

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

IN RE XEROX CORPORATION
ERISA LITIGATION

Master File No. 02 CV-1138 (AWT)

This Document Relates To:

April 7, 2009

ALL ACTIONS.

**DECLARATION OF LYNN L. SARKO IN FURTHER SUPPORT OF:
MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN
OF ALLOCATION
AND
MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES, AND CASE
CONTRIBUTION AWARDS**

I, Lynn L. Sarko, declare pursuant to the penalties of perjury pursuant to 28 U.S.C. 1746 as follows:

1. I am the Managing Partner of Keller Rohrback L.L.P., the head of the firm's Complex Litigation group, was appointed on October 16, 2002 by the Court as Co-Lead Counsel for the Plaintiffs, am one of the attorneys personally involved in the litigation of this matter, and am responsible for the prosecution of this action.

2. I submit this declaration in support of connection with Plaintiffs' Reply in Further Support of: Motion for Final Approval of Class Action Settlement and Plan of Allocation and Motion for Award of Attorneys' Fees, Expenses, and Case Contribution Awards ("Reply Memo").

A. The Independent Fiduciary's Review and Authorization of the Settlement Supports Approval of the Settlement, the Approval Motion and the Fees and Expenses Motion.

3. As contemplated by Section 2.4 of the Settlement Agreement, an Independent Fiduciary was appointed to approve and authorize the Settlement in accordance with U.S. Department of Labor Prohibited Transaction Class Exemption 2003-39 (the "Class Exemption"). The Independent Fiduciary was U.S. Trust, Bank of America Private Wealth Management, which has extensive experience in serving in the capacity as an independent fiduciary, including in connection with ERISA class action settlements.

4. The Class Exemption requires the Independent Fiduciary to make determinations whether (i) the Settlement is reasonable in light of the Plans' likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone; (ii) the terms and conditions of the transaction are no less favorable to the Plans than comparable arms-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances; and (iii) the transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest.

5. In evaluating the Settlement, the Independent Fiduciary primarily considered the merits of the claims and the respective parties' arguments, the amount of the consideration paid, the scope of the release, the plan of allocation and the legal fees requested by Plaintiffs' counsel.

6. The Independent Fiduciary reviewed various documents filed with the Court in this litigation, including the Approval Motion and the Fees and Expenses Motion, as well as the

parties' mediation briefs, interviewed counsel and the mediator, evaluated the strengths and weaknesses of the legal and factual arguments asserted in the litigation, and reviewed and analyzed the scope of the Settlement release and the plan of allocation.

7. After this review and analysis, the Independent Fiduciary requested certain minor clarifying amendments to the Settlement Agreement (set forth in the Stipulation and [Proposed] Order Regarding Clarifying Amendments to Settlement Agreement filed with the Court on March 24, 2009), and authorized the Plans to enter into the Settlement, concluding that the Settlement is reasonable and otherwise meets the requirements of the Class Exemption.

B. The Class's Reaction Strongly Supports Approval of the Settlement.

8. In response to the more than 41,000 Class Notices mailed to Plan participants and beneficiaries, as well as the Summary Notice that was published in four newspapers and issued over the Business Wire,¹ only two persons have lodged objections to the proposed Settlement or requested attorneys' fees. The small number of objections from a class so large strongly militates in favor of approval of the Settlement.

9. This conclusion is reinforced by the fact that the Settlement Administrator has received 387 telephone calls regarding the Settlement. This does not include the number of additional Settlement inquiries that Co-Lead Counsel have received and responded to directly.

C. Neither Objection Has Merit.

10. The two objections that have been filed are not meritorious. Plaintiffs previously addressed the first of the two objections, submitted by Michael Petrisson, in their Memorandum

¹ See Affidavit of Ashley Barr re: A) Mailing of the Notice of Proposed Settlement of ERISA Class Action Litigation and B) Publication of the Summary Notice, attached as Exhibit B to 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 ("Joint Declaration") (Dkt. No. 348).

of Law in Support of Motion for Final Approval of Class Action Settlement (Dkt. No. 346) and in the Joint Declaration.

