IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SCOTT J. SWAIN and KENNY FIORITO, on behalf of the ISCO Industries Inc. Employee Stock Ownership Plan, and on behalf of a class of all other persons similarly situated, Plaintiffs, v. WILMINGTON TRUST, N.A., as successor to Wilmington Trust Retirement and Institutional Services Company, Defendant.	C.A. No. 17-071-RGA-MPT

PLAINTIFFS' UNOPPOSED MOTION AND INCORPORATED MEMORANDUM OF LAW FOR PRELIMINARY APPROVAL OF SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS

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Plaintiffs Scott J. Swain and Kenny Fiorito, Individually and as Class Representatives, hereby move for an order certifying a settlement class, preliminarily approving a class action settlement agreement between Plaintiffs and Defendant Wilmington Trust, N.A. ("Wilmington Trust"), approving notice to the class and setting a date for a fairness hearing.[1]

I. INTRODUCTION

Subject to the Court's approval, the Parties have settled this Employee Retirement Income Security Act, 29 U.S.C. § 1000, *et seq.,* ("ERISA") class action for a cash payment of $5,000,000.00. No portion of the settlement payment is a tax or penalty under ERISA or the Internal Revenue Code of 1986 as amended. Should the Court grant final approval, every eligible Class Member will receive their portion of the Net Proceeds according to a plan of allocation.

The proposed settlement ("Settlement") satisfies all of the criteria for preliminary approval, and provides an excellent result for the Settlement Class. For these reasons, discussed in more detail below, Plaintiffs request that the Court grant this motion.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Background

This is a proposed class action brought on behalf of participants and beneficiaries of the ISCO Industries, Inc. Employee Stock Ownership Plan ("Plan"). The Complaint alleges that Defendant and plan trustee, Wilmington Trust violated ERISA in connection with the purchase of 4 million shares of ISCO Industries, Inc. ("ISCO") common stock by the Plan on December 20, 2012, for $98 million (the "ESOP Transaction").

Plaintiffs allege that Wilmington Trust violated ERISA § 406, 29 U.S.C. § 1106, because it engaged in a prohibited transaction under ERISA by, *inter alia*, causing the Plan to borrow

[1] Unless otherwise defined, all capitalized terms herein shall have the same meaning as set forth in the Parties' Settlement Agreement.

money from ISCO; causing the Plan to acquire ISCO shares from ISCO; acting for the benefit of ISCO and the shareholders that sold to or redeemed their shares with ISCO prior to the ESOP Transaction by approving a purchase price for ISCO stock that exceeded its fair market value; and receiving payment from ISCO for serving as trustee on behalf of the Plan.

Wilmington Trust denies these allegations; denies any wrongdoing or liability; and has vigorously defended itself in this action. Wilmington Trust does not admit wrongdoing of any kind regarding the ESOP Transaction or this action.

B. Discovery

The Parties have vigorously prosecuted this action and have engaged in robust discovery. They propounded and responded to written discovery. Plaintiffs' and Wilmington Trust's counsel received and reviewed over 40,000 documents produced by ISCO, Wilmington Trust, and various non-parties. Plaintiffs' counsel retained and consulted with two experts, who prepared detailed reports and analyses on valuation and due diligence. Wilmington Trust's counsel likewise retained and consulted with two experts, who prepared reports on similar topics. Two of the four experts were deposed before the Parties agreed to a settlement in principle.

The Parties also took eleven fact depositions. Plaintiffs took the depositions of two of Wilmington Trust's employees, two of Wilmington Trust's financial advisors, two ISCO executives (one of whom was also a selling shareholder), ISCO's financial advisor, an investment banker who advised ISCO's shareholders on other sale options available to ISCO, and an individual whose private equity firm submitted an offer to purchase ISCO before the ESOP Transaction. All of these depositions were attended by Wilmington Trust's counsel, who also examined some of those witnesses. Wilmington Trust took the depositions of the named Plaintiffs.

