

DRAFT
CONFIDENTIAL – FOR SETTLEMENT PURPOSES ONLY
SUBJECT TO 42 Pa.C.S. § 5949 AND Pa.R.Evid. 408

ARTHUR ALAN WOLK, PHILIP	:	
BROWNEIS, and CATHERINE	:	
MARCHAND,	:	
	:	
Plaintiffs,	:	No. 2016-01839
	:	
v.	:	
	:	
LOWER MERION SCHOOL DISTRICT,	:	
	:	
<u>Defendant.</u>	:	

SETTLEMENT AGREEMENT AND MUTUAL RELEASES

WHEREAS, Arthur Alan Wolk, on behalf of himself and the Settlement Class as defined below, brought an action (“Action”) in the Court of Common Pleas of Montgomery County (“Court”) on February 1, 2016 against the Lower Merion School District (“District”); and

WHEREAS, the Complaint has been amended from time to time, including on March 11, 2016, adding Philip Browneis and Catharine Marchand, as named Plaintiffs on behalf of themselves and the Settlement Class as defined below (together, all three are referred to as “Plaintiffs”); and

WHEREAS, on August 29, 2016, the Court entered a preliminary injunction, which injunction was affirmed on appeal; and

WHEREAS, Plaintiffs have asked that the Court hold the District in contempt of that injunction; and

WHEREAS, the District has denied the assertions set forth in the Complaint, Amended Complaint, and Second Amended Complaint, as well as the motions for contempt, and has asserted defenses to the Second Amended Complaint and motions for contempt, and denies that it is liable for the claims asserted (or for claims unasserted); and

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WHEREAS, notwithstanding the foregoing, both Plaintiffs and the District have negotiated in good faith to resolve all claims subject to certain conditions and both Plaintiffs and the District agree that it is in the best interests of the, District, taxpayers, and the students of the District to settle this matter;

NOW THEREFORE, subject to the approval of the Court, that in consideration of the promises herein and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties to this Settlement Agreement, intending to be legally bound, hereby agree that this action will be compromised, settled, and discontinued based on and subject to the following terms and conditions:

A. COURT APPROVAL

This Settlement Agreement, the Proposed Order of Approval (Exhibit 1), Notice (Exhibit 2), Proposed Order of Denial as Moot (Exhibit 3), and Stipulation of Discontinuance (Exhibit 4), each of which is incorporated by reference as if set forth verbatim, and the terms of which are expressly made a part of this Settlement Agreement (together, “Agreement”) will be submitted to the Honorable Richard P. Haaz of the Montgomery Court of Common Pleas as soon as the captioned parties have executed the Agreement.

The Parties will request that the Court hold a hearing as to the fairness and reasonableness of the proposed terms of the settlement in light of Pennsylvania Rule of Civil Procedure 1714, and the Agreement will not become effective unless and until the Court approves it as fair. A Proposed Order of Approval is attached hereto as Exhibit 1.

The Parties and their counsel agree to cooperate fully with one another and the Court in seeking Court approval.

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After the hearing as to the fairness and reasonable of the proposed terms of the settlement has been scheduled and reasonably in advance of the hearing date, the District or its designated Settlement Administrator will provide notice to the Settlement Class (as defined in Section D, *infra*) substantially in the form attached as Exhibit 2.

The Parties will request that concurrent with the Court's Order approving the Settlement, each of the pending motions for contempt [Seq. 84, 134, 155] will be denied as moot, using a proposed Order substantially in the form attached as Exhibit 3.

Within ten business days of the Court's Order approving the Agreement, the Plaintiffs will file a Stipulation in substantially the form attached hereto at Exhibit 4, to mark this action Settled, Discontinued, and Ended.

B. PLAINTIFFS' INVESTIGATION

Plaintiffs, through their attorneys and experts, conducted an investigation of the facts and circumstances underlying the issues raised in the Complaint and have concluded that given the risks of litigation, as well as the public interest sought through this suit, it is in the best interests of the Settlement Class (defined in Section D, *infra*) to resolve all matters at issue in this Action, and to settle this Action against the District on the terms set forth herein.

C. NO ADMISSION OF LIABILITY

Neither this Agreement nor any document, transaction, or proceeding in connection with the settlement or the execution or implementation of the settlement is an admission or concession by District of any fault, liability, wrongdoing, damages or of the truth of any allegations asserted by any Plaintiffs against it. The District has concluded that given the expenses and risks of litigation, it is in the best interests of the District, taxpayers, and students of the District to settle this Action on the terms set forth herein.