11. The second objection is in the form of a letter from Andrew Whitmore, a copy of which is attached hereto as Exhibit A. The filing information on the top of the document indicates that Mr. Whitmore failed to file his objection with the Court until after the March 31, 2009 deadline. *See* Docket No. 351. We nevertheless address the substance of his objection.

12. While Mr. Whitmore states that this settlement is “unnecessary” in light of the results achieved in the SEC litigation against Xerox and certain officers, the only specific objection he raises pertains to the requested attorneys’ fees. Mr. Whitmore asserts that his employer pays a rate of \$350 per hour for legal representation, and characterizes the attorneys’ fees requested here as being “more than triple what someone on the open market would be willing to pay.”

13. As an initial matter, the calculations and method underlying Mr. Whitmore’s conclusions are flawed. Mr. Whitmore divides a hypothetical fee of \$15,300,000 by total hours worked of 19,200 to yield an average of “over \$795 per hour of work.” This broad-brush approach of dividing a total fee by all professional hours is of dubious value at best. Moreover, the total fee requested is \$15,250,000, and the total hours worked, which we set forth in detail in the Joint Declaration, is 22,164.

14. More importantly, Mr. Whitmore’s fundamental premise, that the hourly rate that he understands his employer pays for legal representation is the proper yardstick for a fee award is simply without basis under the applicable law of this Circuit, for the reasons set forth in the Reply Memo.

15. By focusing on what he understands his employer pays for legal representation – presumably on a monthly basis, without any requirement that the attorneys advance costs or bear any material risk of non-payment – Mr. Whitmore ignores critical elements of the applicable analysis, including the magnitude and complexities of the litigation, risk, quality of representation, the fee in relation to the settlement, including analyses of the lodestar/multiplier and percentage of settlement, and the public policy reasons for awarding a reasonable attorneys’ fee. What constitutes a reasonable contingent fee in a complex case such as this is based upon all these factors, each of which Plaintiffs have addressed in detail in their Memorandum in Support of Motion for Award of Attorneys’ Fees, Expenses, and Case Contribution Awards (Docket No. 347-2) (“Fee Memo”) at 11-25, and which we summarize in the Reply Memo.

16. Plaintiffs’ Counsel have devoted significant time and effort to this case since its filing in July 2002. Plaintiffs’ Counsel’s efforts were intensive, carefully coordinated, and efficient. The requested fee of \$15.25 million – a 1.6 lodestar multiplier and 29.9% of the recovery – is fair and reasonable in relation to the recovery and compares favorably to fee awards in other risky common fund cases in the Second Circuit and elsewhere. The requested fee is well within the customary range of awards in cases like this one under both a “lodestar” and “percentage of fund” analysis.

17. The lodestar in this case is \$9,318,130.70. This figure was calculated using the customary rates of the attorneys who have worked on this case, and was based on contemporaneous, daily time records, regularly prepared and maintained by Plaintiffs’ Counsel in the ordinary course of business.

18. As we previously noted at page 9 of the Fee Memo, our work on the case has not ended, nor will it end anytime soon. We have continued to incur additional hours in connection

with the Independent Fiduciary's review and settlement approval in general, including in connection with the final approval hearing. Beyond that, past experience teaches that we will spend a substantial amount of additional time over the next year or more following final approval responding to inquiries from Class members, interacting with bank personnel with respect to technical matters concerning the Qualified Settlement Fund, and generally shepherding implementation of a settlement affecting the two qualified retirement plans and more than 40,000 participants. Our necessarily rough estimate is that before this case is finally closed, the lawyers will invest approximately 200 additional hours of time in the case, over and above the 22,164 hours invested as of March 20, 2009. In the *Enron* ERISA case, *In re Enron Corp. Sec., Derivative & "ERISA" Litigation*, No. 01-3913 (S.D. Tex.), for example, in which one of the co-lead counsel in this case was co-lead counsel, we are still responding to occasional inquiries from class members, advising the district court of our views on various implementation matters, and monitoring the docket, even though the case settled in 2007.

