

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GREG PFEIFER and ANDREW DORLEY,

Plaintiffs,

-vs.-

Case No. 16-00497-PD

WAWA, INC., RETIREMENT PLANS
COMMITTEE OF WAWA, INC., JARED G.
CULOTTA, MICHAEL J. ECKHARDT, JAMES
MOREY, CATHERINE PULOS, HOWARD B.
STOECKEL, DOROTHY SWARTZ, RICHARD D.
WOOD, JR. and KEVIN WIGGINS.

Defendants,

and

WAWA, INC. EMPLOYEE STOCK OWNERSHIP
PLAN.

Nominal Defendant.

**[PROPOSED] ORDER GRANTING PLAINTIFFS'
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT
AND RENEWED MOTION FOR CLASS CERTIFICATION**

The above-entitled matter came before the Court on Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Motion for Preliminary Approval") and Renewed Motion for Class Certification ("Motion for Class Certification"). ECF No. ___ and ECF No. ___. Both Motions are unopposed. ECF No. ___ and ECF No. ___.

I. Class Certification

1. The case is hereby certified as a class action for settlement purposes only on

behalf of the following individuals (“the Class”):

All persons who were Terminated Employee Participants¹ in the Wawa, Inc. Employee Stock Ownership Plan (“Wawa ESOP”) as of January 1, 2015 with account balances greater than \$5,000.00 and the beneficiaries of such participants and any Alternate Payees whose stock in the Wawa ESOP was liquidated pursuant to 2015 Amendment (i.e. Plan Amendment No. 4) (“Class”).

Excluded from the Class are the Defendant Trustees and members of the Defendant Committee and their immediate families; the current officers and directors of Defendant Wawa and their immediate families; and legal representatives, successors, heirs, and assigns of any such excluded persons.

2. Plaintiffs have pled the following claims in their Amended Complaint: Count I alleges that the ESOP Committee Defendants and the Trustee Defendants² breached their fiduciary duties in the September 2015 liquidation of Wawa stock. Count II alleges that Wawa and the Trustee Defendants engaged in a prohibited transaction because Wawa paid less than fair market value for Wawa shares in the liquidation and failed to conduct an adequate investigation as to the fair market value of Wawa stock, and that Defendants Wood and Stoeckel received a personal benefit from the 2015 liquidation. Count III alleges that the ESOP Committee Defendants and the Trustee Defendants breached their fiduciary duties in failing to act in accordance with the terms of the Plan by transferring participants’ assets from the Wawa ESOP in a manner that decreased participants’ benefits due to an incorrect valuation and \$50 distribution charge. Count IV claims that the ESOP Committee Defendants and the Trustee Defendants misrepresented Terminated Employee Participants’ ability to continue to hold Wawa

¹ Pursuant to the Parties Stipulation to Class Certification as to Certain Issues & Claims (ECF No. 75), “Terminated Employee Participant” means participants in the Wawa, Inc. Employee Stock Ownership Plan with vested accounts as of August 30, 2015 whose employment with Wawa, Inc. terminated prior to January 1, 2015 for any reason other than retirement, death or disability.

² The terms “ESOP Committee Defendants” and “Trustee Defendants” have the same meaning as set forth in Plaintiffs’ Amended Complaint. ECF No. 20.

stock. Count V alleges that Wawa violated the anti-cutback provision of ERISA § 204(g) (as to the distribution of accounts) by adopting the 2015 Plan Amendment. Count VI claims that Defendants violated ERISA by unilaterally amending the terms of the ESOP after Plaintiffs and the Class completed performance. Count VII alleges that the ESOP Committee Defendants violated ERISA § 102 by providing inaccurate information in the Summary Plan Description. Count VIII claims that Defendant Wawa failed to monitor the other fiduciaries. Lastly, Count IX claims that to the extent that the Plan attempts to disclaim liability of its fiduciaries for fiduciary breaches, that provision is void as a matter of public policy.

