UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

MARVIN OVERBY, ET AL. Plaintiffs, vs. TYCO INTERNATIONAL LTD., ET AL. Defendants.	Case No. 02-CV-1357-B This Document Relates To: ERISA Actions

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENTS, APPROVAL OF NOTICE PLAN AND SETTING OF FAIRNESS HEARING

IZARD NOBEL, LLP
Robert A. Izard
29 South Main Street, Suite 215
West Hartford, CT 06107
(860) 493-6292

STULL, STULL & BRODY
Edwin J. Mills
6 East 45th Street
New York, NY 10017
(212) 687-7230

Co-Lead Counsel for Plaintiffs

BOUCHARD, KLEINMAN & WRIGHT, P.A.
Kenneth G. Bouchard (NH Bar # 51)
1 Merrill Drive, Suite 6
Hampton, NH 03842
(603) 926-9333

Liaison Counsel for Plaintiffs

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I. INTRODUCTION

Plaintiffs/Class Representatives Edmund Dunne, Kay Jepson, John Gordon, Gary Johnson, Peter Poffenberger and Karen Wade (collectively, "Plaintiffs") respectfully submit this Memorandum in support of their unopposed Motion for an Order (i) Preliminarily Approving the Settlements; [1] (ii) Approving the Notice Plan; [2] and (iii) Setting a Final Fairness Hearing.

The proposed $70.525 million dollar Settlements were reached after seven years of hard-fought litigation (including full briefing on Defendants' motion to dismiss, Plaintiffs' motion for class certification, and cross-motions for partial summary judgment) and comprehensive discovery (ERISA - specific discovery and more than a hundred depositions taken in conjunction with the coordinated discovery in the related MDL cases). Even given this exhaustive litigation history, which brought this case to the brink of trial, the parties reached settlement only after multiple arms'-length mediation sessions conducted by Professor Eric Green and with guidance provided by the Court on certain issues. Based on their extensive litigation and mediation efforts, Plaintiffs obtained an outstanding settlement that is many times the per share recovery obtained by plaintiffs in the PSLRA action. Moreover, the proposed Notice Plan discussed herein satisfies the requirements of due process and the form of notice is consistent with the form of notice used in analogous actions. Accordingly, Plaintiffs respectfully request that their motion for preliminary approval be granted.

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[1] The "Settlements" refer collectively to the three separate agreements embodied in the Class Action Settlement Agreement with Defendants Tyco, Jerry Boggess, Mark Foley, Irving Gutin, Jeffrey Mattfolk, Richard Meelia, Patricia Prue and Michael Robinson (the 'Tyco Defendants"), the Class Action Settlement Agreement with Defendant L. Dennis Kozlowski, dated July 29, 2009, and the Class Action Settlement Agreement with Defendant Mark Swartz, dated August 4, 2009 (collectively the "Settlement Agreements"), copies of which having been filed together with Plaintiffs' Motion for Preliminary Approval of Settlement.

[2] The "Notice Plan" refers to the provisions for Class Notice set forth in the proposed Findings and Orders Preliminarily Approving Proposed Settlement, Approving Form and Dissemination of Class Notice, and Setting Date For Hearing On Final Approval Of Settlement, submitted herewith (the "Preliminary Approval Orders"), at ¶ 3.

II. STATEMENT OF FACTS

A. Plaintiffs' Claims

This case was initially filed on April 1, 2002, in the Southern District of New York, and was transferred to this District on October 1, 2002. A Consolidated Amended Complaint ("Complaint") (Dkt. No. 6) was filed with this Court on February 3, 2003. Plaintiffs allege that the fiduciaries of Tyco's defined contribution plans (the "Plans") violated their fiduciary duties under ERISA, 29 U.S.C. § 1101, *et seq.*[3] Specifically, the Complaint alleges that the Defendants, each of whom is alleged to be a fiduciary of the Plans, violated ERISA by, among other things, (i) failing to prudently manage the assets of the Plans, (ii) failing to provide required disclosures to the participants and beneficiaries of the Plans, and (iii) failing to properly appoint, monitor and inform other fiduciaries of the Plans. Plaintiffs allege that the Defendants knew or should have known that one of the investment options in the Plans – the Tyco International Ltd. Stock Fund (the "Tyco Stock Fund" or "Fund") – was not a prudent retirement plan investment during the Class Period and that the Defendants acted imprudently by not preventing Plan investment in the Fund and not liquidating the Plans' Tyco Stock Fund holdings. Plaintiffs also assert that certain Defendants violated their alleged fiduciary duties by failing to provide Plan participants with complete and accurate information about the Fund and Tyco.

