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

JOINT MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT

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Plaintiffs, together with Defendants Brown University ("Brown" or the "University"), Brown President Christina H. Paxson, and Brown Athletic Director Jack Hayes (collectively, the "Parties"), respectfully submit this joint motion pursuant to Federal Rule of Civil Procedure 23(e) seeking: (1) preliminary approval of the proposed settlement reached by the Parties, as reflected in the Settlement Terms attached as Exhibit A and the proposed Amendment to the Joint Agreement attached as Exhibit B; (2) approval of the proposed notice to class members attached as Exhibit C and proposed notice plan set forth below; and (3) entry of the proposed preliminary approval order attached as Exhibit D, scheduling a fairness hearing and related deadlines as set forth below.

BACKGROUND

I. The Underlying Litigation & Plaintiffs' Motion

Between 1992 and 1998, the Parties were involved in class action litigation over whether Brown's athletics program complied with its obligations under Title IX of the Education Amendments of 1972. The Parties resolved their dispute by entering into a Joint Agreement after the Court found Brown had violated Title IX. The Joint Agreement was approved by the Court on October 15, 1998. *See* ECF 357-2 ("Joint Agreement"). Among other things, the Joint Agreement requires that Brown provide varsity "participation opportunities" at a level such that "the percentage of each gender participating . . . is within [a fixed percentage] of each gender's percentage in the undergraduate enrollment for the same academic year." *Id.* § III(C). That percentage is 3.5%, unless Brown chooses to take certain actions, one of which is eliminating or replacing existing women's varsity teams, in which case the permitted variance drops to 2.25%. *Id*.

On May 28, 2020, Brown made the following announcement:

> Effective immediately, Brown will cease training, competition and related operations at the varsity level for the following sports: men and women's fencing; men and women's golf; women's skiing; men and women's squash; women's equestrian; and men's track, field and cross country (which are three varsity sports under federal Title IX rules governing access to opportunities in sports). In addition, club coed sailing and club women's sailing each will transition to varsity status.

https://www.brown.edu/about/administration/president/statements/excellence-initiative-reshape-athletics-brown (accessed 9/23/20).

About two weeks later, on June 9, after considering, among other things, the impact that the changes would have on diversity in Brown's athletics program, the University announced that it would reinstate men's track and field and cross country to varsity status. Brown did not reinstate any women's teams on June 9.

On June 29, 2020, Plaintiffs filed their Motion to Enforce Judgment, to Adjudge in Contempt, and for Emergency Relief. *See* ECF 357; 357–1 ("Plaintiffs' Motion"). Plaintiffs' Motion alleged that Brown's restructuring, with the reinstatement of men's track and field and cross country, resulted in a gross violation of the Joint Agreement. Plaintiffs' Motion sought reinstatement of the transitioned women's sports until and unless Brown was able to show cause that it was not in violation of the Joint Agreement, an Order to Defendants to show cause as to why they should not be held in civil contempt, and attorneys' fees and expenses. *Id.* In response to Plaintiffs' Motion, Defendants expressly denied that they had violated the Joint Agreement.

The Court set a schedule that called for expedited discovery, briefing, a mediation before Magistrate Judge Patricia A. Sullivan, and a hearing on Plaintiffs' Motion "[i]f the mediation fail[ed]." ECF 369. Over the next two-and-a-half months, the Parties collected, reviewed, and produced tens of thousands of pages of documents, took and defended six depositions, prepared

five separate expert reports, litigated three discovery motions, briefed Plaintiffs' Motion, and began preparing for an evidentiary hearing that was originally scheduled to take place on September 15, 2020.

On September 9, less than a week before the evidentiary hearing, the Parties began Court-ordered mediation before Judge Sullivan, submitting written statements and engaging in a full-day mediation conference via Zoom. Following the September 9 conference, Judge Sullivan held many additional conferences with the Parties over the span of a week in an attempt to resolve the claims raised in Plaintiffs' Motion. Judge Sullivan also oversaw the negotiation of a term sheet memorializing a potential settlement. On September 17, following these extended negotiations before Judge Sullivan, the Parties executed a term sheet (attached as Exhibit A) setting forth settlement terms that would resolve the claims raised by Plaintiffs' Motion, subject to class notice, an opportunity to object, and Court approval.