3. The Court finds that all of Plaintiffs' claims satisfy the requirements of Fed. R. Civ. P. 23(a) as follows:

- a. Because the Class consists of over 2,000 individuals, joinder of all Class members would be impracticable;
- b. Each claim raises common questions of law and fact. The claims all contest either the validity of the 2015 Amendment or the calculation of the fair market value of Wawa stock at the time of the liquidation. The 2015 Amendment was applied uniformly to each Class member, which requires resolution of the same factual and legal issues for each individual. All Class members received the same price per share for their Wawa stock and Plaintiffs assert this price was less than fair market value. The claims also allege that Defendants breached their fiduciary duties in transferring Class members' accounts, in attempting to disclaim liability to fiduciary breaches in the Plan, and in failing to properly disclose the terms of the Plan in uniform, written ERISA-mandated disclosures consistent with

Defendants' fiduciary duties and/or the requirements of ERISA;

- c. The claims of Plaintiffs Greg Pfeifer and Andrew Dorley and the claims of proposed Class representative Michael DiLoreto are typical of the claims of the Class and seek the same relief. Pfeifer, Dorley and DiLoreto were all participants in the ESOP until their shares were liquidated following the 2015 Amendment. Defendants' conduct—in adopting and implementing the 2015 Amendment—was identical as to Plaintiffs and each Class member. Defendants have not raised any unique defenses against Plaintiffs or Mr. DiLoreto;
- d. Plaintiffs and their counsel have no interests antagonistic to the Class and Plaintiffs have retained counsel with extensive experience litigating ERISA class actions, including ESOP cases. Plaintiffs and their counsel will fairly and adequately protect the interests of the Class.

4. The claims meet the requirements of Fed. R. Civ. P. 23(b)(1) because the fiduciaries of the Plan are required by law to interpret and consistently apply the terms of the Plan to all similarly-situated participants. As such, varying or inconsistent adjudications regarding the application of the 2015 Amendment to the Terminated Employee Participants or regarding whether the share price paid for Wawa stock in the 2015 liquidation was fair market value would establish incompatible standards of conduct. For similar reasons, an adjudication regarding the interpretation of the Plan as to Plaintiffs or the fair market value of Wawa stock in September 2015 would, as a practical matter, adjudicate these issues with respect to the other Terminated Employee Participants. Additionally, the relief sought would be paid to the ESOP and then allocated to Class members' individual accounts (and the proposed settlement has the

same procedure for the settlement payment).

5. The claims also meet the requirements of Fed. R. Civ. P. 23(b)(2). First, Defendants have acted on the same grounds as to all members of the Class by adopting and implementing the 2015 Amendment, using the same fair market value of Wawa stock for all the Class members' shares, and making identical representations as to their rights under the Plan in Plan summaries. Second, Plaintiffs' claims primarily seek declaratory and injunctive relief. In the claims challenging the 2015 Amendment, Plaintiffs seek a declaration that the Class Members are entitled to have their benefits calculated in accordance with the terms of the Plan in effect when they terminated employment and, as a result, that the 2015 Amendment is invalid or to reform the Plan consistent with the prior disclosures and representations of the terms of the Plan. In the claims alleging that Defendants breached their fiduciary duties in implementing the 2015 Amendment, Plaintiffs seek a determination regarding the fair market value to be paid for Wawa stock and fees charged for distributing participants' accounts. To the extent that monetary relief is awarded, any monetary relief would flow from the declaratory relief. If the Court determined that the 2015 Amendment was invalid, the primary relief would be invalidation of the Amendment, and either restoration of the stock or payment of the equivalent monetary value thereof. If the Court determined that the Class did not receive fair market value for their stock, the primary relief would be at least one of the following remedies: rescission of the sale, restoration of the stock or payment of the difference between what the Class received and fair market value. As a result, the monetary relief will not determine the key procedures to be used, will not introduce any new and significant factual or legal issues, and will not require individualized hearings. Thus, the lawsuit primarily, if not exclusively, seeks final declaratory and injunctive relief.

6. Because the Class is suited for certification under Fed. R. Civ. P. 23(b)(1) and (b)(2), the Court need not address whether the Class may also be certified under 23(b)(3).