C. Motion Practice

The Parties engaged in extensive motion practice. Wilmington Trust filed a Motion to

Dismiss Plaintiffs' Complaint, Dkt. 10, which was referred to Chief Magistrate Judge Mary Pat Thynge, Dkt. 16, who issued a report and recommendation granting Wilmington Trust's Motion to Dismiss, Dkt. 20. Plaintiffs filed objections to the report and recommendation, Dkt. 22, and this Court adopted in part and rejected in part the report and recommendation, Dkt. 28, 29. Plaintiffs moved to file an Amended Complaint, Dkt. 46. Wilmington Trust opposed the motion, Dkt. 48, but the Parties entered into a stipulation, Dkt. 55, and Plaintiffs filed their First Amended Complaint, Dkt. 56 ("FAC"). Plaintiffs filed a Motion for Class Certification, Dkt. 82, to which Wilmington Trust filed an answering brief in opposition, Dkt. 89.

D. The Parties' Settlement Efforts

The Parties attempted to mediate this matter with Robert A. Meyer, Esq. of JAMS. The Parties drafted and submitted comprehensive mediation statements to Mr. Meyer that focused all sides on the key issues. Counsel for the Parties attended a one-day mediation in Washington D.C. on July 24, 2019. The attendees vigorously engaged in the mediation process, during which all attendees' counsel made presentations to Mr. Meyer and all attendees. Despite much deliberation, discussion, and compromise, the Parties were not able to reach a resolution at that time.

Settlement discussions continued in the weeks following the mediation. The Parties were ultimately able to reach the proposed settlement currently before the Court for preliminary approval on September 25, 2019. Declaration of Gregory Y. Porter ("Porter Decl.") ¶ 16.

III. SUMMARY OF THE PROPOSED SETTLEMENT TERMS

The material terms of the Settlement Agreement are summarized below. The proposed Settlement Class is:

> All persons who, at any time, were vested participants in the ISCO Industries, Inc. Employee Stock Ownership Plan. Excluded from the Settlement Class are 2012 ISCO Shareholders, 2018 ISCO Shareholders, the directors of ISCO, and legal representatives, successors, and assigns of any such excluded persons.

Settlement Agmt., ¶ 1.12.

A. Benefits to the Class.

Defendant has agreed to pay $5 million ("Settlement Amount") into the Settlement Fund. *Id*., ¶ 7. The funds remaining after deduction from the Settlement Amount for (i) taxes (or reserves to pay taxes), (ii) settlement administration fees, (iii) Court-approved attorneys' fees or expenses, and (iv) any Service Awards to the Class Representatives, shall constitute the "Net Proceeds." The Net Proceeds will be distributed to the Class Members pursuant to the Plan of Allocation.

B. Notice and Administration.

The Settlement Administrator, KCC, LLC shall be responsible for disseminating Class Notice, establishing a website for case documents, establishing an interactive voice response system to respond to enquiries, and processing objections. The Settlement Administrator shall also implement the Plan of Allocation and make payments to former participants in the Plan and provide the current trustee of the Plan with a spreadsheet reflecting each current participant's distribution from the Net Settlement Fund.

KCC shall also serve as Escrow Agent, and shall be responsible for establishing and maintaining a qualified settlement trust to hold the Settlement Amount and Net Settlement Fund. The Escrow Agent shall invest the assets of the qualified settlement trust pursuant to the agreement with KCC and Plaintiffs' counsel. KCC's summary of experience and proposal for Settlement Administration and Escrow Agent services is Exhibit B to the Porter Declaration.

C. Service Award to the Class Representatives and Attorneys' Fees and Costs

Subject to Court approval, Class Counsel's fees, costs and expenses, and Service Awards to the Class Representatives shall be paid from the Settlement Amount. Settlement Agmt., ¶¶ 8.1, 8.2, 9.1. Plaintiffs shall petition the Court for Service Awards not to exceed $15,000 for each Class Representative in recognition of their service to the Class. *Id*., ¶ 8.2.2. Class Counsel will also

petition the Court for an award of attorneys' fees in an amount not exceeding 33% of the Settlement Amount, and for reimbursement of litigation expenses, including the cost and expense of any service company, expert, or consultant retained by Plaintiffs' Counsel. The aggregate amount of the attorneys' fees and litigation expenses shall not exceed 50% of the Settlement Amount. *Id.*, ¶ 9.1.

