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October 7, 2019

By ECF
Hon. Stewart D. Aaron
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *Cates v. Trustees of Columbia University*, 16-06524-GBD-SDA

Dear Judge Aaron,

Plaintiffs submit this response to the Court's October 2, 2019 (Doc. 330) Order requesting a letter "addressing how the pending motions in this case should be decided assuming that the *Cunningham* decision constituted binding precedent."[1] Assuming *arguendo*[2] that *Cunningham* had binding effect, it would not support Columbia here.[3]

The only portions of *Cunningham* relevant to Defendant's motion for summary judgment would require the Court to deny the motion. As explained below, *Cunningham* granted partial summary judgment based on lack of evidence elements of a fiduciary breach claim for which Columbia does *not* argue it is entitled to summary judgment, and either found material disputes or did not address the elements on which Columbia argues for summary judgment. Additionally, *Cunningham* is factually distinguishable. Plaintiffs have submitted extensive evidence in this case that was not present in *Cunningham*, based on which a reasonable fact-finder could rule in Plaintiffs' favor on all remaining claims.

I. Summary of *Cunningham*

The operative complaint in *Cunningham* alleges that the defendants breached the duties of loyalty and prudence and committed prohibited transactions in a variety of ways. *Cunningham,* Doc. 81. While there are similarities between the claims in both cases, the cases are distinct in a number of material ways. Most importantly, the plans in *Cunningham* were recordkept by TIAA and Fidelity rather than TIAA, Vanguard, and Calvert. *Id.* ¶101. The *Cunningham* plans had 299 and 301 investments, roughly 100 more than the Plans here. *Id.* ¶¶102–103. Additionally, the

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[1] *Cunningham v. Cornell University*, 16-cv-6525, Doc. 352 ("*Cunningham*").
[2] Binding Supreme Court precedent makes clear that "[a] decision of a federal district court judge is *not* binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (emphasis added).
[3] Plaintiffs assume for the purposes of this letter only that *Cunningham*'s statements regarding the underlying record are correct. *Cunningham* made numerous findings of fact that are contradicted by record evidence that the plaintiffs in that case intend to identify and challenge.

Cunningham complaint alleged that there were 178 underperforming funds in the plans, in comparison to 76 underperforming funds alleged in this case. *Id.* ¶ 74; Doc. 76-1 ¶172. Of the underperforming funds, there is very little overlap between the two cases, so at summary judgment only the CREF Stock Account and the TIAA Real Estate Account were at issue in both cases. *Compare Cunningham*, Doc. 81 ¶174 *with* Doc. 76-1 ¶172.

On September 6, 2019, *Cunningham* denied in part the defendants' motion to strike the jury demand. *Cunningham v. Cornell Univ.*, No. 16-CV-6525 (PKC), 2018 WL 4279466, at *4 (S.D.N.Y. Sept. 6, 2018). In contrast, this Court struck Plaintiffs' jury trial demand. Doc. 140.

On January 22, 2019, the court granted class certification in *Cunningham*. *Cunningham v. Cornell Univ.*, No. 16-CV-6525 (PKC), 2019 WL 275827, at *1, *9 (S.D.N.Y. Jan. 22, 2019). *Cunningham* ended the class period on August 17, 2016—more than three years ago—while this Court granted certification through the date of judgment. *Compare id.* at *9 *with* Doc. 218 at 2.

On September 27, 2019, the *Cunningham* court granted in part defendants' motion for summary judgment and motion *in limine* to exclude the plaintiffs' experts Albert Otto and Ty Minnich. *Cunningham*, Doc. 352. The court deferred decision on a motion to exclude the plaintiffs' experts Wendy Dominguez and Gerald Buetow. *Id.* at 2 n.2.

A. Excessive recordkeeping fees

As discussed in Plaintiffs' Opposition to Summary Judgment, to establish a prima facie case of breach of fiduciary duty, the plaintiff must prove two elements: (1) a breach of fiduciary duty, and (2) "the fact of damages" or loss to the plan. Doc. 293 at 9–10. The burden then shifts to the defendant to prove that its ultimate decision was objectively prudent. *Id*. Although the *Cunningham* defendants argued that the plaintiffs could not meet their burden on the element of breach, the court in *Cunningham* held that "*[m]aterial issues of fact remain with respect to whether the Cornell Defendants' process to monitor recordkeeping fees breached a duty of prudence*," rejecting arguments similar to those made by Columbia. *Id.* (emphasis added). The Court instead granted summary judgment based on its finding that there was no evidence to demonstrate the fact of damages or loss to the plan, which is not at issue here. *Id.* at 13–14. The court did not determine whether there were issues of fact as to objective prudence or who bears the burden of proving objective prudence. *Id.* at 13–14 n.6.

