

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,	)	Case No. 6:07-cv-00340 (NPM/ATB)
Plaintiffs,	)	DECLARATION OF LYNN LINCOLN
vs.	)	SARKO IN SUPPORT OF PLAINTIFFS’
ONEIDA LTD. EMPLOYEE BENEFITS ADMINISTRATIVE COMMITTEE, <i>et al.</i> ,	)	MOTION FOR FINAL APPROVAL OF
Defendants.	)	CLASS ACTION SETTLEMENT AND
	)	PLAN OF ALLOCATION
	)	
	)	

Lynn Lincoln Sarko declares pursuant to 28 U.S.C. § 1746(2) as follows:

1. I am the Managing Partner of Keller Rohrback L.L.P. (“Keller Rohrback” or “Named Plaintiffs’ Counsel”),<sup>1</sup> and head of the firm’s Complex Litigation group. Keller Rohrback represents Plaintiffs, has been involved in the litigation of this matter, and is responsible for the prosecution of this action.

2. I submit this declaration in support of the Plaintiffs’ Motion for Final Approval of Class Action Settlement and Plan of Allocation. I am pleased to present the Settlement Agreement to the Court for its consideration, and believe strongly that it should be approved.

**I. THE SETTLEMENT AGREEMENT**

3. Under the preliminarily approved Settlement Agreement, a Settlement Fund of \$1.85 million has been established. A copy of the Settlement Agreement was attached to my

<sup>1</sup> Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Class Action Settlement Agreement (“Settlement Agreement”). See Affidavit of Lynn Lincoln Sarko in Support of Settlement Agreement, Ex. 1 (Dkt. No. 144-2) (June 4, 2010).

previously filed affidavit in of the Settlement Agreement. *See* Affidavit of Lynn Lincoln Sarko in Support of Settlement Agreement (Dkt. No. 144-2) (June 4, 2010) (“Sarko Preliminary Approval Aff.”) at Exhibit 1.

**A. The complexity, expense and likely duration of the litigation**

4. As fully detailed in my previously filed affidavit in support of award of attorneys’ fees, expenses, and case contribution awards, this case is fraught with risk at every turn. Affidavit of Lynn Lincoln Sarko in Support of Plaintiffs’ Motion for Award of Attorneys’ Fees, Expenses, and Case Contribution Awards (“Sarko Award Aff.”) (Dkt. No. 147-2) (Sept. 9, 2010) at ¶¶ 9-20.

5. 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.

**B. The reaction of the class to the settlement**

6. Under the provisions of the Preliminary Approval Order and the Class Notice, the deadline for filing and service of objections was September 20, 2010.

7. To date, Named Plaintiffs’ Counsel have received no objections to the Settlement Agreement, the requested attorneys’ fee, expense reimbursement, or case contribution awards; or the proposed Plan of Allocation.

**C. The stage of the proceedings and discovery completed**

8. Named Plaintiffs’ Counsel started discovery before filing the Action with statutory requests for documents 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.

9. 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.

10. Plaintiffs and Defendants then exchanged information and provided additional documents as part of their Rule 26(a) Initial Disclosures.

11. On December 18, 2007, Plaintiffs issued their First Requests for Production of Documents to Defendants. Defendants responded to these requests with an initial production of documents on July 1, 2008 and supplemented that production on September 16, 2008.

12. On August 13, 2008, Plaintiffs issued their Second Requests for Production of Documents to Defendants. Defendants responded to these requests with a production of documents on September 15, 2008.

13. Named Plaintiffs' Counsel established an electronic document depository for the litigation and implemented a system of coding and categorizing documents relevant to the ERISA claims and defenses. Based on this system, Named Plaintiffs' Counsel reviewed thousands of pages of documents produced by Defendants.

14. Additionally, Plaintiffs issued third-party subpoenas to Alvarez & Marsal, BDO Seidman LLP, Carl Marks Consulting Group LLC, J.P. Morgan Chase Bank, Peter J. Solomon Co., PriceWaterhouseCoppers LLP, and Credit Suisse Securities (USA) LLC, requesting various documents relevant to this Action.

**D. The risks of establishing liability**

15. In Named Plaintiffs' Counsel's view, Defendants are Plan fiduciaries who, as a result of their inattention, failed to protect the participants from preventable losses.

16. Nonetheless, as fully detailed in my Award Affidavit, this case is fraught with risk at every turn. Sarko Award Aff. ¶¶ 9-20. 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.

**E. The risks of establishing damages**

17. As detailed in my Award Affidavit, no company stock ERISA case has been tried to a successful conclusion; accordingly, no court has definitively applied a damage measure to such cases after trial. Sarko Award Aff. ¶ 16.

