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

JOHN J. CUNNINGHAM, et al., Plaintiffs, -vs.- WAWA, INC., et al. Defendants, and WAWA, INC. EMPLOYEE STOCK OWNERSHIP PLAN. Nominal Defendant.	**Case No. 18-03355-PD**

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. INTRODUCTION

Plaintiffs and Class Representatives John J. Cunningham, David Ciuffetelli, Benjamin DiDonato, and John Rucki, Jr. (collectively the "Plaintiffs"), on behalf of themselves and the Class, move this Court for an order preliminarily approving the Settlement Agreement, attached to the Declaration of Daniel Feinberg ("Feinberg Dec.") as Exhibit 1,[1] approving the form and manner of Class notice, and for this Court to schedule a Fairness Hearing for the final approval of the proposed Settlement. The proposed Notice of Class Action Settlement (to which all Parties have agreed) is attached as Ex. 2.

The proposed Settlement includes a payment of $21,612,500.00 – less Class Counsel's fees and litigation expenses, and incentive payments to the Class Representatives – to the Wawa, Inc. Employee Stock Ownership Plan ("the ESOP" or "the Plan"), which will be allocated among the approximately 10,000 Class Members. Class Members can elect to receive a distribution of their settlement allocations or roll over their settlement allocations to an IRA or another qualified pension plan. If a Class Member does not make an election, his or her settlement allocations will be transferred to the Class Member's account in the Wawa, Inc. 401(k) Plan ("the 401(k) Plan").

[1] All references to "Ex." are to the Exhibits attached to the Feinberg Declaration. Capitalized terms used herein are defined in the Settlement Agreement.

The proposed Settlement resolves Plaintiffs' claims alleging that (1) the 2014 Plan amendment to the ESOP improperly limited the right of members of the Terminated Pre-2014 Employee Subclass to remain invested in shares of Wawa, Inc. ("Wawa") stock in their ESOP accounts until age 68, (2) the 2015 Plan amendment to the ESOP improperly limited the right of the Retired Employee Subclass to remain invested in shares of Wawa stock in their ESOP accounts until age 68, and (3) the Class Members received less than fair market value for their Wawa shares liquidated on an annual basis in 2016, 2017, 2018 and 2019 pursuant to four separate valuations conducted in each of those years. The ESOP directly purchased a total of approximately 43,658 shares from Class Members during the Class period at $7,652 per share in 2016, $8,863 per share in 2017, $9,926 per share in 2018 and $12,190 per share in 2019. The proposed settlement payment of $21,612,500 is equivalent to an additional payment of approximately $500 per share to each Class on a per share basis. As discussed below, the proposed Settlement merits preliminary approval.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Description of the Action and Procedural History

In light of the Court's familiarity with the case, the background facts are stated briefly.

Plaintiffs' claims arise out of (1) the 2014 Plan amendment eliminating Terminated Pre-2014 Employee Subclass members' right to continue to remain invested in shares of Wawa stock in their individual ESOP accounts, (2) the 2015 Plan amendment eliminating the Retired Employee Subclass members' right to continue to remain invested in shares of Wawa stock in their individual ESOP accounts and (3) the liquidation of Class Members' stock in 2016, 2017, 2018 and 2019 at values separately established in those years. First, Plaintiffs allege the ESOP's fiduciaries breached their fiduciary duties in implementing the amendments by liquidating the former employees' shares at less than fair market value and furthering the trustees' personal financial interests. Second, Plaintiffs allege that former employees who retired prior to the 2015 Amendment, and former employees who were employed by Wawa prior to the 2014 Amendment and who terminated employment on or after January 1, 2015, had accrued a right to continue to hold shares of Wawa stock in their ESOP accounts until age 68. Plaintiffs Cunningham and DiDonato alleged that the rights of Retired Employee Subclass Members under the ESOP became fixed when they terminated employment and, as a result, an amendment adopted after their employment ended could not be applied retroactively to take away their rights under the Plan. Plaintiffs Ciuffetelli and Rucki allege that rights of Terminated Pre-2014 Employee Subclass Members could not be altered by the 2014 Amendment.

