

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

CASEY CUNNINGHAM, et al.,

Plaintiffs,

v.

CORNELL UNIVERSITY, et al.

Defendants.

No. 1:16-CV-06525-PKC

**NOTICE OF PLAINTIFFS'
UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS
SETTLEMENT**

Please take notice that, upon the accompanying Memorandum of Law, dated September 21, 2020, Plaintiffs Casey Cunningham, Charles E. Lance, Stanley T. Marcus, Lydia Pettis, and Joy Veronneau will move this Court before the Honorable P. Kevin Castel, at the Daniel Patrick Moynihan United States Courthouse for the Southern District of New York, 500 Pearl Street, Courtroom 11D, New York, New York 10007, at a time and date to be set by the Court, for an order granting preliminary approval of a class action settlement. The Cornell Defendants do not oppose this motion.

Please take notice that opposing papers, if any, shall be served no later than October 5, 2020, and Plaintiffs shall serve reply papers, if any, no later than October 12, 2020.

September 21, 2020

Respectfully Submitted,

/s/ Joel D. Rohlf
SCHLICHTER BOGARD & DENTON LLP
Andrew D. Schlichter, Bar No. 4403267
Jerome J. Schlichter*
Heather Lea*
Joel D. Rohlf*
Scott Apking*
100 South Fourth Street, Suite 1200
St. Louis, Missouri 63102
(314) 621-6115, (314) 621-5934 (fax)
aschlichter@uselaws.com
jschlichter@uselaws.com
hlea@uselaws.com
jrohlf@uselaws.com
sapking@uselaws.com
*Admitted *pro hac vice*

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2020, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the attorneys of record.

/s/ Joel D. Rohlf

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

CASEY CUNNINGHAM, *et al.*,

Plaintiffs,

v.

CORNELL UNIVERSITY, *et al.*,

Defendants.

No. 16-cv-6525-PKC

**[PROPOSED] ORDER FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT OF RELEASED CLAIM**

This litigation arises out of a class action alleging breaches of fiduciary duties and prohibited transactions against the Defendants Cornell University, the Retirement Plan Oversight Committee, and Mary G. Opperman under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. § 1001, *et seq.*, with respect to its management, operation, and administration of the Cornell University Retirement Plan for the Employees of the Endowed Colleges at Ithaca and the Cornell University Tax Deferred Annuity Plan (the “Plans”). The parties have negotiated a settlement of only that portion of Count V of the Corrected Amended Complaint (Doc. 81) upon which summary judgment was denied in an order dated September 27, 2019 (Doc. 352), alleging that the Plans should have adopted a lower cost share class of the TIAA-CREF Lifecycle Funds prior to April 2012. The rest of the claims were dismissed for the reasons set forth in the order dated September 27, 2019.

The terms of the Settlement are set out in a Class Action Settlement Agreement dated September 18, 2020, executed by the parties and their counsel.

The Court has considered the proposed Settlement. For purposes of this Order, if not defined herein, capitalized terms have the definitions in the Settlement Agreement, which is incorporated herein by reference. Having reviewed the Settlement Agreement and the accompanying and supporting papers, it is **ORDERED** as follows:

1. **Preliminary Findings Regarding Proposed Settlement:** The Court preliminarily finds that:
 - A. The proposed Settlement resulted from arm's-length negotiations;
 - B. The Settlement Agreement was executed only after the parties engaged in extensive litigation for approximately four years, including discovery, and after settlement negotiations, including telephonic and email communications;
 - C. Class Counsel has concluded that the Settlement Agreement is fair, reasonable and adequate; and
 - D. The Settlement is sufficiently fair, reasonable, and adequate to warrant sending notice of the Settlement to the Settlement Class.

2. **Fairness Hearing:** A hearing is scheduled at the United States District Court for the Southern District of New York, the Honorable District Court Judge P. Kevin Castel presiding, at ____ a.m./p.m. on _____, 202__, (the "Fairness Hearing") to determine, among other issues:

- A. Whether the Settlement Agreement should be approved as fair, reasonable, and adequate;
- B. Whether the Settlement Notice and notice methodology were performed as directed by this Court;
- C. Whether the motion for attorneys' fees and costs to be filed by Class Counsel should be approved;
- D. Whether an amount of compensation to the Class Representative should be approved; and
- E. Whether the Administrative Expenses specified in the Settlement

Agreement and requested by the Settling Parties should be approved for payment from the Gross Settlement Amount.

3. **Establishment of Qualified Settlement Fund:** A common fund is agreed to by the Settling Parties in the Settlement Agreement and is hereby established and shall be known as the *Cunningham v. Cornell University* Litigation Settlement Fund (the “Settlement Fund” or “Gross Settlement Amount”). The Settlement Fund shall be a “qualified settlement fund” within the meaning of Treasury Regulations § 1.468-1(a) promulgated under Section 468B of the Internal Revenue Code. The Settlement Fund shall consist of \$225,000 and any interest earned thereon. The Settlement Fund shall be administered as follows:

A. The Settlement Fund is established exclusively for the purposes of: (i) making distributions to the Class Representative and the Settlement Class specified in the Settlement Agreement; (ii) making payments for all settlement administration costs and costs of notice, including payments of all Administrative Expenses specified in the Settlement Agreement; (iii) making payments of all Attorneys’ Fees and Costs to Class Counsel as awarded by the Court; and (iv) paying employment, withholding, income and other applicable taxes, all in accordance with the terms of the Settlement Agreement and this Order. Other than the payment of Administrative Expenses or as otherwise expressly provided in the Settlement Agreement, no distribution shall be made from the Settlement Fund until after the Settlement Effective Date.

B. Within the time period set forth in the Settlement Agreement, Defendants or their insurer shall cause \$225,000 to be deposited into the Settlement Fund.

C. The Court appoints Analytics Consulting LLC as the Settlement

Administrator for providing Settlement Notice, implementing the Plan of Allocation, and otherwise assisting in administration of the Settlement as set forth in the Settlement Agreement.

D. Defendants shall timely furnish a statement to the Settlement Administrator that complies with Treasury Regulation § 1.468B-3(e)(2), which may be a combined statement under Treasury Regulation § 1.468B-3(e)(2)(ii), and shall attach a copy of the statement to their federal income tax returns filed for the taxable year in which Defendants make a transfer to the Settlement Fund.

E. Defendants shall have no withholding, reporting or tax reporting responsibilities with regard to the Settlement Fund or its distribution, except as otherwise specifically identified herein. Moreover, Defendants shall have no liability, obligation, or responsibility for administration of the Settlement Fund or the disbursement of any monies from the Settlement Fund except for: (1) its obligation to cause the Gross Settlement Amount to be paid; and (2) its agreement to cooperate in providing information that is necessary for settlement administration set forth in the Settlement Agreement.

F. The oversight of the Settlement Fund is the responsibility of the Settlement Administrator. The status and powers of the Settlement Administrator are as defined by this Order and as approved in the Settlement Agreement.

G. The Gross Settlement Amount caused to be paid by Defendants and/or insurer into the Settlement Fund in accordance with the Settlement Agreement, and all income generated by that amount, shall be *in custodia legis* and immune from attachment, execution, assignment, hypothecation, transfer or similar

process by any person. Once the Settlement Fund vests, it is irrevocable during its term and Defendants have divested themselves of all right, title or interest, whether legal or equitable, in the Settlement Fund, if any; provided, however, in the event the Settlement Agreement is not approved by the Court or the Settlement set forth in the Settlement Agreement is terminated or fails to become effective in accordance with its terms (or, if following approval by this Court, such approval is reversed or modified), the parties shall be restored to their respective positions in this case as of the day prior to the Settlement Agreement Execution Date; the terms and provisions of the Settlement Agreement and this Order shall be void and have no force and effect and shall not be used in this case or in any proceeding for any purpose; and the Settlement Fund and income earned thereon shall immediately be returned to the entity(ies) that funded the Settlement Fund.

H. The Settlement Administrator may make disbursements out of the Settlement Fund only in accordance with this Order or any additional Orders issued by the Court.

I. The Settlement Fund shall expire after the Settlement Administrator distributes all of the assets of the Settlement Fund in accordance with Article 6 of the Settlement Agreement, provided, however, that the Settlement Fund shall not terminate until its liability for any and all government fees, fines, taxes, charges and excises of any kind, including income taxes, and any interest, penalties or additions to such amounts, are, in the Settlement Administrator's sole discretion, finally determined and all such amounts have been paid by the Settlement Fund.

J. The Settlement Fund shall be used to make payments to Class Members under the Plan of Allocation set forth in the Settlement Agreement. Individual payments to Class Members will be subject to tax withholding as required by law and as described in the Class Notice and its attachments. In addition, all Class Representatives' Compensation, Administrative Expenses and all Attorneys' Fees and Costs of Class Counsel shall be paid from the Settlement Fund.

K. The Court and the Settlement Administrator recognize that there will be tax payments, withholding and reporting requirements in connection with the administration of the Settlement Fund. The Settlement Administrator shall, in accordance with the Settlement Agreement, determine, withhold, and pay over to the appropriate taxing authorities any taxes due with respect to any distribution from the Settlement Fund and shall make and file with the appropriate taxing authorities any reports or returns due with respect to any distributions from the Settlement Fund. The Settlement Administrator also shall determine and pay any income taxes owing with respect to the income earned by the Settlement Fund. Additionally, the Settlement Administrator shall file returns and reports with the appropriate taxing authorities with respect to the payment and withholding of taxes.

L. The Settlement Administrator, in its discretion, may request expedited review and decision by the IRS or the applicable state or local taxing authorities, with regard to the correctness of the returns filed for the Settlement Fund and shall establish reserves to assure the availability of sufficient funds to meet the obligations of the Settlement Fund itself and the Settlement Administrator as

fiduciaries of the Settlement Fund. Reserves may be established for taxes on the Settlement Fund income or on distributions.

M. The Settlement Administrator shall have all the necessary powers, and take all necessary ministerial steps, to effectuate the terms of the Settlement Agreement, including the payment of all distributions. Such powers include receiving and processing information from Former Participants pertaining to their claims and investing, allocating and distributing the Settlement Fund, and in general supervising the administration of the Settlement Agreement in accordance with its terms and this Order.

N. The Settlement Administrator shall keep detailed and accurate accounts of all investments, receipts, disbursements and other transactions of the Settlement Fund. All accounts, books and records relating to the Settlement Fund shall be open for reasonable inspection by such persons or entities as the Court orders. Included in the Settlement Administrator's records shall be complete information regarding actions taken with respect to the award of any payments to any person; the nature and status of any payment from the Settlement Fund and other information which the Settlement Administrator considers relevant to showing that the Settlement Fund is being administered, and awards are being made, in accordance with the purposes of the Settlement Agreement, this Order, and any future orders that the Court may find it necessary to issue.

O. The Settlement Administrator may establish protective conditions concerning the disclosure of information maintained by the Settlement Administrator if publication of such information would violate any law, including

rights to privacy. Any person entitled to such information who is denied access to the Settlement Fund's records may submit a request to the Court for such information. However, the Settlement Administrator shall supply such information to any claimant as may be reasonably necessary to allow him or her to accurately determine his or her federal, state and local tax liabilities. Such information shall be supplied in the form and manner prescribed by relevant law.

P. This Order will bind any successor Settlement Administrator. The successor Settlement Administrator(s) shall have, without further act on the part of anyone, all the duties, powers, functions, immunities, and discretion granted to the original Settlement Administrator. Any Settlement Administrator(s) who is replaced (by reason other than death) shall execute all instruments, and do all acts, that may be necessary or that may be ordered or requested in writing by the Court or by any successor Settlement Administrator(s), to transfer administrative powers over the Settlement Fund to the successor Settlement Administrator(s). The appointment of a successor Settlement Administrator(s), if any, shall not under any circumstances require Defendants make any further payment of any nature into the Settlement Fund or otherwise.

4. **Class Notice:** The Settling Parties have presented to the Court the proposed form of Settlement Notice, which is appended to the September 18, 2020 Settlement Agreement as Exhibit 3.

A. The Court finds that the proposed form and the website referenced in the Settlement Notice fairly and adequately:

i. Describe the terms and effect of the Settlement Agreement and of the

Settlement;

- ii. Notify the Settlement Class concerning the proposed Plan of Allocation;
- iii. Notify the Settlement Class that Class Counsel will seek compensation from the Settlement Fund for the Class Representative, Attorneys' Fees and Costs;
- iv. Notify the Settlement Class that Administrative Expenses related to the implementation of the Settlement will be paid from the Settlement Fund;
- v. Give notice to the Settlement Class of the time and place of the Fairness Hearing; and
- vi. Describe how the recipients of the Class Notice may object to any of the relief requested and the rights of the Settling Parties to discovery concerning such objections.

B. The Settling Parties have proposed the following manner of communicating the notice to Class Members: (1) Class Counsel shall post a notice and link with a claim form for former participants on the Settlement Website; (2) and (2) the Settlement Administrator shall by no later than sixty (60) days before the Fairness Hearing, cause the Settlement Notice, with such non-substantive modifications thereto as may be agreed upon by the Settling Parties, to be sent by electronic email to the last known e-mail address of each Settlement Class Member provided by the Defendants' Counsel, Defendants and/or the Plan's recordkeepers (or their designee(s)). In the event of a bounce-back e-mail, the Settlement Administrator shall mail a copy of the notice to the Settlement Class Member's address obtained by the Settlement Administrator through its efforts to

verify the Class Member's last known address. The Court finds that such proposed manner is reasonable under the circumstances, because the Settlement provides nearly complete recovery to the class and any additional costs for the notice program would risk eviscerating the Settlement, and directs Class Counsel to provide notice to the Settlement Class in the manner described.

C. At or before the Fairness Hearing, Class Counsel or the Settlement Administrator shall file with the Court a proof of timely compliance with the foregoing requirements.

5. **Objections to Settlement:** Any Class Member who wishes to object to the fairness, reasonableness or adequacy of the Settlement, to the Plan of Allocation, to any term of the Settlement Agreement, to the proposed award of attorneys' fees and costs, or to any request for Class Representatives' Compensation, must file an objection in the manner set out in this Order.

A. A Class Member wishing to raise an objection to the Plan of Allocation, to any term of the Settlement Agreement, to the proposed award of attorneys' fees and costs, or to any request for Class Representatives' Compensation must do the following: (i) file with the Court a statement of his, her, or its objection(s), specifying the reason(s), if any, for each such objection made, including any legal support or evidence that such objector wishes to bring to the Court's attention or introduce in support of such objection; and (ii) serve copies of the objection and all supporting authorities or evidence to Class Counsel and Defense Counsel. The addresses for filing objections with the Court and for service of such objections on counsel for the parties to this matter are as follows:

Clerk of the Court
United States District Courthouse
500 Pearl Street
New York, NY 10007-1312

SCHLICHTER, BOGARD & DENTON, LLP
Attn: Cornell 403b Plan Settlement
100 S. 4th Street, Ste. 1200
St. Louis, MO 63102
Attorneys for Plaintiffs

MAYER BROWN
Attn: Brian D. Netter
1999 K Street NW
Washington, DC 20006
Attorneys for Defendants

- B. The objector or his, her, or its counsel (if any) must serve copies of the objection(s) on the attorneys listed above and file it with the Court by no later than thirty (30) calendar days before the date of the Fairness Hearing.
- C. If an objector hires an attorney to represent him, her, or it for the purposes of making such objection pursuant to this paragraph, the attorney must serve a notice of appearance on the attorneys listed above and file it with the Court by no later than thirty (30) calendar days before the date of the Fairness Hearing.
- D. Failure to serve objections(s) on either the Court or counsel for the parties shall constitute a waiver of the objection(s). Any Class Member or other person who does not timely file and serve a written objection complying with the terms of this Order shall be deemed to have waived, and shall be foreclosed from raising, any objection to the Settlement, and any untimely objection shall be barred.
- E. Any party wishing to obtain discovery from any objector may, but is not required to, serve discovery requests, including requests for documents and notice of deposition not to exceed two (2) hours in length, on any objector within ten

(10) calendar days of receipt of the objection and that any responses to discovery or depositions must be completed within ten (10) calendar days of the request being served on the objector.

F. Any party wishing to file a response to an objection must do so, and serve the response on all parties, no later than ten (10) calendar days before the Fairness Hearing.

6. **Appearance at Fairness Hearing:** Any objector who files and serves a timely, written objection in accordance with the terms of this Order as set out in Paragraph 8 above may also appear at the Fairness Hearing either in person or through counsel retained at the objector's expense. Objectors or their attorneys intending to speak at the Fairness Hearing must serve a notice of intention to speak setting forth, among other things, the name, address, and telephone number of the objector (and, if applicable, the name, address, and telephone number of the objector's attorney) on Class Counsel and Defense Counsel (at the addresses set out above) and file it with the Court by no later than ten (10) calendar days before the date of the Fairness Hearing. Any objector (or objector's attorney) who does not timely file and serve a notice of intention to appear in accordance with this paragraph shall not be permitted to speak at the Fairness Hearing.

7. **Claim Form Deadline:** All valid Former Participant Claim Forms must be received by the Settlement Administrator with a postmark date no later than _____, 202_, or electronically submitted online at www.Cornell403bPlanSettlement.com no later than _____, 202_.

8. **Service of Papers:** Defense Counsel and Class Counsel shall promptly furnish each other with copies of all objections that come into their possession.

9. **Termination of Settlement:** If the Settlement is terminated in accordance with the Settlement Agreement, this Order shall become null and void, and shall be without prejudice to the rights of the Settling Parties, all of whom shall be restored to their respective positions existing the day before the Settlement Agreement Execution Date.

10. **Use of Order:** This Order shall not be construed or used as an admission, concession, or declaration by or against Defendants of any fault, wrongdoing, breach, or liability or a waiver of any claims or defenses, including but not limited to those as to the propriety of any amended pleadings or the propriety and scope of class certification. This Order shall not be construed or used as an admission, concession, or declaration by or against any named plaintiff, Class Representatives, or the Settlement Class that their claims lack merit, or that the relief requested in the Class Action is inappropriate, improper or unavailable. This Order shall not be construed or used as a waiver by any party of any arguments, defenses, or claims he, she, or it may have, including but not limited to any objections by Defendants to class certification in the event that the Settlement Agreement is terminated.

11. **Parallel Proceedings:** Pending final determination of whether the Settlement Agreement should be approved, the Class Representatives and every Class Member are prohibited and enjoined from directly, through representatives, or in any other capacity, commencing any action or proceeding in any court or tribunal asserting the Released Claim against the Released Parties (including Defendants).

12. **Class Action Fairness Act Notice:** The form of notice under the Class Action Fairness Act of 2005 (“CAFA”) submitted as Exhibit 5 to the Settlement Agreement complies with the requirements of CAFA and will, upon mailing, discharge Defendants’ obligations pursuant to CAFA.

13. **Continuance of Hearing:** The Court may continue the Fairness Hearing in its discretion without direct notice to the Settlement Class, other than by notice to Class Counsel and Defense Counsel, and any Class Member wishing to appear should check the Court's docket or call the Clerk's office three (3) calendar days before the scheduled date of the Fairness Hearing.

SO ORDERED:

DATED: _____, 202_

HON. P. KEVIN CASTEL
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

CASEY CUNNINGHAM, et al.,

Plaintiffs,

v.

CORNELL UNIVERSITY, et al.,

Defendants.

