inter alia*, the following terms:

- relative participation on intercollegiate athletic teams must be within 3.5% of the gender ratio for undergraduate student enrollment
- in the event that Brown added any new men's teams, the variation from the gender ratio of undergraduate student enrollment must be no more than 2.25% and a women's team would need to be added at the same time
- funding by Brown in defined amounts for both men's and women's donor-funded teams in the several years following the settlement
- the provision of annual reports no later than August 1 of each year to Class Counsel to enable oversight of Brown's compliance with its obligations under the Joint Agreement
- agreement to a defined mechanism for objections by Class Counsel, including requests for expedited hearings, and allowance of review by the court for Brown's non-compliance
- the provision of additional information reasonably requested by Class Counsel regarding its compliance

- retention of jurisdiction by the district court concerning the enforcement of and compliance with the Joint Agreement

Id.

Significantly, the Joint Agreement explicitly was "indefinite in duration." A103 at ¶ I.E. The district court gave final approval to the Joint Agreement on October 8, 1998, finding it in compliance with Federal Rule of Civil Procedure 23, and a binding judgment was entered on October 16, 1998. A41. Thereafter, the district court awarded over $1 million in attorneys' fees and costs to Class Counsel. A45-47 (Dkt. 337, 351).

For over a two decades, that Joint Agreement has remained in place. Pursuant to it, every August, Brown has provided Class Counsel with reports of its programs and participants for the just-concluded academic year. A56-7, ¶ 3. The reporting provisions have proved to be critical to ensuring Brown's compliance with its Title IX obligations during that time. Despite its clearly defined obligations, Brown still failed to achieve compliance for four years, which was revealed through its reporting duties. *Id.* It took corrective action only after notifying Class Counsel. *Id.*

III. Brown's Intentional and Calculated Violation of The Joint Agreement

On May 28, 2020, Brown, without prior notice to Class Counsel and in violation of the binding Joint Agreement, unilaterally announced it was eliminating five women's varsity sports (equestrian, fencing, golf, skiing, and squash) and six men's varsity sports (fencing, golf, squash, indoor and outdoor track, field and cross

country) and adding a varsity sailing program. A57 at ¶ 5; Christina Paxson, *Excellence initiative to reshape athletics at Brown* (May 28, 2020) https://www.brown.edu/about/administration/president/statements/excellence-initiativereshape-athletics-brown. In that statement, Brown President Christina Paxson said its decision to eliminate eleven teams was not based upon budgetary or pandemic-related concerns, but rather made to improve the overall competitiveness of its programs. *Id.*

Brown publicly placed the blame for its decision to eliminate men's track, field, and cross country upon the 1998 Joint Agreement in a statement issued by President Paxson:

> if men's track, field, and cross country "were restored at their current levels and no other changes were made, Brown would not be in compliance with our legal obligations under the [Joint] Agreement."

A58 at ¶ 7; *see* Christina Paxson, *Addressing Brown varsity sports decisions* (June 6, 2020), https://www.brown.edu/about/administration/president/statements/addressing-brown-varsity-sports-decisions. After a predictable backlash, just three days later on June 9, 2020, Brown announced it was reversing its decision to discontinue those men's programs. A58 at ¶ 8; A355-56; *see* Letter from President Paxson: Track and field and cross country (June 9, 2020) https://www.brown.edu/news/2020-06-09/track. No women's programs were restored. *Id.* That decision constituted a plain

violation of Title IX and the Joint Agreement, as admitted by President Paxson. *Id.*; *see also* A82.

Class Counsel promptly informed Brown that its actions were a willful violation of the Joint Agreement, which Brown denied despite President Paxson's admissions, and requested production of documents relating to its decisions, which Brown initially completely refused to provide. A58-9 at ¶¶ 10-12. Thereafter, on June 16, 2020, Brown then further breached the Joint Agreement by providing only selective documentation, including stale enrollment data from 2019-20 rather than 2020-21 as required, to support its knowingly false position that it was unaware if it was in compliance with the applicable 2.25% variation figure. A59 at ¶ 13. That documentation revealed that Brown was using its newly created varsity sailing program to misleadingly inflate the number of women in their varsity programs by double-counting the same 25 women for their participation on the women's and the coed teams. A59 at ¶ 13; A62-3 at ¶¶ 18-19. Brown again breached the Joint Agreement by steadfastly refusing to produce any documentation regarding its deliberations or decision-making. A59-60 at ¶ 14.

As a result of Brown's refusal to confer with Class Counsel or to take steps to bring itself into compliance, Class Counsel took the route of expedited action provided for under the Joint Agreement and filed a motion to enforce the Agreement, to hold Brown in contempt and for a preliminary injunction on June 29, 2020 (the

"Enforcement Motion"). A56-68; A63 at ¶¶ 20-21. That Enforcement Motion was filed on behalf of the named class representatives who participated in the original litigation beginning in 1992 (the "Named Class Representatives").[4] A47 (Dkt. 357). Expedited discovery was taken, including depositions of four Brown officials and decisionmakers, which revealed the shocking truth that Brown had knowingly and intentionally violated the Joint Agreement. *See* A182, 186, 194; A338, 346-51, A354. Documentary evidence consisting of emails between Brown officials established that Brown had consciously chosen to violate the Joint Agreement as part of a cynical scheme to create a dispute to challenge the Agreement and to ultimately rid itself of its troublesome requirements, Class Counsel's oversight and the streamlined enforcement mechanism for addressing Brown's violative conduct. *Id.*

In particular, internal emails, which Brown aggressively sought to shield from public view, reveal that Brown willfully conspired to gin up anger and resentment for the Joint Agreement by eliminating men's sports that would garner the most backlash -- track, field and cross-county, which have a large number of minority athletes -- with the intent to pit gender and race interests against each other. *Id.* They also planned to parlay the anticipated outcry into support for ridding itself of the

[4] The record does not establish that the named class representatives participated in the filing of the Enforcement Motion or related discovery.

Joint Agreement. Brown Chancellor Samuel Mencoff made explicit this calculated hatched plan in an email to President Paxson:

> here's an idea. Could we use this moment, where anger and frustration, especially from track and squash, are intense and building to go after the Consent Decree once and for all? Could we channel all this emotion away from anger at Brown to anger at the court and kill this pestilential thing? The argument would be that the Consent Decree is forcing us to eliminate these sports, and the court was to "channel all this emotion away from anger at Brown to anger at the court and [to] kill this pestilential thing."

A338.

President Paxson made explicit that their plan of attack upon the Joint Agreement was intended to avoid riling up "the Cohens of the world." A354. Amy Cohen, an original named Plaintiff and present Class Representative, was, like many of the Appellant Objectors, a Brown gymnast. Class Counsel's supplemental filing on August 26, 2020 in support of its original Motion to Enforce was replete with examples of Brown's deceitful tactics, bad faith and unlawful efforts employed to avoid its duties to its female athletes and its resentment at being held accountable for its wrongful conduct. *See* A179-221. Brown's abhorrent racist and sexist scheme worked to perfection for them.

In further support of its Enforcement Motion, Class Counsel filed an expert report by Dr. Donna Lopiano on September 8, 2020, in which she concluded that Brown's restructured selection of men's and women's sports did not meet Title IX's mandates. A542-89. She specifically noted that the replacement sport of sailing

was not a compliant solution and that priority should have been given to keeping women's sports that already existed at Brown. A556, 558, 566-67, 572-73. Dr. Lopiano further opined that equestrian, skiing and squash are strong collegiate programs while fencing and golf are in rebuilding cycles. A572t 31

Unfortunately, rather than seeking to enforce the existing Joint Agreement and seeking monetary damages, the Class Representatives folded.

IV. The Amended Settlement

On or about September 17, 2020, Class Counsel and Brown settled and entered into a new agreement, in the form of an amendment to the 1998 Joint Agreement (the "Settlement Agreement"). A608-16. That new Settlement Agreement provided, *inter alia*, for the following:

- reinstatement of only two of the five eliminated women's teams (equestrian, fencing);
- elevation of Brown's sailing program to varsity status and limiting of each individual's counting as a single participant
- restoration of two women's sports in the event that a men's sports team is restored;
- a bar on the elimination of any women's sports until August 2024
- the maintenance of funding support and a limit on permissible reductions; and
- requiring Brown to provide compliance information to Class Counsel to enable its continued oversight.

