

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

IN RE XEROX CORPORATION
ERISA LITIGATION

Master File No. 02 CV-1138 (AWT)

This Document Relates To:

March 24, 2009

ALL ACTIONS.

**PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES,
AND CASE CONTRIBUTION AWARDS**

Named Plaintiffs David Alliet, Thomas Patti, Linda Willis, and Cheryl Wright hereby move the Court for entry of an Order awarding Class Counsel attorneys' fees in the amount of \$15,250,000, and for reimbursement of expenses in the amount of \$992,108.61, plus interest, both of which were incurred in connection with the prosecution and successful resolution of this action. In addition, we request that the Court grant case contribution awards in the amount of \$5,000 to Named Plaintiffs David Alliet, Thomas Patti, Linda Willis, Cheryl Wright and the estate of Plaintiff William Saba, in recognition of their valuable service to the Class.

In support of this motion, and as may be required by Fed. R. Civ. P. 54(d)(2)(B), Plaintiffs state that Plaintiffs' Counsel are entitled to the award of attorneys' fees and reimbursement of expenses in the amounts represented herein as a result of having created a substantial monetary fund for the benefit of the Class.

In further support of this motion, Plaintiffs rely upon (a) the record herein; (b) the Class Action Settlement Agreement, as dated January 26, 2009 (Docket No. 340), as amended by that certain Stipulation and [Proposed] Order Regarding Clarifying Amendments to Settlement Agreement dated March 24, 2009 (Docket No. 345) (the "Settlement Agreement"); (c) the

accompanying memorandum of law; and (d) 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 (the "Joint Declaration").

Plaintiffs' [Proposed] Order Granting Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Case Contribution Awards is submitted herewith.

3. In conjunction with filing this Motion, Co-Lead Counsel are adding to the documents posted on the settlement website approved by the Court in this case, <http://www.kellersettlements.com/XeroxERISA.html>, this Motion, supporting Memorandum, and the Joint Declaration.

4. Plaintiffs' Counsel note that in addition to this motion, their Motion for Final Approval of Class Action Settlement also is pending. As part of a final resolution of this litigation, Plaintiffs respectfully request that the Court grant final approval of the Settlement.

WHEREFORE, for the foregoing reasons and those stated in the supporting Memorandum, Named Plaintiffs respectfully request that the Court enter their [Proposed] Order Granting Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Case Contribution Awards.

Respectfully submitted this 24th day of March, 2009.

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**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

In re XEROX CORPORATION ERISA
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CLASS ACTION

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2009, a copy of foregoing PLAINTIFFS' 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.

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**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

IN RE XEROX CORPORATION
ERISA LITIGATION

Master File No. 02 CV-1138 (AWT)

This Document Relates To:

CLASS ACTION

ALL ACTIONS.

March 24, 2009

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION
FOR AWARD OF ATTORNEYS' FEES, EXPENSES, AND
CASE CONTRIBUTION AWARDS**

