

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA



PAUL SMITH and ALFIE CARTER, each on)
behalf of himself and all others similarly)
situated including all participants and)
beneficiaries in the Krispy Kreme Doughnut)
Corporation Retirement Savings Plan or the)
Krispy Kreme Profit Sharing Stock Ownership)
Plan,)

No. 1:05CV00187

Plaintiffs,)

v.)

KRISPY KREME DOUGHNUT)
CORPORATION, RANDY J. CASSTEVENS,)
KEN HUDSON, SHERRY LUPER, FRANK)
MURPHY, PAM PETRO-OTT, MICHAEL C.)
PHALEN, SHERRY POLONSKY, JEFF)
THIELEN, SCOTT A. LIVENGOOD, and)
JOHN N. (JACK) MCALEER,)

Defendants.))

**FINDINGS AND ORDER PRELIMINARILY CERTIFYING A CLASS FOR
SETTLEMENT PURPOSES, PRELIMINARILY APPROVING PROPOSED
SETTLEMENT, APPROVING FORM AND DISSEMINATION OF CLASS NOTICE,
AND SETTING DATE FOR HEARING ON FINAL APPROVAL**

This litigation involves claims for alleged violations of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001, *et seq.* (“ERISA”), with respect to the Krispy Kreme Doughnut Corporation Retirement Savings Plan (the “RSP”) and the Krispy Kreme Profit Sharing Stock Ownership Plan (the “KSOP”) (collectively, the “Plans”).¹

Presented to the Court for preliminary approval is a settlement of the litigation as against all Defendants. The terms of the Settlement are set out in a Class Action Settlement Agreement

¹ Capitalized terms not otherwise defined in this Order shall have the same meaning as ascribed to them in the Settlement Agreement.

dated August 15, 2006 (the "Settlement Agreement"), executed by counsel on behalf of the Named Plaintiffs and the Defendants.

On Sept 22, 2006, the Court preliminarily considered the Settlement to determine, among other things, whether to certify a class for settlement purposes only and whether the Settlement is sufficient to warrant the issuance of notice to members of the Settlement Class. Upon reviewing the record and good cause appearing therefor,

It is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. **Class Findings:** Solely for the purposes of the Settlement, the Court preliminarily finds that the requirements of the Federal Rules of Civil Procedure, the United States Constitution, the Rules of the Court and any other applicable law have been met as to the "Settlement Class" (defined as all persons who were participants in or beneficiaries of either of the Plans at any time from January 1, 2003 through and including May 15, 2006 and whose accounts in either of the Plans included investments in Company stock, provided that Defendants are excluded from the Settlement Class), in that:

A. All findings in this Section 1 are based on the submissions to the Court, including the Settlement Agreement. These findings are not based upon any admissions, representations, assertions, or arguments by the Defendants that a class can, should, or would be certified in the Action, and these findings are made while preserving fully the Defendants' rights to argue, in the event that the Settlement does not become Final or is terminated pursuant to the Settlement Agreement, that no class can or should be certified in the Action.

B. The Court preliminarily finds that, as required by Rule 23(a)(1), the Settlement Class is ascertainable from records kept with respect to the Plan and from

other objective criteria, and the members of the Settlement Class are so numerous that their joinder before the Court would be impracticable.

C. The Court preliminarily finds that, as required by Rule 23(a)(2), there are one or more questions of fact and/or law common to the Settlement Class.

D. The Court preliminarily finds that, as required by Rule 23(a)(3), the claims of the Named Plaintiffs are typical of the claims of the Settlement Class.

E. The Court preliminarily finds, as required by Rule 23(a)(4), that the Named Plaintiffs will fairly and adequately protect the interests of the Settlement Class in that (i) the interests of Named Plaintiffs and the nature of their alleged claims are consistent with those of the members of the Settlement Class, (ii) there appear to be no conflicts between or among the Named Plaintiffs and the Settlement Class, and (iii) the Named Plaintiffs and the members of the Settlement Class are represented by qualified, reputable counsel who are experienced in preparing and prosecuting large, complicated ERISA class actions.

F. The Court preliminarily finds that, as required by Rule 23(b)(1), the prosecution of separate actions by individual members of the Settlement Class would create a risk of inconsistent or varying adjudications as to individual class members that would establish incompatible standards of conduct for the parties opposing the claims asserted in the ERISA Action, or adjudications as to individual class members would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications, or substantially impair or impede those persons' ability to protect their interests.