19. My firm has played a leading role in the development of this area of law and serves or has served in a leadership capacity in numerous prominent ERISA company stock cases filed throughout the country,² including several in within this Circuit alone.³

20. The hourly rates charged by Plaintiffs' Counsel in this case are prevailing rates in the community, have been approved in many judicial settlement hearings, and are consistent with

² The numerous ERISA breach of fiduciary duty class actions for which Keller Rohrback serves as lead or co-lead counsel are provided in the resume of Keller Rohrback's Complex Litigation Department, attached as Exhibit D to the Joint Declaration.

³ *In re WorldCom, Inc. ERISA Litig.*, No. 02-4816 (S.D.N.Y. Jun. 21, 2002) (J. Cote); *In re Global Crossing ERISA Litig.*, No. 02-7453 (S.D.N.Y. Sept. 16, 2002) (J. Lynch); *In re Polaroid ERISA Litig.*, No. 03-8335 (S.D.N.Y. Oct. 22, 2003) (J. Pauley); *In re Marsh ERISA Litig.*, No. 04-8157 (S.D.N.Y. Oct. 15, 2004) (J. Kram); *In re Pfizer Inc. ERISA Litig.*, No. 04-10071 (S.D.N.Y.) (J. Swain); *In re AIG ERISA Litig.*, No. 04-8141 (S.D.N.Y. Oct. 15, 2004) (J. Sprizzo); *In re Merrill Lynch & Co., Inc. Sec., Derivative & ERISA Litig.*, No. 07-9633 (S.D.N.Y. Oct. 30, 2007) (J. Rakoff); *In re Wachovia Corp. ERISA Litig.*, No. 08-5320 (S.D.N.Y. Dec. 24, 2008) (J. Buchwald); and *In re Bear Stearns Cos., Inc., Sec., Derivative & ERISA Litig.*, No. 08-1963 (S.D.N.Y. Dec. 29, 2008) (J. Sweet).

rates approved in this Circuit and others in many recent class action cases. Based on my personal experience, these rates, as well as the multiplier and percentage award sought here are eminently reasonable. Indeed, in the *AIG* ERISA company stock case, in which Keller Rohrback serves in a leadership role, Judge Sprizzo recently granted plaintiffs' request for attorneys' fees in the amount of 30% of the settlement in a case involving attorney rates of up to \$725 per hour. And in *EDS*, another company stock case in which Keller Rohrback served in a leadership role, Judge Davis approved plaintiffs' request for an award equal to one-third of the monetary relief obtained where hourly rates were as much as \$800 per hour.

21. The requested fee represents a multiplier on Plaintiffs' Counsel's lodestar of 1.6 and 29.9% of the Settlement. In a risky, long-duration case as this one, in which a substantial recovery was nonetheless obtained, an award in this range is well justified. Substantially higher multipliers and percentages have been awarded in many other comparable company stock ERISA cases across the country, including in the Second Circuit. *See, e.g.*, Fee Memo at pp. 22-23.

22. Plaintiffs are also submitting the affidavit of Lowell E. Sachnoff (the "Sachnoff Affidavit"). Mr. Sachnoff is a nationally-respected attorney with over thirty years of experience representing both plaintiffs and defendants in class actions, including substantial experience with ERISA matters. In his affidavit, Mr. Sachnoff addresses various of the applicable factors and confirms the reasonableness of the requested fee.

23. For the reasons discussed herein, the Settlement is a fair, adequate, and reasonable resolution of the claims against the Defendants in this complex and hard-fought ERISA class action. The requested fees, expenses and case contribution awards are well warranted. Thus,

Plaintiffs and Plaintiffs' Counsel respectfully request that the Court grant their motions in their entirety.

Respectfully submitted this 7th day of April, 2009.

Submitted By



Lynn Lincoln Sarko

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

In re XEROX CORPORATION ERISA
LITIGATION,

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

CLASS ACTION

This Document Relates to:

CERTIFICATE OF SERVICE

ALL ACTIONS

I hereby certify that on April 7, 2009, a copy of foregoing DECLARATION OF LYNN L. SARKO IN FURTHER SUPPORT OF: MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION AND MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES, AND CASE CONTRIBUTION AWARDS 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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