

## **REVISED SETTLEMENT AGREEMENT AND GENERAL COMPLETE RELEASE**

This Settlement Agreement and General Complete Release (“Settlement Agreement”) is entered into on this \_\_\_\_ day of December, 2015, between New Mexico State University (“NMSU”) and the Regents of New Mexico State University (collectively, “Defendants”), and Dulcinea Lara, on behalf of herself and all others similarly situated (“Releasers”), and commemorates the agreements reached between the parties after good-faith negotiations between the parties on June 1, 2015 and July 30, 2015.

The parties agree to the following terms and conditions of settlement:

### **I. INTRODUCTION**

Subject to approval by the United States District Court for the District of New Mexico (the “Court”), this Settlement Agreement (“Settlement Agreement”) sets forth the full and final terms by which the Named Plaintiff, on behalf of herself and members of the Class defined herein, and New Mexico State University (“NMSU”) and the Regents of New Mexico State University (collectively, “Employer” or “Defendant”), have settled and resolved all claims that have been raised in the Complaint filed by the Named Plaintiff on April 29, 2014. This Action and Settlement applies to all regular nine month faculty members who are or were employed by the Employer who had a Family Medical Leave Act (“FMLA”)-qualifying leave event pertaining to the birth or placement of a child at any time between April 29, 2011 and the date of Preliminary Approval and who had been employed by NMSU for at least one year at the time of the qualifying event and worked at least 1250 hours in the year preceding the FMLA event.

### **II. NATURE AND RESOLUTION OF THE CASE**

A. On April 29, 2014, the Named Plaintiff, Dulcinea Lara, Ph.D., filed a Complaint in the Court on behalf of herself as an individual and on behalf of a class of nine



month faculty against Defendants pursuant to the FMLA. In this Action, the Named Plaintiff, among other things, alleged on behalf of herself and members of the Class defined herein, that they are employees who are or were employed with Employer as faculty members, that they were eligible for up to 12 weeks of leave under the FMLA for the birth or adoption of a child or the placement of a foster child (“parental leave”) and did not receive the notices and leave to which they were entitled under the FMLA. Named Plaintiff further alleged, on behalf of herself and members of the Class defined herein, that the Employer’s violations of the FMLA include, but are not limited to, failure to post required FMLA notices in the workplace, failure to provide individual notice of FMLA rights and responsibilities upon notice to the employer of an event which may constitute an FMLA-qualifying parental leave, requiring more onerous proof of qualification for parental leave than is permitted by law, denial of leave, failure to designate some or all of the parental leave take as FMLA-protected leave, and interference with FMLA-rights. In addition to these class claims, the Named Plaintiff asserted individual, non-class claims, including for interference with FMLA-protected rights and retaliation, as set forth in the Complaint. The Named Plaintiff devoted significant time and energy to pursuing the claims of the Class.

**B.** Defendants deny the allegations in the Complaint.

**C.** The parties engaged in class-wide discovery as to the number of employees who constitute the class, the Employer’s policies and practices with respect to the FMLA and leaves of absence, the Employer’s the handling of the Named Plaintiff’s FMLA-parental-leave-qualifying event, the Employer’s handling of other class members FMLA-parental-leave-qualifying events, employee additions of dependents to health insurance benefits available through the Employer, and the Employer’s training and compliance activities with

respect to FMLA-qualifying parental leave. Over 20,000 documents were provided by the Employer in the course of discovery, including personnel records, emails related to parental-leave, faculty benefits, training materials, policies, forms and letters. The parties' counsel, who are experienced class action attorneys, participated in settlement discussions and negotiations June 1 and July 30, 2015. The parties utilized the settlement facilitation services of the Honorable Carmen Garza, United States Magistrate Judge. The formal settlement facilitation sessions and follow-up settlement discussions between the parties concluded with the execution of this Settlement Agreement. During the negotiations, counsel bargained vigorously on behalf of their clients. All negotiations were conducted at arm's length and in good faith.

**D.** Counsel for the parties have also conducted their own substantial investigations of the matter, including the facts underlying the claims and issues raised in the charges and the Complaint. The investigations included, among other things, interviewing Class Member witnesses, deposing three key Human Resources employees responsible for the Employer's FMLA compliance, and reviewing a substantial number of relevant records. As a result of the exchange of discovery, the investigation, and other activity both prior to and after filing the Complaint, counsel for the parties are familiar with the strengths and weaknesses of their respective positions, and have had a full opportunity to assess the litigation risks presented in this case. All parties and their counsel recognize that, in the absence of an approved settlement, they would face a long litigation course, including motions for class certification, formal discovery and depositions, motions for summary judgment, and trial and potential appellate proceedings that would consume time and resources and present each of them with ongoing litigation risks and uncertainties. The parties wish to avoid these risks and

uncertainties, as well as the consumption of time and resources, and have decided that an amicable settlement pursuant to the terms and conditions of this Settlement Agreement is more beneficial to them than continued litigation. Class Counsel believe that the terms of the Settlement Agreement are in the best interests of the Class and are fair, reasonable, and adequate, and the Employer wishes to bring the litigation to a conclusion on the terms set forth in this Settlement Agreement.

### **III. GENERAL TERMS OF THE SETTLEMENT AGREEMENT**

**A. Definitions.** In addition to terms identified and defined elsewhere in this Settlement Agreement, and as used in this Settlement Agreement, the following terms shall have the following meanings:

1. “Claims Administrator” means Settlement Services Inc., managed by attorney Thomas A. Warren, which has been jointly designated by counsel for the parties to administer the Claims and Settlement Fund pursuant to this Agreement and orders of the Court.

2. “Claim Form” means the form to be submitted by eligible Class Members and as agreed to by the parties, attached hereto as Exhibit 2.