D. Release of Claims

In exchange for payment of the Settlement Amount by Wilmington Trust and satisfaction of the conditions required by the Settlement Agreement, Plaintiffs and the Settlement Class will release any claims which were or could have been asserted in this action that in any way relate to the ISCO ESOP's investment in or divestiture of the Stock of ISCO, including but not limited to claims related to the ISCO ESOP Transaction, the 2012 ISCO Shareholders, the 2018 ISCO Shareholders, or the termination of the ISCO ESOP, and will be prohibited from bringing or pursuing any other lawsuits or other actions based on such claims. The released parties, released claims and the covenant not to sue are set forth in full in the Settlement Agreement. *Id.*, ¶¶ 3.1, 3.2, 4.1.

E. Notice and Proposed Schedule of Events

The Settlement Agreement provides that the Parties will request that ISCO provide the names, last known addresses of Settlement Class Members, and number of shares of ISCO stock allocated to their ESOP accounts as of the relevant date. *Id.*, ¶ 2.2.3.

The proposed Class Notice, Settlement Agmt. Ex. 1-A, provides all the information necessary to inform Class Members about the nature of the Action, the terms of the Settlement, and the procedures for entering an appearance to be heard or to object to the Settlement. In addition, key court documents, including the Amended Complaint, the Settlement Agreement, preliminary approval papers, Plaintiffs' Motion for Award of Attorneys' Fees, and Plaintiffs'

Motion for Final Approval will be posted on the settlement website. The Class Notice will be mailed by First Class mail. Class Counsel anticipate that Class Members' mailing information will be largely accurate, because many Class Members were recently employed by ISCO and are participants in the Plan. For returned mail, the Settlement Administrator will engage in standardized processes to identify and locate Class Members.

The Parties agree to the following schedule of events subject to the Court's approval:

Event	Timing
CAFA Notice	Within 10 days after the Settlement Agreement is filed
Preliminary Approval Hearing	TBD
Settlement Administrator to receive Class list and Class contact information	At least twenty-one (21) days prior to the deadline for mailing notice
Mail Settlement Notice	At least ninety (90) days before the Fairness Hearing
Motions for final approval of settlement, award of attorneys' fees and expenses, service award for named plaintiff	No later than forty-five (45) days before the Fairness Hearing
Objections to the Settlement, notice of intention to appear at Fairness Hearing	Must be received by the Court on or before twenty-one (21) days before the Fairness Hearing
Response to Objections and Settlement Administrator's Notice Declaration	No later than seven days before the Fairness Hearing
Fairness Hearing	TBD

IV. ARGUMENT

A. The Court Should Certify the Settlement Class.

As part of the Settlement, the Parties request that the Court certify that proposed Settlement Class, defined in Section III above, for purposes of settlement only.

1. The Proposed Settlement Class Meets The Requirements of Rule 23

Certification of a class is required where the plaintiff demonstrates the four prerequisites of Rule 23(a) and at least one of the requirements of Rule 23(b). Fed. R. Civ. P. 23. As in other ERISA class action, those requirements are easily met here for settlement purposes.

2. The Class satisfies the requirements of Rule 23(a)

Rule 23(a) provides that a class must satisfy four preconditions: (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. 23(a).

a) The Class is sufficiently numerous.

As to numerosity, the Third Circuit has held that "generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001). The Plan's Form 5500 for 2016 indicates that at year end 2016 the Plan had 389 participants (including one deceased participant whose beneficiaries were entitled to benefits). Porter Decl. at Ex. B at Part II Line 6.f. Accordingly, numerosity is satisfied.

b) There are common questions of law and fact

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Not all questions of law and fact must be common. *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 486 (3d Cir. 2015). "[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 the plaintiffs' claims "depend upon a common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. at 350.