B. Discovery

The Parties engaged in substantial discovery prior to negotiating the proposed Settlement. Plaintiffs completed discovery on issues related to class certification and most of merits discovery, and the parties exchanged expert reports prior to the December 2019 mediation among Plaintiffs, Defendants, and certain of Defendants' insurers. Discovery related to class certification included document production, the depositions of the four Named Plaintiffs, and the depositions of five witnesses produced by Defendant Wawa as corporate representatives for a Rule 30(b)(6) deposition. For merits discovery, Plaintiffs took the depositions of the appraiser responsible for the valuations of ESOP stock during the Class period and the independent trustee who approved certain transactions related to the sale of some of the stock liquidated by the ESOP. Plaintiffs also reviewed tens of thousands of documents produced in discovery by Wawa, individual defendants and non-parties, including Defendants' financial and legal advisors and the ESOP valuation advisor. Finally, Plaintiffs served their expert reports regarding the potential recovery for the Class and the Subclasses under their alternative claims. Defendants' expert reports were not due until after the December 2019 mediation, but Defendants provided Plaintiffs with draft expert reports in connection with the

mediation, and Defendants' valuation expert attended and participated in the mediation. Therefore, Class Counsel had more than sufficient information to thoroughly evaluate both the merits of Plaintiffs' claims and the potential recovery for the Class prior to negotiating the proposed Settlement.

C. The Court's Rulings on Defendants' Motion to Strike Class Allegations and Motion to Dismiss

On November 5, 2018, the Court denied Defendants' Motion to Strike Class Allegations without prejudice. ECF No. 31. On January 10, 2019, the Court largely denied Defendants' Motion to Dismiss. ECF No. 45.

D. The Court's Ruling on Plaintiffs' Motion for Class Certification and Defendants' Rule 23(f) Appeal

Following class-related discovery, Plaintiffs filed their Motion for Class Certification. ECF No. 56. On July 2, 2019, the Court granted Plaintiffs' Motion (ECF No. 65). *Cunningham v. Wawa, Inc.*, 387 F. Supp. 3d 529 (E.D. Pa. 2019). The Court certified the Class and two Subclasses. The Class is defined as:

> All Participants in the Wawa, Inc. Employee Stock Ownership Plan ("Wawa ESOP") with account balances greater than $5,000.00 as of the date that they terminated employment whose accounts were liquidated on or after September 12, 2015 and the beneficiaries of such participants.

Id. at 537. The Retired Employee Subclass is defined as:

> All Participant members of the Class who Retired between January 1, 2011 and December 31, 2014 except for Participants whose accounts were liquidated due to death, disability or a voluntary request for distribution, and the beneficiaries of such Participants.

Id. The Terminated Pre-2014 Employee Subclass is defined as:

> All Participant members of the Class who were employed by Wawa and participated in the ESOP before January 1, 2014 and who terminated employment on or after January 1, 2015 except for Participants whose accounts were liquidated due to death, disability or a voluntary request for distribution, and the beneficiaries of such participants.

Id. Excluded from the Class and Subclasses are: (a) Defendant Trustees and members of the Defendant Committee and their immediate families; (b) the current officers and directors of Wawa and their immediate families; (c) members of the Pfeifer Class; and (d) these individuals' legal representatives, successors, heirs, and assigns. *Id*.

Defendants filed a Petition for Permission to Appeal the Court's Class Certification Order pursuant to Rule 23(f) (ECF No. 68), and the Third Circuit granted the Petition on August 13, 2019. Defendants' Rule 23(f) Petition challenged the Court's certification of three of the four claims brought on behalf of the Subclasses: Counts V, VII and VIII. Counts V-VIII are brought by Plaintiffs Cunningham and DiDonato on behalf of the Retired Employee Subclass (retirees between January 1, 2011 and December 31, 2014), and Counts VI and VIII are brought by Plaintiffs Ciuffetelli and Rucki on behalf of the Terminated Pre-2014 Employee Subclass (employees before January 1, 2014 who terminated on or after January 1, 2015).