Significantly, the new Settlement Agreement sacrificed the critical no-end date of the original Joint Agreement for an end date of August 31, 2024. A609 at ¶ I.C. It further resulted in the elimination of the women's sports of golf, skiing and squash and endorsed Brown's elevation of the sailing program to varsity status which was patently contrived to circumvent Title IX's requirements. A609-11 at ¶¶ II.A., II.D. Class Counsel deemed the result as a "bittersweet outcome."[5]

On or about September 25, 2020, the district court gave preliminary approval to the Settlement Agreement. A53 (Dkt. 390). When presenting that Agreement for preliminary approval under Federal Rule of Civil Procedure 23, Class Counsel indicated the motion was filed by "All Plaintiffs." *Id.* (Dkt. 389). Neither the Settlement Agreement nor the preliminary approval order identified any named class representatives who had negotiated the Settlement Agreement on behalf of the class or who were the class representatives required under Rule 23. A590-603, 608-16, 617-26, 629-30. Although declarations were filed by ten current female Brown students who were members of eliminated female varsity sports in a supplemental filing on August 26, 2020 in connection with the Enforcement Motion filed by the Class Representatives (A271-336), they were not offered to, or approved by, the

[5] https://www.providencejournal.com/story/news/courts/2020/09/17/brown-reaches-proposed-settlement-with-female-athletes-to-restore-some-sports/42635351/.

district court as named class representatives, were not identified as proposed class representatives in either the preliminary approval order or the class notice and did not submit declarations in support of the Settlement Agreement. In its motion for final approval, Class Counsel made explicit that the Class Representatives in connection with the Settlement Agreement remain the original Named Plaintiffs from 1992. A673.

The Appellant Objectors, current female members of Brown's varsity gymnastics and hockey teams, filed timely objections on November 24, 2020, and appeared through counsel at the fairness hearing conducted on December 15, 2020. ADD11-12; A631-53. At that hearing, the district court gave final approval to the Settlement Agreement, finding "pursuant to Rule 23 of the Federal Rules of Civil Procedure governing class actions that the settlement proposed in this case is fair, adequate and reasonable." ADD34. Although noting the Objectors' objection as to the adequacy of the Class Representatives, the court did not address that argument, stating only that "[t]hese objections do not persuade the Court that the proposed agreement is not reasonable." ADD36. On December 21, 2020, the court entered a final approval order, consisting of the executed amendment to the Joint Settlement. ADD2-10. The present appeal ensued.

SUMMARY OF ARGUMENT

The district court erred in approving the Settlement Agreement under Federal Rule of Civil Procedure 23 for multiple, equally fatal, reasons.

First, the district court failed to conduct any analysis at all as to the adequacy of the Class Representatives as required for approval of a class settlement under Rule 23(e)(2)(A). That was legal error and requires reversal.

Second, the Class Representatives, all of whom had ceased being members of the class over two decades ago, were not Rule 23 adequate representatives. Without due process-compliant class representatives, the Settlement Agreement was incapable of approval.

Finally, the Settlement Agreement was neither fair, nor reasonable, nor adequate under Rule 23(e). There was no valid basis to forfeit the rights of the class possessed under the Joint Agreement in exchange for a new Settlement Agreement that fails to secure for them meaningful or equivalent relief and gives away -- in exchange for an artificially created conflict among previously aligned absent class members -- very valuable material terms, conditions and procedures that had been in place for over two decades, and otherwise rewards Brown's intentionally violative conduct.

Accordingly, final approval should be reversed and the case remanded.

ARGUMENT

I. THE DISTRICT COURT ERRED BY APPROVING A CLASS SETTLEMENT THAT WAS REACHED WITHOUT ADEQUATE REPRESENTATION BY PERMISSIBLE CLASS REPRESENTATIVES IN VIOLATION OF DUE PROCESS AND FED. R. CIV. P. 23.

A district court's approval of a class settlement is contingent on its finding that the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). This Rule was revised in 2018 and specifically instructs courts to consider whether "the class representatives . . . have adequately represented the class" when making that determination. Fed. R. Civ. P. 23(e)(2)(A). Constitutional due process requires the presence of that adequate representation. *Hansberry v. Lee*, 311 U.S. 32, 45 (1940).

Here, the district court's summary rejection of the Objectors' objection as to the adequacy of their Class Representatives on the ground that it found the Class Settlement "reasonable" does not constitute meaningful consideration of that prerequisite element, nor does it evidence that the district court satisfied its fiduciary duty to absent class members. The court's complete failure to address specifically the acute issues arising from the representation of the class by the non-class member Class Representatives ran afoul of Rule 23's recent amendments' stated purpose of "focus[ing] the court . . . on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." *See* Advisory Committee

Notes, 2018 Amendments on Rule 23(e)(2). For that reason alone, the final approval order must be reversed.

In any event, the district court's approval of the Class Settlement under Rule 23(e) was in error because the named Class Representatives ceased being members of the class decades ago and no current named class members were substituted in their place. As such, they were inadequate representatives of the class as a matter of law in violation of Rule 23(e)(2)(A) because they had no stake in the action and their interests were not aligned with the absent members of the class. In fact, there is no evidence in the record that the purported Class Representatives were even consulted or did anything whatsoever represent the class, and certainly no evidence establishing that they vigorously pursued the claims of the absent class members. Thus, from the record, it appears that only class counsel effectively filled the role of class representatives.

A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). To permit class treatment and disposition of unnamed, absent individuals' claims, due process requires that such individuals be adequately represented by the named class representatives -- class representatives that have a current and concrete interest in the issues in the case and the relief sought. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 827 F.3d

223, 231 (2d Cir. 2016), *cert. denied*, 137 S. Ct. (2017). This Circuit has found the adequate representation requirement to be "particularly important because the due process rights of absentee class members may be implicated if they are bound by a final judgment in a suit where they were inadequately represented by the named plaintiff." *Key v. Gillette Co.*, 782 F.2d 5, 7 (1st Cir. 1986).

The Supreme Court has held that "the Due Process Clause of course requires that the named plaintiff *at all times* adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (emphasis added). Adequacy of representation within a class proceeding is a core and continuing requirement of class action status and certification of the class under Fed. R. Civ. P. 23 (a)(4). As this Court has cogently noted,

> all four requirements of Rule 23(a) must be met in order for certification of a class to be proper. One of the most important of these requirements is that the representative party fairly and adequately represent the interests of the class. Rule 23(a)(4). This requirement is particularly important because the due process rights of absentee class members may be implicated if they are bound by a final judgment in a suit where they were inadequately represented by the named plaintiff.

Key, 782 F.2d at 7 (citations omitted).

Emphasizing the importance of such representation, this Court imposes an ongoing fiduciary duty on the district court to ensure the adequate representation requirement is complied with at all stages of the litigation. *Id.*; *see Silber v. Mabon*,

957 F.2d 697, 701 (9th Cir. 1992) ("courts have a duty to protect the interests of absent class members").

The Rule 23 adequacy inquiry "is twofold: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members."[6] *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006). "To assure vigorous prosecution, courts consider whether the class representative has adequate incentive to pursue the class's claim, and whether some difference between the class representative and some class members might undermine that incentive." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 31 (E.D.N.Y. 2019) (applying traditional adequacy analysis to Rule 23(e)(2)(A)); *see Johnson v. Rausch, Sturm, Israel, Enerson & Hornik, LLP*, 333 F.R.D. 314, 320 (S.D.N.Y. 2019) (rejecting settlement where adequacy of representation under Rule 23(e)(2)(A) concerns existed). Commonality of interest serves to ensure class representatives have that adequate incentive to pursue the interests of other class

---

[6] Rule 23(e)(2)(A)'s adequacy of representation requirement is analyzed in the same manner that adequacy is evaluated for class certification under Rule 23(a)(4). *In re Samsung Top-load Washing Mach. Mktg., Sales Practices & Products Liab. Litig.*, 17-ML-2792-D, 2020 WL 2616711, at *12 (W.D. Okla. May 22, 2020), *appeal filed*, (10th Cir. June 23, 2020); *see also* 4 Newburg on Class Actions § 13:48 (5th ed.) (Rule 23(e)(2)(A) adequacy analysis is "redundant of the requirements of Rule 23(a)(4)").

members. *Miller v. University of Cincinnati*, 241 F.R.D. 285, 290 (S.D. Ohio 2006) (inherent conflict existed were all named plaintiffs were members of single sport).

