

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE (“Agreement”) is made and entered into by and between Eugene Scalia, Secretary of the United States Department of Labor, through his duly authorized representatives (the “Secretary”), and Wilmington Trust, N.A. (“Wilmington Trust”) (collectively, “the parties”). The Agreement is effective as of the date it is signed by the last party to execute the Agreement (“Effective Date”).

WHEREAS, the Secretary is responsible for the administration and enforcement of Title I of the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. § 1001 et seq.; and

WHEREAS, the Secretary, through the national office and the regional offices of the Department of Labor, investigated Wilmington Trust’s performance of its responsibilities as a trustee or other fiduciary of ERISA-covered employee stock ownership plans (“ESOPs”) in connection with the ESOPs’ acquisition or sale of employer securities in transactions that closed prior to and including September 23, 2017 (the “Released ESOP Transactions”), and filed three lawsuits alleging that Wilmington violated provisions of Title I of ERISA in connection with certain ESOP transactions (the “DOL Litigation”); and

WHEREAS, the Secretary has not alleged that Wilmington Trust impermissibly benefited from its services as a trustee or fiduciary in connection with the Released ESOP Transactions; and

WHEREAS, Wilmington Trust provided responses and disputed the Secretary’s allegations in the DOL Litigation; and

WHEREAS, there were no determinations made by a court, arbitrator or other fact finder addressing or resolving the merits of the issues alleged by the Secretary in connection with the Released ESOP Transactions or the DOL Litigation; and

WHEREAS, the parties engaged in a series of confidential mediations with a national mediator; and

WHEREAS, without admitting or denying the Secretary's allegations, Wilmington Trust has agreed to the relief specified in this Agreement; and

WHEREAS, Wilmington Trust represents that it has ceased providing services as a trustee or other fiduciary in connection with ESOP transactions, and that the last ESOP transaction for which Wilmington Trust served as a trustee or other fiduciary closed on September 23, 2017; and

WHEREAS, the parties have agreed to resolve all of the Secretary's issues relating to or associated with Wilmington Trust's performance of its responsibilities as a trustee or other fiduciary in connection with the Released ESOP Transactions.

NOW THEREFORE, in consideration of the mutual covenants and payments set forth herein and other valuable and sufficient consideration, the receipt of which is hereby acknowledged, the parties agree as follows:

1. **Settlement Payment.** Within forty-five (45) days of the Effective Date, Wilmington Trust shall make restitution by paying a total of \$80,000,000 (Eighty million dollars) to and for the benefit of the ESOPs sponsored by the companies listed below ("ESOP Recipients") and in the amounts specified:

<u>ESOP</u>	<u>Payment Amount</u>
a. Graphite Sales	\$2,263,748
b. HCMC	\$7,158,339
c. Stargate	\$8,259,620
d. Paramount	\$7,265,713

e. Henny Penny	\$7,625,231
f. Evy of CA	\$3,854,489
g. Vertex	\$6,577,105
h. A.H. Schreiber	\$4,007,445
i. West-Camp Press	\$5,637,038
j. Ram 1971	\$5,574,326
k. FST Logistics	\$2,880,160
l. Trius	\$2,294,339
m. Best Restaurant	\$2,115,686
n. Axia Consulting	\$2,356,439
o. Consolidated Bus	\$5,624,801
p. Retina Institute	\$1,284,830
q. Cohen Ventures	\$1,529,559
r. Cost Containment	\$ 859,306
s. Sterling Staffing	\$1,040,100
t. Mapsys	\$ 996,355
<u>u. Life's Abundance</u>	<u>\$ 795,371</u>
Total	\$80,000,000

No portion of the settlement payment shall be allocated to or paid to the account of any participant (or beneficiary of such participant) who sold shares to the ESOP in any of the Released ESOP Transactions. The parties will notify the plan administrator for the ESOP Recipients of this restriction.