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D. SETTLEMENT CLASS

For the purposes of this Agreement, and notwithstanding the provisions of Pennsylvania Rule of Civil Procedure 1714(b), the Parties agree to conditional certification of a Settlement Class, which is defined as owners of real property in the District as of the date the Preliminary Injunction was issued, August 29, 2016, who paid their school real property taxes (“school taxes”) for that year.

Plaintiffs, and to the best of their knowledge, information, and belief, their counsel, represent and warrant that (a) Plaintiffs would be members of the Settlement Class as herein defined; and (b) none of the Plaintiffs’ claims or causes of action in the Action have been assigned, encumbered, or in any manner transferred in whole or in part.

E. COUNT VI OF THE SECOND AMENDED COMPLAINT

The Parties expressly acknowledge that Count VI of the Second Amended Complaint arises from conduct that was alleged to have occurred over a decade ago. Further by Order of the United States District Court for the Eastern District of Pennsylvania dated May 14, 2010, the District provided notice and the opportunity for all affected persons to review under court supervision any photographs that had been captured by the anti-theft software. That notice and opportunity were provided more than a decade ago. Because it is not evident whether any member of the Settlement Class could assert a claim on the facts giving rise to Count VI now, that count is being dismissed without prejudice.

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F. PAYMENTS

The District or its designated Settlement Administrator will distribute checks to the Settlement Class within 45 days of the entry of the Order approving the Agreement.

The payments will be calculated as follows. The taxpayer’s individual school tax amount will be calculated as a percentage of all school real property taxes (“school taxes”) assessed by the District in 2016-2017, and that percentage will be multiplied by \$15 million to identify the amounts for each of the checks to be distributed. (By way of example only, if school taxes for 2016-2017 were \$240 million, and if one taxpayer paid \$12,000 in school taxes, that taxpayer would receive a check for \$750 (which is .005 percent of \$15 million).

The settlement checks will bear the stamp “In settlement of *Wolk, Browndeis & Marchand v. Lower Merion School District*, No. 2016-01839. Cashing of this check will constitute a release of claims in that litigation.” The \$15 million will be from monies the District segregated following the 2016 Preliminary Injunction Order, and following approval of this Settlement, no further set aside of those funds shall take place.

G. PROSPECTIVE ACTION

The Parties agree that the following steps will be taken going forward.

1. A total of \$4 million per year will be credited to taxpayers who own real property within the District in the form of a rebate on the tax bills for the years 2023, 2024, and 2025, in proportion to the taxes each taxpayer is paying. In each of those years, the tax bill will bear the same stamp, “In settlement of *Wolk, Browndeis & Marchand v. Lower Merion School District*, No. 2016-01839” in identifying the rebate. The \$12 million will be from monies the District segregated following the 2016 Preliminary Injunction Order, and following approval of this Settlement, no further set aside of those funds shall take place.

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2, The millage rate for the 2022-2023 fiscal year will be 31.2045. It was calculated using the basis that would have been in place if the tax increase for 2016-2017 had been 2.40%, starting with the 2015-2016 millage rate of 26.2321, utilizing the tax increase taken each year since, and including the Act 1 index for 2022-2023.

This millage rate will be implemented upon execution of this Agreement, which the Parties acknowledge will precede the hearing for approval of the Settlement and the implementation of the post-approval terms. The Parties further recognize that the millage rate reduction is being implemented by the District for the 2022-2023 fiscal year as part of the Parties' good faith efforts to timely resolve the litigation. Accordingly, Plaintiffs will not seek a further reduction of the millage rate as part of any motions to hold the District in contempt of the 2016 Preliminary Injunction Order unless the District fails to comply with this agreement.

This millage rate will be the basis for the District's millage rates going forward. Subsequent years will be increased as provided for in Act 1.

3. Beginning with the 2022-2023 fiscal year, in the event there is more than a 2% variance between budgeted and actual expenditures and revenues for a fiscal year, 50% of the surplus realized by the District for that fiscal year will be credited to the taxpayers. This surplus is separate from and in addition to the rebates the District has agreed to provide in tax years 2023, 2024, and 2025.