3. “Class” means the class that the parties jointly seek to have certified, solely for the purposes of this Settlement Agreement, which is defined as:

All regular nine month faculty members who are or were employed by the Employer who had an FMLA-qualifying leave event pertaining to the birth or placement of a child at any time between April 29, 2011 and the date of Preliminary Approval and who had been employed by NMSU for at least one year at the time of the FMLA-qualifying parental leave and worked at least 1250 hours in the year preceding the FMLA-qualifying parental leave.

4. “Claimants” means Class Members who have submitted a timely Claim Form and the Named Plaintiff.

5. “Class Counsel” means the law firm of Moody & Warner, P.C.

6. “Class Member” means any person who meets the criteria set forth in the definition of “Class”.

7. “Class Member Release” means the Release Agreement in the form agreed to by counsel for the parties, with respect to those Class Members who are not the Named Plaintiff as referenced in Section .

8. “Employer” means NMSU and the Regents of NMSU.

9. “Complaint” means the Complaint filed in this Action on April 29, 2014.

10. “Court” means the United States District Court for the District of New Mexico.

11. “Defendants” means NMSU, the Regents of NMSU.

12. “Defendants’ Counsel” means the law firm of Miller Stratvert.

13. “Depository Bank” means a bank selected by the Claims Administrator to receive, hold, invest, and disburse the Settlement Fund, subject to the direction of the Claims Administrator.

14. “Effective Date” means the date on which all of the following have occurred: (1) the Court has finally approved and entered this Settlement Agreement; (2) the Court has entered an Order and Judgment dismissing the Action with prejudice, with continuing jurisdiction limited to enforcing this Settlement Agreement for a period not to exceed three years; and (3) the time for appeal has either run without an appeal being filed or any appeal (including any requests for rehearing *en banc*, petitions for certiorari or appellate review) has been finally resolved.

15. “Final Approval” means the date on which the Court grants final

approval of the Settlement.

16. “Notice” means the Notice of Class Action, Proposed Settlement Agreement, and Settlement Hearing, which is to be mailed directly to Class Members substantially in the form attached hereto as Exhibit 1.

17. “Notice of Award” means the letter sent to each eligible Claimant specifying the amount of that Claimant’s award, as determined by the Claims Administrator.

18. “Plaintiff” or “Named Plaintiff” or “Class Representative” means Dulcinea Lara, Ph.D., the Plaintiff named in the caption of the Complaint.

19. “Preliminary Approval” means the order of the Court preliminarily certifying the Settlement Class and preliminarily approving this Settlement Agreement and the form of Notice to be sent to Class Members.

20. “Settlement,” “Agreement,” and “Settlement Agreement” each mean the settlement as reflected in this Settlement Agreement.

21. “Settlement Class” means the Class that the parties seek to have certified for purposes of this Settlement Agreement, excluding any Class Member who files and serves a timely opt out statement that is not subsequently rescinded within the allotted time period for revocation.

22. “Settlement Class Member” means any person who meets the criteria set forth in the definition of “Settlement Class”.

23. “Settlement Fund” or “Fund” means the settlement monies transferred by the Employer to the Depository Bank pursuant to this Settlement Agreement, including any interest earned thereon, to be held, invested, administered, and disbursed pursuant to this Settlement Agreement.

24. “Settlement Hearing” means the hearing at which the Court will consider final approval of this Settlement Agreement and related matters.

**B. Duration of the Settlement.** The programmatic relief embodied in this Settlement Agreement and the agreements incorporated in it shall remain binding on the parties for a three-year period following the Effective Date.

**C. Cooperation.** The parties agree that they will cooperate to effectuate and implement all terms and conditions of this Settlement Agreement, and exercise good faith efforts to accomplish the terms and conditions of this Settlement Agreement. The parties agree to accept non-material and procedural changes to this Settlement Agreement if so required by the Court in connection with Final Approval of the Settlement, but are not obligated to accept any changes in the monetary amount of relief or the substantive programmatic relief provided for herein, or any other material substantive change.

**D. Certification.** The Class will be certified pursuant to Fed. R. Civ. P. 23(b)(2) and 23(b)(3).

#### **IV. COURT APPROVAL/NOTICE AND FAIRNESS HEARING**

**A. Jurisdiction and Venue.** The parties agree that the Court has jurisdiction over the parties and the subject matter of this Action and that venue is proper. The Court shall retain jurisdiction of this Action for three years from the Effective Date solely for the purpose of entering all orders and judgments authorized hereunder that may be necessary to implement and enforce the relief provided herein. The Parties mutually consent and request that the Honorable Carmen Garza be appointed by the Court to serve as the presiding Judge over the Settlement and represent that Judge Garza has agreed to be so appointed, however, should Judge Garza be unable to serve or this case be transferred, the presiding District Judge

shall select (or not select) any successor.

**B. Preliminary Approval**

1. Prior to execution of this Settlement Agreement, the parties have agreed upon a form for written Notice of this Settlement Agreement to Class Members, subject to Court approval.

2. Within ten (10) days after the execution of this Settlement Agreement, but no later than October 16, 2015, the parties shall petition the Court for the following orders: (a) preliminarily certifying the Class; (b) preliminarily approving this Settlement Agreement; and (c) approving the Notice to be sent to Class Members describing the terms of the Settlement and informing them of their rights to submit objections and to opt out.

**C. Notice and Settlement Hearing**

1. The Employer will identify all Identifiable Class Members and will provide to the Claims Administrator, no later than December 28, 2015, the name, social security number, and last known email address and the last known mailing address of each Class Member, the dates of employment, dates of regular nine month faculty positions, annual salary as of the date of Preliminary Approval, dates of known FMLA-qualifying leave(s) events and known dates of leave taken in conjunction with the FMLA-qualifying leave(s) events. There are approximately 44 Identifiable Class Members based on changes to benefits enrollments indicating the employee added a new minor dependent.