TABLE OF CONTENTS

I. THE COURT SHOULD APPROVE COUNSEL’S REQUEST FOR ATTORNEYS’ FEES 2

 A. Brief History of this Litigation 2

 B. The Legal Standard Governing Awards of Attorneys’ Fees in ERISA Fiduciary Breach Class Actions 9

 C. The Requested Fees Are Reasonable Under the Goldberger Factors 11

 1. “Time and Labor” 11

 2. “Magnitude and Complexities” 12

 3. “Risk” 14

 4. “Quality of Representation” 20

 5. “Fee in Relation to the Settlement” 21

 6. “Public Policy” 24

II. THE COURT SHOULD ALLOW COUNSEL’S REQUEST FOR REIMBURSEMENT OF EXPENSES 25

III. CASE CONTRIBUTION AWARDS FOR THE NAMED PLAINTIFFS ARE WELL DESERVED..... 26

IV. CONCLUSION..... 27

TABLE OF AUTHORITIES

Cases

Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985) 24

Beam v. HSBC Bank, No. 02-0682 (W.D.N.Y. Nov. 21, 2005) 23

Becher v. Long Island Lighting Co., 64 F. Supp. 2d 174 (E.D.N.Y. 1999)..... 23

Blum v. Stenson, 465 U.S. 886 (1984) 19, 21

Blyler v. Agee, No. 97-0332 (D. Id. Aug. 25, 2004)..... 24

Boeing Co. v. Van Gemert, 444 U.S. 472 (1980)..... 9

*Central States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco
Managed Care, L.L.C.*, 504 F.3d 229 (2d Cir. 2007) 23

County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2d Cir. 1990)..... 10

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sub nom., Pa. Co. for Insurances on Lives and Granting Annuities*, 123 F.2d
979 (3d Cir. 1941)..... 15

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Ellman v. Grandma Lee's Inc., No. 82-1912, 1986 WL 53400 (E.D.N.Y. May 28,
1986) 24

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Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000)..... passim

Hull v. Policy Mgmt. Sys. Corp., No. 00-778, 2001 WL 1836286 (D.S.C. Feb. 9,
2001) 17

In Merrill Lynch & Co., Inc. Research Reports Sec. Litig., No. 02-1484, 2007 WL
313474 (S.D.N.Y. Feb. 1, 2007)..... 22

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1991) 23

In re AOL Time Warner, Inc. ERISA Litig., No. 02-8238, 2006 WL 2789862 (S.D.N.Y. Sept. 27, 2006)..... 22

In re Bristol Myers Squibb Co, ERISA Litig., No. 02-10129 (S.D.N.Y. Oct. 12, 2005) 22

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In re Crazy Eddie Sec. Litig., 824 F. Supp. 320 (E.D.N.Y. 1993)..... 23

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In re EDS ERISA Litig., No. 03-126 (E.D. Tex. Aug. 6, 2008)..... 23

In re Enron Corp. Sec., Derivative & “ERISA” Litig., 228 F.R.D. 541 (S.D. Tex. 2005) 9

In re Enron Corp. Sec., Derivative & “ERISA” Litig., 284 F. Supp. 2d 511 (S.D. Tex. 2003)..... 17

In re Gilat Satellite Networks, Ltd., No. 02-1510, 2007 WL 2743675 (E.D.N.Y. Sept. 18, 2007) 22

In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436 (S.D.N.Y. 2004) 14, 20, 22

In re Healthsouth Corp. ERISA Litig., No. 03-1700, 2006 WL 2109484 (N.D. Ala. June 28, 2006)..... 23

In re Honeywell Int’l ERISA Litig., No. 03-1214 (D.N.J. July 20, 2005)..... 22

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In re Ikon Office Solutions, Inc., Sec. Litig., 209 F.R.D. 94 (E.D. Pa. 2002)..... 13

In re Mirant Corp. ERISA Litig., No. 03-1027 (N.D. Ga. Nov. 16, 2006) 23

In re Providian Fin. Corp. ERISA Litig., No. 01-5027, 2003 WL 22005019 (N.D. Cal. June 30, 2003) 23

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In re Sears, Roebuck & Co. ERISA Litig., No. 02-8324 (N.D. Ill. June 26, 2007)..... 23

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In re WorldCom, Inc. ERISA Litig., No. 02-4816, 2005 WL 3116188 (S.D.N.Y. Nov. 22, 2005) 11

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In re Xerox Corp. ERISA Litig., No. 02-1138, 2008 WL 918539 (D. Conn. Mar. 31, 2008) 3

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Kling v. Fidelity Mngmnt Trust Co., No. 01-11939 (D. Mass. June 29, 2006) 23

Koch v. Dwyer, No. 98-5519 (S.D.N.Y. May 7, 2002)..... 18, 24, 27

Koch v. Dwyer, No. 98-5519, 1999 WL 528181 (S.D.N.Y. July 22, 1999)..... 17

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Masters v. Wilhelmina Modeling Agency, 473 F.3d 423 (2d Cir. 2007) 10