A. The numbers used to calculate the percentage of the variance and any taxpayer credit for a fiscal year will be taken from the General Fund Budgetary Comparison Schedule in the Independent Auditor's Report. An example is shown below from the Independent Auditor's Report for the Fiscal Year ending June 30, 2021:

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LOWER MERION SCHOOL DISTRICT
 Required Supplementary Information
 Budgetary Comparison Schedule
 General Fund
 For the Year Ended June 30, 2021

	Original Budget	Amended Budget	Actual	Variance with Final Budget - Positive (Negative)
Revenues:				
Local Revenues	\$ 240,434,196	\$ 240,434,196	\$ 243,640,730	\$ 3,206,534
State Program Revenues	41,360,144	41,360,144	41,171,788	(188,356)
Federal Program Revenues	1,542,000	1,542,000	3,331,889	1,789,889
TOTAL REVENUES	283,336,340	283,336,340	288,144,407	4,808,067
Expenditures:				
Regular Programs	113,878,090	113,709,090	113,709,053	37
Special Programs	50,060,512	48,746,112	48,746,050	62
Vocational Programs	425,000	504,000	503,963	37
Other Instructional Programs	1,298,280	825,262	825,134	128
Pupil Personnel Services	11,006,007	10,744,707	10,744,705	2
Instructional Staff Services	7,294,810	6,538,035	6,538,035	0
Administrative Services	15,194,632	16,241,632	16,241,486	146
Pupil Health	4,665,499	4,097,799	4,097,793	6
Business Services	1,545,092	1,403,892	1,403,795	97
Operation and Maintenance of Plant Services	20,860,267	21,292,467	21,292,271	196
Student Transportation Services	16,810,262	14,069,062	14,069,021	41
Central and Other Support Services	8,971,479	8,255,879	8,255,798	81
Student Activities	5,921,192	5,231,342	5,231,305	37
Community Services	254,200	245,100	245,040	60
Debt Service	28,982,373	29,349,573	29,349,561	12
TOTAL EXPENDITURES	287,167,695	281,253,952	281,253,010	942
EXCESS (DEFICIENCY) OF REVENUES OVER EXPENDITURES	(3,831,355)	2,082,388	6,891,397	4,809,009
Other Financing Uses:				
Budgetary Reserve	(800,000)	0	0	0
Interfund Transfers Out	(62,000)	(5,368,943)	(5,368,943)	0
Refunds of Prior Years' Revenues	0	(1,406,800)	(1,406,706)	94
TOTAL OTHER FINANCING USES	(862,000)	(6,775,743)	(6,775,649)	94
NET CHANGE IN FUND BALANCES	\$ (4,693,355)	\$ (4,693,355)	115,748	\$ 4,809,103
Fund Balance - July 1, 2020			43,033,339	
FUND BALANCE - JUNE 30, 2021			\$ 43,149,087	

B. The expenditures and revenues used to calculate the percentage of the variance and any taxpayer credit for each fiscal year will be taken from the General Fund Budgetary Comparison Schedule in the Independent Auditor's Report. An example is shown below from the Independent Auditor's Report for the fiscal year ending June 30, 2021:

1. Revenue Variance = Actual Total Revenues – Original Budget Total Revenues
2. Expenditure Variance = Original Budget Total Expenditures – Actual Total Expenditures
3. Budgetary Reserve Variance = Original Budget Budgetary Reserve
4. Total Variance = Revenue Variance + Expenditure Variance + Budgetary Reserve Variance

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5. 2% Allowance = Actual Total Expenditures * 2%
6. Excess Variance = Total Variance – 2% Allowance
7. Taxpayer Credit = If Excess Variance is a positive number then Excess Variance * 50%; If Excess Variance is a negative number then zero

As an example, the calculation if the provisions had been in place for the 2020–2021 fiscal year is shown below.

	Original Budget	Actual	Variance
Revenues	283,336,340	288,144,407	4,808,067
Total Expenditures	287,167,695	281,253,010	5,914,685
Budgetary Reserves	800,000	0	800,000
Total Variance			11,522,752
2% Allowance			5,625,060
Excess Variance			5,897,692
Taxpayer Credit			2,948,846

C. The taxpayer credit calculation shall be made and publicized at the public meeting when the Independent Audit is accepted by the District’s Board of Directors (“the Board”). The taxpayer credit will then be applied to the tax bills in the subsequent fiscal year. For clarification and as an example, the Independent Auditor’s Report for the 2020–2021 fiscal year was accepted by the Board on January 24, 2022, and if these provisions had been in place at that time, the taxpayer credit would have applied to the bills sent for the 2022–2023 fiscal year.

D. Unbudgeted interfund transfers shall not be included in the calculated 2% variance.

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E. Proceeds from any bond refinancing that occurs may be applied to the debt service fund without being considered revenues or interfund transfers.

