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 FINAL APPROVAL OF PROPOSED SETTLEMENT

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

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

(Counsel list continued on following page)

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

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

Counsel for Defendants

December 4, 2020

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

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

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 final approval of the proposed settlement reached by the Parties. The proposed settlement, which the Court preliminarily approved on September 25, 2020, ECF 390, is reflected in the Settlement Terms and the proposed Amendment to the Joint Agreement (collectively, the "Settlement"), ECF 389-1 & 389-2.

Because the Settlement represents a fair, reasonable, and adequate resolution of the claims raised in Plaintiffs' Motion to Enforce Judgment, to Adjudge in Contempt, and for Emergency Relief ("Plaintiffs' Motion"), ECF 357 & 357-1, the Parties jointly request that the Court grant final approval of the Settlement.

RELEVANT BACKGROUND

The pertinent factual and procedural background leading up to the Settlement is set forth in the Parties' Joint Motion for Preliminary Approval of the Settlement ("Preliminary Approval Motion"), ECF 389 at 1-3, and the Parties hereby incorporate by reference that factual and procedural background here. After the Parties executed the relevant Settlement Terms on September 17, 2020, the Parties filed the Preliminary Approval Motion on September 23, 2020, *id.* The specific terms of the Settlement are summarized in the Preliminary Approval Motion, *see id.* at 3-5, and the Parties hereby incorporate that summary by reference here as well.

The Preliminary Approval Motion set forth a plan for providing notice of the Settlement to members of the Plaintiff Class and attached a proposed "Notice of Proposed Settlement of Class Action Lawsuit" (the "Class Notice"), which explains the nature of the Parties' dispute, the Settlement Terms, the proposed Amendment to the Joint Agreement, the right of Class members

to object to the 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). *See id.* at 9-10; ECF 389-3. Under the Parties' proposed notice plan, the Class Notice was to be sent by email to the Brown email addresses 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 was also to be posted on Brown's website (on the University's admissions page, athletics page, and page for the Excellence in Athletics Initiative) and the websites of Class Counsel and their affiliates (namely, Public Justice, the ACLU of Rhode Island, and Bailey & Glasser, LLP) until the Fairness Hearing. Class Counsel provided input and approved the selected University websites and the notice link on those websites.

On September 25, 2020, the Court granted the Preliminary Approval Motion, approved the Class Notice and notice plan set forth therein, and directed the Parties to complete issuance of the Class Notice by September 30, 2020. ECF 390. The Court also set a deadline of November 24, 2020 for Class members to object to final approval of the Settlement. *Id.*

In compliance with the Court's Order and pursuant to the Court-approved notice plan, the Parties completed issuance of the Class Notice on September 30, 2020. By the November 24, 2020 deadline, only a single, joint objection to the Settlement had been submitted by twelve Class members, all of whom are members of two varsity women's teams that were not affected by the restructuring at issue (Gymnastics and Ice Hockey).

ARGUMENT

Under Federal Rule of Civil Procedure 23(e), a court "must approve the settlement in a class action and, to do so, must allow a hearing and make a finding that the settlement 'is fair,

reasonable, and adequate,' or (in shorthand), 'reasonable.'" *Nat'l Ass'n of Chain Drug Stores v. New Eng. Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009) (quoting Fed. R. Civ. P. 23(e)(2)); *see also Del Sesto v. Prospect Chartercare, LLC*, No. 18 Civ. 328, 2019 WL 5067200, at *3 (D.R.I. Oct. 9, 2019). "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, at *2 (S.D. Ohio May 27, 1993); *accord Nat'l Ass'n of Chain Drug Stores Fund*, 582 F.3d at 44; *see also Rolland v. Patrick*, 562 F. Supp. 2d 176, 178 (D. Mass. 2008) ("[Rule 23(e) requires] an evaluation of 'whether the proposal, taken as a whole, is fair, adequate, reasonable and in the best interests of all those who will be affected by it.'" (quoting *Giusti–Bravo v. U.S. Veterans Admin.*, 853 F. Supp. 34, 36 (D.P.R. 1993))).

"[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."'" *Del Sesto*, 2019 WL 5067200, at *3 (quoting *Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 82 (1st Cir. 2015)). In making this "ultimate decision," the district court "enjoys considerable range in approving or disapproving a class action settlement, given the generality of the standard and the need to balance benefits and costs." *Nat'l Ass'n of Chain Drug Stores Fund*, 582 F.3d at 44-45; *see also Common Cause R.I. v. Gorbea*, No. 12 Civ. 318, 2020 WL 4365608, at *4 (D.R.I. July 30, 2020) ("Approval of a consent decree is 'committed to the trial court's informed discretion.'" (quoting *P.R. Dairy Farmers Ass'n v. Pagan*, 748 F.3d 13, 20 (1st Cir. 2014))).

In exercising its discretion, "the district court must presume the settlement is reasonable"

where, as here, "the parties negotiated at arm's length and conducted sufficient discovery." *Bezdek*, 809 F.3d at 82 (quoting *In re Pharm. Average Wholesale Price Litig*, 588 F.3d 24, 32–33 (1st Cir. 2009)); *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 350–51 (N.D. Ohio 2001) ("[W]hen a settlement is the result of extensive negotiations by experienced counsel, the Court should presume it is fair."). That 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) (quoting *Newman v. Stein*, 464 F. 3d 689, 692 (2d Cir. 1972)); *see also Del Sesto*, 2019 WL 5067200, at *3 (noting courts should consider "the range of reasonableness of the settlement . . . in light of the best possible recovery").

Moreover, because "the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight." *Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000); *see also Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999) ("The Court's fairness determination also reflects the weight it has placed on the judgment of the parties' respective counsel, who are experienced attorneys and have represented to the Court that they believe the settlement provides to the Class relief that is fair, reasonable and adequate."); *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 review of the settlement at issue should also account for the "clear policy in favor of encouraging settlements" of class actions. *Durrett v. Hous. Auth. of Providence*, 896 F.2d 600, 604 (1st Cir. 1990) (quoting *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980)); *see also In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d at 36 (noting

that the First Circuit has "recogniz[ed] a policy encouraging class action settlements"); *Medoff v. CVS Caremark Corp.*, No. 09 Civ. 554, 2016 WL 632238, at *5 (D.R.I. Feb. 17, 2016) (noting courts must "perform[] this analysis in the shadow of the 'strong public policy in favor of settlements,' particularly in class action litigation" (quoting *P.R. Dairy Farmers Ass'n*, 748 F.3d at 20)).