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Miltland Raleigh-Durham v. Myers, 840 F. Supp. 235 (S.D.N.Y. 1993)..... 25

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Reinhart v. Lucent Technologies, No. 01-3491 (D.N.J. Mar. 15, 2004)..... 23

Savoie v. Merchants Bank, 166 F.3d 456 (2d Cir. 1999)..... 21

Sheppard v. Consolidated Edison Co. of New York, Inc., No. 94-403, 2002 WL 2003206 (E.D.N.Y. August 1, 2002) 27

Spann v. AOL Time Warner, No. 02-8238, 2005 WL 1330937 (S.D.N.Y. June 7, 2005) 25, 27

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Trustees v. Greenough, 105 U.S. 527 (1881). 26

Van Natta v. Sara Lee Corp., 439 F. Supp. 2d 911 (N.D. Iowa 2006) 17

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Statutes

Employee Retirement Income Security Act of 1974, 88 Stat. 829 (Sept. 2, 1974) 16

ERISA § 404(c), 29 U.S.C. § 1104(c) 18

ERISA § 502(a), 29 U.S.C. § 1132(a) 24

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Regulations

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55,544 (Nov. 10, 1981)..... 16

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Trail of Error in Russell, Mertens, and Great-West*, 103 Colum. L. Rev. 1317,
1353-62 (2003)..... 17

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INTRODUCTION

Following nearly seven years of hard-fought litigation that encompassed motion practice, extensive class and merits discovery, and almost eight months of mediation conducted by a nationally-recognized mediator, the Parties¹ have now settled this ERISA fiduciary breach class action. The Settlement provides for a cash payment of \$51,000,000, to be allocated among the Xerox 401(k) Plan accounts of the members of the Settlement Class, and for improvements to Plan provisions relating to the administration of the Plans and their assets. This Settlement was achieved solely through the dedicated efforts of Plaintiffs' Counsel,² working with a diligent group of Named Plaintiffs representing Xerox's Union and Salaried Plans.

On January 28, 2009, this Court issued an Order Preliminarily Approving Settlement and Confirming Final Settlement Hearing, which was amended by Order dated February 5, 2009 (together, the "Preliminary Approval Order"). Pursuant to the schedule in the Preliminary Approval Order, Plaintiffs' Counsel are now filing this Memorandum, along with their Memorandum of Law in Support of Motion for Final Approval of Class Action Settlement and Plan of Allocation ("Final Approval Brief") and 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"). In the Final Approval Brief, we explain why the Settlement is an excellent result for the Class and should be approved. In this Memorandum, we address Plaintiffs' Counsel's request for an award of attorneys' fees in the amount of \$15,250,000, a "multiplier" of approximately 1.6, and reimbursement of out-of-pocket litigation expenses of \$992,108.61. In addition, we request that

¹ All capitalized terms not otherwise defined in this Memorandum have the same meaning given them in the Class Action Settlement Agreement (the "Settlement Agreement") filed with the Court on January 26, 2009, including the amendments submitted to the Court on March 24, 2009, which are intended to clarify the intent of the Parties. See Stipulation and Order Regarding Clarifying Amendments to the Settlement Agreement (Docket No. 345).

² On October 16, 2002, the Court entered Pretrial Order No. 1 appointing Lynn Sarko of Keller Rohrback L.L.P. and Charles Watkins of Futterman Howard Watkins Wylie & Ashley, Chtd. as Co-Lead Counsel, with responsibility, among other things, to lead and coordinate the prosecution of the case.

the Court grant the Named Plaintiffs case contribution awards of \$5,000 each in recognition of their valuable service to the Class.

As demonstrated below, the record in this case and the case law in the Second Circuit fully support these requests for fees, expenses, and case contribution awards, based on the risks taken and results obtained in this litigation. Accordingly, Plaintiffs' Counsel respectfully request that the Court approve them. The fees are addressed in Section I below, the expenses in Section II, and the case contribution awards in Section III.

