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; ONEIDA LTD. MANAGEMENT DEVELOPMENT AND EXECUTIVE COMPENSATION COMMITTEE; ONEIDA LTD. PENSION AND PROFIT SHARING FUND INVESTMENT COMMITTEE; WILBER D. ALLEN; WILLIAM F. ALLYN; CHRISTINE BOOTH; ANDREW CHURCH; ALLAN H. CONSEUR; CLARENCE A. DAVIS; GEORGIA S. DERRICO; J. PETER FOBARE; GREGORY M. HARDEN; SHELLEY J. HYDE; PETER J. KALLET; DAVID KEENAN; WILLIAM C. LANGLEY; PETER J. MARSHALL; WHITNEY D. PIDOT; HUGH R. ROVIT; CHRISTOPHER H. SMITH; FRED SPIVAK; BRIAN SUBA; CATHERINE H. SUTTMEIER; WILLIAM M. TUCK; TERRY G. WESTBROOK; NICK WHITE; and JOHN AND JANE DOES 1-20, Defendants.	Case No. 6:07-cv-00340 (NPM/GJD) SECOND AMENDED CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

I. INTRODUCTION

1. Plaintiffs Milton Lilly and Donald Grogan allege the following based upon the investigation of Plaintiffs' counsel, which included a review of U.S. Securities and Exchange Commission ("SEC") filings by Oneida Ltd.[1] ("Oneida" or the "Company"), including proxy statements (Form 14A), annual reports (Form 10-K), quarterly reports (Form 10-Q), periodic reports (Form 8-K), and registration statements (Form S-8) filed on behalf of the Oneida Ltd. Employee Stock Ownership Plan (the "Plan"), a review of the Forms 5500 filed by the Plan with the Department of Labor, interviews with participants of the Plan, and a review of available documents governing the operations of the Plan. Plaintiffs believe that substantial additional evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery.

II. NATURE OF THE ACTION

2. This is a class action brought on behalf of the Plan pursuant to ERISA §§ 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a)(2) and (a)(3), against the fiduciaries of the Plan for violations of ERISA.

3. The Plan was a stock bonus plan and trust and purportedly an Employee Stock Ownership Plan as defined by ERISA § 407(d)(6), 29 U.S.C. § 1107(d)(6), and the Internal Revenue Code (the "Code"), 26 U.S.C. § 4975(e)(7).

[1] On information and belief, Oneida effected a plan of reorganization under Chapter 11 of the U.S. Bankruptcy Code, 11 U.S.C. § 1101 et seq., pursuant to which Oneida Ltd., a New York corporation, was merged with and into Oneida Ltd., a Delaware corporation, as of September 15, 2006, with the Delaware entity as the surviving entity. References to "Oneida" or "the Company" in this complaint refer to the New York entity up to September 15, 2006 and the Delaware entity as of and following that date.

4. Plaintiffs' claims arise from the failure of Defendants, who are fiduciaries of the Plan, to act solely in the interest of the participants and beneficiaries of the Plan, and to exercise the required skill, care, prudence, and diligence in administering the Plan and the Plan's assets during the period May 28, 2003 to March 20, 2006 (the "Class Period"). On information and belief, the Plan held between 1.5 million and 1.8 million shares of Oneida common stock during the Class Period.

5. The Plan document provides that the Plan should be invested primarily in Oneida stock. However, under ERISA, the Plan document's provision for investment in Company stock was controlling only to the extent that it was consistent with ERISA. As explained below, during the period from May 28, 2003 to March 20, 2006, Oneida stock became an imprudent investment for an ERISA retirement plan. Plaintiffs allege that Defendants allowed imprudent investment of the Plan's assets in Oneida equity throughout the Class Period despite the fact that they clearly knew or should have known that such investment was imprudent due to, among other things, (a) the fact that Oneida's core legacy business – production of flatware, dinnerware, crystal, glassware and metal serveware - was suffering from declining consumer confidence and a weak economy; (b) a failed business plan that combined acquisitions of companies outside of Oneida's core business, coupled with a restructuring plan that resulted in massive employee layoffs; (c) the failure of negotiations with a private investor with regard to a preferred equity investment in the Company; (d) repeated disclosures that Oneida was in breach of its loan covenants and required waivers from it lenders, (e) two consecutive years of financial statements that included a "going concern" qualification from Oneida's independent public accountants; and (e) the steady weakening of the Company's financial position and its ultimate collapse into bankruptcy.

6. Specifically, Plaintiffs allege in Count I that the Defendants, who were responsible for the investment of the Plan's assets, breached their fiduciary duties to the Plan's participants in violation of ERISA by failing to prudently and loyally manage the Plan's investment in Oneida common stock. In Count II, Plaintiffs allege that the Defendants, who were responsible for the selection, monitoring and removal of the Plan's other fiduciaries, failed to properly monitor the performance of their fiduciary appointees and remove and replace those whose performance was inadequate. In each Count, Plaintiffs allege that Defendants breached their duties and responsibilities as co-fiduciaries by failing to prevent breaches by other fiduciaries of their duties of prudent and loyal management, and adequate monitoring.

7. As more fully explained below, during the Class Period, Defendants imprudently permitted the Plan to continue to hold tens of millions of dollars in Oneida stock. Based on publicly available Plan information, it appears that Defendants' effectively did nothing to protect Oneida employees from losing the entire value of their Plan accounts, particularly those who by virtue of the terms of the Plan were not free to diversify the Oneida stock in the Plan or withdraw their funds from the Plan. As a result of the Defendants' breaches of fiduciary duty, they have caused the Plan to lose tens of millions of dollars.

8. This action is brought on behalf of the Plan and seeks to recover losses to the Plan for which Defendants are personally liable pursuant to ERISA §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109 and 1132(a)(2). In addition, under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), Plaintiffs seek other equitable relief from Defendants, including, without limitation, injunctive relief and, as available under applicable law, constructive trust, restitution, equitable tracing, and other monetary relief.

9. ERISA §§ 409(a) and 502(a)(2) authorize participants such as Plaintiffs to sue in a representative capacity for losses suffered by the Plan as a result of breaches of fiduciary duty. Pursuant to that authority, Plaintiffs bring this action as a class action under Fed. R. Civ. P. 23 on behalf of all participants and beneficiaries of the Plan whose Plan accounts were invested in Oneida stock during the Class Period.

10. In addition, because the information and documents on which Plaintiffs' claims are based are, for the most part, solely in Defendants' possession, certain of Plaintiffs' allegations are by necessity upon information and belief. At such time as Plaintiffs have had the opportunity to conduct discovery, Plaintiffs will, to the extent necessary and appropriate, amend this Complaint, or, if required, seek leave to amend, to add such other additional facts as are discovered that further support Plaintiffs' claims.

III. JURISDICTION AND VENUE

11. **Subject Matter Jurisdiction.** This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

12. **Personal Jurisdiction.** ERISA provides for nationwide service of process. ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2). All of the Defendants are either residents of the United States or subject to service in the United States, and this Court therefore has personal jurisdiction over them. This Court also has personal jurisdiction over them pursuant to Fed. R. Civ. P. 4(k)(1)(A) because they would all be subject to the jurisdiction of a court of general jurisdiction in the State of New York.

13. **Venue.** Venue is proper in this district pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the Plan is administered in this district, some or all of the fiduciary

breaches for which relief is sought occurred in this district, and/or some Defendants reside and/or transact business in this district.

IV. PARTIES

A. Plaintiffs

14. Plaintiff Milton Lilly is a resident of Camden, New York. Plaintiff Lilly worked for Oneida beginning in April 1979 and is still employed by Oneida. Plaintiff Lilly is a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), and held Oneida common stock in his account in the Plan during the Class Period.

15. Plaintiff Donald Grogan is a resident of Oneida, New York. Plaintiff Grogan worked for Oneida beginning in May 1986 and is still employed by Oneida.. Plaintiff Grogan is a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), and held Oneida common stock in his account in the Plan during the Class Period.

B. Defendants

16. **Oneida Director Defendants.** As explained more fully below, the Plan assigns fiduciary responsibilities and duties to Oneida's Board of Directors. Plaintiffs allege that these Director Defendants knew or should have known that Oneida stock was an imprudent investment for Plan assets, and failed to take any action to protect participants or otherwise satisfy their duties, including their failure under ERISA to properly monitor other fiduciaries. The Defendants identified in this Paragraph are referred to as the "Director Defendants." On information and belief, the individual Director Defendants are as follows:

(a) **Defendant William F. Allyn** served as a Director from 1989 until his resignation from the Board effective October 25, 2004. Allyn was a member of

the Pension and Profit Sharing Fund Investment Committee until November 2003 and a member of the Management Development and Executive Compensation Committee from November 2003 until his resignation from the Board effective October 25, 2004.

(b) **Defendant Allan H. Conseur** served as a Director from 2001 until his resignation effective July 23, 2004.

(c) **Defendant Clarence A. Davis** served as a Director from August 2005 until at least September 6, 2006.

(d) **Defendant Georgia S. Derrico** served as a Director from 1982 until her resignation from the Board effective October 25, 2004. Derrico was a member of the Pension and Profit Sharing Fund Investment Committee until November 2003 and a member of the Management Development and Executive Compensation Committee from November 2003 until her resignation from the Board effective October 25, 2004.

(e) **Defendant J. Peter Fobare** served as a Director from 1998 until his resignation from the Board effective October 25, 2004.

(f) **Defendant Gregory M. Harden** served as a Director from 1998 until at least September 6, 2006. Harden was a member of the Pension and Profit Sharing Fund Investment Committee until November 2003 and a member of the Management Development and Executive Compensation Committee from November 2003 until at least September 6, 2006.

(g) **Defendant Peter J. Kallet** served as a Director from 1996 until his resignation from the Board effective May 25, 2005.