In light of these principles, and because all four of the reasonableness factors enumerated in Rule 23(e)(2) are satisfied here, *see infra*, the Court should approve the Settlement.

I. The Settlement Is Fair, Reasonable, and Adequate

To determine whether a proposed settlement is "fair, reasonable, and adequate," courts consider the four Rule 23(e)(2) factors recently codified in 2018. These four factors are meant to overlay and help focus the broader considerations bearing on reasonableness articulated in earlier caselaw. *See* 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(2) (noting that the 2018 amendment to Rule 23(e) was "not to displace" the "lists of factors" bearing on reasonableness developed by each circuit, "but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal"). The two procedural factors enumerated in Rule 23(e)(2) include whether "the class representatives and class counsel have adequately represented the class" and whether "the proposal was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(A)-(B); *see also* William B. Rubenstein, 4 Newberg on Class Actions § 13:48 (5th ed. 2020) (hereinafter "Newberg"). The two substantive factors include the adequacy of relief to the class and whether "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(C)-(D).

A. The Class Has Been Adequately Represented

Class Counsel have adequately represented the Class in this litigation. *See* Fed. R. Civ. P. 23(e)(2)(A). With respect to the adequacy of the "class representatives" themselves, "it is unclear

that [Rule 23(e)(2)(A)] adds anything to [the] analysis" because "the court . . . has certified a class" and therefore has already determined under Rule 23(a)(4) that the class representatives "will fairly and adequately protect the interests of the class." Newberg § 13:49; *see also Walters v. Target Corp.*, No. 16 Civ. 1678, 2020 WL 6277436, at *6 (S.D. Cal. Oct. 26, 2020); Fed. R. Civ. P. 23(a)(4). Consequently, "the focus at this point is on the actual performance of *counsel* acting on behalf of the class." 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(2) (emphasis added).

In assessing the adequacy of representation, courts look to, among other things, "the stage of the proceedings and the amount of discovery completed." *Del Sesto*, 2019 WL 5067200, at *3 (quoting *Baptista v. Mutual of Omaha Ins. Co.*, 859 F. Supp. 2d 236, 240-41 (D.R.I. 2012)); 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(2) (noting importance of "the nature and amount of discovery in this or other cases"). Where, as here, experienced counsel "conducted sufficient discovery" before engaging in arm's length settlement negotiations, the settlement is presumed reasonable. *Bezdek*, 809 F.3d at 82 (quoting *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d at 32-33); *see also Hill v. State St. Corp.*, No. 09 Civ. 12146, 2015 WL 127728, at *7 (D. Mass. Jan. 8, 2015) (approving settlement where experienced co-lead counsel "were well informed about the strengths and weaknesses of the case at the time the Settlement was achieved").

Here, Class Counsel includes the original Class Counsel who have represented Plaintiffs in all phases of these proceedings—meaning the Court has already found them to be adequate advocates. *See* Newberg § 13:49 (noting court has already approved class counsel and representatives as adequate, "[s]ince the court . . . has certified a class" under Rule 23(a)(4)); *see also* 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(2) ("If the court has appointed class counsel . . . , it will have made an initial evaluation of counsel's capacities and experience.").

Attorney Lynette Labinger was designated to serve as counsel for the Class in this matter in 1992. She is an experienced civil rights litigator. She has been a member of the Rhode Island bar since 1975 and completed a two-year clerkship with this Court in 1976. She has litigated civil rights and discrimination cases in both the state and federal courts of Rhode Island in both individual and class action matters. She is currently serving, by designation of this Court, as class counsel or successor class counsel in *Chapdelaine v. Neronha*, No. 15 Civ. 0450, and *Morris v. Travisono*, No. 69 Civ. 4192. She also served as settlement class counsel in the Rhode Island Superior Court in *Rhode Island Public Employees Retiree Coalition v. Raimondo*, No. PC 2015-1468, 2015 WL 1872189 (R.I. Super. Ct. Apr. 16, 2015) (certifying class and preliminarily approving settlement); *see also* 2015 WL 3648161 (R.I. Super. Ct. June 9, 2015) (approving settlement after fairness hearing), *aff'd sub nom. Clifford v. Raimondo*, 184 A.3d 673 (R.I. 2018).

Attorney Arthur Bryant was appointed class counsel for the plaintiffs in this case in 1992 and has been personally involved in its prosecution, settlement, and monitoring ever since. He has been successfully litigating class action sex discrimination cases for females against educational institutions since he tried and won the landmark case getting girls into Philadelphia's public, previously all-male Central High School in 1983. *Newberg v. Bd. of Public Educ.*, 26 Pa. D & C.3d 682 (Pa. C.P. 1983). He joined Public Justice (then called Trial Lawyers for Public Justice) in 1984 as its sole staff attorney, became its Executive Director in 1987, its Chairman in 2014, and its Chairman Emeritus in 2019, when he joined Bailey & Glasser, LLP. He has won major victories and established precedents in several areas of the law, including constitutional law, civil rights, consumer protection, toxic torts, class actions, and mass torts. *The National Law Journal* has twice named him one of the 100 Most Influential Attorneys in America. Bryant has been a leading Title IX litigator since 1985, when he started serving as the lead trial counsel for the plaintiff class in

Haffer v. Temple University, No. 80 Civ. 1362, *see, e.g.*, 678 F. Supp. 517 (E.D. Pa. 1988). He has successfully represented more women athletes and potential athletes in Title IX litigation against schools and universities than any lawyer in America, including in *Haffer* and *Cohen.* He has appeared in federal and state trial and appellate courts throughout the nation, including the United States Supreme Court. *See, e.g., Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (1999); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995). And he has received many awards, including, for his Title IX work, receiving the Enhanced Opportunity Award for Women's Intercollegiate Athletics from the Council of Collegiate Women Athletic Administrators, being named One of 50 Most Influential People in College Sports by *College Sports* magazine, receiving an Honorary Degree from Ripon College for playing a "Significant Role in the Rise of Women's Athletics in the United States," being named a finalist by the Women's Sports Foundation for the Billie Jean King Contribution Award for "Significant Contribution to the Overall Development of Girls' and Women's Sports," and receiving the "Sport At Its Best Award" from the League of Fans for his success advancing equal opportunity in sports. *See* https://www.baileyglasser.com/lawyers-arthur-h-bryant.