I. THE COURT SHOULD APPROVE COUNSEL'S REQUEST FOR ATTORNEYS' FEES

A. Brief History of this Litigation

The Final Approval Brief and the Joint Declaration contain a detailed discussion of this litigation's progress and ultimate success. We ask the Court to consider these documents in connection with this request for fees and expenses, and we refer to them in this Memorandum as appropriate.

To summarize, the first of five ERISA cases challenging the Defendants' conduct in relation to Xerox's two 401(k) plans' investment in Xerox stock – the so-called “*Patti*” case – was filed on July 1, 2002. Now, almost seven years later, we are settling all aspects of these cases. Between these bookends, Plaintiffs' Counsel have thoroughly and aggressively prosecuted this case, and defense counsel have no less thoroughly and aggressively defended it. Because the details are in the Final Approval Brief and Joint Declaration, here we describe only the major features of the litigation:

The Complaints. The first four complaints against Xerox and the Plans' other fiduciaries, filed during July and August 2002, were consolidated by Pretrial Order No. 1.³ On November 15, 2002, Plaintiffs filed their Consolidated Amended Complaint. The Consolidated Amended Complaint alleged that Defendants violated their fiduciary and co-fiduciary duties

³ By Amendment to Pretrial Order No. 1, on December 24, 2002, the Court consolidated a fifth action, *Wright v. Allaire*, No. 02-10997.

under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (“ERISA”) by, inter alia: (1) failing to prudently and loyally manage the Plans and the Plans’ assets; (2) failing to properly monitor the performance of their fiduciary appointees, and remove and replace those whose performance was inadequate; (3) failing to provide participants with complete and accurate information regarding the Xerox Stock Fund sufficient to advise participants of the true risks of investing their retirement savings; and (4) failing to protect the Plans and their participants and beneficiaries from Defendants’ conflict of interest. Plaintiffs allege that Defendants knew or should have known that Xerox stock was not a prudent retirement investment during the Class Period and that the Defendants acted imprudently by allowing further investment in Xerox stock and not liquidating those holdings. Two further amended complaints followed, the most recent of which was filed only last year.

The Motions to Dismiss. There were two rounds of motions to dismiss. In January and February 2003, the Defendants filed the first round. On April 17, 2007, the Court issued a 32-page opinion, denying the motions in significant part, and granting them in part with leave to replead certain matters. *In re Xerox Corp. ERISA Litig.*, 483 F. Supp. 2d 206 (D. Conn. 2007). The Court’s ruling triggered an intense period of activity in this case, with the Parties proceeding on multiple fronts simultaneously, including new dismissal motions, merits discovery and class certification, and later mediation and ultimately settlement.

On May 17, 2007, Plaintiffs filed their Second Consolidated Amended Complaint. Defendants answered parts of it but moved to dismiss portions of the Complaint that had been repleaded. On March 31, 2008, after additional briefing, the Court ruled on the second round of motions to dismiss, denying them in every important respect. *In re Xerox Corp. ERISA Litig.*, No. 02-1138, 2008 WL 918539 (D. Conn. Mar. 31, 2008).

Motions to dismiss are often routine, even perfunctory, but these motions were not. The Defendants used their dismissal motions to lay the groundwork for a repeated series of attacks on the case, and the briefing was unusually extensive. Plaintiffs’ Counsel are very experienced in

ERISA company stock litigation and know of no case, not even *Enron*, in which motions to dismiss were so exhaustively briefed. The process was complicated by the fact that while the dismissal motions were pending, the case law was developing rapidly, requiring counsel and the Court to assimilate an ever-increasing list of new decisions. Eventually, the Court deemed it necessary for the Parties to re-brief the issues on Defendants' first motion to take account of the new law. The Court's docket reflects the heavy activity relating to the dismissal motions, with more than seventy entries and the thousands of pages of briefing and other materials they encompassed.