F. The District can budget for interfund transfers to the capital reserve fund as long as the following conditions are met:

1. The District specifies (1) the amount of money that will be transferred, and (2) the item(s) the budgeted money will be used to purchase,

2. The District spends or encumbers the money within five fiscal years of the transfer or must seek leave of Court to extend that time period;

3. The District makes the transfer before the end of the fiscal year for which it has been budgeted; and

4. The District does not budget funds from elsewhere to pay for the same items that are the subject of the budgeted-for interfund transfer.

F. The District must maintain buildings and grounds in good repair, and monies in the capital reserve fund can be used for capital improvements in the order of urgency as determined by the Board. Monies transferred into the capital reserve fund pursuant to this Stipulated Consent Order will not be considered unspent if a more urgent capital improvement becomes required, as long as the money is encumbered by the time originally designated.

G. If the District does not encumber the funds subject to the budgeted interfund transfer by the end of the period it specified in making the initial transfer, it shall credit the unencumbered funds to the taxpayers in the following fiscal year.

H. The process outlined in Paragraph A – G, above, will continue until the 2025-2026 fiscal year. At the end of the 2025-2026 fiscal year, if there has been no year in which the variance between budgeted and actual expenditures and revenues is in excess of 2%, the Board may determine at its sole discretion whether to continue or

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discontinue these processes. If there have been years in which actual varied from budgeted expenditures in excess of 2%, the Board will continue these processes until there have been three out of four years in which the variance between budgeted and actual expenditures does not exceed more than 2%, at which point the Board may determine at its sole discretion whether to continue or discontinue the processes.

I. In the event the Board determines that it is in the District's best interest to create additional funds during the time period of the Stipulated Consent Order, the District's transfers to those newly created funds will be governed by the procedures set forth in this Stipulated Consent Order.

J. If a statute is enacted or amended or if accounting principles are promulgated that are inconsistent with the terms of the procedures outlined in Paragraphs A – G, above, the Parties will meet and confer to identify procedures for the District to remain in compliance with Paragraphs A – G, above, and the newly promulgated law or accounting principles. In the event the Parties are not able to reach agreement, either Party may make an application to the Court.

4. The Plaintiffs will have 20 business days following entry of the Order approving the Agreement to submit to the Court documentation of litigation expenses, not to exceed \$100,000. Plaintiffs have sent the District the documentation of these expenses as of May 31, 2022, and the District does not object to the expenses. When approved by the Court as reasonable, the District will reimburse Plaintiffs for the expenses. The District shall pay all administrative costs associated with the finalization of this Settlement.

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H. RELEASES

Effective upon the approval of this Agreement by the Honorable Richard P. Haaz of the Court of Common Pleas of Montgomery County after a hearing, each of the Plaintiffs, their counsel, the Settlement Class, and the District on their own behalf, and on behalf of any affiliates, predecessors or successors in interest, heirs, assigns, and current and former agents, Directors, Administrators, employees, advisors, and counsel hereby irrevocably and unconditionally remises, releases, and forever discharges the other Party and its respective affiliates, predecessors or successors in interest, heirs, assigns, and current and former agents, Directors, Administrators (including Superintendents and Business Managers), employees, advisors, and counsel of and from any and all actions, claims, liabilities, suits, causes of action, debts, charges, complaints, obligations, demands, expenses, obligations, damages, attorneys' fees, and debts that each Party ever had or now has, whether known or unknown, whether asserted or unasserted, for or by reason of any cause, matter, or thing whatsoever, whether pursuant to statute, common law, or otherwise, from the beginning of time to the date of the approval of this Agreement, including but not limited to the claims and counterclaims and causes of actions (except for Count VI as set forth above), arising from or relating to the facts and matters alleged in Montgomery County Court of Common Pleas Civil Action No. 2016-01839, *Wolk v. Lower Merion School District*. It is the intention of the parties that the foregoing releases be construed broadly. In the event that any person or entity subject to the foregoing releases fails to comply with this release, the aggrieved Party shall have all available defenses and remedies as to the offending Party.

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I. ENFORCEMENT AND CONSTRUCTION

Continuing Jurisdiction.

The Court shall retain jurisdiction over all matters relating to the implementation, enforcement, construction, administration, and interpretation of this Settlement and the agreement contained herein with the sole exception of any alleged violations of the terms of the release.

Venue

Except as otherwise provided, any suit to enforce a right under this Agreement or to seek remedy for a breach thereof including, if warranted, declaratory or injunctive relief will be brought in the Montgomery County Court of Common Pleas, and the parties waive their right to object to this forum.

Choice of Law

This Agreement shall be governed by, and construed in accordance with, the laws of the Commonwealth of Pennsylvania without regard to conflicts of laws principles.