Count V alleges that the fiduciaries breached their duties to participants by making representations to all participants, including in SPDs, about the right to continue to own Wawa stock. Am. Compl. ¶¶ 183-89. Count VII alleges that the 2015 Amendment cannot be applied to the Retired Employee Subclass because they had terminated employment before its adoption. Am. Compl. ¶¶ 206-11. Count VIII alleges that the ESOP Committee failed to describe participants' rights in the SPD as required by ERISA § 102. Am. Compl. ¶¶ 212-20.

Both Defendants and Plaintiffs filed appellate briefs, but the Third Circuit did not issue a ruling on the Petition. On January 9, 2020, the Third Circuit issued an order staying the appeal until March 30, 2020, pending finalization of the settlement in principle. On April 6, 2020, the Third Circuit issued an order extending the stay of the appeal until May 29, 2020. The Third Circuit subsequently indefinitely stayed the appeal but required ongoing reports from the Parties regarding the status of settlement.

E. Mediation

The Parties agreed to use David Geronemus, Esq. of JAMS in New York City as a mediator in this action because of Mr. Geronemus' experience in mediating complex class actions. On December 17, 2019, the Parties, together with certain of Defendants' insurers, engaged in an all-day mediation session with Mr. Geronemus. The mediation session was not successful, but the Parties continued

negotiations and reached agreement on a settlement in principle the following week. *See* ECF No. 86.

On December 27, 2019, the Court placed the action on its suspense calendar and stayed case deadlines until March 30, 2020 to give the Parties more time to finalize the settlement. ECF No. 87. On April 3, 2020, the Parties filed a Joint Notice of Settlement Status providing an update regarding the status of the settlement.

F. The Proposed Settlement

The terms of the proposed Settlement are set forth in the Settlement Agreement. Ex. 1. In short, the Settlement Agreement provides for a payment of $21,612,500, inclusive of payments to the Class, Class Counsel's attorneys' fees and litigation expenses, and incentive awards to the Class Representatives. In addition to the settlement payment, Defendants will pay settlement administration costs and the cost of an independent fiduciary.

Settlement Amount and Timing of Payment

The Settlement Agreement provides that Defendants and their insurers will pay $5,250,000 into a qualified settlement fund account within thirty (30) days of the execution of the Settlement Agreement and the balance of the Settlement Amount into the qualified settlement fund account within thirty (30) days of preliminary approval.

Upon final approval and the Settlement becoming non-appealable, the Settlement Amount, less approved Class Counsel attorneys' fees and litigation expenses and Class Representative service awards, will be distributed to Class Members' accounts in the Wawa ESOP. Within 30 days of the Net Settlement Amount being transferred to the ESOP, the ESOP plan administrator will allocate the Net Settlement Amount to the Class Members' ESOP accounts pursuant to Class Counsel's proposed formula to be approved by the Court. The proposed allocation formula proposes to allocate the Net Settlement Amount based upon each Class Member's percentage of the Wawa shares liquidated for all Class Members, with an extra 10% allocation for members of the subclasses because of their additional claims.

After the Net Settlement Amounts are paid into the Wawa ESOP, the Net Settlement Amount allocated to the Class Members' individual ESOP accounts will be distributed to Class Members based on their online elections or Distribution Election forms submitted to the Plan Administrator. Class Members may elect to receive a distribution or roll over their settlement allocations to an IRA or another qualified retirement plan.

For Class Members who do not make an online election or submit a Distribution Election form, the Plan Administrator will transfer their individual ESOP accounts into the Class Members' accounts in the 401(k) Plan. For Class

Members who are no longer participants in the 401(k) Plan, the 401(k) Plan administrator will re-activate or establish new 401(k) accounts for such Class Members for purposes of the Settlement allocation. Each Class Member's settlement allocation will be invested according to his or her investment allocation under the 401(k) Plan. If the Class Member has not made an investment allocation election, then the Class Member's settlement allocation shall be invested in the 401(k) Plan's default investment.

Mutual Release

The Class Representatives and the Class will release and dismiss with prejudice their claims asserted in the Amended Complaint (ECF No. 89) against Defendants and certain of Defendants' insurers.