(h) **Defendant William C. Langley** served as a Director from October 25 2004 until at least September 6, 2006. Langley was a member of the Management

Development and Executive Compensation Committee from 2005 until the end of January 2006.

(i) **Defendant Peter J. Marshall** served as a Director from August 2002 until his resignation from the Board effective June 7, 2005. Marshall was a member of the Pension and Profit Sharing Fund Investment Committee until November 2003 and a member of the Management Development and Executive Compensation Committee from November 2003 until the end of January 2005.

(j) **Defendant Whitney D. Pidot** served as a Director from 1996 until his resignation from the Board effective October 25, 2004. Pidot was a member of the Pension and Profit Sharing Fund Investment Committee until November 2003 and a member of the Management Development and Executive Compensation Committee from November 2003 until his resignation from the Board effective October 25, 2004.

(k) **Defendant Hugh R. Rovit** served as a Director from October 25, 2004 until at least September 6, 2006.

(l) **Defendant Christopher H. Smith** served as a Director from October 25, 2004 until at least September 6, 2006. Smith was a member of the Management Development and Executive Compensation Committee from 2004 until at least April 29, 2005.

(m) **Defendant Fred Spivak** served as a Director from October 25, 2004 until at least September 6, 2006. Spivak was a member of the Management Development and Executive Compensation Committee from the end of January 2005 until at least September 6, 2006.

(n) **Defendant Catherine H. Suttmeier** served as a Director from 1998 until her resignation from the Board effective October 25, 2004.

(o) **Defendant William M. Tuck** served as a Director from 1996 until his resignation from the Board effective October 25, 2004. Tuck was a member of the Pension and Profit Sharing Fund Investment Committee until November 2003 and a member of the Management Development and Executive Compensation Committee from November 2003 until his resignation from the Board effective October 25, 2004.

(p) **Defendant Terry G. Westbrook** served as a Director from October 25, 2004 until at least September 6, 2006. Westbrook was a member of the Management Development and Executive Committee from October 2004 until the end of January 2005.

(q) **Defendant Nick White** served as a Director from October 25, 2004 until at least September 6, 2006. White was a member of the Management Development and Executive Compensation Committee from October 2004 until at least September 6, 2006.

17. **Director Committee Defendants.** The Pension and Profit Sharing Fund Investment Committee ("PPSFIC") was a committee comprised of members of the Oneida Board of Directors. The PPSFIC was charged with fiduciary responsibility with respect to the Plan. In November 2003 the PPSFIC was consolidated into the Management Development and Executive Compensation Committee ("MDECC") and the MDECC assumed the fiduciary responsibility with respect to the Plan. Plaintiffs allege that these Director Committee Defendants knew or should have known that Oneida stock was an imprudent investment for Plan assets, and failed to take any action to protect participants or otherwise satisfy their fiduciary duties. The Defendants identified in this Paragraph are referred to as the "Director Committee Defendants." On information and belief, the individual Director Committee Defendants are as follows:

(a) **Defendant William F. Allyn** served as a member of the Pension and Profit Sharing Fund Investment Committee until November 2003 and a member of the Management Development and Executive Compensation Committee from November 2003 until his resignation from the Board effective October 25, 2004.

(b) **Defendant Georgia S. Derrico** served as a member of the Pension and Profit Sharing Fund Investment Committee until November 2003 and a member of the Management Development and Executive Compensation Committee from November 2003 until her resignation from the Board effective October 25, 2004.

(c) **Defendant Gregory M. Harden** served as a member of the Pension and Profit Sharing Fund Investment Committee until November 2003 and a member of the Management Development and Executive Compensation Committee from November 2003 until at least September 6, 2006.

(d) **Defendant William C. Langley** served as a member of the Management Development and Executive Compensation Committee from 2005 until the end of January 2006.

(e) **Defendant Peter J. Marshall** served as a member of the Pension and Profit Sharing Fund Investment Committee until November 2003 and a member of the Management Development and Executive Compensation Committee from November 2003 until the end of January 2005.

(f) **Defendant Whitney D. Pidot** served as a member of the Pension and Profit Sharing Fund Investment Committee until November 2003 and a member of the Management Development and Executive Compensation Committee from November 2003 until his resignation from the Board effective October 25, 2004.

(g) **Defendant Christopher H. Smith** served as a member of the Management Development and Executive Compensation Committee from 2004

until at least April 29, 2005.

(h) .**Defendant Fred Spivak** served as a member of the Management Development and Executive Compensation Committee from the end of January 2005 until at least September 6, 2006.

(i) **Defendant William M. Tuck** served as a member of the Pension and Profit Sharing Fund Investment Committee until November 2003 and a member of the Management Development and Executive Compensation Committee from November 2003 until his resignation from the Board effective October 25, 2004.

(j) **Defendant Terry G. Westbrook** served as a member of the Management Development and Executive Committee from October 2004 until the end of January 2005.

(k) **Defendant Nick White** served as a member of the Management Development and Executive Compensation Committee from October 2004 until at least September 6, 2006.

18. **Administrative Committee Defendants.** The Plan authorizes the creation of an "Employee Benefits Administrative Committee" to be responsible for the administration and interpretation of the Plan; engaging accountants for the Plan; reviewing the investment performance and methods of the trustee under the Plan's trust agreement (the "Trustee") and any other funding agency under the Plan; appointing or removing investment managers; and delegating to such investment managers authority and discretion to manage the assets of the Plan. *See* Oneida Ltd. Employee Stock Ownership Plan, Amended and Restated as of January 1, 2001 (the "Plan Document") ¶ 13.1, filed as Exhibit 4.4 to Oneida Ltd., Registration Statement (Form S-8) (Aug. 1, 2002)¶. The Defendants identified in this Paragraph are referred to as the

"Administrative Committee Defendants." On information and belief, the individual Administrative Committee Defendants are as follows:

(a) **Defendant Wilber D. Allen** served as member of the Administrative Committee from 2003 through 2006,

(b) **Defendant Christine Booth** served as member of the Administrative Committee from 2003 through 2004.

(c) **Defendant Andrew Church** served as member of the Administrative Committee in 2006.

(d) **Defendant Shelley J. Hyde** served as member of the Administrative Committee from 2003 through 2005.

(e) **Defendant David Keenan** served as member of the Administrative Committee in 2006.

(f) **Defendant Brian Suba** served as member of the Administrative Committee in 2006.

(g) **Defendant Catherine H. Suttmeier** served as member of the Administrative Committee from 2003 through 2006.

19. **John and Jane Does 1-20.** Until discovery is complete, Plaintiffs may not know the identity of all of the Plan's fiduciaries during the Class Period. Therefore, some of the fiduciaries are named fictitiously, as Defendants John and Jane Does 1-20. Once their true identities are ascertained, Plaintiffs will seek leave to join them under their true names.

V. THE PLAN

20. The Plan, sponsored by Oneida, was an "individual account plan" within the meaning of ERISA 407(d)(6), 29 U.S.C. § 1107(d)(6). The Plan is a legal entity that can sue and be sued. ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1). However, in a breach of fiduciary duty action such as this, the Plan is neither a defendant nor a plaintiff. Rather, pursuant to ERISA § 409, 29 U.S.C. § 1109, and the law interpreting it, the relief requested in this action is for the benefit of the Plan and its participants/beneficiaries.

21. Certain ERISA plans, referred to as Employee Stock Ownership Plans ("ESOPs"), are designed to invest primarily in employer securities pursuant to ERISA § 407(d)(6), 29 U.S.C. § 1107(d)(6). The Plan was purportedly an ESOP. *Id.* ¶ 1.1.

22. The Plan was established effective June 8, 1987 and is a stock bonus plan and trust which are qualified and exempt from taxation under §§ 401(a) and 501(a) of the Code.

23. Employees who had completed one year of service with the Company as of June 8, 1987 became enrolled in the Plan as of that date. Employees hired after June 8, 1987 became enrolled in the Plan on the first day of the month next following the date on which the Employee completed one year of service. *Id.* ¶ 3.1.

24. Under the Plan Document, the assets of the Plan are held in a Trust and all contributions are paid over to the Trustee to hold pursuant to the Plan and the Trust Agreement. *Id.* ¶ 5.1. An account is maintained for each participant, reflecting the participant's interest in the Trust Fund. According to the Plan Document, no participants are allowed to contribute to the Trust Fund. The Company contributes to the Trust Fund for each Plan year a sum as the Board of Directors may, in its sole discretion, determine, which sum may be zero. *Id.* ¶ 4.1.

25. The Trust Fund is designed to primarily invest in shares of Oneida stock. *Id.* ¶¶ 5.3. The Trust Fund could also, in limited circumstances, be invested in cash or cash equivalent investments. *Id*.

26. A participant becomes 100% vested in his account after five years of completed service with the Company. *Id.* ¶ 7.1.

27. Throughout the Class Period, participants could not diversify the Company contribution in the Plan until they became a "Qualified Participant." According to the Plan Document, a Qualified Participant is a participant who has attained age 55 and completed 10 years of participation in the Plan. *Id.* ¶ 2.41. A Qualified Participant has limited diversification rights, as follows:

> Each Qualified Participant shall be permitted to direct the Plan as to the investment of 25 percent of the value of such Participant's Account, within 90 days after the last day of each Plan Year[2] during the Participant's Qualified Election Period.[3] Within 90 days after the close of the last Plan Year in the Participant's Qualified Election Period, a Qualified Participant may direct the Plan as to the investment of 50 percent of the value of his Account. Notwithstanding the foregoing, if the fair market value of Company Stock allocated to the Account of a Qualified Participant is $500 or less as of the Valuation Date immediately preceding the first day on which a Qualified Participant is eligible to make a diversification election under this Section 5.7, then the Qualified Participant shall not be entitled to make an election under this Section 5.7 of their employment or until they reached 59 1/2 years of age.

