

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: MERCER COUNTY
DOCKET NO.: C-99-02

WILLIAM ROBERTSON, ANNE R. MEIER,
KATHERINE ERNST and ROBERT
HALLIGAN,

Plaintiffs,

vs.

PRINCETON UNIVERSITY, SHIRLEY M.
TILGHMAN, PETER WENDELL and
STEPHEN OXMAN,

Defendants,

and

THE ROBERTSON FOUNDATION,

Nominal Defendant.

**MEMORANDUM OF LAW IN SUPPORT OF THE PARTIES'
JOINT MOTION ON CONSENT SEEKING THE COURT'S APPROVAL
OF SETTLEMENT AGREEMENT AND DISMISSAL OF ACTION
WITH PREJUDICE AND WITHOUT COSTS**

BLANK ROME LLP
301 Carnegie Center, 3rd Floor
Princeton, NJ 08540
609.750.7700

SHARTSIS FRIESE LLP
One Maritime Plaza, 18th Floor
San Francisco, CA 94111
415.421.6500

*Attorneys for Plaintiffs William Robertson,
Anne R. Meier, Katherine Ernst and Robert
Halligan*

LOWENSTEIN SANDLER PC
65 Livingston Avenue
Roseland, New Jersey 07068
973.597.2500

SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
212.455.2000

*Attorneys for Defendants Princeton University,
Shirley M. Tilghman, Peter C. Wendell and
Stephen A. Oxman*

TABLE OF CONTENTS

| | <u>Page</u> |
|--|--------------------|
| TABLE OF AUTHORITIES | ii |
| PRELIMINARY STATEMENT | 1 |
| BACKGROUND | 4 |
| A. Procedural History | 4 |
| B. Settlement Terms | 6 |
| ARGUMENT | 8 |
| I. The Settlement Agreement Should Be Approved Because It Has Been Approved By All Interested Parties, Including The Robertson Foundation’s Independent Settlement Committee | 10 |
| II. The Settlement Agreement Should Be Approved Because Both Princeton and the RFGI Are Required To Use Robertson Foundation Resources Solely To Further the Robertson Foundation’s Important Charitable Object and Purpose..... | 13 |
| III. The Settlement Agreement Should Be Approved Because It Enables The Parties To Resume Their Charitable Activities Without The Cost, Distraction and Uncertainties Involved In A Protracted Trial and Any Ensuing Appeals..... | 14 |
| CONCLUSION..... | 16 |

TABLE OF AUTHORITIES

| CASES | Pages |
|--|----------|
| <i>Brundage v. Estate of Carambio</i> , 195 N.J. 575 (2008) | 8 |
| <i>Chattin v. Cape May Greene, Inc.</i> , 216 N.J. Super. 618 (App. Div. 1987) | 8, 9 |
| <i>City of Paterson v. Paterson Gen. Hosp.</i> , 104 N.J. Super. 472 (App. Div. 1969), <i>aff'd</i> 53 N.J. 421 (1969)..... | 9 |
| <i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998) | 9 |
| <i>Honeywell v. Bubb</i> , 130 N.J. Super. 130 (App. Div. 1974) | 13 |
| <i>Ihlenfeld v. Ihlenfeld</i> , 1996 WL 453431 (Del. Super. Ct. 1996)..... | 15 |
| <i>Jannarone v. W.T. Co.</i> , 65 N.J. Super. 472 (App. Div.), <i>certif. den.</i> 35 N.J. 61 (1961)..... | 8 |
| <i>Judson v. Peoples Bank & Trust Co.</i> , 25 N.J. 17 (1957) | 9 |
| <i>Morris County Fair Hous. Council v. Boonton Township</i> , 197 N.J. Super. 359 (Law. Div. 1984)..... | 9, 15 |
| <i>In re Oracle Derivative Litig.</i> , 808 A.2d 1206 (Del. Ch. 2002)..... | 10 |
| <i>Pascarella v. Bruck</i> , 190 N.J. Super. 118 (App. Div. 1983) | 13 |
| <i>Robbins v. Alibrandi</i> , 127 Cal. App. 4th 438 (Cal. App. 1st Dist. 2005)..... | 12 |
| <i>Rome v. Archer</i> , 197 A.2d 49 (Del. 1964) | 12 |
| <i>Tabaac v. Atlantic City</i> , 174 N.J. Super. 519 (Law Div. 1980)..... | 8, 9, 10 |