II. The Parties' Proposed Settlement

As reflected in the Settlement Terms attached as Exhibit A and the proposed Amendment to the Joint Agreement attached as Exhibit B, the Parties' proposed settlement provides that:

- Brown will restore the following teams to varsity status upon the Court's preliminary approval:
    1. Women's Equestrian; and
    2. Women's Fencing.
- If Brown restores to varsity status a men's team that had been slated to transition from varsity to club status in May 2020 (other than the restored men's track & field and cross country teams), then Brown will also restore to varsity status a total number of women's teams that is at least two greater than the number of men's teams restored.
- During the term of the amended Joint Agreement, Brown will not add any additional men's teams to its program other than as provided above.
- Brown will not reduce the status of or eliminate any women's varsity team for the remaining term of the Joint Agreement.

- 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, provided that:

    1. The level of support provided may be reduced if the overall level of funding for Brown's athletics program is also reduced; and

    2. 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.

- Brown will provide information to Plaintiffs' counsel concerning the level of support for each of the restored teams, which Brown reports to the U.S. Department of Education each year under the Equity in Athletics Disclosure Act (EADA), within ten business days of submitting that information to the U.S. Department of Education.

The proposed settlement reflected in the Settlement Terms and proposed Amendment to the Joint Agreement further provides that:

- The requirements of the 1998 Joint Agreement will otherwise remain in effect until August 31, 2024, with the following modifications:

    1. The Joint Agreement shall terminate on August 31, 2024;

    2. Brown's reporting obligation and 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; and

    3. 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, but those reports will be treated as interim snapshots and will not be determinative of Brown's compliance with the 2.25% variance requirement under the Joint Agreement.

- Until the Joint Agreement expires on August 31, 2024, Brown will continue to abide by the gender proportionality requirement in the Joint Agreement, which requires the percentage of each gender participating in Brown's intercollegiate athletic program to be within 2.25% of each gender's percentage in the full-time undergraduate enrollment for the same academic year.

- Brown has elevated its sailing program to varsity status and has announced the creation of separate Women's and Co-ed varsity sailing teams. The Parties continue to dispute whether Women's and Co-ed sailing are two separate teams, and agree that the proposed Amendment to the Joint Agreement does not resolve this dispute. Nevertheless, the Parties agree that, to calculate the average number of male and female

sailors on the first and last days of competition for purposes of the Joint Agreement, each individual identified on one or more sailing squad list(s) shall only be counted as a single participant, without prejudice to Brown treating or counting participation opportunities on its sailing teams differently in any other context outside of the Joint Agreement.

- In the event of a future dispute over Brown's compliance with the Joint Agreement's 2.25% requirement or with the proposed Amendment to the Joint Agreement, the Parties agree to first mediate their dispute in good faith before Judge Sullivan (or another mutually agreeable mediator if Judge Sullivan is not available, or a court-appointed mediator in the event that the Parties cannot agree on another mediator) before seeking judicial intervention.

- The Parties agree that the Joint Agreement as amended will not limit, resolve, or determine any claims or defenses that may arise after August 31, 2024 under then applicable law.

The Settlement Terms and proposed Amendment to the Joint Agreement provide the following regarding the payment of attorneys' fees and costs:

- After the Court has conducted a fairness hearing and approved the amended Joint Agreement, 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.

Pursuant to Rule 23(e)(3), the parties hereby notify the Court that, other than as stated in the Settlement Terms and proposed Amendment to the Joint Agreement, there are no agreements requiring disclosure that were "made in connection with the proposal." Fed. R. Civ. P. 23(e)(3).

ARGUMENT

I. The Settlement Should Be Preliminarily Approved Pursuant to Rule 23

Under Federal Rule of Civil Procedure 23(e), certain procedures, including court approval and notice to the class with an opportunity to object or comment, are necessary before "the claims, issues, or defenses of a certified class" can be "settled, voluntarily dismissed, or compromised." Fed. R. Civ. P. 23(e). Here, the termination of the Joint Agreement will constitute a final resolution

to this matter, requiring adherence to the requirements of Rule 23. *See Patterson v. Newspaper & Mail Deliverers Union of N.Y. & Vicinity*, No. 73 Civ. 3058, 1986 WL 520, at *4 (S.D.N.Y. Oct. 22, 1986) (holding "members of the plaintiff class are entitled to notice and an opportunity to be heard on the issue of termination or modification of the consent decree").