Within the settlement context, Rule 23(e)(2)(A) specifically incorporates the adequacy of the class representatives' representation of the class as a factor required for approval of a class settlement. Other courts have noted the importance of that duty to be elevated in the settlement context. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) ("undiluted, even heightened, attention" to class certification is necessary in a settlement context); *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002) ("district judge in the settlement phase of a class action suit [is] a fiduciary of the class").

Rule 23(e) makes plain that its requirements -- including the adequacy of representation by class representatives under subsection (2)(A) -- apply regardless of whether a class has been previously certified in the litigation or is being sought for purposes of settlement. Fed. R. Civ. P. 23(e). Thus, even where a settlement is reached subsequent to class certification, the due process requirement that the class representatives be adequate continues to apply. *See In re MyFord Touch Consumer Litig.*, 13-CV-03072-EMC, 2019 WL 1411510, at *8 (N.D. Cal. Mar. 28, 2019) (in case where class already certified, court preliminarily approved settlement only after revisiting adequacy issue regarding alignment of interests to ensure class representatives would "vigorously" protect class members' rights and finding "[t]hat

remains the case"). Those due process protections simply do not disappear once certification is granted and, by the same token, certification does not exist in perpetuity. *See, e.g.*, *Key*, 782 F.2d at 7 (affirming decertification of class in employment discrimination suit for lack of adequate representation); *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1214 (6th Cir.1997) ("duty to assay whether the named plaintiffs are adequately representing the broader class does not end with the initial certification; as long as the court retains jurisdiction over the case it must continue carefully to scrutinize the adequacy of representation") (citation omitted).

Cases applying the adequacy of representation requirement in Rule 23(e)(2)(A) to approve class settlements have focused upon the alignment of interests and injuries suffered by the named class representatives with the unnamed class members and that vigorous representation thereby ensured. *See, e.g.*, *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019) (applying Rule 23(e)(2)(A)'s adequacy of representation prong to approve settlement where named plaintiffs suffered same injury as class and thus had interest in vigorously pursuing class claims); *In re Samsung Top-load Washing Mach. Mktg., Sales Practices & Products Liab. Litig.*, 17-ML-2792-D, 2020 WL 2616711, at *12 (W.D. Okla. May 22, 2020); *In re USC Student Health Ctr. Litig.*, 218CV04940SVWGJS, 2020 WL 5198251, at *1 (C.D. Cal. Feb. 25, 2020). Those cases further plainly envision the involvement of the named representatives in the litigation proceedings and

settlement negotiations as required as well as their commonality of interest and vigorous level of representation.

Here, the named Class Representatives did not, and could not, adequately represent the class in reaching the Class Settlement. They are no longer class members and have not been for decades. They do not have interests aligned with the class and do not possess adequate incentives to vigorously pursue them. In fact, they do not even hold any claims or stake in the litigation. *See East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (class representative must be part of the class and "possess the same interest and suffer the same injury" as the class members); *Rand v. Cullinet Software, Inc.*, 847 F. Supp. 200, 213 (D. Mass. 1994) ("[A] fundamental requirement of representatives in a class action is that they must be members of the subclasses they seek to represent."); *Tate v. Hartsville/Trousdale County*, 3:09-0201, 2010 WL 4822270, at *2 (M.D. Tenn. Nov. 22, 2010) (decertifying class where "the initial basis upon which certification was granted no longer exists, to wit, the existence of an identified suitable class representative to carry the torch"); *Lavin v. Chicago Bd. Of Ed.*, 73 F.R.D. 438 (N.D. Ill. 1977) (inadequate representation where named plaintiff had graduated high school and had no continuing injury). The named Class Representatives certainly cannot claim to suffer that same injury as current class members, or possess incentives to represent the interests of the class.

Among the other defects, the significant passage of time since the Class Representatives' status as female Brown varsity athletes disqualifies them as adequate representatives of the class, who are permitted to compromise and negotiate the forfeiture of their rights and to bind that same class to a Settlement Agreement. Indeed, as noted, there was no indication in the record that those prior female Brown athletes were even consulted with or involved in the negotiation or decision-making process regarding the Settlement Agreement, or that they actually "represented" in any sense the class in anything other than name. A representative is inadequate where a party is "simply lending his name to a suit controlled entirely by the class attorney; the named party must be an adequate representative in addition to having adequate counsel." Wright, Miller & Kane, 7A Fed. Prac. & Proc. Civ. § 1766 (3d ed.); *Robinson v. Gillespie*, 219 F.R.D. 179, 186 (D. Kan. 2003). The record reflects that this is exactly what occurred here -- except that the class representatives lent their names decades ago.

At a minimum, due process requires the appointment and participation of named representatives who possess an actual interest in the provision and funding of each women's sport offered by Brown prior to its recent manipulations. Due process requires that named representatives who are impacted be appointed and allowed to participate in this litigation and any associated settlement negotiations. *See Telles v. Midland Coll.*, 7:17-CV-00083, 2018 WL 7352424, at *3 (W.D. Tex.

Sept. 7, 2018) (Title IX class action approving settlement where court found "that the representative Plaintiffs and their counsel will fairly and adequately protect the interests of the class. . . . [and] possess the same interest and allege the same injury as the class members they seek to represent.").

Beyond this, conflicts exist between members of the various sports affected which require representation. For example, the class members whose sports were eliminated clearly would possess an incentive to give up rights and benefits secured by the Joint Agreement in order to gain reinstatement of their sport. By contrast, members of the class whose sports were not eliminated, such as the Objectors, who held substantial and important rights under by the Joint Agreement, possessed the incentive to retain that Agreement as-is and thus had interests that conflicted with the incentives of the class members' whose sports were eliminated. Those rights include, *inter alia*, Brown's continuing obligation to submit to an expedited efficient review that is far less complex and resource draining as start-from-scratch litigation, and a court-ordered duty to comply with the full scope of terms of the Joint Agreement without an end date. A101-36.

To the extent that any of the foregoing conflicts is deemed to impact the provision of uniform class-wide representation in a contested setting, subclassing is available to give the vigorous, stake-holding representation required to enable class determination of unnamed parties' interests and claims. *See Gordon v. Jordan Sch.*

Dist., 2:17-CV-00677, 2018 WL 4899098, at *2 (D. Utah Oct. 9, 2018) (requiring subclassing of female athlete class to resolve conflict due to concern that named plaintiffs, who were all members of football subclass, were adequate to vigorously pursue claims of all class members).

Adequate representation of absent class members by named representatives with aligned interests and claims is an inviolate cornerstone of due process. *Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (use of class representative "whose substantial interests are not necessarily, or even probably, the same as those [whom] they deemed to represent" violates due process). The Class Settlement here did not comport with Rule 23's adequacy of representation and due process requirements, and, therefore, cannot be sustained.

II. THE DISTRICT COURT ERRED IN APPROVING THE CLASS SETTLEMENT AS FAIR, REASONABLE AND ADEQUATE.

Under Federal Rule of Civil Procedure 23(e), a court may approve a proposed class settlement only upon a finding that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The district court erred when it approved the Class Settlement whose August 2024 end date forfeits critical indefinite-in-duration protections afforded to the class under the Joint Agreement. The new Settlement Agreement's material and adverse alteration of many substantial rights, protections and benefits currently possessed by class members in exchange for minimal and limited short-term gains largely benefitting only select class members was patently

conflicted, unfair and unreasonable. Creating conflicts among class members is a fatal, irreconcilable flaw. The district court's approval of that Settlement was, therefore, an abuse of discretion.

There can be no reasonable dispute that the Joint Agreement has proven to be critical in ensuring Brown's compliance with its Title IX obligations to the female athlete class since its approval. During that time, Brown failed to comply with its proportionality obligations on four occasions, which was timely revealed through the Joint Agreement's reporting requirements. A56-7, ¶ 3. In addition, Brown stubbornly refused to turn over evidence that eventually incriminated it. A59-60 at ¶ 14. Even more, Brown's conduct in connection with its efforts to rid itself of the Joint Agreement's Title IX-protective provisions raises valid concerns regarding its good faith and future conduct. The fact that its officials cynically concocted a secretive, carefully plotted scheme to not only intentionally violate the Joint Agreement, but to do so in a manner the created and exploited tensions between race and gender, cannot be ignored. Validation of the Class Settlement rewards Brown for that conduct and frees it from demonstrably necessary oversight and critical enforcement mechanisms.

