UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN J. CUNNINGHAM, DAVID CIUFFETELLI, BENJAMIN DIDONATO and JOHN RUCKI, JR.,

Plaintiffs,

-vs.-

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., KEVIN WIGGINS and CHRISTOPHER D. WRIGHT.

Defendants,

and

WAWA, INC. EMPLOYEE STOCK OWNERSHIP PLAN.

Nominal Defendant.

Case No. 2:18-cv-03355-PD

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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Exhibit 2: Wawa, Inc. Employee Stock Ownership Plan Form 5500 for Plan Year 2017, produced by Plaintiffs and bearing Bates numbers PLAINTIFF_000037 through PLAINTIFF_000072

Exhibit 3: Defendants' Amended Objections and Responses to Plaintiffs' First Set of Interrogatories dated and served on Plaintiffs' counsel March 4, 2019

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Excerpt 5: Excerpt from the Rule 30(b)(6) Deposition of Wawa, Inc. by its Designated Witness Catherine Pulos on March 7, 2019

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Declaration of R. Joseph Barton with the following attachment:

Exhibit A: Firm Resume of Block & Leviton LLP

Declaration of John J. Cunningham with the following attachment:

Exhibit 1: Duties of Class Representatives signed by John J. Cunningham

Declaration of David Ciuffetelli with the following attachment:

Exhibit 1: Duties of Class Representatives signed by David Ciuffetelli

Declaration of Benjamin DiDonato with the following attachment:

Exhibit 1: Duties of Class Representatives signed by Benjamin DiDonato

Declaration of John Rucki, Jr. with the following attachment:

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CHART OF CLASS CLAIMS AND RELEVANT PARTIES BY COUNT

Count &Violation	Plaintiffs	Defendants
Count I: Breach of fiduciary duty as to valuation of Wawa stock under ERISA §§ 404(a)(1)(A), (B) & (D), 29 U.S.C. §§ 1104(a)(1)(A), (B) & (D)	All Plaintiffs for the Class	Committee Defendants, Trustees
Count II: Prohibited transaction re: failure to ensure Wawa paid fair market value for liquidated stock in violation of ERISA §§ 406(a)(1)(A) & (D), 29 U.S.C. §§ 1106(a)(1)(A) & (D)	All Plaintiffs for the Class	Trustees, Wawa
Count III: Prohibited transaction re: Wood and Stoeckel in connection with the transactions in violation of ERISA § 406(b), 29 U.S.C. § 1106(b)	All Plaintiffs for the Class	Stoeckel, Wood
Count IV: Breach of fiduciary duty as to under ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) by failing to act in accordance with the terms of the Plan in connection with the transfer and liquidation of accounts.	All Plaintiffs for the Class	Committee Defendants, Trustees
Count V: Breach of fiduciary duty as to misrepresentations and omissions under ERISA §§ 404(a)(1)(A) & (B), 29 U.S.C. §§ 1104(a)(1)(A) & (B)	Cunningham and DiDonato for the Retired Employee Subclass	Committee Defendants, Wawa, Stoeckel
Count VI: Violation of ERISA § 204(g), 29 U.S.C. § 1054(g)	All Plaintiffs: * Cunningham and DiDonato for the Retired Employee Subclass, * Ciuffettelli and Rucki for the Terminated Pre-	Wawa

	2014 Employee Subclass	
Count VII: Claim under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) to enforce the terms of the Plan prior to 2014 and 2015 Amendments and/or invalidate the 2015 Amendment	Cunningham and DiDonato for the Retired Employee Subclass	All Defendants
Count VIII: Violation of ERISA § 102, 29 U.S.C. § 1022 in connection with the issuance of Summary Plan Descriptions	All Plaintiffs: * Cunningham and DiDonato for the Retired Employee Subclass * Ciuffettelli and Rucki for the Terminated Pre-2014 Employee Subclass	Committee Defendants
Count IX: Breach of fiduciary duty to monitor under ERISA §§ 404(a)(1)(A) & (B), 29 U.S.C. §§ 1104(a)(1)(A) & (B)	All Plaintiffs for the Class	Wawa
Count X: ERISA 410 anti-indemnification claim under ERISA § 410, 29 U.S.C. § 1110, & ERISA §§ 404(a)(1)(A) & (B), 29 U.S.C. §§ 1104(a)(1)(A) & (B)	All Plaintiffs for Class	All Defendants

INTRODUCTION

Plaintiffs are former employees of Wawa, Inc. ("Wawa") and, at least until their accounts were liquidated, were participants in the Wawa, Inc. Employee Stock Ownership Plan (the "ESOP" or "Plan"). The Complaint alleges claims based on similar legal theories as those alleged in *Pfeifer v. Wawa, Inc.*, No. CV 16-497 PD (E.D. Pa.). The claims here arise out of two amendments to the Plan—in 2014 and 2015—whereby Defendants began systematically and involuntarily liquidating the Wawa stock held by former employees in the Wawa ESOP. This Court certified *Pfeifer* as a class action. Likewise, Plaintiffs' claims—like ERISA claims in other cases challenging plan amendments, valuation of ESOP stock, fiduciary duties and prohibited transactions—are ideally suited for class certification and meet the requirements of Rule 23.