A class action settlement agreement can receive final approval "only after a hearing and only on finding that it is fair, reasonable and adequate." Fed. R. Civ. P. 23(e). "At the preliminary approval stage, however, a less rigorous standard applies: the Court need only determine whether the settlement 'appears to fall within the range of possible final approval.'" *Sesto v. Prospect CharterCARE, LLC*, No. 18 Civ. 328, 2019 WL 2394251, at *1 (D.R.I. June 6, 2019) (quoting *Trombley v. Bank of Am. Corp.*, No. 08 Civ. 456, 2011 WL 3740488, at *4 (D.R.I. Aug. 24, 2011)); *see also* Fed. R. Civ. P. 23(e)(1)(B) (providing that courts must direct notice to be provided to class members of a proposed settlement "if giving notice is justified by the parties' showing that the court will likely be able to . . . approve the proposal under Rule 23(e)(2)"). "Preliminary approval should not be confused for a final finding of reasonableness or fairness." *Sesto*, 2019 WL 2394251, at *1. Rather, at the preliminary approval stage, the Court need only "ascertain whether notice of the proposed settlement should be sent to the class," which "requires only an initial evaluation of the fairness of the proposed settlement" on its face. *Id.* (internal quotation marks omitted). Preliminary approval does not require a court to reach any ultimate conclusions on the issues of fact and law that underlie the merits of the dispute. *See Detroit v. Grinnel Corp.*, 495 F.2d 448, 456 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 48 (2d Cir. 2000). Instead, "[t]his analysis often focuses on whether the settlement is the product of arm's-length negotiations." *Curiale v. Lenox Grp. Inc.*, No. 07-1432, 2008 WL 4899474, *4 (E.D. Pa. Nov. 14, 2008).

A review of the Parties' proposed settlement resolving the claims at issue in this litigation must consider the "clear policy in favor of encouraging settlements" of class actions. *Durrett v. Hous. Auth. of the City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990). "Approval of a consent decree is 'committed to the trial court's informed discretion.'" *Common Cause Rhode Island v. Gorbea*, No. 12 Civ. 00318, 2020 WL 4365608, at *4 (D.R.I. July 30, 2020). In a court's evaluation of a proposed settlement, the "professional judgment of counsel involved in the litigation is entitled to significant weight." *Fisher Bros. v. Phelps Dodge Indus., Inc.*, 604 F. Supp. 446, 452 (E.D. Pa. 1985); *see also Varacallo v. Mass Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005) ("Class Counsel's approval of the Settlement also weighs in favor of the Settlement's fairness."). "[A]lthough '[t]he case law offers 'laundry lists of factors' pertaining to reasonableness . . . the ultimate decision by the judge involves balancing the advantages and disadvantages of the proposed settlement as against the consequences of going to trial or other possible but perhaps unattainable variations on the proffered settlement.'" *Sesto v. Prospect Chartercare, LLC*, No. CV 18-328 WES, 2019 WL 5067200, at *3 (D.R.I. Oct. 9, 2019) (quoting *Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 82 (1st Cir. 2015)).

"It is neither required, nor is it possible for a court to determine that the settlement is the fairest possible resolution of the claims of every individual class member; rather, the settlement, *taken as a whole*, must be fair, adequate and reasonable." *Shy v. Navistar Int'l Corp.*, No. C-3-92-333, 1993 WL 1318607, *2 (S.D. Ohio May 27, 1993) (emphasis in original). "Moreover, when a settlement is the result of extensive negotiations by experienced counsel, the Court should presume it is fair." *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 350-51 (N.D. Ohio 2001). This is because "there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and

costs necessarily inherent in taking any litigation to completion." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005).

The proposed settlement is fair, reasonable, and adequate. It was reached after hard-fought litigation, including highly-expedited discovery, briefing, and hearing preparation over the course of two-and-a-half months, resulting in a well-developed record on which the Parties could thoroughly evaluate their respective claims and defenses. The Parties were aided by experienced counsel on both sides, including the original class counsel who represented Plaintiffs in all phases of these proceedings. Moreover, the proposed settlement was reached only after the Parties participated in Court-ordered mediation overseen by Judge Sullivan, which included a full-day mediation conference and a week of intensive, arm's-length negotiations.

The proposed settlement will offer substantial benefits to the class. Among other things, the University has agreed to: (i) reinstate two women's sports teams to varsity status; and (ii) not reduce the status of or eliminate any women's varsity team for the remaining life of the Joint Agreement. The proposed settlement also avoids the uncertainty, delay, and burden of continued litigation (including any appeals)—a burden that has been and would be particularly acute on both Plaintiffs and the University in light of the COVID-19 pandemic.