Attorney Leslie Brueckner joined the Plaintiff Class litigation team in this case in 1994 after joining Public Justice and has actively participated in representing the Class since that time. Attorney Brueckner is a Senior Attorney at Public Justice focusing on appellate litigation and the areas of class actions, constitutional law, federal preemption, mass torts, consumer rights, personal jurisdiction, and combating court secrecy. *See* https://www.publicjustice.net/team/leslie-a-brueckner/. She has appeared in trial and appellate courts throughout the country, including serving as lead and co-counsel in numerous cases in the United States Supreme Court. *E.g.*, *Geier*, 529 U.S. 861; *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *U.S. Airways v. McCutchen*, 569 U.S.

88 (2013). She has served as lead counsel in five cases in the California Supreme Court, including several class actions, winning landmark decisions on behalf of consumers. *E.g., Noel v. Thrifty Payless, Inc.*, 455 P.3d 626 (2019); *Quesada v. Herb Thyme, Inc.*, 361 P.3d 868 (2015). She has appeared as class counsel in numerous Title IX athletics cases, including *Cohen* and *Barrett v. West Chester University of Pennsylvania of State System of Higher Education*, No. 03 Civ. 4978, 2003 WL 22803477 (E.D. Pa. Nov. 12, 2003), and as class counsel in numerous other consumer and civil rights cases, *e.g., Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018); *Western Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017). Brueckner has won numerous awards, including the "Women's Consumer Advocate of the Year Award" from Consumer Attorneys of California and the 2019 Dale Haralson "FALLOUT AWARD" from the Western Trial Lawyers Association "in recognition of her extraordinary work in advancing Public Justice for the past quarter century."

Attorneys Jill Zwagerman and Lori Bullock of Iowa were added to the Plaintiff Class litigation team in recognition of the demands of ramping up the challenge to Brown's decision to transition five women's teams from varsity status on a very compressed timeline. Attorneys Zwagerman and Bullock were designated class counsel for plaintiffs in a successful Title IX challenge to team cuts by Eastern Michigan University. *See, e.g., Mayerova v. E. Mich. Univ.*, 346 F. Supp. 3d 983 (E.D. Mich. 2018) (granting preliminary injunction), *appeal dismissed*, 2020 WL 1970535 (6th Cir. 2020). Attorneys Zwagerman and Bullock successfully concluded the EMU case by class settlement in 2020. Attorney Zwagerman has been a part of several class actions over her career, in both lead and supporting roles. *See Williams v. Wells Fargo Bank*, 901 F.3d 1036 (8th Cir. 2018); *Eggers v. Wells Fargo Bank*, 899 F.3d 629 (8th Cir. 2018); *Pippen v. State*, 854 N.W.2d 1 (Iowa 2014); *Haviland v. Catholic Health Initiatives-Iowa, Corp.*, 692 F. Supp. 2d 1040

(S.D. Iowa 2010); *Dietrich v. Liberty Square L.L.C.*, 230 F.R.D. 574 (N.D. Iowa 2005). Attorney Bullock has represented plaintiffs in both class action litigation and Title IX cases. *See Eggers v. Wells Fargo*, No. 14 Civ. 394, 2016 WL 8849025 (S.D. Iowa Oct. 27, 2016); *Mayerova*, 346 F. Supp. 3d 983. Attorneys Zwagerman and Bullock have also represented hundreds of plaintiffs in discrimination cases and are constantly pursuing claims to improve equality for their clients, which often relies upon equity relief rather than monetary relief only.

Based on the voluminous and well-developed record at the time of the Settlement, Class Counsel had more than a sufficient basis for determining the Settlement's reasonableness. By the time the Settlement was reached, the Parties had collected, reviewed, and produced tens of thousands of pages of documents; conducted six depositions; completed five separate expert reports; briefed several discovery disputes and the merits of Plaintiffs' Motion; and prepared for an evidentiary hearing on the merits. *See* Newberg § 13:49 (noting significance to Rule 23(e)(3)(A) analysis of "extent of discovery," including "documents produced," "depositions undertaken," and "retaining expert witnesses"). All of this discovery and motion practice resulted in a well-developed record on which Class Counsel could thoroughly evaluate the Parties' respective claims and defenses. *Cf. Hill*, 2015 WL 127728, at *7 (approving settlement that was achieved after "extensive factual discovery"); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 73 (D. Mass. 2005) (approving settlement reached after "parties engaged in 'extensive discovery'" and "significant motion practice during the course of the litigation," and "ha[d] consistently and vigorously been preparing for trial"); *Rapuano v. Trs. of Dartmouth Coll.*, No. 18 Civ. 1070 (D.N.H. July 10, 2020), ECF 69 ¶ 5 (incorporating by reference the reasoning in *Rapuano v. Trs. of Dartmouth Coll.*, 334 F.R.D. 637, 655 (D.N.H. 2020) (preliminarily approving settlement resulting from "significant discovery," independent investigations, and "three full days of mediation")).

Thus, under circumstances such as those present here, the adequacy of class representation supports the presumptive reasonableness of the Settlement. *See Bezdek*, 809 F.3d at 82.

B. The Settlement Results from Arm's Length Negotiations

The Settlement here was undeniably "negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). Courts treat "the involvement of a neutral or court-affiliated mediator or facilitator in . . . negotiations" as evidence that "they were conducted in a manner that would protect and further the class interests." 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(2); *Rapuano*, 334 F.R.D. at 655 (noting significance of three days of mediation to settlement approval); *Crane v. Sexy Hair Concepts, LLC*, No. 17 Civ. 10300, 2019 WL 2137136, at *2 (D. Mass. May 14, 2019) (approving settlement negotiated "at arms' length and with the assistance of an experienced mediator and experienced counsel"); *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995) (affirming settlement approval where "a Magistrate Judge presided over the settlement negotiations" (footnote omitted)); *accord Common Cause R.I.*, 2020 WL 4365608, at *4 (approving consent decree drafted after "a weekend of negotiations").