B. Plaintiffs Have Thoroughly and Aggressively Litigated This Case

The parties have litigated this case for seven years and brought this action to the brink of trial. In addition to exhaustive discovery, the parties have engaged in extensive motion practice that has required Plaintiffs to thoroughly analyze and understand the strengths and weaknesses of the Class' claims and their likelihood of success.

[3] As used herein, "Tyco" or the "Company" refer to Tyco International (US) Inc. together with Tyco International, Ltd.

1. Plaintiffs Have Engaged in Substantial Motion Practice

Plaintiffs successfully opposed the Motions to Dismiss the Complaint filed by Defendants in April of 2003; filed and briefed a Motion to Certify the Class in January of 2005, which the Court granted; filed a Motion for Summary Judgment through which the Court struck Defendants' § 404(c) defense; and defended against Defendants' Motion for Partial Summary Judgment. Moreover, Plaintiffs litigated a number of discovery issues concerning the scope and amount of document production and the cost thereof and the application of various privileges. Plaintiffs also filed Motions to Strike certain portions of Defendants' expert reports. Finally, Plaintiffs filed pleadings in the related Tyco securities case to ensure that no class claims were released pursuant to the settlement in the securities case and that the class was fully protected.

2. Plaintiffs Have Conducted Thorough and Comprehensive Discovery

Plaintiffs conducted substantial discovery to prepare this matter for trial. In accordance with the coordinated discovery plan ordered by this Court, Defendants provided counsel in both the securities and ERISA actions with the same documents. Plaintiffs independently reviewed those documents, as well as additional and voluminous ERISA-related documents. In particular, Counsel separately categorized by legal and factual issue approximately 1.5 million documents, comprised of millions of pages, which were particularly relevant to the claims or defenses raised in this suit. Counsel participated in hundreds of days of depositions of Plaintiffs, Defendants, Tyco personnel and third-parties. To efficiently organize the voluminous facts of this case, Counsel then reviewed tens of thousands of pages of deposition transcripts and related exhibits, distilled the relevant portions and input that work product and analysis into Casemap, a litigation management software program. Plaintiffs also conducted extensive expert discovery in that they reviewed numerous expert reports, deposed one of Defendants' experts and defended depositions of Plaintiffs' experts. Discovery had been completed when the Settlements were reached.

3. The Parties Participated In Comprehensive, Arms'-Length Settlement Negotiations

The Settlement with the Tyco Defendants was the result of intense negotiations conducted by mediator Prof. Eric Green over more than a year. Settlement discussions with all parties were fully informed as a result of the intensive factual and expert discovery that already had been conducted as well as by briefing and memoranda prepared by the parties on all contested legal issues. The negotiations were vigorous and both sides argued their respective positions strenuously. Trial was scheduled for October 2009 and Plaintiffs were preparing for trial when settlement was reached. The resulting Settlements were undeniably the product of arms' length bargaining.

C. The Proposed Settlements

The terms of the Settlements are memorialized in the Settlement Agreements. The following is a summary of the principal terms of the Settlements.

The Settlement Agreements provide that Defendants, other than Non-Settling Defendant Swartz, shall pay the aggregate sum of $70,525,000 into an interest-bearing escrow account (the "Settlement Fund"). Of this amount, the Tyco Defendants will pay $70,200,000, Kozlowski will pay $100,000 and Swartz will pay $225,000.. This amount will be recovered by the Plans in addition to any amount recovered by the Plans and participants from the securities settlement.

The Net Settlement Fund will be paid directly to the Plans and then allocated to current and former Plan participant accounts pursuant to Plaintiffs' proposed plan of allocation, which Plaintiffs believe will fairly and adequately address settlement administration, claims procedure

and allocation among the settlement class. The payment will be made as soon as possible after all relevant orders become final.[4]

III. ARGUMENT

A. The Proposed Settlements Warrant Preliminary Approval

As a matter of public policy, settlement is a highly favored means of resolving complex class action litigations. *See In Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005) ("the law favors class action settlements."); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 784 (3d. Cir. 1995) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."); *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985) ("There is little doubt that the law favors settlements, particularly of class action suits.") (citations omitted).