The proposed settlement provides for the award of reasonable attorneys' fees, costs, and expenses to Plaintiffs' counsel if the proposed settlement is approved by the Court, in an amount either to be determined in mediation with Judge Sullivan or, if no agreement is reached in mediation, by the Court. "There is no suggestion, or basis for one, that the proposed [settlement] would violate any law," *Durrett*, 896 F.2d at 604, and the proposed settlement is not the result of collusion, *see Sesto*, 2019 WL 2394251, at *3. It is fair, reasonable, and adequate and therefore, the Parties believe that the Court should grant this Joint Motion.

II. The Proposed Notice and Notice Plan Should Be Approved

Under Rule 23, notice of a proposed class action settlement must be "direct[ed] . . . in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1); *see also Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 336 (D. Mass. 2015) ("Notice of a class action settlement must be 'reasonably calculated to reach the absent class members.'" (quoting *Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 56 (1st Cir. 2004)).

The Parties have agreed to the proposed "**NOTICE OF PROPOSED SETTLEMENT OF CLASS ACTION LAWSUIT**" attached as Exhibit C that will be sent by email to the Brown email address accounts that Brown has assigned to all full-time female undergraduate students currently enrolled at Brown, as well as female undergraduate students who are currently on leave or who have deferred matriculation for the current academic year. A link to the notice will also be posted on the University's website (on the University's admissions page, athletics page, and page for the Excellence in Athletics Initiative) and the websites of Public Justice, the ACLU of Rhode Island, and Bailey & Glasser, LLP, until the Fairness Hearing. The notice explains the nature of the controversy, the Settlement Terms, and the proposed settlement and Amendment to the Joint Agreement, the right of class members to object to the proposed settlement and, if they submit a timely objection to the Court, to appear and be heard at the "Fairness Hearing" required by Federal Rule of Civil Procedure 23(e)(2). Such notice comports with the requirement to provide "notice in a reasonable manner to all class members," Fed. R. Civ. P. 23(e)(1)(B), and is the most practicable method of notice under the circumstances, particularly given that, as a result of the pandemic, class members are likely to have consistent access to email and the referenced Brown webpages, but not necessarily their physical mailing addresses, their campus mail (as students have been given the choice of returning to campus for the fall semester due to the pandemic), or print

publications. *See, e.g.*, *In re Loestrin 24 Fe Antitrust Litig.*, No. 13 Md. 2472, 2020 WL 5203323, at *2 (D.R.I. Sept. 1, 2020); *Nat'l Ass'n of Deaf v. Mass. Inst. of Tech.*, No. 15 Civ. 30024, 2020 WL 1495903, at *4 (D. Mass. Mar. 27, 2020); *see also* 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(c)(2) (noting that "technological change since 1974 has introduced other means of communication [besides first class mail] that may sometimes provide a reliable additional or alternative method for giving notice," and that "courts and counsel have begun to employ new technology to make notice more effective").

Finally, as reflected in the proposed order attached as Exhibit D, the Parties respectfully propose that, upon the Court's issuance of an order granting the Parties' Joint Motion for Preliminary Approval of Proposed Settlement ("Preliminary Approval"), the Court set the following schedule for issuance of the class notice, objections to the settlement, submitting papers in connection with final approval, and the fairness hearing:

5 days after Preliminary Approval:	Parties complete issuance of notice to class members via email and web posting;
60 days after Preliminary Approval:	Deadline for submission of any objections from class members;
10 days before the fairness hearing:	Parties file their joint motion for final approval of the settlement and respond to any objections; and
at least 75 days after Preliminary Approval:	Court to hold fairness hearing, permitting appearances via Zoom.

CONCLUSION

The Parties respectfully request that the Court grant their joint motion[1] and issue the proposed order attached hereto as Exhibit D: (1) granting preliminary approval of the settlement reached by the Parties, as reflected in the Settlement Terms attached as Exhibit A and the proposed Amendment to the Joint Agreement attached as Exhibit B; (2) approving the proposed notice to class members attached as Exhibit C and proposed notice plan set forth above; and (3) scheduling a fairness hearing and related deadlines as set forth above.

Dated: September 23, 2020

Respectfully submitted,

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[1] A hearing is neither necessary nor required under Fed. R. Civ. P. 23(e) at the preliminary approval stage. As explained in the MANUAL FOR COMPLEX LITIGATION, § 21.632 at 382 (4th ed. 2005), "[i]n some cases, this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties." *See also Curiale*, 2008 WL 4899474 (court granting preliminary approval without hearing).

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