Here, the Settlement was reached after the Parties participated in a Court-ordered mediation with Magistrate Judge Patricia A. Sullivan acting as mediator. The mediation included the submission of written mediation statements, a full-day mediation conference, and an additional week of intensive negotiations overseen by Judge Sullivan. Judge Sullivan's participation as the mediator in this case offers significant assurance that negotiations occurred at "arm's length," especially given the compromises ultimately reflected in the Settlement. *See Common Cause R.I.*, 2020 WL 4365608, at *4. As noted above, a settlement like this one—"negotiated at arm's length" and after the Parties "conducted sufficient discovery"—is entitled to a presumption of reasonableness. *See Bezdek*, 809 F.3d at 82 (quoting *In re Pharm. Indus. Average Wholesale Price*

Litig., 588 F.3d 24 at 32–33).

C. The Settlement Provides Adequate Relief to the Class

Rule 23(e)(2) next directs courts to consider whether a settlement provides adequate relief to the class, based on the following four subfactors:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3).

Fed. R. Civ. P. 23(e)(2)(C). The second subfactor is not relevant where, as here, plaintiffs seek only injunctive relief, which need not be "distributed" to the class. *See, e.g.*, *Nelson v. Constant*, No. 17 Civ. 14581, 2020 WL 5258454, at *8 (E.D. La. Sept. 3, 2020); *see also* Newberg § 13:51. Taking the remaining three subfactors into consideration, the Parties' Settlement provides adequate relief to the Class.

1. The "Costs, Risks and Delay of Trial and Appeal" Weigh in Favor of the Settlement's Reasonableness

As to subfactor (i)—"the costs, risks, and delay of trial and appeal"—the Settlement offers substantial benefits to the Class, placing it comfortably within the "range of reasonableness" when accounting for "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*, 228 F.R.D. at 186 (quoting *Newman*, 464 F.2d at 693); *see also Del Sesto*, 2019 WL 5067200, at *3 (noting significance of "the complexity, expense and likely duration of the litigation," "the risks of establishing liability," "the range of reasonableness of the settlement . . . in light of the best possible recovery," and "all the attendant risks of litigation" when evaluating settlement's reasonableness

(quoting *Baptista*, 859 F. Supp. 2d at 240–41)); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 207 (D. Me. 2003) ("Obviously, the first and fundamental question is how the value of the settlement compares to the relief the plaintiffs might recover after a successful trial and appeal, discounted for risk, delay and expense."). As an initial matter, the Settlement provides significant relief for the Class. The University has agreed, among other things, to: (i) reinstate two out of five women's teams to varsity status (and ensure that the number of women's teams restored to varsity status remains at least two more than the number of men's teams restored); (ii) not reduce the status of or eliminate any women's varsity team for the remaining life of the Joint Agreement;[1] (iii) maintain the same level of support for each restored varsity women's team that the team received prior to May 2020 (although that level of support may be reduced commensurate with reductions in overall athletics funding); (iv) not add any new men's varsity teams during the remaining life of the Joint Agreement; and (v) for purposes of calculating compliance with the Joint Agreement, count only once sailors who are identified on one or more sailing squad list(s). *See* ECF 389-1 at 1–2.

These benefits to the Class under the Settlement are substantial and overall provide the relief sought in Plaintiffs' Motion—namely, the University's "compliance with its obligations under the Joint Agreement." *See, e.g.*, ECF 378 at 42. Here, with the reinstatement of two out of the five transitioned women's varsity teams and only counting women sailors one time for purposes of the Joint Agreement, compliance with the Joint Agreement's proportionality requirement for the 2020-21 academic year can no longer be in dispute, even despite the Parties' vigorously litigated disagreements as to whether compliance was achieved under the status quo after June 2020. *See, e.g.*, ECF 380 at 43.

[1] The termination of the Joint Agreement is addressed in Section II.B, *infra*.

In addition to providing these benefits to the Class, the Settlement also allows the Parties to avoid the uncertainty, delay, and burden of continued litigation. *See, e.g.*, *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 261 (D.N.H. 2007) ("[R]isk, complexity, expense, and duration all weigh[ed] in favor of approving the proposed settlement."); *Del Sesto*, 2019 WL 5067200, at *6 (approving settlement that avoided "a costly and time-consuming trial"). Proceeding with an evidentiary hearing on the merits would only drive litigation costs higher in this case, while the Settlement, of course, avoids further costs from being incurred. *Cf. Del Sesto*, 2019 WL 5067200, at *6. What is more, "[c]ounsel for both [sides] made it clear by their words and deeds during the course of the litigation that they intended to [and did] vigorously contest" the claims at issue. *In re Tyco*, 535 F. Supp. 2d at 260. Indeed, if litigation were to continue, either side would be expected to appeal an unfavorable decision, further contributing to the mounting expenses and continued burdens of resolving this dispute through litigation. It also bears reiterating that continued litigation imposes a particularly acute potential burden on both Parties in light of the continuing challenges presented by the COVID-19 pandemic. In short, in light of the anticipated "costs, risks, and delay of trial and appeal" in securing relief, Fed. R. Civ. P. 23(e)(2)(C), the Settlement constitutes a reasonable resolution of the claims at issue.

2. The Remaining Subfactors Weigh in Favor of the Settlement's Reasonableness

As to subfactors (iii) and (iv), there are no agreements requiring disclosure—other than those already disclosed in the Preliminary Approval Motion (*i.e.*, the Settlement Terms and Amended Joint Agreement, ECF 389-1 & 389-2)—that were "made in connection with the proposal" under Rule 23(e)(3), *see* ECF 389 at 5. Nor is there yet a negotiated award of attorney's fees that could somehow impact the reasonableness of the Settlement. *Cf.* Newberg § 13:48 ("[I]n assessing the reasonableness of a settlement, . . . an inordinate fee may be the sign that counsel

sold out the class's claims at a low value in return for the high fee."). Indeed, the Settlement provides for the award of reasonable attorney's fees, costs, and expenses to Plaintiffs' counsel only if the Settlement is approved by the Court, and only in an amount determined in mediation with Judge Sullivan or, if no agreement is reached in mediation, by the Court. *See* ECF 389-1 at ¶ 8. Under these circumstances, there is no reason to question the reasonableness of the Settlement. *See Blessing v. Sirius XM Radio Inc.*, 507 F. App'x 1, 2 (2d Cir. 2012) (approving fee award and class action settlement where "the fee was negotiated only after settlement terms had been decided and did not, as the district court found, reduce what the class ultimately received"); Newberg § 13:50 (instructing, in context of Rule 23(e)(2), that "[f]ees should not be negotiated between class counsel and defendant's counsel until after a settlement of the class's claims has been agreed upon"); *see also Common Cause R.I.*, 2020 WL 4365608, at *5 (approving consent decree that was "not legally impermissible," and where third-party objector provided "no evidence of collusion among the parties"); *Durrett*, 896 F.2d at 604 ("[t]here is no suggestion, or basis for one, that the proposed [settlement] would violate any law"); *Del Sesto*, 2019 WL 2394251, at *3 (noting court's independent obligation to ensure the absence of collusion). Moreover, "[u]ltimately, any award of attorney's fees must be evaluated under Rule 23(h)" for reasonableness in any event. 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e)(2).