G. The Court preliminarily finds that, as required by Rule 23(b)(2), the Defendants have acted or did not act on grounds generally applicable to the Settlement Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Settlement Class as a whole.

H. The Court preliminarily finds that, as required by Rule 23(g), Class Counsel are capable of fairly and adequately representing the interests of the Settlement Class, in that Counsel have done extensive work identifying or investigating potential claims in the action, and have litigated the validity of those claims at the motion to dismiss stage of this case; Class Counsel are experienced in handling class actions and claims of the type asserted in the Action; Class Counsel are knowledgeable of the applicable law; and Class Counsel have committed the necessary resources to represent the Settlement Class.

2. **Class Certification** – Based solely on the findings set forth in Section 1 above, and not on any admissions, representations, assertions, or arguments by the Defendants, the Court preliminarily certifies the Settlement Class for settlement purposes under Fed. R. Civ. P. 23(b)(1) and/or (b)(2) and 23(e) in this litigation. The Court appoints Named Plaintiffs as the class representatives for the Settlement Class, and Class Counsel as counsel for the Settlement Class.

3. **Preliminary Findings Regarding Proposed Settlement** – The Court preliminarily finds that (i) the proposed Settlement resulted from extensive arm's-length negotiations, (ii) the Settlement Agreement was executed only after counsel for Named Plaintiffs had conducted pre-settlement investigation, (iii) counsel for Named Plaintiffs have concluded that the Settlement Agreement is fair, reasonable and adequate, and (iv) the Settlement evidenced by the Settlement

Agreement is sufficiently fair, reasonable, and adequate to warrant sending notice of the Settlement to the Settlement Class.

4. **Fairness Hearing** – A hearing is scheduled for November 20, 2006 ^{WLO} (the

“Fairness Hearing”) to determine, among other things:

- Whether the Settlement should be approved as fair, reasonable and adequate;
- Whether the litigation should be dismissed with prejudice as to the Defendants pursuant to the terms of the Settlement;
- Whether the notice and notice methodology implemented pursuant to the Settlement Agreement (i) constituted the best practicable notice, (ii) constituted notice that was reasonably calculated, under the circumstances, to apprise members of the Settlement Class of the pendency of the litigation, their right to object to the Settlement, and their right to appear at the Fairness Hearing, (iii) were reasonable and constituted due, adequate, and sufficient notice to all persons entitled to notice and (iv) met all requirements of the Federal Rules of Civil Procedure and any other applicable law;
- Whether Class Counsel adequately represented the Settlement Class for purposes of entering into and implementing the Settlement Agreement;
- Whether the Plan of Allocation should be approved;
- Whether the application for attorneys’ fees and expenses filed by Class Counsel should be approved; and
- Whether the application for Case Contribution Awards to the Named Plaintiffs should be approved.

5. **Class Notice** – A proposed form of Class Notice has been presented for the Court’s consideration. The Court finds that the proposed Notice fairly and adequately (a) describes the

terms and effect of the Settlement Agreement and of the Settlement, (b) notifies the Settlement Class concerning the proposed Plan of Allocation, (c) notifies the Settlement Class that Class Counsel will seek compensation from the Settlement Fund for reimbursement of non-taxable costs of litigation, and for attorneys fees not to exceed 26% of the Settlement Amount, (d) notifies the Settlement Class that Class Counsel will seek Case Contribution Awards to the Named Plaintiffs not to exceed \$15,000 each; (e) gives notice to the Settlement Class of the time and place of the Fairness Hearing, and (f) describes how the recipients of the Class Notice may object to any of the relief requested. The Court further finds that first class mailed Notice to each Class Member, at his or her last known address, is the best notice practicable under the circumstances, and directs that Co-Lead Counsel shall:

- By no later than 30 days before the Fairness Hearing, cause the Class Notice, with such non-substantive modifications thereto as may be agreed upon by the Parties and presented to the Court, to be mailed, by first-class mail, postage prepaid, to the last known address of each Person within the Settlement Class who can be identified by reasonable effort. Defendants have provided Class Counsel with the names and last known addresses of the members of the Settlement Class, which names and addresses shall be used solely for the purpose of providing notice of this Settlement and for no other purpose.
- By no later than 30 days before the Fairness Hearing, cause the Class Notice to be published on each website identified in the Class Notice.