Id. ¶ 5.7.

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[2] "Plan Year means the twelve-month period beginning on January 1 and ending on December 31." *Id.* ¶ 2.36.

[3] "Qualified Election Period means the period beginning with the Plan Year in which the Participant first becomes a Qualified Participant and ending with the fifth successive Plan Year after the Participant has both attained age 55 and completed 10 years of participation." *Id.* ¶ 2.40.

28. Oneida was the administrator and "named fiduciary" of the Plan under ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), but to carry out many of its duties under ERISA, Oneida allocated many of its administrative functions to the Administrative Committee. Under the Plan Document, the Board of Directors retained the right to appoint the members of the Administrative Committee and to appoint the Trustee.

29. The Administrative Committee had the general responsibility for administration and interpretation of the Plan. The Administrative Committee had the duty to periodically review the investment performance and methods of the Trustee. The Administrative Committee also had the power to appoint or remove one or more Investment Managers and to delegate to such Investment Manager authority and discretion to manage (including the power to acquire and dispose of) the assets of the Plan. The Administrative Committee was to periodically review the investment performance and methods of each Investment Manager.

VI. DEFENDANTS' FIDUCIARY STATUS

A. The Nature of Fiduciary Status

30. **Named Fiduciaries.** Every plan must have one or more "named fiduciaries." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). The person named as the "administrator" in the plan instrument is automatically a named fiduciary, and in the absence of such a designation, the sponsor is the administrator. ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A).

31. **De Facto Fiduciaries.** ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under § 402(a)(1), 29 U.S.C. § 1102(a)(1), but also any other persons who in fact perform fiduciary functions. Thus, a person is a fiduciary to the extent "(i) he exercises any discretionary authority or discretionary control respecting management of such plan or

exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

32. Each of the Defendants was a fiduciary with respect to the Plan and owed fiduciary duties to the Plan and the participants under ERISA in the manner and to the extent set forth in the Plan Document, through their conduct, and under ERISA.

33. As fiduciaries, Defendants were required by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), to manage and administer the Plan and the Plan's investments solely in the interest of the Plan's participants and beneficiaries and "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

34. Plaintiffs do not allege that each Defendant was a fiduciary with respect to all aspects of the Plan's management and administration. Rather, as set forth below, Defendants were fiduciaries to the extent of the specific fiduciary discretion and authority assigned to or exercised by each of them, and, as further set forth below, the claims against each Defendant are based on such specific discretion and authority.

35. ERISA permits fiduciary functions to be delegated to insiders without an automatic violation of the rules against prohibited transactions, ERISA § 408(c)(3), 29 U.S.C. §

1108(c)(3), but insider fiduciaries, like external fiduciaries, must act solely in the interest of participants and beneficiaries, not in the interest of the Plan sponsor.

B. The Director Defendants' Fiduciary Status Under the Plan

36. Pursuant to the Plan, the Director Defendants are responsible for appointing, renewing, and removing the members of the Administrative Committee and the Trustee. *See* Plan Document ¶¶ 13.1, 13.4. As Department of Labor regulations make clear, this is a fiduciary function under ERISA. 29 C.F.R. § 2509.75-8 (D-4). Upon information and belief the Director Defendants are also responsible for appointing, renewing and removing the members of the Director Committee.

37. Consequently, in light of the foregoing duties, responsibilities, and actions, the Director Defendants were and are *de facto* fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period in that they exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

C. The Director Committee Defendants' Fiduciary Status Under the Plan

38. As members of the PPSFIC, and then from November 2003 until the end of the Class Period, as members of the MDECC, the Director Committee Defendants had the duty and responsibility to ensure that the funds in the Plan were invested in secure assets that would lead to long term growth and stability. *See* Charter of the Oneida Ltd. Management Development and Executive Compensation Committee, available at: http://www.irconnect.com/ocq/pages/corpgov.html.

39. Consequently, in light of the foregoing duties, responsibilities, and actions, the Director Committee Defendants were and are *de facto* fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period in that they exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

D. The Administrative Committee Defendants' Fiduciary Status Under the Plan

40. The Administrative Committee had the general responsibility for administration and interpretation of the Plan. The Administrative Committee had the duty to periodically review the investment performance and methods of the Trustee. The Administrative Committee also had the power to appoint or remove one or more Investment Managers and to delegate to such Investment Manager authority and discretion to manage (including the power to acquire and dispose of) the assets of the Plan. The Administrative Committee was to periodically review the investment performance and methods of each Investment Manager. The Administrative Committee had the power to administer the Plan, including the power to construe the Plan and determine all questions that arise under it. *Id.* ¶ 13.1 *et. seq.*

41. Consequently, in light of the foregoing duties, responsibilities, and actions, the Administrative Committee Defendants were and are *de facto* fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period in that they exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

VII. FACTS BEARING ON FIDUCIARY BREACH

A. Oneida Stock Became an Imprudent Investment for the Plan During the Class Period

42. In recent years and during the Class Period, Oneida was plagued by an increasingly serious set of financial and operational problems that made it imprudent for the Plan's fiduciaries to hold Oneida stock as an asset in the Plan. More specifically, Oneida stock posed an inordinate risk of significant loss, including risk of total loss of the value of the common stock in bankruptcy, and this risk is not one that could have been prudently borne on behalf of the beneficiaries of the Plan. In short, the fiduciaries in this case disregarded the Company's deteriorating financial circumstances when it came to managing the Plan's investment in Oneida stock, and were unwilling or unable to act prudently to rescue the Plan's investments.

43. The Company's deteriorating financial circumstances were not known to the settlor at the time of the Plan was established. Nor was it then known that because of these circumstances continued investment in Oneida stock would defeat or substantially impair the accomplishment of the purposes of the Plan. Given these circumstances, Defendants could not have believed reasonably that continued investment in Oneida stock was in keeping with the settlor's expectations of how a prudent fiduciary would operate.

44. Moreover, as the financial state of Oneida deteriorated, Defendants increasingly served two masters. As their loyalties became more uncertain, their discretion to act diminished. In view of the circumstances alleged below, under the prudent person standard, Defendants were required to make a careful and impartial investigation of all investment decisions. As alleged

below, the fiduciaries here cannot show that they impartially investigated the options, and consequently they abused their discretion.

45. As further noted with more particularity in the paragraphs that follow, during the Class Period the Defendants imprudently disregarded numerous clear, compelling and public indicators that the Plan's holding Oneida common stock imposed excessive risk on the beneficiaries to whom the Defendants owed a fiduciary duty. Those indicators included:

- Five consecutive Quarterly Reports on Form 10-Q, publicly filed with the SEC in the course of nearly two years, that disclosed that Oneida was in breach of its loan covenants and required waivers thereof from its lenders;
- Multiple Reports on Form 8-K, publicly filed with the SEC, that disclosed various divestitures, plant closings, layoffs, abandonment of various benefit plans, and other desperate cash-preserving measures;
- The termination of dividend payments on the common stock;
- The hiring of outside advisors by Oneida's senior lender to conduct due diligence regarding the Company's operational and financial position;
- The delisting of Oneida's common stock from the New York Stock Exchange;
- Two consecutive years of financial statements that included a 'going concern' qualification from Oneida's independent public accountants; and
- The substantial dilution of existing equity – including that held by the Plan – by the dilutive issuance of nearly 200 percent more shares in a desperate financial restructuring.

46. Oneida's march toward bankruptcy began in the early 2000's and culminated in its filing for Chapter 11 protection on March 19, 2006. Throughout this period and especially during the Class Period, prudent fiduciaries of the Plan would not have ignored the circumstances and allowed the risk of loss to the plan's beneficiaries to increase to unacceptable levels, but rather would have undertaken an investigation regarding the continued prudence in retaining and/or acquiring Oneida stock in the ESOP. Unfortunately, the fiduciaries of the Plan, on information and belief, did not and for all intents and purposes wiped out the Plan.

47. In the mid to late 1990's, Oneida went on a buying spree and acquired a number of companies that expanded Oneida's business beyond the manufacture of flatware. On November 14, 1996, Oneida acquired the assets of THC Systems, Inc., an importer and marketer of vitreous china and porcelain dinnerware for the food service industry. *See* Oneida Ltd., Current Report (Form 8-K) (Nov. 18, 1996). In June 1998, Oneida acquired the assets Badgin Nominees Pty. Ltd., which operated two Australian-based businesses, Stanley Rogers & Son, an importer and marketer of stainless steel and silverplated flatware to retail customers in Australia and New Zealand, and Westminster China, an importer and marketer of porcelain dinnerware in Australia and New Zealand. *See* Oneida Ltd., Annual Report (Form 10-K) (Apr. 13, 1999).

48. Through these acquisitions and other restructuring efforts, Oneida began an attempt to move from the manufacturing of marketed tableware to sourcing tableware. In January 1999 Oneida announced that it was implementing a restructuring program that was designed to reduce overhead expenses and enhance the Company's earnings and cash flow. Part of the restructuring program included voluntary retirement offers and the elimination of what the Company termed "overhead positions." Peter J. Kallet ("Kallet"), at the time Oneida's Chairman

and Chief Executive Officer stated, "[T]hese measures were necessary for the overall good of the company." *See* Allison Zisko, *Libbey, Oneida Restructure*, HFN, January 11, 1999.

49. On March 31, 1999 Oneida issued a press release entitled, "Oneida Broadens Strategic Restructuring Program, Expects Improved Performance, Reduced Costs" in which it announced the Company was broadening its strategic restructuring program and that it would eliminate approximately 200 positions. Kallet stated "The program we began in January was extremely successful…. We now have the flexibility to close our higher-cost manufacturing facility in Canada and reallocate that production to more efficient, lower-cost sites in New York and Mexico."