Claims that a stock was improperly valued or sold at an incorrect price, such as those at issue here, satisfy the commonality requirement. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182–83 (3d Cir. 2001) (finding common questions of law and fact as to the sale of securities at the price offered on the central National Best Bid and Offer system without investigating other prices); *Kindle v. Dejana*, 315 F.R.D. 7, 11 (E.D.N.Y. 2016) (common issues

exist where plaintiff alleged ESOP stock sold for less than fair market value).

Commonality is satisfied here because Defendant's alleged violations of ERISA are the same for all Class Members. Defendant either did or did not engage in prohibited transactions under ERISA. Thus, Defendant's actions and inaction with respect to the ESOP Transaction either resulted in, or did not result in, ERISA violations toward the whole class.

Common issues in this case include: whether Wilmington Trust engaged in prohibited transactions under ERISA by permitting the Plan to purchase ISCO stock and take a loan form ISCO; whether Wilmington Trust took sufficient steps to determine the value of the ISCO stock in connection with the ESOP Transaction; whether Wilmington Trust caused the Plan to pay more than fair market value for ISCO stock; whether Wilmington Trust engaged in a prohibited transaction under ERISA by acting on behalf of a party adverse to the Plan and its participants in the ESOP Transaction; and other questions contained in the motion for class certification.

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." The typicality requirement ensures that "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) (emphasis in original). The Third Circuit has emphasized that this analysis sets a "'low threshold' for typicality." *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 428 (3d Cir. 2016) (citing cases).

By definition a prohibited transaction claim brought under ERISA §§ 409(a), 502(a)(2) is brought on behalf of the plan and any recovery must be paid "to such plan." 29 U.S.C. §§ 1109(a), 1132(a)(2). Thus, courts generally find that ERISA cases arising under § 502(a)(2) meet the

typicality requirement because the "action is brought on behalf of the Plan," and Plaintiff's claims, "of necessity, are typical of the claims" of class members. *Lively v. Dynegy, Inc.*, No. 05-00063, 2007 WL 685861, at *10 (S.D. Ill. Mar. 2, 2007).

The Plaintiffs were participants in the ESOP during the relevant time period. See Declarations in Support of Motion for Class Certification of Scott J. Swain (Swain Decl.), Dkt. 84-2, Ex. C at ¶ 2 & Ex. 1-7 and of Kenny L. Fiorito (Fiorito Decl.), Dkt. 84-3, Ex. D at ¶ 2 & Ex. 1-7. The Plan's primary asset was the ISCO stock it purchased during the relevant time period. In *Neil v. Zell*, an ERISA case arising from ESOP transactions, the court held that the named plaintiffs satisfied the typicality requirement because they "held the same investment as did all other members of the … ESOP"—employer stock. 275 F.R.D. 256, 261 (N.D. Ill. 2011); *see also Nistra v. Reliance Trust Co.*, No. 16 C 4773, 2018 WL 835341, at *3 (N.D. Ill. Feb. 13, 2018); (*Pfeifer v. Wawa, Inc.*, No. 16-497, 2018 WL 2057466, at *4 (E.D. Pa. May 1, 2018). In addition, the damages sought here are losses and other relief on behalf of the Plan as a whole. Typicality is met.

d) The proposed Class Representatives and their counsel will fairly and adequately protect the interests of the Class.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." The purpose of the "adequacy" requirement is to "uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). The Third Circuit has recognized that this inquiry serves two purposes: "to determine [1] that the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously, … and [2] that 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.

Proposed Class Representatives Swain and Fiorito have been actively engaged in the

litigation, and they have provided documents to counsel used to draft the Complaint. Second, they have no conflicts. The named Plaintiffs assert claims on the Plan's behalf and request no individual relief. Therefore, the adequacy requirement of Rule 23(a)(4) is met.

Plaintiffs' counsel in this case is well-qualified as described in detail in the Declaration of Gregory Porter. Porter Decl. ¶¶ 8-13. Not only do these attorneys have extensive experience litigating class actions, including numerous ESOP cases, they have worked diligently to litigate the claims. Porter Decl. ¶ 15**.** There should be no question that counsel have brought sufficient skill and resources to litigate this case. Thus, Plaintiffs' counsel satisfy Rule 23(a)(4) and 23(g).

