

Smith, et al. v. Krispy Kreme Doughnut Corporation, et al  
Notice Administrator  
P.O. Box 3240  
Portland, OR 97208-3240

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF NORTH CAROLINA**

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

Plaintiffs,

v.

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

Defendants.

No. 1:05CV00187

**NOTICE OF CLASS ACTION SETTLEMENT**

**Your legal rights might be affected if you are a member of the following class:**

ALL PARTICIPANTS IN THE KRISPY KREME DOUGHNUT CORPORATION RETIREMENT SAVINGS PLAN (THE "RSP") OR THE KRISPY KREME PROFIT SHARING STOCK OWNERSHIP PLAN (THE "KSOP") (COLLECTIVELY THE "PLANS") AND THEIR BENEFICIARIES, EXCLUDING THE DEFENDANTS, FOR WHOSE ACCOUNTS THE FIDUCIARIES OF THE PLANS MADE OR MAINTAINED INVESTMENTS IN KRISPY KREME COMMON STOCK BETWEEN JANUARY 1, 2003 AND MAY 15, 2006.

**A FEDERAL COURT AUTHORIZED THIS NOTICE.  
THIS IS NOT A SOLICITATION FROM A LAWYER. YOU HAVE NOT BEEN SUED.**

- The Court has preliminarily approved a proposed settlement of a class action lawsuit brought under the Employee Retirement Income Security Act (often referred to as "ERISA") (the "Settlement"). The Settlement will provide for payments to the Krispy Kreme Doughnut Corporation Retirement Savings Plan (the "RSP") and the Krispy Kreme Profit Sharing Stock Ownership Plan (the KSOP") and for allocation of those payments to the accounts of members of the Settlement Class who had portions of their Plans accounts invested in Company stock.
- The Court has scheduled a hearing on final approval of the Settlement and on Named Plaintiffs' motion for attorneys' fees and expenses and for Named Plaintiff Case Contribution Awards. That hearing before United States District Judge William L. Osteen has been scheduled for January 10, 2007, at the United States District Court, Middle District of North Carolina, Greensboro, North Carolina 27401.
- This Notice contains summary information with respect to the Settlement. The terms and conditions of the Settlement are set forth in a Class Action Settlement Agreement (the "Settlement Agreement"). Capitalized terms used in this Notice but not otherwise defined herein shall have the meanings assigned to them in the Settlement Agreement. The Settlement Agreement, and additional information with respect to this lawsuit and the Settlement, are available at [www.kellersettlements.com](http://www.kellersettlements.com) or from Class Counsel listed in response to Question No. 13 below. Class Counsel have established a toll-free phone number to receive your comments and questions: 1-800-269-0816.

**PLEASE READ THIS NOTICE CAREFULLY AND COMPLETELY. IF YOU ARE A MEMBER OF THE SETTLEMENT CLASS TO WHOM THIS NOTICE IS ADDRESSED, THE SETTLEMENT WILL AFFECT YOUR RIGHTS. YOU ARE NOT**

**BEING SUED IN THIS MATTER. YOU DO NOT HAVE TO APPEAR IN COURT, AND YOU DO NOT HAVE TO HIRE AN ATTORNEY IN THIS CASE. IF YOU ARE IN FAVOR OF THE SETTLEMENT, YOU NEED NOT DO ANYTHING. IF YOU DISAPPROVE, YOU MAY OBJECT TO THE SETTLEMENT PURSUANT TO THE PROCEDURES DESCRIBED BELOW.**

