

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

_____)
MILTON LILLY and DONALD GROGAN, on)
behalf of themselves and a class of persons)
similarly situated,)

Plaintiffs,)

vs.)

ONEIDA LTD. EMPLOYEE BENEFITS)
ADMINISTRATIVE COMMITTEE, *et al.*,)

Defendants.)
_____)

Case No. 6:07-cv-00340 (NPM/ATB)

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT
AND PLAN OF ALLOCATION**

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I. INTRODUCTION

On June 15, 2010, the Court granted preliminary approval of the Class Action Settlement Agreement (“Settlement Agreement”)¹ in this action, finding that the Settlement Agreement—which provides for a \$1.85 million cash payment—was fair, reasonable, and adequate and warranted providing the proposed method and form of notice to the preliminarily certified Settlement Class. Order Preliminarily Approving Settlement, Certifying Settlement Class, Approving Notice Plan, and Setting Fairness Hearing Date (Dkt. No. 146) (June 15, 2010) (“Preliminary Approval Order”).

In accordance with the Preliminary Approval Order, the Settlement Class received notice of: the Action; the Settlement Agreement; the requested attorneys’ fee, expense reimbursement, and case contribution awards; the proposed Plan of Allocation; the deadlines for filing any objections and notices of appearance; and the Fairness Hearing. Preliminary Approval Order ¶ 5, Exhibits A & B; Affidavit of Anya Verkhovskaya (Aug. 31, 2010) (“A.B. Data Aff.”) ¶¶ 4, 6, 8, Exhibit 1; See also accompanying Declaration of Lynn Lincoln Sarko in Support of Plaintiffs’ Motion for Final Approval of Class Action Settlement and Plan of Allocation (Sept. 27, 2010) (“Sarko Final Approval Dec.”) ¶¶ 29-37. The deadline for filing objections has now expired and Named Plaintiffs’ Counsel has not received any such objections to date.² Preliminary Approval Order ¶¶ 4, 6; Sarko Final Approval Dec. ¶¶ 6-7.

As demonstrated below, the record in this case and the case law in the Second Circuit fully support entry of an order: (A) granting final approval of the Settlement Agreement; (B)

¹ Capitalized terms not otherwise defined herein have the meanings ascribed to them in Settlement Agreement filed on June 1, 2010.

² In the event that Named Plaintiffs’ Counsel receive any such objections after this motion is filed, Named Plaintiffs’ Counsel intend to fully respond at or before the Fairness Hearing. In this regard, Named Plaintiffs’ Counsel note that pursuant to Section 2.2.2 of the Settlement Agreement, an Independent Fiduciary is expected to complete a report that reviews the Settlement Agreement on behalf of the Plan for fairness before the Fairness Hearing. If the Independent Fiduciary believes the Settlement Agreement to be fair, the Independent Fiduciary will agree in writing, in consideration of the terms of the Settlement Agreement, to grant, effective upon the entry of the Final Order by the Court, releases of the Releasees, which such releases: (i) shall release the same claims as to the Releasees as set forth in Article 3 of the Settlement Agreement; and (ii) shall be determined by the Independent Fiduciary to meet the requirements of Prohibited Transaction Exemption 2003-39, “Release of Claims and Extensions of Credit in Connection with Litigation,” issued December 31, 2003, by the United States Department of Labor, 68 Fed. Reg. 75,632. See Settlement Agreement § 2.2.2.

determining that the notice provided to the Settlement Class was appropriate and sufficient; (C) maintaining Settlement Class certification; and (D) approving the proposed Plan of Allocation.

II. DISCUSSION

A. The Court Should Grant Final Approval to the Settlement Agreement

Courts may approve class action settlements after notice is provided in a reasonable manner to class members who would be bound by the settlement if, after a hearing, they find that the settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e).