FACTUAL BACKGROUND

This lawsuit challenges the adoption and implementation of amendments to the ESOP in 2014 and 2015 that required the liquidation of Wawa stock held by former employees who had remained participants in the Wawa ESOP and the closing of their ESOP accounts. Compl. ¶¶ 1–2. Prior to 2014, the written instrument of the Plan (the "Plan Document") provided that all former employees had the right to remain participants in the ESOP and continue to hold Wawa stock in their ESOP accounts after they terminated or retired, at least until age 68.

Downes Decl. Ex. 1. The 2014 Amendment applied to those ESOP participants who terminated employment on or after January 1, 2015. Dkt. No. 27-3. The 2015 Amendment applied to those ESOP participants who had already terminated employment, including those who had retired. Dkt. No. 27-5. The Complaint alleges ten claims on behalf of a Class and two Subclasses. *See* Compl. ¶¶ 109–111. The claims can be generally divided into two groups: First, claims on behalf of the Class challenge whether price paid by Wawa for the Wawa stock in the ESOP was for adequate consideration, including whether the ESOP fiduciaries breached their duties or committed prohibited transactions. Second, claims on behalf of the Subclasses challenge whether the Amendments can be applied to certain retired or terminated employees.

The Claims of the Class

The Class consists of all ESOP participants with account balances of more than $5,000 whose ESOP accounts were liquidated on or after September 12, 2015 (and their beneficiaries). Compl. ¶ 109; Dkt. No. 53 ¶ 1. Counts I–IV, IX and X are brought by all Plaintiffs on behalf of the Class. Compl. ¶¶ 136–167, 204–215. Counts I-IV allege breaches of fiduciary duty under ERISA § 404 or prohibited transactions violating ERISA § 406 against the ESOP fiduciaries—the Committee, the Trustees and/or Wawa—challenging the valuation and the price at which the shares were sold. Compl. ¶¶ 136–67. While the members of the Class had their

shares liquidated at different times and different prices, these claims challenge common problems with the methodology. *Id.* ¶¶ 81–102. Wawa's Form 5500 acknowledges that "[t]here have been no changes in the methodologies used" for valuations. *Id.* ¶ 91; Downes Decl. Ex. 2 at 31. Count IX alleges that Wawa breached its own duty by failing to properly monitor these breaching fiduciaries. *Id.* ¶¶ 204–09. Finally, Count X seeks to invalidate Plan provisions that would require Wawa to indemnify these fiduciaries for their breaches. *Id.* ¶¶ 210–15.

The Claims of the Retiree Subclass

The Retiree Subclass consists of ESOP participants in the Class who Retired between January 1, 2011 and December 31, 2014 (and their beneficiaries). Dkt. No. 53 ¶ 2.[1] Counts V–VIII are brought by Plaintiffs Cunningham and DiDonato on behalf of the Retiree Subclass and Counts V and VII are brought *only* on behalf of the Retiree Subclass. Compl. ¶¶ 68-203. Counts V alleges the Trustees and the ESOP Committee breached their fiduciary duties under ERISA § 404 in connections with making certain representations, which were made to all ESOP participants (including in the SPD), about their right to continue to hold ESOP stock. *Id.* ¶¶ 170–173. Count VII alleges that the 2015 Amendment cannot be applied to the Retired Employee Subclass as it was enacted after they completed

[1] The Retiree Subclass uses the definition of Retired from the 2015 Amendment and also excludes Participants whose accounts were liquidated due to death, disability or a voluntary request for distribution.

performance (i.e. terminated employment) and their rights are governed by the terms of the Plan at the time of their retirement. *Id.* ¶¶ 190–95

The Claims of the Terminated Pre-2014 Subclass (and Retiree Subclass)

The Terminated Pre-2014 Employee Subclass consists of ESOP participants in the Class who were employed before January 1, 2014 and who terminated employment on or after January 1, 2015 (and their beneficiaries). Compl. ¶ 111; Dkt. No. 53 ¶ 3.[2] Counts VI and VIII are brought by Plaintiffs Ciuffetelli and Rucki on behalf of the Terminated Pre-2014 Employee Subclass and by Plaintiffs Cunningham and DiDonato on behalf of the Retiree Subclass. *Id.* ¶¶ 174-189, 196-203. Count VI alleges that the 2014 and 2015 Amendments violate ERISA's anti-cutback rules. *Id.* ¶¶ 174-89. Count VIII alleges that the ESOP Committee violated ERISA § 102 in describing participants' rights in the Summary Plan Descriptions ("SPDs"). *Id.* ¶¶ 196–203. The Parties agree that the SPDs prior to February 10, 2014 were identical in all material respects. Dkt. No. 53 ¶ 11.

Stipulations

Defendants have stipulated that numerous elements of Rule 23 are met including: Ascertainability, *id.* ¶¶ 4–6, Rule 23(a)(1), *id.* ¶¶ 7–9, the existence of common issues as to Counts III and IX, *id.* ¶ 10, adequacy of counsel, *id.* ¶ 12, and

[2] This Subclass also excludes Participants whose accounts were liquidated due to death, disability or a voluntary request for distribution

the adequacy of Ciuffetelli and Rucki. Dkt. No. 55 ¶¶ 4–6.