<b>YOUR LEGAL RIGHTS AND OPTIONS IN THE SETTLEMENT:</b>	
<b>YOU CAN DO NOTHING. NO ACTION IS NECESSARY TO RECEIVE PAYMENT.</b>	If the Settlement is approved by the Court and you are a member of the Settlement Class, you will not need to do anything to receive a payment. The portion, if any, of the Settlement Fund to be allocated to your Plans account will be calculated as part of the implementation of the Settlement.  If you are a current Plan participant, any share of the Settlement Fund to which you are entitled will be deposited into your Plans account. If you no longer are a participant of the Plans and are entitled to share in the Settlement Fund, a Plan account may be established for you, if necessary, and you will be notified of such account.
<b>YOU CAN OBJECT. (BY DECEMBER 18, 2006)</b>	If you wish to object to any part of the Settlement, you may (as discussed below) write to the Court and counsel about why you do not approve of the Settlement.
<b>YOU CAN GO TO A HEARING. (TO BE HELD AT 2:00 P.M., ON JANUARY 10, 2007)</b>	If you have submitted a timely written objection to the Settlement to the Court and counsel, you may (but do not have to) attend the Court Hearing about the Settlement and present your objections to the Court. You may attend the Hearing even if you do not file a written objection, but you will only be allowed to speak at the Hearing if you file written comments in advance of the Hearing.

- These rights and options - **and the deadlines to exercise them** - are explained in this Notice.
- The Court still has to decide whether to finally approve the Settlement. Payments will be made only if the Court finally approves the Settlement and that approval is upheld in the event of any appeals.

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This litigation (the “Action”) is a case in which Plaintiffs allege that the Defendants breached certain fiduciary duties they owed to the participants in and beneficiaries of the Plans. Copies of the most recent Complaint and other documents filed in the Action are available at [www.kellersettlements.com](http://www.kellersettlements.com).

## SUMMARY OF SETTLEMENT

A Settlement Fund consisting of \$4.75 million in cash, plus interest, is being established in the Action. The net cash amount in the Settlement Fund, after payment of any taxes, expenses, approved attorneys’ fees and costs, and compensation to the Named Plaintiffs, will be paid to the Plan and be allocated to Settlement Class members according to a Plan of Allocation to be approved by the Court.

In addition, the Company is providing important and valuable structural relief as described in detail below in Section 6 of this Notice.

As with any litigated case, Plaintiffs would face an uncertain outcome if the Action were to continue against the Defendants. Continued litigation of the Action against these Defendants could result in a judgment or verdict greater or lesser than the recovery under the Settlement Agreement, or in no recovery at all.

Throughout this litigation, the Named Plaintiffs and the Defendants have disagreed on both liability and damages, and they do not agree on the amount that would be recoverable even if the Plaintiffs were to prevail at trial. The Defendants have denied and continue to deny the claims and contentions alleged by the Named Plaintiffs. They deny that they are liable at all to the Settlement Class and that the Settlement Class or the Plan have suffered any damages for which the Defendants could be legally responsible. Nevertheless, the Defendants have taken into account the uncertainty and risks inherent in any litigation, particularly in a complex case such as this, and have concluded that it is desirable that the Action be fully and finally settled as to them on the terms and conditions set forth in the Settlement Agreement.

### 1. Why did I get this Notice package?

You or someone in your family is, or may have been, a participant in or beneficiary of the Plans. The Court caused this Notice to be sent to you because, if you fall within that group, you have a right to know about the Settlement and about all of your options before the Court decides whether to approve the Settlement. If the Court approves the Settlement, and after any appeals are resolved, the net amount of the Settlement Fund will be paid to the Plans and then allocated among Settlement Class members according to a Court-approved Plan of Allocation. This Notice package describes the litigation, the Settlement, your legal rights, what benefits are available, who is eligible for them, and how to get them.

The Court in charge of this case is the United States District Court for the Middle District of North Carolina. The people who sued are called the “Named Plaintiffs,” and the people they sued are called “Defendants.” The Named Plaintiffs in the Action are Paul Smith and Alfie Carter. The Defendants are the Company and the following other Persons named as defendants in the Complaint: Randy J. Casstevens, Ken Hudson, Sherry Luper, Frank Murphy, Pam Petro-Ott, Michael C. Phalen, Sherry Polonsky, Jeff Thielen, Scott A. Livengood, and John N. (Jack) McAleer. The legal action that is the subject of this Notice and the Settlement is known as *Smith, et al. v. Krispy Kreme Doughnut Corporation, et al.*, Civil Action No. 1:05cv00187 (the “Action”).