1. The Court has Preliminarily Approved the Settlement

Based on Plaintiffs' detailed preliminary approval papers, which set forth and discussed each of the Second Circuit factors for evaluating the fairness of a settlement, save one – the reaction of Class members – which was not known in advance of the issuance of notice, the Court preliminarily found that the Settlement was a result of “informed, extensive arm’s length negotiations” and that the Settlement is “sufficiently fair, reasonable, and adequate to warrant sending notice of the Settlement to the Settlement Class.” Preliminary Approval Order ¶ 3.

2. The Settlement was Reached through Arm’s-Length Negotiations, and is Fair, Reasonable, and Adequate

A district court’s consideration of a settlement’s fairness begins with an examination of “the negotiating process leading up to the settlement as well as the settlement’s substantive terms.” *D’Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). The court must ensure that the settlement resulted from arm’s-length negotiations. *See, e.g., In re WorldCom, Inc. ERISA Litig.*, No. 02-4816, 2004 WL 2338151, at *5 (S.D.N.Y. Oct. 18, 2004) (quoting *D’Amato*, 236 F.3d at 85). As detailed in Plaintiffs’ preliminary approval papers, the Settlement Agreement is the result of vigorous, arm’s-length negotiations that were mediated by Sherwin S. Kaplan. *See* Plaintiffs’ Memorandum Of Law In Support Of Motion For Order Preliminarily Approving Settlement, Certifying Settlement Class, Approving Notice Plan And Setting Fairness Hearing Date (Dkt. No. 144-1) (June 4, 2010) (“Preliminary Approval Memo”) § II(B); Affidavit of Lynn Lincoln Sarko in Support of Settlement Agreement (Dkt. No. 144-2) (June 4, 2010) (“Sarko Preliminary Approval Aff.”) ¶¶ 3-4.

Next, a court must determine whether a settlement is fair, reasonable, and adequate, guided by the nine factors identified by the Second Circuit:

(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 the 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.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974).

For the reasons articulated and discussed in detail in the preliminary approval papers and summarized below, the Settlement satisfies all of the *Grinnell* factors. See Preliminary Approval Memo § V(A)(2).

(a) The complexity, expense and likely duration of the litigation

Many courts have recognized the complexity of ERISA breach of fiduciary duty company stock claims. Indeed, as Judge Lynch explained with respect to similar ERISA claims:

The ERISA cases would pose additional factual and legal issues. Fiduciary status, the scope of fiduciary responsibility, the appropriate fiduciary response to the Plans' concentration in company stock and [company] business practices would be issues for proof, and numerous legal issues concerning fiduciary liability in connection with company stock in 401(k) plans remain unresolved. These uncertainties would substantially increase the ERISA cases' complexity, duration, and expense – and thus militate in favor of settlement approval.

In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 456 (S.D.N.Y. 2004).

Here, Plaintiffs' claims raise numerous complex legal and factual issues under ERISA that require extensive factual and expensive expert discovery and testimony. Affidavit of Lynn Lincoln Sarko in Support of Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Case Contribution Awards (Dkt. 147-2) (Sept. 7, 2010) ("Sarko Award Aff.") ¶¶ 6, 9-14. The facts and circumstances surrounding numerous compelling and public indicators that the Oneida Ltd. Employee Stock Ownership Plan's ("Plan") holding and purchasing of Oneida stock during the Class Period may have imposed excessive risk to the Plan's participants and beneficiaries, underlying Plaintiffs' breach of fiduciary duty claims in the Complaint, are highly complex and

undeniably would be greatly time-consuming and expensive to litigate further to trial. *Id.* ¶¶ 15-20. The Settlement Agreement cuts short the likely additional months of contested discovery, and eliminates the time and expense of substantial briefing that likely would occur in preparing Plaintiffs' case against Defendants for trial. Sarko Final Approval Dec. ¶ 5. Accordingly, the complexity, expense and duration of this litigation weigh heavily in favor of approving the Settlement.