Zapata v. Maldonado,
430 A.2d 779 (Del. 1981)10

STATUTES

8 Del. C. § 141(c).....10

Section 501(c)(3) of the Internal Revenue Code14

Section 509(a)(3) of the Internal Revenue Code12

Section 145 of the Delaware General Corporation Law.....7, 8

RULES

Rule 4:32-2(e)16

Rule 4:32-2(e)(1)(C)9

Rules 4:32-2(e) and 4:32-31, 9

Rule 4:32-3.....9

Pursuant to Rules 4:32-2(e) and 4:32-3 of the Rules Governing the Courts of the State of New Jersey William Robertson, Anne R. Meier, Katherine Ernst and Robert Halligan (“plaintiffs”), The Trustees of Princeton University (“Princeton”), Shirley M. Tilghman, Peter C. Wendell and Stephen A. Oxman (the “individual defendants,” and collectively with Princeton, the “Princeton defendants”), and the Robertson Foundation as the nominal defendant respectfully submit this memorandum of law, together with the Certification of Douglas S. Eakeley, dated December 9, 2008, and the exhibits thereto (the “Eakeley Certification”), in support of their joint motion seeking (i) approval by this Court of the proposed settlement of this action in accordance with the terms and conditions set forth in the parties’ Agreement of Settlement dated December 9, 2008 (the “Settlement Agreement”), an executed copy of which is attached as Exhibit A to the Eakeley Certification; and (ii) dismissal of this action with prejudice and without costs.

PRELIMINARY STATEMENT

Following more than six years of hard-fought litigation, the parties to this derivative action (the “Parties”) have reached a settlement of all claims and counterclaims that, if approved by this Court, will achieve three critical goals – furthering the charitable objectives as agreed upon by the Robertson Family and Princeton in 1961, obtaining finality, and avoiding further burdensome litigation and trial.

As the Court is aware, plaintiffs commenced this suit principally as a derivative action in their capacity as the Family-designated Trustees of the Robertson Foundation (the “Foundation”). They sued the Princeton defendants, as well as two former University-designated Trustees of the Robertson Foundation who previously were dismissed as defendants. Three of the plaintiffs who are children of Charles and Marie Robertson also asserted direct claims against the Princeton defendants.

The Foundation itself, a Delaware non-stock, not-for-profit corporation governed by a seven-member Board (the “Trustees”), is a nominal party to the derivative claims. Trustee Thomas Kean, acting as the Settlement Committee of the Robertson Foundation, has determined that it is in the best interests of the Robertson Foundation to settle this dispute in accordance with the terms of the Settlement Agreement.

The settlement, in short, calls for all claims and counterclaims in the action to be dismissed with prejudice, and for the Robertson Foundation to be dissolved in accordance with its Certificate of Incorporation and its assets split two ways, with one portion staying with Princeton as an endowment fund for the same restricted purpose as the Robertson Foundation, and the other being transferred to a new foundation to pursue the same charitable goals.

First and foremost, the Settlement Agreement provides that all of the Robertson Foundation’s resources will continue to be used to educate graduate students as intended when Marie Robertson made the generous gift in 1961 (facilitated by her husband Charles Robertson, a Princeton alumnus with strong ties to and affection for the University). The majority of the Foundation’s resources will remain as a restricted gift at the University to continue to fund the graduate program of the Woodrow Wilson School of Public and International Affairs (the “Woodrow Wilson School”), as has been the case for the past 47 years, in accordance with Princeton’s understanding and implementation of the Robertson Foundation’s Certificate of Incorporation. The remainder of the Robertson Foundation’s resources will be transferred to a newly formed private foundation whose object and purpose mirrors the object and purpose of the Robertson Foundation, as understood and interpreted by plaintiffs. Thus, the Settlement Agreement honors and preserves the terms of the original charitable gift, as understood by the Princeton defendants and by plaintiffs.