ARGUMENT

Certification of a class requires meeting the four prerequisites of Rule 23(a) and at least one of part of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613–14 (1997). A district court does not have discretion to deny class certification to claims meeting the requirements of Rule 23. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) ("By its terms [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action"). The elements of Rule 23 are analyzed claim-by-claim. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 453 (3d Cir. 1977). The requirements of Rule 23—except the question of manageability under Rule 23(b)(3)—apply equally to a class certified for purposes of settlement. *Amchem*, 521 U.S. at 620 (finding that settlement classes "demand undiluted, even heightened attention"). This Court previously certified a class on nearly identical claims on behalf of a different Class. *Pfeifer v. Wawa, Inc.*, CV 16-497, 2018 WL 2057466, at *4 (E.D. Pa. May 1, 2018); *Pfeifer v. Wawa*, 2018 WL 4203880 (E.D. Pa. Aug. 31, 2018). This case likewise satisfies all the requirements of Rule 23 and should be certified as a class action on all claims.[3]

[3] This Court may apply the law of the case doctrine to Plaintiffs' request to certify all but Count V. *Moss v. Crawford & Co.*, 201 F.R.D. 398, 401 n.1 (W.D. Pa. 2000) (explaining the law of the case doctrine applies where "one judge or court

I. The Class and the Subclasses are Ascertainable.

The Third Circuit has concluded there is an implicit requirement that Rule 23(b)(3) classes be ascertainable. *Shelton v. Bledsoe*, 775 F.3d 554, 562 (3d Cir. 2015) (finding the ascertainability requirement applied to a Rule(b)(3) class are unnecessary for classes under Rule (b)(2)). The Third Circuit's ascertainability test for Rule 23(b)(3) classes has two prongs: (1) the class is "defined with reference to objective criteria," and (2) there is a "reliable and administratively feasible mechanism[] for determining whether putative class members fall within the class definition." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015). Although the members of the Class and the Subclasses do not need to be ascertainable, as they meet the requirements of both Rule 23(b)(1) and (b)(2), the members of the Class and Subclasses are ascertainable.

Not only can the members of the Class and Subclasses be readily determined by records that ERISA requires the ESOP maintain, but Defendants have produced a spreadsheet of the members of the Class and Subclass. Downes Decl. Ex. 3 at Nos. 8–10. The Parties have also stipulated that the members of the Class and the

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[adheres] to the rulings of another judge or court in the same case or closely related cases"); *see also Disimone v. Browner*, 121 F.3d 1262, 1266–67 (9th Cir. 1997) ("Although the plaintiffs in the second case were not parties to the first case, the court held that the law of the case doctrine required application of the prior contract interpretation to the new parties" (citing *Zdanok v. Glidden Co., Durkee Famous Foods Div.*, 327 F.2d 944, 953 (2nd Cir. 1964)).

Subclasses are ascertainable. Dkt. No. 53 ¶ 4–6. Thus, the ascertainability requirement is met.

II. The Class and the Subclasses Meet the Requirements of Rule 23(a).

Rule 23(a) provides that a class must satisfy four criteria: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims and defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. Rule 23(a). Here, the Class and each of the Subclasses satisfies all these criteria.

A. Joinder of All Class and Subclass Members is Impracticable.

Rule 23(a)(1) requires that the members be so numerous that joinder of all members is impracticable. The Third Circuit has held that where the class "exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001). Defendants stipulated that Rule 23(a)(1) is met as to the Class and each of the Subclasses. Dkt No. 53 ¶¶ 7–9. Based on the class data produced by Defendants, there are over 1000 members of the Class and each Subclass has hundreds of members. Downes Decl ¶ 3. Thus, Rule 23(a)(1) is met.

B. There are Common Questions of Law and Fact.

"[A] single [common] question" will satisfy Rule 23(a)(2). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011). Commonality exists if plaintiffs' claims

"depend upon a common contention" that is "of such a nature that it is capable of classwide resolution." *Id*. at 350. The existence of "a general policy" or a "uniform employment practice" satisfies Rule 23(a)(2). *Id*. at 355. Commonality exists "even when not all members of the plaintiff class suffered an actual injury, when class members did not have identical claims," and even "when some members' claims were arguably not even viable." *In re Nat'l Football League Players Concussion Injury Litig.* ("*NFL"*), 821 F.3d 410, 427 (3d Cir. 2016). Even if "some individualized determinations may be necessary to completely resolve the claims of each [] class member" that does not undermine commonality where "defendant's conduct was common as to all of the class members." *In re Community Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 399 (3d Cir. 2015). In *Pfeifer*, this Court found Rule 23(a)(2) was met based on the following common questions: "(1) whether the 2015 Plan Amendment is valid under the terms of the Plan and under the law; (2) whether the [price] per share paid to each Class Member was less than the fair value of the shares; and (3) whether the SPDs were materially misleading." *Pfeifer*, 2018 WL 4203880, at *4. Those same common questions exist for the claims of the Class and the Subclasses.