2. No later than December 28, 2015, in addition to identifying the known Class Members, the Employer will provide to the Claims Administrator the name, social security number or NMSU banner ID number, and last known email address of all currently employed regular nine month faculty members and the last known mailing address of each



formerly employed regular nine month faculty member (for the period of April 29, 2011 through the date of Preliminary Approval) who could be an eligible Class Member if he/she had an FMLA-qualifying event related to the birth or placement of a child, regardless of whether the faculty member previously notified the Employer of the existence of an FMLA-qualifying parental leave. The regular nine month faculty members (approximately 800 people) shall be provided with a short, mutually agreed upon communication, including an electronic link to the Claim Form and contact information for the Claims Administrator, for the purpose of providing an opportunity for regular nine month faculty members whose qualifying parental-leaves may be otherwise unknown to the Employer to be informed of the Settlement and participate in it. In addition to the Identifiable Class Members, those regular nine month faculty members who notify the Claims Administrator that they had an FMLA-qualifying parental leave will be added to the list of Identifiable Class Members and provided with the Notice. The Claims Administrator may require additional information from the faculty members, Class Counsel and/or the Employer to verify that the additional faculty members meet the Class Definition or resolve discrepancies. It is estimated that there are approximately 9 additional regular nine month faculty members who may meet the Class Definition and who are therefore Class Members.

3. No later than January 11, 2016, the Claims Administrator will email and mail the Notice to each Class Member in the form agreed upon by the parties or such other form as approved by the Court. The parties intend to provide actual notice to each Class Member, to the extent practicable. The Claims Administrator shall mail a Claim Form to each Class Member at the same time the Notice is sent.

4. The Claims Administrator shall provide to Class Counsel a list of

those Class Members whose mailings have been returned as undeliverable and the Claims Administrator may engage third party vendors in order to locate Class Members. The Claims Administrator will maintain a log of its activities undertaken pursuant to this section.

5. Class Member objections to this Settlement Agreement must be submitted in writing and must include a detailed description of the basis of the objection. Objections must be served on Class Counsel no later than February 25, 2016. No one may appear at the Settlement Hearing for the purpose of objecting to the Settlement Agreement without first having served his/her objection(s) in writing no later than February 25, 2016. Class Counsel will file with the Court the objections received no later than March 15, 2016.

6. Any Class Member who wishes to opt out of the Class must mail to Class Counsel and counsel for the Employer a written, signed statement that he/she is opting out. Class Counsel shall file with the Court all opt-out statements that are timely received. The Settlement Class will not include those individuals who file and serve a timely opt-out statement, and individuals who opt out are not entitled to any monetary award under this Settlement Agreement. With respect to each such individual, the statute of limitations for him/her to assert any claims for individual relief shall be tolled as of April 29, 2014 and will resume running on the date of Final Approval of the Settlement. The Notice mentioned above shall include the following language: "Any Class Member who wishes to opt out of the Class must mail a written, signed statement that he/she is opting out of the Class to Class Counsel and counsel for the Employer at the addresses as listed in the Notice. To be effective, this opt-out statement must be received by Class Counsel and counsel for the Employer on or before February 25, 2016. To be effective, the opt-out letter and statement

must include the language specified in the Notice confirming that the individual is aware that by opting out he/she will forego the opportunity to receive monetary benefits from this Settlement. Class Members who file opt-outs may rescind their opt-outs. To be effective, such rescissions must be in writing and must be received by either Class Counsel, counsel for the Employer, or the Claims Administrator on or before March 15, 2016.

7. Upon Preliminary Approval, a briefing schedule and Settlement Hearing date will be set at the Court's convenience. The parties' Motion for Final Approval and for Certification of the Class will be due no earlier than May 10, 2016, and the Settlement Hearing will be held no earlier than April 4, 2016.

8. The time periods referenced in this section are guidelines; actual dates will be inserted in the Preliminary Approval Order by the Court.

9. In the event that this Settlement Agreement does not become final and binding, no party shall be deemed to have waived any claims, objections, rights or defenses, or legal arguments or positions, including, but not limited to, claims or objections to class certification, and claims and defenses on the merits. Neither this Settlement Agreement nor the Court's Preliminary or Final Approval hereof shall be admissible in any court regarding the propriety of class certification or regarding any other issue or subject (except for the purpose of enforcing this Settlement Agreement). Each party reserves the right to prosecute or defend this Action in the event that the Settlement Agreement does not become final and binding.

#### **V. RELEASE/BAR OF CLAIMS**

A. All Settlement Class Members, other than the Named Plaintiff, as a condition of receiving a monetary payment in conjunction with this Settlement Agreement, will be required

to execute and deliver to the Claims Administrator a Class Member Release in the form agreed to by counsel for the parties. The Class Member Release will release all parental-leave FMLA claims against the Employer up through the date that Notice is mailed to the Class. Class Members shall not be required to release any other claims.

**B.** The Named Plaintiff, as a condition of receiving a monetary payment and additional benefits provided to the Named Plaintiff, described herein, will sign this Agreement, including the general release of claims. The Named Plaintiff's release is more expansive than the limited release of parental-leave FMLA claims to be executed by other Class Members. It releases all of the Named Plaintiff's individual claims and is a general release of all claims of any nature against Defendants under federal, state and local laws for any period up through the date she signs this Agreement.

**C.** The Claims Administrator shall provide all Eligible Claimants with the Class Member Release at the time the Notice of Award is provided to them.

**D.** The terms of the Class Member Release, are a material part of this Settlement Agreement and are hereby incorporated as if fully set forth in the Settlement Agreement; if the Release, is not finally approved by the Court, or the Settlement Agreement cannot become effective for any reason and the Settlement set forth in this Settlement Agreement shall terminate as provided in this Agreement, then the Named Plaintiff's release of claims and the Class Member Releases shall terminate *nunc pro tunc* and be of no force and effect.

**E.** Any Class Member who does not execute and timely deliver a Class Member Release, shall be ineligible for, and forever barred from receiving, monetary relief under this Settlement Agreement, even if said Class Member has not opted out.