The streamlined method for class members to seek judicial intervention for Brown's Title IX violative conduct -- behavior in which Brown has repeatedly shown a propensity to engage -- is a highly valuable and materially significant class

benefit found in the continued existence of the Joint Agreement as an enforceable, contractual agreement. A113-17 at ¶ V. Those provisions have avoided the need to institute independent litigation which, as the proceedings up to entry into the Joint Agreement demonstrate, are risky, lengthy, complex, costly, burdensome and resource-draining. Beyond this, there is the certain elimination of the Class Counsels' input, whose evaluative criteria when faced with a wrong would be materially altered and significantly weighted against litigation. The substantial value of the Joint Agreement as providing a quick and efficient mechanism to address improper manipulations of Brown's athletic program, and to secure discovery of those facts, is plain when the present Enforcement Motion proceedings are juxtaposed against the years of litigation underlying the securing of the Joint Agreement. That Agreement also provides clear, objective parameters against which Brown's compliance with its Title IX obligations can be efficiently measured and evaluated. The fact that Brown continues to be subject to Title IX is therefore insufficient ground to justify forfeiting the rights and benefits of the Joint Agreement.

Just as importantly, many of the purported benefits of the Class Settlement are illusory. For example, the reporting obligations provided for in the Settlement Agreement for the 2023-24 academic year are of limited value because the Agreement provides "they will not be determinative of whether Brown is in violation

of the 2.25% variance under the Joint Agreement." *See* A611-12 at ¶ III.C. Further, that Agreement endorses Brown's use of the sailing program as a replacement sport, which Plaintiffs' expert opined was not a Title IX-compliant solution. A611 at ¶ II.D. It further improperly reinstates fencing -- a sport Dr. Lopiano characterized as a program in a rebuilding cycle -- while eliminating skiing and squash, which she concluded are strong collegiate programs. A609 at ¶ II.A.2.

Finally, the Class Settlement unfairly treats class members inequitably relative to each other in violation of Fed. R. Civ. P. 23(e)(2)(D). With respect to inequitable treatment among class members on different sports teams, the Settlement Agreement benefits those on the two teams that were reinstated (equestrian and fencing) but entirely forfeits and abandons the interests and rights under the Joint Agreement relative to preservation of the other three newly-omitted teams (skiing, squash and golf). It further trades away the rights of members on all other teams for reinstatement of those two sports. The creation of this conflict among previously united class members as well as the extreme disparate treatment of the class members who suddenly find themselves kicked out and with no remedy are fatal as a matter of law. The same is true with respect to inequitable treatment of class members in different and future graduation classes, members who graduate after August 2024, including current Brown Freshman and those who have been admitted to Brown who will not receive the benefits of the Joint Agreement or Settlement Agreement.

CONCLUSION

For the foregoing reasons, the Appellant Objectors respectfully request that this Court vacate the district court's order approving the Class Settlement and remand with instructions consistent with the legal standards discussed herein.

Dated: April 19, 2021
Boston, Massachusetts

BONSIGNORE TRIAL LAWYERS, PLLC

/s/ Robert J. Bonsignore

Robert J. Bonsignore (No. 1146643)
Lisa Sleboda
23 Forest St.
Medford, MA 02155
Telephone: (781) 350-0000
Facsimile: (702) 852-5726
rbonsignore@classactions.us

/s/ Anthony J. Gianfrancesco

Anthony J. Gianfrancesco (No. 121074)
Gianfrancesco & Friedmann LLP
214 Broadway
Providence, RI 02903
Telephone: (401) 270-0070
Facsimile: (401) 270-0073
anthony@gianfrancescolaw.com

Attorneys for Objectors-Appellants

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7181 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14pt.

Dated: April 19, 2021

By: */s/ Robert J. Bonsignore*
Robert J. Bonsignore

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system and that I also served a copy of the foregoing document on them by email:

Leslie Brueckner
Public Justice PC
475 14th St., Ste 610
Oakland, CA 94612
lbrueckner@publicjustice.net

Amato A. DeLuca
DeLuca & Weizenbaum Ltd
199 N Main St
Providence, RI 02903-0000
bud@dwlaw.us

Arthur Harry Bryant
Bailey & Glasser LLP
1999 Harrison St, Ste 660
Oakland, CA 94612
abryant@baileyglasser.com

Roberta A. Kaplan
Kaplan Hecker & Fink LLP
350 5th Ave, Ste 7110
New York, NY 10118
jmazzitelli@kaplanhecker.com

Lori Bullock
Newkirk Zwagerman, P.L.C.
521 E. Locust St., Ste. 300
Des Moines, IA 50309
lbullock@newkirk.com

Lynette J. Labinger
128 Dorrance St, Box 710
Providence, RI 02903
LL@labingerlaw.com

Marcella Coburn
Kaplan Hecker & Fink LLP
350 5th Ave, Ste 7110
New York, NY 10118
mcoburn@kaplanhecker.com

Raymond A. Marcaccio
Oliverio & Marcaccio LLP
55 Dorrance St, Ste 400
Providence, RI 02903-0000
ram@om-rilaw.com

Robert C. Corrente
Whelan Corrente & Flanders, LLP
100 Westminster St., Ste. 710
Providence, RI 02903
rcorrente@whelancorrente.com

Gabrielle Tenzer
Kaplan Hecker & Fink LLP
350 5th Ave, Ste 7110
New York, NY 10118
gtenzer@kaplanhecker.com

Jill Zwagerman
Newkirk Zwagerman, P.L.C.
521 E. Locust St., Ste. 300
Des Moines, IA 50309
lbullock@newkirk.com
jzwagerman@newkirk.com

s/ Robert J. Bonsignore
Robert J. Bonsignore

In the United States Court of Appeals for the First Circuit

No. 21-1032

AMY COHEN; EILEEN ROCCHIO; NICOLE A. TURGEON; KAREN A. MCDONALD; MELISSA KURODA; LISA C. STERN; JENNIFER HSU; JENNIFER E. CLOUD; DARCY SHEARER, individually and on behalf of all others similarly situated; JODY BUDGE; MEGAN HULL,

Plaintiffs – Appellees,

CATHERINE LUKE; KYLE HACKETT, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

BROWN UNIVERSITY; CHRISTINA PAXSON, as successor to VARTAN GREGORIAN; JACK HAYES, as successor to DAVID ROACH,

Defendants – Appellees,

ABIGAIL WALSH; LAUREN LAZARO; ROSE DOMONOSKE; MEI LI COSTA; ELLA POLEY; ALYSSA GARDNER; LAUREN MCKEOWN; ALLISON LOWE; TINA PAOLILLO; EVA DURANDEAU; MADELINE STOCKFISH; SONJA BJORNSON

Objectors – Appellants.

Appeal from the United States District Court for the District of Rhode Island, Case No. 1:92-cv-00197-JJM, Judge John J. McConnell, Jr.

ADDENDUM

ROBERT J. BONSIGNORE
(No. 1146643)
LISA SLEBODA
Bonsignore Trial Lawyers, PLLC
23 Forest St.
Medford, MA 02155
Telephone: (781) 350-0000
Facsimile: (702) 852-5726
rbonsignore@classactions.us

ANTHONY J. GIANFRANCESCO
(No. 121074)
GIANFRANCESCO & FRIEDMANN LLP
214 Broadway
Providence, RI 02903
Telephone: (401) 270-0070
Facsimile: (401) 270-0073
anthony@gianfrancescolaw.com

TABLE OF CONTENTS

12/15/2020	TEXT ORDER denying as moot 357 Motion to Enforce Judgment and granting 392 Joint MOTION Final Approval of Proposed Settlement - So Ordered by Chief Judge John J. McConnell, Jr. on 12/15/2020. (Barletta, Barbara) (Entered: 12/15/2020)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

AMY COHEN, *et al.*, *Plaintiffs,* v. BROWN UNIVERSITY, CHRISTINA PAXSON, *as successor to* VARTAN GREGORIAN, and JACK HAYES, *as successor to* DAVID ROACH, *Defendants*.	Case No. 92 Civ. 0197

AMENDMENT TO THE JOINT AGREEMENT

This Amendment to the Joint Agreement is made between Plaintiffs and Defendants Brown University ("Brown"), Christina H. Paxson, and Jack Hayes.