Court approval of a proposed class action settlement generally involves two steps, preliminary and then final approval. *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 57 (D. Mass. 2005) (quoting Manual For Complex Litigation, Fourth ("MCL") § 13.14 at 171); MCL § 21.632 ("Review of a proposed class action settlement generally involves two hearings."). At the "preliminary approval" stage of the proceedings, the Court is not required to undertake an in-depth consideration of the relevant factors for final approval. Instead, the "judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of the notice of the certification, proposed settlement, and date of the final fairness hearing." MCL § 21.632.

[4] Significantly, unlike a securities case, all records of relevant transactions are maintained by the Plans, and the amounts to be distributed can be determined quickly. Consequently, actual distribution to class members typically occurs soon after all orders concerning approval of a settlement and for the award of fees and expenses become final.

"For purposes of preliminary approval, the court considers whether the proposed settlement is illegal or collusive. If the proposed settlement appears to meet the standard of being fair, reasonable and adequate, it may be approved, preliminarily, as within the range of possible approval." *Scott v. First American Title Ins. Co.*, No. 06-cv-286-JD, 2008 WL 4820498, at *3-4 (D.N.H. Nov. 5, 2008) (DiClerico, J.). Moreover, "[i]n evaluating the substantive fairness of a class action settlement, the court cannot, and should not, use as a benchmark the highest award that could be made to the plaintiff[s] after full and successful litigation of the claim[s]." *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 68 (D. Mass. 1997). As the First Circuit has observed:

> [A]ny settlement is the result of a compromise – each party surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a trial.

Greenspun v. Bogan, 492 F. 2d 375, 381 (1st Cir. 1974). *See also In re Lupron Mktg.*, 228 F.R.D. at 97 (the court should not "hypothesize about larger amounts that might have been recovered").

The proposed Settlements easily meet these standards for preliminary approval.[5]

[5] Apart from the relevant criteria for ***preliminary*** approval at this stage, courts in this Circuit have considered (and Plaintiffs will address at the appropriate juncture) the following factors in evaluating the ***final*** fairness of a class action settlement: (1) the potentially significant obstacles to a recovery; (2) the complexity and likely duration of the litigation; (3) the stage of the proceedings at which the settlement was reached; (4) the amount of the settlement in light of the risks of litigation; (5) whether the settlement was reached after arms'-length negotiations and the opinion of qualified counsel; and (6) the reaction of the Class to the proposed settlement. *See, e.g., Hawkins ex rel. Hawkins v. Commissioner of New Hampshire Dept. of Health and Human Services*, 2004 WL 166722, at *5 (D.N.H. Jan. 23, 2004); *Rolland v. Cellucci*,191 F.R.D. 3, 8 (D. Mass. 2000).

1. The Proposed Settlements Were the Result of Serious, Informed and Non-Collusive Negotiations

As set forth above, the proposed Settlements in this litigation were the result of informed and arms'-length negotiations. The parties agreed to the Settlements only after seven years of vigorous litigation and exhaustive discovery that brought the parties to the brink of trial, during which the strengths and weaknesses of the parties' positions were fully explored. A proposed class action settlement enjoys a strong presumption that it is fair, reasonable and adequate if, as is the case here, it was the product of arms'-length negotiations conducted by experienced and capable counsel after "sufficient discovery has been provided." *City P'ship Co. v. Atlantic Acquisition Ltd. P'ship.*, 100 F.3d 1041, 1043 (1st Cir. 1996); *see also Hawkins v. Comm'r of the N.H. Dept. of Health & Human Services*, No. 99-143, 2004 WL 166722, at *5 (D.N.H. Jan. 23, 2004) ("A presumption in favor of the proposed settlement arises when sufficient discovery has been provided, counsel have experience in similar cases, and the parties have bargained at arms-length").