D. The Settlement Treats Class Members Equitably

Finally, Rule 23 requires the court to determine whether "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). "Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." 2018 Advisory Committee Notes to Fed. R. Civ.

P. 23(e)(2). "There is no requirement that all class members in a settlement be treated *equally*"; rather, Rule 23 requires only that all class members are treated fairly. *Swinton v. SquareTrade, Inc.*, 454 F. 3d 848, 875 (S.D. Iowa Apr. 14, 2020) (emphasis in original) (finally approving settlement where all class members would "benefit from injunctive relief" and receive a settlement coupon, but only some class members would receive a product refund); *cf. Radcliffe v. Hernandez*, 794 F. App'x 605, 607 (9th Cir. 2019) (stating that Rule 23(e)(2)(D)'s "flexible standard allows for the unequal distribution of settlement funds so long as the distribution formula takes account of legitimate considerations and the settlement remains 'fair, reasonable, and adequate'").

Here, in this "injunctive-relief-only class action" litigation, all of the Class members have the same claim: namely, ensuring Brown's varsity athletics program is in compliance with the Joint Agreement's gender proportionality requirement. *Cf. Gumm v. Ford*, No. 15 Civ. 41, 2019 WL 479506, at *7 (M.D. Ga. Jan. 17, 2019) (holding that injunctive relief "class action settlement which provides for changes to policies and practices . . . appl[ied] equally to all class members"); *see also In re Google LLC St. View Elec. Commc'ns Litig.*, No. 10 Md. 2184, 2020 WL 1288377, at *1, 15 (N.D. Cal. Mar. 18, 2020) (approving settlement as equitable where "a vast but nonetheless difficult-to-identify class of people suffered intangible injury, and minimal damages" and "each receive[d] identical injunctive relief and enjoy[ed] the benefits conferred by . . . *cy pres* recipients in furthering their interest").

The fact that the Settlement here reinstates some, but not all, of the women's varsity teams affected by Brown's May 2020 decision does not result in any intra-Class inequity. To the contrary, the Settlement accounts for the fact that, so long as it complies with the Joint Agreement and Title IX, Brown retains "discretion to decide how it will balance its program" and "may eliminate its athletic program altogether, it may elevate or create the requisite number of women's positions, it

may demote or eliminate the requisite number of men's positions, or it may implement a combination of these remedies." *Cohen v. Brown Univ.*, 879 F. Supp 185, 214 (D.R.I. 1995); ECF 384 at 20. In other words, Class members have rights to "equal opportunities for [Brown's] men and women athletes," but not to the continuation of certain specific varsity programs. *Cohen*, 879 F. Supp at 214. Accordingly, the Settlement treats all Class members equitably. *Cf. Doe v. Ohio*, No. 91 Civ. 464, 2020 WL 728276, at *2 (S.D. Ohio Feb. 12, 2020) (holding settlement that "contain[ed] commitments from the State that will benefit all class members" and "especially in the 11 Districts" that most needed improvement treated class members equitably under Rule 23(e)(2)).

II. The Reaction of the Class to the Settlement

To determine the reasonableness of a proposed settlement under Rule 23(e)(2), courts also consider "the reaction of the class to the settlement." *Del Sesto*, 2019 WL 5067200, at *3. Here, nothing about the Class members' reactions provides any reason to doubt the fairness, reasonableness, and adequacy of the Settlement. Indeed, only one objection was filed on behalf of just twelve varsity women student-athletes at Brown. *See* ECF 391 ("the Objection"). The number of objectors, representing a small fraction of the Class members as a whole and about 2.7 percent of the women varsity student-athletes,[2] is itself evidence of the Settlement's reasonableness. *See Del Sesto*, 2019 WL 5067200, at *4 ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 118 (2d Cir. 2005))); *Medoff*, 2016 WL 632238, at *6 (same); *In re Colgate-Palmolive Softsoap Antibacterial Hand Soap Mktg. & Sales Practices Litig.*, No. 12 Md. 2320, 2015 WL 7282543, at *12 (D.N.H. Nov. 16, 2015) (same); *In re Tyco*, 535 F. Supp. 2d at

[2] Notice of the Settlement was emailed to over 3,560 individuals. Last year, according to Brown's annual report under the Joint Agreement, there were, on average, 447.5 women participating in the varsity program at Brown.

269 ("Only a tiny percentage of the class has objected to the proposed fee request . . . . Thus, the reaction of the class weighs in favor of approval."). Moreover, the three purported inadequacies set forth in the Objection concerning the Class representatives, the nature of the relief, and the notice provided are all meritless.

A. The Class Representatives Have Already Been Approved by the Court

The Objection raises no legitimate concerns about the adequacy of the Class representatives. As a threshold matter, to the extent the objectors couch their challenge in terms of "Settlement Class Certification," Objection at 5, their argument rests on a fundamental misunderstanding of the procedural posture here. The Court certified the Class at the time it was originally filed and, in doing so, determined the named Plaintiffs would adequately and fairly represent the Class. *See Cohen v. Brown Univ.*, 809 F. Supp. 978, 979–80 (D.R.I. 1992); Fed. R. Civ. P. 23(a)(4). The Settlement presents no reason for the Court to revisit that certification here. *See* 2018 Advisory Committee Notes to Fed. R. Civ. P. 23(e) ("If the court has already certified a class the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted."); *see also In re Banc of Cal. Sec. Litig.*, No. 17 Civ. 118, 2019 WL 6605884, at *1 (C.D. Cal. Dec. 4, 2019) (explaining that fairness determination does not require court to revisit certification); Newberg § 13:16 (same).