No. 1:16-CV-06525-PKC

**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF THEIR UNOPPOSED
MOTION FOR PRELIMINARY
APPROVAL OF CLASS SETTLEMENT**

Table of Contents

BACKGROUND 1

 I. The claims in this action..... 1

 II. The terms of the proposed settlement..... 3

 A. Monetary Relief..... 3

 B. Notice and Class Representatives’ Compensation..... 4

 C. Attorneys’ Fees and Costs..... 5

ARGUMENT..... 5

 I. The settlement is the product of arm’s length negotiations conducted by
 experienced counsel after extensive litigation..... 6

 A. Plaintiffs’ counsel is highly experienced and capable. 7

 B. The settlement was reached after extended litigation and significant
 investigation of the claims asserted by Plaintiffs..... 8

 II. The Settlement is substantively reasonable..... 9

 III. This fair, reasonable, and adequate settlement warrants sending notice to the
 Settlement Class. 9

CONCLUSION..... 11

Table of Authorities

Cases

<i>Abbott v. Lockheed Martin Corp.</i> , No. 06-701, 2015 WL 4398475 (S.D.Ill. July 17, 2015).....	5, 7
<i>Agonath v. Interstate Home Loans Ctr., Inc.</i> , No. 17-5267-JS-SIL, 2019 WL 1060627 (E.D.N.Y. Mar. 6, 2019).....	10
<i>Arbuthnot v. Pierson</i> , 607 F. App'x 73 (2d Cir. 2015)	7
<i>Berkson v. Gogo LLC</i> , 147 F. Supp. 3d 123 (E.D.N.Y. 2015)	10
<i>Cassell v. Vanderbilt Univ.</i> , No. 16-2086, Doc. 174 (M.D. Tenn. Oct. 22, 2019)	5
<i>City of Detroit v. Grinnell Corporation</i> , 495 F.2d 448 (2d Cir. 1974)	6, 9
<i>City of Providence v. Aeropostale, Inc.</i> , No. 11-712-CM-GWG, 2014 WL 1883494 (S.D.N.Y. May 9, 2014).....	7
<i>Clark v. Duke</i> , No. 16-1044, 2019 WL 2579201 (M.D.N.C. June 24, 2019).....	5, 8
<i>Dial Corp. v. News Corp.</i> , 317 F.R.D. 426 (S.D.N.Y. 2016)	4
<i>Dornberger v. Metro. Life Ins. Co.</i> , 203 F.R.D. 118 (S.D.N.Y. 2001).....	5
<i>Eisen v. Carlisle and Jacquelin</i> , 417 U.S. 156 (1974).....	9
<i>Goldberger v. Integrated Res., Inc.</i> , 209 F.3d 43 (2d Cir. 2000)	6
<i>In re Michael Milken and Assocs. Secs. Litig.</i> , 150 F.R.D. 57 (S.D.N.Y. 1993).....	7
<i>In re Northrop Grumman Corp. ERISA Litig.</i> , No. 06-6213, 2017 WL 9614818 (C.D. Cal. Oct. 24, 2017)	7
<i>In re Platinum & Palladium Commod. Litig.</i> , No. 10-3617-WHP, 2014 WL 3500655 (S.D.N.Y. July 15, 2014).....	6
<i>In re Pool Prod. Distribution Mkt. Antitrust Litig.</i> , 310 F.R.D. 300 (E.D. La. 2015)	10
<i>Kelly v. Johns Hopkins Univ.</i> , No. 16-2835, 2020 WL 434473 (D. Md. Jan. 20, 2020).....	5, 8
<i>Krueger v. Ameriprise Fin., Inc.</i> , No. 11-2781, 2015 WL 4246879 (D. Minn. July 13, 2015).....	7
<i>Mullane v. Central Hanover Bank and Trust Co.</i> , 339 U.S. 306 (1950).....	9
<i>Nolte v. Cigna Corp.</i> , No. 07-2046, 2013 WL 12242015 (C.D. Ill Oct. 15, 2013)	7

<i>Sanchez v. Salsa Con Fuego, Inc.</i> , No. 16-473-RJS-BCM, 2016 WL 4533574 (S.D.N.Y. Aug. 24, 2016).....	10
<i>Tibble v. Edison, Int’l</i> , 575 U.S. 523, 135 S.Ct. 1823 (2015).....	5
<i>Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.</i> , 396 F.3d 96 (2d Cir. 2005)	7
Statutes	
29 U.S.C. § 1109(a)	2
Rules	
Fed R. Civ. P 23(c)(2)(B)	10
Fed. R. Civ. P. 23(e)(1).....	6
Fed. R. Civ. P. 23(e)(1)(B)	6
Fed. R. Civ. P. 23(e)(2).....	6

Plaintiffs move for the Court’s preliminary approval of a settlement of the remaining claim currently set for trial after summary judgment. Plaintiffs allege that Defendants Cornell University, the Retirement Plan Oversight Committee, and Mary G. Opperman (collectively, the “Cornell Defendants”) breached their fiduciary duties and committed prohibited transactions under the Employee Retirement Income Security Act of 1974 (“ERISA”) by causing the Cornell University Retirement Plan for the Employees of the Endowed Colleges at Ithaca and the Cornell University Tax Deferred Annuity Plan (“the Plans”) to pay unreasonable recordkeeping and administrative fees and to maintain high-cost and underperforming investment options, including investment options in higher-cost share classes. Docs. 1, 81. The Cornell Defendants dispute these allegations and deny liability for any alleged fiduciary breach. The Court dismissed or granted summary judgment on all of Plaintiffs’ claims except insofar as Plaintiffs alleged that the Cornell Defendants breached their duty of prudence by failing to adopt the institutional share classes of the TIAA-CREF Lifecycle Funds. Doc. 352 at 39.

After the Court’s summary judgment ruling, Plaintiffs and the Cornell Defendants engaged in arms-length settlement discussions, reaching an agreement to settle the remaining TIAA-CREF Lifecycle Funds claim. This settlement represents nearly full recovery on the TIAA-CREF Lifecycle Funds claim and does not settle the dismissed claims, which may be appealed. In light of the litigation risks that further prosecution of the remaining claim would inevitably entail, Plaintiffs respectfully request that this Court: (1) preliminarily approve the proposed settlement; (2) approve the proposed form and method of notice to the Settlement Class; and (3) schedule a hearing at which the Court will consider final approval of the settlement.

BACKGROUND

I. The claims in this action.

On August 17, 2016, Plaintiff Casey Cunningham filed his complaint. Doc. 1. On December

8, 2016, Casey Cunningham, Charles E. Lance, Stanley T. Marcus, Lydia Pettis, and Joy Veronneau (“Plaintiffs”), filed an amended complaint alleging claims against Cornell University, the Retirement Plan Oversight Committee, Mary G. Opperman, and CAPTRUST Financial Advisors. Doc. 38. Plaintiffs filed a corrected amended complaint on February 24, 2017 to change the name of CAPTRUST Financial Advisors to CapFinancial Partners, LLC d/b/a CAPTRUST Financial Advisors. Doc. 81.

Plaintiffs alleged that Defendants breached their fiduciary duties and committed prohibited transactions relating to the management, operation, and administration of the Plans. Plaintiffs sought to recover all alleged losses to the Plans resulting from each breach of duty under 29 U.S.C. § 1109(a) and for other equitable and remedial relief.

On September 29, 2017, the Court granted in part and denied in part Defendants’ motion to dismiss Plaintiffs’ corrected amended complaint. Doc. 107. The parties then completed fact and expert discovery and took the depositions of each named Plaintiff, seven Cornell-affiliated witnesses, two Capfinancial Partners-affiliated witnesses, three non-party witnesses, and seven expert witnesses.

On January 22, 2019, the Court certified the following class:

All participants and beneficiaries of the Cornell University Retirement Plan for the Employees of the Endowed Colleges at Ithaca and the Cornell University Tax Deferred Annuity Plan from August 17, 2010, through August 17, 2016, excluding the Defendants and any participant who is a fiduciary to the Plans.

Doc. 219 at 19. The Court appointed Class Representatives and Class Counsel. *Id.* On September 27, 2019, the Court granted in part and denied in part Defendants’ motion for summary judgment. Doc. 352. The court denied Defendants’ motion insofar as Plaintiffs alleged that Defendants breached their duty of prudence by failing to adopt the institutional share classes of the TIAA-CREF Lifecycle Funds. *Id.* at 38. The Court granted the motion in all other respects. Plaintiffs

continued litigating the remaining claim after summary judgment, preparing all pretrial exchanges and fully preparing for trial. *See* Doc. 391. The matter is set for jury trial starting on September 29, 2020. Doc. 413.

Plaintiffs and the Cornell Defendants engaged in settlement discussions regarding the remaining claim in October 2019, May 2020 and August 2020. On September 18, 2020, the parties reached an agreement on all terms.

II. The terms of the proposed settlement.

Plaintiffs request by separate motion that the Court certify a Settlement Class consisting of:

The set of persons who participated in the Plans and invested in the TIAA-CREF Lifecycle funds between August 17, 2010 and April 17, 2012, including any Beneficiary of a deceased person who participated in one or more of the Plans at any time during the Class Period and invested in the TIAA-CREF Lifecycle funds between August 17, 2010 and April 17, 2012, and any Alternate Payee of a person subject to a Qualified Domestic Relations Order who participated in one or more of the Plans at any time during the Class Period and invested in the TIAA-CREF Lifecycle funds between August 17, 2010 and April 17, 2012. Excluded from the Settlement Class are any individuals that served as members of the Retirement Plan Oversight Committee from August 17, 2010 to April 17, 2012.

Ex. A, §2.37.¹ In exchange for the dismissal of the TIAA-CREF Lifecycle Funds claim and for entry of the Judgment as provided for in the Settlement Agreement, the Cornell Defendants will make available to Settlement Class members the benefits described below.

A. Monetary Relief.

The Cornell Defendants will deposit \$225,000 (the “Gross Settlement Amount”) in an interest-bearing settlement account (the “Gross Settlement Fund”). The Gross Settlement Fund will be used to pay the participants’ recoveries, administrative expenses to facilitate the Settlement, Plaintiffs’ counsel’s attorneys’ fees and costs, and the Class Representative’s Compensation if awarded by the Court.

¹ Cornell Defendants do not oppose Plaintiffs’ motion to certify a settlement-only sub-class.

B. Notice and Class Representatives' Compensation.

The costs to administer the settlement, including those associated with providing notice to the Settlement Class, will be paid from the Gross Settlement Amount. Incentive payments in an amount approved by the Court also will be paid from the Gross Settlement Amount. For the costs associated with the Settlement Administrator, Plaintiffs received a proposal from a candidate to provide these services. After consideration of the proposed fees and the quality of the services, Analytics Consulting LLC was selected as the Settlement Administrator at an estimated cost of \$14,875 to provide notices electronically to the last known email address of each Settlement Class Member provided by the Defendants' Counsel, Defendants, and/or the Plan's recordkeepers (or their designee(s)), unless an updated address is obtained by the Settlement Administrator through its efforts to verify the last known addresses provided by to the Settlement Administrator.² Class Counsel also shall post a copy of the Settlement Notice on the Settlement Website, and a link to the Settlement Website will also appear on Class Counsel's website.

Plaintiffs will seek an incentive award of \$1,000 for Plaintiff Casey Cunningham, the only named plaintiff who invested in the TIAA-CREF Lifecycle Funds during the period at issue. This amount is consistent with precedent recognizing the value of individuals stepping forward to represent a class, particularly in contested complex litigation like this where the potential benefit to any individual does not outweigh the cost of prosecuting class-wide claims, there are significant risks of no recovery, and risk of alienation from their employers and peers. *E.g.*, *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 439 (S.D.N.Y. 2016) (approving incentive awards of \$50,000 and noting that incentive awards "have generally ranged from \$2,500 to \$85,000");

² The proposed fee for the Settlement Administrator to provide notice to class members and other related services to facilitate the settlement is estimated based on information presently available to the parties and is subject to change once the number of class members and e-mail addresses are determined.

Dornberger v. Metro. Life Ins. Co., 203 F.R.D. 118, 125 (S.D.N.Y. 2001) (similar).

C. Attorneys' Fees and Costs.

Plaintiffs' counsel will request attorneys' fees paid out of the Gross Settlement Fund in an amount not more than one-third of the Gross Settlement Amount, or \$75,000, as well as reimbursement for costs incurred of no more than \$18,000. Plaintiffs' counsel "pioneer[ed]" 401(k) excessive fee litigation as recognized by multiple federal judges, *e.g.*, *Abbott v. Lockheed Martin Corp.*, No. 06-701, 2015 WL 4398475, at *1 (S.D.Ill. July 17, 2015), and successfully handled the only ERISA excessive fee case taken by the Supreme Court, *Tibble v. Edison, Int'l*, 575 U.S. 523, 135 S.Ct. 1823 (2015). Plaintiffs' counsel also filed the first 403(b) excessive fee cases in history, of which this case was one. Before Plaintiffs' counsel filed both the 401(k) cases and the 403(b) cases, no one had ever brought a case alleging excessive 401(k) or 403(b) fees. A contingent one-third fee is the market rate for complex ERISA excessive fee cases. *E.g.*, *Kelly v. Johns Hopkins Univ.*, No. 16-2835, 2020 WL 434473, at *3 (D. Md. Jan. 20, 2020) (collecting cases); *Cassell v. Vanderbilt Univ.*, No. 16-2086, Doc. 174 (M.D. Tenn. Oct. 22, 2019); *Clark v. Duke*, No. 16-1044, 2019 WL 2579201, at *3-4 (M.D.N.C. June 24, 2019). It is also the rate contractually agreed to by the named Plaintiffs. Decl. of Jerome J. Schlichter, ¶4.

Plaintiffs' counsel will not seek attorneys' fees: (1) from the interest earned on the Gross Settlement Amount; (2) for time associated with communicating with class members or Defendants during the Settlement Period; and (3) for work required in future years to enforce the settlement, if necessary. Plaintiffs' counsel will submit a formal application for attorneys' fees and costs and for the Class Representatives' incentive awards at least 30 days prior to the deadline for class members to file objections to the settlement.

ARGUMENT

Review of a proposed class action settlement is a two-step process. First, the court performs

a preliminary review of the terms of the proposed settlement to determine whether to send notice to the class. *See* Fed. R. Civ. P. 23(e)(1). Second, after notice is sent to the class and a hearing is conducted, the Court determines whether to approve the settlement on a finding that it is “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2).

A court should grant preliminary approval to authorize notice to the class upon a finding that it “will likely be able” to finally approve the settlement. *See* Fed. R. Civ. P. 23(e)(1)(B). In considering preliminary approval, a court looks to both the “negotiation process leading up to the settlement, *i.e.*, procedural fairness, as well as the settlement’s substantive terms, *i.e.* substantive fairness.” *In re Platinum & Palladium Commod. Litig.*, No. 10-3617-WHP, 2014 WL 3500655, at *11 (S.D.N.Y. July 15, 2014). The Court should grant preliminary approval in this matter because the proposed settlement is procedurally and substantively fair, reasonable, and adequate.³

I. The settlement is the product of arm’s length negotiations conducted by experienced counsel after extensive litigation.

There is a strong initial presumption that a proposed class action settlement is fair and reasonable when it is the result of arm’s-length negotiations by experienced, capable counsel after meaningful discovery. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir.

³ During the final approval phase, Courts in the Second Circuit consider the following factors set forth in *City of Detroit v. Grinnell Corporation*, 495 F.2d 448 (2d Cir. 1974) when evaluating a class-action settlement:

- (1) the complexity, expense and likely duration of the litigation;
- (2) the reaction of the class to the settlement;
- (3) the stage of the proceeding and the amount of discovery completed;
- (4) the risks of establishing liability;
- (5) the risks of establishing damages;
- (6) the risks of maintaining the class action through the trial;
- (7) the ability of the defendants to withstand a greater judgment;
- (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and]
- (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. at 463 (citations omitted), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

2005) (settlement may be presumed to be fair where it is “reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery”); *City of Providence v. Aeropostale, Inc.*, No. 11-712-CM-GWG, 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014) (“This initial presumption of fairness and adequacy applies here because the Settlement was reached by experienced, fully-informed counsel after arm’s-length negotiations.”), *aff’d*, *Arbuthnot v. Pierson*, 607 F. App’x 73 (2d Cir. 2015). The settlement is the result of lengthy and complex arm’s-length negotiations between the parties. *See* Schlichter Decl., ¶2. Counsel on both sides are experienced, thoroughly familiar with the factual and legal issues presented, and highly experienced in this type of litigation. It is recognized that the opinion of experienced and informed counsel supporting the settlement is entitled to considerable weight. *In re Michael Milken and Assocs. Secs. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993) (“the view of experienced counsel favoring the settlement is entitled to great weight.”) (citation and quotation marks omitted).

A. Plaintiffs’ counsel is highly experienced and capable.

Plaintiffs’ counsel is not only highly experienced in handling ERISA class actions involving 401(k) and 403(b) plans, but “pioneer[ed]...the field of retirement plan litigation.” *Abbott v. Lockheed Martin Corp.*, No. 06-701, 2015 WL 4398475, at *1 (S.D. Ill. July 17, 2015). Schlichter Bogard and Denton is the “preeminent firm” in excessive fee litigation having “achieved unparalleled results on behalf of its clients” in the face of “enormous risks.” *Nolte v. Cigna Corp.*, No. 07-2046, 2013 WL 12242015, at *2–3 (C.D. Ill Oct. 15, 2013). They are “experts in ERISA litigation,” *Krueger v. Ameriprise Fin., Inc.*, No. 11-2781, 2015 WL 4246879, at *2 (D. Minn. July 13, 2015) (citation omitted), and “highly experienced,” *In re Northrop Grumman Corp. ERISA Litig.*, No. 06-6213, 2017 WL 9614818, at *4 (C.D. Cal. Oct. 24, 2017).

District courts across the country have recognized the reputation, extraordinary skill and determination of Plaintiffs' counsel. Recently, in similar cases against university 403(b) plan sponsors, Judge Catherine Eagles and Judge George L Russell, III opined on Class Counsel's experience and competence. Judge Eagles noted that "these [ERISA] cases require a high level of skill on behalf of plaintiffs to achieve any recovery." *Clark v. Duke*, No. 16-01044, Doc. 165 at 6 (M.D.N.C. June 24, 2019). Judge Eagles concluded that "[Schlichter Bogard & Denton] has demonstrated diligence, skill, and determination in this matter and, more generally, in an area of law in which few attorneys and law firms are willing or capable of practicing." *Id.* at 7. Judge Russell noted that "Schlichter Bogard & Denton's work on behalf of participants in large 401(k) and 403(b) plans has significantly improved these plans, brought to light fiduciary misconduct that has detrimentally impacted the retirement savings of American workers, and dramatically brought down fees in defined contribution plans." *Kelly*, 2020 WL 434473, at *2. Judge Russell continued, "[w]ithout the unique and unparalleled foresight for this novel area of litigation by Schlichter, Bogard & Denton, the class would not have obtained any recovery for the alleged fiduciary breaches that affected the Johns Hopkins University 403(b) plan for years prior." *Id.* at *4.

B. The settlement was reached after extended litigation and significant investigation of the claims asserted by Plaintiffs.

At the time the settlement was reached, the parties had engaged in four years of litigation, including extensive dispositive motion practice. Plaintiffs' counsel extensively developed the facts and legal theories supporting their claims. They conducted a substantial investigation of their claims prior to the filing of the complaint. Thereafter, they completed fact and expert discovery. The parties vigorously litigated the case during all stages of litigation resulting in one remaining claim after dispositive motion practice. The case is set for jury trial on September 29,

2020. Only after hard-fought litigation and months of arm's length negotiations were the parties able to reach an agreement to resolve the claim remaining to be tried in this lawsuit.