In ERISA cases challenging plan interpretation or amendment, the theory of liability of each member is identical. *Cottillion v. United Ref. Co*., No. CIV.A. 09-140E, 2013 WL 5936368, at *3–4 (W.D. Pa. Nov. 5, 2013) (citing cases certifying

classes challenging legality of ERISA plan amendments), *aff'd*, 781 F.3d 47 (3d Cir. 2015). Such a "lawsuit target[s] a single decision that was universally applied and affected each putative class member in the same fashion." *Cottillion*, 2013 WL 5936368, at *3; *Savani v. Washington Safety Mgmt. Sols., LLC*, No. 1:06-cv-02806, 2012 WL 3757239, at *3 (D.S.C. Aug. 28, 2012) (same). Here, Counts V–VIII challenging the adoption of the 2014 and 2015 Amendments rest on the same questions: whether those amendments are valid under the terms of the Plan or the under the law as to members of each of the Subclasses. *See* Compl. ¶¶ 168-203.

Claims that a stock was improperly valued or sold at an incorrect price likewise satisfy the commonality requirement. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182–83 (3d Cir. 2001) (finding Rule 23(a)(2) met for claims challenging sale of securities without proper investigation of other, potentially higher prices); *Kindle v. Dejana*, 315 F.R.D. 7, 11 (E.D.N.Y. 2016) (finding common issues for claims alleging ESOP sold stock for less than fair market value); *In re Ikon Office Sols., Inc. Sec. Litig.*, 191 F.R.D. 457, 462–63 (E.D. Pa. 2000) (finding commonality for claims challenging price that Plan purchased stock at different times over 3 years). Here, Counts I–IV, and IX focus on whether the price paid for ESOP shares was proper. Compl. ¶¶ 136–167, 204–209. While the price differed over time, each valuation is alleged to have suffered from the same flawed methodology. *Id.* ¶¶ 95–102.

The Third Circuit has long found commonality exists for misrepresentation claims even when they include "individual questions as to [] reliance" by class members. *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 315 (3d Cir. 1998) (quoting *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir.1985) (reversing denial of class certification on that basis)). In ERISA cases alleging misrepresentations by fiduciaries, courts in this District have applied these principles to find commonality based on "what communications they made to plan participants and beneficiaries, and whether those communications contained material misrepresentations." *Ikon,* 191 F.R.D. at 464; *Feret v. Corestates Fin. Corp.*, CIV. A. 97-6759, 1998 WL 512933, at *9 (E.D. Pa. Aug. 18, 1998) (citing *Prudential* and *Eisenberg* and finding same). The same reasoning applies to both Count VIII (ERISA § 102 claim) and Count V (ERISA § 404 claim) because they are both based on *uniform, written statements issued to all plan participants* about whether former employees could remain in the ESOP and invested in Wawa stock and whether Wawa could take away this right. Compl. ¶¶ 200–201 & 171(a)–(c).

C. The Typicality Requirement of Rule 23(a) is Met.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "[T]ypicality, as with commonality, does not require that all putative class members share identical claims." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d

516, 531–32 (3d Cir. 2004). The typicality requirement ensures that the class representatives are sufficiently *similar* to the rest of the class—in terms of their legal claims, factual circumstances, and stake in the litigation—so that certifying those individuals to represent the class will be fair to the rest of the proposed class. *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 597 (3d Cir. 2009). The Third Circuit has repeatedly emphasized that this analysis sets a "low threshold for typicality." *NFL*, 821 F.3d at 428 (citing cases).

1. Plaintiffs' Claims are Typical of the Class and Their Respective Subclasses

The similarity between claims of the representative and those of the class "does not have to be perfect." *Schering Plough Corp.*, 589 F.3d at 598. "[T]he named plaintiffs' claims must merely be 'typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class.'" *Id.* (quoting *Beck v. Maximus, Inc.*, 457 F.3d 291, 295–96 (3d Cir. 2006)). "Even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories or where the claim arises from the same practice or course of conduct." *NFL*, 821 F.3d at 428 (quoting *Prudential*, 148 F.3d at 311). In *Pfeifer*, this Court found that the claims challenging the valuation, challenging the Plan Amendment and whether the SPDs "were materially misleading" all met the typicality requirement. *Pfeifer*, 2018 WL 2057466, at *4. The same rationale applies to all of the claims here.

Courts in this Circuit have repeatedly found that ERISA claims alleging breach of fiduciary duty or prohibited transactions (like Counts I–V and IX) satisfy the typicality requirement. *E.g. Mehling v. N.Y. Life Ins. Co.*, 246 F.R.D. 467, 475 (E.D. Pa. 2007) (fiduciary breach and prohibited transaction claims alleging improper investment into proprietary funds); *Stanford v. Foamex L.P.*, 263 F.R.D. 156, 167 (E.D. Pa. 2009) (fiduciary breach claims alleging unauthorized sales of stock). The same is true for ERISA claims challenging plan amendments (like Counts VI and VII). *E.g. Cottillion*, 2013 WL 5936368, at *4 (finding that ERISA claim contesting an plan amendment satisfied typicality); *Stanford*, 263 F.R.D. at 168 (same); *Pender v. Bank of Am. Corp*., 269 F.R.D. 589, 597 (W.D.N.C. 2010) (same).[4]

In cases where misrepresentation or disclosure claims are based on written materials or a "common scheme," the Third Circuit has repeatedly held that such claims satisfy Rule 23(a)(3). *Prudential*, 148 F.3d at 312 (affirming finding of typicality based on "scheme to defraud"); *Eisenberg*, 766 F.2d at 787 (reversing denial of class where "the core of" the misrepresentations were based on "virtually identical written materials"). Even "individual questions as to [] reliance of each [class member]" does not mean "the claims are not typical." *Eisenberg,* 766 F.2d at

[4] The same rationale applies to Count IX which seeks to void Plan provisions that violate ERISA § 410 by indemnifying fiduciaries for liability for a breach of fiduciary duty. Compl. ¶¶ 204–209.