Independent Fiduciary

The Settlement is contingent upon an Independent Fiduciary approving the Settlement and the release of claims on behalf of the Wawa ESOP, as required by Department of Labor Class Exemption 2003-39, which is designed to ensure that settlement of fiduciary litigation does not constitute a prohibited transaction. (*See* Prohibited Transaction Class Exemption 2003-39, "Release of Claims and Extensions of Credit in Connection with Litigation," issued December 31, 2003, by the United States Department of Labor, 68 Fed. Reg. 75,632, as amended.) The

Court will have the benefit of the Independent Fiduciary's report as it will be available prior to the final approval hearing.

Attorneys' Fees and Costs

Class Counsel will apply for up to 20% of the Settlement Amount as a common fund fee award, and an award of Class Counsel's reasonable costs of litigation up to $175,000. Most of the litigation costs are for expert witness expenses, as Plaintiffs served two expert reports prior to the Mediation. All attorneys' fees and costs approved by the Court will be paid out of the Settlement Amount. Plaintiffs do not have the right to withdraw from the Settlement if the Court awards less than 20% of the Settlement Amount as attorneys' fees. Defendants will take no position on Class Counsel's fee application.

Incentive Payments

Class Counsel will apply for a service incentive payment of up to $25,000 to each of the four Class Representatives, which shall be paid out of the Settlement Amount. Defendants deposed each of the four Class Representatives and the Class Representatives actively participated in the litigation, including the December 2019 mediation. Defendants will take no position on Plaintiffs' incentive payment application.

Notice to the Settlement Class

The Parties have agreed to Simpluris as the Settlement Administrator who will be responsible for giving notice to the Class in a form approved by the Court. Simpluris's credentials are appended as Exhibit 3 to the Feinberg Declaration. Plaintiffs request that the Court approve the form of Class Notice appended as Exhibit 2 to the Feinberg Declaration. The Notice will be delivered by electronic mail or sent by first-class mail no later than ten (10) days after this Court grants preliminary approval of the Settlement.

III. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL

A. Standard of Review

Under Federal Rule of Civil Procedure 23(e), the settlement of a class action requires court approval. Fed. R. Civ. P. 23(e)(2). Review of a proposed class action settlement generally proceeds in two stages: (1) preliminary approval and notice to class members of the proposed settlement; and (2) final approval following a fairness hearing in which the Court determines whether the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

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 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). *See also Pfeifer v. Wawa, Inc.*, No. CV 16-497, 2018 WL 2057466, at *2 (E.D. Pa. May 1, 2018) ("At preliminary approval, I must determine if there are any obvious deficiencies and whether the settlement falls within the range of reason") (quotation omitted). "[The Court] will also consider whether the negotiations occurred at arm's length, [and] whether there was significant investigation of Plaintiffs' claims . . . ." *In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. at 198. Under Rule 23, a settlement "fall[s] 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).

As explained below, the proposed Settlement was reached after extensive investigation of Plaintiffs' claims and as the result of arm's-length negotiations. Moreover, the proposed Settlement has every indication of being fair, reasonable,

and adequate, and is otherwise devoid of obvious deficiencies. As such, the Court should grant preliminary approval.[2]

C. The Scope of the Release is Proper

The Parties seek to resolve all claims of the Class Members related to the 2015 Amendment in consideration for the settlement payment. The release in the Settlement Agreement includes all claims arising from the 2014 Amendment and 2015 Amendment and valuation of Wawa ESOP stock for each of the four years from 2016 - 2019, which would encompass claims that were not actually alleged in the Complaint but only so long as they arose out of the Amendments or stock valuations. Settlement at 34-35.

---

[2] Effective December 1, 2018, Rule 23(e)(2) was amended to list factors to guide a court's inquiry for final approval. Following the amendments, courts in the Third Circuit continue to evaluate final approval of class action settlements under the nine factors outlined in *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975). *See Huffman v. Prudential Ins. Co. of Am.*, No. 2:10-CV-05135, 2019 WL 1499475, at *3 (E.D. Pa. Apr. 5, 2019); *see also Stevens v. SEI Investments Co.*, No. CV 18-4205, 2020 WL 996418, at *3-*6 (E.D. Pa. Feb. 28, 2020); *Myers v. Jani-King of Philadelphia, Inc.*, No. CV 09-1738, 2019 WL 4034736, at *7 n.4 (E.D. Pa. Aug. 26, 2019). Those factors are: (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. *Girsh*, 521 F.2d at 157. At the preliminary approval stage, the Court does need not address these factors as "the standard for preliminary approval is far less demanding." *Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 444 n.7 (E.D. Pa. 2008). Nonetheless, consideration of these factors leads to the conclusion that the proposed Settlement is fair, reasonable, and adequate.