50. According to the Company's 10-K filed April 27, 2000, "Key components of the restructuring included the closure of the Company's flatware manufacturing facility in Niagara Falls, Canada; consolidation of the Company's international operations; and further elimination of positions and underperforming product lines." These restructuring efforts, combined with Oneida's rapid acquisition program, ultimately put the Company at great risk.

51. Oneida's buying spree continued. On May 30, 2000 Oneida issued a press release entitled, "Oneida Ltd. To Acquire Viners In U.K.; Expands International Distribution Rights in Separate Transaction" in which the Company announced its acquisition of all the outstanding shares of London-based Viners of Sheffield Limited, a marketer of consumer flatware and cookware in the U.K. The Company also announced that it had acquired, in a separate transaction, exclusive distribution rights for Schott Zwiesel crystal in the U.K. The agreement included both consumer and foodservice markets, and was similar to Oneida's ongoing distribution of Schott products in the United States, Canada, Latin America and Australia.

According to the press release, "The acquisition and distribution agreements are the latest in a series of moves by Oneida to support its strategic plan of becoming a worldwide leader in the global tableware market."

52. On May 31, 2000 Oneida issued a press release entitled "Oneida Ltd. To Acquire Delco International; Strategic Acquisition Expands Foodservice Division" in which the Company announced that it had signed a definitive agreement to acquire all outstanding shares of Delco International, Ltd., a marketer of foodservice tableware to foodservice distributors, chains and airlines.

53. The Company's focus on expansion, however, caused serious problems. As explained by Kallet, the Company had had five years of sales growth from 1996 though 2001, and that as a result "we did not pay attention to internal workings." *See* Chana R. Schoenberger, *Tarnished*, Forbes, March 15, 2004. The result of this inattentiveness was that the Company began to frantically chop expenses – sending manufacturing work to Asia and closing plants closer to home and laying off additional workers. The Company closed its Canadian and Mexican flatware manufacturing facilities and also sold its New York dinnerware manufacturing facility. From 1999 to 2004, Oneida essentially closed all of its manufacturing facilities in Canada, Mexico, Italy and China.

54. On October 7, 2002, Oneida announced plans to cut 170 jobs in the manufacturing and management sectors of the Company. This news came after Oneida had laid off approximately 470 employees in 2001 and had recalled about 100 workers at the beginning of 2002. *See Flatware Maker Plans To Cut 170 Jobs*, The Associated Press, Oct. 7, 2002. The restructuring efforts did little to improve earnings for the Company. The stock price, $12.95 per

share in October 2002, would begin to steadily decline and would never return to this value as the Company began a downward spiral towards bankruptcy.

55. On May 13, 2003, Oneida issued a press release entitled "Oneida Reports First Quarter Results" in which the Company announced that operating results for the first quarter ending April 26, 2003 included a net loss of $3.4 million, equal to a loss of $0.21 per share on sales of $103.9 million. This compared to net income in the prior year of $1.6 million, equal to earnings of $0.10 per share on sales of $115 million, for the first quarter of the fiscal year that ended April 2002. At the time, Oneida excused its poor performance by a series of external factors including declining consumer confidence, the conflict in Iraq, bad weather and the outbreak of the SARS virus, which Oneida complained had curtailed foreign travel and related economic activity. Oneida also announced that it would lay off more workers, thereby eliminating over 80 jobs.

56. On May 28, 2003 Oneida announced at its annual meeting that for the first time in 67 years, after 269 consecutive quarters, shareholders would not be getting a dividend check. Kallet stated, "We need to really strengthen the financial condition of the company before we pay a dividend." *See* Charley Hannagan, *Oneida's Dividend Streak Ends At 67 Years; Company Paid Shareholders for 269 Consecutive Quarters – Until Now*, The Post-Standard (Syracuse), May 29, 2003. Oneida stock closed at $9.80 per share. By this date, given the actions of the Company over the last several years, and the resulting adverse financial consequences, a prudent fiduciary would have made a serious inquiry into whether remaining so heavily invested in Oneida stock within the retirement plan was in the best interests of the Plan's participants. On

information and belief, the Defendants made no such serious inquiry to protect Plan participants and beneficiaries.

57. On June 12, 2003, employees at Oneida-owned Buffalo China Company were told that Oneida had eliminated the third-shift at the dinnerware manufacturing facility. This effectively laid off approximately 90 employees. *See* T.J. Pignataro, *Buffalo China Eliminates Third Shift*, Buff. News, June 13, 2003.

58. Shortly thereafter, Oneida once again reported losses. On August 27, 2003, Oneida issued a press release entitled "Oneida Reports Financial Results for Second Quarter and Six Months Ended July 26, 2003 – Outlines Plan to Reduce Costs and Restore Profitability" in which the Company announced a second quarter net loss of $3.7 million, equal to a loss of $0.23 per share, compared to a year-ago second quarter net income of $2.9 million, equal to earnings of $0.17 per share. For the first time, on August 27, 2003, Oneida announced that it had secured from certain lenders a waiver of the financial covenants under its credit agreement for the second quarter and that "more restrictive covenants must be met as of October 26, 2003, and it is probable that the Company will fail to meet these requirements." The Company also chopped 100 more jobs at its main manufacturing plant and announced that the Board of Directors was also considering closing the Company's Buffalo operations and four international facilities.

59. On August 28, 2003, in a conference call with market analysts, Kallet stated, "The lay offs and restructuring are designed to make Oneida Ltd. profitable again, but if the latest steps are not enough, we will take more actions if necessary…." *See Oneida Ltd. Making Tough Decisions*, Observer-Dispatch (Utica), Aug. 29, 2003.

60. The next several months brought increasingly dire news from Oneida. On October 8, 2003, Oneida earned the inglorious designation of being the biggest loser of the first year of a bull market. *See* Hope Yen, *Top Gainers, Losers On The NYSE In First Year Of New Bull Market*, The Associated Press, Oct. 8, 2003. Oneida stock closed at $3.05 per share, a decrease of 69% in share value since the closing price of $9.80 per share on May 28, 2003.

61. Later that same month, on October 31, 2003, Oneida issued a press release entitled "Oneida Approves Cost-Saving Plan Involving Five Manufacturing Sites" in which the Company announced the decision to close five of its factory sites because of substantial negative manufacturing variances. Kallet recognized at the time that the sites had "been a vital part of our company, and we recognize the ramifications of this decision for all of the affected employees." Regardless of this turn of events, on information and belief, the Oneida fiduciaries did nothing to protect the beneficiaries of the Plan from the impact of these occurrences on the value of their Plan holdings.

62. On November 3, 2003, Oneida issued a press release entitled "Oneida Ltd. Obtains Waivers From Lenders and Deferral of Certain Payments" in which the Company again announced that it had obtained waivers from lenders. The bank lenders agreed to the postponement of a $5 million reduction in the Company's credit availability until November 21, 2003, and Oneida's senior note holders agreed to defer until November 21, 2003 a $3.9 million payment from the Company that had been due on October 31, 2003.

63. On November 21, 2003 Oneida issued a press release entitled "Oneida Ltd. Obtains Extended Waivers From Lenders And Further Deferral Of Certain Payments" in which the Company announced that it had obtained further waivers from its lenders. The bank lenders

agreed to continue postponement of the $5 million reduction in the Company's credit availability until December 12, 2003, and the senior note holders agreed to defer until December 12, 2003 the $3.9 million payment that had been due on October 31, 2003.

64. On December 3, 2003, Oneida issued a press release entitled "Oneida Ltd. Reports Financial Results for Third Quarter and Nine Months Ended October 25, 2003; Moved Forward with Plan Closings, Cost Savings to Help Restore Profitability" in which the Company once again reported a quarterly loss of $74.8 million, or $4.50 per share, compared to a year-ago net income of $1.6 million, or $0.09 per share.

65. Unable to harness its debt problems, on December 12, 2003 Oneida announced once again that it had obtained a further extension of waivers from its lenders and senior note holders through January 30, 2004, of the reduction in the Company's revolving credit and the $3.9 million payment that had been originally due on October 31, 2003. The Company also announced that layoffs affecting 380 workers could begin as early as December 31, 2003.

66. In its Form 10-K for the fiscal year ended January 31, 2004, filed nearly two weeks late on April 30, 2004, Oneida's independent auditor, PricewaterhouseCoopers LLP ("PWC"), was professionally obligated to disclose definitely Oneida's woeful status. Noting Oneida's significant financial losses and continuing violation of its debt covenants, PWC concluded, "***These matters raise substantial doubt about the Company's ability to continue as a going concern.***" *Id*. at 32 (emphasis added).

67. A "going concern" qualification arises from evaluation by a company's accountants when conducting an audit.

> Continuation of an entity as a going concern is assumed in financial reporting in the absence of significant information to the contrary.

> Ordinarily, ***information that significantly contradicts the going concern assumption relates to the entity's inability to continue to meet its obligations as they become due*** without substantial disposition of assets outside the ordinary course of business, restructuring of debt, externally forced revisions of its operations, or similar actions.

Codification of Accounting Standards and Procedures, Statement on Auditing Standards No. 59, § 341.01 (Am. Inst. of Certified Pub. Accountants 2006) (emphasis added).

68. In the 2004 Form 10-K Oneida expanded on the dire financial circumstances facing the Company. The Company announced the risk it faced regarding its level of indebtedness and its ability to maintain sufficient levels of liquidity. Oneida admitted that its possible failure to obtain needed waivers and amendments to it financing agreements was "particularly tangible." The Company admitted that it had experienced several financial covenant violations over the past fiscal year.