WHEREAS Plaintiffs initiated this action on April 4, 1992, alleging violations of Title IX of the Education Amendments, 20 U.S.C. §1681;

WHEREAS Plaintiffs and Defendants entered into a Joint Agreement on June 23, 1998, which the Court entered as its Judgment in this case on October 15, 1998 (hereinafter "Joint Agreement");

WHEREAS Brown announced certain changes to its varsity athletics offerings on May 28, 2020, and June 9, 2020;

WHEREAS Plaintiffs filed a Motion to Enforce Judgment, to Adjudge in Contempt, and for Emergency Relief ("Plaintiffs' Motion"), alleging a gross violation of the Joint Agreement on June 29, 2020;

WHEREAS Defendants expressly denied that they were in violation of the Joint Agreement.

WHEREAS Plaintiffs and Defendants (together, the "Parties") reached the agreement reflected in this Amendment to the Joint Agreement (hereinafter "Amendment"), which, if approved by the Court, will resolve the Parties' dispute regarding the claims and issues presented by Plaintiffs' Motion;

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, it is agreed by, between, and among the Parties that, subject to Court approval, the Parties' dispute regarding the claims and issues presented by Plaintiffs' Motion shall be fully and completely settled and resolved according to the following terms and conditions:

I. GENERAL PROVISIONS

A. This Amendment shall be binding on the Parties hereto, as well as their successors, as the case may be, only if approved by the Court as set forth herein.

B. This Amendment modifies the Joint Agreement. In case of a conflict between the provisions of this Amendment and any other provisions of the Joint Agreement, the provisions of this Amendment shall govern.

C. Except as expressly amended or modified by this Amendment, all terms, covenants and provisions of the Joint Agreement are and shall remain in full force and effect until August 31, 2024.

D. This Amendment resolves all issues and claims for relief, including injunctive or declaratory relief, presented by Plaintiffs' Motion.

II. BROWN'S INTERCOLLEGIATE ATHLETICS PROGRAM

A. Upon Preliminary Approval of the Amendment by the Court, Brown shall restore to varsity status certain teams that Brown has selected. These teams are:

1. Women's Equestrian; and

2. Women's Fencing.

B. During the remaining term of the Joint Agreement as amended by this Amendment:

1. If Brown restores to varsity status a men's team that was slated to transition from varsity to club status in May 2020, other than the previously restored men's track & field and cross country teams, then the total number of women's teams restored to varsity status must be at least two greater than the number of men's teams restored.

2. Brown shall not add any additional men's teams to its varsity program other than as provided above.

C. Brown will maintain at least the same level of support for each varsity women's team it restores to varsity status that the team received before the team was transitioned from varsity status in May 2020, although the level of support may be reduced commensurate with reductions in the overall level of funding for Brown's athletics program.

1. In the event that there are reductions in the overall level of funding for Brown's athletics program, Brown will not reduce overall funding for its women's teams any more than it reduces overall funding for its men's teams with the exception that, in a year in which a team does not compete due to COVID-19, that team's operating budget may be reduced to reflect declines in the expenses associated with training, team travel and other aspects of competition, which may result in variation between teams that play in different seasons.

2. Information concerning the level of support for each of the restored teams

is contained in Brown's annual EADA reports, which will be provided to Plaintiffs' counsel within ten (10) business days of submission. Brown will provide that same information for each of the restored teams in its final annual report provided under the Joint Agreement no later than August 1, 2024.

D. Plaintiffs acknowledge that Brown has elevated its sailing program to varsity status and has announced the creation of separate Women's and Co-ed varsity sailing teams. Brown acknowledges that Plaintiffs do not agree that these are two separate teams. The Parties agree that the amended Joint Agreement does not resolve this dispute.

1. To calculate the average number of male and female sailors on the first and last day of competition for purposes of the Joint Agreement, each individual identified on one or more sailing squad list(s) shall be counted only as a single participant. Counting participation opportunities for sailing in this way for purposes of the Joint Agreement is without prejudice to Brown treating or counting participation opportunities on its sailing teams differently in any other context.

E. Brown shall not reduce the status of or eliminate any women's varsity team for the remaining term of the Joint Agreement as amended by this Amendment.

III. REMAINING TERM OF THE JOINT AGREEMENT

A. The Joint Agreement shall terminate on August 31, 2024.

B. Brown's reporting obligation and the attendant deadline under Section V.A of the Joint Agreement (*i.e.*, by no later than August 1, 2024), shall remain in full force

and effect through August 31, 2024.

C. For the 2023-2024 academic year only, Brown shall provide interim reports of participation rates within thirty days after the first date of competition for each varsity team. The Parties acknowledge that these interim reports will be a snapshot in time of the current season, and that they will not be determinative of whether Brown is in violation of the 2.25% variance requirement under the Joint Agreement.

IV. DISPUTE RESOLUTION

A. If, between now and the time at which the Joint Agreement terminates in August 2024, the Parties have a dispute as to whether Brown remains in compliance with the provisions herein or the 2.25% variance in the Joint Agreement, the parties agree to first mediate their dispute in good faith before Magistrate Judge Patricia A. Sullivan. If any such mediation is unsuccessful, either party may seek court intervention, including in the event of a purported gross violation.

1. If Magistrate Judge Sullivan is unable to serve as mediator, then the Parties shall select another mediator within three (3) business days. The Parties will use their best efforts to agree upon another mediator.

2. If, however, the Parties cannot come to an agreement on another mediator within three (3) business days, then the district court judge presiding over the case will select the mediator with a preference for a federal magistrate judge or a retired federal district court or magistrate judge from either the District of Rhode Island or the District of Massachusetts.

B. The Parties agree that the Joint Agreement, as amended by this Amendment, will not limit, resolve, or determine any claims or defenses that may arise after August

31, 2024 under then applicable law.

V. CLASS NOTICE AND JUDICIAL APPROVAL

A. Upon finalization of this Amendment, the Parties shall promptly present the Amendment to the Court in a Joint Motion for Preliminary Approval of the Settlement ("Joint Motion for Preliminary Approval"), and will propose notice to the class, which will be directed at all present and future Brown women students and potential women students who participate or will seek to participate in intercollegiate athletics at Brown. The fairness hearing required by federal law to approve the Proposed Amendment to the Joint Agreement will be held, and the Parties will cooperate with respect to any such fairness hearing, with Brown bearing all costs of providing notice to the plaintiff class.

B. After the Court has conducted a fairness hearing and approved this Amendment, Brown will pay Plaintiffs' reasonable attorneys' fees, costs, and expenses, including expert witness fees, in connection with the current proceeding, including reasonable fees and expenses of any fairness hearing, in an amount either to be determined in mediation with Magistrate Judge Sullivan or, if no agreement is reached in mediation, by the Court.

/s/ Lynette Labinger
Date: 12/21/2020

Lynette Labinger
128 Dorrance St., Box 710
Providence, RI 02903
401.465.9565
ll@labingerlaw.com

/s/ Arthur H. Bryant
Date: 12/21/2020

Arthur H. Bryant
Bailey & Glasser, LLP
1999 Harrison Street, Suite 660
Oakland, CA 94612
510.507.9972
abryant@baileyglasser.com

/s/ Leslie Brueckner
Date: 12/21/2020

Leslie Brueckner
Public Justice, P.C.
475 14th Street, Suite 610
Oakland, CA 94612
510.622.8205
lbrueckner@publicjustice.net

/s/ Lori Bullock
Date: 12/21/2020

Jill Zwagerman, AT0000324
Lori Bullock, AT0012240
Newkirk Zwagerman, P.L.C.
521 E. Locust Street, Suite 300
Des Moines, IA 50309
515.883.2000
jzwagerman@newkirklaw.com
lbullock@newkirklaw.com

Counsel for Plaintiffs
Cooperating Counsel,
Public Justice, P.C. and
American Civil Liberties Union
Foundation of Rhode Island

/s/ Eileen Goldgeier

Date: 12/21/2020

Eileen Goldgeier
Vice President and General Counsel, Brown University
Brown University
Box 1913
Providence, RI 02912
eileen_goldgeier@brown.edu