(b) The reaction of the class to the settlement

Named Plaintiffs Milton Lilly and Donald Grogan, were kept informed of the settlement negotiations with Defendants throughout the negotiating process and support the Settlement without qualification. *See* Declaration of Plaintiff Milton Lilly in Support of Motion for Final Approval of Class Action Settlement ¶¶ 2-3 (Sept. 18, 2010); Declaration of Plaintiff Donald Grogan in Support of Motion for Final Approval of Class Action Settlement ¶¶ 2-3 (Sept. 20, 2010).

In addition, pursuant to the Preliminary Approval Order, the court-approved Notice was mailed to Settlement Class members on August 5, 2010, via First-Class Mail, postage prepaid at their last known addresses as provided by Defendants. A.B. Data Aff. ¶ 8, Exhibit 1. Likewise, beginning on August 5, 2010, the Summary Notice was posted at www.kellersettlements.com and continues to be posted there to date. Sarko Final Approval Dec. ¶ 34, Exhibit A.

While the deadline for filing and service of objections was September 20, 2010, Named Plaintiffs' Counsel have received no objections to the Settlement Agreement to date. Preliminary Approval Order ¶ 6; Sarko Final Approval Dec. ¶¶ 6-7. This factor thus weighs heavily in favor of final approval. *D'Amato*, 236 F.3d at 86-87 (small numbers of objections support finding the settlement fair, reasonable, and adequate); *Global Crossing*, 225 F.R.D. at 457 (same).

(c) The stage of the proceedings and discovery completed

There is no litmus test for determining how much work needs to be done in a case for the Court to evaluate a settlement and ensure that counsel were in a position to make an intelligent assessment of their prospects before settling. *See* 4 William B. Rubenstein, *Alba Conte &*

Herbert B. Newberg, *Newberg on Class Actions* § 11:45 (4th ed. 2002 & Supp. 2009). Rather, this factor is satisfied where plaintiffs show that they “have a clear view of the strengths and weaknesses of their case[.]” *Teachers’ Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-11814, 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) (quotation omitted); *see also In re Elan Sec. Litig.*, 385 F. Supp. 2d 363, 370 (S.D.N.Y. 2005) (approving settlement despite little or no formal discovery when class counsel interviewed former employees, reviewed documents and deposition summaries from an SEC investigation, hired forensic accountants to review the financial errors, and retained experts to analyze damages).

As described in Plaintiffs’ preliminary approval papers, Plaintiffs here have developed a comprehensive understanding of the key issues in the case due to their experience pioneering this specialized area of ERISA breach of fiduciary duty law and through the briefing and discovery to date. Sarko Preliminary Approval Aff. ¶¶ 2, 3, & 8-13. Before filing the Action, Named Plaintiffs’ Counsel obtained numerous publicly filed documents and requested and received numerous Plan documents on behalf of Plaintiff Lilly pursuant to their requests under ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4), to assist them with investigating potential claims and in framing the allegations of the Complaint. Sarko Final Approval Dec. ¶ 8. At the outset of the action, Named Plaintiffs’ Counsel supplemented these requests with informal requests for a variety of ERISA-related materials. In response to these requests, Defendants produced the Plan documents and amendments, and summary plan descriptions, information from which was subsequently incorporated into the Complaint and relied upon in opposition to Defendants’ motion to dismiss. *Id.* ¶ 9. In terms of formal discovery, as of the time of the Settlement, the Parties exchanged Rule 26(a) Initial Disclosures, and Plaintiffs served document requests and numerous third-party subpoenas for documents, reviewed thousands of pages of documents, and analyzed studies performed by their consultants regarding the estimated damages. *Id.* ¶¶ 10-14. The stage of the proceedings and the discovery completed accordingly supports the fairness, reasonableness, and adequacy of the Settlement Agreement. Moreover, Plaintiffs survived Defendants’ Motion to Dismiss their claims and moved for class certification before reaching an agreement in principle, which ultimately culminated in the Settlement Agreement. *See Lilly v.*

Oneida Ltd. Emp. Benefits Admin. Comm., No. 07-0340, 2008 WL 2019728 (N.D.N.Y. May 8, 2008); Plaintiffs' Motion for Class Certification (Dkt. No. 113) (Sept. 30, 2008).