69. As a result of the above failures, Oneida announced that it was requesting amendments to several of its financial arrangements. The Company was clear, however, that "[i]n the event the Company's lenders are unwilling to agree to such changes, the Company will continue to default in compliance with various of the covenants and provisions of its revolving credit agreement and note agreements." Oneida warned that unremedied default under the agreements could cause the lenders to declare the principal outstanding to become immediately payable, and that "[s]uch an event would create an immediate and material liquidity crisis for the Company." *Id*.

70. The Executive Summary of Management's Discussion and Analysis of Financial Conditions and Results of Operations ("MD&A") in the 2004 Form 10-K outlined the bleak outlook for the Company.

> The Company experienced a net loss of approximately $99 million for the year ended January 31, 2004 and has provided a full valuation allowance for its deferred tax assets in 2004. This has resulted in a deficit in retained earnings. In addition, the Company has violated its interest coverage ratio, leverage ratio, and net worth covenants for the second and third quarters in fiscal 2004 and at year end. The lenders have waived the covenant violations through June 15, 2004, and deferred the required pay down of total indebtedness which amounts to $35 million at year end. In addition, $3.9 million due to senior note holders has been deferred. Under the amended and restated agreement, covenant violations, if not corrected, could cause the lenders to disclose the principal outstanding to be payable immediately. Accordingly, the entire bank debt has been reported as current in the accompanying balance sheet. On March 31, 2004, the Company announced that negotiations with a potential investor had been terminated. ***These factors raise substantial doubt as to the Company's ability to continue as a going concern.***

Id. at 13 (emphasis added).

71. The MD&A went further to recognize the need to raise additional capital to reduce its outstanding debt obligations. Indeed, it outlined that in addition to raising additional capital, the Company needed to obtain amendments and/or waivers concerning its debt and improve operating results as a result of restructuring activities. If any one of these failed, ***"the Company may not continue as a going concern.***" *Id*. at 19 (emphasis added).

72. In its Notes to the Consolidated Financial Statements for the fiscal year ended January 31, 2004, the outlook for the Company could not have been clearer:

> If the Company is unable to achieve it operating and strategic plans and objectives, the Company may need to raise additional capital, obtain further covenant waivers from its lenders or seek additional investors. There can be no assurance that the Company will be successful in any or all of these endeavors, and failure may affect the Company's ability to continue to operate its business.

Id. at 34.

73. By March 19, 2004, the Company continued to flounder. The Company's cost of doing business was out of control and its liabilities outweighed its assets. As one commentator

noted, "[T]hey [Oneida] are operationally bankrupt." *See* Traci Gregory*, Floundering Oneida Ltd. Faces Many 'ifs',* Observer-Dispatch (Utica), March 19, 2004.

74. Oneida's financial meltdown continued. On May 6, 2004, PWC notified Oneida that it would decline to stand for re-election as the Company's independent accountant. *See* Oneida Ltd., Current Report (Form 8-K) (May 11, 2004). By this time, Oneida had laid off or otherwise reduced 46% of its employee workforce in a year and eliminated health care insurance for its retirees. Oneida stock closed at $0.84 per share, a decrease of 91% since the closing price of $9.80 per share on May 28, 2003. In spite of continued negative events, the Defendants did nothing to stem the Plan losses and to protect the Plan participants.

75. On May 11, 2004 Oneida issued a press release entitled "Oneida Ltd To Trade On OTC Market Effective May 11, 2004" in which the Company announced that the Company's common stock had been suspended from the New York Stock Exchange and would be traded on the Over the Counter (OTC) market. Four days later Kallet was quoted as saying, "We had five years of sales growth [through 2001], and we did not pay attention to internal workings." *See* Chana R. Schoenberger, *Tarnished*, Forbes, Mar. 15, 2004. Such inattention included the internal health of the ESOP's investments in Oneida common stock.

76. On May 26, 2004, Oneida issued a press release entitled "Oneida Reports Sales Increase in Financial Results for First Quarter Ended May 1, 2004; Business Restructuring Results in Savings" in which the Company reported income of $54.4 million for the quarter. That profit, however, arose from extraordinary items, including eliminating the Company's post-retirement medical liabilities and freezing the defined benefit pension plans. Without the extraordinary items, but including charges relating to inventory writedowns and professional

fees, Oneida had a first quarter loss of $6.3 million. Within the next month, Oneida cut 25 more workers from its headquarters and its Sherrill, NY factory.

77. By late May 2004, the combination of increasing financial losses and missed debt obligations, "going concern" warnings, worker lay offs and de-listing by the New York Stock Exchange, Oneida admitted defeat in being able to help itself and instead hired two New York firms, Carl Marks Consulting Group LLC and Peter J. Solomon Co., to advise it on restructuring and strategy.

78. On June 15, 2004 Oneida spokesman David Gymburch confirmed that the Company had failed to make a required quarterly contribution for the Oneida employee's pension plan. According to stock analyst Greg McLean, president of Caruso McLean and Co., "It's a very significant event for Oneida Ltd. to miss that payment…. For them to miss that payment, the financial situation has to be very poor." *See* Traci Gregory, *Oneida Ltd. Misses Retirement Contribution,* Observer-Dispatch (Utica), June 15, 2004.

79. On June 25, 2004, Oneida announced that it had reached an agreement in principle regarding the restructuring its existing indebtedness of $233.2 million. The proposal provided for a new $30 million revolving credit facility and for the conversion of $30 million of debt into approximately 29.8 million shares of common stock, resulting in the lenders holding 62% of the common stock. In addition the lenders would become entitled to designate six of the nine members of Oneida's Board of Directors. Oneida Ltd., Current Report (Form 8-K) (June 25, 2004), at 2. The debt restructuring closed on August 9, 2004. Oneida Ltd., Current Report (Form 8-K) (August 9, 2004), at 2.

80. Concurrently with the June 2004 negotiation of the debt restructuring, Oneida's Board of Directors was considering a bankruptcy filing. David Gymburch, Oneida's then-spokesperson, addressed the board's consideration of bankruptcy:

> Bankruptcy carries its own financial risks and significant uncertainties . . . . The Oneida Board of Directors, with the help of its advisors, very carefully considered the options available. We believe the restructuring agreement is a very positive step for Oneida.

Traci Gregory, Bank Control Part of Oneida Ltd. Deal, Observer-Dispatch (Utica), Jul. 13, 2004.

81. The debt and equity restructuring constituted a change in control of the Company. A change in control of the Company would have triggered acceleration of benefits and other obligations under several of the Company's employee benefit plans. The Company amended the plans so that the change in control did not act as a trigger.

82. On September 9, 2004, Oneida issued a press release entitled "Oneida Reports Second Quarter Financial Results; To Cease Operation of Flatware Factory in First Quarter of 2005" in which the Company announced its decision to cease operations of its flatware factory in Sherrill, New York. The closing of the Sherrill plant would result in the firing of 500 workers. The Company also announced a second quarter net loss of $48.3 million, or a loss of $2.88 per share. Before non-recurring charges and gains, the quarterly loss was still $7.6 million, or $0.45 per share. The Company was losing $1.5 million a month, according to Kallet. *See* Jolene Walters, *Kallet Says Plant Will Never Reopen,* Oneida Daily Dispatch, September 11, 2004.

83. The scope of the financial crisis Oneida was facing in 2004 was well-known to the Director Defendants, the Director Committee Defendants, and senior management, including Oneida's then Senior Vice President and Chief Financial Officer, Andrew Church. At the

hearing confirming Oneida's reorganization plan, Mr. Church testified as to the financial condition of the Company when he was hired in November 2004:

> When I came on board there was clearly a liquidity crisis and the company was incurring significant operating losses. The revenue quarter-after-quarter were declining. The company was losing market share. Gross margins were at twenty-two percent, which was a historical low. They should be more in the thirty-percent range. And that was a result of a very uncompetitive manufacturing plant that was located in Sherrill, New York.
>
> Spending was in excess of their capacity to absorb that spending in the company's operating model. And all that resulted in an operating loss for the year ended January of '05 of $89 million.
>
> On the balance sheet it was a very highly-leveraged company. The leverage ratio was eleven times EBITDAR. If you added in the forty-million-dollar – approximate forty-million-dollar unfunded pension liability, that leverage ratio was closer to thirteen times EBITDAR.
>
> Liquidity also was very low at that juncture – that point in time, about $12 million. The company had eaten through $18 million of cash in just four months prior to me joining the company.

Testimony of Andrew Church, *In* re *Oneida, Ltd., et al.*, Confirmation Hearing, Case No. 06-10489 (ALG), United States Bankruptcy Court Southern District of New York, Tr. 2-8: 1-21. When Mr. Church was asked if the Company began to consider filing for Chapter 11 bankruptcy protection, Mr. Church answered:

> Yes, we did. We – as Mr. Smith testified yesterday, we hired Credit Suisse to advise us in August of '05, and then we actually had our first meeting with the administrative agent at the end of November. So I would say it was in the October – September/October time frame when we first contemplated a Chapter 11 filing.

Id., Tr. 2-12: 6-11. Another witness at the confirmation hearing, Mr. Dennis Stogsdill, shed further light on Oneida's dire financial straits as far back as 2003. Mr. Stogsdill was the managing director and co-head of Alvarz & Marsal's ("A&M") National Credit Advisory Group, where he represented senior lenders and others by providing them due diligence, assessment of

companies' business plans, and other general financial advisory services. A&M was hired by one of Oneida's senior lenders, JPMorgan Chase, in early September 2003. According to Mr. Stogsdill he was charged:

> to take a look at the companies [sic] current management and – I'm sorry – operational and financial position, and help JPMorgan with assessing the financial restructuring alternatives, if any.

Id., Tr. 4-10: 16-19.

During A&M's evaluation of Oneida's financial condition, Mr. Stogsdill testified that bankruptcy was a possibility:

> The company wanted to consummate an out-of-court structuring, wanted to keep the company out of bankruptcy for operational reasons, and started the dialogue in April of '04 around an out-of-court restructuring to that effect.