To the extent the Objection challenges the adequacy of the Class representatives for purposes of the Settlement's reasonableness under Rule 23(e), the objectors present no valid reason to doubt that "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A); *see also* Section I.A, *supra*. While the objectors attempt to challenge the Class representatives' qualifications "because they are no longer class members," Objection at 6—presumably because they have graduated and are no longer students—that argument is

erroneous as a matter of law. It is well established that where, as here, a class has been certified, the named plaintiffs can continue to represent the class in a case against the named defendants, "even though the claim of the named plaintiff has become moot." *Sosna v. Iowa*, 419 U.S. 393, 402 (1975); *accord S. Orange Chiropractic Ctr., LLC v. Cayan LLC*, No. 15 Civ. 13069, 2016 WL 1441791, at *5 (D. Mass. Apr. 12, 2016); *see also Roman v. Korson*, 307 F. Supp. 2d 908, 914 (W.D. Mich. 2004) (concluding that the class "can be represented by named class members," even if their individual claims have been settled).

Indeed, when the Court approved the Joint Agreement in 1998 (after notice to the Class), all of the named Plaintiffs had already long since graduated. Here, current Class members actively participated in all phases of these proceedings leading up to the Settlement, including the provision of ten declarations from current members of the teams transitioned from varsity status and consultation on the mediation. No Class member, including the present objectors, sought to be substituted or added to the list of those formally certified as Class representatives on any ground, including lack of adequate representation. From the perspective of Class Counsel, in the absence of a requirement to add or substitute current athletes, it was important to make clear that no student or team would be considered as having a greater claim to direct the litigation or to reinstatement than any other.

Nor does "due process require[] that named representatives from each female sport and each class year be appointed" as Class representatives. Objection at 6. This rigid and formulaic conception of adequacy is unsupported by citation to any relevant authority. *See id.*[3] That is

[3] The only case the objectors cite for this proposition is *Telles v. Midland College*, in which the court certified "members of the Midland College softball team" to represent a settlement class of "former, current, and future members of the team." No. 17 Civ. 83, 2018 WL 7352424, at *3 (W.D. Tex. Sept. 7, 2018). That case says nothing about whether due process requires class representatives from every team at a university to represent a certified class of *all* female student-athletes alleging program-wide claims. *Cf. Cohen*, 809 F. Supp. at 979 (defining class). And as the law of this case makes clear, *see id.*, due process imposes no such requirement. *See generally* Newberg

unsurprising, given that the objectors' position contravenes not only well-established precedent, *see, e.g.*, *Foltz*, 269 F.R.D. at 423 ("[S]everal courts have recognized that members of eliminated teams may serve as representatives of a class of all current and future athletes."), but also the law of this case, *Naser Jewelers, Inc. v. City of Concord*, 538 F.3d 17, 20 (1st Cir. 2008) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983))). The same goes for the Objection's alternative suggestion that "subclassing" would be appropriate here. Objection at 6 (citing *S.G. ex. Rel. Gordon v. Jordan Sch. Dist.*, No. 17 Civ. 677, 2018 WL 4899098, at *2 (D. Utah Oct. 9, 2018) (resolving a motion for class certification, not settlement approval)). The Court long ago certified a single class of "all present and future Brown University women [student-athletes]," without any subclasses, and appointed only "members of the women's gymnastics and volleyball teams" to represent them. *Cohen*, 809 F. Supp. at 979. That decision is the law of this case.

Moreover, in this case, Class Counsel worked diligently to make sure that both the Class representatives and the members of the Class most directly affected by Brown's recent decision to transition five women's teams from varsity status—the current members of those teams—were fully informed about, and provided input into, the prosecution and proposed settlement of the case. It is notable that none of those Class members directly affected by the transition have objected, and that the small number of Class members who did object never discussed their concerns with

§ 3:58 ("Adequacy does not require complete identity of claims or interests between the proposed representative and the class."); *see also Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012) (explaining, under Rule 23(a)(4), the "class, as certified" need not be "monolithic"; "perfect symmetry of interest is not required and not every discrepancy among the interests of class members renders a putative class action untenable"). Other Title IX cases are in accord in rejecting such arguments for sport-specific class representation. *See, e.g.*, *A.B. by C.B. v. Haw. State Dep't of Educ.*, 334 F.R.D. 600, 611 (D. Haw. 2019); *Portz v. St. Cloud State Univ.*, 297 F. Supp. 3d 929, 946-47 (D. Minn. 2018); *Foltz v. Del. State Univ.*, 269 F.R.D. 419, 423-24 (D. Del. 2010) (collecting cases).

Class Counsel.

B. The Nature of the Relief Is Fair and Reasonable

The Objection challenges the Settlement's relief as "neither fair nor reasonable." Objection at 7. But as already discussed above, "the district court must presume the settlement is reasonable" where, as here, "the parties negotiated at arm's length and conducted sufficient discovery," *Bezdek*, 809 F.3d at 82 (quoting *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d at 32–33), and the Objection fails to overcome that presumption, *see Rolland v. Cellucci*, 191 F.R.D. at 6; *Del Sesto*, 2019 WL 5067200, at *4. Moreover, a settlement need not be the "fairest possible resolution of the claims of every individual," *Shy*, 1993 WL 1318607, at *2, or "the best possible recovery," *Del Sesto*, 2019 WL 5067200, at *3. Rather, it must simply be within a reasonable range, taking the agreement "as a whole," *Rolland v. Patrick*, 562 F. Supp. 2d at 178 (quoting *Giusti-Bravo v. U.S. Veterans Admin.*, 853 F. Supp. 34, 36 (D.P.R. 1993)), and "balanc[ing] benefits and costs," *Nat'l Ass'n of Chain Drug Stores Fund*, 582 F.3d at 45. In other words, in focusing on the fact that the Settlement "alters the rights currently possessed by class members under the Joint Agreement," Objection at 7, the Objection fails to appreciate that *all* consent decrees and settlements—a judicially preferred method of class action resolution, *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d at 36—require *compromise*, *see, e.g.*, *Common Cause R.I.*, 2020 WL 4365608, at *4 (approving consent decree after fairness hearing in part based on existence of "compromise and the fact that the plaintiffs did not get everything that they sought in the Consent Decree").