II. The Settlement is substantively reasonable.

There were substantial risks in prosecuting this action, and further prosecution of this action to trial may have yielded limited or no recovery. Instead, the settlement fund of \$225,000 provides nearly complete recovery on the remaining claim. In the last calculation by Plaintiffs' expert, based on market conditions at the times of calculation, maximum class-wide damages were \$283,803. *See* Doc. 367-2 at 3. In other words, the settlement recovers nearly eighty percent of possible damages. The settlement does not affect the ability of the previously certified class to appeal the dismissed claims. The settlement is clearly in the range of possible approval. *Grinnell*, 495 F.2d at 455 n.2 (“In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.”)

III. This fair, reasonable, and adequate settlement warrants sending notice to the Settlement Class.

Under Rule 23(c)(2)(A) and (e)(1)(B), class notice for certification or settlement of a class certified under Rule 23(b)(1) need only be “appropriate” or “in a reasonable manner.” Due process and Rule 23(e) do not require that each Class Member receive notice, but do require that the class notice be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950). “Individual notice must be provided to those class members who are identifiable through reasonable effort.” *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 175 (1974). Even under the more stringent requirements of Rule 23(c)(2)(B) for classes certified under Rule 23(b)(3), notice by email only can be the

“best notice that is practicable.” Fed R. Civ. P 23(c)(2)(B) (“The notice may be by one or more of the following: . . . electronic means . . .”); *see also, e.g., Berkson v. Gogo LLC*, 147 F. Supp. 3d 123, 139 (E.D.N.Y. 2015) (approving notice by email only); *In re Pool Prod. Distribution Mkt. Antitrust Litig.*, 310 F.R.D. 300, 318 (E.D. La. 2015) (approving notice by email only). Courts in the Second Circuit routinely recognized that email notice is reasonable and often more effective than traditional mail. *Agonath v. Interstate Home Loans Ctr., Inc.*, No. 17-5267-JS-SIL, 2019 WL 1060627, at *7 (E.D.N.Y. Mar. 6, 2019) (collecting cases); *Sanchez v. Salsa Con Fuego, Inc.*, No. 16-473-RJS-BCM, 2016 WL 4533574, at *5–6 (S.D.N.Y. Aug. 24, 2016).

The proposed form and method of notice satisfies all due process considerations and meets the requirements of Rule 23(e)(1) because it is reasonably calculated to effect actual notice to the Settlement Class. The parties’ proposed notice to current and former participants is attached as Exhibit 3 to the Settlement Agreement. The notice will fully apprise Class Members of the existence of the lawsuit, the proposed settlement, and the information they need to make informed decisions about their rights, including: (i) the terms and operation of the settlement; (ii) the nature and extent of the release; (iii) the maximum attorneys’ fees and costs that will be sought; (iv) the procedure and timing for objecting to the settlement and the right of parties to seek limited discovery from objectors; (v) the date and place of the fairness hearing; and (vi) the website on which the full settlement documents and any modifications thereto will be posted.

The notice plan consists of multiple components designed to reach class members. First, the notice will be sent by electronic email to all class members who have an email address known to Cornell University and/or the Plan’s recordkeeper(s) and by first-class mail to the current or last known address of all class members for whom emails bounced back to the Settlement Administrator shortly after entry of the order preliminarily approving the Settlement. In addition

to the notice, Plaintiffs' counsel will develop a dedicated website solely for the settlement, and a link to that website will appear on Plaintiffs' counsel's website [www.uselaws.com]. In Plaintiffs' counsel experience a more extensive notice program by first class mail can cost \$33,000 to over \$100,000 and would be unreasonable given the size of the settlement. Schlichter Decl. ¶5. Thus, the form of notice and proposed procedures for notice satisfy the requirements of due process and the Court should approve the notice plan as adequate.

CONCLUSION

Plaintiffs respectfully request that the Court grant preliminary approval of the settlement.

September 21, 2020

Respectfully Submitted,
/s/ Joel D. Rohlf
SCHLICHTER BOGARD & DENTON LLP
Andrew D. Schlichter, Bar No. 4403267
Jerome J. Schlichter*
Heather Lea*
Joel D. Rohlf*
Scott Apking*
100 South Fourth Street, Suite 1200
St. Louis, Missouri 63102
(314) 621-6115, (314) 621-5934 (fax)
aschlichter@uselaws.com
jschlichter@uselaws.com
hlea@uselaws.com
jrohlf@uselaws.com
sapking@uselaws.com
*Admitted *pro hac vice*

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2020, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the attorneys of record.

/s/ Joel D. Rohlf
Counsel for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

CASEY CUNNINGHAM, et al.,

Plaintiffs,

v.

CORNELL UNIVERSITY, et al.

Defendants.

No. 1:16-CV-06525-PKC

**DECLARATION OF JEROME J.
SCHLICHTER IN SUPPORT OF
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

1. I am the founding partner of the law firm Schlichter Bogard & Denton LLP, counsel for the Plaintiffs in the above-referenced matters. This declaration is submitted in support of Plaintiffs' Memorandum in Support of the Unopposed Motion for Preliminary Approval of Class Settlement. I am familiar with the facts set forth below and able to testify to them.

2. There has been no collusion or complicity of any kind in connection with the negotiations for, or the agreement to, settle the Released Claim. As illustrated in Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of Class Settlement, all settlement negotiations in this case were conducted at arm's length by adverse, represented parties. The negotiations were extensive and adversarial. It is my opinion that the proposed settlement is not only "within the range of reasonableness," but also is fair, reasonable, adequate, and in the best interest of the Plans and their participants in light of the procedural and substantive risks Plaintiffs would face if litigation were to continue.

3. Attached to hereto as **Exhibit A** is a true and accurate copy of the Settlement Agreement between Plaintiffs and Defendants.

4. Each of the named plaintiffs in this litigation have a contract with this firm agreeing to a one-third fee to Schlichter Bogard & Denton LLP in the event of any recovery.

5. In recent ERISA cases settled by Schlichter Bogard & Denton LLP, notice programs have ranged from \$32,813 to \$103,638,

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and that this declaration was executed on September 21, 2020, in St. Louis, Missouri.

/s/ Jerome J. Schlichter
Jerome J. Schlichter

CLASS ACTION SETTLEMENT AGREEMENT

This Class Action Settlement Agreement (“Settlement Agreement”) is entered into between and among the Settlement Class Representative, all Settlement Class Members, and Cornell University, the Retirement Plan Oversight Committee, and Mary G. Opperman (“Defendants”).

1. Article 1 - Recitals

1.1 On August 17, 2016, Plaintiff Casey Cunningham, individually and as representative of a class of participants and beneficiaries of the Cornell University Retirement Plan for the Employees of the Endowed Colleges at Ithaca and the Cornell University Tax Deferred Annuity Plan (the “Plans”) filed his complaint in the United States District Court for the Southern District of New York, Case No. 16-6525, Doc. 1. Plaintiff brought this action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. (“ERISA”), alleging that Defendants Cornell University and the Retirement Plan Oversight Committee, among others, breached their fiduciary duties and committed prohibited transactions relating to the management, operation, and administration of the Plans. Plaintiff sought to recover all alleged losses to the Plans resulting from each breach of duty under 29 U.S.C. § 1109(a) and for other equitable and remedial relief.

1.2 On December 8, 2016, an amended complaint was filed by Casey Cunningham, Charles E. Lance, Stanley T. Marcus, Lydia Pettis, and Joy Veronneau (“Plaintiffs”), alleging claims against Cornell University, the Retirement Plan Oversight Committee, Mary G. Opperman, and CAPTRUST Financial Advisors. Doc. 38. That amended complaint was corrected on February 24, 2017, to change the name of CAPTRUST Financial Advisors to CapFinancial Partners, LLC d/b/a CAPTRUST Financial Advisors. Doc. 81. The operative complaint is the corrected amended complaint.

1.3 On September 29, 2017, the district court granted in part and denied in part Defendants’ motion to dismiss Plaintiffs’ corrected amended complaint. Doc. 107. The parties then proceeded to discovery. The parties completed fact and expert discovery and took the depositions of each named Plaintiff, seven Cornell-affiliated witnesses, two CapFinancial-Partners affiliated witnesses, three non-party witnesses, and seven expert witnesses.

1.4 On January 22, 2019, the Court certified the following class:

All participants and beneficiaries of the Cornell University Retirement Plan for the Employees of the Endowed Colleges at Ithaca and the Cornell University Tax Deferred Annuity Plan from August 17, 2010, through August 17, 2016, excluding the Defendants and any participant who is a fiduciary to the Plans.

The Court appointed Class Representatives and Class Counsel. Doc. 219.

1.5 On September 27, 2019, the district court granted in part and denied in part Defendants’ motion for summary judgment. Doc. 352. The court denied Defendants’ motion insofar as Plaintiffs alleged that Defendants breached their duty of prudence by failing to adopt the institutional share classes of the TIAA-CREF Lifecycle Funds. The district court granted the motion in all other respects.

- 1.6 The jury trial of the remaining claim was set to commence on September 29, 2020.
- 1.7 After the Court's summary judgment ruling, the parties engaged in settlement discussions. On September 1, 2020, the parties reached an agreement on all terms. The terms of the parties' settlement are memorialized in this Settlement Agreement. The settlement is limited to the claim that survived summary judgment, related to the share class of the TIAA-CREF Lifecycle Funds, and does not extend to the dismissed claims or other pretrial rulings, for which the Settling Parties reserve all rights to challenge and appeal.
- 1.8 The Settlement Class Representative and Class Counsel consider it desirable and in the Settlement Class Members' best interests that the Released Claim against Cornell Defendants be settled on behalf of the Settlement Class Representative and the Settlement Class Members upon the terms set forth below, and they have concluded that such terms are fair, reasonable, and adequate and that this Settlement will result in benefits to the Settlement Class Representative and the Settlement Class Members.
- 1.9 The Cornell Defendants agree that it is desirable to settle the sole remaining issue for trial and maintain that they are without fault or liability with respect to that issue or any of the allegations or claims asserted in this action. The Cornell Defendants are settling the Released Claim solely to avoid litigation costs and the risks associated with an in-person trial set for September 2020 amidst the current public health crisis. The Cornell Defendants provided detailed evidence that the Plans have been managed, operated and administered at all relevant times reasonably and prudently, in the best interest of the Plans and the Plans' participants, and in compliance with ERISA and applicable regulations, including the fiduciary and prohibited transaction provisions of ERISA. This Settlement Agreement, and the discussions between the Settling Parties preceding it, shall in no event constitute, be construed as, or be deemed evidence of, an admission or concession of fault or liability of any kind by the Cornell Defendants or any individual named in the Corrected Amended Complaint and identified in the Settlement Agreement.
- 1.10 The Settling Parties, as defined below, have concluded it is desirable that the remaining claim to be tried in this matter be finally settled upon the terms and conditions set forth in this Settlement Agreement. This settlement does not include the claims previously dismissed by the Court at summary judgment or upon motions to dismiss. Those claims and other pretrial rulings may be appealed to the Second Circuit.
- 1.11 Therefore, the Settling Parties, in consideration of the promises, covenants, and agreements herein described, acknowledged by each of them to be satisfactory and adequate, and intending to be legally bound, do hereby mutually agree to the terms of this Settlement Agreement.

2. Article 2 - Definitions

As used in this Settlement Agreement and the Exhibits hereto, unless otherwise defined, the following terms have the meanings specified below

- 2.1 "Administrative Expenses" means expenses incurred in the administration of this Settlement Agreement, including (a) all fees, expenses, and costs associated with providing the Settlement Notices to the Settlement Class Members, including but not

limited to the fees of the Plans' recordkeeper(s) to identify the names and addresses of Settlement Class Members; (b) related tax expenses (including taxes and tax expenses as described in Paragraph 5.3); (c) all expenses and costs associated with the distribution of funds under the Plan of Allocation, including but not limited to the fees of the Plans' recordkeepers associated with implementing this Settlement Agreement, facilitating the distribution of funds under the Plan of Allocation, and gathering the data necessary to prepare the Plan of Allocation; (d) all fees and expenses of the Independent Fiduciary, Settlement Administrator, and Escrow Agent; and (e) all fees, expenses, and costs associated with providing notices required by the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1711–1715. Excluded from Administrative Expenses are Defendants' internal expenses and the Settling Parties' respective legal expenses. Administrative Expenses shall be paid from the Gross Settlement Amount.

- 2.2** “Active Account” means an individual investment account in the Plans with a balance greater than \$0 as of September 1, 2020.
- 2.3** “Alternate Payee” means a person other than a participant or Beneficiary in the Plans who is entitled to a benefit under the Plans as a result of a Qualified Domestic Relations Order.
- 2.4** “Attorneys’ Fees and Costs” means the amount awarded by the Court as compensation for the services provided by Class Counsel and to be provided in the future during the Settlement Period. The amount of attorneys’ fees for Class Counsel shall not exceed 33 1/3% of the Gross Settlement Amount (or \$75,000), which shall be recovered from the Gross Settlement Amount. Class Counsel also will seek reimbursement from the Gross Settlement Amount for all litigation costs and expenses incurred as part of the Released Claim, including expenses incurred during the pre-litigation investigation period, not to exceed \$18,000.
- 2.5** “Authorized Former Participant” means a Former Participant who has submitted a completed, satisfactory Former Participant Claim Form with a postmarked date by the Claims Deadline, or electronically submitted online no later than the Claims Deadline, set by the Court in the Preliminary Order and whose Former Participant Claim Form is accepted by the Settlement Administrator.
- 2.6** “Beneficiary” means a person who currently is entitled to receive a benefit under the Plans upon the death of a plan participant, other than an Alternate Payee. A Beneficiary includes, but is not limited to, a spouse, surviving spouse, domestic partner, or child who currently is entitled to a benefit.
- 2.7** “CAFA” means the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1711–1715.
- 2.8** “Claims Deadline” means a date that is no later than ten (10) calendar days before the Fairness Hearing.
- 2.9** “Class Action” means *Cunningham, et al. v. Cornell University, et al.*, Case No. 16-06525, in the United States District Court for the Southern District of New York.

- 2.10** “Class Counsel” means Schlichter, Bogard & Denton LLP, 100 S. Fourth Street, Suite 1200, Saint Louis, Missouri, 63102.
- 2.11** “Class Period” means the period from August 17, 2010, through the date of entry of the Preliminary Order.
- 2.12** “Settlement Class Representative” means Casey Cunningham. The other named class representatives are not members of the Settlement Class, but remain class representatives for the non-settled claims.
- 2.13** “Settlement Class Representative’s Compensation” means an amount to be determined by the Court, but not to exceed \$1,000 for the Settlement Class Representative, which shall be paid from the Gross Settlement Amount directly to the Settlement Class Representative.
- 2.14** “Court” means the United States District Court for the Southern District of New York.
- 2.15** “Current Participant” means a Settlement Class Member who had an Active Account as of September 1, 2020.
- 2.16** “Cornell Defendants” means Cornell University, the Retirement Plan Oversight Committee, and Mary G. Opperman.
- 2.17** “Defense Counsel” means counsel for the Cornell Defendants, including Mayer Brown LLP.
- 2.18** “Escrow Agent” means UMB, or another entity agreed to by the Settling Parties.
- 2.19** “Fairness Hearing” means the hearing scheduled by the Court to consider (a) any objections from Settlement Class Members to the Settlement Agreement; (b) Class Counsel’s petition for Attorneys’ Fees and Costs and Settlement Class Representative’s Compensation; and (c) whether to finally approve the Settlement under Fed. R. Civ. P. 23.
- 2.20** “Final Order” means the entry of the order and final judgment approving the Settlement Agreement, implementing the terms of this Settlement Agreement, and dismissing the Released Claim with prejudice, to be proposed by the Settling Parties for approval by the Court, in substantially the form attached as Exhibit 4 hereto.
- 2.21** “Final” means with respect to any judicial ruling, order, or judgment, other than the final judgment granting Defendants summary judgment in part, that the period for any motions for reconsideration, motions for rehearing, appeals, petitions for certiorari, or the like (“Review Proceeding”) has expired without the initiation of a Review Proceeding, or, if a Review Proceeding has been timely initiated, that it has been fully and finally resolved, either by court action or by voluntary action of any party, without any possibility of a reversal, vacatur, or modification of any judicial ruling, order, or judgment, including the exhaustion of all proceedings in any remand or subsequent appeal and remand. The Settling Parties agree that absent an appeal or other attempted review proceeding, the

period after which the Final Order becomes Final is thirty-five (35) calendar days after its entry by the Court. The appeal of other claims in this case shall not affect the finality of the Final Order approving this settlement and each of its terms.

- 2.22** “Former Participant” is a member of the Settlement Class who did not have an Active Account as of September 1, 2020.
- 2.23** “Former Participant Claim Form” means the form substantially in the form attached as Exhibit 1.
- 2.24** “Gross Settlement Amount” means the sum of two hundred twenty-five thousand dollars (\$225,000), contributed to the Qualified Settlement Fund in accordance with Article 5. The Gross Settlement Amount shall be the full and sole monetary payment to the Settlement Class, Plaintiffs, and Class Counsel made on behalf of the Cornell Defendants in connection with the Settlement effectuated through this Settlement Agreement. The Cornell Defendants and their insurers will make no additional payment in connection with the Settlement of the Class Action.
- 2.25** “Net Settlement Amount” means the Gross Settlement Amount minus: (a) all Attorneys’ Fees and Costs paid to Class Counsel; (b) all Settlement Class Representative’s Compensation as authorized by the Court; (c) all Administrative Expenses; and (d) a contingency reserve not to exceed an amount to be mutually agreed upon by the Settling Parties that is set aside by the Settlement Administrator for: (1) Administrative Expenses incurred before the Settlement Effective Date but not yet paid, (2) Administrative Expenses estimated to be incurred after the Settlement Effective Date but before the end of the Settlement Period, and (3) an amount estimated for adjustments of data or calculation errors.
- 2.26** “Plaintiffs” means Casey Cunningham, Charles E. Lance, Stanley T. Marcus, Lydia Pettis, and Joy Veronneau.
- 2.27** “Plans” means the Cornell University Retirement Plan for the Employees of the Endowed Colleges at Ithaca and the Cornell University Tax Deferred Annuity Plan.
- 2.28** “Plan of Allocation” means the methodology for allocating and distributing the Net Settlement Amount in accordance with Article 6 herein.
- 2.29** “Preliminary Order” means the order proposed by the Settling Parties and approved by the Court in connection with the Motion for Entry of the Preliminary Order to be filed by the Settlement Class Representative through Class Counsel, as described in Paragraph 3.31 and in substantially the form attached hereto as Exhibit 2.
- 2.30** “Protective Orders” means the Confidentiality Stipulation and Order entered by the Court on February 7, 2018, (Doc. 131).
- 2.31** “Qualified Settlement Fund” or “Settlement Fund” means the interest-bearing settlement fund account to be established and maintained by the Escrow Agent in accordance with

Article 5 herein and referred to as the Qualified Settlement Fund (within the meaning of Treas. Reg. § 1.468B-1).