786. Applying these same principles, the Ninth Circuit held found an ERISA § 102 claim was typical where "defendant's representations were allegedly made on a uniform and classwide basis." *Moyle v. Liberty Mut. Ret. Ben. Plan*, 823 F.3d 948, 964 (9th Cir. 2016) (affirming certification); *see Osberg v. Foot Locker, Inc.*, 07-CV-1358 KBF, 2014 WL 5796686, at *6–*7 (S.D.N.Y. Sept. 24, 2014) (certifying SPD claim under ERISA § 102); *Ikon*, 191 F.R.D. at 465 (finding ERISA § 404(a) misrepresentation claims were typical). Here the Parties have stipulated that the relevant provisions at issue in the SPDs are materially the same. Dkt. No. 53 ¶ 11. Similarly, Count V is based on the SPDs and other written materials distributed to all participants. Compl. ¶¶ 168–173.

Moreover, reliance is not an issue for Count VIII as both the Supreme Court and the Third Circuit have held that reliance is *not* an element for an ERISA § 102 claim, at least for the remedies sought by the Complaint. *CIGNA Corp. v. Amara*, 563 U.S. 421, 441–42 (2011) (explaining reliance was not necessary for the remedies of reformation or surcharge); *Burstein v. Ret. Account Plan For Emps. of Allegheny Health Educ. and Research Found.*, 334 F.3d 365, 381 (3d Cir. 2003) (finding that an ERISA claim based on the SPD "need[s] neither [to] plead nor prove reliance on the SPD"). Similarly, with respect to Count V, "[a]pplication of *Amara[]'s* reasoning mandates the conclusion that detrimental reliance need not be shown where, as here, a plaintiff alleging a violation of § 404(a) seeks plan

reformation under § 502(a)(3).” *Osberg v. Foot Locker, Inc.*, 862 F.3d 198, 212 (2d Cir. 2017). As reliance is the only basis for Defendants’ argument that these claims do not meet Rule 23(a)(3) and it is not an issue, Rule 23(a)(3) is met. *See* Dkt. No. 23-1 at 11–16; Downes Decl Ex. 3 at No. 6.

2. Defendants Assert No Unique Defenses Against Plaintiffs.

In order for a defense to defeat class certification, the class representative would have to “be subject to a defense that is *both* inapplicable to many members of the class *and* likely to become a major focus of the litigation[.]” *Schering Plough Corp.*, 589 F.3d at 599 (emphasis added). The burden of demonstrating unique defenses is on defendants: “To defeat class certification, a defendant must show some degree of likelihood a unique defense will play a significant role at trial.” *Beck*, 457 F.3d at 300. Merely raising a defense is insufficient: “If a court determines an asserted unique defense has no merit, the defense will not preclude class certification.” *Id.* Defendants’ affirmative defenses do not suggest a defense unique to any of the Plaintiffs. Answer (ECF No. 49) at ¶¶ 48–50; Downes Decl. Ex. 4 (Def. Resp. to Pl. 2nd Set of Interrog.) at Nos. 11–16.

Defendants do not challenge the typicality of Plaintiffs Ciuffetelli and Rucki based on how they terminated employment with Wawa. Dkt No. 55 ¶¶ 5–6. Wawa’s Rule 30(b)(6) Representatives testified that Cunningham and DiDonato’s terminations would not make their rights under the ESOP different than other

former employees with the same service. Downes Decl. Ex. 5 (Pulos Dep.) at 57:10–20; *id.* Ex. 6 (Crawford Dep.) at 43:18–44:7.

D. Plaintiffs and their Counsel will Fairly and Adequately Represent the Class and the Subclasses.

Rule 23(a)(4) requires that (1) plaintiff "has the ability and the incentive to represent the claims of the class vigorously" and (2) "there is no conflict between the individual's claims and those asserted on behalf of the class." *Larson v. AT & T Mobility LLC*, 687 F.3d 109, 132 (3d Cir. 2012). These requirements are met here.