(d) The risks of establishing liability

In assessing the Settlement Agreement, the Court should balance the benefits it provides to the class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463. The types of ERISA claims asserted by Plaintiffs here have been described as implicating “a rapidly developing, and somewhat esoteric, area of law.” *Global Crossing*, 225 F.R.D. at 459 n.13 (finding that plaintiffs' significant legal and factual obstacles to proving their case, when viewed against the substantial and certain benefits of settlement, supported settlement approval).

Named Plaintiffs' Counsel are confident in their ability ultimately to prove the claims asserted. Sarko Final Approval Dec. ¶ 15. Nevertheless, Defendants have presented a number of defenses that would have to be overcome to establish liability. *See* Defendants' Answer to Plaintiffs' Second Amended Class Action Complaint (Dkt. No. 107) (May 28, 2008), at 33-37. The risks of the case being lost or its value diminished on a pre-trial motion or at trial, when weighed against the immediate benefits of settlement, indicate that the Settlement Agreement is in the best interest of the Settlement Class. Sarko Final Approval Dec. ¶ 16.

(e) The risks of establishing damages

Settlements for even a small percentage of total estimated damages are fair, reasonable, and adequate where the magnitude of damages involves a “battle of experts ... with no guarantee of outcome.” *In re Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 54 (S.D.N.Y. 1993); *see also Bonime v. Doyle*, 416 F. Supp. 1372, 1386 n.9 (S.D.N.Y. 1976) (difficulty in determining damages supports settlement), *aff'd*, 556 F.2d 554 (2d Cir. 1977).

The relevant law on damages to ERISA plans as a result of imprudent investments was well established in the Second Circuit's influential opinion in *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985).³ This does not, however, prevent defendants from disputing the facts

³ The Second Circuit stated “[w]here several alternative investment strategies were equally plausible, the court should presume that the funds would have been used in the most profitable of these.” *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985); *see also LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 253 n.4 (2008)

pertaining to the magnitude of damages. For instance, defendants generally argue that even if plaintiffs can show that investment in company stock was imprudent, it did not become imprudent until so late in the proposed class period that plaintiffs' damages would be minimal. *See Sarko Award Aff.* ¶ 12. Moreover, a further layer of risk affects the determination of damages in this Action. *Id.* ¶ 13. Defendants moved to dismiss the Action and argued that because the Plan contained a floor-offset provision,⁴ the Class members suffered no loss. This is because to the extent a Class members' Plan account fell below the value of his/her promised benefit, the difference would be made up by the Oneida Ltd. Retirement Plan ("Retirement Plan"). While the Court found that Plaintiffs adequately pled an injury in fact, the measure of such injury is yet to be established, and would likely be limited to a reasonable return on the Plan's loss between the end of the Class Period and the time any judgment would become final. *Lilly*, 2008 WL 2019728 at *7. This factor, like the others, also weighs in favor of a sum-certain settlement as provided in through the Settlement Agreement.

(f) The risks of maintaining the class action through trial

The Court preliminarily certified the Settlement Class pursuant to the Federal Rules of Civil Procedure Sections 23(b)(1) and (e). Preliminary Approval Order ¶ 2. Named Plaintiffs' Counsel strongly believe this Action is appropriate to maintain as a class action through trial because it is a representative action brought by Plaintiffs on behalf of the Plan pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). *Sarko Final Approval Dec.* ¶ 20. That said, class certification can be reviewed and modified at any time before final judgment, so there is always a risk that the Action, or particular claims in the Action, might not be maintained on a class-wide

("[Section] 502(a)(2) encompasses appropriate claims for 'lost profits.'"). Any ambiguity or uncertainty in damages is resolved against the fiduciaries. *Donovan*, 754 F.2d at 1056. In addition, unlike the securities laws, which only protect persons who *purchased* stock during the class period, *see, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 n.9 (1975), ERISA provides relief for the imprudent purchase *and holding* of stock by a plan during the class period. *See In re Ikon Office Solutions, Inc. Sec. Litig.*, 191 F.R.D. 457, 463-64 (E.D. Pa. 2000) ("Plaintiffs correctly stress the difference between a securities fraud claim and an ERISA claim" and discussing in particular the availability of "holder claims" under ERISA).