3. The claims meet the requirements of certification under Rule 23(b)(1).

In addition to meeting the requirements of Rule 23(a), claims must meet at least one of the three provisions of Rule 23(b). The claims meet the requirement of Rule 23(b)(1).

"Most ERISA class actions are certified under Rule 23(b)(1)." *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008). "[T]he unique and representative nature of an ERISA § 502(a)(2) suit" makes such claims particularly appropriate. *Stanford v. Foamex L.P.*, 263 F.R.D. 156 (E.D. Pa. 2009). ERISA actions meet the requirements of Rule 23(b)(1) because "defendants often provide 'unitary treatment to all members of [a] putative class' and "the rights of absent 'class member[s] [are often] … implicated by litigation brought by other class members.'" *Feret v. Corestates Fin. Corp.*, C.A. No. 97–6759, 1998 WL 512933, at *13 (E.D. Pa. Aug. 18, 1998).

a) Class certification under Rule 23(b)(1)(A) is appropriate.

Rule 23(b)(1)(A) provides that a class may be certified if prosecuting separate actions would create a risk of inconsistent adjudications that would establish incompatible standards of conduct for the party opposing the class. "ERISA requires plan administrators to treat all similarly situated participants in a consistent manner." *Alday v. Raytheon Co.*, 619 F. Supp. 2d 726, 736 (D. Ariz. 2008) (citations omitted). For this reason, courts have certified cases involving violations of

ERISA under Rule 23(b)(1)(A). *See Neil*, 275 F.R.D. at 267-68; *Knight v. Lavine*, No. 12-611, 2013 WL 427880, at *4 (E.D. Va. Feb. 4, 2013).

The risk of inconsistent adjudications is apparent in this case. For example, the central issue in this case is whether the Plan acquired ISCO stock at an appropriate value and the steps that Wilmington Trust and its advisors undertook to determine that value. Separate lawsuits over these issues could result in different outcomes. Inconsistent adjudications on the true fair market value of ISCO stock at the time of the ESOP's stock purchase obtained by similarly-situated participants would make it impossible for the Plan administrator to treat similarly-situated participants alike. Accordingly, certification under Rule 23(b)(1)(A) is appropriate.

b) Class certification under Rule 23(b)(1)(B) is appropriate.

Certification under Rule 23(b)(1)(B) is appropriate where "*any* individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999) (emphasis added). One example of an action ideally suited for certification under Rule 23(b)(1) is "the adjudication of the rights of all participants in a fund in which the participants have common rights." *Id*. at 834 n.14. Rule 23(b)(1)(B) is designed for "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 other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust." Fed. R. Civ. P. 23, Advisory Committee Notes to 1966 Amendment. That precisely describes the claims here.

Claims involving a fiduciary's breach of ERISA's prohibited transaction rules must be brought in a representative capacity on behalf of the plan under § 502(a)(2) for § 409 relief. 29 U.S.C. §§ 1109, 1132(a)(2); *Schering Plough Corp.*, 589 F.3d at 594-95. Thus, courts recognize that ERISA cases are the classic examples of Rule 23(b)(1)(B) class actions. *See*, *e.g., Neil*, 275 F.R.D. at 267-68; *DiFelice v. U.S. Airways, Inc.*, 235 F.R.D. 70, 80 (E.D. Va. 2006). This is

particularly true for cases involving an ESOP. *See*, *e.g.*, *In re Ikon Office Solutions, Inc.,* 191 F.R.D. 457, 466-67 (E.D. Pa. 2000) (certifying 23(b)(1) class).

The key issues in the case thus focus on Defendant's conduct—principally, whether and how it caused the complained of prohibited transactions, the adequacy of its investigation into the value of ISCO stock, the information used in its valuations, and the conclusions drawn from that information. Thus, a judgment that Defendant breached ERISA would apply to the Plan as a whole and impact all class members equally. Further, any money recovered will be paid to the Plan, meaning that resolution of these issues will affect *all* participants in the Plan.