If, as of the Effective Date, Wilmington Trust is no longer serving as trustee for an ESOP Recipient, the Department will instruct Wilmington Trust as to the name and contact information of a current fiduciary for that ESOP Recipient to whom Wilmington Trust shall direct the settlement payment for that ESOP Recipient specified in this paragraph.

If, as of the Effective Date, either (a) the ESOP Recipient is terminated, or (b) there is not a person who is then acting as the plan administrator for the ESOP Recipient, then the Department shall seek the appointment of an independent fiduciary for the ESOP Recipient to accept and allocate the payment to the ESOP Recipient, with the fees and cost of the independent fiduciary to be paid out of the amount to be received by the ESOP Recipient pursuant to paragraph 1. If, as of the Effective Date, an independent fiduciary has not been appointed for an ESOP Recipient that has been terminated or that lacks a plan administrator, Wilmington Trust must make the payment specified in this paragraph to the ESOP Recipient within the later of forty-five (45) days from the Effective Date or ten (10) days after being notified by the Department of the independent fiduciary's appointment.

If any of the ESOP Recipients do not agree to these allocation and payment terms and restrictions, the Department retains the right to reallocate the settlement payment attributable to that ESOP Recipient (to the extent the ESOP does not agree to allocate it per the terms of this Agreement) to the other ESOP Recipients listed above.

2. Waiver of Indemnification. Wilmington Trust agrees not to seek indemnification or reimbursement from any company that sponsored an ESOP for any part of the settlement payment described in paragraph 1.

3. Reimbursement of Plan Sponsors and/or Plans. Within thirty (30) days of the Effective Date, Wilmington Trust will prepare and provide to the Secretary an accounting of all

payments to or for the benefit of Wilmington Trust made by any ESOP Recipient or sponsor of an ESOP Recipient for all legal fees and expenses incurred in connection with investigations or litigation conducted by the Department of Labor. Within forty-five (45) days of the Effective Date, Wilmington Trust will fully reimburse each of the companies and ESOPs that made such payments for the amounts identified in the accounting. Wilmington Trust will not seek or receive payment from any ESOP Recipient or the companies that sponsor them for any unpaid bills or amounts allegedly owed for legal fees and expenses Wilmington Trust incurred in connection with investigations or litigation conducted by the Department of Labor. Wilmington Trust also will not seek payment pursuant to any indemnification agreement from any ESOP Recipient or the companies that sponsor them for any other amounts Wilmington Trust incurred or incurs in connection with investigations or litigation conducted by the Department of Labor.

4. ERISA Section 502(l) Payment. ERISA Section 502(l) provides that in any case in which there is a recovery from a fiduciary pursuant to a settlement agreement with the Secretary of a claim of a fiduciary breach, the Secretary is required to assess an additional payment equal to 20% of the recovery amount. Accordingly, the Secretary hereby assesses a payment under ERISA section 502(l), 29 U.S.C. § 1132(l), of 20% of the amounts paid pursuant to paragraph 1 of this Agreement. However, the Secretary is also authorized, under certain circumstances, to compromise or reduce the amount of the ERISA Section 502(l) payment, and has agreed to do so in this case. The parties have entered into a compromise to reduce the amount of the 502(l) payment to \$8 million (Eight million dollars), which is 10% of the recovery amount. The Secretary agrees to accept, as full satisfaction of the assessed Section 502(l) payment, the amount of \$8 million (Eight million dollars) (the “502(l) Payment”). Wilmington Trust waives its rights to a separate notice of assessment under ERISA Section 502(1), 29 U.S.C.

§ 1132(l), to the service requirement of 29 C.F.R. § 2570.83, and to contest the assessment.

Wilmington Trust shall pay or cause its insurers to pay the 502(l) Payment to the U.S.