The scope of the proposed release is proper because "[i]t is settled law within this Circuit that 'a judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims in the settled class action.'" *Scott v. Bimbo Bakeries USA, Inc.*, No. 10-3154, 2015 WL 8764491, at *3 (E.D. Pa. Dec. 15, 2015) (*quoting In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 366 (3d Cir. 2001). Therefore, the Settlement meets the requirement that "the factual predicate for [released] future claims is identical to the factual predicate underlying the settlement agreement." *See Scott*, 2015 WL 8764491 at *3.

D. The Settlement Is the Result of Good Faith, Arm's-Length Negotiations by Well-Informed and Experienced Counsel

"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); *Gates*, 248 F.R.D. at 439, 444 (stressing the importance of arm's-length negotiations and highlighting the fact that the negotiations included "two full days of mediation"). Here, the Parties held a full day of mediation with an experienced mediator following substantial discovery and motion practice. Plaintiffs' counsel had a thorough understanding of Defendants' arguments and

defenses. By the time of the mediation, Plaintiffs had completed all discovery related to class certification, most of merits discovery, reviewed tens of thousands of pages of documents produced by Defendants and all relevant non-parties, served their expert reports and reviewed Defendants' draft expert reports. In order to assess the potential value of the claims, Plaintiffs' counsel served reports from two different experts – one to assess the value of the Subclass members' right to remain invested in shares of Wawa stock in their ESOP accounts until age 68, and a valuation expert to opine as to the correct fair market value of the Wawa stock liquidated by the ESOP in 2016, 2017, 2018 and 2019, respectively. Finally, as stated by the Court in the order granting Plaintiffs' Motion for Class Certification, "Class counsel . . . have substantial experience with both class actions and ERISA litigation, and their performance here . . . well confirms their competence." *Cunningham*, 387 F. Supp. 3d at 539. Therefore, there can be no doubt that the proposed Settlement is the result of good faith, arm's-length negotiations by well-informed and experienced counsel.

E. There Are No Obvious Deficiencies to Cast Doubt on the Proposed Settlement's Fairness

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 – $21,612,500 – represents an additional payment of approximately $500 per share for the Class Members, assuming a per share

allocation. The Settlement Cash Payment will be allocated on a pro rata basis, with an extra 10% allocation to members of the Subclasses to account for their additional claims. *See Mehling*, 246 F.R.D. at 473 n.3 (E.D. Pa. 2007) (granting preliminary approval to pension plan class action settlement allocating settlement payment on pro rata basis adjusted for minimum and maximum payments). Although the potential recovery was higher, Plaintiffs faced many obstacles in litigation. Class Counsel believes the proposed Settlement is a fair compromise of the claims.

In the opinion of Plaintiffs' counsel, which was supported by two expert witnesses, the range of possible recoveries was between $0 and approximately $77 million for the fair market value claims on behalf of the Class and between $0 and approximately $120 million for the claims asserting the right to continue holding Wawa stock until age 68 on behalf of the Subclasses. Feinberg Dec. at ¶ 6. Subclass members would not be able to recover under both theories – (A) the fair market value of the Wawa stock liquidated in 2016, 2017, 2018 and 2019, respectively, and (B) the present value of the right to continue holding shares of Wawa stock in the individual ESOP accounts until age 68 – because these are alternative claims for recovery. *Id*. Class Members who are not members of the Subclasses do not have claims asserting the right to continue holding Wawa stock

until age 68. In the opinion of Plaintiffs' counsel, the Class was more likely to recover under the former theory. *Id*.