Id., Tr. 4-16: 8-11.

Mr. Stogsdill went on to testify as to what he and A&M discovered when they became involved with Oneida in September 2003:

> The company was facing quite a bit of hardship because of their competitive disadvantage of having been one of the sole domestic producers/manufacturers of tableware in the United States, and there had been quite a bit of negative customer trends, as well as the 9/11 – events of 9/11, and the SARS crisis that were working against the company; and, in a lot of ways, the company was at a crossroads in late 2003. And so our work revolved around getting the lenders educated on everything Oneida.
>
> . . .Before we arrived, there had been a default of the credit agreement a handful of times, which had been cured through waivers and amendments. And when we were there in September, they were in the midst of violating another covenant.
>
> . . .
>
> Right around the time, just after we were involved, I think it was in October of '03, the company engaged an investment banker to pursue the

> potential injection of private equity capital into the company for the purpose of delivering.
>
> Unfortunately, [the investment banker] walked away in, I think it was late March [2004].

Id., Tr. 4-12: 23-25; 4-13: 1-6; 4-13: 19-23; 4-14: 11-15; 4-14: 21-22.

84. In spite of its debt restructuring, closure of facilities and mass layoffs, on December 10, 2004, Oneida issued a press release entitled "Oneida Ltd. Announces Financial Results for Third Quarter and Nine Months Ended October 30, 2004" in which the Company announced an ever widening quarterly loss of $23.8 million, or $0.57 per share. Still the Defendants did nothing to protect the Plan participants from losing their retirement funds.

85. In its Form 10-K for the fiscal year ended January 29, 2005, the Company once again heralded the financial trouble it was in:

> If the Company is unable to achieve its operating and strategic objectives, the Company may need to raise additional capital, obtain further covenant waivers or credit agreement amendments from its lenders or seek additional investors. There can be no assurance that the Company will be successful in any or all of these endeavors, ***and failure may affect the Company's ability to continue to operate its business.***

Oneida Ltd., Annual Report (Form 10-K) (Apr. 28, 2005) at 16 (emphasis added).

86. The impact of the Company's financial freefall was felt at the highest level when on March 23, 2005 Kallet resigned as Oneida's President and Chief Executive Officer. *See* Oneida Ltd., Current Report (Form 8-K) (Mar. 29, 2005). While attempts were made to temper the news with the reassurance that Kallet would remain a member of the Board of Directors, it was clear he was to resign that position as well by May 25, 2005. Kallet's resignation was followed by the resignation of Paul M. Rooney, Oneida's Corporate Controller on March 28, 2005. *See* Oneida Ltd., Current Report (Form 8-K) (Mar. 28, 2005).

87. By April 7, 2005, Oneida was in default of its restructured indebtedness. The default arose from the inclusion of a "going concern" opinion from BDO Seidman, LLP in Oneida's financial statements for the fiscal year ending January 2005. (BDO Seidman had replaced PWC as Oneida's independent public accountants after PWC's resignation.) The lenders waived the default and consented to the loosening of the financial covenants that the Company had agreed to only eight months earlier. *See* Oneida Ltd., Current Report (Form 8-K) (Apr. 12, 2005). In spite of these repeated red flags of a collapsing investment, including the second consecutive year of Oneida's receiving a "going concern" qualification from its auditors, the Plan fiduciaries did not act to prevent further losses to the Plan assets.

88. On April 14, 2005, Oneida issued a press release entitled "Oneida Ltd. Reports Financial Results for Fourth Quarter and Fiscal Year Ended January 29, 2005; Restructuring Activities are Continuing on Schedule; Amendment to the Company's Credit Agreement Provides Less Restrictive Financial Covenants and Increased Liquidity" in which the Company reported a fourth quarter net loss of $33.4 million, equal to $0.72 per share.

89. In August 2005, Oneida engaged a new financial advisory, Credit Suisse Securities (USA) LLC, to provide additional advice regarding the Company's plight.

90. Oneida also engaged in a number of desperate moves to seek liquidity at a significant cost to Oneida's retirees and prospective retirees. On September 30, 2005, the Internal Revenue Service granted Oneida's application for a waiver of its 2004 plan year minimum funding requirements in the amount of $7.8 million for the Retirement Plan for Employees of Oneida Ltd. *See* Oneida Ltd., Current Report (Form 8-K) (Oct. 6, 2005).

91. On December 8, 2005, Oneida issued a press release entitled "Oneida Ltd. Reports Improved Operating Income for Third Quarter and Nine Months Ended October 29, 2005" in which the Company reported another net loss. For the third quarter ending October 29, 2005, Oneida's net loss was $6.0 million, equal to $0.13 per share.

92. On March 9, 2006, Oneida issued a press release entitled "Oneida Announces Comprehensive Prenegotiated Recapitalization" in which the Company announced that it had reached an agreement with its lenders on a recapitalization plan. The terms of the plan required Oneida to file a voluntary petition for a prenegotiated reorganization under Chapter 11 of the U.S. Bankruptcy Code. Upon confirmation of the plan, all of Oneida's existing common and preferred stock would be cancelled and receive no recovery, and new common stock would be issued to the holders of Oneida's Tranche B debt. As of March 9, 2006, "the company believes that Oneida's currently outstanding preferred and common stock has no value." *Id.*

93. Upon information and belief the Plan participants were notified that effective March 20, 2006, ***eleven days after the Company announced that it would file for bankruptcy***, the shares held in the Plan were to be sold and the liquidation would be completed by March 27, 2006. Upon settlement of all trades related to the sales of the Oneida shares, Plan participant's balances in Oneida shares were automatically transferred to the Fidelity Retirement Government Money Market Portfolio. Oneida stock closed at $0.075 per share on March 20, 2006, a decrease of 99% in share value since the closing price of $9.80 per share on May 28, 2003.

B. Defendants Knew or Should Have Known That Oneida Stock Was an Imprudent Investment

94. During the Class Period, Defendants knew or should have known that Oneida stock was an imprudent investment for the Plan due to (1) the precipitous decline in the value of

Oneida stock, (2) the serious mismanagement of the Company including numerous operational problems; and (3) the abundant evidence of the Company's desperate financial condition.

1. The Value of the Plan's Investment in Oneida Stock Precipitously Declined During the Class Period

95. Defendants were responsible for managing the Plan's investment in Oneida stock. Notwithstanding this responsibility, Defendants took no action to protect the Plan in the face of the precipitous decline in the price of the stock. Oneida stock began its final downward fall in October 2002. During the Class Period, the fall became a freefall. As shown below, the stock plunged from $12 per share to effectively $0 during the Class Period. Despite this precipitous decline and the decimation of retirement savings that it caused, Defendants took no action, standing idly by as the entire company stock investment was lost.

96. The Defendants abused their discretion by not taking action until after the stock became worthless.

2. Oneida Was Seriously Mismanaged and Faced Desperate Financial Circumstances During the Class Period

97. As described above, the Company experienced numerous operation problems and failures before and during the Class Period that changed the risk profile of the company and exposed participants' retirement savings to unacceptable levels of risk. The litany of the failure to meet financial covenants, the divestitures, layoffs, abandonment of benefit plans, termination of dividends, "going concern" warnings and more, were all publicly disclosed and therefore easily known to Defendants. These failures exhibit a pattern of mismanagement that imperiled the Company as well as the Plan's investment in Oneida stock.

- As described in Section VI above, the Company was suffering financially during the Class Period.

Any **one** of these events indicated that Oneida's financial condition was difficult. Any **two** indicated the trend of deterioration. **All** of these events were, for all intents and purposes, ignored by the Defendants, in further abuse of their discretion.

98. If Defendants had examined cursorily Oneida's debt restructuring, they should have noticed the drastic adverse shift in the Company's financial structure:

Before August 2004 debt restructuring[4]		
Debt instrument	**Principal (million)**	**Interest rate**
Senior Notes due May 31, 2005	$18.0	9.49%
Revolving Credit Agreement due May 31, 2005	$202.0	1.56 – 5.13%

[4] Oneida Ltd., Annual Report (Form 10-K) (Apr. 28, 2005) at 48.

After August 2004 debt restructuring[5]		
Debt instrument	**Principal (million)**	**Interest rate**[6]
Tranche A term loan	$125	14.1 – 14.6%
Tranche B term loan	$80	17%
Revolving credit facility	$30	6.6 – 9.3%

Defendants also should have noticed that the Tranche B loan provided that in the first year of the loan, interest was to be added to the principal, in the second year 70% of the interest was to be added to the principal, and in the third year 30% of the interest was to be added to the principal – terms redolent of the 'negative amortization' loans that are part of the current residential mortgage industry crisis. Since higher interest rates are correlated to greater risk, *see, e.g.*, *In re Oakwood Homes Corp.*, 449 F.3d 588, 613 (3d Cir. 2006), Defendants should have recognized the lenders' assessment of Oneida as parlous when the Company's prevalent loan interest rate skyrocketed from 1.5 to 5.1% to more than 14%.