Each of the Objection's challenges to the Settlement's relief fails to establish that the Settlement is not fair or reasonable:

Termination of Joint Agreement. While the Objection takes specific issue with the

Parties' agreement to terminate the Joint Agreement as of August 31, 2024 (ECF 389-2, § III), Objection at 7, there is nothing unfair or unreasonable about terminating a consent judgment, even where its effect was originally indefinite. *See In re Pearson*, 990 F.2d 653, 658 (1st Cir. 1993) ("In institutional reform litigation, injunctions should not operate inviolate in perpetuity."); *Still's Pharmacy, Inc. v. Cuomo*, 981 F.2d 632, 639 (2d Cir. 1992) ("[A] consent decree is 'not intended to operate in perpetuity.'" (quoting *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991))); *Youngblood v. Dalzell*, 925 F.2d 954, 961 (6th Cir. 1991) (noting that "the court is not required to leave the decree in force indefinitely"); *see also Jensen v. Stiglich*, 36 F.3d 1099, 1994 WL 405768, at *5 n.4 (7th Cir. 1994) (rejecting a proposed standard for determining whether a court-appointed monitor could remain involved in the litigation, because the standard "would justify the continuation of consent decrees in perpetuity"); *Smith v. Bd. of Educ.*, 769 F.3d 566, 572 (8th Cir. 2014) ("A court of equity always retains discretion to modify . . . a consent decree," including "when changed factual conditions make compliance with the decree substantially more onerous," "when a decree proves to be unworkable because of unforeseen obstacles," or "when enforcement would be detrimental to the public interest." (quoting *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 384 (1992))). That is especially true where, as here, "the goals of th[e] decree have been achieved," *see* Objection at 8 (noting just four instances of noncompliance over 20 year–life of the Joint Agreement, all of which were reported and rectified, and none after 2010); "there has been little legal activity concerning the decree in recent years," *see* ECF 356-357 (reflecting 16 years without litigation); and "litigation is now . . . rais[ing] more current concerns," *Youngblood*, 925 F.2d at 961, which the Settlement will resolve in a manner fully compatible with the obligations under the Joint Agreement and provide additional safeguards and benefits for compliance through the 2023-24 academic year.

Funding Safeguards. The Objection also argues that the Settlement "forfeits critical rights and safeguards relative to the funding of Brown's women's sports." Objection at 8. However, all funding safeguards for women's sports under the Joint Agreement expired on or before the conclusion of academic year 2001-02, *see* ECF 357-2 ("Joint Agreement"), § IV, and all annual reporting relating to funding expired on or before the conclusion of academic year 2001-02, *id.* § V.B.1-2. Thus, there are no "rights or safeguards relative to the funding of Brown's women's sports" under the Joint Agreement at this time. In contrast, the Settlement would impose new funding protections to the reinstated Equestrian and Fencing teams and would prohibit Brown from eliminating any additional women's or coed team through the conclusion of academic year 2024. These are critical rights and safeguards that will be created by the Settlement and do not currently exist, further confirming that Class relief under the Settlement is more than adequate.

Additional Relief for Class Members Generally. The objectors—current members of the Gymnastics and women's Ice Hockey teams—start with the premise that the Settlement "fails to secure *them* meaningful or equivalent additional relief." Objection at 7 (emphasis added). In so doing, they ignore the fact that each of them will personally and directly benefit from the Settlement because Brown has agreed not to cut their teams throughout their expected time remaining at Brown.[4] In the absence of the Settlement, Brown would be free to continue to reduce the size of its varsity program, so long as it achieved the 2.25% differential. For athletes on each of the varsity teams, including Gymnastics and Ice Hockey, as well as the members of the reinstated Equestrian and Fencing teams, this is additional, meaningful relief, from which they personally benefit.

[4] The parties have reviewed the Roster Declaration Forms for 2020-21 for Gymnastics and women's Ice Hockey. It appears that one of the twelve objectors is a member of the class of 2024; the rest are sophomores, juniors and seniors.

The Settlement also provides meaningful, additional relief to the Class as a whole, including the members of the three teams that have not been reinstated, for at least two more reasons. First, Title IX's requirement of non-discrimination in athletics is program-wide, not team specific, which is why a class that does not differentiate among athletic teams is appropriate. *See supra* at 19-20. After the conclusion of the 2001-02 academic year, when the protection for Gymnastics ended, no particular women's team was protected from elimination. Under the Settlement, through academic year 2023-24, the current teams enjoy such protection, which otherwise would not necessarily be available under Title IX or the Joint Agreement.

Second, the Settlement contains an agreement and obligation that Brown reinstate at least one more of the eliminated women's teams for every one of the eliminated men's teams that it hereafter may reinstate. If Brown were to restore each of the eliminated men's teams of Golf, Fencing and Squash, for example, it would be obliged, under the Settlement, to reinstate each of the remaining women's teams that it transitioned from varsity status (and ultimately to ensure that the number of women's teams restored to varsity status remains at least two more than the number of men's teams restored). This potential obligation constitutes a benefit, albeit not as valuable as the required reinstatement of Equestrian and Fencing, to the Class member-participants on those teams that must be reinstated in conjunction with any reinstatement of men's teams.

Reporting. To the extent that the objectors assume that the Joint Agreement's reporting requirements are more robust than reporting requirements separately mandated by law, they are incorrect. While there are differences in the timing and content of these reporting requirements, those differences are, respectfully, not material to one's ability to assess Brown's compliance with

Title IX, and specifically the Three-Part Test, *see, e.g.*, 1996 Dear Colleague Letter.[5] This is because a host of reporting requirements have come into existence since the case started. The Equity in Athletics Disclosure Act ("EADA") imposes at least comparable, and in other respects additional, reporting requirements, requiring information not only on number of participants, but also financial data relating to expenditures and coaching support.[6] *See* 34 C.F.R. § 668.47.

There is a difference in the method of counting team size between the 1998 Joint Agreement and the EADA. The Joint Agreement measures participation on both the first and last day of competition, Joint Agreement § III.F, while the EADA requires disclosure of data based only on the first day of competition. 34 C.F.R. § 668.47(b)(3). In addition, the Joint Agreement counts winter and spring track as one sport, Joint Agreement § III.F.1, while the EADA does not include that restriction, 34 C.F.R. § 668.47.

Overall, the differences in the reporting requirements under the EADA and the Joint Agreement are not significant to Class members' ability to assess gender proportionality in athletics participation at Brown to determine equal opportunity.

Retaliation. The objectors also assume that the anti-retaliation protection in the Joint Agreement will be lost in 2024. It will not be. At the time the parties entered the Joint Agreement in spring 1998, the question of whether Title IX accorded direct protection against retaliation for opposing Title IX violations was not clearly established. But that changed in 2005, when the U.S. Supreme Court resolved a circuit split and held that "the private right of action implied by Title IX encompasses claims of retaliation." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005).