B. Imprudent investments

Regarding the claims of a breach of fiduciary duty related to monitoring and retention of investment options, *Cunningham* found no genuine issue of fact as to whether the defendants in that case employed a prudent process. *Id.* at 27–35. Here, Columbia did not even seek summary judgment on fiduciary process, expressly conceding that the subject is "ill-suited" for summary judgment. Doc. 262 at 19.

C. Expert testimony

Cunningham also granted in part a motion to exclude the testimony of Otto and Minnich. *Id.* at 15–19. *Cunningham* rejected arguments that Otto and Minnich lacked sufficient experience with large higher education 403(b) plans, or plans with TIAA annuities, and held that Otto and Minnich had expertise to testify regarding recordkeeping fees and the process for monitoring recordkeeping fees. *Id.* at 16–18. While *Cunningham* did not reach the admissibility of their process opinions, it held that they were "likely . . . admissible." *Id.* at 22 n.10. *Cunningham* excluded the reasonable fee portion of Otto and Minnich's opinion because in that case they did not adequately explain their methodology. *Id.* at 19–22.

II. *Cunningham*'s Dismissal of Count III Is Inapplicable to This Case

A. *Cunningham* granted partial summary judgment based on an element—loss to the plan—on which Columbia does not even seek summary judgment

The *Cunningham* court granted summary judgment based on its finding that there was no evidence to demonstrate the fact of damages or loss to the plan. Doc. 352 at 13–15. But Defendant makes no such argument here. It instead argues for summary judgment on Count III on only two grounds: (1) process and (2) objective prudence. Doc. 262 at 10 ("Here, Plaintiffs have failed to adduce evidence *showing a genuine issue of fact as to process or objective prudence*. Summary judgment is appropriate on either of these independent grounds.") (emphasis added). Despite filing two briefs, Defendant does not even mention the element on which the *Cunningham* court relied—the "fact of damages" or loss to the plan. *See* Doc. 262; Doc. 315. Defendant does not even use the word "loss" in its Rule 56.1 statement and only uses "damages" when discussing the CREF Growth Account. Doc. 263 ¶124. Regarding the breach element raised by Columbia, *Cunningham* actually found similar evidence of failures to "(1) determine whether the amount of revenue sharing with the recordkeepers was competitive or reasonable; (2) solicit bids from competing recordkeepers on a flat fee, or per-participant, basis; and (3) engage in a reasoned decision-making process to determine whether the Plans should move to a single recordkeeper" created issues of fact requiring trial. *Cunningham*, Doc. 352 at 11–12. As to the second element on which Columbia seeks summary judgment—objective prudence—*Cunningham* expressly reached no decision. *Id.* at 13–14 n.6. To grant summary judgment on "grounds not raised by a party," such as loss to the plan, the Court would need to give Plaintiffs "notice and a reasonable time to respond." Fed. R. Civ. P. 56(f).

B. *Cunningham* is factually very different

Even if Columbia had not waived the argument, there is additional evidence of loss in this case.

First, as discussed below, Minnich's reasonable fee opinion is admissible even under *Cunningham*. Second, there is overwhelming non-expert evidence here that the Plans paid excessive fees. *See* Doc. 294 ¶225–31. While *Cunningham* held that benchmarking data

demonstrating lower fees alone was insufficient to demonstrate loss (Doc. 352 at 14), there is additional evidence here. *Columbia's own consultant, Aon Hewitt, concluded in 2016 that the Plans paid $300,000 per year in "excess fees" from 2011 until 2016. See* Doc. 294 ¶227. *Cunningham* had no such contemporaneous reports from an investment advisor concluding that excessive fees were paid for most of the statutory period. *Cunningham*, Doc. 352 at 14. Additionally, *Cunningham* held the contemporaneous benchmarking did not create an issue of fact because "Plaintiffs offer no expert testimony opining on why this data is based upon relevant comparators . . ." *Id.* Here, in contrast, Plaintiffs' expert Al Otto analyzed the benchmarking data, explained why plans under 10,000 participants were not appropriate comparators, and then calculated loss using the benchmarks of large plans. *See* Otto Rebuttal Report, Doc. 255-6 ¶¶40–41, 65–72; Doc. 294 ¶230. If only large plan comparators are used, Otto concludes that the Plans paid over $3,000,000 in excessive fees. *Id.*