F. Class Members who neither timely opt out nor timely file a Claim Form shall, upon the Effective Date, be ineligible to receive any monetary award pursuant to this Settlement Agreement and be deemed to have fully, finally and irrevocably waived, released and discharged the Employer from any and all parental-leave FMLA claims, whether known or unknown, actual or potential, from April 29, 2011 to the date that Notice is mailed to the Class.

**VI. MONETARY AND NON-MONETARY RELIEF**

**A. Individual Relief for Plaintiff/Class Representative Dr. Dulcinea Lara**

1. Dr. Lara's allocation of work at New Mexico State University for the next three years shall reflect a temporary reduction in teaching and a commensurate increase in research allocation, with the teaching assignment limited to the following course load:

Spring 2016: 0 courses	Fall 2016: 0 courses
Spring 2017: 0 courses	Fall 2017: 1 course
Spring 2018: 2 courses	Fall 2018: 3 courses

During the 2016-17 academic year, in addition to the course releases noted above, Dr. Lara will have no service obligations and will have a 100% of her effort allocated to research. During the 2017-18 academic year, she will serve on master's thesis committees and departmental committees, but will not chair such committees. During the 2018-19 academic year, she will resume a normal service load allocation. During the time periods where Dr. Lara does not have an allocation of effort for teaching, she may continue to work with graduate students.

2. The parties agree that the adjustment of allocation of effort for 2016-2018, standing alone, will not impact Dr. Lara's application for promotion.

3. Dr. Lara has been provided with access to a \$20,000 allocation of support funds to be used for research or other appropriate and valid professional

development and academic activities. The funding will be made available beginning in the Fall 2015 semester through the Provost's Office, and will not come from the Criminal Justice Department's budget. Dr. Lara will have four (4) years to use these funds; any unused funds will revert to NMSU. These funds shall be in addition to any other funds available to faculty for which Dr. Lara would otherwise be eligible. The support funds shall be held by NMSU until requested by Dr. Lara and shall not be placed in the Settlement Fund.

4. Dr. Lara will be evaluated by whoever is serving as the Department Head of her home department, provided that the Department Head is not Christa Slaton, Beth Pollack, or Jeff Brown. For as long as Christa Slaton serves as Dean of the college in which the Criminal Justice Department is located, Dr. Lara's evaluations will be reviewed and approved (as appropriate) by the Deputy Provost, rather than Dean Slaton, Pollack and/or Brown.

5. The parties agree that the individual relief negotiated for the Named Plaintiff is fair and reasonable because it is provided in exchange for her execution of a substantially broader release of claims than that executed by the Class Members and because it is an appropriate incentive award for her efforts on behalf of the class. On behalf of the approximately 800 current and former regular nine month faculty members, Dr. Lara alone put her name on the Action, pursued the interests of the Class subordinating her own interests to those of the class, participated in drafting discovery requests, attended depositions, reviewed discovery produced by Defendants, provided input to Class Counsel as to class-based relief and discovery, provided relevant documents and information to Class Counsel for investigation of the claims, attended settlement conferences, obtained meaningful financial relief and paid leave benefits for the injured class members (estimated to be 44-53

people), obtained a paid FMLA leave benefit for *all* current regular nine month faculty members (approximately 800 people) valued at approximately \$16 Million (no paid leave existed for regular nine month faculty prior to this Action), and accepted all the risk of losing the case, ostracism and retaliation for pursuing these claims.

**B. Non-Monetary Class Relief**

**1. Training.**

a. NMSU will provide mandatory FMLA training to its academic administrators (defined as College Deans, Associate Deans for Academics and Academic Department Heads) beginning immediately, with all such administrators assigned to such roles at the beginning of the Fall 2015 semester to receive initial training either prior to commencement of the semester, or no later than December 31, 2015. Academic administrators appointed after the commencement of the Fall 2015 semester will receive such training within six (6) months of appointment.

b. Pursuant to the Parties' Agreement, NMSU provided mandatory FMLA training to all individuals assigned to serve their units as "HR Liaison." Such training will be completed no later than July 30, 2016. NMSU will continue to provide similar training to newly appointed HR Liaisons, when possible before they assume that role, but in any event within 6 months of appointment or hire.

c. NMSU agrees to commence training of other employees designated as "supervisors" immediately and that all supervisors serving as such on the date that this Settlement Agreement is approved by the Court will receive FMLA training within one year of the Effective Date. Individuals hired or appointed to supervisor positions after the date of approval shall receive the training as soon as feasible, but in no event later than the latter of

one year after the Effective Date or 6 months after appointment. For the purpose of this Settlement Agreement “supervisors” shall be defined as those NMSU employees who supervise “regular” employees, including faculty, as defined in NMSU policy. NMSU will conduct annual FMLA refresher trainings for all academic administrators, supervisors and HR Liaisons on or before October 31, 2016, October 31, 2017 and October 31, 2018.

d. NMSU will provide accurate lists of all academic administrators, HR Liaisons and Supervisors and the respective training records which shall be current as of a date two weeks prior to the report date to Class Counsel. Lists and records will be provided by April 1, 2016 and each six months thereafter for the duration of this Agreement. The parties will confer to determine if any administrator, Liaison or Supervisor has failed to complete the initial training.

e. Attendance for all in-person FMLA training and participation for all online training required under paragraphs a, b, c and d above will be documented and verified. Participation in on-line training will be verified using NMSU’s current online training system which requires use of the NMSU log-in identification and requires interactive responses by participants. NMSU will provide evidence of compliance relating to those trainings to Class Counsel on the reporting dates indicated in paragraph e above. Verified attendance rosters or online participation logs along with training content materials will satisfy this requirement.

f. NMSU will have a 30-day grace period after a determination that any academic administrator, HR Liaison, or Supervisor, did not attend or participate in the applicable training. If those individuals still have not been trained at the expiration of the grace period, liquidated damages of \$250 per person will be assessed and shall be



immediately due and owing to Class Counsel who shall monitor compliance. For any individual who is on any type of leave of absence during all or most of the 30 day grace period, the grace period will be extended for 30 days following the individual's return to active service at NMSU.

g. NMSU added an FMLA training module to its newly instituted online employee training system designed to apprise employees of their FMLA rights. NMSU has adopted a policy which allows this training to be deemed mandatory and will make good faith efforts to ensure that all employees participate in this online FMLA awareness training. NMSU will continue to require such training for all new employees through the period of this agreement.