7. Based on the foregoing findings and conclusions, the following claims are certified as a class action for settlement purposes pursuant to Fed. R. Civ. P. 23(b)(1) and (b)(2) on behalf of the Class in Paragraph 1: Counts I, II, III, IV, V, VI, VII, VIII, and IX.

8. Plaintiffs Greg Pfeifer and Andrew Dorley and Proposed Class Representative Michael DiLoreto are hereby appointed representatives of the Class.

9. Pursuant to Rule 23(g)(1), the law firms of Feinberg Jackson Worthman & Wasow LLP, Block & Leviton LLP, and Donahoo & Associates, P.C., are appointed Co-Lead Class Counsel, and Cohen Milstein Sellers & Toll, PLLC, is appointed as Liaison Counsel for the Class.

II. Preliminary Approval of Settlement

10. Based upon the Court's review of the Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval and the Declaration of Daniel Feinberg ("Feinberg Declaration") and the exhibits attached thereto, the Court grants preliminary approval of the settlement memorialized in the Settlement Agreement³, attached to the Feinberg Declaration as Exhibit 1.

11. The standard for obtaining preliminary approval of a proposed class action settlement is "far less demanding" than the standard to obtain final approval. *Curiale v. Lenox Grp. Inc.*, No. 07-cv-1432, 2008 WL 4899474, at *9 n.4 (E.D. Pa. Nov. 14, 2008). "In deciding whether to grant preliminary approval, a court determines whether: the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential

³ Capitalized terms have the same meaning as set forth in the Definitions section of the Settlement Agreement.

treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval.” *In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. 191, 197–98 (E.D. Pa. 2014) (quotation omitted). Courts often grant preliminary settlement approval without requiring a hearing or a court appearance. *See Capsolas v. Pasta Res. Inc.*, No. 10 Civ. 5595, 2012 WL 1656920, at *1 (S.D.N.Y. May 9, 2012) (granting preliminary approval based on plaintiffs' memorandum of law, attorney declaration, and exhibits); *Palacio v. E*TRADE Fin. Corp.*, No. 10 Civ. 4030, 2012 WL 1058409, at *1 (S.D.N.Y. Mar. 12, 2012) (same). “[The Court] will also consider whether the negotiations occurred at arm’s length, [and] whether there was significant investigation of Plaintiffs’ claims....” *Id.* at 198. Under Rule 23, a settlement “falls within the range of possible approval,” if there is a conceivable basis for presuming that the standard applied for final approval—fairness, adequacy, and reasonableness—will be satisfied. *Mehling v. New York Life Ins.*, 246 F.R.D. 467, 472 (E.D. Pa. 2007).

12. “Whether a settlement arises from arm’s length negotiations is a key factor in deciding whether to grant preliminary approval.” *In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. at 198; *see also In re CIGNA Corp. Sec. Litig.*, No. 02–8088, 2007 WL 2071898, at *2 (E.D. Pa. July 13, 2007) (noting that a presumption of fairness exists where parties negotiate at arm's-length, assisted by a mediator). Here, the Parties held two full days of mediation with an experienced mediator and engaged in settlement negotiations only after substantial discovery and motion practice.

13. The proposed Settlement provides substantial relief to the Class and has no obvious deficiencies such as preferential treatment to a portion of the Class. The Settlement Cash Payment – \$25 million – would provide Class Members with an additional payment of nearly

\$1,000 per share for their Wawa stock liquidated in 2015. The Plan of Allocation proposes to allocate the Net Settlement Fund on a pro rata basis. *See Mehling*, 246 F.R.D. at 473 fn. 3 (E.D. Pa. 2007) (granting preliminary approval to pension plan class action settlement allocating settlement payment on pro rata basis). Although the potential recovery was higher, Plaintiffs faced many obstacles in litigation. Plaintiffs believe the proposed Settlement is a fair, adequate and reasonable compromise of their claims. The Court notes that the settlement represents 25% – 50% of Class Counsel’s assessment of the maximum recovery.

14. The Court finds that there are no grounds to doubt the fairness of the Settlement Agreement or other obvious deficiencies, and concludes that the proposed Settlement Agreement is within the range of possible settlement approval, such that notice to the class is appropriate.