- 2.32** “Released Parties” means (a) Cornell University, the Retirement Plan Oversight Committee, and Mary G. Opperman; (b) their insurers, co-insurers, and reinsurers; (c) their past, present, and future affiliates, subsidiaries, divisions, joint ventures, predecessors, successors, successors-in-interest, and assigns; (d) their past, present, and future agents, officers, employees, trustees, boards of trustees, members of their board of trustees, independent contractors, representatives, attorneys, administrators, fiduciaries, accountants, auditors, advisors, consultants, personal representatives, spouses, heirs, executors, administrators, associates, employee benefit plan fiduciaries (with the exception of the Independent Fiduciary), employee benefit plan administrators, (f) the Plans and the Plans’ fiduciaries, administrators, plan administrators, recordkeepers, service providers, consultants, and parties-in-interest, other than CapFinancial Partners, LLC d/b/a Captrust Financial Advisors.
- 2.33** “Released Claim” means the portion of Count V of the Corrected Amended Complaint (Doc. 81) related to the alleged failure to adopt a lower cost share class of the TIAA-CREF Lifecycle Funds upon which summary judgment was denied in an order dated September 27, 2019 (Doc. 352). This agreement does not settle or release any of the other claims in the Corrected Amended Complaint and does not settle or release any other claim.
- 2.34** “Settlement” or “Settlement Agreement” refers to the agreement embodied in this agreement and its exhibits.
- 2.35** “Settlement Administrator” means an independent contractor to be retained by Class Counsel to administer the Settlement and Plan of Allocation.
- 2.36** “Settlement Agreement Execution Date” means that date on which the final signature is affixed to this Settlement Agreement.
- 2.37** “Settlement Class” means the set of persons who participated in the Plans and invested in the TIAA-CREF Lifecycle funds between August 17, 2010 and April 17, 2012, including any Beneficiary of a deceased person who participated in one or more of the Plans at any time during the Class Period and invested in the TIAA-CREF Lifecycle funds between August 17, 2010 and April 17, 2012, and any Alternate Payee of a person subject to a Qualified Domestic Relations Order who participated in one or more of the Plans at any time during the Class Period and invested in the TIAA-CREF Lifecycle funds between August 17, 2010 and April 17, 2012. Excluded from the Settlement Class are any individuals that served as members of the Retirement Plan Oversight Committee from August 17, 2010 to April 17, 2012.
- 2.38** “Settlement Class Members” means all individuals in the Settlement Class, including the Class Representative.
- 2.39** “Settlement Effective Date” means the date on which the Final Order is Final, provided that by such date the Settlement has not been terminated in accordance with Article 11.

- 2.40** “Settlement Notice” means the Notices of Class Action Settlement and Fairness Hearing to be sent to Settlement Class Members identified by the Settlement Administrator following the Court’s issuance of the Preliminary Order, in substantially the form attached hereto as Exhibit 3. The Settlement Notice informs Settlement Class Members of a Fairness Hearing to be held before the Court, on a date to be determined by the Court, at which any Settlement Class Member satisfying the conditions set forth in the Preliminary Order and the Settlement Notice may be heard regarding: (a) the terms of the Settlement Agreement; (b) the petition of Class Counsel for award of Attorneys’ Fees and Costs; (c) payment of and reserve for Administrative Expenses; and (d) Settlement Class Representative’s Compensation.
- 2.41** “Settlement Website” means the internet website established in accordance with Paragraph 11.2.
- 2.42** “Settling Parties” means the Cornell Defendants and the Settlement Class Representative, on behalf of himself, the Plan, and each of the Settlement Class Members.

3. Article 3 – Preliminary Settlement Approval and Notice to the Class

- 3.1** Settlement Class Representative, through Class Counsel, shall file with the Court motions seeking preliminary approval of this Settlement Agreement and class certification for settlement purposes only, and for entry of the Preliminary Order in substantially the form attached hereto as Exhibit 2. The Preliminary Order to be presented to the Court shall, among other things:
- 3.1.1** Grant the motion to certify the Settlement Class as defined in Paragraph 2.37 for settlement purposes only under Fed. R. Civ. P. 23(b)(1);
- 3.1.2** Approve the text of the Settlement Notice for sending by electronic means to Settlement Class Members to notify them (1) of the Settlement Agreement, (2) of the Fairness Hearing, and (3) that notice of changes to the Settlement Agreement, future orders regarding the Settlement, modifications to the Class Notice, changes in the date or timing of the Fairness Hearing, or other modifications to the Settlement, including the Plan of Allocation, may be provided to the Settlement Class through the Settlement Website without requiring additional mailed or electronic notice;
- 3.1.3** Determine that under Rule 23(e)(1) of the Federal Rules of Civil Procedure, the Settlement Notices constitute reasonable notice under the circumstances, provide due and sufficient notice of the Fairness Hearing and of the rights of all Settlement Class Members, and comply fully with the requirements of Fed. R. Civ. P. 23, the Constitution of the United States, and any other applicable law;
- 3.1.4** Cause the Settlement Administrator to transmit, by electronic means, the Settlement Notice to each Settlement Class Member identified by the Settlement Administrator, based upon the data provided by the Plan’s recordkeeper;

- 3.1.5** Set the Fairness Hearing for no sooner than one hundred twenty (120) calendar days after the date the Motion for Entry of the Preliminary Order is filed, in order to determine whether (a) the Court should approve the Settlement as fair, reasonable, and adequate; (b) the Court should enter the Final Order; and (c) the Court should approve the application for Attorneys' Fees and Costs, Settlement Class Representative's Compensation, Administrative Expenses incurred to date, and a reserve for anticipated future Administrative Expenses;
- 3.1.6** Provide that any objections to any aspect of the Settlement Agreement shall be heard, and any papers submitted in support of said objections shall be considered, by the Court at the Fairness Hearing if they have been filed validly with the Clerk of the Court and copies provided to Class Counsel and Defense Counsel. To be filed validly, the objection and any notice of intent to appear or supporting documents must be filed at least thirty (30) calendar days prior to the scheduled Fairness Hearing. Any person wishing to speak at the Fairness Hearing shall file and serve a notice of intent to appear within the time limitation set forth above;
- 3.1.7** Provide that the Settling Party may, but is not required to, serve discovery requests, including requests for documents and notices of deposition not to exceed two (2) hours in length, on any objector within ten (10) calendar days of receipt of the objection, and that any responses to discovery or depositions must be completed within ten (10) calendar days of the discovery request being served on the objector;
- 3.1.8** Provide that any party may file a response to an objection by a Settlement Class Member;
- 3.1.9** Set a deadline of no later than the date of ten (10) calendar days prior to the Fairness Hearing by which each Former Participant must file a Former Participant Claim Form with Class Counsel in order to be considered for a distribution in accordance with the Plan of Allocation;
- 3.1.10** Provide that the Fairness Hearing may, without further direct notice to the Settlement Class Members, other than by notice to Class Counsel, be adjourned or continued by order of the Court;
- 3.1.11** Approve the form of the CAFA Notices attached as Exhibit 5 and order that upon mailing of the CAFA notices, the Cornell Defendants shall have fulfilled their obligations under CAFA.
- 3.2** The Cornell Defendants and Defense Counsel, or their delegates, shall use reasonable efforts to respond timely to written requests, including by e-mail, from the Settlement Administrator for readily accessible data that are reasonably necessary to determine the feasibility of administering the Plan of Allocation or to implement the Plan of Allocation. The actual and reasonable expenses of any third party, including the Plans' recordkeepers, that are necessary to perform such work shall be Administrative Expenses

to be deducted from the Gross Settlement Amount, except that the Plans' recordkeeper(s) shall not receive compensation for crediting the accounts of the Current Participants under Paragraph 6.7

- 3.3 The Settlement Administrator shall be bound by the Protective Order and any further non-disclosure or security protocol required by the Settling Parties.
 - 3.4 The Settlement Administrator shall use the data provided by Defendants and the Plans' recordkeepers solely for the purpose of meeting its obligations as Settlement Administrator, and for no other purpose.
 - 3.5 At the request of the Settling Parties, the Settlement Administrator shall provide a written protocol concerning how the Settlement Administrator will maintain and store information provided to it in order to ensure that reasonable and necessary precautions are taken to safeguard the privacy and security of such information.
 - 3.6 By the date and in the manner set by the Court in the Preliminary Order, and unless otherwise set forth below, the Settlement Administrator shall:
 - 3.6.1 Cause to be sent to each Settlement Class Member identified by the Settlement Administrator a Settlement Notice in the form and manner to be approved by the Court, which shall be in substantially the form attached hereto as Exhibit 3 and approved by the Court. The Settlement Notice shall be sent to the last known e-mail address of each Settlement Class Member provided by the Defendants' Counsel, Defendants and/or the Plan's recordkeepers (or their designee(s)), unless an updated address is obtained by the Settlement Administrator through its efforts to verify the last known addresses provided by to the Settlement Administrator. Class Counsel also shall post a copy of the Settlement Notice on the Settlement Website, and a link to the Settlement Website will also appear on Class Counsel's website.
 - 3.7 No later than ten (10) calendar days after the filing of the motion for preliminary approval of the Settlement, the Settlement Administrator shall serve the CAFA notices, at the direction of the Cornell Defendants, in substantially the form attached as Exhibit 5 hereto on the Attorney General of the United States, the Secretary of the Department of Labor, and the attorneys general of all states in which members of the Settlement Class reside, as specified by 28 U.S.C. § 1715,
- 4. Article 4 – Final Settlement Approval**
- 4.1 No later than ten (10) business days before the Fairness Hearing, Class Counsel shall submit to the Court a motion for entry of the Final Order (Exhibit 4) in the form approved by Class Counsel and Defense Counsel, which shall request approval by the Court of the terms of this Settlement Agreement and entry of the Final Order in accordance with this Settlement Agreement. The Final Order as proposed by the Settling Parties shall provide for the following, among other things, as is necessary to carry out the Settlement consistent with applicable law and governing Plan documents:

- 4.1.1** Approval of the Settlement of the Released Claim covered by this Settlement Agreement adjudging the terms of the Settlement Agreement to be fair, reasonable, and adequate to the Plans and the Settlement Class Members and directing the Settling Parties to take the necessary steps to effectuate the terms of the Settlement Agreement;
- 4.1.2** A determination under Rule 23(e)(1) of the Federal Rules of Civil Procedure that the Settlement Notice constitutes reasonable under the circumstances and that due and sufficient notice of the Fairness Hearing and the rights of all Settlement Class Members has been provided;
- 4.1.3** Dismissal with prejudice of the Released Claim asserted therein whether asserted by the Settlement Class Representative on his own behalf or on behalf of the Settlement Class Members, or on behalf of the Plans, without costs to any of the Settling Parties other than as provided for in this Settlement Agreement;
- 4.1.4** That the Plans and each Settlement Class Member (and their respective heirs, beneficiaries, executors, administrators, estates, past and present partners, officers, directors, agents, attorneys, predecessors, successors, and assigns) shall be (a) conclusively deemed to have, and by operation of the Final Order shall have, fully, finally, and forever settled, released, relinquished, waived, and discharged the Released Parties from the Released Claim; and (b) barred and enjoined from suing the Released Parties in any action or proceeding alleging based on the factual predicate of the Released Claim. The provisions (a) and (b) shall apply even if any Settlement Class Member may thereafter discover facts in addition to or different from those which the Settlement Class Members or Class Counsel now know or believe to be true with respect to the Class Action and the Released Claim, whether or not such Settlement Class Members receive a monetary benefit from the Settlement, whether or not such Settlement Class Members have executed and delivered a Former Participant Claim Form, whether or not such Settlement Class Members have filed an objection to the Settlement or to any application by Class Counsel for an award of Attorneys' Fees and Costs, and whether or not the objections or claims for distribution of such Settlement Class Members have been approved or allowed;
- 4.1.5** That each Settlement Class Member shall release the Released Parties, Defense Counsel, Settlement Class Representative and Class Counsel for any claims, liabilities, and attorneys' fees and expenses arising from the allocation of the Gross Settlement Amount or Net Settlement Amount and for all tax liability and associated penalties and interest as well as related attorneys' fees and expenses;
- 4.1.6** That all applicable CAFA requirements have been satisfied;
- 4.1.7** That the Settlement Administrator shall have final authority to determine the share of the Net Settlement Amount to be allocated to each Current Participant and each Authorized Former Participant in accordance with the Plan of Allocation approved by the Court;

- 4.1.8 That the Settlement Administrator shall have final authority to determine the share of the Net Settlement Amount to be allocated to each Current Participant and each Authorized Former Participant pursuant to the Plan of Allocation approved by the Court;
 - 4.1.9 That, with respect to payments or distributions to Authorized Former Participants, all questions not resolved by the Settlement Agreement shall be resolved by the Settlement Administrator in its sole and exclusive discretion, including whether a Former Participant Claim Form should be accepted in the first instance;
 - 4.1.10 That, with respect to any matters that arise concerning the implementation of distributions to Current Participants (after allocation decisions have been made by the Settlement Administrator in its sole discretion), all questions not resolved by the Settlement Agreement shall be resolved by the Plan administrator or other fiduciaries of the Plans, in accordance with applicable law and the governing terms of the Plans; and
 - 4.1.11 That within twenty-one (21) calendar days following the issuance of all settlement payments to Settlement Class Members as provided by the Plan of Allocation approved by the Court, the Settlement Administrator shall prepare and provide to Class Counsel and Defense Counsel a list of each person who received a settlement payment or contribution from the Qualified Settlement Fund and the amount of such payment or contribution
- 4.2 The Final Order and judgment entered by the Court approving the Settlement Agreement shall provide that upon its entry all Settling Parties, the Settlement Class, and the Plans shall be bound by the Settlement Agreement and by the Final Order.

5. Article 5 – Establishment of Qualified Settlement Fund

- 5.1 No later than five (5) business days after entry of the Preliminary Order, the Escrow Agent shall establish an escrow account. The Settling Parties agree that the escrow account is intended to be, and will be, an interest-bearing Qualified Settlement Fund within the meaning of Treas. Reg. § 1.468B-1. In addition, the Escrow Agent timely shall make such elections as necessary or advisable to carry out the provisions of this Paragraph 5.1, including the “relation-back election” (as defined in Treas. Reg. § 1.468B-1) back to the earliest permitted date. Such elections shall be made in compliance with the procedures and requirements contained in such regulations. It shall be the responsibility of the Escrow Agent to prepare and deliver, in a timely and proper manner, the necessary documentation for signature by all necessary parties, and thereafter to cause the appropriate filing to occur.
- 5.2 For the purpose of § 468B of the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder, the “administrator” shall be the Escrow Agent. The Escrow Agents, or the Settlement Administrator on its behalf, shall timely and properly cause to be filed all informational and other tax returns necessary or advisable with

respect to the Gross Settlement Amount (including without limitation applying for a Taxpayer Identification Number for the Fund and filing the returns described in Treas. Reg. § 1.468B-2(k)). Such returns as well as the election described in Paragraph 5.1 shall be consistent with this Article 5 and, in all events, shall reflect that all taxes (as defined in Paragraph 5.3 below) (including any estimated taxes, interest, or penalties) on the income earned by the Gross Settlement Amount shall be deducted and paid from the Gross Settlement Amount as provided in Paragraph 5.3 hereof.

- 5.3** Taxes and tax expenses are Administrative Expenses to be deducted and paid from the Gross Settlement Amount, including but not limited to: (a) all taxes (including any estimated taxes, interest, or penalties) arising with respect to the income earned by the Gross Settlement Amount, including any taxes or tax detriments that may be imposed upon Defendants or Defense Counsel with respect to any income earned by the Gross Settlement Amount for any period during which the Gross Settlement Amount does not qualify as a “qualified settlement fund” for federal or state income tax purposes; and (b) all tax expenses and costs incurred in connection with the operation and implementation of this Article 5 (including, without limitation, expenses of tax attorneys and/or accountants and mailing and distribution costs and expenses relating to filing (or failing to file) the returns described in this Article 5). Such taxes and tax expenses shall be Administrative Expenses and shall be paid timely by the Escrow Agent out of the Gross Settlement Amount without prior order from the Court. The Escrow Agent shall be obligated (notwithstanding anything herein to the contrary) to withhold from distribution to any Settlement Class Member any funds necessary to pay such amounts, including the establishment of adequate reserves for any taxes and tax expenses (as well as any amounts that may be required to be withheld under Treas. Reg. § 1.468B-2(1)(2)); neither the Released Parties, Defense Counsel, nor Class Counsel are responsible nor shall they have any liability therefor. The Settling Parties agree to cooperate with the Escrow Agent, each other, and their tax attorneys and accountants to the extent reasonably necessary to carry out the provisions of this Article 5.
- 5.4** Within twenty-one (21) calendar days after the later of (a) the date the Preliminary Order is entered, or (b) the date the escrow account described in Paragraph 5.1 is established and the Escrow Agent shall have furnished to Defendants in writing the escrow account name, IRS W-9 Form, and all necessary wiring instructions, Defendants and/or their insurer(s) shall deposit two hundred twenty-five thousand dollars (\$225,000) into the Qualified Settlement Fund.
- 5.5** The Escrow Agent shall, at the written direction of Class Counsel, invest the Qualified Settlement Fund in short-term United States Agency or Treasury Securities or other instruments backed by the Full Faith and Credit of the United States Government or an Agency thereof, or fully insured by the United States Government or an Agency thereof, and shall reinvest the proceeds of these investments as they mature in similar instruments at their then-current market rates.
- 5.6** The Escrow Agent shall not disburse the Qualified Settlement Fund or any portion except as provided in this Settlement Agreement, in an order of the Court, or in a subsequent written stipulation between Class Counsel and Defense Counsel. Subject to the orders of

the Court, the Escrow Agent is authorized to execute such transactions as are consistent with the terms of this Settlement Agreement.

- 5.7** Within one-hundred twenty (120) calendar days after the Settlement Effective Date, the Gross Settlement Amount will be distributed from the Qualified Settlement Fund as follows: (a) first, all Attorneys' Fees and costs shall be paid to Class Counsel within seven (7) business days after the Settlement Effective Date; (b) second, all Administrative Expenses not paid previously shall be paid within seven (7) business days after the Settlement Effective Date; (c) third, any Settlement Class Representative's Compensation ordered by the Court shall be paid within seven (7) business days after the Settlement Effective Date; (d) fourth, a contingency reserve not to exceed an amount to be mutually agreed upon by the Settling Parties shall be set aside by the Settlement Administrator for: (1) Administrative Expenses incurred before the Settlement Effective Date but not yet paid, (2) Administrative Expenses estimated to be incurred after the Settlement Effective Date but before the end of the Settlement Period, (3) an amount estimated for adjustments of data or calculation errors, and (e) fifth, the Net Settlement Amount will be distributed in accordance with the Plan of Allocation. Pending final distribution of the Net Settlement Amount in accordance with the Plan of Allocation, the Escrow Agent will maintain the Qualified Settlement Fund.
- 5.8** The Escrow Agent, or the Settlement Administrator on its behalf, shall be responsible for making provision for the payment from the Qualified Settlement Fund of all taxes and tax expenses, if any, owed with respect to the Qualified Settlement Fund, and for all tax reporting, remittance, and/or withholding obligations, if any, for amounts distributed from it. The Released Parties, Defense Counsel, and/or Class Counsel have no responsibility or any liability for any taxes or tax expenses owed by, or any tax reporting or withholding obligations, if any, of the Qualified Settlement Fund.
- 5.9** No later than February 15 of the year following the calendar year in which the Cornell Defendants, their insurers, or agents make a transfer to the Qualified Settlement Fund in accordance with the terms of this Article 5, the Cornell Defendants, their insurers, or agents shall timely furnish a statement to the Escrow Agent, or the Settlement Administrator on its behalf that complies with Treas. Reg. § 1.468B-3(e)(2), which may be a combined statement under Treas. Reg. § 1.468B3(e)(2)(ii), and shall attach a copy of the statement to their federal income tax returns filed for the taxable year in which the Cornell Defendants, their insurers, or agents make a transfer to the Qualified Settlement Fund.
- 6. Article 6 – Plan of Allocation**
- 6.1** After the Settlement Effective Date, the Settlement Administrator shall cause the Net Settlement Amount to be allocated and distributed to the Authorized Former Participants and Current Participants in accordance with the Plan of Allocation set forth in this Article 6 and as ordered by the Court.
- 6.2** To be eligible for a distribution from the Net Settlement Amount, a person must be a Current Participant, an Authorized Former Participant, or a Beneficiary or Alternate

Payee of such a person. Current Participants shall receive their settlement payments as earnings credited to their Plan accounts as described in this Article 6 unless, as of the date of the settlement payments, they no longer have an account in the Plans.