2. **Physical Posting.** NMSU agrees to comply with the notice provisions of the FMLA by posting physical notice posters in any Main Campus building where faculty offices are located. For community colleges, posters will be located in the Administration Buildings. Compliance can be verified with cell phone photographs or otherwise, and a list of all locations where postings occur and a certification of compliance will be provided to Class Counsel annually, by April 1, 2016 of each year during the term of this Agreement. Proof of initial compliance will be made within 30 days of the Effective Date.

3. **Online Posting.** NMSU provides an online notice of FMLA rights that is available to employees with internet access and will continue to do so through the term of this Agreement. Compliance with these provisions will be monitored annually with the first certification due within 30 days of the Effective Date, and subsequent certifications of compliance will be provided to Class Counsel on April 1 of each year during the term of this Agreement.

4. **Supervisor Notification to HR.** NMSU will require that supervisors and academic administrators promptly notify the Human Resources Department (“HR”) when any employee makes the supervisor aware of any situation which may constitute an FMLA qualifying event, whether or not FMLA leave is requested or contemplated by the employee. This requirement will be set forth in published rules and will be emphasized in all supervisor training sessions. Upon such notification, the NMSU HR unit will issue a written notice of (1) FMLA eligibility and (2) FMLA rights and responsibilities to the employee. Upon receipt of adequate information, the HR unit will then review the situation and issue FMLA notices of qualification (or non-qualification) and designation of leave as FMLA as required by the FMLA.

5. **Benefits Enrollment/Change Forms.** HR will also promptly review employee benefit documents to determine whether benefits changes may indicate an FMLA- qualifying event, such as the addition of a new child/dependent. NMSU will issue a notice of eligibility and notice of rights and responsibilities to any affected employee within 5 business days of receipt of the benefits change notification. All notices of eligibility and designations of FMLA leave will issue from the HR Department.

6. **No Medical Certification for Parental Leave.** NMSU will not require employees to produce medical certification forms to substantiate parental leave. NMSU will allow employees to self-certify the date a child is added to their family.

7. **Policy Revisions.** If it has not already done so by the date of Preliminary Approval, NMSU will revise its leave policy #7.20.75(A)(10) in a manner that does not restrict the use of paid leave for pregnancy-related medical conditions to a time period that is less than the time available for any other short-term medical conditions, and

remove the language from policy #7.20.75(A)(10) suggesting that sick leave is only available for adoption or placement of a child from foster care when the child is under the age of 5, and remove the requirement that pregnancy-related medical leave or leave for adoption or foster care placement must be taken within 12 weeks of the birth or placement of the child.

8. **Paid FMLA Leave Benefit.** Pursuant to the parties' agreement, NMSU has adopted policy #7.20.42, Faculty Care Leave as of August 17, 2015. All current regular nine month faculty will accrue up to 9 (nine) days (72 hours) per year of paid leave which may be used for any FMLA qualifying event. Under this plan, leave may be accrued up to a total of 800 hours. Those regular nine month faculty who were employed on or before August 17, 2015 will be provided an accrued bank of leave at the standard accrual rate for their prior period of service up to a maximum of a 10 (ten) year period. Regular nine month faculty hired after August 17, 2015 will begin accruing paid leave for FMLA use upon hire. Under no circumstances will any employee be permitted to have a total FMLA leave bank in excess of 800 hours. This paid leave benefit shall be used only for FMLA qualifying events and only during the nine month regular academic year period when the regular nine month faculty member would otherwise receive salary. The paid leave benefit shall have no cash payout upon retirement or separation from the University.

9. The period of compliance for training and other requirements under this Settlement Agreement, as described herein, will expire three (3) years of the Effective Date.

C. **Monetary Relief for Class Members**

1. **Settlement Fund.** No later than ten (10) days after Preliminary Approval of this Settlement Agreement, the Employer shall pay by wire transfer or otherwise transmit to the Depository Bank the sum of \$710,730.77, of which \$250,000 is allocated to Attorneys'

Fees and Costs and the remainder shall constitute the Claims Fund. The Funds will be placed in an account titled in the name of NMSU FMLA Settlement Fund, a Qualified Settlement Fund organized and existing under the laws of the State of Florida, intended by the parties to be a “Qualified Settlement Fund” as described in Section 468B of the Internal Revenue Code of 1986, as amended, and Treas. Reg. Section 1.468B-1, et seq. This payment is made in order to satisfy the claims of the Named Plaintiff and Settlement Class Members, as well as for other purposes identified in this paragraph. The monies so transferred, together with any interest subsequently earned thereon, shall constitute the Settlement Fund. The Settlement Fund is inclusive of payment for: (a) all amounts paid to Settlement Class Members, including the Named Plaintiff’s participation in the relief accorded to Class Members; and (b) all attorneys’ fees and costs awarded by the Court, including those in connection with securing court approval of the Settlement, other than fees and costs awarded in connection with any successful proceeding to enforce the terms of this Settlement Agreement. The Settlement Fund does not include the costs of Claims Administration, the additional support funds or other individual relief to Dr. Lara, or liquidated damages which may be subsequently owed under this Agreement. Nothing herein shall release Employer from expending the resources required to fulfill its responsibilities under this Settlement Agreement.