15. The Court finds that the Settlement Agreement is the result of extensive, arm’s length negotiations by counsel well-versed in the prosecution of ERISA litigation and class actions. The assistance of a professional mediator reinforces that the Settlement Agreement is non-collusive.

III. Class Notice

16. The Court approves the Proposed Notice of Class Action Settlement (“Class Notice”) which is attached as Exhibit 2 to the Feinberg Declaration and directs its distribution to the Class.

17. The content of the Class Notice fully complies with due process and Federal Rule of Civil Procedure 23.

18. Pursuant to Federal Rule of Civil Procedure 23(c)(2)(B), a notice must provide:

the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: the nature of the action; the definition of the class certified; the class claims, issues, or defenses;

that a class member may enter an appearance through counsel if the member so desires; that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and the binding effect of a class judgment on class members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). Additionally, Rule 23(c) gives the district court discretion as to “appropriate notice” for a class certified under Rule 23(b)(1) or (b)(2). Fed. R. Civ. P. 23(c)(2)(A). In order to satisfy due process concerns, “notice to class members must 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.” *Mehling*, 246 F.R.D. at 477 (quotation omitted). Here, Class Members will receive notice by electronic mail and/or first-class mail. Defendants have email addresses and/or mailing addresses for each Class member. The Court finds that this notice plan is the best notice practicable under the circumstances and complies with the requirements of due process.

19. Rule 23(c) requires that the “notice must inform class members of (1) the nature of the litigation; (2) the settlement’s general terms; (3) where complete information can be located; and (4) the time and place of the fairness hearing and that objectors maybe heard.” *Id.* (quotation omitted). *See also In re Baby Products Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013) (“Generally speaking,” notice is sufficient if it “enable[s] class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement”). The proposed Class Notice here satisfies each of these requirements and fully complies with the requirements of Rule 23(c). It also describes the terms of the settlement, informs the class about the request for attorneys’ fees, and provides specific information regarding the date, time, and place of the final approval hearing.

20. The Court appoints Dahl Administrators as the Settlement Administrator for providing Class Notice and otherwise assisting in administration of the Settlement as set forth in Settlement Agreement Section VII.2.

21. To the extent that they have not already done so, Defendants shall provide Class Data to Class Counsel and the Settlement Administrator as specified in Section III.7 of the Settlement Agreement by _____, 2018.

22. The Settlement Administrator will send to all Class Members identified by Defendants in the Class Data by electronic mail (if available) or by U.S. Mail (if unavailable or undeliverable) the Class Notice and any Election Forms necessary for a Class Member to request a distribution from the ESOP on or before _____, 2018 [21 calendar days of this Order]. The Settlement Administrator will post the Class Notice, any Election Forms necessary for a Class Member to request a distribution from the ESOP or the 401k Plan and other information about the Settlement on the following website: _____. The website will contain at least the following documents and information: (a) the Amended Complaint; (b) the Settlement Agreement; (c) the Motion & Memorandum in Support of Class Certification; (d) the Motion & Memorandum in Support of Preliminary Approval; (e) Class Counsel's Motion & Memorandum for Fees and Expenses; (f) the Motion & Memorandum in Support of Class Representative Service Awards; (g) the Class Notice; (h) any orders of this Court related to the Settlement; (i) the current Election Form(s) necessary to elect a distribution from the Wawa ESOP and the Wawa 401k Plan; (j) the contact information (including telephone numbers) for the Settlement Administrator, the Plan Administrator, and Co-Lead Class Counsel; (k) the date, time and location of the Final Approval Hearing and (l) any updates regarding the distribution of the Net Settlement Fund to the Class. The Settlement Administrator will maintain the documents

and information on the website for at least one year after the time that Final Approval is entered or that all appeals are resolved, whichever is later. By no later than ___ ___, 2018 [30 days after Notice is required be sent], the Settlement Administrator will file a declaration with the Court confirming that the Class Notice, the Election Forms and any other information required by the Settlement or the Plan of Allocation were sent in accordance with this Order.