---

[5] Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, U.S. Dep't of Educ. at 4, Office of Civil Rights (Jan. 16, 1996).

[6] Plaintiffs initially received annual budgets, while there was a minimum funding requirement, but that reporting requirement ended when the guaranteed funding expired.

Enforcement. The objectors are correct when they state that "[t]he Joint Agreement provides a streamlined method to obtain enforcement, including clear, objective measurements, without the need to initiate new litigation." Objection at 8. But it is Plaintiffs' view that, with the passage of time and development of Title IX case law and application, that mechanism may operate as much as a shield—by providing Brown a defense to a Title IX argument that a gap of 2.25% under the circumstances fails to achieve "substantial proportionality"—as it does as a sword—enabling the Class to establish that a gap greater than 2.25% is non-compliant, regardless of the size of the program. *See, e.g.*, 1996 Dear Colleague Letter, *supra*; 1979 Title IX Policy Interpretation, 44 Fed. Reg. 71,413 (Dec. 11, 1979); *see generally Equity In Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 97 (4th Cir. 2011) (recounting regulatory history and development of Three-Part Test). And it is also Plaintiffs' view that, in the absence of the Joint Agreement, binding upon both Brown and the Class, women athletes would be able to present a claim, which the Joint Agreement forecloses, that the "substantial proportionality" prong of Title IX's Three-Part Test would not be satisfied—given the size of Brown's varsity program—by a differential of 2.25%, because that participation gap at Brown is large enough to field one or more teams. *See, e.g.*, *Biediger v. Quinnipiac University*, 691 F.3d 85, 106 (2d Cir. 2012) (citing 1996 Dear Colleague Letter, *supra* at 4).[7]

Furthermore, the Settlement provides an additional vehicle to resolve any compliance disputes during the remaining term of the Joint Agreement (which will have been in place for some 25 years when it ends) and leaves the annual reporting requirements in place to track compliance through the balance of the Joint Agreement. The last report in August 2024 will provide information concerning the year then concluding, contemporaneous with its conclusion, which will

[7] Defendants take no position on Plaintiffs' views here, which Defendants believe are speculative and beside the point given that Brown is and will remain in compliance with Title IX's requirements.

be available to any Class member who may harbor concerns in the future about Brown's varsity lineup.

Intraclass Equity. Finally, the Objection claims that the Settlement "treats class members inequitably relative to each other" by reinstating just two out of five teams. Objection at 8. It is worth noting that no members of the three women's teams that have not been restored to varsity status—Golf, Skiing, and Squash—lodged any objection to the Settlement. And, as explained above, *see* Section I.D, *supra*, the Objection suffers from a basic misunderstanding of Brown's obligations, and the Class members' rights, under the Joint Agreement. Neither Title IX nor the Joint Agreement, even without the amendment proposed as part of the Settlement, has ever obligated Brown to offer opportunities to participate on a particular men's or women's varsity team. Instead, as this Court made clear over two decades ago, Brown has always retained "discretion to decide how it will balance its program" and, in exercising that discretion, Brown "may eliminate its athletic program altogether, it may elevate or create the requisite number of women's positions, it may demote or eliminate the requisite number of men's positions, or it may implement a combination of these remedies." *Cohen*, 879 F. Supp at 214. Thus, to the extent the Objection maintains that the Joint Agreement protects against elimination of any particular team, it is wrong. And, more importantly, the Objection does not dispute that the reinstatement of the women's varsity Equestrian and Fencing teams accomplishes the Joint Agreement's gender proportionality goal for the 2020-21 academic year.[8]

[8] The Objection's contention that terminating the Joint Agreement treats "future graduation classes" inequitably relative to present students is also meritless. Objection at 8. If that were true, then the Joint Agreement could never be modified or terminated by the Court. *See, e.g., Bos. Chapter, NAACP, Inc. v. Beecher*, 295 F. Supp. 3d 26, 36 (D. Mass. 2018) (granting motion to modify consent decree and imposing "presumptive five-year termination date"); *see also supra* 21-22.

C. The Class Notice Was Adequate

Finally, the Objection challenges the adequacy of the Class Notice, suggesting (among other things) that the notice should have been disseminated on the website of USA Gymnastics, a website over which neither party has control or access, and (presumably) the analogous websites of the "national governing body" for every other sport Brown offers; through a "joint press release"; and through "direct[]" notice to any female student "at any point in the recruitment process." Objection at 8–9. But the law does not require such procedures without regard to practical constraints. Rather, all that Rule 23 and due process require is "notice in a reasonable manner," Fed. R. Civ. P. 23(e)(1)(B), or in other words, "the best notice practicable under the circumstances," *Duncan v. Nissan N. Am., Inc.*, No. 16 Civ. 12120, 2020 WL 5901399, at *1 (D. Mass. Aug. 25, 2020); *see also Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1337 (1st Cir. 1991) (Rule 23(e) "leaves the form of the notice to the court's discretion"); *Nilsen v. York Cnty.*, 382 F. Supp. 2d 206, 210 (D. Me. 2005) (class notice satisfies requirements "if it is reasonably calculated to reach the class members and inform them of the existence of and the opportunity to object to the settlement"); *Wal-Mart*, 396 F.3d at 114 ("There are no rigid rules to determine whether a settlement notice to class members satisfies constitutional and Rule 23(e) requirements.").

Here, the Parties distributed Class Notice pursuant to the procedures approved by the Court, ECF 390, and in a manner that courts have already determined to be reasonably calculated to reach Class members. *See In Re Loestrin 24 Fe Antitrust Litig.*, No. 13 Md. 2472, 2020 WL 5203323, at *2 (D.R.I. Sept. 1, 2020) (holding due process satisfied where notice was sent to all class members by e-mail and posted on a settlement website); *In re TelexFree Sec. Litig.*, No. 14 Md. 2566, 2020 WL 4340966, at *2 (D. Mass. July 28, 2020) (same). By all accounts, Class Notice reached all

intended recipients, including the twelve objectors, and any claim that it did not reach certain Class members is purely speculative.

CONCLUSION

Based on the foregoing, the Parties respectfully request that the Court enter an order granting final approval of the Settlement as fair, reasonable, and adequate; overruling the Objection (ECF 391); and approving the Amendment to the Joint Agreement (ECF 389-2).

Dated: December 4, 2020

Respectfully submitted,

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

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

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

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

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

Counsel for Defendants

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