18. Further, damage calculations in company stock ERISA cases are computer- and expert-intensive. The proof requires a computer model of the plan, tracking the plan's holdings of company stock, often on a daily basis, and the returns those holdings generate. This data is then compared with the performance of alternative investments on specified breach dates, subject to various additional factors and assumptions, such as the size of the plans' holdings compared to the market as a whole. The expert must create the model, test it, use it, and effectively explain it. In addition, in making these calculations, complex determinations need to be made about the precise period during which the investment in employer stock was imprudent, and the proper investment alternative to use as a comparison.

19. In addition to these usual complications of establishing damages in company stock ERISA cases, discovery revealed that the Plan at issue in this Action contained a floor-offset provision. A floor-offset provision pertains to two plans, a defined benefit plan and a defined contribution plan such as the Plan. 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.

**F. The risks of maintaining the class action through trial**

20. 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).

21. 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 basis through trial. *See* Fed. R. Civ. P. 23(c)(1)(C).

**G. The ability of defendants to withstand a greater judgment**

22. The Action here was filed against Defendants after Oneida filed for bankruptcy. When it emerged from bankruptcy, it did so only with an \$80 million asset-based revolving credit facility and a \$90 million term loan. *See, e.g.*, Andrew G. Church, "Oneida Completes \$170 Million Financing and Emerges from Chapter 11," (Sept. 15, 2006), *available at* <http://www.globenewswire.com/newsroom/news.html?d=105323>.

23. Consequently, there is no corporate "deep pocket" to indemnify Defendants.

24. Rather, Defendants are covered by a "wasting" insurance policy. Under the wasting policy, every dime of insurance money that is spent in litigating this matter results in less money available for Plan participants to recover in any eventual judgment or settlement.

25. As a result, 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.

**H. The reasonableness of the settlement in light of the best possible recovery and the attendant risks of litigation**

26. 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.

27. This estimate is based upon two alternative breach dates that could be found by a factfinder in this Action and losses that correspond with those dates:

- a. If Plaintiffs were to establish a breach date of May 28, 2003 – the date that Oneida announced at its annual meeting that it needed to strengthen the financial condition of the Company and would not be paying a dividend for the first time in 67 years – the loss in value of the Oneida stock held by the Plan (the “principal loss”) would be approximately \$15.707 million, and the total loss had the assets in Oneida stock been invested in alternative Plan investments, ranges from \$16.486 to \$20.955 million. If one were to assume that all Settlement Class members would exercise the choice to take a lump sum payment in the amount of the loss as of the last day of the Class Period (March 20, 2006) and invest that sum in an annuity on the open market that returned between 6% and 9%, the time value of the Settlement Class members’ loss ranged from \$2,153,415 to \$4,309,248 at the time of the Parties’ mediation.<sup>2</sup>
- b. If Plaintiffs were able to establish a breach date of November 21, 2003 – the date Oneida issued a press release in which it announced it had obtained extended waivers from lenders and further deferral of payments – the principal loss would be approximately \$6.541 million, and the total loss had the assets in the Oneida stock been invested in alternative Plan investments, ranges from \$6.899 to \$8.262 million. If one were to assume that all

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<sup>2</sup> Courts often measure losses by comparing the performance of the imprudent investment with the amount the plan “would have earned during this period as measured and adjusted by the movement of an appropriate index reflecting the stock market.” *Dasler v. E.F. Hutton & Co., Inc.*, 694 F. Supp. 624, 634 (D. Minn. 1988).

Settlement Class members would exercise the choice to take a lump sum payment in the amount of the loss as of the last day of the Class Period (March 20, 2006) and invest that sum in an annuity on the open market that returned between 6% and 9%, the time value of the Settlement Class members' loss ranged from \$896,778 - \$1,699,027 at the time of the Parties' mediation.

28. Under this analysis, the Settlement represents between 42.9% and 206.3% of the total potential estimated losses. 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.

## **II. NOTICE TO THE SETTLEMENT CLASS**

29. The Court-approved notice plan consisted of: (a) mailing the Notice to Settlement Class members at their last known addresses provided by Defendants; (b) posting the Summary Notice on [www.kellersettlements.com](http://www.kellersettlements.com), a dedicated website administered by Named Plaintiffs' Counsel to provide information to Settlement Class members; (c) providing a toll-free telephone for Settlement Class member to obtain further information; and (d) providing an email address that Class members may use to contact Named Plaintiffs' Counsel.