2. **Administration by Trustees.** Class Counsel shall serve as Trustees of the Settlement Fund and shall act as a fiduciary with respect to the handling, management and distribution of the Settlement Fund. The Claims Administrator shall serve as a Trustee of the Settlement Fund with regard to payment of valid claims and reporting on such awards. Class Counsel shall act in a manner necessary to qualify the Settlement Fund as a

“Qualified Settlement Fund” under Section 468B of the Internal Revenue Code of 1986, as amended, and Treas. Reg. Section 1.468B-1, *et seq.*, and to maintain that qualification.

**3. Claims Filing Procedures for Settlement of Claims.**

a. Settlement Class Members shall be entitled to submit their Claim Forms to the Claims Administrator in accordance with the procedures set forth on the Claim Form.

b. In order to be eligible for an award from the Settlement Fund, Settlement Class Members must submit a Claim Form which must be postmarked or actually received by the date established by the Court. The Claim Form shall be completed in its entirety to the extent applicable. The Claims Administrator will provide counsel for the Employer and Employer’s payroll department with the names and social security numbers of Eligible Settlement Class Members who submitted Claim Forms (“Claimants”) for the purpose of providing the leave bank credit described in paragraph E below. The identity of the Claimants will not be disclosed to anyone other than counsel for Employer and those employees of Employer with a strict business need to know or otherwise necessary to retrieve the information to be provided to the Claims Administrator or verify Eligibility. The content of the Claim Form will be kept confidential. In no case shall the identity of participating class members be provided to any NMSU employee outside the Legal, Human Resources, Payroll, or Provost’s Departments.

c. After receiving the Class Member information from the Employer and the Claimant information discussed in the paragraph above, if additional information is needed for the Claims Administrator to verify the Claim or to resolve a discrepancy between the Claimant’s statements and the Employer’s records then the Claims Administrator, Defense Counsel, Class Counsel and the Employer will cooperate to resolve the discrepancy

in a timely manner. To the extent there is any disagreement relating to the accuracy of the information provided to the Claimants, the disagreement shall be resolved by the Claims Administrator.

4. **Claims Administrator's Authority to Determine Award Eligibility.**

a. Within no more than 20 calendar days after the date specified for receipt of the Claim Forms, the Claims Administrator shall render a determination as to the monetary award, if any, that should be paid to each Claimant from the Settlement Fund. Settlement Class Members who submit a Claim Form will be eligible to receive monies based on (i) the number of FMLA-qualifying events the Claimant had between April 29, 2011 and Preliminary Approval; and (ii) the amount of leave actually take in conjunction with the FMLA-qualifying parental leave, if any. Class Counsel, with input from the Claims Administrator, propose the following distribution formula.

Step 1. If there are 53 or more Eligible Claimants the Claims Fund shall be divided equally among all Eligible Claimants. If there are fewer than 53 Eligible Claimants, each Eligible Claimant will receive the equivalent of six weeks of pay at his/her salary as of [Preliminary Approval] or his/her last date of employment in the case of former employees.

Step 2. Remaining funds will be allocated as follows: Each Eligible Claimant starts with 12 points for each parental leave event he/she had in the applicable time frame. Subtract 1 point for each week that the Eligible Claimant took time off to be with their new dependent with pay, or ½ a point for each week that the Eligible Claimant took time off without pay, up to a maximum of 12 points deducted per event. Any partial pay or partial week is treated as a week without pay. Add up the total points of all the Eligible Claimants. Each Eligible Claimant gets a share equal to his/her pro rata points. Multiply the share times the amount remaining in the Claims Fund. The Step 2 allocation may not exceed an amount equal to the Claimant's Step 1 allocation.

Illustration: Assume there is \$100,000 remaining in the Claims Fund after Step 1. Assume there are 40 claimants and the total of all their points is 400. The pro rata share for a claimant who had 6 points, for example, would be  $(6/400) * \$100,000 = \$1,500.00$ . This claimant would receive the amount provided by Step 1, plus an additional \$1,500, pursuant to Step 2.

The Claims Administrator shall render a determination as to the monetary award that should be paid to each Claimant from the Settlement Fund. The Claims Administrator's determination shall be final and not subject to review by, or appeal to, any court, mediator, arbitrator or other judicial body, including without limitation this Court, except for clear, obvious, and material error. As will be reflected in the final order approving this Settlement, the Employer and Class Counsel shall have no responsibility, and may not be held liable, for any determination reached by the Claims Administrator.

b. The Claims Fund is \$460,730.77, plus any interest accrued thereon, to be allocated among participating Class Members. Each Claimant will receive a minimum of the equivalent of six weeks of pay at their rate of pay as of the date of Preliminary Approval, or the last day of employment for former employees. If there are additional settlement funds they shall be allocated on a pro rata basis among the Claimants based on the Claimant's number of FMLA- qualifying parental leave and the amount of leave the Claimant took during each FMLA- qualifying parental leave, with those Claimants who took the least amount of leave receiving the greatest share and those taking the greatest amount of leave receiving the smallest share, up to a maximum of twelve weeks of pay per Claimant. The total amount of such awards shall not exceed \$460,730.77, plus any interest accrued thereon between the time of deposit and the date of payments to Claimants.

c. Following approval by the Court, the Claims Administrator shall send a Notice of Award to each eligible Claimant along with a Class Member Release. Within ten (10) business days after receipt of an executed Release, the Claims Administrator shall send the Named Plaintiff or Settlement Class Member his or her award payment. Any Settlement Class Member who does not execute and timely deliver an

executed Class Member Release to the Claims Administrator within three (3) months of the date the Notice of Award was mailed to him/her shall be ineligible for, and forever barred from receiving, monetary relief under this Settlement Agreement and be deemed to have fully, finally and irrevocably waived, released, and discharged the Employer from any and all FMLA parental leave claims, whether known or unknown, actual or potential, from April 29, 2011 to the date that Notice is mailed to the Class, even though said Settlement Class Member has not opted out. Any undistributed funds that remain after three (3) months after the mailing of the Notice of Award due to unsubmitted releases shall be distributed in accordance with the *cy pres* provisions of this Agreement.

d. The Claims Administrator shall maintain the distribution plan and allocation list for a period of five (5) years. The Employer shall have access to individual allocation amounts only upon written notice to Class Counsel and a showing of good cause (e.g., actual or threatened litigation by a Claimant). Any dispute as to whether good cause exists for such a requested disclosure shall be resolved through the Dispute Resolution process set forth in in this Agreement.