- 6.3** Current Participants shall receive their settlement payments as contributions to their account(s) in the Plans.
- 6.4** Authorized Former Participants shall receive their settlement payments in the form of a check, as provided in Paragraph 6.10 below.
- 6.5** Beneficiaries shall receive payments by check in amounts corresponding to their entitlement as beneficiaries of the Current Participant or of the Authorized Former Participant with respect to which the payment is made. Alternate Payees shall receive payments by check if and to the extent they are entitled to receive a portion of a Current Participant's or Authorized Former Participant's allocation under this Article 6 in accordance with the terms of the applicable Qualified Domestic Relations Order. The Settlement Administrator shall have sole and final discretion to determine the amounts to be paid to Beneficiaries and Alternate Payees in accordance with the Plan of Allocation set forth in this Article 6 and as ordered by the Court.
- 6.6** **Calculation of Settlement Payments.** Payments to Authorized Former Participants and Current Participants shall be calculated by the Settlement Administrator in accordance with the Plan of Allocation as follows:

 - 6.6.1** The Settlement Administrator shall obtain from Class Counsel or the Plans' recordkeepers a list of Current and Former Participants who invested in the TIAA-CREF Lifecycle Funds between August 17, 2010 and April 17, 2012. Defendants agree to provide the necessary approvals authorizing transmission of such information to the Settlement Administrator.
 - 6.6.2** Payments to the Authorized Former Participants and Current Participants shall be calculated by the Settlement Administrator on a per-capita basis by dividing the Net Settlement Amount by the number of Current Participants and Authorized Former Participants.
 - 6.6.3** The Settlement Administrator shall determine the total settlement payment available to each Current Participants and Authorized Former Participant by calculating each such participant's share of the Net Settlement as set forth above.
 - 6.6.4** The Settlement Administrator shall complete all payment calculations for all Current Participants and Authorized Former Participants within thirty (30) business days after the Settlement Effective Date.
 - 6.6.5** The Settlement Administrator shall utilize the calculations required to be performed herein for (a) making the required payments to Current Participants and Authorized Former Participants under Paragraphs 6.7, and 6.10 of the Settlement Agreement; and (b) instructing the Plans as to the amounts to be

distributed to the Current Participants under Paragraph 6.7 of the Settlement Agreement and calculating the total amount to deposit into each Current Participant's Active Account(s) to fulfill this instruction.

6.7 Payments to Current Participants. Current Participants will not be required to submit a Former Participant Claim Form to receive a settlement payment.

6.7.1 Within two (2) business days after the Settlement Administrator has completed all payment calculations for all Current Participants, the Settlement Administrator will provide to each of the Plans' recordkeepers an Excel spreadsheet containing the name, Social Security number, and the amount of the settlement payment to be made by that recordkeeper into the Active Account(s) for each Current Participant.

6.7.2 Thereafter, within ten (10) business days' written notice to Defendants (or their designee), the Settlement Administrator shall effect a transfer from the Qualified Settlement Fund to each of the Plans' recordkeepers of the aggregate amount of all settlement payments payable to Current Participants with that recordkeeper, as reflected in the spreadsheets provided by the Settlement Administrator.

6.7.3 The Cornell Defendants (or their designee) shall direct the Plans' recordkeepers to credit the individual Active Account(s) of each Current Participant in an amount equal to that stated on the spreadsheets provided by the Settlement Administrator in relation to such Current Participant.

6.7.4 If the Current Participant has multiple accounts, the payment shall be deposited into the account in which the TIAA-CREF Lifecycle Funds were held between August 17, 2010 and April 17, 2012. If the Current Participant invested in the TIAA-CREF Lifecycle Funds in more than one account, the payment shall be deposited into the account that currently has the highest account balance. If the Current Participant invested in the TIAA-CREF Lifecycle Funds in an account that is no longer active, the payment shall be deposited into the Current Participant's active account with the highest account balance.

6.7.5 The settlement payment for each Current Participant with each recordkeeper will be invested in accordance with and proportionate to such Current Participant's investment elections then on file for new contributions with that recordkeeper. If there is no investment election for new contributions on file for any Current Participant with a recordkeeper, then such Current Participant shall be deemed to have directed such payment to be invested in the relevant Plan's "Qualified Default Investment Alternative" as defined in 29 C.F.R. § 2550.404c-5.

6.7.6 If the Current Participant has a zero account balance, the settlement payment shall be invested in the relevant Plan's "Qualified Default Investment Alternative" as defined in 29 C.F.R. § 2550.404c-5.

6.7.7 The settlement payment will be reflected in the Current Participant's Plan account as additional earnings.

- 6.7.8** The Plans' recordkeepers shall process all Current Participant transactions within thirty (30) calendar days of receiving direction from Defendants (or their designee) for any Current Participant.
- 6.8** If, as of the date when distributions pursuant to this Settlement Agreement are made, a Current Participant no longer has an Active Account, he or she will be treated as an Authorized Former Participant for purposes of the settlement distribution only and will receive his or her payment from the Settlement Administrator in one settlement check as described in Paragraph 6.9. A Current Participant who no longer has an Active Account on the date of his or her Settlement distribution need not complete a Former Participant Claim Form. Settlement payments that cannot be made by the Plans' recordkeeper(s) within thirty (30) calendar days of receiving direction from the Plan Fiduciary because the Class Member no longer has an Active Account shall be returned by the recordkeeper(s) to the Settlement Administrator for distribution within ten (10) calendar days thereafter.
- 6.9** **Payments to Authorized Former Participants.** The Former Participant Claim Form shall advise the Authorized Former Participant that any distribution in accordance with the Settlement may be rollover eligible and of their right to roll over such an amount. If the Authorized Former Participant elects to treat the Settlement Distribution as a rollover, the Settlement Administrator shall follow proper rollover instructions provided by the Authorized Former Participant. Neither the Released Parties, Defense Counsel, nor Class Counsel shall have any responsibility for or liability whatsoever with respect to any tax advice given to the Authorized Former Participants or the Current Participants.
- 6.10** For each Authorized Former Participant, the Settlement Administrator will issue a single check from the Qualified Settlement Fund and mail the check to the address of such Authorized Former Participant listed in his or her Former Participant Claim Form or, in the case of ambiguity or uncertainty, to the address of such person as determined by the Settlement Administrator using commercially reasonable means. The check shall be issued as follows:
- 6.10.1** For each check issued, the Settlement Administrator shall (a) calculate and withhold any applicable taxes associated with the payments allocable to the Authorized Former Participant; (b) report such payments and remit such tax withholdings to the Internal Revenue Service and applicable state revenue agents; and (c) issue appropriate tax forms to the Authorized Former Participants.
- 6.10.2** The Settlement Administrator shall advise the Authorized Former Participant that any distribution in accordance with the Settlement is rollover eligible and of their right to rollover such an amount, and shall follow proper rollover instructions provided by the Authorized Former Participant.
- 6.11** This Plan of Allocation is based upon preliminary data regarding the Settlement Class Members who may be entitled to settlement payments. If the Settlement Administrator concludes that it is impracticable to implement any provision of this Plan of Allocation,

the Settling Parties will modify promptly the terms of this Plan of Allocation and present such modified terms, first, to the Independent Fiduciary for its review and approval and, second, to the Court for its approval. Direct mailed or electronic notice to Settlement Class Members of such proposed modification of the Plan of Allocation shall not be required. However, notice of such proposed modification shall be posted on the Settlement Website within five (5) business days of the date that the proposed modification is submitted to the Court for its approval. If the proposed modification is implemented, notice of such modification shall be posted on the Settlement Website within five (5) business days of the date that the modification was implemented.

- 6.12** The Settlement Administrator shall be solely responsible for performing any calculations required by this Plan of Allocation.
- 6.13** Within ten (10) business days of completing all aspects of this Plan of Allocation, the Settlement Administrator shall send to Class Counsel, Defense Counsel, and Defendants one or more affidavits stating the following: (a) the name of each Settlement Class Member to whom the Settlement Administrator sent the Settlement Notice or the Former Participant Claim Form, and the address of such mailing; (b) the date(s) upon which the Settlement Administrator sent the Settlement Notice or the Former Participant Claim Form; (c) the name of each Settlement Class Member whose Settlement Notice or Former Participant Claim Form was returned as undeliverable; (d) the efforts made by the Settlement Administrator to find the correct address and to deliver the Settlement Notice or Former Participant Claim Form for each such Settlement Class Member; and (e) the name of each Settlement Class Member to whom the Settlement Administrator made a distribution from the Net Settlement Amount, together with the amount of the distribution, the name of the payee, the date of distribution, the amount of tax withholdings, if applicable, and the date of remittance of tax withholdings to the appropriate tax authority, if applicable. These affidavits and the accompanying information shall be considered “Confidential” under the terms of the Protective Orders.
- 6.14** The Settling Parties acknowledge that any payments to Settlement Class Members or their attorneys may be subject to applicable tax laws. The Cornell Defendants, Defense Counsel, Class Counsel, and Settlement Class Representative will provide no tax advice to the Settlement Class Members and make no representation regarding the tax consequences of any of the settlement payments described in this Settlement Agreement. To the extent that any portion of any settlement payment is subject to income or other tax, the recipient of the payment shall be responsible for payment of such tax. Deductions will be made, and reporting will be performed by the Settlement Administrator, as required by law in respect of all payments made under the Settlement Agreement. Payments from the Qualified Settlement Fund shall not be treated as wages by the Settling Parties.
- 6.15** Each Settlement Class Member, Beneficiary, or Alternate Payee who receives a payment under this Settlement Agreement shall be fully and ultimately responsible for payment of any and all federal, state, or local taxes resulting from or attributable to the payment received by such person. Each such Settlement Class Member, Beneficiary, or Alternate Payee shall hold the Released Parties, Defense Counsel, Class Counsel, and the

Settlement Administrator harmless from any tax liability, including penalties and interest, related in any way to payments under the Settlement Agreement, and shall hold the Released Parties, Defense Counsel, Class Counsel, and the Settlement Administrator harmless from the costs (including, for example, attorneys' fees and disbursements) of any proceedings (including, for example, investigation and suit), related to such tax liability.

- 6.16** All checks issued in accordance with this Plan of Allocation shall expire no later than one hundred twenty (120) calendar days after their issue date. All checks that are undelivered or are not cashed before their expiration date shall revert to the Qualified Settlement Fund.
- 6.17** No sooner than thirty (30) calendar days following the end of the Settlement Period, any Net Settlement Amount remaining in the Qualified Settlement Fund after distributions, including costs, taxes and interest-earned on the Qualified Settlement Fund, shall be paid to the Plans for the purpose of defraying administrative fees and expenses of the Plans that would otherwise be charged to the Plans' participants. In no event shall any part of the Settlement Fund be used to reimburse any of the Cornell Defendants or otherwise offset settlement related costs incurred by any of the Cornell Defendants.

7. Article 7 – Attorneys' Fees and Costs

- 7.1** Class Counsel intends to seek to recover their attorneys' fees not to exceed \$75,000, and litigation costs and expenses incurred as part of the Released Claim, not to exceed \$18,000, which shall be recovered from the Gross Settlement Amount. Class Counsel also intends to seek Settlement Class Representative's Compensation, in an amount not to exceed \$1,000 for the Settlement Class Representative which shall be recovered from the Gross Settlement Amount.
- 7.2** Class Counsel will file a motion for an award of Attorneys' Fees and Costs at least thirty (30) days before the deadline set in the Preliminary Order for objections to the proposed settlements, which may be supplemented thereafter.

8. Article 8 – Release and Covenant Not to Sue

- 8.1** As of the Settlement Effective Date, the Plans, and each Settlement Class Member (and their respective heirs, beneficiaries, executors, administrators, estates, past and present partners, officers, directors, agents, attorneys, predecessors, successors, and assigns), on his/her own behalf and on behalf of the Plans, shall be deemed to have fully, finally, and forever settled, released, relinquished, waived, and discharged all Released Parties from the Released Claim, whether or not such Settlement Class Member has received a monetary benefit from the Settlement.
- 8.2** As of the Settlement Effective Date, the Settlement Class Representative, the Settlement Class Members and the Plans expressly agree that they, acting individually or together, or in combination with others, shall not sue or seek to institute, maintain, prosecute, argue,

or assert in any action or proceeding (including but not limited to an IRS determination letter proceeding, a Department of Labor proceeding, an arbitration or a proceeding before any state insurance or other department or commission), any cause of action, demand, or claim based upon the identical factual predicate of the Released Claim. Nothing herein shall preclude any action to enforce the terms of this Settlement Agreement in accordance with the procedures set forth in this Settlement Agreement.

8.3 Class Counsel, the Settlement Class Representative, Settlement Class Members, or the Plans may hereafter discover facts in addition to or different from those that they know or believe to be true with respect to the Released Claim. Such facts, if known by them, might have affected the decision to settle with the Released Parties, or the decision to release, relinquish, waive, and discharge the Released Claim, or the decision of a Settlement Class Member not to object to the Settlement. Notwithstanding the foregoing, each Settlement Class Member and the Plans shall expressly, upon the entry of the Final Order, be deemed to have, and, by operation of the Final Order, shall have fully, finally, and forever settled, released, relinquished, waived, and discharged the Released Claim.

9. Article 9 – Representations and Warranties

9.1 The Settling Parties represent:

9.1.1 That they are voluntarily entering into this Settlement Agreement as a result of arm's length negotiations among their counsel, and that in executing this Settlement Agreement they are relying solely upon their own judgment, belief, and knowledge, and upon the advice and recommendations of their own independently selected counsel, concerning the nature, extent, and duration of their rights and claims hereunder and regarding all matters that relate in any way to the subject matter hereof;

9.1.2 That they assume the risk of mistake as to facts or law;

9.1.3 That they recognize that additional evidence may have come to light, but that they nevertheless desire to avoid the expense and uncertainty of litigation by entering into the Settlement;

9.1.4 That they have read carefully the contents of this Settlement Agreement, and this Settlement Agreement is signed freely by each individual executing this Settlement Agreement on behalf of each of the Settling Parties; and

9.1.5 That they have made such investigation of the facts pertaining to the Settlement and all matters pertaining thereto, as they deem necessary.

9.2 Each individual executing this Settlement Agreement on behalf of a Settling Party does hereby personally represent and warrant to the other Settling Parties that he/she has the authority to execute this Settlement Agreement on behalf of, and fully bind, each principal that each such individual represents or purports to represent.

10. Article 10 – Termination, Conditions of Settlement, and Effect of Disapproval, Cancellation, or Termination

10.1 The Settlement Agreement shall automatically terminate, and thereby become null and void with no further force or effect if:

10.1.1 The Preliminary Order or the Final Order is not entered by the Court in substantially the form submitted by the Settling Parties or in a form which is otherwise agreed to by the Settling Parties;

10.1.2 The Settlement Class is not certified as defined herein or in a form which is otherwise agreed to by the Settling Parties;

10.1.3 This Settlement Agreement is disapproved by the Court or fails to become effective; or;

10.1.4 The Preliminary Order or Final Order is finally reversed on appeal, or is modified on appeal, and the Settling Parties do not mutually agree to any such modifications.

10.2 If the Settlement Agreement is terminated, deemed null and void, or has no further force or effect, the Class Action and the Released Claim asserted by the Settlement Class Representative shall for all purposes with respect to the Settling Parties revert to their status as though the Settling Parties never executed the Settlement Agreement. All funds deposited in the Qualified Settlement Fund, and any interest earned thereon, shall be returned to Defendants, their agents, or insurers pro rata based on their contributions to the Qualified Settlement Fund within thirty (30) calendar days after the Settlement Agreement is finally terminated or deemed null and void, except as provided for in Paragraph 10.4.

10.3 It shall not be deemed a failure to approve the Settlement Agreement if the Court denies, in whole or in part, Class Counsel's request for Attorneys' Fees and Costs and/or Settlement Class Representative's Compensation and/or modifies any of the proposed orders relating to Attorneys' Fees and Costs and/or Settlement Class Representative's Compensation.

10.4 In the event that the Settlement Agreement is terminated, Administrative Expenses incurred prior to the termination shall be paid first from the interest earned, if any, on the Qualified Settlement Fund. Administrative Expenses in excess of the interest earned on the Qualified Settlement Fund shall be split evenly and paid by Class Counsel, on the one hand, and Defendants, on the other hand.

11. Article 11 – Confidentiality of the Settlement Negotiations and Permitted Settlement-Related Communications

11.1 Except as set forth explicitly below, the Settling Parties, Class Counsel, and Defense Counsel agree to keep confidential all positions, assertions, and offers made during settlement negotiations relating to the Class Action and the Settlement Agreement, except

that they may discuss the negotiations with the Class Members, and the Settling Parties' tax, legal, and regulatory advisors, provided in each case that they (a) secure written agreements with such persons or entities that such information shall not be further disclosed; and (b) comply with this Article 12 in all other respects.

- 11.2** Class Counsel will establish a Settlement Website on which it will post the following documents or links to the following documents on or following the date of the Preliminary Order: the operative Complaint, Settlement Agreement and its Exhibits, Settlement Notice, Former Participants Claim Form, Settlement Class Representative's Motion for Attorneys' Fees and Costs and Award of Compensation to the Settlement Class Representative, any Court orders related to the Settlement, any amendments or revisions to these documents, and any other documents or information mutually agreed upon by the Settling Parties ("Settlement Website Information"). No other information or documents will be posted on the Settlement Website unless agreed to in advance by the Settling Parties in writing. Class Counsel will take down the Settlement Website ninety (90) calendar days after the Settlement Effective Date.
- 11.3** Within thirty (30) calendar days of the filing of the motion for preliminary approval of the Settlement, Defendants may issue a communication to the Plans' participants explaining the terms of the Settlement and/or Plan of Allocation. If Defendants decide to issue such a communication, it shall be approved in advance by Class Counsel.

12. Article 12 – General Provisions

- 12.1** The Settling Parties agree to cooperate fully with each other in seeking Court approvals of the Preliminary Order and the Final Order, and to do all things as may reasonably be required to effectuate preliminary and final approval and the implementation of this Settlement Agreement according to its terms. The Settling Parties agree to provide each other with copies of any filings necessary to effectuate this Settlement reasonably in advance of filing.
- 12.2** This Settlement Agreement, whether or not consummated, and any negotiations or proceedings hereunder are not, and shall not be construed as, deemed to be, or offered or received as evidence of an admission by or on the part of any Released Party of any wrongdoing, fault, or liability whatsoever by any Released Party, or give rise to any inference of any wrongdoing, fault, or liability or admission of any wrongdoing, fault, or liability in the Class Action or any other proceeding, and Defendants and Released Parties admit no wrongdoing, fault, or liability with respect to any of the allegations or claims in the Class Action. This Settlement Agreement, whether or not consummated, and any negotiations or proceedings hereunder, shall not constitute admissions of any liability of any kind, whether legal or factual. Subject to Federal Rule of Evidence 408, the Settlement and the negotiations related to it are not admissible as substantive evidence, for purposes of impeachment, or for any other purpose. Defendants deny all allegations of wrongdoing. Defendants contend that the Plans have been managed, operated, and administered at all relevant times reasonably and prudently, in the best interest of the Plans' participants, and in accordance with ERISA, including the fiduciary duty and prohibited transaction provisions of ERISA.