Department of Labor within forty-five (45) days after the Effective Date. The check for the 502(l) Payment shall be made payable to the United States Department of Labor, and mailed to either of the following addresses:

Standard (Regular U.S. Mail) Remittance Address:

ERISA Civil Penalty
P.O. Box 6200-36
Portland, OR 97228-6200

or

Express Mail or Commercial Overnight Delivery Address:

U.S. Bank
Attn: ERISA Civil Penalty #6200-36
17650 NE Sandy Blvd.
PD-OR-C1GL
Portland, OR 97230

The check shall be accompanied with a transmittal letter in a form provided to Wilmington Trust by the Department that identifies the cases and case numbers for which the payment is made.

5. Proof of Payment. Within sixty (60) days of the Effective Date, Wilmington Trust will provide proof of the payments described in paragraphs 1, 3 and 4 of this Agreement. Such proof shall include copies of checks, wire transfers, or other documents evidencing the payments, and correspondence or an affidavit confirming that the required payments and disclosures have been made. Any proof provided under this paragraph will be sent to the Secretary's representatives at the following address:

Mabel Capolongo
Office of Enforcement
Employee Benefits Security Admin.
U.S. Dept. of Labor
200 Constitution Ave. NW

Suite 600
Washington, D.C. 20210

with a duplicate delivered to:

Blair Byrum
Plan Benefits Security Division
Office of the Solicitor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-4611
Washington, DC 20210

6. Release and Covenant Not to Sue by the Department. Upon Wilmington Trust's payments of the amounts set forth in paragraphs 1, 3, and 4 of this Agreement, and except as necessary to enforce the rights and obligations in this Agreement, the Secretary and his agents, attorneys, representatives, assigns, predecessors and successors in interest, acting in their official capacities, do hereby release, waive, and forever discharge any and all claims, demands, actions, causes of actions, liabilities, penalties and fines that they may have against Wilmington Trust and its parent companies, subsidiaries, and affiliates and each of their respective directors, officers, employees, agents, attorneys, representatives, assigns, predecessors and successors in interest (the "Wilmington Trust Releasees") related to Wilmington Trust's performance of its responsibilities as trustee or other fiduciary in connection with any of the Released ESOP Transactions, subject to the exceptions set forth in subparagraphs 6.1 and 6.2.

6.1. Excepted from the release and covenant not to sue described in paragraph 6 is any claim related to a Released ESOP Transaction that is not identified in paragraph 1 if Wilmington Trust (or a person who acted on behalf of Wilmington Trust) is convicted of a crime other than a misdemeanor or similar minor offense in a state or federal court for any part of its

conduct in acting as an ESOP trustee for that transaction. Wilmington Trust hereby agrees to waive any timeliness defense, including statute of limitations and laches, with respect to any claim brought by the Secretary covered by this paragraph, provided the Secretary brings such claim within 6 months from the date on which Wilmington Trust (or a person who acted on behalf of Wilmington Trust) is convicted of that crime.

6.2. Wilmington Trust represents and warrants that it has not engaged in “fraud” or “concealment” related to any Released ESOP Transaction that is not identified in paragraph 1. For the purposes of this representation and warranty, (a) “fraud” shall be defined as knowingly and intentionally making a false representation or omission of a material fact that was relied upon and caused harm to an ESOP; and (b) “concealment” shall be defined as an affirmative action taken to hinder the discovery of a breach of fiduciary duty with respect to the particular ESOP transaction. With the exception of publicly filed lawsuits by participants in certain ESOPs, Wilmington Trust further represents that it is not aware of any complaint by an ESOP participant or beneficiary about Wilmington Trust’s approval of any Released ESOP Transaction that is not identified in paragraph 1. Further excepted from the release and covenant not to sue in paragraph 6 are any claims related to a breach of these representations and warranties.

6.3. With the exception of the claims described in subparagraphs 6.1 and 6.2, the Secretary agrees not to commence any civil investigation or institute, maintain, or prosecute any civil action or legal proceeding against the Wilmington Trust Releasees for their actions as transactional trustee on the Released ESOP Transactions. Nothing herein shall preclude any action to enforce the terms of this Agreement.

