

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT**

In re XEROX CORPORATION ERISA  
LITIGATION

This Document Relates To:

All Actions

Master File No. 02-CV-1138 (AWT)

CLASS ACTION

April 7, 2009

**AFFIDAVIT OF LOWELL E. SACHNOFF**

Lowell E. Sachnoff, being duly sworn, states the following to be true:

1. This affidavit is submitted in connection with Plaintiffs' Motion for Award of Attorneys' Fees, Expenses and Case Contribution Awards. All statements herein, unless indicated otherwise, are based on my own personal knowledge and if called as a witness I could testify competently thereto.

2. I am an attorney licensed to practice in Illinois and I was admitted to the Illinois bar in 1957. I am a 1952 graduate of Harvard University and a 1957 graduate of Harvard Law School. I was also a senior, and a named partner of Sachnoff & Weaver, Ltd. ("S&W"), a Chicago law firm which I helped found. In 2007, S&W merged into the international firm of Reed Smith, LLP, and I have been of counsel in Reed Smith, LLP since that time. Our lawyers practice in a wide range of areas, with a concentration on complex federal court litigation. I have prepared and argued cases in the U.S. Supreme Court and many United States Courts of Appeals. I have tried many cases, both civil and criminal, representing both plaintiffs and defendants, in state and federal courts throughout the United States. I have written and spoken widely on class

action issues, including attorneys' fees. Other aspects of my credentials and qualifications are set forth in my attached resume.

3. As senior partner of S&W, prior to our merger with Reed Smith, I have represented many plaintiff classes in cases in many federal and state courts, in cases arising under the federal securities laws, the federal antitrust laws, ERISA, federal civil rights statutes and others, and cases arising under state law breach of fiduciary rules. Before S&W's practice gravitated in the mid-1980's toward class action defense, I have been involved on the plaintiffs' side in a number of significant class action cases over the past four decades since Rule 23, Fed. R. Civ. P. was amended in 1966, which have resulted in landmark decisions including *SEC v. Texas Gulf Sulfur Co.*, 401 F.2d 833 (2d Cir. 1968) (landmark 10b-5 class action), *In re Equity Funding Corp. of America Securities Litigation*, 416 F. Supp. 161 (C. D. Cal. 1976) (one of the most egregious securities frauds uncovered to date), and *In re Corrugated Container Antitrust Litigation*, MDL 310 (S.D. Tex.), which resulted in what was then one of the, if not the, largest antitrust class action recoveries ever. See, *In re Corrugated Container Antitrust Litigation*, 1983 WL 1872, at \*3 (S.D. Tex. Sept. 1, 1983).

4. In addition, I have been heavily involved in defending nearly as many class actions as I have prosecuted. With the success of S&W's plaintiffs' practice, and the growth of its corporate practice, S&W began defending class actions as well as prosecuting them and eventually concentrated primarily on class action defense. In recent years, S&W represented major American corporations such as Cerro Copper, Inc., Marshall Field & Co., First Health Inc., Honeywell Inc., System Software Associates, Inc., 3Com Corporation, Waste Management, Inc., Jackson National Life Insurance Company and numerous other companies in defending class action cases in state and federal courts throughout the nation. Although class actions are

very seldom tried, S&W litigated and won jury verdicts for defendants in several class actions, including *Panter v. Marshall Field & Co*, 646 F.2d 271 (7th Cir. 1981) (affirming grant of directed verdict for defendants), *In re System Software Assoc. Inc. Securities Litigation*, No. 91-0054 (N.D. Ill. July 6, 1993), and *In re Tricord Inc Securities Litigation*, No. 94-00746 (D. Minn. June 16, 1997).

5. In addition, S&W, and now Reed Smith, represents and has represented parties, including major Fortune 500 corporations, in the prosecution of complex commercial matters on straight hourly, contingent fee and blended contingent-hourly bases. We have represented plaintiffs and defendants in a wide variety of matters, including contract cases, fraud cases, and cases arising under the patent laws. We often face competition in seeking clients and, because we regard representation of plaintiffs in complex commercial matters on a fully or partly contingent basis as part of our firm's flexible approach to best representing our clients' interests, we have spent a substantial amount of time studying structures for and the market for contingent fee representation. We have entered into many negotiated contingent fee arrangements.