/s/ Roberta A. Kaplan

Date: 12/21/2020

Roberta A. Kaplan
Gabrielle E. Tenzer
Joshua Matz
Matthew J. Craig
David Shieh
KAPLAN HECKER & FINK LLP
350 Fifth Avenue, Suite 7110
New York, NY 10118
212.763.0883
rkaplan@kaplanhecker.com
gtenzer@kaplanhecker.com
jmatz@kaplanhecker.com
mcraig@kaplanhecker.com
dshieh@kaplanhecker.com

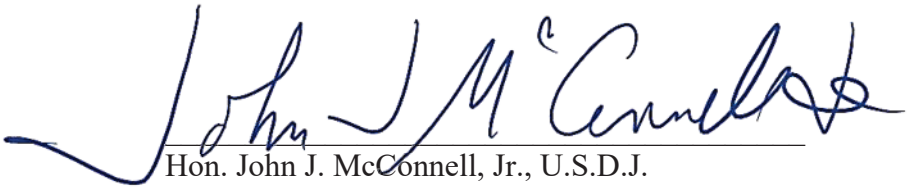
/s/ Robert C. Corrente

Date: 12/21/2020

Robert C. Corrente
WHELAN CORRENTE & FLANDERS LLP
100 Westminster Street, Suite 710
Providence, RI 02903
401.270.1333
rcorrente@whelancorrente.com

Counsel for Defendants

SO ORDERED:



Hon. John J. McConnell, Jr., U.S.D.J.

Date: December 21, 2020

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

* * * * * * * * * * * * * * * *	C.A. NO. 92-197-JJM
AMY COHEN, et al *	
VS. *	DECEMBER 15, 2020 9:30 A.M.
BROWN UNIVERSITY, et al *	
* * * * * * * * * * * * * * * *	VIA VIDEOCONFERENCE

BEFORE THE HONORABLE JOHN J. McCONNELL, JR.,

CHIEF JUDGE

(Fairness Hearing)

APPEARANCES:

FOR THE PLAINTIFFS:
LYNETTE J. LABINGER, ESQ.
Lynette Labinger, Atty. at Law
128 Dorrance Street, Box 710
Providence, RI 02903

LORI BULLOCK, ESQ.
Newkirk Zwagerman, PLC
521 E. Locust Street
Des Moines, IA 50409

ARTHUR H. BRYANT, ESQ.
Bailey & Glasser, LLP
1999 Harriston Street, Ste. 660
Oakland, CA 94612

FOR THE DEFENDANTS:
GABRIELLE E. TENZER, ESQ.
Kaplan, Hecker & Fink LLP
350 Fifth Avenue, Suite 7110
New York, NY 10118

ROBERT CLARK CORRENTE, ESQ.
Whelan, Corrente & Flanders, LLP
100 Westminster Street
Suite 710
Providence, RI 02903

FOR THE OBJECTORS:
ROBERT J. BONSIGNORE, ESQ.
3771 Meadowcrest Drive
Las Vegas, NV 89121

Court Reporter:
Karen M. Wischnowsky, RPR-RMR-CRR
One Exchange Terrace
Providence, RI 02903

15 DECEMBER 2020 -- 9:30 A.M.
VIA VIDEOCONFERENCE

THE COURT: Good morning, everyone. We are here this morning in the case of Cohen versus Brown University, Civil Action 1992-197.

Would counsel identify themselves for the record, please.

MS. LABINGER: Lynette Labinger, one of the attorneys for the Plaintiff class.

THE COURT: Good morning.

MS. LABINGER: Good morning.

MS. BULLOCK: Lori Bullock, one of the attorneys for the Plaintiff class.

MR. BRYANT: Arthur Bryant, one of the attorneys for the Plaintiff class.

THE COURT: Arthur, you look a lot like Nick Moser.

MR. BRYANT: I'm sorry. This is what happens when you -- I apologize. I'll get it fixed.

THE COURT: I'm not worried about it. That's fine. I happen to know what you look like, so I knew it was a facade.

MR. BRYANT: I hope you'll say I look better.

THE COURT: Eh.

MR. BRYANT: Thanks. Really nice.

MS. TENZER: Your Honor, Gabrielle Tenzer from Kaplan, Hecker & Fink on behalf of the Defendants.

THE COURT: Great. Good morning. Bob, you're muted.

MR. CORRENTE: Sorry about that. Robert Corrente, also for Brown. Thank you.

THE COURT: Great. Thanks. And we have a representative for the objectors that was filed as well.

MR. BONSIGNORE: Yes, Robert Bonsignore. Arthur, you do look better.

MR. BRYANT: Thank you.

THE COURT: Welcome, everyone. So we're here on a joint motion by the Plaintiffs and the Defendants to approve their class action settlement.

There has been one objection filed on behalf of some female student athletes at Brown. And so I have read the voluminous papers, and why don't we begin with Ms. Labinger and see if there's anything you want to add to them or say or anything in response to the objector.

MS. LABINGER: Well, your Honor, if I could respond to Mr. Bonsignore if he has any additional comments today.

We believe that our joint motion did address

each and every one of his objections or the objections of the 12 class members in our joint motion because we had the benefit of the written objection at that time.

I don't want to unduly add to the volume in this case, but I'm probably compelled by just longevity to say something more than "rest on the papers," so if the Court would indulge me.

This case, as the Court knows, started in 1992, and Arthur Bryant and I were part of the original class counsel and have been actively involved in this case throughout its history.

I think that what's before you now is actually the third fairness hearing in this case. We had one in 1994 on program equality, we had the original hearing on the joint agreement which we're proposing to amend today in 1998, and we're here today.

And we have, I believe it is fair to say, vigorously and diligently represented the class and the class interest for a long time. I guess it's almost 30 years.

And one hallmark of this case that I think the Court will concur with is, in terms of its experience with the case in these past few months, is that every step of the way this case has been vigorously litigated. Every issue has been contested. The

parties have been very diligent in advocating their issues.

Our case in the First Circuit in 1993 was the first appeals court interpreting and applying the three-part test under Title IX to athletics, and this case is considered one of the landmark decisions in the Title IX area.

We had two trials, one on preliminary injunction, one on the merits, two appeals, Brown took an unsuccessful attempt to go before the Supreme Court, all on the merits before the parties were able to come to an agreement on compliance. And that resulted in the entry of the joint agreement, which has been in place since 1998.

And the issues that have arisen this year, which were, again, hotly contested and vigorously litigated, demonstrated that we were at a different point in this case where Brown had decided to restructure and shrink the number of athletic teams in its program, which it was entitled to do as long as it complied with Title IX.

And faced with that, we had to assess both what the merits of our case were, what the likely successful outcome would look like and what the risks were of an unsuccessful outcome and the continuum in between.

And with the assistance, major assistance of Magistrate Sullivan, because the parties were very adversarial, we were able to hammer out an agreement which we believe is in the best interest of the Plaintiff class.

It doesn't give us everything that we were hoping for, but it gives us substantial benefits and it guarantees that Brown will not make any more cuts to its women's program after reinstating two of the five eliminated women's teams and guaranteeing their funding through the balance of the life of this settlement, which at its conclusion, if the Court approves the settlement, will have been just shy of 26 years in operation.

We believe that it sets a framework that will benefit all of the members of the class and will not undermine the interest of potential members of the class after the settlement comes to an end after the -- at the conclusion of the '23-24 academic year.

The standards are well laid out in the joint motion. The Court is not to impose its own view of what the best outcome is but, rather, to determine whether the proposed settlement is fair, adequate and reasonable.

We believe that if the Court were to look at

this in great detail, it would probably come to the same kind of conclusion; but we are satisfied and convinced and we believe we have presented a persuasive argument that the Court should feel quite convinced that the settlement that's presented is fair, adequate and reasonable and should be approved.

And if the Court has any questions, I'll be happy to answer them now or reserve addressing the objections after Mr. Bonsignore has made his presentation.

THE COURT: Great. Thanks. Ms. Tenzer for the Defendants.

MS. TENZER: Your Honor, like Ms. Labinger, I don't want to unnecessarily add to the record. You know, we have -- as she said, we've set this forth in our papers; but we would also echo, as she's put forward, that this is a settlement and, therefore, is a product of compromise, that both sides vigorously litigated this dispute and that throughout the dispute Brown has maintained that it remained in compliance with the joint agreement, it was in compliance with the joint agreement, and it had every intention of continuing to be in compliance with the joint agreement and that, you know, in an effort to avoid a costly and lengthy litigation and with the yeoman's work and

assistance of Judge Sullivan and her clerk, Carrie Mosca, and working with the Plaintiff were able to come to a compromise in the interest of putting an end to the dispute.