Second, the Settlement Agreement fully and forever resolves any disputes between the parties concerning the purpose or use of Robertson Foundation resources. Critically, upon Court approval, the Robertson Foundation will be dissolved (as contemplated by Article 13 of its Certificate of Incorporation) and its assets will be transferred to a restricted fund at Princeton, subject to Princeton's obligation to transfer a portion of the Robertson Foundation's resources to the new foundation. The dissolution of the Robertson Foundation, including its permanently mandated 4-3 Board of Trustees structure and potential for recurring disputes and disagreements over the appropriate programmatic initiatives in furtherance of the Foundation's purposes, will ensure that this litigation is not repeated again in future years. Toward that end, the parties have expressly agreed to release all claims concerning past use of Robertson Foundation resources, and to waive any right they may have to bring claims concerning future use of Robertson Foundation resources.

Finally, the Settlement Agreement avoids the necessity of a long and complex trial featuring dozens of witnesses and thousands of exhibits that could last as long as six to nine months. The parties estimate that such a trial, together with any ensuing appeals, would cost several million dollars per month above and beyond the costs of the litigation to date. Such costs would be funded from charitable dollars (Princeton from its own endowment and plaintiffs from the Banbury Fund). Moreover, the length and complexity of the trial would distract many of Princeton's non-party faculty members and senior administrators whose time can otherwise be dedicated to furthering and supporting the purposes of Princeton University and the education of its students, while plaintiffs would likewise be distracted from serving the charitable interests of the Banbury Fund and, eventually, their new foundation. In sum, the Court's approval of this

Settlement Agreement will end this costly and burdensome litigation and allow the parties' time and resources to be devoted to charitable purposes rather than to litigation.

Notably, while there are derivative claims in this case such that Court approval of the settlement is statutorily required, this action differs significantly from the ordinary derivative litigation in two significant respects. First, there are no absent shareholders or class members because, under Article 11(a) of the Foundation's Certificate of Incorporation, the Foundation's Trustees are also its sole members.¹ All of the parties affected by the litigation, or their authorized representatives, are before the Court, and all have agreed to the settlement. Second, all payments are being made to charitable organizations pursuant to specified terms.

For these reasons, and for the reasons discussed more fully below, the parties respectfully request that this Court enter an order approving the Settlement Agreement and dismissing this litigation in its entirety.

BACKGROUND

A. Procedural History

Plaintiffs filed their original Complaint on July 17, 2002 alleging, among other things, that the Princeton defendants and/or certain predecessor defendants: (i) failed to carry out the mission of the Robertson Foundation; (ii) improperly decided to transfer control of the Robertson Foundation's investment management program from the Foundation's Investment Committee to the Princeton University Investment Company ("PRINCO"); and (iii) improperly failed to disclose to plaintiffs material facts concerning Princeton's use of the Robertson Foundation's resources. See Eakeley Cert., ¶ 4. Following discovery, plaintiffs filed a Verified Amended Complaint on

¹ Members are the Delaware law equivalent of shareholders in the nonprofit context. Article 11(a) provides that "each member of the corporation shall be a trustee" and "[a]ny person ceasing to be a member of the corporation shall cease to be a trustee [while] any person ceasing to be a trustee shall cease to be a member." See Eakeley Cert., Ex. B at ¶ 11(a).

November 12, 2004, which repeated the allegations in the original Complaint and added allegations that the Princeton defendants and/or certain predecessor defendants improperly diverted to other departments and programs at the University the Robertson Foundation's resources that were to be devoted to the graduate program of the Woodrow Wilson School. *Id.*, ¶ 5.

On February 2, 2005, the then Princeton defendants filed their Amended Answer, Affirmative Defenses, and Counterclaims for Declaratory Relief, denying all of plaintiffs' material allegations and seeking a declaration that, among other things, Princeton University is and will remain the sole beneficiary (*i.e.*, the sole charitable supported organization) entitled to the support of the Robertson Foundation, that the decision of the Foundation's Board of Trustees to retain PRINCO as an investment manager was a valid exercise of business judgment, and that the Foundation's Certificate of Incorporation authorized the expenditure of capital gains and appreciation. *See Eakeley Cert.*, ¶ 6. On or about October 5, 2005, plaintiffs filed their Answer and Affirmative Defenses denying the allegations set forth in the then Princeton defendants' counterclaims. *Id.*, ¶ 7.