### 2. What is the lawsuit about?

The Action claims that the Defendants were fiduciaries of the Plans and violated fiduciary duties under ERISA that they owed to current and former participants in and beneficiaries of the Plans. In the Complaint, Named Plaintiffs asserted causes of action for the losses they allege were suffered by the Plan as the result of the alleged breaches of fiduciary duty by the Defendants.

During the Class Period, Krispy Kreme stock was offered as an investment option for participant contributions in the 401(k) plan known as the RSP. In addition, the Company contributed Krispy Kreme stock and held that stock in an investment in the KSOP credited to participant accounts. The Action alleges that the Defendants had the discretion to prevent further investments in these funds and to sell the Plans’ holdings in these funds, and that they breached fiduciary duties by not exercising that discretion at the point that Company stock no longer was a prudent Plan investment. Named Plaintiffs also assert that certain directors failed to properly appoint and monitor the fiduciaries responsible for the Plans’ administration and investment decisions.

The Defendants deny that they have liability to the Plans or their participants or beneficiaries. If the litigation were to continue, Defendants would raise numerous defenses to liability, including the following:

- They were not fiduciaries of the Plans, or, if they were fiduciaries, their fiduciary duties did not extend to the matters at issue in the Action;
- Company stock was at all relevant times a prudent investment for the Plans and their participants;
- To the extent they were fiduciaries as to the matters at issue in the Action, they fully discharged all fiduciary duties imposed on them by ERISA;
- Even if they failed to discharge one or more of their ERISA fiduciary duties, any such breach of fiduciary duty did not cause the losses alleged by the Plaintiffs; and
- The relief sought by the Plaintiffs in the Action is not permitted by ERISA.

Class Counsel have conducted an extensive investigation of the allegations in the Action. In addition, through that investigation and through informal discovery of information in the Action, Class Counsel have obtained and reviewed documents and other materials governing the Plans, SEC filings, press releases, public statements, news articles, and other documents.

### 3. Why is this case a class action?

In a class action, one or more plaintiffs, called “Named Plaintiffs,” sue on behalf of people who have similar claims. All of the

individuals on whose behalf the Named Plaintiffs are suing are “Class Members,” and they are also referred to herein as members of the Settlement Class. One court resolves the issues for all Class Members. U.S. District Judge William L. Osteen is presiding over this case.

#### **4. Why is there a Settlement?**

This Settlement is the product of extensive negotiations between Class Counsel and the Defendants’ counsel, including the services of an experienced mediator. Throughout the settlement negotiations, the Plaintiffs and the Defendants were advised by various consultants and experts, including individuals with expertise in ERISA fiduciary liability issues, insurance coverage issues, and estimating potential damages in cases involving ERISA fiduciary liability. The Court has not reached any final decisions in connection with Plaintiffs’ claims against the Defendants. Instead, the Plaintiffs and the Defendants have agreed to a settlement. In reaching the Settlement, they have avoided the additional cost and time of a trial. As with any litigated case, the Plaintiffs would face an uncertain outcome if this case went to trial. On the one hand, continuation of the case against the Defendants could result in a verdict greater than this Settlement. On the other hand, continuing the case against the Defendants could result in a verdict for less money than Plaintiffs have obtained in this Settlement, or even no recovery at all. Based on these factors, the Named Plaintiffs and their attorneys believe the Settlement is best for all Class Members. Additional information concerning the Settlement and these factors is available in the motion for preliminary approval of the Settlement Agreement, which may be obtained at [www.kellersettlements.com](http://www.kellersettlements.com), or directly from the Clerk of the United States District Court for the Middle District of North Carolina.

#### **5. How do I know whether I am part of the Settlement?**

The proceeds of this Settlement will be allocated only to Class Members, and then only according to a Court-approved Plan of Allocation. You are a Class Member if you fall within the “Settlement Class” approved by United States District Judge William L. Osteen:

All persons who were participants in or beneficiaries of either the Krispy Kreme Doughnut Corporation Retirement Savings Plan or the Krispy Kreme Profit Sharing Stock Ownership Plan at any time between January 1, 2003 and May 15, 2006 and whose accounts in either of the Plans included investments in Krispy Kreme common stock. The Defendants are excluded from the Class.