5. **Non-Admissibility of Fact of Award (or Non-Award).** Except to the extent that it would constitute a set off in an action for damages claimed for any period covered by this settlement, neither the fact nor amount of an award, nor the fact of any non-award, shall be admissible in any other proceeding for any purpose other than to enforce a Release executed in accordance with this claims process.

6. **Tax Treatment**

a. **Qualified Tax Status and Tax Responsibilities.** The Settlement Fund shall be established as a Qualified Settlement Fund within the meaning of Section 468B of the



Internal Revenue Code of 1986, as amended, and Treas. Reg. Section 1.468B-1, et seq., and shall be administered by Class Counsel and Claims Administrator under the Court's supervision. The parties shall cooperate to ensure such treatment and shall not take a position in any filing or before any tax authority inconsistent with such treatment.

b. Payment of Federal, State and Local Taxes. The parties recognize that the awards to eligible Claimants are not compensation and fall within section 29 U.S.C. sec. 2617(a)(1)(A)(i)(II) and therefore should not be subject to payroll tax withholding and reporting. Settlement Class Members shall be responsible for reporting and paying any federal or state income taxes which may be owed on the Payment. The Claims Administrator shall be responsible for reporting to the IRS and to Claimants on Form 1099-MISC.

c. Defendants and their counsel make no representations concerning the tax status of the lump sum payment. Any and all taxes that may be assessed on receiving the payment are the Claimants' sole responsibilities. To the extent that any federal, state or local taxing authority determines that Defendants should have withheld money for taxes of any kind, Claimants agree to indemnify Defendants for any such federal, state or local taxes, penalties, fines, assessments and other tax liabilities (plus costs and expenses, including attorney's and/or accountant's fees) that would have been the responsibility of Claimants, claimed by any taxing authorities.

d. Claims Fund Administration Expenses. All (i) taxes (including any estimated taxes, interest or penalties) arising with respect to the income earned by the Settlement Fund, including any taxes or tax detriments that may be imposed on the Employer with respect to income earned for any period during which the Settlement Fund does not

qualify as a “Qualified Settlement Fund” for federal and state income tax purposes (hereinafter “Settlement Fund Taxes”), and (ii) expenses and costs incurred in connection with the operation and implementation of this paragraph (including, without limitation, expenses of tax attorneys and/or accountants and mailing and distribution costs and expenses relating to filing (or failing to file) any returns described herein or otherwise required to be filed pursuant to applicable authorities) (hereinafter “Settlement Fund Tax Expenses”), shall be treated as a cost of the administration of the Claims Fund. The parties hereto agree to cooperate with the Claims Administrator, each other, and their tax attorneys and accountants to the extent reasonably necessary to carry out the provisions set forth in this paragraph.

**D. Cy Pres.** If there are less than 25 (twenty-five) Claimants, then there will be a surplus in in the Settlement Fund after paying the maximum of 12 weeks of pay to each Claimant. Any funds remaining will be distributed under the doctrine of *Cy Pres.* The parties have each designated one non-profit organization which engages in work that is thematically similar to the topics at issue in the instant litigation, including child care. Plaintiffs designate Jardin de los Niños, and Defendant designates the New Mexico State University Foundation, with all funds directed towards a scholarship to cover tuition for families with children enrolled at the NMSU School for Young Children.<sup>1</sup>

**E. Non-monetary Relief for Class Members.** Each Eligible Claimant, up to a maximum of 53.25 Claimants, will receive a minimum accrual of 12 (twelve) weeks of paid FMLA leave (or such higher amount of accrued leave as may be provided under paragraph IV.B.8). This leave will be credited to the Claimant’s leave banks within 30 days

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<sup>1</sup> Jardin de los Niños is a non-profit agency which provides comprehensive family services for children who are homeless or near homeless. See <http://www.jardinlc.org/>. The NMSU School for Young Children provides childcare and pre-K services to the children of faculty, staff and community members. See <https://ci.nmsu.edu/programs/concentrations/eced/mcvi/schoolforyoungchildren/>; see also <http://advancing.nmsu.edu/foundation/donors-foundation>.

after the list of Eligible Claimants is provided to Class Counsel and Defense Counsel. This accrual has no cash value upon separation from NMSU or under any other circumstances and can be used only during the class member's regular nine-month employment term at NMSU.

**F. Payment for Settlement Administrator.** The parties agree that the Employer will be responsible for payment of the Claims Administrator, up to \$25,000.00.

**G. Attorneys' Fees.**

1. The parties agree that Class Counsel will receive \$250,000 in attorneys' fees and costs, subject to Court approval. Class Counsel shall be entitled to keep any interest on funds set aside for attorneys' fees that accrues before the attorneys' fees are paid. The parties further agree that no other petitions for attorneys' fees as the prevailing party pursuant to the Family Medical Leave Act will be filed with the Court.

2. The parties agree that Class Counsel shall be entitled to receive reasonable attorneys' fees and costs incurred in enforcement of this Agreement, should enforcement action be necessary, and should Class Counsel prevail. Class Counsel shall keep contemporaneous time records of time spent on such matters.

**H. Form of Order.** This matter will be initially concluded upon filing of the Motion for Preliminary Approval and related documents. The parties agree to judicial oversight for purposes of enforcing the terms of the agreement by United States Magistrate Judge Carmen Garza, provided this arrangement is approved by the Court.