6.4. The Secretary agrees with respect to any and all claims released under paragraph 6 that he shall be conclusively deemed to settle, release, relinquish, waive and discharge any and all rights or benefits he may now have, or in the future may have, under any law relating to the releases of unknown claims pertaining specifically to Section 1542 of the California Civil Code, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, THAT IF KNOWN BY HIM OR HER WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

The Secretary waives any and all provisions, rights and benefits conferred by any law or of any State or territory within the United States or any foreign country, or any principle of common law, which is similar, comparable or equivalent in substance to Section 1542 of the California Civil Code.

7. **Release and Covenant Not to Sue by Wilmington Trust.** Except as necessary to enforce the rights and obligations in this Agreement, Wilmington Trust does hereby release, waive, and forever discharge any and all claims, demands, actions, causes of actions, liabilities, penalties and fines, including those claims arising under the Equal Access to Justice Act or any other statute, rule or regulation, that Wilmington Trust may have against the Secretary and his agents, attorneys, representatives, assigns, predecessors and successors in interest (the “Secretary Releasees”) that relate in any manner to an investigation of a Released ESOP Transaction by the Secretary and/or the filing, prosecution or maintenance of the DOL Litigation by the Secretary. Wilmington Trust agrees not to institute, maintain, or prosecute any action or legal proceeding against the Secretary Releasees relating to an investigation of a Released ESOP Transaction by

the Secretary and/or the filing, prosecution, or maintenance of the DOL Litigation by the Secretary. Nothing herein shall preclude any action to enforce the terms of this Agreement.

7.1. Wilmington Trust agrees with respect to any and all claims released under paragraph 7 that it shall be conclusively deemed to settle, release, relinquish, waive and discharge any and all rights or benefits it may now have, or in the future may have, under any law relating to the releases of unknown claims pertaining specifically to Section 1542 of the California Civil Code, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, AND THAT IF KNOWN BY HIM OR HER WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

Wilmington Trust waives any and all provisions, rights and benefits conferred by any law or of any State or territory within the United States or any foreign country, or any principle of common law, which is similar, comparable or equivalent in substance to Section 1542 of the California Civil Code.

8. ESOP Transaction Services – Process Agreement. Wilmington Trust represents that it does not intend to act in the future as a trustee or other fiduciary in connection with an ESOP transaction. If, however, Wilmington Trust desires to act as a trustee or other fiduciary in connection with an ESOP transaction on or before January 1, 2030, Wilmington Trust hereby agrees that it must first execute an agreement with the Secretary of Labor outlining the process to which Wilmington Trust will adhere in reviewing and approving an ESOP transaction.

9. Private Litigation. This Agreement does not limit the Secretary's authority to submit amicus curiae briefs in litigation brought against Wilmington Trust by private parties or the Secretary's authority to disclose information in response to requests that the Secretary receives under the Freedom of Information Act. The Secretary does not otherwise intend to participate in litigation or disputes involving Wilmington Trust's provision of services as a trustee or fiduciary in connection with the Released ESOP Transactions.

10. No Admissions or Denials. This Agreement, whether or not consummated, and any negotiations or proceedings in furtherance hereof are not, and shall not be construed as, deemed to be, or offered or received as evidence of an admission or denial by or on the part of Wilmington Trust of any wrongdoing, fault, or liability whatsoever by Wilmington Trust, or give rise to any inference of any wrongdoing, fault, or liability or admission of any wrongdoing, fault, or liability in any other proceeding, and Wilmington Trust admits no wrongdoing, fault, or liability with respect to any Released ESOP Transaction.

11. Notices. Provisions of this Agreement requiring notice or other communication to a party shall be satisfied by delivering the notice in writing to the recipients set forth below via express overnight courier:

As to Wilmington Trust:

Michael C. Driscoll
Group Vice President | M&T Bank
Legal Department | Senior Associate General Counsel
One M&T Plaza, 8th Floor
Buffalo, New York 14203
Direct: (716) 842-4611

with a duplicate delivered to:

Michael Prame, Esq.
Groom Law Group, Chtd.