At or before the Fairness Hearing, Class Counsel shall file with the Court a proof of timely compliance with the foregoing mailing and publication requirements.

6. Objections to Settlement – Any member of the Settlement Class who wishes to object to the fairness, reasonableness or adequacy of the Settlement, to the Plan of Allocation, to any term of the Settlement Agreement, to the proposed award of attorneys’ fees and expenses, or to any request for Case Contribution Awards to the Named Plaintiffs, may file an Objection. An objector must file with the Court a statement of his, her, or its objection(s), specifying the reason(s), if any, for each such objection made, including any legal support and/or evidence that such objector wishes to bring to the Court’s attention or introduce in support of such objection. The objector must also mail copies of the objection and all supporting law and/or evidence to Class Counsel and to counsel for the Defendants. The addresses for filing objections with the Court and service on counsel are as follows:

Clerk of the Court
United States District Court
for the Middle District of North Carolina
324 West Market Street, Suite 401
Greensboro, NC 27401
Re: Case No. 5-00187

To Class Counsel:

T. David Copley
Keller Rohrback L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052

To Defendants’ Counsel:

Howard Shapiro
PROSKAUER ROSE LLP
LL&E Tower
909 Poydras Street, Suite 1100
New Orleans, LA 70112-4012

Paul Blankenstein
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue N.W.
Washington, D.C. 20036

The objector or his, her, or its counsel (if any) must effect service of copies of the objection on counsel listed above and file it with the Court by no later than seven (7) days before the date of the Fairness Hearing. If an objector hires an attorney to represent him, her, or it for the purposes of making such objection pursuant to this paragraph, the attorney must both effect service of a notice of appearance on counsel listed above and file it with the Court by no later than seven (7) days before the date of the Fairness Hearing. Any member of the Settlement Class or other Person who does not timely file and serve a written objection complying with the terms of this paragraph shall be deemed to have waived, and shall be foreclosed from raising, any objection to the Settlement, and any untimely objection shall be barred.

7. Appearance at Fairness Hearing – Any objector who files and serves a timely, written objection in accordance with paragraph 6 above may also appear at the Fairness Hearing either in person or through counsel retained at the objector’s expense. Objectors or their attorneys intending to appear at the Fairness Hearing must effect service of a notice of intention to appear setting forth, among other things, the name, address, and telephone number of the objector (and, if applicable, the name, address, and telephone number of the objector’s attorney) on Class Counsel and Defendants’ counsel (at the addresses set out above) and file it with the Court by no later than seven (7) days before the date of the Fairness Hearing. Any objector who does not timely file and serve a notice of intention to appear in accordance with this paragraph shall not be permitted to appear at the Fairness Hearing, except for good cause shown.

8. Notice Expenses – The expenses of printing and mailing and publishing all notices required hereby shall be paid from the Settlement Fund as provided in Section 8.2 of the Settlement Agreement.

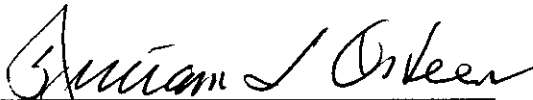
9. **Service of Papers** – Defendants’ counsel and Class Counsel shall promptly furnish each other with copies of any and all objections that come into their possession.

10. **Termination of Settlement** – This Order shall become null and void, and shall be without prejudice to the rights of the Parties, all of whom shall be restored to their respective positions existing immediately before this Court entered this Order, if the Settlement is terminated in accordance with the Settlement Agreement. In such event, Section 9 of the Settlement Agreement shall govern the rights of the Parties.

11. **Use of Order** – This Order shall not be construed or used as an admission, concession, or declaration by or against Defendants of any fault, wrongdoing, breach, or liability. This Order shall not be construed or used as an admission, concession, or declaration by or against Named Plaintiffs or the Settlement Class that their claims lack merit or that the relief requested in the Action is inappropriate, improper or unavailable, or as a waiver by any party of any arguments, defenses, or claims he, she, or it may have, including, but not limited to, any objections by Defendants to class certification in the event that the Settlement Agreement is terminated.

12. **Continuance of Hearing** – The Court reserves the right to continue the Fairness Hearing without further written notice.

SO ORDERED this 27th day of September, 2006.


HON. WILLIAM L. OSTEEN
United States District Judge