1. Plaintiffs are Adequate Representatives.

First, a class representative needs only to possess "a minimal degree of knowledge necessary to meet the adequacy standard." *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007) (reversing denial of class certification). Plaintiffs Cunningham, DiDonato, Ciuffetelli and Rucki have been actively engaged in the litigation. Each has provided documents to counsel, attended the Rule 16 conference on January 10, 2019, and sat for depositions ranging from 2 to 8 hours. Cunningham Decl. ¶ 9; DiDonato Decl. ¶ 8; Ciuffetelli Decl. ¶ 8; Rucki Decl. ¶ 8. As a result of their lengthy employment, each had sizeable ESOP accounts and has a significant interest and incentive to vigorously pursue this litigation. *See id.*

Second, with respect to any conflicts of interest, there are two questions to address: (1) whether an intra-class conflict exists, and if so, (2) whether the conflict

is "fundamental." *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 184 (3d Cir. 2012) ("[N]ot all intra-class conflicts will defeat the adequacy requirement."). A fundamental conflict "exists where some [class] members claim to have been harmed by the same conduct that benefitted other members of the class." *Id*. There is no suggestion that any members of the Class or Subclasses benefited from the Amendments that eliminated their right to hold Wawa stock or by receiving less than fair market value in the liquidation. Thus, Plaintiffs have the same interests as the members of the Class and the respective Subclasses.

2. Plaintiffs' Counsel Meets the Requirements of Rule 23(g).

Rule 23(g) lays out factors for deciding the adequacy of counsel, such as the work counsel has done in identifying or investigating potential claims in the action and counsel's experience handling class actions, other complex litigation, and the types of claims asserted in the action. *Sheinberg v. Sorenson*, 606 F.3d 130, 132 (3d Cir. 2010) (finding that adequacy of counsel is now governed by Rule 23(g) rather than Rule 23(a)(4)). This Court previously found that these attorneys had "extensive experience," had "worked diligently to litigate Plaintiffs' claims" *Pfeifer*, 2018 WL 2057466, at *5, and had "demonstrated sufficient knowledge and experience in ERISA matters." *Pfeifer*, 2018 WL 4203880, at *4. Defendants agree that Plaintiffs' counsel meets the requirements of Rule 23(a)(4) and 23(g). Dkt. No. 53 ¶ 12. Plaintiffs' Co-Lead Counsel have significant relevant experience:

R. Joseph Barton, a partner with Block & Leviton LLP, has litigated ERISA and ESOP class action cases for 17 years. Barton Decl. ¶¶ 4–5. Daniel Feinberg, a partner with Feinberg, Jackson, Worthman & Wasow LLP, has 30 years' experience litigating ERISA cases including numerous ESOP class actions. Feinberg Decl ¶¶ 3–5. Richard Donahoo, a partner with Donahoo & Associates, P.C, has been lead counsel in numerous employment class actions. Donahoo Decl ¶ 3, 5–10. Thus, Plaintiffs' counsel readily satisfy Rule 23(a)(4) and Rule 23(g).

III. The Claims Meet the Requirements of Certification Under Rule 23(b).

In addition to meeting the requirements of Rule 23(a), claims must meet at least one of the three provisions of Rule 23(b). Defendants will not contest certifying certification the claims under Rule 23(b)(1) or (b)(2) if the requirements of Rule 23(a) are met. Dkt. No. 53 ¶ 14. Here, the claims meet the requirements of Rule 23(b)(1) and (b)(2) as well as Rule 23(b)(3).

A. The Claims Meet the Requirements of Rule 23(b)(1).

ERISA cases are commonly certified under Rule 23(b)(1). *Cunningham v. Cornell U.*, 16-CV-6525 (PKC), 2019 WL 275827, at *7 (S.D.N.Y. Jan. 22, 2019); *see Schering Plough*, 589 F.3d at 604 (finding ERISA breach of fiduciary duty claims "are paradigmatic examples of claims" certified under Rule 23(b)(1)); *Cottillion*, 2013 WL 5936368, at *6 (finding same for ERISA claims challenging plan amendment).

1. The Claims Should Be Certified under Rule 23(b)(1)(B)

Rule 23(b)(1)(B) applies to claims where, if the action was litigated individually instead of as a class, it would have the practical effect of impairing the interests of persons who are not parties to the lawsuit. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 (1999). Two classic examples of Rule 23(b)(1)(B) claims apply here: First, "the adjudication of the rights of all participants in a fund in which the participants have common rights." *Id*. at 834 n.14; Second, "an action which charges a breach of trust by a[ ] ... trustee or other fiduciary similarly affecting the members of a large class of security holders or their beneficiaries, and which requires an accounting or like measures to restore the subject of the trust." 1966 Committee Note to Rule 23. "[T]he structure of ERISA favors the principles enumerated under Rule 23(b)(1)(B), since the statute creates a 'shared' set of rights among the plan participants by imposing duties on the fiduciaries relative to the plan, and it even structures relief in terms of the plan and its accounts, rather than directly for the individual participants." *Leber v. Citigroup 401(k) Plan Inv. Comm.*, No. 07-CV-9329 (SHS), 2017 WL 5664850, at *17 (S.D.N.Y. Nov. 27, 2017). Not only are the claims here "classic examples," but this Court certified similar claims under Rule 23(b)(1)(B). *Pfeifer* 2018 WL 4203880, at *5.[5]

[5] Courts in this Circuit have certified ERISA claims under Rule 23(b)(1)(B). *E.g., Sessions v. Owens-Ill., Inc*., 267 F.R.D. 171, 179 (M.D. Pa. 2010) (certifying ERISA benefits claims under Rule 23(b)(1)(B)); *Thomas v. SmithKline Beecham*

With respect to the validity of the 2014 and 2015 Plan Amendments, the questions of whether (a) the Amendments cut back the Class members' benefits, (b) the Plan terms in effect at the time the respective Subclass members left their Wawa employment should govern their benefits, and (c) Section 10.6 of the Plan document attempts to relieve fiduciaries of liability for any breach, Defendants' conduct was the same for each participant. Adjudications of each of these claims would be dispositive of the claims of other class members who are not parties because the Plan administrator must interpret and apply the Plan in accordance with its terms consistently to all similarly situated participants. Accordingly, this action is suited for certification under Rule 23(b)(1)(B).