⁴ A floor-offset plan consists of two plans, a defined benefit plan and a defined contribution plan such as the Plan. *Sarko Final Approval Dec.* ¶ 19. A participant is entitled to the greater of his/her account balance in the defined contribution plan or the benefit promised by the defined benefit plan. If the participant's defined contribution plan account balance is lower than the benefit promised by the defined benefit plan, the participant receives that account balance and the defined benefit plan pays the difference between that amount and the benefit promised by the defined benefit plan. *Id.*

basis through trial. *See* Fed. R. Civ. P. 23(c)(1)(C). Thus, the risk of failing to maintain the class action through trial also weighs in favor of settlement.

(g) The ability of defendants to withstand a greater judgment

Defendants' ability to withstand a greater judgment at trial is a factor in determining whether a settlement is reasonable. *Bello v. Integrated Res., Inc.*, No. 88-1214, 1990 WL 200670, at *2 (S.D.N.Y. Dec. 4, 1990) (risk that plaintiffs would be unable to recover even if victorious is a strong argument supporting settlement). Here, the only source of substantial recovery against Defendants is the fiduciary liability insurance policy that this litigation was quickly depleting. Sarko Final Approval Dec. ¶¶ 22-24. It is very unlikely the Settlement Class could obtain a better result than this one if the case were litigated to a conclusion against Defendants. *Id.* ¶ 25. This factor strongly supports approval of the Settlement Agreement.

(h) The reasonableness of the settlement in light of the best possible recovery and the attendant risks of litigation

In evaluating a proposed settlement, a court is not required to engage in a trial on the merits to determine the prospects of success. *Milken*, 150 F.R.D. at 54. The adequacy of the amount offered in settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989) (citing *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984)). The Court need only determine whether the settlement falls within a "range of reasonableness." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. 1997) (citations omitted). "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455. Notably, "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Id.* at 455 n.2.

As fully explained in Plaintiffs' preliminary approval papers, the "breach" date – that is the date at which Defendants knew or should have known Oneida stock was an imprudent

investment for participants' retirement assets – would have a significant impact on the total amount of potential recovery in this action. Preliminary Approval Memo § V(A)(2)(h). Even more significant to this case, as explained *supra* in Section II(A)(2)(e), the Settlement Class members' injury in this case is likely limited to a reasonable return on the Plan's loss between the end of the Class Period and the time any judgment would become final due to the floor-offset provision between the Plan and the Retirement Plan.

For the reasons fully detailed in the preliminary approval papers and the Sarko Final Approval Affidavit, Named Plaintiffs' Counsel believe that the maximum range that Plaintiffs could reasonably expect to recover in this case if litigated to final judgment, not discounting for risk, is between approximately \$896,778 and \$4.309 million. Preliminary Approval Memo § V(A)(2)(h); Sarko Final Approval Dec. ¶¶ 26-27. Under this analysis, the Settlement represents between 42.9% and 206.3% of the total potential estimated losses. Sarko Final Approval Dec. ¶ 28. The actual recovery might be significantly less, even if Plaintiffs establish liability in this Action, because Defendants would advance several arguments to reduce or eliminate damages. Named Plaintiffs' Counsel would resist any effort to decrease their recovery in this case, but nonetheless, recognize that their ability to recover in this case is far from certain. *Id.*

Moreover, where the settlement or any judgment will be funded by the proceeds of an insurance policy – as in this case – the court determines the range of reasonableness with respect to the amount of available insurance coverage. *See, e.g., In re Blech Sec. Litig.*, No. 94-7696, 2000 WL 661680, at *5 (S.D.N.Y. May 19, 2000) (“While additional years of litigation might well have resulted in a higher settlement or verdict at trial, continued litigation could also have reduced the amount of insurance coverage available and not necessarily resulted in a greater recovery.”).