Class Certification Proceedings. Plaintiffs moved for class certification three times. They filed their initial motion for class certification and a detailed supporting brief on May 23, 2003. Following motion practice regarding when class certification should be considered, the Court postponed these proceedings. Plaintiffs' second motion for class certification was denied without prejudice pending class discovery.

On July 1, 2008, in conjunction with their Third Consolidated Amended Complaint, Plaintiffs filed their renewed and final class motion with a substantially revised supporting brief. Defendants, who had previously served the Named Plaintiffs with interrogatories and requests for production, now took Plaintiffs' depositions. On September 5, 2008, Defendants filed their opposition to the class motion, challenging virtually every aspect of the proposed class's satisfaction of Rule 23. On October 6, 2008, Plaintiffs filed their reply brief. Plaintiffs' motion was pending at the time of the Settlement.

Merits Discovery, Documents. As detailed in the Joint Declaration, Plaintiffs' Counsel started document discovery at the outset of the case with informal requests for a variety of ERISA-related materials, ultimately expending thousands of hours on these and a variety of additional efforts related to document discovery. Joint Declaration ¶¶ 28-40. Among other things, in addition to their informal requests, Plaintiffs' Counsel:

- Served three sets of Requests for Production of Documents, one set of Requests for Admission, and one set of Interrogatories on each of the Defendants and

served five document subpoenas on non-party witnesses such as Xerox's auditor, KPMG, its trustee, State Street, its record keeper, Hewitt Associates, and a management consultant, Mercer-Delta;

- Responded to Defendants' Requests for Documents and Interrogatories issued to the Named Plaintiffs on issues pertaining to class certification;
- Negotiated and served lengthy interrogatories on Xerox, which the parties intended to substitute for a portion of (and provide more information than usually obtained in) traditional Fed. R. Civ. P. 30(b)(6) questioning;
- Engaged in detailed negotiations and motion practice regarding production of relevant information and documents in order to ensure full and fair production of ERISA-specific and other information to which they were entitled under the Federal Rules;
- Established an electronic document depository for the litigation to efficiently review, categorize, code and manage documents produced by the Defendants and others, including more than 3.2 million pages of documents produced by the Defendants to the SEC, including documents encompassing 155 days' of deposition and investigatory transcripts; and
- Laboriously reviewed and analyzed the millions of pages of documents and transcripts that the document discovery process yielded.

Throughout document discovery, Plaintiffs' Counsel sought to avoid duplicating document discovery conducted in connection with prior litigation such as the SEC proceeding, instead using documents previously produced as a springboard to developing our own case. For example, we analyzed in detail the numerous transcripts from the prior SEC litigation and investigation, preparing detailed abstracts of 118 transcripts. However, because many of the elements needed to establish our ERISA claims were substantially different than those required of the SEC and the *Carlson*⁴ plaintiffs, and because Defendants would not stipulate to using documents from other cases in this one, the documents previously gathered were helpful, to be sure, but did not obviate the need for substantial additional discovery in this case.

Merits Discovery, Depositions. Once document discovery was well underway, Plaintiffs' Counsel embarked on an extensive program of depositions of witnesses relevant to our

⁴ *Carlson v. Xerox Corp.*, No. 00-1621 (D. Conn.).