2. The Claims Can Also be Certified Under Rule 23(b)(1)(A)

Certification under Rule 23(b)(1)(A) applies in cases "where the party is obliged by law to treat the members of the class alike […], or where the party must treat all alike as a matter of practical necessity[.]" *Amchem*, 521 U.S. at 614 (citing 1996 Committee Note to Rule 23). ERISA administrators are required to treat similarly situated participants consistently. *In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 275–76 (S.D.N.Y. 2007) (certifying ERISA claims under

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Corp., 201 F.R.D. 386, 397 (E.D. Pa. 2001)) (certifying ERISA fiduciary breach claims under Rule 23(b)(1)(B)); *Ikon*, 191 F.R.D. at 466 (certifying ERISA fiduciary breach claims under Rule 23(b)(1)); *Kane v. United Indep. Union Welfare Fund*, No. 97-1505, 1998 WL 78985, at *9 (E.D. Pa. Feb. 24, 1998) (certifying ERISA fiduciary breach claims under Rule 23(b)(1)(B)).

Rule 23(b)(1)(A)); *see Moyle*, 823 F.3d at 965 (affirming certification of ERISA claims under Rule 23(b)(1)(A) for the same reason).

Here, the claims challenging the validity of the Amendments must have the same answer for all members of the respective Subclasses: they are either valid or not. Likewise, as the valuation claims challenge common methodology used for valuing the stock, the valuation claims must have the same answer for the entire Class. As the Plan is *required to treat similarly situated participants similarly*, separate lawsuits reaching different results about the validity of the Amendments or the value of Wawa stock could result in conflicting adjudications, making uniform administration of the Plan impossible. Thus, certification of the Class and the Subclasses under Rule 23(b)(1)(A) is appropriate.

B. The Claims Meet the Requirements of Rule 23(b)(2).

Certification under Rule 23(b)(2) is appropriate when (1) "the party opposing the class has acted or refused to act on grounds that apply generally to the class" and (2) "final injunctive relief or declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). This Court certified similar claims under Rule 23(b)(2) in *Pfeifer*. *Pfeifer* 2018 WL 4203880, at *5.

1. Defendants Acted or Refused to Act as to the Class as a Whole

"Courts routinely have certified classes pursuant to [Rule 23(b)(2)] where, as in the instant case, an ERISA plan administrator makes a uniform decision about

administering the Plan as it applies to the putative class members." *Cottillion*, 2013 WL 5936368, at *6; *Pfeifer*, 2018 WL 2057466, at *4 (finding "Defendants acted on the same grounds as to all Class Members"). Defendants have acted on grounds generally applicable to the Class and the Subclasses. The 2014 Plan Amendment was applied to all members of the Terminated Pre-2014 Employee Subclass and the 2015 Plan Amendment was applied uniformly to all members of the Retired Employee Subclass. Dkt. No. 27-3 & Dkt. No. 27-5. The valuation claims challenge the same methodological issues used throughout the valuations. *Id.* Ex. 2 at 31.

ERISA § 102 claims predicated on uniform disclosures in SPDs provided to the entire class meet the uniformity requirement. *Amara v. CIGNA Corp.*, 775 F.3d 510, 530 (2d Cir. 2014) (affirming Rule 23(b)(2) certification of ERISA § 102 claim). The Parties have stipulated that the provisions of the pre-2014 SPDs (i.e. the ones at issue) "are identical in respects material to [Plaintiffs'] claims." Dkt. No. 53 § 11. As the focus under Rule 23(b)(2) is on whether Defendants' conduct was uniform as to the class, the first criterion of Rule 23(b)(2) is satisfied.

2. The Complaint Seeks Declaratory and Injunctive Relief

Rule 23(b)(2) applies to claims that seek "injunctive or declaratory relief" for the class. *Dukes*, 564 U.S. at 360–61(explaining Rule 23(b)(2) certification is appropriate "when a single injunction or declaratory judgment would provide the

relief to each member of the class"). Rule 23(b)(2) is satisfied even where a declaratory judgment is "merely a prelude to a request for [monetary relief]." *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 763 (7th Cir. 2003) (affirming certification of ERISA claims under Rule 23(b)(2)). Re-affirming the validity of this rationale after *Dukes*, the Seventh Circuit found ERISA claims were properly certified under 23(b)(2):

> [A] declaration of the rights that the plan confers and an injunction ordering [defendant] to conform the text of the plan to the declaration. If once that is done the award of monetary relief will just be a matter of laying each class member's [plan] records alongside the text of the reformed plan and computing the employee's entitlement by subtracting the benefit already credited it to him from the benefit to which the reformed plan document entitles him, the monetary relief will truly be merely "incidental" to the declaratory and (if necessary) injunctive relief (necessary only if [defendant] ignores the declaration).