- 12.3** Neither the Settling Parties, Class Counsel, nor Defense Counsel shall have any responsibility for or liability whatsoever with respect to (a) any act, omission, or determination of the Settlement Administrator, or any of their respective designees or agents, in connection with the administration of the Gross Settlement Amount or otherwise; (c) the management, investment, or distribution of the Qualified Settlement Fund; (d) the Plan of Allocation as approved by the Court; (e) the determination, administration, calculation, or payment of any claims asserted against the Qualified Settlement Fund; (f) any losses suffered by, or fluctuations in the value of, the Qualified Settlement Fund; or (g) the payment or withholding of any taxes, expenses, and/or costs incurred in connection with the taxation of the Qualified Settlement Fund or tax reporting, or the filing of any returns. Further, neither the Cornell Defendants nor Defense Counsel shall have any responsibility for, or liability whatsoever with respect to, any act, omission, or determination of Class Counsel in connection with the administration of the Gross Settlement Amount or otherwise.
- 12.4** Only Class Counsel shall have standing to seek enforcement of this Settlement Agreement on behalf of the Settlement Class Representative and Settlement Class Members. Any individual concerned about the Cornell Defendants' compliance with this Settlement Agreement may so notify Class Counsel and direct any requests for enforcement to them. Class Counsel shall have the full and sole discretion to take whatever action they deem appropriate, or to refrain from taking any action, in response to such request. Any action by Settlement Class Counsel to monitor or enforce the Settlement Agreement shall be done without additional fee or reimbursement of expenses beyond the Attorneys' Fees and Costs determined by the Court.
- 12.5** This Settlement Agreement shall be interpreted, construed, and enforced in accordance with applicable federal law and, to the extent that federal law does not govern, New York law.
- 12.6** The Settling Parties agree that any and all disputes concerning compliance with the Settlement Agreement, with the exception of any and all disputes concerning compliance with Article 8, shall be exclusively resolved as follows:
- 12.6.1** If a Settling Party has reason to believe that a legitimate dispute exists concerning the Settlement Agreement, other than any and all disputes concerning compliance with Article 8, the party raising the dispute shall first promptly give written notice under the Settlement Agreement to the other party including in such notice: (a) a reference to all specific provisions of the Settlement Agreement that are involved; (b) a statement of the alleged non-compliance; (c) a statement of the remedial action sought; and (d) a brief statement of the specific facts, circumstances, and any other arguments supporting the position of the party raising the dispute;
- 12.6.2** Within twenty-one (21) calendar days after receiving the notice described in Paragraph 12.6.1, the receiving party shall respond in writing with its position and the facts and arguments it relies on in support of its position;

- 12.6.3** For a period of not more than twenty-one (21) calendar days following mailing of the response described in Paragraph 12.6.2, the Settling Parties shall undertake good-faith negotiations, which may include meeting in person or conferring by telephone, to attempt to resolve the dispute;
- 12.6.4** If the dispute is not resolved during the period described in Paragraph 12.6.3, the parties shall conduct a mediation of the dispute with a mutually agreed upon mediator on the earliest reasonably practicable date; provided, however, that the scope of such mediation shall be expressly limited to the dispute;
- 12.6.5** The Settling Parties intend to resolve any disputes quickly, expeditiously, and inexpensively. Accordingly, there shall be no discovery allowed in connection with mediation under Paragraphs 12.6.4, and no witnesses shall be presented or examined during the mediation. The mutually agreed upon mediator will make his or her recommendation based solely on the papers, documents, testimony, and arguments of counsel presented to him or her;
- 12.6.6** In any mediation under Paragraphs 12.6.4, each Settling Party shall bear its own fees and costs;
- 12.6.7** If the dispute is not resolved through mediation, either Settling Party may request that the Court resolve the dispute.
- 12.7** The Settling Parties agree that the Court has personal jurisdiction over the Settlement Class and the Cornell Defendants and shall maintain personal and subject-matter jurisdiction for purposes of resolving any disputes between the Settling Parties concerning compliance with this Settlement Agreement that are not resolved under Paragraph 12.6. Any motion or action to enforce this Settlement Agreement—including by way of injunction—may be filed in the U.S. District Court for the Southern District of New York, or asserted by way of an affirmative defense or counterclaim in response to any action asserting a violation of the Settlement Agreement.
- 12.8** The Settlement Agreement may be executed by exchange of executed signature pages, and any signature transmitted by facsimile or e-mail attachment of scanned signature pages for the purpose of executing this Settlement Agreement shall be deemed an original signature for purposes of this Settlement Agreement. The Settlement Agreement may be executed in any number of counterparts, and each of such counterparts shall for all purposes be deemed an original, and all such counterparts shall together constitute the same instrument.
- 12.9** Each party to this Settlement Agreement hereby acknowledges that he, she, or it has consulted with and obtained the advice of counsel prior to executing this Settlement Agreement and that this Settlement Agreement has been explained to that party by his, her, or its counsel.
- 12.10** Any headings included in this Settlement Agreement are for convenience only and do not in any way limit, alter, or affect the matters contained in this Settlement Agreement or the Articles or Paragraphs they caption. References to a person are also to the person's

permitted successors and assigns, except as otherwise provided herein. Whenever the words “include,” “includes” or “including” are used in this Settlement Agreement, they shall not be limiting but shall be deemed to be followed by the words “without limitation.”

- 12.11** Before entry of the Preliminary Approval Order, this Settlement Agreement may be modified or amended only by written agreement signed by or on behalf of all Settling Parties. Following entry of the Preliminary Approval Order, this Settlement Agreement may be modified or amended only by written agreement signed on behalf of all Settling Parties and approved by the Court.
- 12.12** This Settlement Agreement and the exhibits attached hereto constitute the entire agreement among the Settling Parties and no representations, warranties, or inducements have been made to any party concerning the Settlement other than those contained in this Settlement Agreement and the exhibits thereto.
- 12.13** The provisions of this Settlement Agreement may be waived only by an instrument in writing executed by the waiving party and specifically waiving such provisions. The waiver of any breach of this Settlement Agreement by any party shall not be deemed to be or construed as a waiver of any other breach or waiver by any other party, whether prior, subsequent, or contemporaneous, of this Settlement Agreement.
- 12.14** The provisions of this Settlement Agreement may be waived only by an instrument in writing executed by the waiving party and specifically waiving such provisions. The waiver of any breach of this Settlement Agreement by any party shall not be deemed to be or construed as a waiver of any other breach or waiver by any other party, whether prior, subsequent, or contemporaneous, of this Settlement Agreement.
- 12.15** All of the covenants, representations, and warranties, express or implied, oral or written, concerning the subject matter of this Settlement Agreement are contained in this Settlement Agreement. No party is relying on any oral representations or oral agreements. All such covenants, representations, and warranties set forth in this Settlement Agreement shall be deemed continuing and shall survive the Effective Date of Settlement.
- 12.16** All of the exhibits attached hereto are incorporated by reference as though fully set forth herein. The exhibits shall be: Exhibit 1 – Former Participant Claim Form; Exhibit 2 – Preliminary Order; Exhibit 3 – Notice of Class Action Settlement and Fairness Hearing; Exhibit 4 – Final Order; and Exhibit 5 – Form of CAFA Notice.
- 12.17** No provision of the Settlement Agreement or of the exhibits attached hereto shall be construed against or interpreted to the disadvantage of any party to the Settlement Agreement because that party is deemed to have prepared, structured, drafted, or requested the provision.
- 12.18** Any notice, demand, or other communication under this Settlement Agreement (other than the Settlement Notice, or other notices given at the direction of the Court) shall be in writing and shall be deemed duly given upon receipt if it is addressed to each of the

intended recipients as set forth below and personally delivered, sent by registered or certified mail postage prepaid, or delivered by reputable express overnight courier.

IF TO THE SETTLEMENT CLASS REPRESENTATIVE:

Jerome J. Schlichter (jschlichter@uselaws.com)
Heather Lea (hleas@uselaws.com)
Joel D. Rohlf (jrohlf@uselaws.com)
Scott T. Apking (sapking@uselaws.com)
SCHLICHTER, BOGARD & DENTON, LLP
100 S. Fourth Street, Suite 1200
St. Louis, Missouri 63102
Tel: (314) 621-6115
Fax: (314) 621-5934

IF TO THE CORNELL DEFENDANTS:

Brian D. Netter (bnetter@mayerbrown.com)
Michelle N. Webster (mwebster@mayerbrown.com)
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
Tel: (202) 263-3000
Fax: (202)

Nancy G. Ross (nross@mayerbrown.com)
Samuel P. Myler (smyler@mayerbrown.com)
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606
Tel: (312) 782-0600
Fax: (312) 701-7711

ON BEHALF OF CASEY CUNNINGHAM, Individually and as Representative of the Settlement Class:

Dated: September 17, 2020

SCHLICHTER BOGARD & DENTON LLP



Jerome J. Schlichter

Heather Lea

Joel D. Rohlf

Scott T. Apking

100 South Fourth Street, Suite 1200

St. Louis, MO 63102

Tel: (314) 621-6115

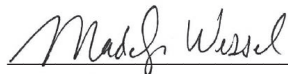
Fax: (314) 621-5934

Attorneys for Settlement Class Members and Settlement Class Representative

ON BEHALF OF THE CORNELL DEFENDANTS:

Dated: September 18, 2020

CORNELL UNIVERSITY



Madelyn Wessel

University Counsel and Secretary of the Corporation

235 Garden Avenue, 300 CCC Building

Ithaca, NY 14853

**Cornell University Retirement Plans
SETTLEMENT ADMINISTRATOR
[ADDRESS]
www.Cornell403bPlanSettlement.com
FORMER PARTICIPANT CLAIM FORM**

ABC1234567890

Claim Number: 1111111

ABC1234567890

JOHN Q CLASS MEMBER
123 MAIN ST
APT 1
ANYTOWN, ST 12345

This Former Participant Claim Form is **ONLY** for Class Members who are **Former Participants**, or the beneficiaries, alternate payees or attorneys-in-fact of Former Participants (all of whom will be treated as Former Participants). A Former Participant is a Class Member who invested in the TIAA-CREF Lifecycle funds between August 17, 2010, and April 17, 2012, but did not have a plan account with a balance greater than \$0 as of September 1, 2020.

This form must be completed, signed and mailed with a postmark date no later than XXXXXXXXX to the Settlement Administrator in order for you to receive your share of the Settlement proceeds. **Former Participants who do not complete and timely return this form will not receive any Settlement payment.** Please review the instructions below carefully. If you have questions regarding this Claim Form, you may contact the Settlement Administrator as indicated below.

PART 1: INSTRUCTIONS FOR COMPLETING FORMER PARTICIPANT CLAIM FORM

1. Complete this claim form and keep a copy of all pages of your Former Participant Claim Form, including page 1 with the address label, for your records.
2. Mail your completed Former Participant Claim Form postmarked no later than XXXXXXXXX to the Settlement Administrator at the following address:

- -
**Settlement Administrator
Attn: Cornell Settlement
[Address]**

It is your responsibility to ensure the Settlement Administrator has timely received your Former Participant Claim Form.

3. Other Reminders:
 - You must provide date of birth, signature and a completed Substitute IRS Form W-9, which is attached as Part 5 to this form.
 - If you desire to do a rollover and you do not complete in full the rollover information in Part 4 Payment Election of the Settlement Distribution Form, payment will be made to the participant.
 - If you change your address after sending in your Former Participant Claim Form, please send your new address to the Settlement Administrator.
 - **Timing Of Payments To Eligible Settlement Class Members.** Please note that Settlement payments are subject to the Settlement Agreement's receiving final Court approval. If the Settlement Agreement is approved and if you are entitled to a Settlement payment under the terms of the Settlement, such payments will be distributed no earlier than the first half of 2021 due to the need to process and verify information for all Settlement Class Members who are entitled to a payment and to compute the amount of each payment. Payments may be further delayed if any appeals are filed.
4. **Questions?** If you have any questions about this Former Participant Claim Form, please call the Settlement Administrator at XXX-XXX-XXXX. The Settlement Administrator will provide instruction only regarding completing this form and will not provide financial, tax or other advice concerning the Settlement. You therefore may want to consult with your financial or tax advisor. Information about the status of the approval of the Settlement, Settlement administration, and claim processing is available on the lawsuit website.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CASEY CUNNINGHAM, *et al.*,

Plaintiffs,

v.

CORNELL UNIVERSITY, *et al.*,

Defendants.

No. 16-cv-6525-PKC

**[PROPOSED] ORDER FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT OF RELEASED CLAIM**

This litigation arises out of a class action alleging breaches of fiduciary duties and prohibited transactions against the Defendants Cornell University, the Retirement Plan Oversight Committee, and Mary G. Opperman under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. § 1001, *et seq.*, with respect to its management, operation, and administration of the Cornell University Retirement Plan for the Employees of the Endowed Colleges at Ithaca and the Cornell University Tax Deferred Annuity Plan (the “Plans”). The parties have negotiated a settlement of only that portion of Count V of the Corrected Amended Complaint (Doc. 81) upon which summary judgment was denied in an order dated September 27, 2019 (Doc. 352), alleging that the Plans should have adopted a lower cost share class of the TIAA-CREF Lifecycle Funds prior to April 2012. The rest of the claims were dismissed for the reasons set forth in the order dated September 27, 2019.

The terms of the Settlement are set out in a Class Action Settlement Agreement dated September 18, 2020, executed by the parties and their counsel.

The Court has considered the proposed Settlement. For purposes of this Order, if not defined herein, capitalized terms have the definitions in the Settlement Agreement, which is incorporated herein by reference. Having reviewed the Settlement Agreement and the accompanying and supporting papers, it is **ORDERED** as follows:

1. **Preliminary Findings Regarding Proposed Settlement:** The Court preliminarily finds that:
 - A. The proposed Settlement resulted from arm's-length negotiations;
 - B. The Settlement Agreement was executed only after the parties engaged in extensive litigation for approximately four years, including discovery, and after settlement negotiations, including telephonic and email communications;
 - C. Class Counsel has concluded that the Settlement Agreement is fair, reasonable and adequate; and
 - D. The Settlement is sufficiently fair, reasonable, and adequate to warrant sending notice of the Settlement to the Settlement Class.

2. **Fairness Hearing:** A hearing is scheduled at the United States District Court for the Southern District of New York, the Honorable District Court Judge P. Kevin Castel presiding, at ____ a.m./p.m. on _____, 202__, (the "Fairness Hearing") to determine, among other issues:

- A. Whether the Settlement Agreement should be approved as fair, reasonable, and adequate;
- B. Whether the Settlement Notice and notice methodology were performed as directed by this Court;
- C. Whether the motion for attorneys' fees and costs to be filed by Class Counsel should be approved;
- D. Whether an amount of compensation to the Class Representative should be approved; and
- E. Whether the Administrative Expenses specified in the Settlement

Agreement and requested by the Settling Parties should be approved for payment from the Gross Settlement Amount.

3. **Establishment of Qualified Settlement Fund:** A common fund is agreed to by the Settling Parties in the Settlement Agreement and is hereby established and shall be known as the *Cunningham v. Cornell University* Litigation Settlement Fund (the “Settlement Fund” or “Gross Settlement Amount”). The Settlement Fund shall be a “qualified settlement fund” within the meaning of Treasury Regulations § 1.468-1(a) promulgated under Section 468B of the Internal Revenue Code. The Settlement Fund shall consist of \$225,000 and any interest earned thereon. The Settlement Fund shall be administered as follows:

A. The Settlement Fund is established exclusively for the purposes of: (i) making distributions to the Class Representative and the Settlement Class specified in the Settlement Agreement; (ii) making payments for all settlement administration costs and costs of notice, including payments of all Administrative Expenses specified in the Settlement Agreement; (iii) making payments of all Attorneys’ Fees and Costs to Class Counsel as awarded by the Court; and (iv) paying employment, withholding, income and other applicable taxes, all in accordance with the terms of the Settlement Agreement and this Order. Other than the payment of Administrative Expenses or as otherwise expressly provided in the Settlement Agreement, no distribution shall be made from the Settlement Fund until after the Settlement Effective Date.

B. Within the time period set forth in the Settlement Agreement, Defendants or their insurer shall cause \$225,000 to be deposited into the Settlement Fund.

C. The Court appoints Analytics Consulting LLC as the Settlement

Administrator for providing Settlement Notice, implementing the Plan of Allocation, and otherwise assisting in administration of the Settlement as set forth in the Settlement Agreement.

D. Defendants shall timely furnish a statement to the Settlement Administrator that complies with Treasury Regulation § 1.468B-3(e)(2), which may be a combined statement under Treasury Regulation § 1.468B-3(e)(2)(ii), and shall attach a copy of the statement to their federal income tax returns filed for the taxable year in which Defendants make a transfer to the Settlement Fund.

E. Defendants shall have no withholding, reporting or tax reporting responsibilities with regard to the Settlement Fund or its distribution, except as otherwise specifically identified herein. Moreover, Defendants shall have no liability, obligation, or responsibility for administration of the Settlement Fund or the disbursement of any monies from the Settlement Fund except for: (1) its obligation to cause the Gross Settlement Amount to be paid; and (2) its agreement to cooperate in providing information that is necessary for settlement administration set forth in the Settlement Agreement.

F. The oversight of the Settlement Fund is the responsibility of the Settlement Administrator. The status and powers of the Settlement Administrator are as defined by this Order and as approved in the Settlement Agreement.

G. The Gross Settlement Amount caused to be paid by Defendants and/or insurer into the Settlement Fund in accordance with the Settlement Agreement, and all income generated by that amount, shall be *in custodia legis* and immune from attachment, execution, assignment, hypothecation, transfer or similar

process by any person. Once the Settlement Fund vests, it is irrevocable during its term and Defendants have divested themselves of all right, title or interest, whether legal or equitable, in the Settlement Fund, if any; provided, however, in the event the Settlement Agreement is not approved by the Court or the Settlement set forth in the Settlement Agreement is terminated or fails to become effective in accordance with its terms (or, if following approval by this Court, such approval is reversed or modified), the parties shall be restored to their respective positions in this case as of the day prior to the Settlement Agreement Execution Date; the terms and provisions of the Settlement Agreement and this Order shall be void and have no force and effect and shall not be used in this case or in any proceeding for any purpose; and the Settlement Fund and income earned thereon shall immediately be returned to the entity(ies) that funded the Settlement Fund.

H. The Settlement Administrator may make disbursements out of the Settlement Fund only in accordance with this Order or any additional Orders issued by the Court.

I. The Settlement Fund shall expire after the Settlement Administrator distributes all of the assets of the Settlement Fund in accordance with Article 6 of the Settlement Agreement, provided, however, that the Settlement Fund shall not terminate until its liability for any and all government fees, fines, taxes, charges and excises of any kind, including income taxes, and any interest, penalties or additions to such amounts, are, in the Settlement Administrator's sole discretion, finally determined and all such amounts have been paid by the Settlement Fund.

J. The Settlement Fund shall be used to make payments to Class Members under the Plan of Allocation set forth in the Settlement Agreement. Individual payments to Class Members will be subject to tax withholding as required by law and as described in the Class Notice and its attachments. In addition, all Class Representatives' Compensation, Administrative Expenses and all Attorneys' Fees and Costs of Class Counsel shall be paid from the Settlement Fund.

K. The Court and the Settlement Administrator recognize that there will be tax payments, withholding and reporting requirements in connection with the administration of the Settlement Fund. The Settlement Administrator shall, in accordance with the Settlement Agreement, determine, withhold, and pay over to the appropriate taxing authorities any taxes due with respect to any distribution from the Settlement Fund and shall make and file with the appropriate taxing authorities any reports or returns due with respect to any distributions from the Settlement Fund. The Settlement Administrator also shall determine and pay any income taxes owing with respect to the income earned by the Settlement Fund. Additionally, the Settlement Administrator shall file returns and reports with the appropriate taxing authorities with respect to the payment and withholding of taxes.