case. We prepared for and participated in one two-day deposition noticed by the *Carlson* Plaintiffs, and we took fourteen key witness depositions of our own, which did not include 30(b)(6) or document custodian depositions (with the exception of certain 30(b)(6) questioning that occurred during the deposition of Sheri London, Xerox's Senior Benefits Counsel, who responded to a series of questions on behalf of Xerox during her full-day deposition on factual issues), as information of that nature was acquired through other efficient means, such as interrogatories negotiated with Defendants. Our deposition witnesses included two former Chief Executive Officers of Xerox, Paul Allaire and Richard Thoman, former Chief Financial Officer Barry Romeril, former Audit Committee chair Thomas Theobald, outside auditor Michael Conway, and various Xerox personnel who were involved in the finance, accounting and/or Plan administration functions – many of whom had not been deposed in either the *Carlson* case or by the SEC. We scheduled and prepared for a number of additional depositions, including the deposition of Defendant Anne Mulcahy, Xerox's current CEO, who also had not been deposed previously. At the outset of our deposition program, there was a possibility that some of the ground we needed to cover with overlapping witnesses might be covered by the *Carlson* plaintiffs, but that prospect evaporated very early in the deposition program when *Carlson* reached an agreement in principle to settle and its deposition program was abandoned. Only with the hand-shake agreement to settle the case in December 2008 did we adjourn the remaining nineteen depositions that were then scheduled. Joint Declaration ¶¶ 41-43.

Retaining and Consulting with Experts. The case settled before formal expert discovery, but by the time of the settlement, Plaintiffs' Counsel were far along in preparing the expert witness side of the case. We had made more or less final decisions regarding Plaintiffs' testifying experts on the key issues in our case, including fiduciary responsibility, accounting and

regulatory reporting issues, the nature and scope of the underlying alleged misconduct, and the measurement of loss to the Plans. Evidencing the extent to which the ERISA issues differed from the issues presented by *Carlson*, only one of our eight experts had any connection to that case. Joint Declaration ¶¶ 44-47.

Preparing for Trial. Although a formal trial date had not yet been set at the time of the Settlement, expert discovery was scheduled to close on April 15, 2009, and accordingly, our trial preparation was well underway. For example, we had prepared detailed strategies for admitting into evidence the large number of documents that Defendants declined to stipulate were authentic and admissible, and we were developing our order of proof at trial. Had this case not settled, we would have pressed for an early trial date and been well prepared to try it in accordance with whatever schedule the Court established. Joint Declaration ¶¶ 48-51.

Settlement Negotiations and Mediation. While we were simultaneously engaged in discovery, briefing class certification, working with our experts, and preparing for trial, we also were vigorously engaged in attempting to settle the case on terms favorable to the Class. In the spring of 2008, the Parties began preparing for what became a marathon series of settlement negotiations under the auspices of mediator Robert Meyer, the same mediator who facilitated settlement discussions in the *Carlson* litigation.

While the mediation proceedings remained at all times on the most professional footing, to say that the mediation was arduous is an understatement. In fact, the two Co-Lead Counsel in the case, Mr. Sarko and Mr. Watkins, with nearly sixty years of legal experience between them, cannot recall another ERISA case in which ongoing settlement discussions continued so long — nearly eight months — or where such persistence on the part of the mediator was required just to keep the talks from breaking down, let alone make them productive. The Parties, represented by both their most senior counsel and more junior personnel, met in formal session on three separate occasions in New York, in addition to participating in private sessions with the mediator in Los

Angeles, and an additional informal counsel session to discuss and debate a variety of mostly legal issues, which the mediator also attended, in Washington, D.C.

In preparation for the formal mediation sessions, the Plaintiffs submitted detailed papers in which they assessed key issues including the elements of their claims, defenses, discovery, recent case law developments, damages, insurance coverage, class certification, along with a variety of other matters. In effect, the mediation was a summary trial, addressing in microcosm every issue likely to arise at the real trial. The Parties responded to the mediator's concerns, briefed issues as they arose, and submitted expert "reports" on particularly important issues. In addition, throughout the mediation process, the Parties participated in innumerable regular telephone conferences and e-mail exchanges with the mediator and each other.

After countless false starts, setbacks, and delays, an agreement in principle regarding the dollar amount and general outlines of the settlement was reached on December 12, 2008. Following this, the Parties engaged in extensive negotiations over the other terms of the written agreement and its associated notices and orders. The Court was timely advised of these developments, and on December 16, 2008, entered an Order staying proceedings pending the hoped-for execution of a full settlement document. Early in 2009, the Parties submitted the signed Settlement Agreement to the Court and requested an order preliminarily approving it, certifying a settlement class, approving their notice plan, and setting the date for the fairness hearing. The Court signed the Preliminary Approval Order on January 28, 2009.