6. Prior to our merger with Reed Smith, S&W successfully prepared and presented class action fee petitions for court approval. Similarly, we have defended fee petitions we have filed, have defended against fee petitions in a variety of contexts, and have participated in challenges to fee petitions in class action cases.

7. At S&W I have been involved in many of the seminal cases relating to attorneys fees, such as *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) (holding that common fund fee awards are calculated based on the fund as a whole), and *In re Continental Securities Litigation*, 462 F.2d 566 (7th Cir. 1992) (holding that risk multiplier should have been awarded), and

*Skelton v. General Motors Corp.*, 860 F.2d 250 (7th Cir. 1988) (risk multiplier should have been awarded in common fund case, despite express language of fee-shifting provision).

8. In sum, in the course of my career I have been intimately involved in negotiating, researching and litigating essentially every aspect of attorneys' fees that could arise or present itself for resolution, on a continuous basis over approximately the past thirty years.

9. I am also aware of, have followed for many years, and have used in my practice case law and scholarly literature on attorneys' fees and fee awards, including standard references such as *Newberg on Class Actions* and *Class Action Reports*.

10. I am qualified by reason of my education, professional experience and position to tender expert opinions on matters relating to class action attorneys' fees and market rates for contingent fee attorneys. I have provided expert and lay opinion affidavits in support of class action fee petitions, which affidavits have, to the best of my knowledge, been accepted by courts considering class action fee petitions.

11. I am familiar with the contingent fee and hourly rates charged by attorneys in complex federal litigation on both the plaintiffs' and defendants' sides, both from our firm's ongoing process of setting our own hourly rates and from my litigation experience and studies.

12. I am familiar with Class Counsel in this matter, and with their qualifications and work, having reviewed the file in this matter and because we have worked in the past either with or against these firms. We have worked with these firms as co-counsel in plaintiff class and non-class matters, including litigation relating to Phar-Mor Inc. and the Exxon Valdez disaster. We have also worked in cases where these counsel represented the opposing party, *e.g.*, *Eli Steinberg v. System Software Associates, Inc.*, No. 97-00287 (Cir. Ct. Cook Cty., Ill.), and *Mercury Finance* No. 97-8790 (Cir. Ct. Cook Cty., Ill).

13. I have reviewed various matters filed in this litigation, including without limitation the Third Consolidated Amended Complaint, the Court's opinions on the motions to dismiss, the Plaintiffs' Memorandum in Support of Motion for Award of Attorneys' Fees, Expenses, and Case Contribution Awards, the Plaintiffs' Motion for Final Approval of Class Action Settlement Agreement and the Joint Declaration of Lynn L. Sarko and Charles R. Watkins in Support of Motion For Final Approval Of Class Action Settlement, Plan of Allocation and Request for Fees, Expenses and Case Contribution Awards. I am familiar with the claims and defenses in this case and with discovery and other work done by the Plaintiffs' Counsel, and have discussed the matter with Class Counsel.

14. Class actions in general, and ERISA class actions in particular, tend to be time consuming, expensive and very risky. A case can be dismissed on motion, class certification can be denied (that issue was briefed but not decided here); summary judgment can be awarded to the defendants; or a case can be lost at trial or on appeal. Even seemingly simple class action cases can be fraught with peril. The case may be delayed by court congestion, the defendant may file bankruptcy, insurers may go into receivership, the class representative may have a change of heart, competing cases may be filed or the law could change mid-stream. And the plaintiff, to succeed, must prevail at each step along the way. Anything less than total victory can result in a loss. A defendant, by contrast, may win only once and prevail.

15. My review of this matter leads me to conclude that the instant case was attended, at its filing and throughout its pendency, by a high degree of risk. In addition to the risk factors alluded to above, at the time this case was filed there were few reported decisions relating to the liability of ERISA fiduciaries with respect to 401(k) plans' investments in employer stock, and none of the opinions issued over the past few years which now establish the law in this area, such

as *LaRue v. DeWolff, Boberg & Assoc., Inc.*, 128 S.Ct. 1020 (2008), and *In re Enron Corporation Securities, Derivative & "ERISA" Litigation*, 284 F. Supp. 2d 511 (S.D. Tex. 2003), had been decided. Nor had the United States Department of Labor yet weighed in with the amicus brief filed in *Enron* clarifying and further explicating the Department of Labor's position.