L. The Settlement Administrator, in its discretion, may request expedited review and decision by the IRS or the applicable state or local taxing authorities, with regard to the correctness of the returns filed for the Settlement Fund and shall establish reserves to assure the availability of sufficient funds to meet the obligations of the Settlement Fund itself and the Settlement Administrator as

fiduciaries of the Settlement Fund. Reserves may be established for taxes on the Settlement Fund income or on distributions.

M. The Settlement Administrator shall have all the necessary powers, and take all necessary ministerial steps, to effectuate the terms of the Settlement Agreement, including the payment of all distributions. Such powers include receiving and processing information from Former Participants pertaining to their claims and investing, allocating and distributing the Settlement Fund, and in general supervising the administration of the Settlement Agreement in accordance with its terms and this Order.

N. The Settlement Administrator shall keep detailed and accurate accounts of all investments, receipts, disbursements and other transactions of the Settlement Fund. All accounts, books and records relating to the Settlement Fund shall be open for reasonable inspection by such persons or entities as the Court orders. Included in the Settlement Administrator's records shall be complete information regarding actions taken with respect to the award of any payments to any person; the nature and status of any payment from the Settlement Fund and other information which the Settlement Administrator considers relevant to showing that the Settlement Fund is being administered, and awards are being made, in accordance with the purposes of the Settlement Agreement, this Order, and any future orders that the Court may find it necessary to issue.

O. The Settlement Administrator may establish protective conditions concerning the disclosure of information maintained by the Settlement Administrator if publication of such information would violate any law, including

rights to privacy. Any person entitled to such information who is denied access to the Settlement Fund's records may submit a request to the Court for such information. However, the Settlement Administrator shall supply such information to any claimant as may be reasonably necessary to allow him or her to accurately determine his or her federal, state and local tax liabilities. Such information shall be supplied in the form and manner prescribed by relevant law.

P. This Order will bind any successor Settlement Administrator. The successor Settlement Administrator(s) shall have, without further act on the part of anyone, all the duties, powers, functions, immunities, and discretion granted to the original Settlement Administrator. Any Settlement Administrator(s) who is replaced (by reason other than death) shall execute all instruments, and do all acts, that may be necessary or that may be ordered or requested in writing by the Court or by any successor Settlement Administrator(s), to transfer administrative powers over the Settlement Fund to the successor Settlement Administrator(s). The appointment of a successor Settlement Administrator(s), if any, shall not under any circumstances require Defendants make any further payment of any nature into the Settlement Fund or otherwise.

4. **Class Notice:** The Settling Parties have presented to the Court the proposed form of Settlement Notice, which is appended to the September 18, 2020 Settlement Agreement as Exhibit 3.

A. The Court finds that the proposed form and the website referenced in the Settlement Notice fairly and adequately:

i. Describe the terms and effect of the Settlement Agreement and of the

Settlement;

- ii. Notify the Settlement Class concerning the proposed Plan of Allocation;
- iii. Notify the Settlement Class that Class Counsel will seek compensation from the Settlement Fund for the Class Representative, Attorneys' Fees and Costs;
- iv. Notify the Settlement Class that Administrative Expenses related to the implementation of the Settlement will be paid from the Settlement Fund;
- v. Give notice to the Settlement Class of the time and place of the Fairness Hearing; and
- vi. Describe how the recipients of the Class Notice may object to any of the relief requested and the rights of the Settling Parties to discovery concerning such objections.

B. The Settling Parties have proposed the following manner of communicating the notice to Class Members: (1) Class Counsel shall post a notice and link with a claim form for former participants on the Settlement Website; (2) and (2) the Settlement Administrator shall by no later than sixty (60) days before the Fairness Hearing, cause the Settlement Notice, with such non-substantive modifications thereto as may be agreed upon by the Settling Parties, to be sent by electronic email to the last known e-mail address of each Settlement Class Member provided by the Defendants' Counsel, Defendants and/or the Plan's recordkeepers (or their designee(s)). In the event of a bounce-back e-mail, the Settlement Administrator shall mail a copy of the notice to the Settlement Class Member's address obtained by the Settlement Administrator through its efforts to

verify the Class Member's last known address. The Court finds that such proposed manner is reasonable under the circumstances, because the Settlement provides nearly complete recovery to the class and any additional costs for the notice program would risk eviscerating the Settlement, and directs Class Counsel to provide notice to the Settlement Class in the manner described.

C. At or before the Fairness Hearing, Class Counsel or the Settlement Administrator shall file with the Court a proof of timely compliance with the foregoing requirements.

5. **Objections to Settlement:** Any Class Member who wishes to object to the fairness, reasonableness or adequacy of the Settlement, to the Plan of Allocation, to any term of the Settlement Agreement, to the proposed award of attorneys' fees and costs, or to any request for Class Representatives' Compensation, must file an objection in the manner set out in this Order.

A. A Class Member wishing to raise an objection to the Plan of Allocation, to any term of the Settlement Agreement, to the proposed award of attorneys' fees and costs, or to any request for Class Representatives' Compensation must do the following: (i) file with the Court a statement of his, her, or its objection(s), specifying the reason(s), if any, for each such objection made, including any legal support or evidence that such objector wishes to bring to the Court's attention or introduce in support of such objection; and (ii) serve copies of the objection and all supporting authorities or evidence to Class Counsel and Defense Counsel. The addresses for filing objections with the Court and for service of such objections on counsel for the parties to this matter are as follows:

Clerk of the Court
United States District Courthouse
500 Pearl Street
New York, NY 10007-1312

SCHLICHTER, BOGARD & DENTON, LLP
Attn: Cornell 403b Plan Settlement
100 S. 4th Street, Ste. 1200
St. Louis, MO 63102
Attorneys for Plaintiffs

MAYER BROWN
Attn: Brian D. Netter
1999 K Street NW
Washington, DC 20006
Attorneys for Defendants

- B. The objector or his, her, or its counsel (if any) must serve copies of the objection(s) on the attorneys listed above and file it with the Court by no later than thirty (30) calendar days before the date of the Fairness Hearing.
- C. If an objector hires an attorney to represent him, her, or it for the purposes of making such objection pursuant to this paragraph, the attorney must serve a notice of appearance on the attorneys listed above and file it with the Court by no later than thirty (30) calendar days before the date of the Fairness Hearing.
- D. Failure to serve objections(s) on either the Court or counsel for the parties shall constitute a waiver of the objection(s). Any Class Member or other person who does not timely file and serve a written objection complying with the terms of this Order shall be deemed to have waived, and shall be foreclosed from raising, any objection to the Settlement, and any untimely objection shall be barred.
- E. Any party wishing to obtain discovery from any objector may, but is not required to, serve discovery requests, including requests for documents and notice of deposition not to exceed two (2) hours in length, on any objector within ten

(10) calendar days of receipt of the objection and that any responses to discovery or depositions must be completed within ten (10) calendar days of the request being served on the objector.

F. Any party wishing to file a response to an objection must do so, and serve the response on all parties, no later than ten (10) calendar days before the Fairness Hearing.

6. **Appearance at Fairness Hearing:** Any objector who files and serves a timely, written objection in accordance with the terms of this Order as set out in Paragraph 8 above may also appear at the Fairness Hearing either in person or through counsel retained at the objector's expense. Objectors or their attorneys intending to speak at the Fairness Hearing must serve a notice of intention to speak setting forth, among other things, the name, address, and telephone number of the objector (and, if applicable, the name, address, and telephone number of the objector's attorney) on Class Counsel and Defense Counsel (at the addresses set out above) and file it with the Court by no later than ten (10) calendar days before the date of the Fairness Hearing. Any objector (or objector's attorney) who does not timely file and serve a notice of intention to appear in accordance with this paragraph shall not be permitted to speak at the Fairness Hearing.

7. **Claim Form Deadline:** All valid Former Participant Claim Forms must be received by the Settlement Administrator with a postmark date no later than _____, 202_, or electronically submitted online at www.Cornell403bPlanSettlement.com no later than _____, 202_.

8. **Service of Papers:** Defense Counsel and Class Counsel shall promptly furnish each other with copies of all objections that come into their possession.

9. **Termination of Settlement:** If the Settlement is terminated in accordance with the Settlement Agreement, this Order shall become null and void, and shall be without prejudice to the rights of the Settling Parties, all of whom shall be restored to their respective positions existing the day before the Settlement Agreement Execution Date.

10. **Use of Order:** This Order shall not be construed or used as an admission, concession, or declaration by or against Defendants of any fault, wrongdoing, breach, or liability or a waiver of any claims or defenses, including but not limited to those as to the propriety of any amended pleadings or the propriety and scope of class certification. This Order shall not be construed or used as an admission, concession, or declaration by or against any named plaintiff, Class Representatives, or the Settlement Class that their claims lack merit, or that the relief requested in the Class Action is inappropriate, improper or unavailable. This Order shall not be construed or used as a waiver by any party of any arguments, defenses, or claims he, she, or it may have, including but not limited to any objections by Defendants to class certification in the event that the Settlement Agreement is terminated.

11. **Parallel Proceedings:** Pending final determination of whether the Settlement Agreement should be approved, the Class Representatives and every Class Member are prohibited and enjoined from directly, through representatives, or in any other capacity, commencing any action or proceeding in any court or tribunal asserting the Released Claim against the Released Parties (including Defendants).

12. **Class Action Fairness Act Notice:** The form of notice under the Class Action Fairness Act of 2005 (“CAFA”) submitted as Exhibit 5 to the Settlement Agreement complies with the requirements of CAFA and will, upon mailing, discharge Defendants’ obligations pursuant to CAFA.

13. **Continuance of Hearing:** The Court may continue the Fairness Hearing in its discretion without direct notice to the Settlement Class, other than by notice to Class Counsel and Defense Counsel, and any Class Member wishing to appear should check the Court's docket or call the Clerk's office three (3) calendar days before the scheduled date of the Fairness Hearing.

SO ORDERED:

DATED: _____, 202_

HON. P. KEVIN CASTEL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CASEY CUNNINGHAM, *et al.*,

Plaintiffs,

v.

CORNELL UNIVERSITY, *et al.*,

Defendants.

No. 16-cv-6525-PKC

NOTICE OF CLASS ACTION SETTLEMENT AND FAIRNESS HEARING

Your legal rights might be affected if you are a member of the following class:

All persons who participated in the Cornell University Retirement Plan for the Employees of the Endowed Colleges at Ithaca and the Cornell University Tax Deferred Annuity Plan and invested in the TIAA-CREF Lifecycle funds between August 17, 2010 and April 17, 2012, including any designated Beneficiary of a deceased person who participated in one or more of the Plans at any time during the Class Period and invested in the TIAA-CREF Lifecycle funds during the relevant time period, and any Alternate Payee of a person subject to a Qualified Domestic Relations Order who participated in one or more of the Plans at any time during the Class Period and invested in the TIAA-CREF Lifecycle funds between August 17, 2010 and April 17, 2012.

The Class Period is defined as August 17, 2010 through the date of the preliminary order. For purposes of this Notice, if not defined herein, capitalized terms have the definitions in the Settlement Agreement, which is incorporated herein by reference.

PLEASE READ THIS SETTLEMENT NOTICE CAREFULLY.

- The Court has given its preliminary approval to a proposed settlement (the “Settlement”) of a class action lawsuit brought by certain participants in the Cornell University Retirement Plan for the Employees of the Endowed Colleges at Ithaca and the Cornell University Tax Deferred Annuity Plan (the “Plans”) against Cornell University, the Retirement Plan Oversight Committee, and Mary G. Opperman (collectively “Cornell” or “Defendants”), alleging violations of the Employee Retirement Income Security Act (“ERISA”) related to the retention of an imprudent share class of the TIAA-CREF Lifecycle Funds. The Settlement will provide for the allocation of monies directly into the individual accounts of the Settlement Class who invested in the TIAA-CREF Lifecycle funds between August 17, 2010 and April 17, 2012 and had Plan accounts during the Class Period with a balance greater than \$0 as of September 1, 2020 (“Current Participants”). Class Members who are entitled to a distribution but who no longer had a Plan account with a balance greater than \$0 as of September 1, 2020 (“Former Participants”) will receive their allocation in the form of a check mailed to the address listed on the Former Participant Claim Form or a rollover, if elected.
- The terms and conditions of the Settlement are set forth in the Settlement Agreement dated September 18, 2020. Capitalized terms used in this Settlement Notice but not defined in this Settlement Notice have the meanings assigned to them in the Settlement Agreement. The Settlement Agreement is available at www.Cornell403bPlanSettlement.com. Any amendments to the Settlement Agreement or any other settlement documents will be posted on that website. You should visit that website if you would like more information about the Settlement and any subsequent amendments to the Settlement Agreement or other changes, including changes to the Plan of Allocation, the date, time, or location of the Fairness Hearing, or other Court orders concerning the Settlement.
- Your rights and options — and the deadlines to exercise them — are explained in this Settlement Notice.
- The Court still has to decide whether to give its final approval to the Settlement. Payments under the Settlement will be made only if the Court finally approves the Settlement and that final approval is upheld in the event of any appeal.
- A hearing on the final approval of the Settlement and for approval of the Class Representatives’ petition for Attorneys’ Fees and Costs and for Class Representatives’ Compensation will take place on _____, 202__

at _____ a.m./p.m., before United States District Court Judge P. Kevin Castel in Courtroom 11D, United States Courthouse, 500 Pearl St., New York, NY, 10007-1312.

- Any objections to the Settlement, to the petition for Attorneys’ Fees and Costs or to Class Representatives’ Compensation, must be served in writing on Class Counsel and Defendant’s Counsel, as identified on page 5 of this Settlement Notice.
- Further information regarding the litigation, the Settlement, and this Settlement Notice, including any changes to the terms of the Settlement and all orders of the Court regarding the Settlement, may be obtained at www.Cornell403bPlanSettlement.com.

If you believe you had any balance invested in the TIAA-CREF Lifecycle funds between August 17, 2010 and April 17, 2012 and do not currently have an account in the Plans, you must complete a Former Participant Claims Form. If you are unsure whether you have an account with the Plan or invested in the TIAA-CREF Lifecycle funds between August 17, 2010 and April 17, 2012, contact the Settlement Administrator. Former Participants are individuals who no longer had an account balance in the Plan greater than \$0 as of September 1, 2020.

YOUR LEGAL RIGHTS AND OPTIONS UNDER THE SETTLEMENT:	
IF YOU ARE A FORMER PARTICIPANT THAT INVESTED IN THE TIAA-CREF LIFECYCLE FUNDS BETWEEN AUGUST 17, 2010 AND APRIL 17, 2012, YOU MUST RETURN THE FORMER PARTICIPANT CLAIM FORM BY _____ TO PARTICIPATE IN THE SETTLEMENT.	<u>If You Are A Former Participant</u> . You must return a Former Participant Claim Form that is postmarked by _____ to receive your share of the Net Settlement Amount. If you do not return the Former Participant Claim Form that is postmarked by _____, you will forfeit your share of the Net Settlement Amount even though you will be bound by the Settlement, including the release. A claim form may also be obtained by accessing www.Cornell403bPlanSettlement.com .
ANY CLASS MEMBER CAN OBJECT (NO LATER THAN _____, 20__)	If you wish to object to any part of the Settlement, you may (as discussed below) write to the Court and counsel about why you object to the Settlement. The Court has authorized the Settling Parties to seek discovery, including the production of documents and appearance at a deposition, from any person who files an objection.
YOU CAN ATTEND A HEARING ON _____	If you submit a written objection to the Settlement to the Court and counsel before the deadline, you may attend the hearing about the Settlement and present your objections to the Court. You may attend the hearing even if you do not file a written objection, but you will not be permitted to address the Court at the hearing if you do not notify the Court and counsel by _____, 202_, of your intention to appear at the hearing.

The Class Action

The case is called *Cunningham, et al., v. Cornell University, et al*, Case No. 16-cv-6525 (S.D.N.Y.) (the “Class Action”). The Court supervising the case is the United States District Court for the Southern District of New York. The individuals who brought this suit are called Class Representatives, and the entity and individuals they sued are called the Defendants. The Class Representatives are current and former participants in the Plans. The Defendants are Cornell University, the Retirement Plan Oversight Committee, and Mary G. Opperman. The Class Representatives’ claims are described below, and additional information about them is available at www.Cornell403bPlanSettlement.com.

What Does the Settlement Provide?

The Settlement was reached on September 18, 2020. Class Counsel filed this action on August 17, 2016. Since the filing of the case and for a period of over four years, the parties engaged in substantial litigation. Class Counsel devoted substantial time and effort to review and analyze voluminous pages of documents produced by Defendant and many other documents, including U.S. Department of Labor Forms 5500 and other publicly available documents, and conducted over 16 depositions to support their underlying claims, not all of which are addressed by the Settlement. The Settling Parties engaged in substantial settlement discussions. Only after

extensive arm's length negotiation over a period of several months were the Settling Parties able to agree to the terms of the Settlement.

Under the Settlement, a Qualified Settlement Fund of \$225,000 will be established to resolve Plaintiffs' claim that Defendants breached their duty of prudence by failing to adopt the institutional share classes of the TIAA-CREF Lifecycle Funds. This settlement does not include claims previously dismissed by the Court or claims to which the Court found that Defendants were entitled to summary judgment. Those claims may be appealed to the Second Circuit. The Net Settlement Amount is \$225,000 minus any Administrative Expenses, taxes, tax expenses, Court-approved Attorneys' Fees and Costs, Class Representative's Compensation, and other approved expenses of the litigation.

The Net Settlement Amount will be allocated to Class Members according to a Plan of Allocation to be approved by the Court. Class Members fall into two categories: Current Participants and Former Participants. Allocations to Current Participants who are entitled to a distribution under the Plan of Allocation will be made into their existing Plan accounts. Former Participants who are entitled to a distribution will receive their distribution as a check mailed to their last known address or, if they elect, as a rollover to a qualified retirement account.

Release

All Class Members and anyone making a claim on their behalf will fully release the Plan as well as Defendants and other "Released Parties" from "Released Claims." The Released Parties include (a) Cornell University, the Retirement Plan Oversight Committee, and Mary G. Opperman; (b) their insurers, co-insurers, and reinsurers; (c) their past, present, and future affiliates, subsidiaries, divisions, joint ventures, predecessors, successors, successors-in-interest, and assigns; (d) their past, present, and future agents, officers, employees, trustees, boards of trustees, members of their board of trustees, independent contractors, representatives, attorneys, administrators, fiduciaries, accountants, auditors, advisors, consultants, personal representatives, spouses, heirs, executors, administrators, associates, employee benefit plan fiduciaries (with the exception of the Independent Fiduciary), employee benefit plan administrators, (e) the Plans and the Plans' fiduciaries, administrators, plan administrators, recordkeepers, service providers, consultants, and parties-in-interest, other than CapFinancial Partners, LLC d/b/a Captrust Financial Advisors.

The Released Claims include the portion of Count V of the Corrected Amended Complaint related to the failure to adopt a lower cost share class of the TIAA-CREF Lifecycle Funds upon which summary judgment was denied in an order dated September 27, 2019. This agreement does not settle nor release any of the other claims in the Corrected Amended Complaint.

This is only a summary of the Released Claims and not a binding description of the Released Claims. The actual governing release is found within the Settlement Agreement at www.Cornell403bPlanSettlement.com. Generally, the release means that Class Members will not have the right to sue the Defendants or the Released Parties for conduct arising out of or relating to the Released Claims.

This is only a summary of the Settlement. The entire Settlement Agreement is at www.Cornell403bPlanSettlement.com.