B. The Court should grant preliminary approval of the Settlement because it is fair, reasonable and adequate.

1. The standards for preliminary approval.

Rule 23(e) provides that a class action cannot be settled without court approval. Ultimately, to approve the proposed settlement the Court must determine that it is fair, reasonable and adequate. *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 488 (3d Cir. 2017).

Before a court approves a proposed settlement, notice must be provided to the class. Fed. R. Civ. P. 23(e)(1). The parties must provide the court with information sufficient to enable the court to determine whether to give such notice of the proposal to the class. *Id.* The court examines the information provided by the parties against a number of factors to determine whether notice should be given to the class. *Id.*

Rule 23, as amended in 2018, provides direction to federal courts considering whether to grant preliminary approval of a class action settlement. Fed. R. Civ. P. 23(e), Committee Notes. "[I]n weighing a grant of preliminary approval, district courts must determine whether 'giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal.'"

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05MD1720MKBJO, 2019 WL 359981, at *12 (E.D.N.Y. Jan. 28, 2019) (citing Fed. R. Civ. P. 23(e)(1)(B)(i–ii)). Therefore, although the factors cited in Rule 23(e)(2) "apply to final approval, the Court looks to them to determine whether it will likely grant final approval based on the information currently before the Court"—those factors are as follows:

> (A) the class representatives and counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Id. (citing Fed. R. Civ. P. 23(e)); *accord Huffman v. Prudential Ins. Co. of Am.*, No. 2:10-CV-05135, 2019 WL 1499475, at *3 (E.D. Pa. Apr. 5, 2019).

However, the 2018 amendments were not intended to displace the list of factors that each circuit had developed to consider. *See Huffman,* 2019 WL 1499475, at *3. The Third Circuit has traditionally evaluated class action settlements under the nine factors outlined in *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975): (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the

best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. Plaintiffs will address each of these factors to the extent they are applicable, many of which overlap. [2]

2. The class is adequately represented and negotiations were arm's length.

Rule 23(e)(2)(A), requiring adequate representation by the Plaintiffs and their counsel is addressed in Section IV(A)(2)(d) above. In addition, and in satisfaction of Rule 23(e)(2)(B), the Parties' negotiations were at arm's length, extensive and hard fought, and were conducted over a number of months with the assistance of a professional, experienced class action mediator. Section II(D) above; Porter Decl. ¶ 16.

3. The complexity, expense, and likely duration of the litigation.

The first *Girsh* factor, and Rule 23(e)(2)(C)(i), address the complexity, cost, and likely duration of the litigation, taking into account the "probable costs, in both time and money, of continued litigation." *In re Cendant Corp. Litig.*, 264 F.3d 201, 233 (3d Cir. 2001) (quotation marks omitted). Litigation would be lengthy and expensive if this action were to proceed. In the near future, there were two remaining expert depositions and dispositive motion practice.

Trial is set for May 11, 2020, and would have required several attorneys from both parties spending most of their time for a month preparing for a trial that was expected to last one week. Before the parties reached trial, they would have to expend substantial time and effort to prepare the joint pretrial exhibit including identification of relevant exhibits and preparing any motions *in limine*. And, regardless of the outcome, there likely would have been appeals that followed, further delaying resolution and causing more expense.

[2] There is no agreement required to be produced under Rule 23(e)(2)(C)(iv), and since Notice has not yet been sent, the reaction of the Class (*Girsch* factor #2) cannot be evaluated yet.

4. The stage of the proceedings and the amount of discovery completed.

This *Girsh* factor requires the Court to evaluate whether Plaintiffs had an "adequate appreciation of the merits of the case before negotiating" settlement. *In re Prudential Ins. Co of Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 319 (3d Cir. 1998) (internal quotation marks omitted).

In this case, as described in Section II B above, the Parties have completed fact discovery and completed the bulk of the expert discovery. The Parties therefore have had a complete opportunity to test their claims and defenses and understand the strengths and weaknesses of their positions.