16. The risks in this case were accentuated by the fact that ERISA is a complex, technical, rapidly-evolving area of the law, with new cases being decided seemingly each month. This case, in particular, presented a number of liability and damage issues that would need to be explored and resolved, including those related to the existence and calculation of damages for Plan participants who owned Xerox stock within the 401(k) Plans. Adding to the risk was the fact that at that time no governmental body had initiated any ERISA-based enforcement action in this matter (and, in fact, no such enforcement action was ever initiated). Moreover, this case was likely to be, as it ultimately was, defended by attorneys at top-flight firms such as Jones Day and Cravath, Swain & Moore, who had effectively unlimited resources at their disposal.

17. It is also clear that Plaintiffs here, through their counsel, not only faced considerable risks, but actually took them. The Plaintiffs' Counsel put in more than 22,100 professional hours to the case and committed in excess of \$992,000 in out-of-pocket on expenses such as experts, document imaging and copying and travel.

18. Based on my experience, research and knowledge the Class, had such an entity existed in cohesive form at the time, would have been required to agree to a contingent fee in the range of 30% to 40% to attract competent counsel willing and, equally important, financially able to undertake this case. I do not believe there are competent, sufficiently capitalized attorneys, experienced in ERISA class actions, who would have taken the case for less. My firm and I, if this case had fit our profile for contingent cases at all, would not have done so.

19. It is my opinion that the fee requested here, \$15,250,000, is reasonable and fair, and well-warranted under existing Second Circuit precedent. In the Second Circuit, the court has discretion to determine the reasonableness of an attorneys' fee award in a common fund case under either the "percentage of recovery" method or the "lodestar" method. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *Goldberger v. Integrated Res. Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). The requested fee constitutes approximately 29.9% of the common fund, and is, approximately, a 1.6 multiplier of the lodestar. It is my opinion that the requested fee is clearly fair and reasonable under either method of analysis.

20. As noted above, had the Class negotiated at the outset of the litigation a contingency fee agreement with competent and financially able counsel, it is my opinion that the required contingency percentage would have been 30% to 40% of the recovery. Thus, the requested fee, as a percentage of the common fund, is less than what I believe would have resulted had a contingency fee been established at the outset. Moreover, the risk inherent in this litigation, together with the substantial efforts over several years that were required to obtain this favorable result for the Class, amply justify an award of the requested percentage of the common fund. It is my opinion that an award of any lesser percentage of the common fund would undercompensate counsel for the risks they undertook, the efforts they expended, and the benefits they conferred on the Class.

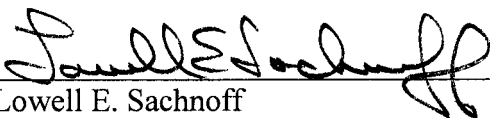
21. Similarly, it is my opinion that a multiplier of 1.6 is plainly fair and reasonable. I have reviewed the hourly rates underlying the lodestar calculation, and it is my opinion that those rates are reasonable and are consistent with prevailing rates in complex litigation of this type. Plaintiffs cite at page 22 of their Memorandum in Support of Motion for Award of Attorneys' Fees, Expenses, and Case Contribution Awards many examples of awards at substantially higher

multipliers, and it is my opinion based on cases in which I have been involved that significantly higher multipliers are commonplace where counsel's efforts has resulted in a substantial common fund, as is the case here. It is my opinion that an award of any lesser multiplier would undercompensate counsel for the risks they undertook, the efforts they expended, and the benefits they conferred on the class.

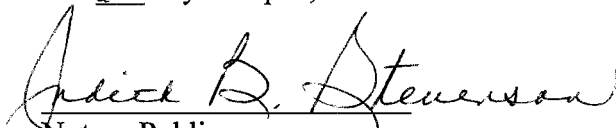
22. If retirement plan participants are to have capable, qualified attorneys available to them to vindicate their rights, then it is essential that courts be willing to award the necessary fees. The undercompensation of counsel who undertake risk and expend efforts to achieve a highly successful result such as this one, could well have a chilling effect on other qualified counsel's willingness to undertake meritorious contingent ERISA class actions in the future.

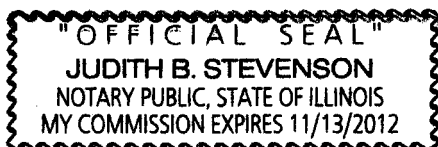
23. I have no pecuniary or other interest in the outcome of this matter, nor does my firm. No compensation has been or will be paid which is dependent on the Court's decision on the fee request.