If you are a Class Member, the amount of money you will receive, if any, will depend upon the Court-approved Plan of Allocation, described in Section 7 below.

#### **6. What does the Settlement provide?**

A Settlement Fund consisting of \$4.75 million in cash, plus interest, is being established in the Action. The net amount in the Settlement Fund, after payment of, and establishment of reserves for, any taxes and Court-approved costs, attorneys’ fees, and expenses, including any Court-approved Named Plaintiff Case Contribution Awards, will be paid to the Plan, and, after payment of implementation expenses, the remaining amount will be allocated to members of the Class according to a Plan of Allocation to be approved by the Court. Allocations will be made to the Plan accounts of members of the Class. Plan accounts may be created for those Class Members who no longer have Plan accounts and who are entitled to an award under the Plan of Allocation.

Under the Settlement, the Company will provide valuable structural relief. The Company will: (i) change the KSOP plan year end to be December 31 rather than Sunday closest to January 31; (ii) provide for merger of the KSOP into the RSP; (iii) revise vesting provisions to provide that all KSOP participants as of the merger of the KSOP into the RSP will be 100% vested in their account balances; (iv) provide that existing accounts in the KSOP will be transferred to the RSP; (v) provide that KSOP accounts holding Company stock transferred into the RSP may continue to be invested in shares of Company stock or converted into units of Company stock or invested in any of the then available investment options offered under the RSP; (vi) provide for establishment of accounts in the RSP for all class members who are entitled to a portion of the settlement proceeds; (vii) provide for allocation of settlement proceeds in accordance with the agreed upon, court-approved Plan of Allocation; (viii) provide that all settlement proceeds will be initially invested in the Federated Capital Preservation Fund of the RSP. Thereafter, class members will be given the ability to direct that such amounts be invested in any of the then available investment options offered under the RSP; (ix) provide that class members who have accounts transferred from the KSOP into the RSP will have the future right to receive the distribution of such amounts in the form of Company stock, to the extent that such class members have their accounts invested in Company stock at the time of distribution, or as otherwise required by section 411(d)(6) of the Internal Revenue Code, but only to the extent that at the time of such distribution, Company stock is still a permissible investment option in the RSP; and (x) provide that settlement proceed accounts in the RSP will be distributed in accordance with the provisions of the RSP, including the “cash out” provisions providing for the automatic cash out to Plan participants of account balances of less than \$1,000.

Under the Settlement, Plaintiffs, on behalf of the Settlement Class, shall release any and all claims of any nature whatsoever (including claims for any and all losses, damages, unjust enrichment, attorneys’ fees, disgorgement of fees, litigation costs, injunction, declaration, contribution, indemnification or any other type or nature of legal or equitable relief), against any of the Defendants, their current or former subsidiaries and affiliates, and the current or former officers, directors, employees, insurers, plan fiduciaries or agents of any Defendant, including BB&T and U.S. Trust, whether accrued or not, whether already acquired or acquired in the future, whether known, unknown, or unsuspected, in law or equity, as well as any claim or right obtained by assignment, brought by way of demand, complaint, cross-claim, counterclaim, third party claim or otherwise (collectively, “Claims”), arising out of or in any way related to, directly or indirectly, any or all of the acts, omissions, facts, matters, transactions or occurrences during the Class Period that are, were or could have been alleged, asserted, or set forth in any complaint Plaintiffs could have sought to file in this case at any time, and/or arising out of or related in any way to the acts, omissions, facts, matters, transactions, or occurrences that have been alleged or referred to in the Action. Nothing in this Settlement Agreement shall release, bar or waive any claim that has been or could be asserted by any member of the Settlement Class or the Plan in any state or federal securities litigation against any Defendant.

The above description of the operation of the Settlement and the release is only a summary. The governing provisions are set forth in the Settlement Agreement (including its exhibits), which may be obtained at [www.kellersettlements.com](http://www.kellersettlements.com), or by contacting Class Counsel.