Third, unlike in *Cunningham*, loss directly tied to Defendant's imprudence is demonstrated by contemporaneous offers from TIAA and Vanguard. TIAA unilaterally offered to reduce its recordkeeping fees by over 30%, with over $1,000,000 in additional saving on investment management fees, if the Plans used TIAA as their sole recordkeeper multiple times. Doc. 294 ¶¶206–07. Additionally, in Defendant's post-lawsuit RFI, TIAA and Vanguard offered to reduce their fees by over 50% and 25% respectively objectively demonstrating losses due to Defendant's failure to engage in competitive bidding. Doc. 294 ¶¶199–200. No evidence of sole recordkeeping bids or competitive bidding for the plans at issue was in evidence in *Cunningham*. Finally, here, Otto offered alternative damages calculations based upon TIAA's sole recordkeeper offers and a Vanguard per-participant offer that Defendant unquestionably failed to consider or failed to consider for at least three years. *Id.* ¶¶207, 211. Otto found that participants paid millions of dollars in excessive fees based on Defendant's failure to accept unilateral fee reduction offers. *Id.* Otto's damages calculation demonstrates loss without reaching the admissibility of Minnich's reasonable fee opinion.

C. *Cunningham*'s loss analysis is inconsistent with prior binding precedent

Even if the Court considers *Cunningham* precedential authority, it is well settled that prior panel decisions of the Second Circuit are binding on later panels (and subordinate district courts). *Fed. Deposit Ins. Corp. v. First Horizon Asset Sec., Inc.*, 821 F.3d 372, 374 (2d Cir. 2016) ("In general, a panel of this Court is bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court.") (quoting *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014)).

Cunningham's loss analysis is inconsistent with prior binding precedent. Where an ERISA plaintiff proves a fiduciary breach—and *Cunningham* found plaintiffs' evidence sufficient to prove a breach—a flawed damages model is not fatal to the claim. In its landmark ERISA decision, the Second Circuit held that the proper course is "to determine what the measure of loss ought to be" rather than dismissal. *Donovan v. Bierwirth,* 754 F.2d 1049, 1055 (2d Cir. 1985) ("Since we have rejected the three measures of loss proposed to us, our task is to determine what

the measure of loss in this case ought to be."); *Martin v. Feilen*, 965 F.2d 660, 671–72 (8th Cir. 1992) (insisting the district court perform its "function 'to fashion the remedy best suited to the harm' " even though the plaintiff had "presented only an unsound . . . damage theory"). That is because in ERISA cases, there are inherent "uncertainties in fixing damages." *See Dardaganis v. Grace Capital Inc.*, 889 F.2d 1237, 1244 (2d Cir. 1989); *accord Bierwirth*, 754 F.2d at 1058 (loss determinations are "of necessity somewhat arbitrary"). Moreover, "[c]ourts do not take kindly to arguments by fiduciaries who have breached their obligations that, if they had not done this, everything would have been the same." *In re Beck Indus., Inc.*, 605 F.2d 624, 636 (2d Cir. 1979). Thus, where the plaintiff proves a breach of fiduciary duty, the appellate courts have repeatedly reversed lower court dismissals based on insufficient proof of loss. *Brotherston v. Putnam Investments, LLC*, 907 F.3d 17, 30–39 (1st Cir. 2018), *pet. for cert. pending*, No. 18-926 (Jan. 11, 2019); *Tussey v. ABB, Inc.*, 850 F.3d 951, 959–60 (8th Cir. 2017) (reversing district court's award of zero damages after finding of breach: "The district court . . . should have considered other ways of measuring the plans' losses from the ABB fiduciaries' breach" even though "the plaintiff 'had presented only an unsound . . . damage theory'") (citation omitted). To hold otherwise "would be a perversion of fundamental principles of justice [and would] deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." *New York v. Julius Nasso Concrete Corp.*, 202 F.3d 82, 89 (2d Cir. 2000). Accordingly, "[a]ny doubt or ambiguity" regarding loss must be resolved against the breaching fiduciary. *Bierwirth,* 754 F.2d at 1056.