Moreover, the parties spent over a year vigorously negotiating the Tyco Defendants Settlement with the assistance of Prof. Green. A "court-appointed mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (citing *County of Suffolk v. Long Island Lighting*, 907 F.2d 1295, 1323 (2d Cir. 1990); *In re Indep. Energy Holdings PLC Sec. Litig.*, 2003 U.S. Dist. LEXIS 17090 at *13 (S.D.N.Y. Sept. 29, 2003) ("[T]he fact that the Settlement was reached after exhaustive arm's-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable") (citing *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280-81 (S.D.N.Y. 1999) ("[A] presumption of fairness, adequacy and reasonableness may attach

to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery.") (internal quotation marks and citation omitted). Accordingly, all the indicia of procedural fairness are present here.

2. The Proposed Settlements Are Within the Range of Possible Approval

The amount of the recovery must be weighed against the obstacles to any recovery in the litigation. *See Bussie v. Allmerica Financial Corp*, 50 F. Supp. 2d 59, 76 (D. Mass. 1999) (approving settlement where plaintiffs faced several significant, viable legal defenses "any one of which, if successful, could result in entry of a judgment *with prejudice* against the Class.") (emphasis in original); *Duhaime*, 177 F.R.D. at 68 (same). The $70.525 million proposed Settlements are fair, reasonable and adequate, and well within the range of possible approval based on a recoverable damages analysis alone without considering any risk of establishing liability.

If the Court were to conclude that the ADT and AMP transactions were not "purchases" of Tyco stock by the Plans during the Class Period, then the Plans, on a net basis, purchased no shares of Tyco stock during the Class Period.[6] Consequently, if the Court found that Defendants had no duty to sell Tyco stock because the stock would have been fairly priced after full disclosure, then, on a net basis, there could have been ***no*** damages in this case. If, on the other hand, the Court concluded that all shares held by the Plans, including the shares from the ADT and AMP mergers, should have been sold and the proceeds of sale "reinvested," under the

[6] At the beginning of the Class Period, the Plans owned 2,656,178 shares of Tyco common stock through the Tyco Stock Fund on a split adjusted basis. The maximum number of shares of Tyco stock that the Plans collectively owned through the Fund during the Class Period was 13,398,834. At the end of the Class Period, the Plans owned 13,047,271 shares. Consequently, the Plans were a net purchaser of approximately 10.39 million shares of Tyco common stock during the Class Period. Of the shares "purchased" during the Class Period, 10.44 million shares were transferred into the Plans as a result of the mergers of the ADT and AMP retirements plans into the Tyco Plans. Consequently, other than the ADT and AMP "purchases," the Plans were net sellers of Tyco stock.

ERISA "alternative investment" damages model, damages using the S & P 500 Index Fund available under the Plans as the alternative investment would have yielded damages of $130 million, assuming that the damage period ended on July 26, 2002 after Tyco's new CEO was announced, and would have yielded damages of $175 million if the damage period ended on July 25, before the announcement of the new CEO (whether the Tyco Stock Fund became a prudent investment either before or after the announcement of the new CEO which caused a significant price rise was a hotly contested issue). However, if the Court were also to conclude that "holder" damages should be reduced by the amount that the price of Tyco stock would have dropped upon full disclosure prior to any sale of Tyco stock holdings and reinvestment in the S & P fund, then damages could have been sharply reduced to as low as $56 million if the Class Period ended on July 26 and $75 million if the Class Period ended on July 25, a 57 % drop.[7] Although Plaintiffs advocated use of the Interest Income Fund, a money market fund, as the appropriate investment alternative, which would have yielded higher damages, even excluding any risks in establishing liability, the Settlement is clearly reasonable based on these possible outcomes.[8]

The Kozlowski Settlement is also reasonable for a number of reasons. First, Kozlowski was not a named fiduciary of the Plans and had significant defenses concerning whether he acted in a fiduciary capacity. Second, Kozlowski was a Defendant only with respect to the Communications Claim and, as a result, damages were arguably limited to a securities law damages model and, therefore, could have included only shares of Tyco stock purchased during the Class Period, which could have sharply reduced damages recoverable from Kozlowski. *See*, *e.g*., *Bendoud v. Hodgson*, 578 F.Supp. 2d 257, 269-271 (D. Mass. 2008). Third, any judgment

[7] Plaintiffs' expert concluded that the hypothetical price drop upon the disclosure of all undisclosed material information concerning corporate looting would have been 24%, would have been 44% if only the accounting irregularities were disclosed and would have been 57% if both categories of information were disclosed.