24. Should the Court require further information or testimony, I am available to respond.

  
Lowell E. Sachnoff

Subscribed and sworn to before me  
this 6<sup>th</sup> day of April, 2009:

  
Notary Public



## Our people

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**Representative  
Matters**

- Lead trial and appellate counsel for plaintiffs and defendants in numerous cases representing individuals and corporations in contract and commercial matters involving corporate, securities, antitrust, accounting, intellectual property, licensing, computer hardware and software, banking and other complex litigation, arbitration and mediation matters.
- Principal attorney defending corporations, senior officers and directors in many individual, multi-party and representative actions arising under federal and state corporate and securities laws, SEC investigations, civil and criminal matters and in derivative litigation for alleged breach of statutory and common-law obligations.
- Successfully represented individual and corporate defendants in numerous civil and criminal jury trials, including class action defense of outside directors of Marshall Field & Company in federal district court in Chicago arising out of the attempted takeover of Marshall Field's by Carter Hawley Hale, and jury verdicts of no liability for all defendants in *In Re System Software Associates, Inc.* in federal court in Chicago and in *In Re Tricord Corp. Litigation* in federal court in St. Paul, Minnesota.
- Obtained a not-guilty verdict for Cerro Copper Corp. in criminal antitrust trial court in Philadelphia.
- Lead trial counsel representing plaintiffs in significant corporate and commercial litigation including:

The founding shareholders of Pacific Lumber Corporation in the *Drexel Burnham* matter in federal district court in New York that resulted in the recovery of \$140 million on the eve of trial; and

The California Public Employees Retirement System as lead counsel in derivative litigation involving W.R. Grace & Co. in state court in New York City.

- Represented the FDIC and RTC in numerous matters, including *In Re Continental Illinois Securities Litigation*, where he spearheaded a recovery for the FDIC of over \$65 million from the bank's D&O insurance carriers, and the *CenTrust* investigation and litigation matters.

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**Speeches / Presentations**

- Writes and speaks extensively on a broad range of topics. Recent articles include: "Securities Laws and Rule 10b-5," Illinois Institute for Continuing Legal Education; "The Business Judgment Rule & Corporate Governance," ALI-ABA; "Federal Antitrust Multiparty Litigation," Practising Law Institute; and "Fiduciary Duties of Directors and Officers In Corporate Takeovers," ALI-ABA

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**Experience**

- 2007 Reed Smith
- 1971 Sachnoff & Weaver (combined with Reed Smith in 2007)

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**Legal Education**

- 1957 LL.B., Harvard University
- Advanced arbitration and mediation training, AAA and CPR Institute For Dispute Resolution

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**Undergraduate Education**

- 1952 A.B., magna cum laude, Harvard University  
Phi Beta Kappa

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**Professional Affiliations**

- Past Chair, Chicago Bar Association Securities Law Committee
- Member, Planning Committee of the Ray Garrett, Jr. Corporate and Securities Institute of Northwestern University Law School; the Tulane Institute For Corporate Governance; the American Law Institute; and the PLI Securities Advisory Committee
- Visiting lecturer on corporate, securities, antitrust and complex litigation at the University of Chicago Law School, Northwestern University School of Law and Chicago-Kent College of Law
- Faculty Member, Corporate Council Institute
- Member, American Bar Association Committee on Corporation Laws -- responsible for drafting the Model Business Corporation Act

- Included in the 2007-2009 editions of *Best Lawyers in America* for the area of Corporate and Securities law
  - Selected as a 2009 Illinois Super Lawyer in Securities Litigation by *Super Lawyers, Corporate Counsel Edition* magazine
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**Awards & Honors**

- Received the 2007 *Edwin A. Rothschild Lifetime Achievement Award for Civil Rights* from the Chicago Lawyers' Committee for Civil Rights Under Law.
  - Recognized in *Crain's Chicago Business* special report, "Who's Who" in the Law, 2007 & 2008.
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DISTRICT OF CONNECTICUT**

In re XEROX CORPORATION ERISA  
LITIGATION,

This Document Relates to:

ALL ACTIONS

Master File No. 02-CV-1138 (AWT)

CLASS ACTION

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2009, a copy of foregoing AFFIDAVIT OF LOWELL SACHNOFF was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/

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