Prior precedent also recognizes a clear distinction between the *fact* of damage and the *amount* of damages. *Anderson Grp., LLC v. City of Saratoga Springs*, 805 F.3d 34, 52 (2d Cir. 2015) (noting "clear distinction between the measure of proof necessary to establish the fact that [a plaintiff] had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount."). Under ERISA, "a plaintiff [only] bears the burden of proving the *fact* of damages," and "proof of the expenditure is alone" is enough to shift the burden to the Defendant to prove that the *amount* of the expenditure was "fair and reasonable." *New York State Teamsters Council Health & Hosp. Fund v. Estate of DePerno*, 18 F.3d 179, 182 (2d Cir. 1994) (emphasis added). Loss merely requires "a comparison of what the Plan actually earned . . . with what the Plan would have earned" but for the breach. *Bierwirth*, 754 F.2d at 1056; *accord Brotherston*, 907 F.3d at 32 (proper measure of loss is "in the amount required to restore the values of the trust estate and trust distributions to what they would have been if the portion of the trust affected by the breach had been properly administered.") (quoting Restatement (Third) of Trusts, § 100).

The *Cunningham* court granted summary judgment on loss based entirely on what it found to be flaws in the experts' methodology regarding the *amount* of plan losses. Doc. 352 at 14, 18–22. Under the precedents cited above, a flawed damages model is not grounds for dismissal. Although the court nominally mentions the "fact" of loss (*id*. at 22), the order lumps these aspects of damages together rather than analyzing them separately as prior precedent requires (*see id*. at 13–14). The *Cunningham* plaintiffs presented numerous examples of fiduciaries who obtained competitive bids, adopted per-participant pricing, or consolidated to a single

recordkeeper significantly lowered their plans' recordkeeping fees. Under binding Second Circuit authority that was enough to make a prima facie showing of the fact of loss to the plans. The *Cunningham* court's finding that those examples were insufficient to make a prima facie showing of loss is inconsistent with prior precedent and erroneously placed the "doubt and ambiguity" regarding loss on the plaintiffs rather than the breaching fiduciary as ERISA requires. *Bierwirth*, 754 F.2d at 1056.

III. *Cunningham's* Dismissal of Count V Is Inapplicable to This Case

Regarding Count V, the investment claims, Defendant asserted that Plaintiffs failed to adduce evidence as to one element of the claim, "objective prudence." Doc. 262 at 19. Defendant conceded that the element of "procedural prudence" was "ill-suited to summary judgment" and it was "prepared to demonstrate its procedural prudence at trial if necessary." *Id. Cunningham's grant of summary judgment regarding process is thus irrelevant to this case. Cunningham* expressly stated that it was not ruling on objective prudence, the sole ground for which Columbia seeks summary judgment. *Cunningham*, Doc. 352 at 13–14 n.6. The Court cannot grant summary judgment on a ground that Columbia expressly disclaimed. *See* Fed. R. Civ. P. 56(e).

Even if the Court were to permit Columbia to raise arguments it waived, factual issues exist here that *Cunningham* did not consider. First, *Cunningham* held that Dominguez's opinions regarding the CREF Stock Account and TIAA Real Estate Account "lacked factual basis" because they were based upon underperformance against a single benchmark and that there was no evidence that any fiduciary used those benchmarks. *Cunningham*, Doc. 352 at 25–27. In contrast, Dominguez here relied upon multiple benchmarks, multiple peer groups, alpha, Sharpe ratio, manager tenure, style drift, and other factors to evaluate the CREF Stock Account and the TIAA Real Estate from 2001 to 2012. Doc. 290-22 ¶¶96–108, 172–87, Exs. 3, 4, 5, 6. For example, Dominguez first evaluated the CREF Stock Account against its prospectus benchmark. *Id.* ¶172. Dominguez found underperformance for the rolling five- and ten-year periods *every year* from 2001 until 2009, as well as consistent underperformance against the one-year rolling benchmark. *Id.* Dominguez also considered that the CREF Stock Account underperformed its Morningstar assigned benchmark, had a negative Sharpe ratio, and a negative alpha at the beginning of the class period. *Id.* ¶174. Dominguez also found underperformance from 2001 through June 30, 2010 against a custom passive benchmark she uses in practice that mimics CREF Stock's underlying holdings. *Id.* ¶175. The custom benchmark Dominguez used, 70% U.S. equity, 23% International Equity, and 7% Emerging Markets, equity is similar to the 70% domestic equity/30% international equity (including emerging markets) that TIAA itself has used as a custom benchmark for its CREF Stock since 2011 and that Aon Hewitt uses to benchmark the CREF Stock Account. *Id.* ¶175 n.144; Doc. 263 ¶95 (describing the CREF Composite Benchmark); Doc. 297-5 at ECF 21 (using the CREF Composite Benchmark to benchmark the CREF Stock Account). Dominguez also found the CREF Stock Account underperformed the Vanguard Total Stock Market Index, and conducted a holding analysis demonstrating the investments were very similar. Doc. 290-22 ¶182, Ex. 6. Dominguez also found similar