99. If Defendants had used and reviewed readily available, objective metrics, they should have recognized that there was a high likelihood that Oneida would be filing for bankruptcy. For instance, the Altman Z-Score, developed in 1968 by Prof. Edward I. Altman of the Stern School of Business at New York University, is a bankruptcy prediction model commonly accepted and used by financial analysts. *See National Wildlife Federation v. EPA*, 286 F.3d 554, 565-66 (D.C. Cir. 2002) (upholding government agency's use of Z-score analysis

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[5] Oneida Ltd., Current Report (Form 8-K) (Aug. 19, 2004) at 15; Second Amended and Restated Credit Agreement dated as of Aug. 9, 2004 among Oneida Ltd., the Financial Institutions Party thereto and JPMorgan Chase Bank, available as Exhibit 10.1 to *id.*

[6] Interest rates are stated in the agreement as a margin over the London Interbank Offered Rate, which was approximately 4.6 to 5.3% as of August 9, 2004 for the durations electable by Oneida. The actual terms of the Tranche A loan provided for interest at LIBOR plus 6.0 to 8.25%; the actual terms of the Tranche B loan provided for interest at LIBOR plus 13%, subject to a 17% cap; and the actual terms of the revolver provided for interest at LIBOR plus 2.0 to 4.0%. Note that the calculated interest rate for the Tranche B loan would have been 17.6 to 18.3% had it not been capped.

for predicting likelihood of bankruptcy and noting that it "has been quite accurate over these last 25 years and remains an objective, established tool") (internal quotes and citations omitted). For every fiscal quarter during the Class Period, a simple Z-Score calculation of would have revealed that Oneida's Z-Score never exceeded 1.1, while companies with Z-Scores below 1.81 are objectively regarded to be likely to file for bankruptcy. *Id.* at 564.

100. Filing for bankruptcy was considered by the Board of Directors and senior management of Oneida during the Class Period, and in any event not later than June 2004. *See* ¶ 77 above. That bankruptcy was an active consideration of Oneida's management and Board of Directors should have indicated to Defendants that continued investment of the Plan in Oneida stock was imprudent, since it is well known, and Defendants should have known, that in bankruptcy common stock is typically cancelled without consideration.

101. Despite these dire, publicly disclosed and readily ascertainable circumstances, on information and belief defendants did not undertake any reasonable or meaningful investigation and action to monitor the situation, or implement a strategy for mitigating the Plan's losses, and defendants failed to take any action to analyze the continued risk of keeping the Plan's investment in company stock during the Class Period.

102. In addition, the Defendants failed to adequately review the performance of the other fiduciaries of the Plan to ensure that they were fulfilling their fiduciary duties under the Plan and ERISA.

103. Defendants failed to conduct an appropriate investigation into whether Oneida stock was and continued to be a prudent investment for the Plan. Any investigation by Defendants would have revealed to a reasonable fiduciary that investment by the Plan in Oneida

common stock, under these circumstances, was clearly imprudent. A prudent fiduciary acting under similar circumstances would have acted to protect participants against unnecessary losses, and would have acted to mitigate the losses.

104. Because Defendants knew or should have known that Oneida was not a prudent investment option for the Plan, they had an obligation to protect the Plan and its participants from unreasonable and entirely predictable losses incurred as a result of the Plan's investment in Oneida common stock.

105. On information and belief, the Defendants failed to make any assessment as to whether the continued holding of the Plan assets in Oneida stock was prudent and loyal under the circumstances even though the price of Oneida stock had declined precipitously, the viability of the Company was seriously in question, and the Plan's holding Oneida common stock imposed excessive, inordinate risk on its beneficiaries. Even when Oneida was on the brink of bankruptcy, the fiduciaries took no meaningful action to prevent further Plan losses.

106. Had Defendants conducted a prudent evaluation and investigation of the future prospects of the Plan's investment in Oneida stock, or taken into account what they knew or should have known about the dire circumstances facing the Company, they would have discovered – to the extent they did not already know – that continued investment in Oneida stock was imprudent.

107. A reasonably prudent fiduciary would have recognized the unacceptable risk posed to Plan assets as a result of Oneida's serious mismanagement and desperate financial condition and would have taken action to prevent or at least mitigate the Plan's losses during the

Class period. By doing nothing as the Plan's investment in Oneida stock was decimated, Defendants breached their duties under ERISA and abused their discretion as Plan fiduciaries.

VIII. THE RELEVANT LAW

108. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides, in pertinent part, that a civil action may be brought by a participant for relief under ERISA § 409, 29 U.S.C. § 1109.

109. ERISA § 409(a), 29 U.S.C. § 1109(a), "Liability for Breach of Fiduciary Duty," provides, in pertinent part, that "any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary."

110. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes individual participants to seek equitable relief from defendants, including, without limitation, injunctive relief and, as available under applicable law, constructive trust, restitution, and other relief.

111. ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B), provides, in pertinent part, that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

112. These fiduciary duties under ERISA §§ 404(a)(1)(A) and (B) are referred to as the duties of loyalty, exclusive purpose and prudence and are the "highest known to the law." *Flanigan v. General Elec. Co.*, 242 F.3d 78, 86 (2d Cir. 2001). They entail, among other things:

(a) The duty to conduct an independent and thorough investigation into, and to continually monitor, the merits of all the investments of a plan, including in this instance the Oneida stock, to ensure that each investment is a suitable option for the plan;

(b) The duty to avoid conflicts of interest and to resolve them promptly when they occur. A fiduciary must always administer a plan with an "eye single" to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor; and

(c) The duty to follow the terms of the plan document only "insofar as such documents and instruments are consistent with the provisions of [title I] and title IV" of ERISA. 29 U.S.C. § 1104(a)(1)(D). Therefore, if a plan's terms are inconsistent with ERISA, a prudent fiduciary acting in the best interests of the plan's participants must effectively override the plan's terms. The Department of Labor's regulations interpreting ERISA also demonstrate that the fiduciary's duty of prudence trumps even his obligations to comply with plan terms, including statements of investment policy or plan design.

113. ERISA § 405(a), 29 U.S.C. § 1105(a), "Liability for Breach by Co-Fiduciary," provides, in pertinent part, that:

> In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> (2) if, by his failure to comply with section 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

114. Co-fiduciary liability is an important part of ERISA's regulation of fiduciary responsibility. Because ERISA permits the fractionalization of the fiduciary duty, there may be, as in this case, several ERISA fiduciaries involved in a given issue, such as the role of company stock in a plan. In the absence of co-fiduciary liability, fiduciaries would be incentivized to limit their responsibilities as much as possible and to ignore the conduct of other fiduciaries. The result would be a setting in which a major fiduciary breach could occur, but the responsible party could not easily be identified. Co-fiduciary liability obviates this. Even if a fiduciary merely knows of a breach, a breach he had no connection with, he must take steps to remedy it:

> [I]f a fiduciary knows that another fiduciary of the plan has committed a breach, and the first fiduciary knows that this is a breach, the first fiduciary must take reasonable steps under the circumstances to remedy the breach. . . . [T]he most appropriate steps in the circumstances may be to notify the plan sponsor of the breach, or to proceed to an appropriate Federal court for instructions, or bring the matter to the attention of the Secretary of Labor. The proper remedy is to be determined by the facts and circumstances of the particular case, and it may be affected by the relationship of the fiduciary to the plan and to the co-fiduciary, the duties and responsibilities of the fiduciary in question, and the nature of the breach.

1974 U.S.C.C.A.N. 5038, 1974 WL 11542, at 5080.

115. Plaintiffs therefore bring this action under the authority of ERISA § 502(a)(2) for relief under ERISA § 409(a) to recover losses sustained by the Plan arising out of the breaches of fiduciary duties by the Defendants for violations under ERISA § 404(a)(1) and ERISA § 405(a).

IX. CAUSES OF ACTION

A. Count I: Failure to Prudently and Loyally Manage the Plan and Assets of the Plan

116. Plaintiffs incorporate by this reference the paragraphs above.

117. This claim is asserted against all Defendants.

118. The Plan is governed by the provisions of ERISA, 29 U.S.C. §§ 1001, et. seq., and Plaintiffs are participants of the Plan.

119. Each of the Defendants acted as a fiduciary under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), with respect to the Plan and its participants.

120. Each of the Defendants was also a co-fiduciary of the other Defendants, under ERISA § 405, 29 U.S.C. § 1105, with respect to the Plan and its participants. As co-fiduciaries, each of the Defendants is liable for the others' conduct under the terms of ERISA § 405(a), 29 U.S.C. § 1005(a).

121. The Defendants breached their fiduciary duties they owed the Plan, Plaintiffs and the Class by maintaining the Plan investment in Oneida stock. Moreover, Defendants breached their duty of prudence by, upon information and belief, failing to conduct any meaningful assessment as to whether the continued holding of all the Plan's assets in Oneida stock was prudent and loyal under the circumstances. Because of their positions at the Company, as well as public statements regarding the Company's dire financial condition, all of the Defendants knew or should have known that Oneida stock was no longer a prudent investment for the Plan.

122. Regardless of the wording of any of the Plan documents, all Defendants were bound by their duties of prudence and loyalty to disregard plan documents when following such documents would be disloyal and imprudent. Defendants named in this Count had a duty under ERISA § 404(a)(D), 29 U.S.C. § 1104(a)(D) to sell the Plan's investment in Oneida stock at such time as continued investment was imprudent, and, thus, contrary to ERISA. As a matter of black letter ERISA law, Plan documents cannot require a fiduciary to act imprudently nor can they obviate a fiduciary's responsibility to manage the Plan prudently and loyally and with an eye single to the interests of the Plan participants and beneficiaries. As the Department of Labor has repeatedly held, even where a plan arguably mandates a fiduciary's actions, ERISA § 404(a)(1)(D) forbids fiduciaries from following plan documents if doing so would be imprudent or otherwise violate ERISA.

123. Each of the Defendants knowingly participated in these fiduciary breaches by their co-fiduciaries, enabled the co-fiduciaries to commit such breaches by their failure to comply with the provisions of ERISA § 404(a), 29 U.S.C. § 1104(a), and had knowledge of the breaches of the co-fiduciaries and failed to make reasonable efforts to remedy such breaches.

124. On information and belief, these Defendants participated in and/or knew about the Company's highly risky financial circumstances and had knowledge at all relevant times of the factual matters pertaining to the imprudence of Oneida common stock as an investment for the participants' retirement assets.