In the six years since the filing of the original Complaint, the parties have engaged in substantial discovery and extensive motion practice. The parties have produced more than 500,000 pages of documents. More than 80 fact and expert witnesses were deposed, generating approximately 25,000 transcript pages and 3,500 deposition exhibits. *See Eakeley Cert.*, ¶ 8. Combined, more than fifteen experts were retained by the parties and 29 expert reports have been exchanged. Six motions for summary judgment were filed in 2006 on a record that included 1,860 pages of briefs and 1,866 exhibits. *Id.* The Court's resulting summary judgment opinions totaled more than 360 pages. *Id.*

B. Settlement Terms

The Settlement Agreement was entered into following extensive and hard-fought negotiations between the parties and their respective counsel. The principal terms of the Settlement Agreement are summarized below.

First, pursuant to Article 13 of its Certificate of Incorporation, the Robertson Foundation will be dissolved and its assets will be transferred to Princeton University. See Eakeley Cert., ¶ 9. Princeton will administer these funds as a separate and distinct endowment – to be known as the “Robertson Fund” – solely to further the purposes and object set forth in the Foundation’s Certificate of Incorporation. *Id.* Plaintiffs will not participate in decision-making related to the Robertson Fund and they expressly waive any right to challenge whether Princeton’s use of the Robertson Fund complies with the terms and conditions set forth in the Robertson Foundation’s Certificate of Incorporation. *Id.*

Second, on information and belief, plaintiffs have incorporated a new private foundation, known as the Robertson Foundation for Government, Inc. (“RFGI”), which is dedicated under the terms of its Certificate of Incorporation to furthering plaintiffs’ understanding and interpretation of the purposes and object set forth in the Certificate of Incorporation of the Robertson Foundation. See Eakeley Cert., ¶ 10. The Settlement Agreement further provides that Princeton will pay to RFGI, from the Robertson Fund or any other lawful source to be determined in Princeton’s sole discretion, a total of \$50 million, plus interest, over a period of seven years.² *Id.*, ¶ 11. RFGI will use this funding solely to further plaintiffs’ understanding and

² In general, and subject to certain potential exceptions, the first payment to RFGI will be due on the third anniversary of the “Settlement Effective Date,” which, under the Settlement Agreement, is defined as the date on which this Court’s order approving the Settlement Agreement becomes final and not subject to further appeal. See Eakeley Cert., Ex. A at §§ 1.8. The schedule of payments owed to RFGI is more fully set forth in § 3.2 of the Settlement Agreement. *Id.*, Ex. A.

interpretation of the purposes and object set forth in the Certificate of Incorporation of the Robertson Foundation. *Id.*

Third, the Settlement Agreement also provides for the reimbursement by the Robertson Foundation of the litigation fees and expenses incurred by or on behalf of the parties in this action. *See Eakeley Cert.*, ¶ 12. On information and belief, the Banbury Fund is a private foundation, controlled by William Robertson, his siblings and their husbands, that funded plaintiffs' litigation fees and expenses in this case. The Settlement Agreement provides that Princeton will pay to the Banbury Fund, from the Robertson Fund or any other lawful source to be determined in Princeton's sole discretion, \$40 million in certified litigation expenses in three installments over a period of two years. *Id.*, ¶ 12.³ Plaintiffs have provided to the Princeton defendants documentation confirming that the litigation expenses to be paid to Banbury were actually and reasonably incurred in furtherance of this litigation.

Further, the Robertson Foundation's independent Settlement Committee, comprised of Robertson Foundation trustee and member, former New Jersey Governor, Co-Chairman of the National Commission on Terrorist Attacks Upon the United States (the "9/11 Commission"), and Drew University President Thomas Kean, determined that Princeton and the individual defendants should be indemnified for their litigation fees and expenses incurred in this action (to the extent not recovered from insurance or other sources) pursuant to Article XI of the Robertson Foundation's bylaws and Section 145 of the Delaware General Corporation Law. *See Eakeley*

³ In general, and subject to certain potential exceptions, the first payment to Banbury will be due on the "Settlement Effective Date," which, under the Settlement Agreement, is defined as the date on which this Court's order approving the Settlement Agreement becomes final and not subject to further appeal. *See Eakeley Cert.*, Ex. A at § 1.8. The schedule of payments owed to Banbury is more fully set forth in § 4.3 of the Settlement Agreement. *Id.* Plaintiffs have provided to defendants documentation confirming that the litigation expenses to be paid to Banbury were actually and reasonably incurred in furtherance of this litigation. *See Eakeley Cert.*, ¶ 12.