Notably, the Action here was filed against Defendants after Oneida filed for bankruptcy. Sarko Final Approval Dec. ¶ 22. When it emerged from bankruptcy, it did so only with an \$80 million asset-based revolving credit facility and a \$90 million term loan. *Id.* Consequently, there is no corporate “deep pocket” to indemnify Defendants. *Id.* ¶ 23. Rather,

Defendants are covered by a “wasting” insurance policy. *Id.* ¶ 24. Under the wasting policy, every dime of insurance money that defendants spend in litigating this matter results in less money available for Plan participants to recover in any eventual judgment or settlement. *Id.*

Therefore, considering the present and time value of money, the probability of lengthy litigation in the absence of a settlement, the risk that the Class would not succeed in proving liability against Defendants, and the potential that much of the available insurance money would be spent in further litigation and would not be available to pay any judgment obtained at trial, the Settlement is well within the range of reasonableness. *See also Global Crossing*, 225 F.R.D. at 461 (“The prompt, guaranteed payment of the settlement money increases the settlement’s value in comparison to ‘some speculative payment of a hypothetically larger amount years down the road.’”) (citation omitted). Accordingly, the Settlement is reasonable in light of the difficult circumstances of this Action.

B. The Notice Provided to the Settlement Class Satisfied Rule 23 and Due Process

Notice to class members must be “reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *In re Prudential Sec. Ltd. P’ships. Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y. 1996). “It is widely recognized that for the due process standard to be met it is not necessary that every class member receive actual notice, so long as class counsel acted reasonably in selecting means likely to inform persons affected.” *Id.*; *see also Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988).

Consistent with applicable law cited in the preliminary approval papers, the Court approved the proposed methods and forms of providing Notice and Summary Notice to the Settlement Class. Preliminary Approval Memo § V(C); Preliminary Approval Order ¶ 5. As noted in § II(A)(2)(b), *supra*, the Notice was mailed to the Settlement Class on August 5, 2010 and the Summary Notice was posted at www.kellersettlements.com beginning on August 5, 2010 and continues to be posted there to date. Sarko Final Approval Dec. ¶ 34, Exhibit A.

The Court-approved mailed Notice and supplemental posted Summary Notice were not only reasonably calculated to reach the Settlement Class members, they were highly successful

in actually reaching them. A.B. Data Aff. ¶¶ 8-12; Sarko Final Approval Dec. ¶¶ 36-37. More than 93% of the mailed Notices sent to the last known addresses of Settlement Class members as maintained in Defendants' business records were not returned by the post office. A.B. Data Aff. ¶¶ 6, 8-10. In addition, two additional potential Settlement Class members who had not received the mailed Notice called the telephone number listed in the Notice and the Summary Notice and were provided with a copy of it. *Id.* ¶ 9. Named Plaintiffs' Counsel also received and promptly responded to six email inquiries from potential Settlement Class members through the email address referenced in the Notice and Summary Notice and at www.kellersettlements.com between August 5, 2010 and the date of this filing.