We think it's a fair -- it's fair, adequate and reasonable, as Ms. Labinger was saying. It has to be within the range of reasonableness. We feel that it falls directly within that range.

And, similarly, you know, we would reserve to respond to anything that Mr. Bonsignore has to say or any questions that your Honor may have; but, again, I also want to take this opportunity to thank Judge Sullivan for all of her work in helping to bring the parties here as part of an ongoing negotiation in a dispute that was very hard fought over several months and with a lot discovery. And I'll leave it at that for now, your Honor.

THE COURT: Great. Thank you.

Mr. Bonsignore, you filed an objection, and the Court will hear you.

MR. BONSIGNORE: Thank you, your Honor, and thank you for the opportunity to be heard. This is, of course, a very, very important case. As goes Brown University, so goes the nation. What happens in this particular case will be felt across the country for

many years by countless women.

The class definition includes all present and future women at Brown and potential women students who will participate, seek to participate and/or are deterred from participating in intercollegiate athletics at Brown. And so what that brings us to is the class definition.

Though all of the legal arguments made by counsel are well established, what wasn't addressed was that named representatives must be members of the subclass that they seek to represent and that it's a very steep uphill battle to come into a court and try to have something overturned that a magistrate judge took a great hand in.

And the magistrate judges do great jobs and the lawyers do a great job to try to do the best that they can; but the question in this particular case is, is it necessary.

Settlement classes are required to go through a very strict and vigorous analysis, and the obligation of the Court is to represent the interests of the unnamed -- unnamed and nonpresent parties.

So Rule 23(a), the adequacy of representation requirement, makes it mandatory and applies to all post-certification proceedings, and it has to be met.

The requirement is particularly important here because of the due process rights of absentee class members.

And no one disputes the work in the past done by the lawyers here. I remember growing up, coming up as a baby lawyer and being very proud of organizations I belonged to that were involved in the Brown University case; but in this particular instance, despite all the vigorous play that occurred in the four quarters, what they've done is they've dropped the ball after they voluntarily agreed to a fifth quarter. And as in football, there's no fifth quarter in the court.

A settlement was reached. The settlement agreement had in its terms certain requirements that they would have to -- Brown University would have to adhere to if it wanted to make a change. That provides all the safety and all the legal protections needed.

A settlement class is not needed. A settlement class will only add cost and complexity to a situation. So instead of coming in to enforce an order, all the future participants will have to come in and start a fresh litigation.

The discovery in this particular case was amazing. What was found was, quite frankly, disgusting. You know, they went out of their way to target women. It was just reprehensible.

However, an enforcement action in the court is more direct. It doesn't require all sorts of things that litigation from scratch will. The named class representatives are no longer members of the class. They don't have skin in the game, as we like to say. Class counsel is class counsel, but you also need class representatives that will do the job.

They don't have interests aligned anymore. They no longer present the incentives or even possess any claims. And the briefing was quite extensive, your Honor. I think those are the main points that I'd like to make, is to try to have the Court reconsider the papers and -- well, actually consider the papers and reject the settlement.

It's not needed, it hurts women, and the evidence against Brown doesn't merit any breaks for them. None. And that's all I'll say for right now, your Honor.

And, again, the class notice is invalid because -- for the reasons in the papers, I'll just submit. I'm sure that you've read them. You said you have, and your reputation is pretty good.

THE COURT: That's the best compliment I've received in a long time, Mr. Bonsignore. Much appreciated.

MR. BONSIGNORE: Thank you.

THE COURT: You're welcome.

Ms. Labinger, do you wish to respond for the Plaintiffs?

MS. LABINGER: To the objectors? Yes, your Honor. This is not a settlement class. This is a modification of an existing consent order that was entered by the Court after notice and hearing in 1998.

The document itself indicates that, you know, one of the things we're always, you know, cognizant of is that either party could move to terminate the agreement at some point.

In this case, although we are agreeing to the end of the joint agreement in '23-24, until that date we're getting for the Plaintiff class more than we would have under the existing agreement in several respects.

First of all, we are getting two of the teams that were cut in 2020 reinstated for the life -- the remaining life of the agreement. We're also getting a guarantee of funding for those teams at the same level that they enjoyed before the cuts. That is valuable for the class members and for individuals whose teams were cut.

For the 12 objectors that Mr. Bonsignore

represents identified as gymnastics and ice hockey, we are getting, if the Court approves the proposed settlement, an additional guarantee that those teams will not be cut or any other women's varsity teams for the remaining life of the agreement, which is to the end of '23-24.

That's not the case under the current agreement as can be seen by the fact that Brown decided to restructure its program in 2020.

If Brown had gone ahead with the restructuring the way that they had originally envisioned, which was to include cutting men's track, field and cross country, they saw our initial calculations, they would have been in compliance and there may have been nothing we could have done other than bemoan the fact that women -- and men, too.

I want to be clear, from the Plaintiffs' perspective, our philosophy in this case has always been to try to get the most opportunities for women to play as possible.

Mathematical curity of substantial proportionality which could be achieved by no varsity program at all, zero percent on each side, does not really benefit the class interest. So that's our perspective on it.

We have -- if the Court approves this agreement, will have benefited the entire class by locking in the benefits that are -- we're gaining at this point for another approximately four years, which is not something we would have under the current agreement.

We also have the potential if Brown either changes its mind or is required to change its mind to restore any of the men's teams, that it will have to restore at least one more women's team than men's team so that there's always a total of two more women's than men's from the cut group. So that's a potential additional benefit to the class.

We also have during the life of the agreement resolved without resolving the parties' dispute about how you count people on the sailing team. This is a dispute that no one knows the answer to.

In fact, I did a, as you can now do, a word search of every Title IX case with the word "sailing" to try to see whether anybody else has resolved this issue; and the word "sailing" only came up in two decisions, both in the Cohen case, and it's not been addressed.

So depending on how that count is done, it is either larger or smaller or we don't count sailing the first year at all, but eventually sailing would count.

So we looked at the range of potential outcomes; and the outcome that we're proposing is well within the range, is of great benefit to the class members.

As I said, there is no settlement class. So the issue of the notion that we have to have subclasses, which, by the way, there's no support for in the vast majority of Title IX cases and this case had no subclasses, it just has nothing to do with this case.

The objectors -- neither the objectors nor anyone else asked to intervene to be a named representative. The case law is clear that even when a named class representative whose case has become moot does not have to be replaced can be replaced.

We did not go through the formality of adding. We must -- I think we were actively involved with over 50 current athletes who are members of the class. We consulted with them.

The Court should be aware that we filed 10 declarations representing representatives of each of the teams in support of our motion to enforce. We've had constant contact with them all the way through.

And one of the reasons why from Plaintiffs' counsels' perspective that we did not rush to name an additional class representative, which we could have done but we did not believe was necessary, is we wanted

to be clear all the way through that we weren't picking favorites among the teams; that the odds of getting all five teams restored when Brown had already cut three men's teams as a permanent resolution as opposed to an interim resolution was very problematic unless we could convince Brown that they were not able to achieve what they wanted to in their original initiative and just put everybody back, which would have been lovely, but it didn't happen.

So, you know, we avoided the issue of anyone suggesting that we were playing favorites with one team or another, and we avoided making any decisions on the part of Plaintiffs; and this is reflected in our supplemental -- I think in our reply brief that we were not picking among the five teams in response to Brown's argument that, at best, Brown said, We only have to restore one more teams to get into compliance.

And our position was that's on Brown to make a decision as to what its plan will look like; but until it does, the status quo should be preserved because we're not going to come out there and say, Pick this one or that one, and the decision as to which teams Brown decided to reinstate consistent with the case law is that it's Brown's call, and we did not pick among our class members.

So I don't believe that we were required to substitute representatives. We were not required to have subclasses. And as far as the information that came out through discovery, our papers certainly speak for themselves as to how we felt about Brown's position.

But that's Brown in 2020; and Brown in 2020 is now, if the settlement is approved, not following through as it had intended. It is reinstating two of the five women's teams, guaranteeing their funding and guaranteeing that these teams will continue to 2024.

So we believe that our proposed settlement accomplishes a substantial portion of our efforts, is well within the range of relief and should be approved. It does not hurt women in any respect at all.