underperformance against multiple benchmarks for the CREF Stock Account in 2012 as well. *Id.* ¶¶186–87. Further, Dominguez found underperformance by the TIAA Real Estate Account against multiple benchmarks and performance measures that were the same as those used by Defendant's own investment advisors. *Id.* ¶¶96–108.

Cunningham also relied heavily on a finding that "Plaintiffs do not offer evidence that other fiduciaries removed" the CREF Stock Account or TIAA Real Estate Account. Here, that is not the case. There is an abundance of evidence here of fiduciaries removing the CREF Stock Account and TIAA Real Estate Account. *Aon Hewitt, who serves as a fiduciary to the plans it advises, has had a "sell" rating for the CREF Stock Account since 2012*. Doc. 294 ¶238. A sell rating means that Aon recommends that plans terminate their investment. Doc. 295-20, Pawlisch Dep. 111:13-15. Aon's sell rating for the CREF Stock Account was based upon performance and how the portfolio was managed. *Id.* at 111:6-22. Additionally, unlike in *Cunningham*, here there is record evidence that many fiduciaries removed or froze contributions to the CREF Stock Account and/or the TIAA Real Estate Account during the class period including: the University of Colorado, Littleton Public Schools, Stanford University, Harvard University, the University of Chicago, Vanderbilt University, Northwestern University, Boston University, Georgetown University, Syracuse University, Carnegie Mellon University, the University of Notre Dame, the Medical College of Wisconsin, Dartmouth College, Brown University, Tufts College, Educational Testing Services, Rice University, Rochester Institute of Technology, the University of Rochester, and Tulane University. Doc. 290-18 at 7 (removing the CREF Stock Account and the TIAA Real Estate Account from the plan lineup); Doc. 290-19 at 3 (removing the CREF Stock Account and the TIAA Real Estate Account from the plan lineup); Chalmers Report, Doc. 278-8, at Exs. 4a, 4c (noting with a [3] plans that "no longer offer[] the CREF Stock Account [or TIAA Real Estate Account], ha[ve] frozen new investments, or did not have information publicly available regarding fund status."). In short, there is evidence that over *20* plans removed either the CREF Stock Account or the TIAA Real Estate Account (most both).

There is also no evidence that Columbia engaged in any discussion about "the pros and cons" of the at issue investment alternatives, which *Cunningham* found demonstrated process. *Cunningham*, Doc. 352 at 30. Columbia was informed by Cammack in July 2012 that there were numerous investments with serious performance issues in the Plans, but Columbia waited four years before discussing the "pros and cons" in September 2016. Doc. 294 ¶¶147–49, 232–44. As a Columbia executive noted in April 2016, the "fund monitoring work" was *not even "off the start line" and up to that of "any peer school." Id.* ¶149 (emphasis added).

Finally, the other investments at issue in this matter are entirely unique from the investments at issue in *Cunningham*. *Compare* Doc. 263 at 3 n.6 (listing the funds at issue other than the CREF Stock Account and the TIAA Real Estate Account) *with Cunningham*, Doc. 337 at 4–10 (listing the 85 different funds at issue in *Cunningham*). *Cunningham* held that underperformance versus peer groups for three and five-year periods beginning in August 2010 was insufficient to create an issue of fact regarding imprudence and as a factual basis for Dominguez's opinion. *Id.* at 33–

35. Here, Dominguez did not just consider underperformance against peer groups in a single year but also considered: (1) underperformance against multiple benchmarks from 2001 until 2012; (2) a second set of peer groups for some funds; and (3) alpha, Sharpe ratio, beta, style drift and management tenure in forming her opinion. Dominguez Report, Doc. 290-22 ¶¶96–128, 137–229. Dominguez's report is nearly 100 pages of investment analysis and cannot be said to be conclusory or lacking factual basis. *See generally id.* Additionally, there is no evidence of a process for removal of the imprudent investment options as the Court found present in *Cunningham*. *Cunningham*, Doc. 352 at 35–36.