For additional information, see the response to Question No. 18 below.

#### **7. How much will my payment be?**

Plaintiffs will submit a detailed Plan of Allocation to the Court for approval prior to the Fairness Hearing. The Plan of Allocation, which, after filing, may be obtained at [www.kellersettlements.com](http://www.kellersettlements.com) or by contacting Class Counsel, will describe the manner by which the Settlement proceeds paid into the Plans (the "Net Proceeds") will be distributed to Class Members. In general terms, the Net Proceeds will be allocated to Class Members in proportion to his or her interest in Company stock in the Plans. Because the Net Proceeds are less than the total losses alleged to be suffered in the Action, each Class Member's proportionate recovery will be less than his or her alleged loss. If your proportionate recovery is de minimis (less than \$50), it may be forfeited to the Plans or distributed *pro rata* to other Class Members. You are not responsible for calculating the amount you may be entitled to receive under the Settlement. This calculation will be done as part of the implementation of the Settlement, and will be based on reasonably available Plan data.

#### **8. How can I get a payment?**

You do not need to file a claim. If you are a Class Member entitled to a share of the Net Proceeds, and have a current Plan account, your share will be deposited in your Plan account. If you are a former Plan participant, an account may be established for you in the Plan. If you are a former participant and have not provided the Plan with your current address, please send an email to [investor@kellerrohrback.com](mailto:investor@kellerrohrback.com).

#### **9. When would I get my payment?**

Payment is conditioned on several matters, including the Court's approval of the Settlement and such approval becoming final and no longer subject to any appeals to any court. Upon satisfaction of various conditions, the net Settlement Fund will be paid to the Plan and allocated to the accounts of members of the Settlement Class pursuant to the Plan of Allocation (described in the Answer to Question No. 7 above) as soon as possible after final approval has been obtained for the Settlement (which includes exhaustion of any appeals). An appeal of the final approval could take several years. Any accrued interest on the Settlement Fund will be included in the amount paid to the Plan and allocated to the Plan accounts of members of the Settlement Class. The Settlement Agreement may be terminated on several grounds, including if the Court does not approve or modifies the Settlement.

#### **10. Can I get out of the Settlement?**

You do not have the right to exclude yourself from the Settlement. The Settlement includes class certification of a Settlement Class under Federal Rules of Civil Procedure 23(b)(1) and/or 23(b)(2). Thus, if the Court grants final approval of the Settlement and Class Certification, it is not possible for any Class Members to exclude themselves from the Settlement. As a Class Member, you will be bound by any judgments or orders that are entered in the Action for all claims that were or could have been asserted in the Action or are otherwise included in the release under the Settlement. Although you cannot opt out of the Settlement, you can object to the Settlement and ask the Court not to approve it. See Answer to Question No. 13 below.

#### **11. Do I have a lawyer in the case?**

The Court has appointed the law firms of Keller Rohrback L.L.P. and Lewis & Roberts, P.L.L.C. as Class Counsel for Named Plaintiffs in the Action. These lawyers are called "Class Counsel." You will not be charged directly by these lawyers. If you want to be represented by your own lawyer, you may hire one at your own expense.

#### **12. How will the lawyers and Named Plaintiffs be paid?**

On or before November 6, 2006, Class Counsel will file a motion for the award of attorneys' fees and expenses for Class Counsel. This motion will be available for review on [www.kellersettlements.com](http://www.kellersettlements.com). This motion will be considered at the Fairness Hearing. Class Counsel will limit their application for an award of attorneys' fees to not more than 26% of the Settlement Fund, plus reimbursement of Class Counsel's expenses incurred in connection with the prosecution of the Action not to exceed \$110,000.00.

The Named Plaintiffs in the Action will share in the allocation of the money paid to the Plan on the same basis and to the same extent as all other members of the Settlement Class, except that, in addition, the Named Plaintiffs Paul Smith and Alfie Carter each may apply to the Court for a Case Contribution Award up to \$15,000. Any Case Contribution Award to Named Plaintiffs by the Court will be payable from the Settlement Fund.