Cert., ¶ 13.⁴ The Settlement Agreement provides that Princeton and the individual defendants will be indemnified from the Robertson Fund or any other lawful source to be determined in Princeton's sole discretion, as authorized by the Settlement Committee.⁵ See Eakeley Cert., ¶ 16.

Finally, the Settlement Agreement contains a number of customary provisions designed to ensure that the Settlement Agreement becomes effective and that any disputes between the parties are fully and forever resolved. See Eakeley Cert., ¶ 17. For example, the parties are required to take in good faith all necessary governance and litigation steps to effectuate the settlement. *Id.*, Ex. A, § 6.1. The parties and certain associated persons and entities are exchanging broad releases and covenants not to sue. *Id.*, Ex. A, §§ 5.1-5.2. In addition, plaintiffs' personal, non-derivative claims against Princeton and the individual defendants are being voluntarily dismissed with prejudice and without costs, with no part of the settlement consideration being paid to resolve such claims. *Id.*, Ex. A, § 6.4.

ARGUMENT

New Jersey has a strong public policy favoring the settlement of litigation. See *Jannarone v. W.T. Co.*, 65 N.J. Super. 472, 476 (App. Div.), *certif. den.* 35 N.J. 61 (1961); *Brundage v. Estate of Carambio*, 195 N.J. 575, 601 (2008); *Chattin v. Cape May Greene, Inc.*, 216 N.J. Super. 618, 626 (App. Div. 1987). The “[s]ettlement of litigation of all kinds is to be

⁴ As required by Section 145 of the Delaware General Corporations Law, the Settlement Committee determined that indemnification was permissible and appropriate because, in the Committee's view, Princeton and the individual defendants acted in good faith and in a manner they reasonably believed was in or not opposed to the best interest of the Robertson Foundation. See Eakeley Cert., ¶ 14.

⁵ Princeton and the individual defendants have certified to the Settlement Committee that the litigation expenses to be paid were actually and reasonably incurred in furtherance of this litigation, and that any future expenses not yet billed will be vetted by Princeton's Office of the General Counsel to verify that such expenses are appropriately documented and reasonable in amount. See Eakeley Cert., ¶ 15.

encouraged,” particularly in the context of complex representative actions. *Tabaac v. Atlantic City*, 174 N.J. Super. 519, 534 (Law Div. 1980); *Judson v. Peoples Bank & Trust Co.*, 25 N.J. 17, 35 (1957) (“[i]t is the policy of the law to encourage settlements”). New Jersey courts recognize that settlements “permit parties to resolve disputes on mutually acceptable terms rather than exposing themselves to the adverse judgment of a court. Settlements also save parties litigation expenses and facilitate the administration of the courts by conserving judicial resources.” *Morris County Fair Hous. Council v. Boonton Township*, 197 N.J. Super. 359, 366 (Law. Div. 1984).

Rules 4:32-2(e) and 4:32-3 provide that the parties must seek judicial approval of the settlement of a derivative action.⁶ In determining whether to approve a derivative settlement, a court must determine that the settlement is fair, reasonable and adequate. *Chattin*, 216 N.J. Super. at 627; *City of Paterson v. Paterson Gen. Hosp.*, 104 N.J. Super. 472 (App. Div. 1969), *aff'd* 53 N.J. 421 (1969). In analyzing a settlement, a court should consider the agreement as a whole and it need not conduct an itemized review of each individual term. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (“it is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness”). A court should not seek to rewrite the agreement or try the issues on the merits. *Tabaac*, 174 N.J. Super. at 524 (“It is the court’s function to determine the reasonableness of the agreement, not to renegotiate the terms of settlement.”).

Courts typically consider certain factors in making the “fair, reasonable and adequate” determination, including (1) the extent of any opposition to the settlement; (2) the complexity, length, and expense of further litigation; (3) the risks of establishing liability and damages; and

⁶ Rule 4:32-2(e)(1)(C) states that: “[t]he court may approve a settlement ... on finding the settlement ... is fair, reasonable, and adequate.” This rule applies explicitly to derivative suits under Rule 4:32-3. *See, e.g., Tabaac*, 174 N.J. Super. at 534.