125. Despite this knowledge, these Defendants knowingly participated in their co-fiduciaries' failures to prudently and loyally manage the Plan's continued holding of Oneida stock during the Class Period. They did so by themselves making imprudent and disloyal

decisions respecting the Plan's continued investment in Oneida stock in the manner alleged herein in violation of ERISA § 405(a)(1)(A). In addition, these same Defendants failed to undertake any effort to remedy their co-fiduciaries' and one-another's failures to prudently and loyally manage the Plan's investment in Oneida stock despite knowing such failures were breaches of fiduciary duty under ERISA. Instead, they allowed the harm to continue and contributed to it throughout the Class Period in violation of ERISA § 405(a)(1)(C).

126. As a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plan, and indirectly the Plaintiffs and the other participants and beneficiaries, lost millions of dollars.

127. Pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), and ERISA § 409(a), 29 U.S.C. § 1109(a), the Defendants are liable to restore the losses to the Plan caused by their violation of their fiduciary duty.

B. Count II: Failure to Monitor Fiduciaries

128. Plaintiffs incorporate by this reference the allegations above.

129. This Count alleges fiduciary breach against the following Defendants: the Director Defendants and the Administrative Committee Defendants (the "Monitoring Defendants").

130. As alleged above, during the Class Period the Monitoring Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or de facto fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

131. As alleged above, the scope of the fiduciary responsibilities of the Monitoring Defendants included the responsibility to appoint, and remove, and thus, monitor the performance of other fiduciaries, as follows:

Monitoring Fiduciary	**Monitored Fiduciary**	**Reference**
Director Defendants	Director Committee and Administrative Committee	Charter of the Oneida Ltd. Management Development and Executive Compensation Committee, available at http://www.irconnect.com/ocq/pages/corpgov.html and Plan Document ¶ 13.1 *et. seq.*
Administrative Committee Defendants	Trustee and Investment Manager	Plan Document ¶ 13.1 *et. seq.*

132. Under ERISA, a monitoring fiduciary must ensure that the monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment and holding of plan assets, and must take prompt and effective action to protect the plan and participants when they are not.

133. The monitoring duty further requires that appointing fiduciaries have procedures in place so that on an ongoing basis they may review and evaluate whether the "hands-on" fiduciaries are doing an adequate job (for example, by requiring periodic reports on their work and the plan's performance, and by ensuring that they have a prudent process for obtaining the information and resources they need). In the absence of a sensible process for monitoring their appointees, the appointing fiduciaries would have no basis for prudently concluding that their appointees were faithfully and effectively performing their obligations to plan participants or for deciding whether to retain or remove them.

134. Furthermore, a monitoring fiduciary must provide the monitored fiduciaries with complete and accurate information in their possession that they know or reasonably should know that the monitored fiduciaries must have in order to prudently manage the plan and the plan assets, or that may have an extreme impact on the plan and the fiduciaries' investment decisions regarding the plan.

135. The Monitoring Defendants breached their fiduciary monitoring duties by, among other things, (a) failing, at least with respect to the Plan's investment in Company stock, to monitor their appointees, to evaluate their performance, or to have any system in place for doing so, and standing idly by as the Plan suffered enormous losses as a result of their appointees' imprudent actions and inaction with respect to Company stock; (b) failing to ensure that the monitored fiduciaries appreciated the true extent of Oneida's deteriorating financial condition and inevitable bankruptcy, and the likely impact of such on the value of the Plan's investment in Oneida stock; (c) to the extent any appointee lacked such information, failing to provide complete and accurate information to all of their appointees such that they could make sufficiently informed fiduciary decisions with respect to the Plan's assets; and (d) failing to remove appointees whose performance was inadequate in that they continued to maintain investments in Oneida stock despite their knowledge of practices that rendered Oneida stock an imprudent investment during the Class Period, and who breached their fiduciary duties under ERISA.

136. As a consequence of the Monitoring Defendants' breaches of fiduciary duty, the Plan suffered tremendous losses. If the Monitoring Defendants had discharged their fiduciary monitoring duties as described above, the losses suffered by the Plan would have been

minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plan, and indirectly Plaintiffs and the other Class members, lost millions of dollars.

137. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a), 1132(a)(2) and (a)(3), the Monitoring Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

138. Each of the Monitoring Defendants knowingly participated in these fiduciary breaches by their co-fiduciaries, enabled the co-fiduciaries to commit such breaches by their failure to comply with the provisions of 29 U.S.C. § 1104(a), and had knowledge of the breaches of the co-fiduciaries and failed to make reasonable efforts to remedy such breaches.

139. Pursuant to 29 U.S.C. § 1132(a)(2) and 29 U.S.C. § 1109(a), the Monitoring Defendants are liable to restore the losses to the Plan and its participants caused by their violation of their fiduciary duty.

X. REMEDY FOR BREACHES OF FIDUCIARY DUTY

140. The Defendants breached their fiduciary duties in that they knew or should have known the facts as alleged above, and therefore knew or should have known that the Plan's assets should not have been invested in Oneida stock during the Class Period.

141. As a consequence of the Defendants' breaches, the Plan suffered significant losses.

142. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) authorizes a plan participant to bring a civil action for appropriate relief under ERISA § 409, 29 U.S.C. § 1109. Section 409 requires

"any person who is a fiduciary…who breaches any of the…duties imposed upon fiduciaries…to make good to such plan any losses to the plan…." Section 409 also authorizes "such other equitable or remedial relief as the court may deem appropriate…."

143. Plaintiffs and the Class are therefore entitled to relief from the Defendants in the form of

(a) a monetary payment to the Plan to make good to the Plan the losses to the Plan resulting from the breaches of fiduciary duties alleged above in an amount to be proven at trial based on the principles described above, as provided by ERISA § 409(a), 29 U.S.C. § 1109(a);

(b) injunctive and other appropriate equitable relief to remedy the breaches alleged above, as provided by ERISA §§ 409(a), 502(a)(2) and (3), 29 U.S.C. §§ 1109(a), 1132(a)(2) and (3);

(c) injunctive and other appropriate equitable relief pursuant to ERISA § 502(a)(3), 29 U.S.C. 1132(a)(3), for knowing participation by a non-fiduciary in a fiduciary breach;

(d) reasonable attorney fees and expenses, as provided by ERISA § 502(g), 29 U.S.C. § 1132(g), the common fund doctrine, and other applicable law;

(e) taxable costs and interest on these amounts, as provided by law; and

(f) such other legal or equitable relief as may be just and proper.

144. Under ERISA, each Defendant is jointly and severally liable for the losses suffered by the Plan in this case.

XI. CLASS ACTION ALLEGATIONS

145. **Class Definition**. Plaintiffs bring this action as a class action pursuant to Rules 23(a), (b)(1), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure on behalf of Plaintiffs and the following class of persons similarly situated (the "Class"):

All persons, other than Defendants, who were participants in or beneficiaries of the Plan at any time between May 28, 2003 and March 20, 2006 and whose Plan accounts included investments in Oneida stock.

146. **Class Period.** The fiduciaries of the Plan knew or should have known at least by May 28, 2003 that the Company's material weaknesses were so pervasive and the risk of holding Oneida stock was so inordinate that Oneida stock could no longer be held or offered as a prudent investment for the Plan.

147. **Numerosity.** The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiffs at this time, and can only be ascertained through appropriate discovery, Plaintiffs believe there are, based on the Plan's Form 5500 for Plan year 2004, more than 1,400 members of the Class who participated in, or were beneficiaries of, the Plan during the Class Period.

148. **Commonality.** Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are:

(a) whether Defendants each owed a fiduciary duty to Plaintiffs and members of the Class;

(b) whether Defendants breached their fiduciary duties to Plaintiffs and members of the Class by failing to act prudently and solely in the interests of the Plan's participants and beneficiaries;

(c) whether Defendants violated ERISA; and

(d) whether the Plan has suffered losses and, if so, what is the proper measure of damages.

149. **Typicality.** Plaintiffs' claims are typical of the claims of the members of the Class because: (a) to the extent Plaintiffs seek relief on behalf of the Plan pursuant to ERISA § 502(a)(2), his claim on behalf of the Plan is not only typical to, but identical to a claim under this section brought by any Class member; and (2) to the extent Plaintiffs seek relief under ERISA § 502(a)(3) on behalf of themselves for equitable relief, that relief would affect all Class members equally.

150. **Adequacy.** Plaintiffs will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class action, complex, and ERISA litigation. Plaintiffs have no interests antagonistic to or in conflict with those of the Class.

151. **Rule 23(b)(1)(B) Requirements.** Class action status in this ERISA action is warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the actions, or substantially impair or impede their ability to protect their interests.

152. **Other Rule 23(b) Requirements.** Class action status is also warranted under the other subsections of Rule 23(b) because: (i) prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for Defendants; (ii) Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole; and (iii) questions of law or fact common to members of the Class predominate over any questions affecting only individual members and a class action is superior to the other available methods for the fair and efficient adjudication of this controversy.

XII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for:

A. A Declaration that the Defendants, and each of them, have breached their ERISA fiduciary duties to the participants;

B. An Order compelling the Defendants to make good to the Plan all losses to the Plan resulting from Defendants' breaches of their fiduciary duties, including losses to the Plan resulting from imprudent investment of the Plan's assets, and to restore to the Plan all profits the Defendants made through use of the Plan's assets, and to restore to the Plan all profits which the participants would have made if the Defendants had fulfilled their fiduciary obligations;

C. Actual damages in the amount of any losses the Plan suffered, to be allocated among the participants' individual accounts in proportion to the accounts' losses;

D. An Order awarding costs pursuant to 29 U.S.C. § 1132(g);

E. An Order awarding attorneys' fees pursuant to the common fund doctrine, 29 U.S.C. § 1132(g), and other applicable law;

F. An Order for equitable restitution and other appropriate equitable and injunctive relief against the Defendants.

Dated this 11th day of July, 2007.

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