You can tell the Court that you do not agree with the Settlement or some part of it, including the attorneys' fees and expenses the attorneys intend to seek, and/or the Named Plaintiffs' Case Contribution Award.

#### **13. How do I tell the Court that I like or don't like the Settlement?**

If you like the Settlement, you need do nothing. If you are a Class Member and you do not like the Settlement, you can object to all or any part of it. You can give reasons why you think the Court should not approve it. To object, you must send a letter or other written statement saying that you object to the Settlement in *Smith, et al. v. Krispy Kreme Doughnut Corporation, et al.*, Civil Action No. 1:05cv00187. Be sure to include your name, address, telephone number, signature, and a full explanation of all reasons you object to the Settlement. To be considered a timely objection, **your written objection must be filed with the Court, and mailed to the counsel listed below, postmarked (and sent via facsimile) by no later than December 18, 2006:**

**Filed with the Clerk of the Court:** 324 West Market Street, Suite 401, Greensboro, NC 27401

**Mailed (and faxed) to each of the following designated Class Counsel and Defendants' Counsel:**

T. David Copley  
Keller Rohrback L.L.P.  
1201 Third Avenue, Ste 3200  
Seattle, WA 98101-3052  
Fax: (206) 623-3384

Howard Shapiro  
Proskauer Rose LLP  
909 Poydras Street, Suite 1100  
New Orleans, LA 70112-4012  
Fax: (504) 310-2022

Paul Blankenstein  
Gibson, Dunn & Crutcher LLP  
1050 Connecticut Avenue N.W.  
Washington, D.C. 20036  
Fax: (202) 530-9592

**14. When and where will the Court decide whether to approve the Settlement?**

The Court will hold a Fairness Hearing at 2:00 p.m. on January 10, 2007, at the United States District Court for the Middle District of North Carolina, 324 West Market Street, Suite 401 Greensboro, NC 27401. At that hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. If there are timely objections, the Court will consider them. At or after the Fairness Hearing, the Court will decide whether to approve the Settlement. The Court will also rule on the motions for attorneys' fees and expenses. We do not know how long it will take the Court to issue these decisions.

**15. Do I have to come to the Hearing?**

No. Class Counsel will answer questions the Court might have. You are welcome to come at your own expense. If you send a timely objection, you do not have to come to Court to talk about it. As long as you mailed your written objection on time, it will be before the Court when the Court considers whether to approve the Settlement as fair, reasonable and adequate. You also may pay your own lawyer to attend the Fairness Hearing, but such attendance is not necessary.

**16. May I speak at the Hearing?**

If you are a Class Member, you may ask the Court for permission to speak at the Fairness Hearing. To do so, you must send a letter or other paper called a "Notice of Intention to Appear at Fairness Hearing in *Smith, et al. v. Krispy Kreme Doughnut Corporation, et al.*, Civil Action No. 1:05cv00187." Be sure to include your name, address, telephone number, and your signature. Your Notice of Intention to Appear must be served on the designated Class Counsel listed in the Answer to Question No. 13 above, postmarked and sent via facsimile no later than Monday, December 18, 2006, and must be filed with the Clerk of the Court at the address listed in the Answer to Question No. 13, postmarked no later than Monday, December 18, 2006.

**17. What happens if I do nothing at all?**

If you do nothing and you are a Class Member, you will participate in the Settlement of the Action as described above in this Notice if the Settlement is approved.

**18. How do I get more information?**

This Notice summarizes the proposed Settlement. The complete Settlement is set forth in the Settlement Agreement. You may obtain a copy of the Settlement Agreement by making a written request to Class Counsel listed in response to Question No. 13 above. Copies of the Settlement Agreement, as well as the Preliminary Motion seeking preliminary approval of the Settlement Agreement, and the Preliminary Approval Order, may also be obtained at [www.kellersettlements.com](http://www.kellersettlements.com). The Settlement Agreement also was filed with the Clerk of the United States District Court for the Middle District of North Carolina, and may be obtained from the Clerk's office directly.

Class Counsel have also established a toll-free phone number to receive your comments and questions: 1-800-269-0816.