Pursuant to the Preliminary Approval Order, Settlement Class Members have also had the opportunity to view and obtain the following documents pertaining to the Action at www.kellersettlements.com: the Complaint; the Settlement Agreement; the Preliminary Approval Order; Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Case Contribution Awards; Memorandum in Support of Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Case Contribution Awards; Affidavit of Lynn Lincoln Sarko in Support of Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Case Contribution Awards (with exhibits); Affidavit of George Szary in Support of the Application on Behalf of DeGraff Foy & Kunz, LLP for an Award of Attorneys Fees; and the proposed Plan of Allocation. Sarko Final Approval Dec. ¶¶ 36-37. In addition, Settlement Class members have had the opportunity to ask questions and receive answers via telephone and email, as well as to file any objections that they may have by the September 20, 2010 deadline stated in the Notice and Summary Notice. A.B. Data Aff. ¶ 12; Sarko Final Approval Dec. ¶ 35. While approximately 2% of potential Settlement Class members requested and received assistance in relation to the Action, Named Plaintiffs' Counsel have received no objections to date. A.B. Data Aff. ¶¶ 6, 12; Sarko Final Approval Dec. ¶¶ 6-7.

As such, the notice provided to the Settlement Class satisfied the requirements of Rule 23 and due process.

C. The Settlement Class Continues to be Properly Certified Pursuant to Rule 23(b)(1)

In the Preliminary Approval Order, the Court found that the requirements of the Federal Rules of Civil Procedure, the United States Constitution, the Rules of the Court and any other applicable law were met on behalf of the Settlement Class in that: (a) the members of the Settlement Class were so “numerous” that “joinder before the Court would be impracticable;” (b) “one or more questions of fact and/or law are common” to the Class; (c) Named Plaintiffs’ claims are “typical” of the claims of the Class; (d) Named Plaintiffs will “fairly and adequately protection the interests of the Settlement Class”; (e) “prosecution of separate actions” by individuals of the Class would create a risk of: (1) “inconsistent or varying adjudications;” or (2) adjudications to individuals of the Class that would be “dispositive of the interests” of other members of the Class not parties to those adjudications; and (f) Named Plaintiffs’ Counsel “is capable of fairly and adequately representing the interests of the Settlement Class.” Preliminary Approval Order ¶ 1.

Consequently, the Court preliminarily certified the following Class:

All Persons, and their Successors-In-Interest, except as expressly excluded herein, who were participants in or beneficiaries of the Plan at any time between May 28, 2003 and March 20, 2006 (the “Class Period”) and whose Plan account included investments in Oneida stock during the Class Period. The “Settlement Class” shall not include any of the Defendants, or any of the Defendants’ Immediate Family, beneficiaries, alternate payees, Representatives or Successors-In-Interest, except for Immediate Family, beneficiaries, alternate payees, Representatives or Successors-In-Interest who themselves were participants in the Plan, who shall be considered members of the Settlement Class with respect to their own Plan accounts.

Id. ¶ 2.

The only new facts pertaining to this Action are that the preliminarily certified Settlement Class has received notice, the opportunity to be heard, and filed no objections. As such, certification of the Settlement Class remains proper pursuant to Rule 23(b)(1).

D. The Plan of Allocation for the Settlement Fund Should Be Approved

In connection with final approval of the Settlement, Plaintiffs request that the Court to also approve their proposed Plan of Allocation for the Settlement Fund. The Plan of Allocation is submitted as Exhibit B to the Sarko Final Approval Affidavit.

“A district court has broad supervisory powers with respect to allocating a class action settlement and wide latitude in determining what to consider in approving a settlement allocation.” *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 145 (S.D.N.Y. 2010). “In determining whether a plan of allocation is fair, courts give substantial weight to the opinions of experienced counsel.” *Id.* “When formulated by competent and experienced class counsel, an allocation plan need have only a reasonable, rational basis.” *Id.* (quoting *Global Crossing*, 225 F.R.D. at 462 (internal quotation omitted)).

Here, the Plan of Allocation was designed by Named Plaintiffs’ Counsel who are experienced in this type of litigation and have prepared similar plans for numerous other similar cases. Sarko Final Approval Dec. ¶ 39. The Plan of Allocation reflects Named Plaintiffs’ Counsel’s informed consideration of the relevant legal and factual matters pertaining to Class Members’ claims. The Plan of Allocation provides that the Net Proceeds of the Settlement Fund will be allocated to Settlement Class members on a *pro rata* basis according to their recognized claims of damages. No Class Member or group of Class Members is singled out for either disproportionately favorable or unfavorable treatment; all participate in recoveries pursuant to the Plan of Allocation in the same manner. *Id.* ¶ 40.