Counsel's Investment of Time and Money in the Case. The amount of time and money Plaintiffs' Counsel have expended on a contingent basis in the foregoing activities was substantial. Through March 20, 2009, Plaintiffs' Counsel have devoted more than 22,164 professional hours to this case, representing \$9,318,130.70 in dollars-times-hours "lodestar," and have incurred \$992,108.61 in out-of-pocket expenses. Joint Declaration ¶¶ 112-119, 165-166 and Exhibits F through O thereto.

And of course, work on the case has not ended, nor will it end anytime soon. We will continue 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.⁵ 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.

B. The Legal Standard Governing Awards of Attorneys' Fees in ERISA Fiduciary Breach Class Actions

Just as in other class actions, attorneys who create a settlement fund for the common benefit of members of a class are entitled to "a reasonable fee – set by the court – to be taken from the fund." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). "The rationale for the doctrine is an equitable one: it prevents unjust enrichment of those benefiting from a lawsuit without contributing to its cost." *Goldberger*, 209 F.3d at 47. Common fund fee awards are therefore a commonplace feature of class litigation. Here, Plaintiffs' Counsel successfully created a common fund of \$51 million plus interest, and accordingly are entitled to a reasonable share of that fund as a fee.

The Second Circuit approves two ways of determining a reasonable attorney's fee in common fund cases: the "percentage-of-recovery" method and the "lodestar" method. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *Goldberger*, 209 F.3d at 50.

⁵ In the *Enron* ERISA case, *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 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.

The Court has discretion to choose whichever method is most appropriate, depending on the circumstances of a particular case. *Wal-Mart*, 396 F.3d at 121. Both approaches have the same basic goal, however: to provide fair and reasonable compensation to class counsel in light of the risks they have run, the work they have done, and the results they have achieved for their clients. *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1326 (2d Cir. 1990). Regardless of the method used, several factors identified in *Goldberger*, which we discuss below in more detail, ultimately determine what is a reasonable fee. *Masters v. Wilhelmina Modeling Agency*, 473 F.3d 423, 436 (2d Cir. 2007).

Under the “lodestar” method, the court determines the lodestar, that is, the number of hours expended on the case multiplied by the appropriate hourly rates, based on submissions from counsel regarding the work they performed. This lodestar is then adjusted, usually upward (a “multiplier”), to take into account a number of factors, including most importantly, the risks assumed by the lawyers and the extent of their success. William B. Rubenstein, Alba Conte & Herbert B. Newberg, *NEWBERG ON CLASS ACTIONS* § 14:5 (4th ed. 2002 & Supp. 2008). Under the percentage-of-recovery method, the fee is calculated simply as a percentage of the amount obtained in the litigation. *Id.* § 14:6 at 550; *In re WorldCom Inc. ERISA Litig.* No. 02-4816, 2004 WL 2338151, at *10-11 (S.D.N.Y. Oct. 18, 2004).

Each method has its pros and cons, and in certain cases the district court’s selection of the appropriate methodology may have a significant impact on the amount of the fee. Here, however, both approaches support the fee requested. Both the multiplier on our lodestar (approximately 1.6) and the percentage fee (29.9%) are very reasonable under the circumstances of this particular case, and consistent with the *Goldberger* factors as well as guidance provided by courts that have addressed fee requests in similar cases.

C. The Requested Fees Are Reasonable Under the Goldberger Factors

The Goldberger factors referred to above are:

1. “the time and labor expended by counsel”;
2. “the magnitude and complexities of the litigation”;
3. “the risk of the litigation”;
4. “the quality of representation”;
5. “the requested fee in relation to the settlement”; and
6. “public policy considerations.”