(4) the range of reasonableness of the settlement in light of all the attendant risks of litigation. *See, e.g., Tabaac*, 174 N.J. Super at 534-35 (citing the Manual for Complex Litigation). Here, application of these factors strongly supports approval of the Settlement Agreement.

I. The Settlement Agreement Should Be Approved Because It Has Been Approved By All Interested Parties, Including The Robertson Foundation's Independent Settlement Committee.

Unlike the typical class action or derivative case, all parties that have an interest in this litigation and the proposed settlement are present before the Court either directly or through their authorized representatives, and all have endorsed and approved the Settlement Agreement. The individual trustees and members who are parties to the case – plaintiffs William Robertson, Robert Halligan, Katherine Ernst and Anne R. Meier and defendants Shirley M. Tilghman, Peter C. Wendell and Stephen A. Oxman – have each signed the Settlement Agreement and concluded that the proposed settlement is fair, reasonable, adequate and in the best interests of the Robertson Foundation and Princeton. *See Eakeley Cert.*, ¶ 18. Together with Governor Kean, the seven trustees and members of the Robertson Foundation who are parties to this action comprise all of the “members” of the Robertson Foundation, as that term is utilized in the Foundation’s Certificate of Incorporation; there are no members who are not before the Court on this motion. *See id.*, ¶ 19.

The Robertson Foundation itself, through its duly constituted and independent Settlement Committee, has approved the settlement and concluded that the Settlement Agreement is fair, reasonable, adequate and in the best interest of the Robertson Foundation. *See Eakeley Cert.*, ¶ 20.⁷ As explained above, the Settlement Committee is comprised of Governor Thomas Kean,

⁷ 8 Del. C. § 141(c) generally provides that board committees “shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation.” It is well recognized under Delaware law that a committee of independent directors empowered to act on behalf of the corporation has the power to control

who was unanimously appointed by the six other members and trustees of the Foundation , is not a party to this action, is not employed by any party, and has not been accused of any wrongdoing. *See id.*, ¶ 13.

Governor Kean was appointed as a trustee and member of the Robertson Foundation in April of 2007, replacing long-time trustee and member John J.F. Sherrerd. In connection with his appointment, Governor Kean consulted on several occasions with plaintiffs and, separately, with the Princeton defendants, and he was provided with several briefings and voluminous materials concerning the litigation. *See Eakeley Cert.*, ¶ 21. Moreover, Governor Kean participated in the 2007 and 2008 annual Robertson Foundation Board meetings, as well as a special telephonic meeting in August 2008. *Id.* As a result, Governor Kean was familiar with the material issues in the litigation prior to his appointment to the Settlement Committee. *Id.*

In addition to materials previously considered by Governor Kean in his capacity as a trustee and member, the parties provided the Settlement Committee with: (i) the Settlement Agreement; (ii) the briefs and hearing transcript with respect to the parties' recent cross-motions to bifurcate the trial and order proofs; (iii) Judge Shuster's relevant summary judgment opinions; and (iv) the parties' mediation statements, which outline the claims, defenses and supporting evidence in exhausting detail. *See Eakeley Cert.*, ¶ 22. Governor Kean, as the Settlement Committee, conducted a teleconference meeting with the Princeton defendants on December 2, 2008 and an in-person meeting on December 5, 2008. *Id.*, ¶ 23. As the Settlement Committee, he also held a teleconference meeting with plaintiff William S. Robertson on December 8, 2008. *Id.* Based on Governor Kean's ongoing work as a trustee and member, as well as the materials

derivative litigation. *See Zapata v. Maldonado*, 430 A.2d 779 (Del. 1981); *In re Oracle Derivative Litig.*, 808 A.2d 1206, 1209 (Del. Ch. 2002). A copy of the Foundation Board's resolution establishing the Settlement Committee is attached as Exhibit C to the Eakeley Certification.