1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-5893
Phone: (202) 857-0620

As to the Secretary:

Mabel Capolongo
Office of Enforcement
Employee Benefits Security Admin.
U.S. Dept. of Labor
200 Constitution Ave. NW
Suite 600
Washington, D.C. 20210
Phone: (202) 693-8443

with a duplicate delivered to:

Blair Byrum
Plan Benefits Security Division
Office of the Solicitor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-4611
Washington, DC 20210
Phone: (202) 693-5600

The parties may, as they deem necessary, change from time to time the designation of persons to receive notice on their behalf by delivering via overnight express courier service notification of such change to the address to which notice should be sent.

12. General Provisions.

12.1. This Agreement constitutes the entire agreement between the parties and supersedes any prior agreement or understanding, whether oral or in writing, that any party may claim exists. This Agreement may not be amended or modified except by a writing signed by all parties, but its modification shall not require the consent of any other person. A provision of this Agreement may be waived only by an instrument in writing executed by the waiving party and

specifically waiving such provision. The waiver of any breach of this Agreement by any party shall not be deemed to be or construed as a waiver of any other breach of this Agreement.

12.2. This Agreement is a binding contract and all parties hereto are bound to perform hereunder. The respective obligations of Wilmington Trust and of the Secretary hereunder shall be binding upon each of them and their respective successors and assigns, and the obligations of each shall be fully enforceable by the other. Wilmington Trust and the Secretary waive any challenge that either may have to the enforceability of this Agreement.

12.3. This Agreement is effective on the date it is fully executed by all of the undersigned parties.

12.4. The Secretary and Wilmington Trust shall bear their own costs, expenses, and attorney's fees in connection with this matter, the Released ESOP Transactions, and the DOL Litigation.

12.5. This Agreement is not binding on any governmental agency other than the United States Department of Labor.

12.6. The undersigned representatives each expressly acknowledge and represent that they are authorized and empowered to execute this Agreement on behalf of the parties represented.

12.7. This Agreement shall be interpreted, construed, and enforced in accordance with applicable federal law.

12.8. The parties agree that any and all disputes concerning compliance with the Agreement shall follow the process below:

12.8.1. If a party has reason to believe that the other party has not complied with the Agreement, it shall first promptly give written notice of such alleged non-

compliance to the other party and will use reasonable efforts to resolve the issue informally. If the issue cannot be resolved within 90 days of the date of the written notice, the parties have the option of seeking resolution by more formal means, including through mediation or an action to enforce the Agreement.

12.8.2. In any mediation under this subparagraph 12.8.1, each party shall bear its own fees and costs.

12.8.3. If the dispute is not resolved through mediation, either party may request that United States District Court for the District of Columbia or the United States District Court for the Southern District of New York resolve the dispute.

12.9. Each party to this Agreement hereby acknowledges that he, she, or it has consulted with and obtained the advice of counsel prior to executing this Agreement and that this Agreement has been explained to that party by his, her, or its counsel.

12.10. No provision of the Agreement or of the exhibits attached hereto shall be construed against or interpreted to the disadvantage of any party to the Agreement because that party is deemed to have prepared, structured, drafted, or requested the provision.

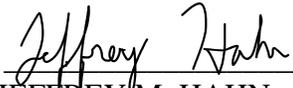
12.11. This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same instrument.

THE SECRETARY OF LABOR:

KATE S. O'SCANNLAIN
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor for Plan Benefits Security

Dated: April 28, 2020



JEFFREY M. HAHN
Senior Trial Attorney
U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division

WILMINGTON TRUST, N.A.

DATE: April 28, 2020

By:  _____
Name: William Farrell
Title: Executive Vice President