Johnson v. Meriter Health Servs. Emp. Ret. Plan, 702 F.3d 364, 371 (7th Cir. 2012); *see Amara*, 775 F.3d at 523 (affirming Rule 23(b)(2) certification because "[w]hen the plan is reformed . . . monetary benefits flow as a necessary consequence of that injunction"). Not only does ERISA expressly permit a participant to obtain either an injunction or a declaration, "[b]ut the fact that th[e] relief takes the form of a money payment does not remove it from the category of traditionally equitable relief." *Amara*, 563 U.S. at 441–42 (concluding "injunctions requir[ing] the plan administrator to pay to already retired beneficiaries money owed them under the plan as reformed" was appropriate equitable relief). As in

Pfeifer, Plaintiffs seek "a declaration and an order requiring that Class Members' benefits be calculated either under the terms of the Plan without the [] Plan Amendment or liquidated at fair market value." *Pfeifer*, 2018 WL 2057466, at *4. Here, the primary relief sought is a declaration invalidating the Plan Amendments or a correcting the stock price. Compl. Prayer for Relief ¶¶ A–O. As payment of money in this suit would be the automatic consequence of the declaratory and injunctive relief, these claims can be certified under Rule 23(b)(2).

C. The Claims Also Meet the Requirements of Rule 23(b)(3).

As the Third Circuit has held that an action maintainable as a mandatory class (i.e. under Rule 23(b)(1) or (b)(2)) should be certified as one, the Court should address Rule 23(b)(3) only if it determines that certification is inappropriate under Rule 23(b)(1) or Rule 23(b)(2)). *See Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 119 (3d Cir. 1990); *Mehling*, 246 F.R.D. at 475 n.6 ("[A] class that can be certified pursuant to Rules 23(b)(1) and (b)(2) should not be treated as a 23(b)(3) class action."). Certification under Rule 23(b)(3) is appropriate where (1) common questions predominate over any questions affecting only individual members, and (2) class resolution is superior to other available methods for the fair and efficient adjudication of claims. Fed. R. Civ. P. 23(b)(3).

1. Common Issues Predominate Over Individual Ones

The predominance requirement tests whether the class is "sufficiently

cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Predominance does not require the absence of individual questions, but merely that common questions outweigh individual questions. *Prudential*, 148 F.3d at 315.

Courts in this Circuit frequently "have found that common issues predominate over individual ones in the context of ERISA claims." *LaFata v. Raytheon Co.*, 207 F.R.D. 35, 44 (E.D. Pa. 2002) (finding that common questions predominated for ERISA claims); *Stanford*, 263 F.R.D. at 174 n.22 (same); *Brooks v. Educators Mut. Life Ins. Co*., 206 F.R.D. 96, 104 (E.D. Pa. 2002) (predominance based on a "common scheme" to pay bills contrary to written policies); *Gilman v. Independence Blue Cross*, Civ. A. 96-1601, 1997 WL 633568, at *6 (E.D. Pa. Oct. 6, 1997) (finding predominance satisfied). Common issues predominate over individual ones for all claims in this case for the same reasons why the claims meet the requirements or Rule 23(b)(1) and (b)(2). *Supra* III.A & B.

Even if reliance was an issue for either of the disclosure or misrepresentation claims, the Third Circuit has repeatedly held that "the presence of individual questions does not *per se* rule out a finding of predominance." *Prudential*, 148 F.3d at 315; *Eisenberg*, 766 F.2d at 786 (reversing denial of class certification and finding the "presence of individual questions as to [] reliance" did not defeat predominance); *see In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 118 (2d Cir. 2013) (finding claims based on uniform misrepresentations met Rule

23(b)(3)). Thus, even if Counts V or VIII could not be certified under Rule 23(b)(1) or (b)(2), they can be certified under Rule 23(b)(3). *See supra* II.C.1.

2. A Class Action is Superior to Other Methods of Adjudication

Superiority measures whether "a class action is superior to other available methods for the fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The four factors set forth in the Rule support finding that a class action is the superior method of adjudicating this controversy. *See Warfarin*, 391 F.3d at 534 (finding superiority met where individuals had small claims in relation to the cost of prosecuting a lawsuit and only a few members had instituted lawsuits).

First, the data provided by Wawa, which is comparable to data in *Pfeifer*, suggests the size of any individual recovery – measured by either restoration of stock or by a change in valuation – is likely too small for most Class members to have an interest in controlling his or her own lawsuit. Second, no other class members have filed litigation. Third, concentrating the claims in this District is desirable as Wawa is headquartered here, and the individual defendants and many class members are also located here. Finally, there are no manageability issues.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for class certification should be granted.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ming Siegel, hereby certify that on March 18, 2019, I electronically filed the foregoing Plaintiffs' Memorandum in Support of Motion for Class Certification using the CM/ECF system, which will send notification of such filing to counsel at the email addresses registered with the system.

/s/ Ming Siegel
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