Statement of Attorneys' Fees and Costs Sought in the Class Actions

Since mid-2016, Class Counsel has devoted many hours investigating potential claims, bringing and handling this case. Class Counsel reviewed voluminous pages of documents produced in this case, conducted a substantial number of depositions, and, prior to filing this action, analyzed thousands of pages of publicly filed documents, including those filed with the Department of Labor, to support their claims. Class Counsel took the entire risk of litigation and has not been paid for any of their time or for any of their costs incurred in bringing this action. Class Counsel has also agreed: (1) to undertake the additional risk of paying half of the costs of the settlement process if the Settlement is not approved; (2) to enforce the Settlement Agreement in accordance with its terms; and (3) to do each of these without additional pay.

Class Counsel will apply to the Court for payment of Attorneys' Fees and Costs for their work in the case. The amount of fees (not including costs) that Class Counsel will request will not exceed one-third of the Settlement Amount, \$75,000, in addition to no more than \$18,000 in litigation costs. Class Counsel will not seek to receive any interest earned by the Qualified Settlement Fund, which will be added to the amount received by the Class. Any Attorneys' Fees and Costs awarded by the Court to Class Counsel will be paid from the Qualified Settlement Fund and must be approved by the Court.

As is customary in class action cases, in which the Class Representatives have spent time and effort on the litigation, Class Counsel also will ask the Court to approve payment, not to exceed \$1,000 each, for one Class Representative who invested in the TIAA-CREF Lifecycle Funds and took on the risk of litigation, devoted considerable time, and committed to spend the time necessary to bring the case to conclusion. The Class Representative's activities also included assisting in the factual investigation of the case by Class Counsel, being deposed by Defense counsel, and providing information for the case. Any Class Representative Compensation awarded by the Court will be paid from the Qualified Settlement Fund.

A full application for Attorneys' Fees and Costs and for Class Representatives' Compensation will be filed with the Court and made available on the Settlement Website, www.Cornell403bPlanSettlement.com.

1. Why Did I Receive This Settlement Notice?

The Court caused this Settlement Notice to be sent to you because the Plan's records indicate that you may be a Class Member. If you fall within the definition of the Class, you have a right to know about the Settlement and about all of the options available to you before the Court decides whether to give its final approval to the Settlement. If the Court approves the Settlement, and after any objections and appeals, if any, are resolved, the Net Settlement Amount will be allocated among Class Members according to a Court-approved Plan of Allocation.

2. What Are The Class Actions About?

In the Class Action, Class Representatives claim that, during the Class Period, the Defendant violated the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §1001, *et seq.*, with respect to its management, operation and administration of the Plan, including allowing excessive fees and imprudent investments in the Plan. The claim at issue involved in the Settlement only includes allegations that Defendants failed to adopt a lower cost share class of the TIAA-CREF Lifecycle Funds.

The district court dismissed some of Plaintiffs' claims for failure to state a viable claim, and determined that Defendants were entitled to summary judgment on the merits of all remaining claims except the claim pertaining to the TIAA-CREF Lifecycle Funds that is the subject of this settlement. Defendants maintain that they are without fault or liability with respect to that issue, as well as any of the allegations or claims asserted in this action that the Court already dismissed. Defendants are settling the Released Claim solely to avoid litigation costs and the risks associated with an in-person trial set for September 2020 amidst the current public health crisis.

3. Why Is There A Settlement?

The Court dismissed or granted summary judgment to Defendants as to all claims other than the portion of Count V of the Corrected Amended Complaint relating to the failure to adopt a lower cost share class of the TIAA-CREF Lifecycle Funds. The Court has not finally decided the final claim. Instead, the Class Representative and Defendants have agreed to the Settlement of that claim. The Settlement is the product of extensive negotiations between Class Counsel and Defendants' counsel. The parties to the Settlement have taken into account the uncertainty and risks of litigation and have concluded that it is desirable to settle on the terms and conditions set forth in the Settlement Agreement. The Class Representative and Class Counsel, who are highly experienced in this kind of matter, believe that the Settlement is best for all Class Members.

4. How Much Will My Distribution Be?

The amount, if any, that will be allocated to you will be based upon records maintained by the Plan's recordkeeper, or, if on September 1, 2020, you either no longer had a Plan account or had a Plan account with no money in it, based upon your Former Participant Claim Form.

To be eligible for a distribution from the Net Settlement Amount, you must have invested in the TIAA-CREF Lifecycle Funds between August 17, 2010 and April 17, 2012. If you invested in these funds and no longer have a Plan account or have a Plan account with no money in it, you must submit a Former Participant Claims Form available at www.Cornell403bPlanSettlement.com and submit that form to the Settlement Administrator

Current Participants shall receive their settlement payments as contributions to their account(s) in the Plans. For each Authorized Former Participant that completes a Former Participant Claims Form, the Settlement Administrator will issue a single check from the Qualified Settlement Fund and mail the check to the address of such Authorized Former Participant listed in his or her Former Participant Claim Form or will follow proper rollover instructions provided by the Authorized Former Participant.

The method of making these calculations is described in the Plan of Allocation, found in Article 6 of the Settlement Agreement and available at www.Cornell403bPlanSettlement.com.

There are approximately 7,000 Class Members.

Note that if you are an alternate payee pursuant to a Qualified Domestic Relations Order, you will receive a check if and to the extent you are entitled to receive a portion of a Current Participant's or Authorized Former Participant's allocation under the Settlement Agreement in accordance with the plan of allocation as if you are a Current Participant or Authorized Former Participant.

5. How Can I Receive My Distribution?

Whether you need to submit a claim form to receive your distribution depends on whether you are considered a "Current Participant" or a "Former Participant." **It is your responsibility to determine whether you are a Former Participant.**

6. When Will I Receive My Distribution?

The timing of the distribution of the Net Settlement Amount is conditioned on several matters, including the Court's final approval of the Settlement and that approval becoming final and no longer subject to any appeals in any court. An appeal of the final approval may take several years. If the Settlement is approved by the Court, and there are no appeals, the Settlement distribution likely will occur during the second half of 2020.

There Will Be No Payments Under The Settlement If The Settlement Agreement Is Terminated.

7. Can I Get Out Of The Settlement?

No. The Class was certified under Federal Rule of Civil Procedure 23(b)(1). Therefore, as a Class Member, you are bound by any judgments or orders that are entered in the Class Actions for all claims that were asserted in the Class Actions or are otherwise included as Released Claims under the Settlement.

8. Do I Have A Lawyer In The Case?

The Court has appointed the law firm Schlichter Bogard & Denton, in St. Louis, Missouri, as Class Counsel. If you want to be represented by your own lawyer, you may hire one at your own expense.

9. How Will The Lawyers Be Paid?

Class Counsel will file a petition for the award of Attorneys' Fees and Costs. This petition will be considered at the Fairness Hearing. Class Counsel has agreed to limit their application for an award of Attorneys' Fees and Costs to not more than \$75,000 in fees and \$18,000 in costs and Class Counsel has committed to bring an enforcement action, if needed, to enforce the Settlement, also with no charge. The Court will determine what fees and costs will be approved.

10. How Do I Tell The Court If I Don't Like The Settlement?

If you are a Class Member, you can tell the Court that you do not agree with the Settlement or some part of it. To object, you must send the Court a written statement that you object to the Settlement in *Cunningham, et al., v. Cornell University, et al*, Case No. 16-cv-6525 (S.D.N.Y.) Be sure to include your name, address, telephone number, signature, and a full explanation of why you object to the Settlement. Your written objection must be received by the Court no later than _____, 20___. The Court's address is Clerk of the Court, United

States District Court for the Southern District of New York, 500 Pearl St., New York, NY, 10007-1312. Your written objection also must be mailed to the lawyers listed below, **no later than _____, 20__**. Please note that the Court’s Order Granting Preliminary Approval of this Settlement provides that any party to the litigation may, but is not required to, serve discovery requests, including requests for documents and notice of deposition not to exceed two hours in length, on any objector. Any responses to discovery, or any depositions, must be completed within ten days of the request being served on the objector.

CLASS COUNSEL	DEFENDANT’S COUNSEL
SCHLICHTER, BOGARD & DENTON Attn: Cornell 403b Plan Settlement 100 S. Fourth St., Suite 1200 St. Louis, MO 63102 _____@uselaws.com	MAYER BROWN LLP Attn: Brian D. Netter 1999 K Street NW Washington, DC 20006 bnetter@mayerbrown.com

11. When And Where Will The Court Decide Whether To Approve The Settlement?

The Court will hold a Fairness Hearing at _____ a.m./p.m. on _____, at the United States District Court for the Southern District of New York, Courtroom 11D, 500 Pearl St., New York, NY, 10007-1312

At the Fairness Hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. If there are objections, the Court will consider them. After the Fairness Hearing, the Court will decide whether to give its final approval to the Settlement. The Court also will consider the petition for Class Counsel’s Attorneys’ Fees and Costs and any Class Representatives’ Compensation.

12. Do I Have To Attend The Fairness Hearing?

No, but you are welcome to come at your own expense. If you send an objection, you do not have to come to the Court to talk about it. As long as you mailed your written objection on time, the Court will consider it when the Court considers whether to approve the Settlement as fair, reasonable and adequate. You also may pay your own lawyer to attend the Fairness Hearing, but such attendance is not necessary.

13. May I Speak At The Fairness Hearing?

If you are a Class Member, you may ask the Court for permission to speak at the Fairness Hearing. To do so, you must send a letter or other paper called a “Notice of Intention to Appear at Fairness Hearing in *Cunningham, et al., v. Cornell University, et al*, Case No. 16-cv-6525.” Be sure to include your name, address, telephone number, and your signature. Your Notice of Intention to Appear must be mailed to the attorneys and filed with the Clerk of the Court, at the addresses listed in the Answer to Question No. 10, **no later than _____, 202_**.

14. What Happens If I Do Nothing At All?

If you are a “Current Participant” as defined on page 1, and do nothing, you will participate in the Settlement of the Class Action as described above in this Settlement Notice if the Settlement is approved.

If you are a “Former Participant” as defined on page 1, and you do nothing, you will be bound by the Settlement of the Class Action as described above in this Settlement Notice if the Settlement is finally approved, BUT YOU WILL NOT RECEIVE ANY MONEY UNLESS YOU SUBMIT A FORMER PARTICIPANT CLAIM FORM.

15. How Do I Get More Information?

If you have general questions regarding the Settlement, you can visit this website: www.Cornell403bPlanSettlement.com, call 1-XXX-XXX-XXXX, or write to the Settlement Administrator at _____.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CASEY CUNNINGHAM, *et al.*,

Plaintiffs,

v.

CORNELL UNIVERSITY, *et al.*,

Defendants.

No. 16-cv-6525-PKC

[PROPOSED] FINAL ORDER AND JUDGMENT

Upon consideration of Plaintiffs' Unopposed Motion for Final Approval of the Settlement of the Released Claim pursuant to the terms of a Class Action Settlement Agreement dated September 18, 2020 (the "Settlement Agreement"), the Court hereby orders and adjudges as follows:

1. For purposes of this Final Order and Judgment, capitalized terms used herein have the definitions in the Settlement Agreement, which is incorporated herein by reference.

2. In accordance with the Court's Orders, and as determined by this Court previously, notice was timely distributed by electronic mail to all members of the Settlement Class who could be identified with reasonable effort, and notice was published on the website maintained by Class Counsel. In addition, pursuant to the Class Action Fairness Act, 28 U.S.C. § 1711, *et seq.*, notice was provided to the Attorneys General for each of the states in which a Settlement Class Member resides, the Attorney General of the United States, and the United States Secretary of Labor.

3. The form and methods of notifying the Settlement Class of the terms and conditions of the proposed Settlement Agreement met the requirements of Fed. R. Civ. P. 23(c)(2), any other applicable law, and due process, and constituted the best notice practicable under the circumstances; and due and sufficient notices of the fairness hearing and the rights of

all Settlement Class Members have been provided to all people, powers and entities entitled thereto.

4. All requirements of the Class Action Fairness Act, 28 U.S.C. § 1711, *et seq.*, have been met.

5. Members of the Settlement Class had the opportunity to be heard on all issues regarding the resolution and release of their claims by submitting objections to the Settlement Agreement to the Court.

6. Each and every Objection to the settlement is overruled with prejudice.

7. The motion for final approval of the Settlement Agreement is hereby **GRANTED**, the Settlement of the Released Claim is **APPROVED** as fair, reasonable and adequate to the Plan and the Settlement Class, and the Settling Parties are hereby directed to take the necessary steps to effectuate the terms of the Settlement Agreement.

8. The Release Claim is hereby dismissed with prejudice and without costs to any of the Settling Parties other than as provided for in this Settlement Agreement.

9. The Plan, the Class Representative, and the Class Members (and their respective heirs, beneficiaries, executors, administrators, estates, past and present partners, officers, directors, agents, attorneys, predecessors, successors and assigns) on their own behalves and on behalf of the Plan, hereby fully, finally, and forever settle, release, relinquish, waive and discharge all Released Parties (including the Defendants) from the Released Claim.

10. The Class Members acting individually or together, or in combination with others, are hereby barred and enjoined from suing or seeking to institute, maintain, prosecute, argue, or assert in any action or proceeding (including but not limited to an IRS determination letter proceeding, a Department of Labor proceeding, an arbitration or a proceeding before any state

insurance or other department or commission), any cause of action, demand, or claim on the basis of, connected with, or arising out of the Released Claim. Nothing herein shall preclude any action to enforce the terms of the Settlement Agreement in accordance with the procedures set forth in the Settlement Agreement.

11. Class Counsel, the Class Representative, the Class Members, or the Plans may hereafter discover facts in addition to or different from those that they know or believe to be true with respect to the Released Claim. Such facts, if known by them, might have affected the decision to settle with the Defendants, the Plans and the other Released Parties or the decision to release, relinquish, waive, and discharge the Released Claim, or might have affected the decision of a Class Member not to object to the Settlement. Notwithstanding the foregoing, the Class Representative and each Class Member has hereby fully, finally and forever settled, released, relinquished, waived and discharged the Released Claim, and the Class Representative and each Class Member has hereby acknowledged that the foregoing waiver was bargained for separately and is a key element of the Settlement embodied in the Settlement Agreement of which this release is a part.

12. The Court finds that it has subject matter jurisdiction over the claims herein and personal jurisdiction over Class Members herein pursuant to the provisions of ERISA, and expressly retains that jurisdiction for purposes of enforcing this Final Order and the Settlement Agreement. Any motion to enforce paragraphs 8 through 12 of this Final Order or the Settlement Agreement, including by way of injunction, may be filed in this Court, and the provisions of the Settlement Agreement and/or this Final Order may also be asserted by way of an affirmative defense or counterclaim in response to any action that is asserted to violate the Settlement Agreement.

13. Each member of the Class shall hold harmless Defense Counsel and the Released Parties for any claims, liabilities, attorneys' fees and expenses arising from the allocation of the Gross Settlement Amount or Net Settlement Amount and for all tax liability and associated penalties and interest as well as related attorneys' fees and expenses.

14. The Settlement Administrator shall have final authority to determine the share of the Net Settlement Amount to be allocated to each Current Participant and each Authorized Former Participant.

15. With respect to payments or distributions to Authorized Former Participants, all questions not resolved by the Settlement Agreement shall be resolved by the Settlement Administrator in its sole and exclusive discretion.

16. Within twenty-one (21) calendar days following the issuance of all settlement payments to Class Members, the Settlement Administrator shall prepare and provide to Class Counsel and Defense Counsel a list of each person who was issued a settlement payment and the amount of such payment.

17. Upon entry of this Order, all Class Members shall be bound by the Settlement Agreement as amended and by this Final Order.

SO ORDERED:

DATED: _____, 202_

HON. P. KEVIN CASTEL
UNITED STATES DISTRICT JUDGE

September __, 2020

VIA FEDERAL EXPRESS

[Department]

[Address]

Re: *Cunningham, et al., v. Cornell University, et al.*,
Case No. 16-cv-6525, (S.D.N.Y.), Notice Pursuant to 28 U.S.C. § 1715

Dear Sir or Madam:

Defendants Cornell University, the Retirement Plan Oversight Committee, and Mary G. Opperman (collectively “Cornell” or “Defendants”) hereby provide this Notice of a Proposed Class Action Settlement in the above-referenced class actions pursuant to the Class Action Fairness Act of 2005 (“CAFA”). The proposed settlement will resolve the portion of Count V of the Corrected Amended Complaint related to the failure to adopt a lower cost share class of the TIAA-CREF Lifecycle Funds upon which summary judgment was denied in an order dated September 27, 2019. The remaining claims were dismissed on summary judgment.

In accordance with its obligations under CAFA, Cornell encloses the following:

(1) The Complaint, any materials filed with the Complaint, and any Amended Complaints.

Plaintiffs’ Class Action Complaint and Corrected Amended Complaint filed in the *Cunningham, et al., v. Cornell University, et al.* case can be found on the enclosed CD as “Exhibit 1- Cunningham Complaints.”

(2) Notice of any scheduled judicial hearing in the class action.

The Court has not yet scheduled a fairness hearing regarding the settlement. Once the Court sets a hearing date, such date(s) can be found on PACER as follows: (1) enter PACER through <https://ecf.nysd.uscourts.gov/cgi-bin/ShowIndex.pl>, (2) click the “Document Filing System” link, (3) click on “Query,” (4) enter the civil case number, 16-

Mayer Brown LLP

ADDRESS

Addressee
September __, 2020
Page 2

cv-1756525, (5) click on “Run Query,” and (6) click on the link “Docket Report.” The order(s) scheduling hearing(s) will be found on the docket entry sheet.

(3) Any proposed or final notification to class members.

The proposed Notice of Class Action Settlement as submitted to the Court can be found on the enclosed CD as “Exhibit 2 – Notice of Class Action Settlement and Fairness Hearing to Class Members.”

(4) Any proposed or final class action settlement.

The Settlement Agreement entered into by the parties and as submitted to the Court can be found on the enclosed CD as “Exhibit 3 – Settlement Agreement.” There are no other agreements contemporaneously made between Class Counsel and counsel for the defendants.

(5) A final judgment or notice of dismissal.

Final judgment has not yet been entered. Upon entry, a copy of the Final Order and Judgment will be available through PACER and can be accessed online as follows: (1) enter PACER through <https://ecf.nysd.uscourts.gov/cgi-bin/ShowIndex.pl>, (2) click the “Document Filing System” link, (3) click on “Query,” (4) enter the civil case number, 1:16-cv-175, (5) click on “Run Query,” and (6) click on the link “Docket Report.” The order(s) entering final judgment will be found on the docket entry sheet.

(6) Names of class members who reside in each state and the estimated proportionate share of the claims of such members to the entire settlement.

On the enclosed CD is a list of the names of Class Members who reside in your state. The specific settlement allocation to each Class Member will be determined by a Settlement Administrator appointed by the Court. As a result, we do not yet know which Class Members will receive settlement proceeds or how much each Class Member will receive, and it is not feasible to determine the estimated proportionate share of the claims of the Class Members who reside in each state to the entire settlement. Upon final approval of the Court, the settlement proceeds will be distributed among the Class Members according to the Plan of Allocation as set forth in the Settlement Agreement.

Addressee
September __, 2020
Page 3

(7) Any written judicial opinion relating to the materials described in (3) through (5).

The Court has not yet entered a Preliminary Approval Order or any opinions relating to the materials described in sections (3) through (5). Upon entry, a copy of said Order or opinion can be found online through the process described in section (5) above.

Final judgment has not yet been entered. Upon entry, a copy of said judgment can be found online through the process described in section (5) above.

If you have questions about this notice, the lawsuits, or the enclosed materials, please do not hesitate to contact me.

Sincerely,

Enclosures