**I. Agreement Regarding Disputes Regarding Settlement Agreement Terms.**  
The parties agree to work together to informally resolve any disputes regarding the terms of this Settlement Agreement. In the event that the parties cannot resolve a dispute, the parties

agree to jointly approach Judge Garza or any other Judge designated about such disputes prior to any formal enforcement action.

**VII. ENFORCEMENT AND DISPUTE RESOLUTION MECHANISMS**

A. Defendants and Class Counsel will meet at least once semi-annually regarding compliance and may confer more frequently at their discretion or as dictated by information either side gathers.

B. The parties will work diligently and in good faith to resolve all disputes that may arise between them concerning the rights, obligations, and duties of the parties to this Agreement. In the event that the parties cannot agree, the parties will attempt to resolve the dispute with the facilitation of a mediator. In the event that mediation is unsuccessful, then either party may institute an enforcement action. In any such enforcement action, the Court will have due regard for academic judgment.

1. In any action brought to enforce this Agreement, the Court may, in its discretion, award reasonable attorneys' fees and expenses to the prevailing party. Counsel shall keep contemporaneous time records of time spent on such matters.

**VIII. GENERAL TERMS**

A. **Governing Law.**

The parties agree that federal law shall govern the validity, construction and enforcement of this Settlement Agreement. To the extent that it is determined that the validity, construction or enforcement of this Settlement Agreement or Class Member Release executed pursuant to its terms is governed by state law, the law of the District of New Mexico shall apply.

B. **Complete Agreement.** This Settlement Agreement, including the Exhibits

hereto, contains the entire agreement and understanding of the parties with respect to the Settlement. This Settlement Agreement does not impose any obligations on the parties beyond the terms and conditions stated herein. Accordingly, this Settlement Agreement shall not prevent or preclude Defendants from revising its employment practices and policies or taking other personnel actions during the term of this Settlement Agreement so long as they are consistent with this Settlement Agreement.

C. **Modifications Must be In Writing.** Except as specifically provided for herein, this Settlement Agreement may not be amended or modified except with the express written consent of the parties.

D. **Severability.** In the event that any part of this agreement is deemed unenforceable, the Parties agree that the remaining portions of this agreement shall continue to be in effect.

#### IX. **NAMED PLAINTIFF RELEASE**

A. Plaintiff Dulcinea Lara warrants, represents and agrees that she is not relying on the advice of Defendants or anyone associated with Defendants as to the legal or other consequences of any kind arising out of this Settlement Agreement. Accordingly, Plaintiff Lara releases and holds harmless Defendants and any and all counsel or consultant for Defendants from any claim, cause, action or other rights of any kind which Plaintiff Lara may assert because the legal or other consequences of the Settlement Agreement and General Complete Release are other than those anticipated by Plaintiff Lara.

B. In entering into this Settlement Agreement, Plaintiff Lara certifies that she is fully competent to enter into this Settlement Agreement. She further represents that she has completely read all of the terms of this Settlement Agreement and that these terms are

fully understood and voluntarily accepted. By signing this Settlement Agreement she certifies that she has entered this agreement with advice of counsel and she is aware of her rights.

C. Plaintiff Lara does hereby, for her heirs, successors and assigns, release, acquit and forever discharge Defendants, and all associated subsidiaries, including but not limited to their employees, agents, principals, officers, directors, predecessors, successors, assigns and attorneys, from any and all claims, actions, demands, causes of actions, rights, debts, damages or accountings of any nature whatsoever, which she ever had or may now have, whether known or unknown, and on account of or in any way arising out of her employment including, but not limited to, any claims arising under any federal, state or local laws prohibiting employment discrimination of any kind or nature, including, but not limited to, any and all claims arising under the New Mexico Human Rights Act, the New Mexico Whistleblower Protection Act, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Employee Retirement Income Security Act, the Americans with Disabilities Act, the Family Medical Leave Act, the Fair Labor Standards Act, the Inspection of Public Records Act, any claims for breach of an expressed or implied employment contract, wrongful or retaliatory termination, bad faith, bad faith breach of contract, retaliatory discharge or termination, retaliation under any statute including the New Mexico Workers' Compensation Act, wrongful or abusive termination, wrongful termination in violation of public policy, personal injury, mental pain, suffering and anguish, emotional upset, impairment of economic opportunities, unlawful interference with employment rights, intentional or negligent infliction of emotional distress, fraud, defamation and other tortious conduct, and including any claims for back wages or future wages, back benefits or future benefits, profit sharing or retirement contributions or fringe benefits,

impairment of economic opportunities, money damages of any kind, punitive damages, liquidated damages, costs, attorneys' fees and the Sarbanes-Oxley Act or similar theories of recovery.

**D.** The fact of this Settlement Agreement and its terms and conditions shall not be used by Plaintiff Lara in any manner in any future litigation or claim arising out of Plaintiff Lara's employment or termination of employment, including to establish liability or fault, against Defendants, their employees, their counsel, and/or their agents. Plaintiff Lara agrees and acknowledges that the execution of this Settlement Agreement and that payment of any money or receipt of any benefits is not an admission of liability or wrongdoing on the part of Defendants, their employees, counsel, or agents, which is expressly denied.

**E.** Defendants and their counsel make no representations concerning the tax status of the lump sum payment. Any and all taxes that may be assessed on receiving the payment are the Plaintiff Lara's sole responsibilities. To the extent that any federal, state or local taxing authority determines that Defendants should have withheld money for taxes, Plaintiff Lara agrees to indemnify Defendants for any such federal, state or local taxes, penalties, fines, assessments and other tax liabilities (plus costs and expenses, including attorney's and/or accountant's fees) claimed by any taxing authorities.

PLAINTIFF DULCINEA LARA, and on behalf of herself and others similarly situated.

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SUBSCRIBED AND SWORN to before me this \_\_\_\_\_ day of December,  
2015 by Dulcinea Lara.

\_\_\_\_\_  
Notary Public

My Commission Expires:  
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