And if the Court has any other questions, I'll be happy to answer them.

THE COURT: Can you just quickly, Ms. Labinger, address the issue from the Plaintiffs' perspective on its reason and willingness to put an end date on the consent decree.

MS. LABINGER: There were two -- at least two reasons. One was that we achieved a substantial increase in the commitment from Brown than under the joint agreement, which is, under the joint agreement,

Brown was free to cut teams.

And having pulled the trigger on the dropdown from 3.5 percent to 2.25 percent, that disincentive that had served the Plaintiff class for some 22 years to keep Brown from cutting its program was now gone.

But in exchange, for the current students, we got two teams restored, guaranteed funding and a promise, a guarantee that none of the teams would be cut for the next four years, which is more than the joint agreement provides.

Now, the notion that we'd have that in perpetuity is unrealistic. At the end of that time, the agreement is terminated; but Title IX, in our estimation, the case law and the statute have so evolved since we entered the agreement in 1998 that we believe that the levels of protection after the agreement ends will be at least as robust as under the agreement.

And when I say "at least as," there is an argument, and we pointed that out in our joint motion, it's listed -- in Plaintiffs' view, because Defendants, of course, did not sign on to it, that when you have a program as large as Brown's, which is somewhere around 900 athletes, 2.25 percent is a lot of students.

It could be as many as 20 students, and at least

three of our teams are under the 20-student level. And in the absence of that 2.25 percent, a team that wants to be varsity status but is not presently varsity could make the argument that that's not substantial proportionality because you've got enough room in there to reasonably sustain at least one more team and competitive opportunities.

Because of the joint agreement, fixing that number, 2.25 percent, it operated both as a sword for us that you can't have more and a shield for Brown that they could use 2.25 percent instead of 0.0 percent as their target for women participants.

We'd rather have them at -- worrying about 0.0 percent once their obligation not to cut any teams ends, and we think that that was a good outcome.

THE COURT: Great. Thank you.

Ms. Tenzer, did you want to add anything on behalf of Brown?

MS. TENZER: Very briefly, your Honor. Mr. Bonsignore said something about Brown having gone out of its way to target women. I don't know what he's referring to, and I'm not even sure it warrants a response; but Brown in no way is targeting women here.

I think, as Ms. Labinger has just stated, that all the parties here believe that the settlement is

fair, reasonable and adequate in that regard.

He also mentioned something about breaks for Brown. Again, I'm not sure what breaks Mr. Bonsignore is referring to. I don't think Brown is getting any breaks. Brown doesn't need any breaks. Brown has been in compliance with the joint agreement, you know, for the life of the agreement.

This is the first time we've been in court over the joint agreement. We've been in compliance and had every intent of continuing to be in compliance, including as the agreement would be amended if your Honor were to approve the settlement, which, as Ms. Labinger said, has us at a 2.25 percent variance.

And even after the joint agreement were to expire if the settlement is agreed to, Brown will continue to comply with its obligations under Title IX, which are very robust.

And, again, I'm not sure what the reference to "break" means, but you can rest assured that Brown is in and will continue to be in compliance with both the joint agreement and Title IX.

And, again, as Ms. Labinger referred to it, in terms of the teams and which teams are restored and so forth, you know, the law of this case is that it is at Brown's discretion to manage its program. And as long

as Brown remains in compliance, it can exercise that discretion, as Ms. Labinger just said, to have no program or to manage its program as it best sees fit.

And we'll continue to do that, again, in compliance with the agreement as -- hopefully as amended if your Honor approves the settlement.

It was our position that we didn't need to reinstitute any of the teams to remain in compliance. We've always maintained in this litigation that we were in compliance with the proposed restructuring that was announced and there was no need to reinstitute any of the teams, not even one of the teams; but now we've agreed to reinstitute two of them, and there can be no question that Brown will be in compliance with the proposed proportionality under the joint agreement.

THE COURT: Great. Thanks, Ms. Tenzer.

Let me make a couple of observations before I give you my ruling. First, I want to echo the sentiment that the attorneys have said thanking Magistrate Judge Sullivan for her work in this. It was nothing short of masterful, in my opinion.

She is as smart and committed a jurist as she is a mediator, and I and we all owe her a debt of gratitude. And I was glad to hear Gabrielle mention Carrie Mosca as well because we don't operate in a

vacuum. We operate with a lot of people helping us out.

So I want to make sure that the record is clear what Judge Sullivan did here and I regularly ask her to do, I should say, and she regularly comes through, which was fabulous.

Second, in my opinion having reviewed the entire record and the settlement and everything right now, I feel compelled to say that it's my opinion that Brown President Chris Paxson got an undeserved bum's rap in the public.

My review of the record and my review of the settlement and the agreement that's been put forth shows that she has remained steadfastly committed to gender equity in athletics at Brown, that she has a commitment -- has had a commitment to the consent decree and to Title IX that perhaps prior presidents at Brown have not had that caused this lawsuit in the first place, and I believe because of the release of certain documents she got a bad rap.

But I think when one looks at the entire record and looks at the -- all the evidence, I think history will tell us that she has been a strong and capable advocate for gender equity in Brown athletics. And as an alum and a citizen, I thank her for that.

Third, there is no human being, in my opinion, that is more tenacious on behalf of her clients than Lynette Labinger. I have known her for many years. The term "zealous advocate" will be on her tombstone because it is how she has lived her life and how she has done it masterfully.

That's to take nothing away from Trial Lawyers For Public Justice and others who I would add in the mix, but any implication that Ms. Labinger had anything but the 100 best interest of the entire class and her decades-long fight for gender equity is just wrong.

I have observed it, I have seen it, and as I'll say in a minute, I think the settlement results in, once again, another credit to her in regards to gender equity both in athletics and beyond, for that matter.

So with those observations, before the Court is a joint motion for final approval of a proposed settlement agreement in the case of Cohen versus Brown University, 92-197.

The Court finds pursuant to Rule 23 of the Federal Rules of Civil Procedure governing class actions that the settlement proposed in this case is fair, adequate and reasonable.

Class counsel has adequately represented, and beyond, adequately represented the class. The parties

collected, reviewed and produced tens of thousands of pages of documents. They conducted six depositions. They completed five separate expert reports. They briefed a lot, trust me, of several discovery disputes, and the merits of Plaintiffs' motion have been fully briefed.

They prepared for an evidentiary hearing on the merits, and I have no doubt that they would have done a masterful job if we went there.

These efforts resulted in a well-developed record which enabled an effective and successful arm's length negotiation with Magistrate Judge Patricia Sullivan.

The Court also considers the adequacy of the relief in light of the cost and the risks associated with a trial on the merits and finds that the proposed settlement accounts for many of the issues raised by the parties throughout this long litigation.

The proposed settlement treats each class member equitably relative to each other, which does not necessarily mean equally, but treats each class member fairly.

Finally, in determining whether the settlement is fair, adequate and reasonable, the Court must consider the reaction of the class. While a small

group of class members ably represented by Mr. Bonsignore here from the women's gymnastics and women's hockey team have objected in writing to the settlement approval and their attorney has reiterated their points of objections in this hearing, they object on several grounds arguing that the class representatives are not valid and that the release is not fair and reasonable and that there has been inadequate notice.

These objections do not persuade the Court that the proposed agreement is not reasonable. In fact, just the opposite. The number of objectors represents a very small fraction of the class members as a whole, and about 2.7 percent of the women varsity student athletes is in and of itself representative of the settlement's reasonableness in the Court's determination.

Therefore, in light of these findings, the Court overrules the objection, grants final approval of the amendment to the joint agreement as fair, reasonable and adequate and grants the joint motion 389.

Ms. Labinger, anything further for the Plaintiff class?

MS. LABINGER: No, your Honor.

THE COURT: Ms. Tenzer or Mr. Corrente, anything

further for Brown?

MS. TENZER: None.

THE COURT: Great. Folks, thanks all. Job well done. Keep up the good work fighting for justice, all of you, and we'll see you on the other side.

(Adjourned)

* * * * * * *

C E R T I F I C A T I O N

I, Karen M. Wischnowsky, RPR-RMR-CRR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

December 17, 2020

Date

/s/ Karen M. Wischnowsky

Karen M. Wischnowsky, RPR-RMR-CRR
Federal Official Court Reporter