IV. *Cunningham's* Decision Excluding Expert Testimony Is Inapplicable

First, *Cunningham* rejected exactly the same arguments made by Columbia that Otto and Minnich lack sufficient experience with higher education 403(b) plans over 5,000 participants or plans with TIAA annuities and expressly held they were highly qualified regarding recordkeeping fees and the process for monitoring recordkeeping fees. *Id.* at 16–18. While *Cunningham* did not reach the admissibility of their process opinions, it held that these opinions were "likely . . . admissible." *Id.* at 22 n.10. Therefore, *Cunningham* rejected the majority of Columbia's arguments for exclusion of Minnich and Otto.

Second, *Cunningham*'s limited exclusion of reasonable fee opinions is not applicable to Minnich's opinion in this case.[4] *Cunningham* excluded the reasonable fee opinions offered in that case because their "conclusory statement[s] of applied knowledge of the industry's customs and practices is insufficient under Rule 702 because 'general references' to an expert's experience' [sic] 'do not provide a reliable basis for [their] proposed testimony." *Id.* at 19 (quoting *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec. LLC*, 691 F. Supp. 2d 448, 475–76 (S.D.N.Y. 2010)). *Cunningham* suggested that experience-based expert testimony is admissible if the expert "articulated how the specifics of his experience led to his conclusions." *Id.* at 19 (quoting *Snyder v. Wells Fargo Bank, N.A.*, No. 11-4496 (SAS), 2012 WL 4876938, at *3 (S.D.N.Y. Oct. 15, 2012)). *Cunningham* did not explain what was required to "articulate[] how the specifics of his experience led to his conclusions." *Id.* The case *Cunningham* cites explains that an expert demonstrates "'a connection between his experience and the process he used and the conclusions he reached' by asserting that the methodology he employed 'was the same one he utilized in the real world . . . when [he] evaluated the authored assembly instructions . . .'" *Snyder*, N.A., 2012 WL 4876938, at *3 n.35 (quoting *Emig v. Electrolux Home Prods. Inc.*, No. 06 Civ. 4791, 2008 WL 4200988, at *8 (S.D.N.Y. Sept. 11, 2008)).

Minnich worked for over 30 years pricing recordkeeping fees at Transamerica Retirement Solutions, Metropolitan Life Insurance Company, and other recordkeepers. Minnich Report, Doc. 252-1 ¶¶ 6–10, Ex. A. As Minnich explained, Transamerica used the same pricing model for 401(k) and 403(b) plans, the same recordkeeping system, the same bidding process and the

[4] Otto does not offer a reasonable fee opinion in this case and adopts Minnich's reasonable fees. Doc. 255-5 ¶151.

same pricing teams (the same method used here). *Id.* ¶74. Minnich explained that standard recordkeeping and administrative services include "payroll/contribution processing, maintaining plan records, tracking account balances and investment elections, transaction processing, call center support, participant education and participant communications." *Id.* ¶23. Because these services are commoditized and competitive, there are significant economies of scale and the cost of providing recordkeeping is based upon the number of participants in a plan. *Id.* ¶¶24–25, 29; *see also* Doc. 261-1, Minnich Dep. at 90:2–90:19 (explaining that his fee opinion was primarily driven by the "50,000-ish participants, the mega size of the plan," "the most critical factor in this determination is the enormous size of participant count" and the "economies of scale" that could be achieved for a plan that size). Participant count is the price driver for any recordkeeper. For example, Minnich references Fidelity's pricing model, which is a simple exponential curve based only on participant count. Doc. 252-1 ¶119. On the Fidelity pricing curve, a plan the size of Columbia's Plans would be priced between *$40* per-participant and *$60* per-participant in 2005 rather than the *$200* plus dollars per-participant the Plans paid in 2010. *Id.* In addition to participant count, enhanced services, such as education services, affect pricing. *Id.* ¶¶29, 73. Finally, Minnich (and the market) consider ancillary revenue sources, known as "owning the participant," such as propriety investment options, IRA rollovers, the cross selling of insurance products, and use of wealth advisors for employees with higher balances. *Id.* ¶¶74–76. Minnich used these same three factors he considered throughout his 30 years pricing plans, participant count, enhanced services and additional revenue sources, to price the Columbia Plans. *Id.* ¶121; *see also* Doc. 292-1, Minnich Dep. 191:24–192:22 (stating his pricing was based primarily upon "50,000 participants and a billion in [ancillary] assets"). Minnich also relied upon the breakout of pricing from 2017 RFI responses from Empower, Fidelity and Transamerica by Aon Hewitt. Minnich testified that the 2017 RFI responses demonstrated how the competitive market priced the specific services provided to the Plans based on its unique complexities. Doc. 252-2, Minnich Dep. 84:1-20. Minnich had no RFI responses for the plans at issue in *Cunningham*. In sum, Minnich "articulated how the specifics of his experience led to his conclusions" by explaining how he priced plans in the real world. *Snyder*, N.A., 2012 WL 4876938, at *3. Unlike in *Cunningham*, Minnich also relied on two real-world former clients with consistent fees. Doc. 252-1 ¶114; Minnich Rebuttal Report, Doc. 292-2 ¶56.