[8] Based on the maximum number of shares held by the Plans during the Class Period, the settlement approximates $5.25 per share.

against Kozlowski could have been uncollectable based on Kozlowski's financial condition as described in the discovery responses Kozlowski filed in this case and the fact that Plaintiffs' claims against Kozlowski may be subordinated to the claims of general creditors. *See, e.g. In re Touch America Holdings, Inc.*, 381 B.R. 95 (Bkrtcy.D.Del. 2008).

The Settlement against Swartz is reasonable due to similar collectability issues.[9]

Weighing the prospect of securing a guaranteed benefit for the Class against the uncertainty of continued litigation, Plaintiffs' Counsel respectfully submits that the Settlements represent a reasonable compromise under the facts and circumstances of this case and fall well within the range for approval.

B. The Proposed Notice Plan Is Adequate

Due process and Rule 23(e) require that Class Members receive notice of the pending settlement which meets the test of "reasonableness." *Wal-Mart Stores Inc v. Visa Usa Inc*, 396 F.3d 96, 113 (2d Cir. 2005). The notice must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings. Notice is adequate if it may be understood by the average class member." *Id.* at 114 (internal quotations and citations omitted).

The content of a settlement notice "need only be reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 527-28 (D.N.J. 1997) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)); *see also In re Michael Milken & Assoc. Sec. Litig.*, 150 F.R.D. 46, 52 (S.D.N.Y. 1993) (notice must be reasonably calculated to apprise the class of the pending action and to afford class members an opportunity to object); *Patrowicz v.*

[9] Swartz has agreed to provide prior to final approval a sworn declaration confirming his financial condition.

Transamerica HomeFirst, Inc., 359 F. Supp. 2d 140, 150 (D. Conn. 2005) ("'the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'") (quoting *Wal-Mart*, 396 F.3d at 114).

Here, the proposed form and method of notice of proposed settlements agreed to by the parties satisfy all due process considerations and meet the requirements of Fed. R. Civ. P. 23(e)(1).[10] The proposed Notice Plan will fully apprise Settlement Class members of the existence of the lawsuit, the proposed Settlements, and the information they need to make informed decisions about their rights, including (i) the terms and operation of the Settlements; (ii) the nature and extent of the release; (iii) the maximum counsel fees and expenses that may be sought; (iv) the procedure and timing for objecting to the Settlements; and (v) the date and place of the fairness hearing.

The Notice Plan consists of multiple components designed to reach class members. First, the Individual Notice will be sent by first-class mail to the last known address of the class members shortly after entry of the Preliminary Approval Order. Addresses of class members are maintained by the Plans' personnel, who use this information for, *inter alia*, mailing Plan notices, updates and other Plan-related information. In that regard, Plaintiffs note that even former employees may be existing Participants. In addition to the Individual Notice, Plaintiffs' counsel will publish the Notice on three separate websites.

Thus, the form of notice and proposed procedures for notice satisfy the requirements of due process and the Court should approve the Notice Plan as adequate. *See Newberg on Class Actions*, § 8.34.

10 Plaintiffs' proposed form of Individual Notice is attached to the Class Action Settlement Agreements.

IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant this unopposed Motion, and enter the proposed Findings and Orders Preliminarily Approving Proposed Settlements, Approving Form and Dissemination of Class Notice and Setting Date for Hearing on Final Approval of Settlements which will provide: (i) preliminary approval of the Settlements; (ii) approval of the form and manner of giving notice to the Class of the Settlements; and (iii) a hearing date and time to consider final approval of the Settlements and related matters.

Dated this 10th day of August, 2009

BOUCHARD, KLEINMAN & WRIGHT, P.A.

/s/ Kenneth Bouchard
Kenneth Bouchard - NH Bar #51
1 Merrill Drive, Suite 6
Hampton, NH 03842
(603) 926-9333

Liaison Counsel

IZARD NOBEL LLP
Robert A. Izard
William Bernarduci
Wayne T. Boulton
29 South Main Street, Suite 215
West Hartford, CT 06107
(860) 493-6292
(860) 493-6290 (fax)

STULL, STULL & BRODY
Edwin J. Mills
Michael J. Klein
6 East 45th Street
New York, NY 10017
(212) 687-7230
(212) 490-2022 (fax)

Lead Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Kenneth G. Bouchard, Esq.
Kenneth G. Bouchard - NH Bar #51