Although the Third Circuit has not ruled on Defendants' Rule 23(f) appeal, several studies have shown that the majority of Rule 23(f) appeals where a petition has been granted result in the court of appeals reversing the district court's class certification order. In light of the Third Circuit's discretionary decision to grant Defendants' Rule 23(f) petition, Plaintiffs' counsel believed there was substantial risk the Third Circuit would reverse the Court's class certification order at least in part as to the Subclass claims.

Moreover, Plaintiffs' fair market value claims were based on errors in four distinct valuations of Wawa stock in 2016, 2017, 2018 and 2019. *Id.* Defendants vigorously disputed each of these valuation issues. *Id*. The Court might have agreed with some but not all of Plaintiffs' valuation critiques, which would have significantly reduced the recovery for the Class. *Id*.

Thus, the proposed Settlement is an excellent result for the Class and discloses no grounds "to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class…." *Mehling*, 246 F.R.D. at 472 (quotation omitted).

IV. THE COURT SHOULD MODIFY THE CLASS DEFINITION AND CLARIFY THE EXCLUSIONS

Rule 23(c)(1) allows for modification of class definition, and as such "[a] court is not bound by the class definition proposed in the complaint." *Weitzner v. Sanofi Pasteur, Inc.*, 3:11-CV-02198, 2017 WL 3894888, at *9 (M.D. Pa. Sept. 6, 2017) (quoting *Weisfeld v. Sun Chem. Corp.*, 84 Fed.Appx. 257, 259 (3d Cir. 2004) (citing *Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir. 1993)). *aff'd*, 909 F.3d 604 (3d Cir. 2018). Holding a plaintiff to the original class definition "would ignore the ongoing refinement and give-and-take inherent in class action litigation, particularly in the formation of a workable class definition." *In re Monumental Life Insurance Co.*, 365 F.3d 408, 414 (5th Cir. 2004). As a result, courts modify proposed class definitions in a complaint throughout the course of litigation. *E.g., Gates v. Rohm & Haas Co.*, 265 F.R.D. 208, 215 n.10 (E.D. Pa. 2010). Courts have recognized that a class definition should have an end date although there is not set rule as to what the end date should be. *Guidry v. Wilmington Tr.*, 333 F.R.D. 324, 329 (D. Del. 2019) (surveying law and setting end date as of the court's decision).

First, the Settlement Agreement defines the end date for the class as December 2019, which is the date of the mediation and the date through which Class Counsel had data to negotiate the monetary amount of the settlement. Feinberg Dec. ¶ 7. This is a sensible and workable modification.

Second, the Court's decision recognized that Plaintiffs' proposed class definition excluded certain persons from the Class. *Cunningham v. Wawa, Inc.,*

387 F. Supp. 3d 529, 537 (E.D. Pa. 2019). However, the concluding portion of the Court's order did not expressly exclude those persons from the Class or Subclasses. *Id.* at 548-550. These persons should be excluded. *See Pfeifer,* 2018 WL 2057466, at *7.

V. THE COURT SHOULD RESTORE THE ACTION TO THE ACTIVE CALENDAR, APPROVE THE PROPOSED NOTICE PLAN, APPOINT A SETTLEMENT ADMINISTRATOR AND SET A FAIRNESS HEARING

The Court should restore this action to the active calendar before making substantive rulings on the pending motions for preliminary approval and class certification. "While circumstances may justify removing cases from the active calendar, in the interest of orderly procedure no action should be taken in such cases until they have been restored to the active calendar." *De Tie v. Orange Cty.*, 152 F.3d 1109, 1111 n.3 (9th Cir. 1998). For example, in *Essex Ins. Co. v. Quick Stop Mart, Inc.*, No. 07-CV-1909, 2009 WL 700879 (E.D. Pa. Mar. 16, 2009), the court placed an insurance coverage action on its suspense calendar pending resolution of the underlying state court case. *Id*. at *3. After the state court action was resolved, the court directed "[t]he Clerk of Court [] to remove th[e] action from the suspense docket and restore it to the active docket," and then ruled on the plaintiff's motion for summary judgment. *Id*. at **9-10. The Court should likewise restore this action to the active docket prior to ruling on the pending motions.

Pursuant to Federal Rule of Civil Procedure 23(e)(1), the Court "must direct notice in a reasonable manner to all class members who would be bound by [a proposed settlement, voluntary dismissal, or compromise]." 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). "To meet this standard, 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").