5. The risks of establishing liability, damages and maintaining the class action through trial.

The fourth, fifth, and sixth *Girsh* factors, and Rule 23(e)(2)(C)(i), take into account the risks of establishing liability, establishing damages, and maintaining certification throughout the trial. These factors "balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of immediate settlement." *Prudential*, 148 F.3d at 319. As to the risks of establishing liability, this factor "examine[s] what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 814 (3d Cir. 1995). As to damages, this factor "attempts to measure the expected value of litigating the action rather than settling it at the current time." *Cendant Corp.*, 264 F.3d at 238–39 (*quoting Gen. Motors*, 55 F.3d at 816). Finally, this factor [concerning the risks of maintaining the class action through trial] measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004) (internal quotation marks and citations omitted).

Here the Plaintiffs faced significant risks. Plaintiffs and Wilmington Trust had vastly different views about Wilmington Trust's actions, its potential liability and the likely outcome of the litigation. Plaintiffs' core allegations regarding the ISCO stock purchase rested on facts that were strongly contested by Wilmington Trust, including the accuracy of ISCO's projections, whether the valuation methods employed by Wilmington Trust and its advisors were proper, and whether there were negative facts that were ignored by or not sufficiently investigated by Wilmington Trust during the due diligence and negotiation process.

Wilmington Trust vigorously denied all of the allegations, asserted affirmative defenses and otherwise defended its actions with respect to the purchase. Wilmington Trust pointed to evidence of purchase offers by third-parties, in its views, supported the conclusion that it has no liability. Wilmington Trust also retained experts who support such conclusions. Wilmington Trust also opposed class certification and argued that releases signed by the named Plaintiffs would have been an impediment to proceeding as Class representatives. If the Action were to proceed through trial, Plaintiffs would have to overcome these defenses and arguments.

Plaintiffs and Wilmington Trust also strongly disagree on the proper measure of damages. Wilmington Trust contends that the Plan and its participants were not harmed at all. Plaintiffs, on the other hand, argued that the Plan incurred significant financial damage through its overpayment for ISCO shares. The Parties have exchanged position papers supporting their differing views of what a proper measure of damages should be and presented their theories extensively in the mediation. That core dispute had not been resolved at the time the Parties reached their settlement and the uncertainty put both parties at great risk.

These fact intensive inquiries would have led to a battle of experts and conflicting evidence and testimony, which would have placed the ultimate outcome of the litigation in doubt, because

no party could reasonably be certain that its expert or evidence would carry the day.

6. The ability of the Defendant to withstand a greater judgment.

The seventh *Girsh* factor weighs the ability of the defendant to withstand a greater judgment. This factor is "relevant where a settlement in a given case is less than would ordinarily be awarded but the defendant's financial circumstances do not permit a greater settlement," *Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 241, 254 (E.D. Pa. 2011). That is not the case here. Although Wilmington Trust's financial circumstances are not a limiting factor, the balance of other factors still support approval of this settlement. *See In re Processed Egg Prod. Antitrust Litig.*, No. 08-MD-2002, 2016 WL 3584632, at *16 (E.D. Pa. June 30, 2016) ("Even if the Court were to presume that the defendants' resources far exceeded the settlement amount, in light of the balance of the other factors considered which indicate the fairness, reasonableness, and adequacy of the settlement, the ability of the defendants to pay more, does not weigh against approval of the settlement.").

7. The range of reasonableness of the settlement fund in light of the best possible recovery and the attended risks of litigation.

The eighth and ninth *Girsh* factors, and Rule 23(e)(2)(C)(i)-(iv), are the range of reasonableness of the settlement fund in light of the best possible recovery and the risks of litigation. These factors assess "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, ... compared with the amount of the proposed settlement." *Prudential*, 148 F.3d at 322.