Dispute Resolution

The parties will negotiate in good faith to resolve disagreements about performance of this Settlement Agreement. Should that fail and should a party seek enforcement of any provisions of the Agreement, the District and Plaintiffs acknowledge that declaratory or injunctive relief may be sought by either party and Plaintiffs may also seek relief for contempt or breach.

Recitals, Headings, Exhibits

The Recitals and headings are provided for convenience of reference only. The Exhibits are an essential element of this Agreement and are made a part thereof.

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No Presumption Against Drafter

This is a negotiated Agreement and has been submitted for approval to the Court.

Accordingly, no terms are to be construed against one Party more strongly than against the other.

J. MISCELLANEOUS

Non-disparagement. No one authorized to speak on behalf of a Party will make disparaging or negative statements, orally or in writing, including through social media or other forms of electronic communication, with regard to the matters alleged in the case and addressed in this Settlement, and neither party will direct or condone any statements that are disparaging or negative with regard to the parties or matters alleged in the case and addressed in the Settlement. Factual recitations do not constitute disparagement. Nothing in this paragraph is intended to limit the rights of anyone under the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 7 of the Constitution of the Commonwealth of Pennsylvania.

No Assessment Retribution. The District agrees that it will not initiate any real estate assessment appeals of the properties owned by the Named Plaintiffs unless the properties are sold **and** initiating an assessment appeal would be permissible under the conditions set forth in District Administration Regulation 605 as it is currently enacted (and which is available here: https://resources.finalsite.net/images/v1573758178/lmsdorg/rtanoqigypok6cs1nyxn/Policy_P605.pdf). The Parties acknowledge that Montgomery County, not the District, controls whether and when countywide and interim property reassessments are done more generally.

Severability. The provisions of this Agreement are severable and if any part thereof is found to be invalid or unenforceable, the Parties shall use their best efforts to substitute a valid, legal and enforceable provision, which insofar as practical, implements the purpose of this Agreement. Any failure to enforce any provision of this Agreement shall not constitute a waiver thereof, or of any other

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provision. The other provisions shall remain valid and enforceable notwithstanding the invalidity of any severable provision.

Entire Agreement. The Agreement embodies the entire understanding and agreement between the Parties. Any prior agreements, whether written or oral, are hereby merged into this Agreement. The Agreement may be changed or modified only by a written addendum signed by all Parties or by an order of the Court, except that either party may seek a modification to the terms in the Consent Order (Exhibit 1) if there is a material change to the governing law or accounting principles that impacts the District's ability to implement the below provisions or that requires a change in how they are implemented.

Authority, Power and Capacity. The Parties hereby represent and warrant to each other that they have the authority, power, and capacity to execute and are free to enter into this Agreement, including the releases contained herein, that the Parties have had the opportunity to have legal counsel of their choosing review this Agreement prior to execution, and that the persons who are signing this document have express authorization to do so.

Counterparts. This Agreement may be executed in counterparts, delivered by fax or electronic mail, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument, representing the agreement of the Parties to this Agreement.

Third Party Beneficiaries. There are no third-party beneficiaries to this Agreement. The obligations and benefits of this Agreement are specific to this Agreement and no right to performance is extended to any person outside the Settlement Class and the Parties.

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PLAINTIFFS

Dated: _____

Arthur Alan Wolk
Named Plaintiff/Attorney for Plaintiffs
THE WOLK LAW FIRM
1710-12 Locust Street
Philadelphia, PA 19103

Dated: _____

Philip Browndeis
Named Plaintiff

Dated: _____

Catherine Marchand
Named Plaintiff

Approved as to form:

Dated: _____

Joseph P. Walsh
Counsel for Plaintiffs
WALSH PANCIO, LLC
2028 N. Broad Street
Lansdale, PA 19446

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LOWER MERION SCHOOL DISTRICT

Dated: _____

Lucy Klain
Board President

Attest:

Dated: _____

Denise LaPera
Board Secretary

Dated: _____

Chanda A. Miller
Counsel for Lower Merion School District
FAEGRE DRINKER BIDDLE & REATH LLP
One Logan Square, Suite 2000
Philadelphia, PA 19103

Dated: _____

Kenneth A. Roos
Solicitor for Lower Merion School District
WISLER PEARLSTINE, LLP
460 Norristown Road, Suite 110
Blue Bell, PA 19422

AND NOW, this _____ day of _____ 2022, the Parties' Settlement Agreement is approved. **IT IS SO ORDERED.** A separate Order approving the settlement as fair and reasonable is being entered contemporaneously herewith.

BY THE COURT:

RICHARD P. HAAZ, J.