The Plan of Allocation was described in the Notice, which was approved by the Court on June 15, 2010 and mailed to Class Members on August 5, 2010. The Notice stated:

The Net Proceeds shall be distributed among Settlement Class members in proportion to their net losses. Each Settlement Class member’s “Net Loss” will be, for each Settlement Class member, the greater of (a) zero; or (b) the result obtained by taking (i) the dollar amount of Oneida stock in the Settlement Class member’s Plan account at the beginning of the Class Period; adding (ii) the dollar amount of Oneida stock added to the Settlement Class member’s Plan account during the Class Period (including the value of Oneida stock received as a dividend); and subtracting (iii) the dollar amount credited to the Settlement Class member’s Plan account balance resulting from dispositions from the Oneida

Common Stock Fund during the Class Period.

The Net Losses of the Settlement Class members will be aggregated. Each Settlement Class member will be assigned a Net Loss Percentage, showing the percentage of the Settlement Class member's Net Loss in relation to all Settlement Class members' Net Losses. Each Settlement Class member's share of the Net Proceeds will be equal to the Net Proceeds multiplied by the member's Net Loss Percentage. It also stated that if data is not available for the beginning date of the Class Period, then data from the nearest available date will be used.

A.B. Data Aff., Exhibit 1 § 4.

The Notice also explained that, by default, the Settlement Fund will be allocated to Settlement Class members as follows:

(1) Settlement Class members who possess an account in the Oneida Ltd. Profit Sharing/401(k) Plan shall have any allocated amount transferred into that account and allocated to the investment elections on file. If no eligible elections are on file, any allocated amount will be deposited into the Oneida, Ltd. Profit Sharing/401(k) Plan's Qualified Default Investment Alternative, which is the age-appropriate Fidelity Freedom Funds; and

(2) All other Settlement Class members shall be issued a check and appropriate tax forms for their allocated amounts.

A.B. Data Aff., Exhibit 1 § 8.

Alternatively, the Notice explained that Settlement Class members that do not possess an account in the Oneida Ltd. Profit Sharing/401(k) Plan and are allocated an amount over \$1,000 pre-tax under the Plan of Allocation have the option to have their allocation rolled over to a no-fee Fidelity IRA that will be invested on a cash reserves basis in short-term securities and money-market instruments that seek to preserve the value of the investment while retaining liquidity. Settlement Class Members that elect this option can transfer the funds to an alternate investment at any time, and Fidelity will not charge a fee for transferring the funds out of the IRA. An Election Form will be provided to Settlement Class members that will be allocated an amount over \$1,000 pre-tax under the Plan of Allocation. To elect this option, Settlement Class members must complete and timely return an Election Form within thirty (30) days after the date that the Election Form is provided. *Id.*

This is substantially the same methodology used in other company stock ERISA cases that have been approved in this Circuit. *See, e.g., Marsh*, 265 F.R.D. at 145. This methodology has also been employed without objection from the Department of Labor or an independent fiduciary. *See, e.g., In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. 02-5575, 2006 WL 903236, at *17 (S.D.N.Y. Apr. 6, 2006). As of this filing, September 27, 2010, Named Plaintiffs' Counsel note that they have received no objections to this method of allocating the Net Proceeds of the Settlement Fund. Sarko Final Approval Dec. ¶ 7.

Named Plaintiffs' Counsel believe the proposed Plan of Allocation is fair, reasonable, and not unduly complicated or expensive. Accordingly, Plaintiffs request that the Court adopt and approve it.

III. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court enter an Order: (A) granting final approval of the Settlement Agreement; (B) determining that the notice provided to the Settlement Class was appropriate and sufficient; (C) maintaining Settlement Class certification; and (D) approving the proposed Plan of Allocation.

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