Cunningham rejected the examples that Otto and Minnich relied upon because they, unlike here, had not adequately explained why they chose these data examples and that most of them were outside the class period (after August 2016). *Cunningham*, Doc. 352 at 19–22. Here, the class period extends to the date of judgment (Doc. 218 at 2), so all Minnich's thirteen data points (more than double *Cunningham*) are within the relevant period. Minnich also explains why he chose these data points. For example, Minnich chose CalTech and Stanford to demonstrate consolidation, per-participant pricing and competitive bidding reducing fees. Doc. 252-1 ¶¶96–97, ¶100-01. Minnich also identified five additional 401(k) plans that he did not consider in *Cunningham* between 15,000 and 36,000 participant that paid between $30 to $40 per-participant from 2010 to 2018 to demonstrate pricing achieved by similar sized 401(k) plans. Doc. 252-1 ¶¶115–118 (discussing Nike, New Albertson's, Regions, and Chevron); Doc. 292-2 ¶22

(discussing MIT). Finally, Minnich found it compelling that his reasonable fee of $34 fell within the range of bids in the 2017 multiple recordkeeper RFI after applying the 28% reduction TIAA offered to be the Plans' sole recordkeeper to the bids. Doc. 252-1 ¶122.

Third, this is a bench tried case, not a jury tried case. In bench tried cases, the standard for the admissibility of expert testimony is relaxed and "*unless the disputed evidence is wholly irrelevant or so speculative as to have no probative value*," the Court should "take in the evidence freely and separate helpful conclusions from ones that are not grounded in reliable methodology." *720 Lex Acquisition LLC v. Guess? Retail, Inc.*, No. 09-CV-7199 AJN, 2014 WL 4184691, at *10 (S.D.N.Y. Aug. 22, 2014) (emphasis added).

Fourth**,** even if *Cunningham* is treated as precedential and not distinguishable, it cannot conflict with prior Second Circuit cases. The Second Circuit holds that to be reliable an experience-based expert must show "how his or her experience . . . led to his conclusion or provided a basis for his opinion." *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 467 F.3d 107, 132 (2d Cir. 2006). For experience-based pricing experts, numerous courts in the Second Circuit have interpreted *SR International* to only require that the expert have the requisite market experience and identify examples in the market that support his opinion. *See* Doc. 291 at 20 (citing numerous cases). Similarly, courts around the country have admitted recordkeeping experts who base a "reasonable per head fee for [recordkeeping] services" on their experience when those fees are consistent with similar plans. *Tussey v. ABB, Inc.*, No. 06-4305, 2012 WL 1113291, at *11–13 (W.D. Mo. Mar. 31, 2012) *affirmed in relevant part, Tussey v. ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014); *accord Abbott v. Lockheed Martin Corp.*, No. 06-0701-MJR, Doc. 225 at 3–4 (S.D. Ill. Mar. 31, 2009) (rejecting a *Daubert* motion by Columbia's counsel to exclude Otto); *Sims v. BB&T*, No. 15-732, Doc. 386 (M.D.N.C. July 31, 2018).

For all these reasons, even if *Cunningham* were precedential authority (it is not), summary judgment is inappropriate in the above-captioned matter.

Respectfully submitted,

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