and meetings provided specifically in connection with the proposed settlement, Governor Kean concluded, in his Settlement Committee capacity, that the Settlement Agreement was fair, reasonable, adequate and in the best interests of the Robertson Foundation. *Id.*, ¶ 24.⁸ All seven members/trustees of the Robertson Foundation then ratified the Settlement Committee's conclusion and directed Princeton and the Foundation's officers to take all steps necessary to effectuate the settlement as soon as practicable. *Id.*, ¶ 25.⁹

Finally, the Settlement Agreement has been formally approved by defendant Princeton in its capacity as the Robertson Foundation's supported organization. *See Eakeley Cert.*, ¶ 26. The Robertson Foundation is classified as a Type I supporting organization to Princeton University under Section 509(a)(3) of the Internal Revenue Code because the Foundation was created and operated exclusively for the benefit of Princeton. By resolution dated November 21, 2008, Princeton's Board of Trustees affirmed that the proposed settlement would be fair and reasonable, and in furtherance of the interests of Princeton University as the supported organization of the Robertson Foundation. *Id.*, ¶ 26.

This unanimous support of all interested parties is itself strong evidence that the Settlement Agreement is fair and reasonable and should be approved. *See Rome v. Archer*, 197 A.2d 49, 58 (Del. 1964) (approving settlement that was ratified by large majority of shareholders); *see also Robbins v. Alibrandi*, 127 Cal. App. 4th 438, 449 (Cal. App. 1st Dist. 2005) ("A court reviews the settlement of a derivative suit as a means of protecting the interests

⁸ An executed copy of the Settlement Committee's resolution approving the Settlement Agreement is attached as Exhibit D to the Eakeley Certification.

⁹ A fully executed copy of the Resolution of the members and trustees of the Foundation ratifying the determination of the Settlement Committee is attached as Exhibit E to the Eakeley Certification.

of those who are not directly represented in the settlement negotiations” (citing Delaware law for authority)).¹⁰

II. The Settlement Agreement Should Be Approved Because Both Princeton and the RFGI Are Required To Use Robertson Foundation Resources Solely To Further the Robertson Foundation’s Important Charitable Object and Purpose.

A critical feature of the Settlement Agreement is its requirement that the parties will continue to use Robertson Foundation assets to further the Robertson Foundation’s object and purpose. The parties have vigorously contested the purposes and object of the exceedingly generous Robertson gift given in 1961. Plaintiffs have argued that the purpose of the gift was to “strengthen the Government of the United States and increase its ability and determination to defend and extend freedom throughout the world by improving the facilities for the training and education of men and women for government service.” *See Eakeley Cert.*, ¶ 27. Defendants have pointed to the language of the Certificate of Incorporation providing that the Foundation was “to establish or maintain and support, at Princeton University and as part of the Woodrow Wilson School, a Graduate School, where men and women dedicated to public service may prepare for careers in government service, with particular emphasis on the education of such persons for careers in those areas of the Federal Government that are concerned with international relations and affairs.” Under either portion of the Certificate of Incorporation, the purpose of the gift was and remains a critically important and vital charitable endeavor.

The proposed settlement, if approved by the Court, will ensure that the parties will continue implementing the important purpose the Robertson gift without wasting further

¹⁰ Indeed, although this action is technically a derivative suit, the presence of all parties throughout and their unanimous support of the settlement terms makes the suit more akin to an individual action in which parties may generally enter into an enforceable settlement without court approval. *See Pascarella v. Bruck*, 190 N.J. Super. 118, 123-25 (App. Div. 1983); *Honeywell v. Bubb*, 130 N.J. Super. 130, 134-36 (App. Div. 1974).

resources through a prolonged and distracting trial and, presumptively, appeals. Under the Settlement Agreement, Princeton will be required to use the Robertson Fund solely to further the purposes described in the Foundation's Certificate of Incorporation: Princeton will use the Robertson Fund to provide continued support for the world-class graduate program at the Woodrow Wilson School of Public and International Affairs. Plaintiffs, at the same time, will be required to use the Robertson funds paid to RFGI solely to further the purposes set forth in RFGI's Certificate of Incorporation (which describes plaintiffs' interpretation and understanding of the purpose of the 1961 gift).

Significantly, no settlement payment will be made to any individual trustee. All payments contemplated by the Settlement Agreement will be made to charitable organizations exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended.