In addition, Rule 23(e) gives the district court discretion as to the manner of the notice. Fed. R. Civ. P. 23(e)(1). It is well-established that notice sent by first class mail to each member of the settlement class "who can be identified through reasonable effort" constitutes reasonable notice. *Eisen v. Carlisle & Jacquelin*, 417

U.S. 156, 173-77 (1974). In recent years, courts have also approved notice by email. *See, e.g., In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 214 (E.D. Pa. 2014); *Saint v. BMW of N. Am., LLC*, No. CIV.A. 12-6105 CCC, 2015 WL 2448846, at *8 (D.N.J. May 21, 2015); *Skeen v. BMW of N. Am., LLC*, No. 2:13-CV-1531-WHW-CLW, 2016 WL 4033969, at *7 (D.N.J. July 26, 2016) (finding that a 94 percent email success rate met the notice requirements of Fed. R. Civ. P. 23(c)(2)(B)).

The proposed Class Notice plan is designed to reach the largest number of Settlement Class Members possible. The Notice, which is attached hereto as Exhibit 2, will be sent by email or first-class U.S. mail to each Settlement Class Member more than two months prior to the Fairness Hearing. Because all Settlement Class members had ESOP accounts, the ESOP has last known addresses for them, at least as of the Class Period, and has their Social Security numbers, which can be used to do an address update if Notices are returned as undeliverable.

The Class Notice Plan agreed to by the Parties satisfies all due process considerations and meets the requirements of Fed. R. Civ. P. 23(e). It describes in plain English: (i) the Settlement's terms and operations; (ii) the nature and extent of the released claims; (iii) the procedure and timing for objecting to the

Settlement; and (iv) the date and place for the Fairness Hearing. As such, it should be approved by the Court.

To facilitate the Class Notice Plan, the Parties request that the Court schedule a Fairness Hearing to take place approximately 80 days after issuing its order on this Motion. The Parties further requests that Simpluris be appointed to serve as the Settlement Administrator for purposes of effectuating the Class Notice Plan.

IV. CONCLUSION

For the foregoing reasons, the Class Representatives respectfully requests that the Court restore this action to the active docket, grant the Motion for Preliminary Approval of Class Action Settlement, and enter the proposed Preliminary Approval Order submitted herewith.

Dated: July 9, 2020

Respectfully submitted,

/s/ R. Joseph Barton
R. Joseph Barton (*pro hac vice*)
Colin Downes (*pro hac vice*)
BLOCK & LEVITON LLP
1735 20th Street, N.W.
Washington, DC 20009
Tel: (202) 734-7046
Email: jbarton@blockesq.com
Email: colin@blockesq.com

/s/ Daniel Feinberg
Daniel Feinberg (*pro hac vice*)
FEINBERG, JACKSON, WORTHMAN & WASOW LLP
2030 Addison Street, Suite 500
Berkeley, CA 94704
Tel: (510) 269-7998
Fax: (510) 269-7994
Email: dan@feinbergjackson.com

Richard E. Donahoo (*pro hac vice*)
DONAHOO & ASSOCIATES, P.C.
440 W. First Street, Suite 101
Tustin, California 92780
Tel: (714) 953-1010
Fax: (714) 953-1777
Email: rdonahoo@donahoo.com

Raymond M. Sarola (Pa Bar No. 318164)
Gary L. Azorsky (Pa Bar No. 38924)
COHEN MILSETIN SELLERS & TOLL PLLC
1717 Arch Street, Suite 3610
Philadelphia, PA 19103
Tel: (267) 479-5700
rsarola@cohenmilstein.com

Attorneys for Plaintiffs and the Class

CERTIFICATE OF SERVICE[1]

I hereby certify that I caused a true and correct copy of the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**, to be served on the counsel listed below via the Court's ECF system on July 9, 2020:

Brian T. Ortelere
Morgan Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
215-963-5150

David I. Monteiro
Morgan Lewis & Bockius LLP
1717 Main Street
Suite 3200
Dallas, TX 75201
214-466-4000

/s/ *Ming Siegel*
Ming Siegel