30. After accepting and evaluating bids from competing notice providers, Named Plaintiffs' Counsel retained A.B. Data, Ltd. to disseminate the court-approved Notice to Settlement Class members by First-Class Mail, postage paid and to provide interactive voice response and live operator assistance to potential Settlement Class members. On or about June 29, 2010, Named Plaintiffs' Counsel provided A.B. Data, Ltd. with the Court-approved Notice.

31. Pursuant to the Settlement Agreement and the Order Preliminarily Approving Settlement, Certifying Settlement Class, Approving Notice Plan, and Setting Fairness Hearing Date (Dkt. No. 146) (June 15, 2010) (“Preliminary Approval Order”), on or about July 8, 2010, Named Plaintiffs’ Counsel received a spreadsheet from counsel for Defendants containing the names of 1,414 potential Settlement Class members along with their last known addresses as reflected in defendants’ business records.

32. Named Plaintiffs’ Counsel, in turn, forwarded that spreadsheet, without revision, to A.B. Data, Ltd., for use in preparing the Class Notice mailing on or about July 8, 2010. The steps A.B. Data took to disseminate the court-approved mailed Notice are detailed in the accompanying affidavit of Anya Verkhovskaya (Aug. 31, 2010) (“A.B. Data Affidavit”), filed herewith, at ¶¶ 5-10.

33. The steps A.B. Data took to provide interactive voice response and live operator assistance to potential Settlement Class members are detailed in the A.B. Data Affidavit at ¶¶ 11-12.

34. Pursuant to the Preliminary Approval Order, Named Plaintiffs’ Counsel posted the court-approved Summary Notice at [www.kellersettlements.com](http://www.kellersettlements.com) on August 5, 2010 and continues to be posted there to date. A copy of the posted Summary Notice is attached hereto as Exhibit A.

35. Additionally, Named Plaintiffs’ Counsel activated the email address referenced in the Notice and Summary Notice to which potential Settlement Class members could direct inquiries to Named Plaintiffs’ Counsel on August 5, 2010. To date, Named Plaintiffs’ Counsel has received and promptly responded to six such email inquiries.

36. Settlement Class Members have also had the opportunity to view and obtain the following documents at [www.kellersettlements.com](http://www.kellersettlements.com) since August 5, 2010:

- a. Second Amended Class Action Complaint for Violations of Employee Retirement Income Security Act of 1974 (Dkt. No. 40) (July 11, 2007);
- b. Class Action Settlement Agreement (June 4, 2010);
- c. Order Preliminarily Approving Settlement, Certifying Settlement Class, Approving Notice Plan, and Setting Fairness Hearing Date (Dkt. No. 146) (June 15, 2010); and
- d. Class Notice.

37. In addition, Settlement Class Members have had the opportunity to view and obtain the following documents at [www.kellersettlements.com](http://www.kellersettlements.com) since September 13, 2010:

- a. Plaintiffs' Motion for Award of Attorneys' Fees, Expenses & Case Contribution Awards (Dkt. No. 147) (Sept. 9, 2010);
- b. Memorandum in Support of Plaintiffs' Motion for Award of Attorneys' Fees, Expenses & Case Contribution Awards (Dkt. No. 147-1) (Sept. 9, 2010);
- c. Affidavit of Lynn Sarko in Support of Plaintiffs' Motion for Award of Attorneys' Fees, Expenses & Case Contribution Awards (Dkt. No. 147-2) (Sept. 9, 2010);
- d. Affidavit of George Szary in Support of Motion for Award of Attorneys' Fees, Expenses & Case Contribution Awards (Dkt. No. 147-3) (Sept. 9, 2010); and
- e. A proposed Plan of Allocation.

### **III. PLAN OF ALLOCATION**

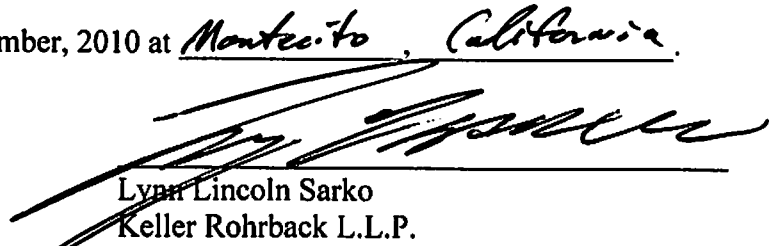
38. The Plan of Allocation that Named Plaintiffs' Counsel request the Court to adopt is attached hereto as Exhibit B.

39. 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.

40. 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.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 27th day of September, 2010 at Monterey, California.



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