III. The Settlement Agreement Should Be Approved Because It Enables The Parties To Resume Their Charitable Activities Without The Cost, Distraction and Uncertainties Involved In A Protracted Trial and Any Ensuing Appeals.

The Settlement Agreement avoids what would certainly be an extremely time-consuming and expensive trial. Prior to the Settlement Agreement, plaintiffs designated nearly 3,500 trial exhibits, 39 "highly likely" witnesses, 7 "probable" witnesses, and 30 "possible" witnesses, many of whom are University administrators and faculty. Defendants designated approximately 1,500 trial exhibits, 27 "highly likely" trial witnesses, 11 "probable" witnesses, and 67 "possible" witnesses. *See* Eakeley Cert., ¶ 28. Nine *in limine* motions addressed to evidentiary issues are currently pending before the Court, and the parties have indicated their intent to file additional pre-trial motions. *Id.* The parties have estimated that trial could take from six to nine months, at a cost of many more millions of dollars in further fees and costs. *Id.* The substantial expense to the parties of such a large, complex trial and subsequent appellate practice, and their

attendant strain on judicial resources provide further strong support for the Settlement Agreement. *See Morris County*, 197 N.J. Super. at 366 (encouraging settlement to “save parties litigation expenses” and to “conserv[e] judicial resources); *see also Ihlenfeld v. Ihlenfeld*, 1996 WL 453431 (Del. Super. Ct. 1996) (“[C]ompromise settlements are held in high regard by the Courts because they terminate litigation and avoid the time and expense which a trial imposes on the parties as well as the judicial system.”).

Moreover, both parties face substantial risks if the case proceeds to trial. Plaintiffs face significant risks establishing liability and proving the Robertson Foundation’s entitlement to a repayment by Princeton of any funds or otherwise establishing an entitlement to some form of equitable relief. Plaintiffs’ risks are aggravated by the fact that the Princeton defendants’ alleged wrongdoings are based on events that took place over the course of 45 years and often involve individuals who have long since died. Moreover, plaintiffs are pursuing a legally unprecedented remedy for Princeton’s alleged wrongdoing: a complete divestiture of the Robertson Foundation’s assets from Princeton.

From Princeton’s perspective, in his summary judgment opinions, Judge Shuster made clear that the Court has “broad and adaptable” equitable powers to craft an appropriate remedy, which could result in a significant encumbrance on Princeton’s academic judgment and ability to use the Robertson gift as effectively as possible. Thus, the Princeton defendants, while denying wrongdoing regarding the claims to be tried, would be confronted at trial with the prospect that they would have to consume untold time of University officers, faculty and administrators defending thousands of decisions made over the course of more than 40 years.



The Settlement Agreement avoids these considerable risks and achieves finality for the parties and the Court. By dissolving the Robertson Foundation and funding the RFGI, the

Settlement Agreement assures that disputes over the meaning of the Foundation's Certificate of Incorporation and the use of Foundation assets will not be back before this Court.

CONCLUSION

After weighing the benefits of this settlement against the uncertainty and risks of continued litigation, the parties have concluded that the Settlement Agreement is, in the words of Rule 4:32-2(e), "fair, reasonable, and adequate." Accordingly, all parties to this action respectfully request that the Court fully and finally approve the Settlement Agreement.

December 9, 2008

| | |
|---|--|
| <p> By: Seth Lapdow</p> <p>BLANK ROME LLP 301 Carnegie Center 3rd Floor Princeton, NJ 08540 609.750.7700</p> <p>SHARTSIS FRIESE LLP One Maritime Plaza 18th Floor San Francisco, CA 94111 415.421.6500</p> <p><i>Attorneys for Plaintiffs William Robertson, Robert Halligan, Katherine Ernst and Anne Meier</i></p> | <p> By: Douglas S. Eakeley</p> <p>LOWENSTEIN SANDLER PC 65 Livingston Avenue Roseland, New Jersey 07068 973.597.2500</p> <p>SIMPSON THACHER & BARTLETT LLP 425 Lexington Avenue New York, NY 10017 212.455.2000</p> <p><i>Attorneys for Defendants Princeton University, Shirley M. Tilghman, Peter C. Wendell and Stephen A. Oxman</i></p> |
|---|--|