IV. The Plan of Allocation

23. The Plan of Allocation proposed by Class Counsel is preliminarily approved as fair, reasonable and adequate as it proposes to allocate the Net Settlement Fund on a pro rata basis based the amount of Wawa stock held by each Class Member in his or her ESOP account.

V. Class Action Fairness Act Notice

24. The form of notice under the Class Action Fairness Act of 2005 (“CAFA”) submitted as Exhibit 1 to the Declaration of Brian Ortelere complies with the requirements of CAFA and will, upon mailing, discharge Defendants’ obligations pursuant to CAFA.

VI. Class Action Settlement Procedure

25. This Clerk of Court is directed to remove this action from the suspense docket and restore it to the active docket for the purpose of reviewing the proposed settlement pursuant to FRCP 23(e).

26. Any Class Member who wishes to object to this Settlement, the proposed Plan of Allocation, the Request for Class Representative Service Awards or Class Counsel’s motion for attorneys’ fees or expenses or otherwise to be heard concerning this Settlement shall timely inform the District Court in writing of his or her intent to object to this Settlement and/or to appear at the Fairness Hearing by following the procedures set forth in the Class Notice (“Objection”). To be considered timely, the Objection must bear a postmark that is no later than

_____, 2018 [forty-five (45) calendar days after the Notice is mailed]. The Objection must set forth at least the following: (a) the full name, address and contact information for the Objector, the Objector's status in the Plan (e.g. participant, beneficiary, or Alternate Payee) and the name and address of counsel (if represented by counsel); (b) a written statement of any and all objections to this Settlement, including any supporting papers and arguments; (c) the signature of the Objector (or his or her attorney). Any Class Member who fails to make his or her objection in the manner provided shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness or adequacy of the proposed settlement as incorporated in the Settlement Agreement, to the Judgment, to the Plan of Allocation, to the award of attorneys' fees and reimbursement of expenses to Class Counsel, unless otherwise ordered by the Court. To the extent that any objections or comments are transmitted to Settlement Administrator, or the Parties' counsel, but are not filed with the Court, those persons are hereby directed to file such objections with the Court.

27. Any Class Member who wishes to challenge his or her ESOP account data (the number of Wawa shares allocated to the Class Member's ESOP as of September 2015) must submit a challenge and supporting documentation to the Settlement Administrator and any such submission must bear a postmark that is no later than _____, 2018 [forty-five (45) calendar days after the Notice is mailed]. Any such challenge must set forth the identity of the participant or beneficiary making the challenge and set forth sufficient evidentiary basis to show that the data provided by Defendants is incorrect.

28. The Settlement Administrator shall complete its recommended determination(s) as to the accuracy of the account data based on the challenges by any Class Members (or

potential Class Members) and submit its recommendation(s), with an explanation and supporting evidence, to the Court by _____, 2018 [twenty-one (21) days before fairness hearing].

29. The Settlement Fund will be deemed and considered to be in *custodial egis* of the Court and will remain subject to the jurisdiction of the Court until such time as such funds will be distributed pursuant to the Settlement Agreement and/or the order of the Court.

30. Class Counsel will file any Motion for Attorneys' Fees, Costs, and any motion for Class Representative Service Awards no later than _____, 2018 [thirty (30) days after preliminary approval order].

31. Neither Defendants nor Defendants' counsel will have any responsibility for the Plan of Allocation or will make any application for or take any position on attorneys' fees or reimbursement of expenses submitted by Co-Lead Class Counsel and such matters will be considered separately from the fairness, reasonableness and adequacy of the Settlement.

32. Co-Lead Class Counsel will file a Motion for Final Approval of Settlement no later than _____, 2018 [fourteen (14) days before fairness hearing].

33. The Court will hold a final fairness hearing on April __, 2018 at _____ at the United States District Court for the Eastern District of Pennsylvania, 601 Market Street, Philadelphia, Pennsylvania 19106, Courtroom 14-A. The Court may continue the date of the final fairness hearing if necessary without further notice the Class, but any such continuance will be publicized on the settlement website.

34. The Parties shall abide by all terms of the Settlement Agreement.

It is so ORDERED this ___ day of January, 2018.

Honorable Paul Diamond
United States District Judge