In light of the inherent uncertainty in this litigation, a settlement of $5,000,000—approximately $12,000 per participant before fees and other costs are applied—is a good result for the Class. As courts in this Circuit have noted, "in conducting the analysis, the court must guard against demanding too large a settlement based on its view of the merits of the litigation; after all,

settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 324 (3d Cir. 2011). Indeed, even recoveries representing a very small percentage of the defendant's maximum exposure, which this is not, may be found to be fair, adequate and reasonable. *See, e.g.*, *Newbridge Networks Sec. Litig.*, No. 94-1678, 1998 WL 765724, at *2 (D.D.C. Oct. 23, 1998); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses").

Considering the costs, risks and delay of trial and appeal, the immediate and certain recovery of $5,000,000 outweighs the uncertain possibility of a greater amount in the future, particularly given the amount of time it would take—including trial, post-trial and post-judgment briefing, and appeals—for any judgment to be reduced to actual payment to Plan participants.

8. The effectiveness of the proposed method of distributing relief to the Class.

Rule 23(e)(2)(C)(ii), examines the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims. Here, the Settlement Agreement contemplates ISCO providing the names and last known addresses of the Settlement Class members, and the number of shares of ISCO stock allocated to their ESOP account to the Settlement Administrator. Settlement Agmt., ¶ 2.2.3. The Settlement Administrator will use that information, and follow the Plan of Allocation Those Class Members with existing account balance in the ISCO ESOP will have the funds contributed directly to their account; those Class Members without an existing account balance in the ISCO ESOP will receive a check directly from the Settlement Administrator.

9. The terms of the proposed award of attorneys' fees.

Rule 23(e)(2)(C)(iii) looks at the terms of any proposed award of attorneys' fees, including timing of payment. As described above in Section II(C), Plaintiffs' Counsel will file an application

seeking an award of attorneys' fees in an amount not exceeding 33% of the Settlement Amount, and reimbursement of litigation expenses. *Id*., ¶ 9.1. Combined, the fees and costs will not exceed 50% of the Settlement Amount.

10. The proposal treats class members equitably relative to each other.

Under Rule 23(e)(2)(D), the court must consider whether the proposal treats class members equitably relative to each other. As noted in Section IV(B)(9) above, distributions to the Class Members is based on the number of vested shares held in their ISCO ESOP Accounts. Following that process, individual Class Members will not receive preferential treatment but instead all will receive *pro rata* distributions based on the number of vested shares in their account and as detailed in the Plan of Allocation.

C. The Court Should Approve the Notice Plan and Schedule A Fairness Hearing.

As described in Section III(E) above, the Parties have agreed, subject to Court approval, to a notice plan, which calls for individual mailed notice to Settlement Class members. This notice and the manner in which it will be disseminated to Class Members satisfy Rule 23(e)(1) and constitutional due process concerns.

Plaintiffs' request that the Court approve KCC as Settlement Administrator and Escrow Agent. As detailed in the December 12, 2019 letter from Robert DeWitte, KCC has extensive experience in the administration of settlements of this type. (Exhibit B to Porter Decl.).

Finally, the Parties request that the Court schedule a fairness hearing on Plaintiffs' motion for final approval of the Settlement and motion of an award of reasonable attorneys' fees and Service Award to Plaintiffs, as set forth in the proposed Preliminary Approval Order. This will establish a reasonable and efficient process for disseminating notice, providing the opportunity for Class Members to object, and considering final approval of the Settlement.

V. CONCLUSION

The proposed settlement meets the standard for preliminary approval. Accordingly, Plaintiffs respectfully requests that the Court issue an Order: (a) grant preliminary approval of the Settlement Agreement, attached to the Porter Declaration as Exhibit A; (b) approve the proposed Class Notice, Exhibit 1-A to the Settlement Agreement; (c) appoint KCC as the Settlement Administrator; (d) approve the Plan of Allocation; (e) appoint KCC as Escrow Agent; and (f) set a date for a Fairness Hearing.

Dated: December 23, 2019

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CERTIFICATE OF SERVICE

I certify that on December 23, 2019, a true and correct copy of the foregoing document was served on all counsel of record by electronic mail.

/s/ David A. Felice
David A. Felice