Goldberger, 209 F.3d at 50; *see also In re WorldCom, Inc. ERISA Litig.*, No. 02-4816, 2005 WL 3116188, at *7 (S.D.N.Y. Nov. 22, 2005) (citing *Wal-Mart*, 396 F.3d at 121). Each of the factors militates strongly in favor of the requested fee.

1. “Time and Labor”

Without benefit of significant contract labor, Plaintiffs’ Counsel have dedicated enormous efforts to this case since it was filed in 2002. We summarized that work above, and the details are described in the Joint Declaration.

The Court’s docket hints at the size of the undertaking: it contains over 343 entries, more than in all but a handful of company stock cases. The duration of the case also speaks to the time and labor required of counsel: from initial complaint to the final approval hearing is a span of nearly seven years, longer than any other company stock case (and two years longer than *Enron*).

Not that the amount of labor required was a surprise. Having served in leadership positions in similar cases, Plaintiffs’ Counsel were aware at the outset of the case that considerable time and resources would likely be necessary to prosecute it, and that proved to be so. Joint Declaration ¶¶ 126-130. As detailed above, in all, Plaintiffs’ Counsel devoted more

than 22,164.37 hours to the successful prosecution of the action, and advanced expenses in the amount of \$992,108.61. *Id.* ¶ 129.

All of Plaintiffs' Counsels' efforts were conducted efficiently and with cost-savings in mind. *Id.* ¶ 130. For example, rather than start from scratch in learning the lay of the land at Xerox, we scoured the transcripts of SEC proceedings for whatever they would yield in terms of our ERISA claims. Being on a contingent fee basis, Plaintiffs' Counsel had every incentive to do whatever they could to flatten the learning curve via such tactics and avoid "make work." Similarly, Co-Lead Counsel took significant precautions to avoid duplication of effort, prevent unauthorized work, and ensure that areas of potential discovery deemed tangential were not pursued. *Id.* Work was assigned to lawyers in areas in which they had experience. *Id.* Where professionally feasible, work was assigned to associates and paralegals with lower billing rates, to provide quality work at the lowest cost.⁶ Thus, while document coding work was often assigned out to non-Lead Plaintiffs' Counsel firms, key functions such as deposition preparation and taking were handled mainly by a small core cadre of attorneys who were knowledgeable about the entire case. As set forth above, and more fully in the Joint Declaration, this *Goldberger* factor – the time and labor expended by counsel – clearly supports the requested fee award in this case.

2. "Magnitude and Complexities"

As the foregoing brief description of the litigation suggests, this case was both large in scope and extremely complex. In addition to involving scores of witnesses, more than 40,000 participants in Xerox's two 401(k) Plans, millions of pages of documents, and tens of millions of dollars, it presented complex factual and legal issues against the backdrop of a fast-developing and hotly disputed area of the law. This case has required the hard work of attorneys with specialized expertise, who spent many thousands of attorney hours over a nearly seven-year time

⁶ Plaintiffs' Counsel maintained daily time records throughout this litigation. A detailed compilation of their activity and time will be submitted in camera upon request. A summary of such time is attached to the Joint Declaration as Exhibits F-O.

frame. *See In re Ikon Office Solutions, Inc., Sec. Litig.*, 209 F.R.D. 94, 104 (E.D. Pa. 2002) (noting the complexity of similar breach of fiduciary duty claims, as well as the expense of litigation and risks of establishing liability and damages); *In re Enron Corp. Sec., Derivative & “ERISA” Litig.*, 228 F.R.D. 541, 565 (S.D. Tex. 2005) (same); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (finding that “[f]iduciary status, the scope of fiduciary responsibility, the appropriate fiduciary response to the Plans’ concentration in company stock and [Global Crossing’s] business practices would be issues for proof, and numerous legal issues concerning fiduciary liability in connection with company stock in 401(k) plans remain unresolved”).

This litigation presented a host of challenging issues, including:

- **Complex and innovative legal theories.** ERISA is a highly-specialized and complex area of the law, and the type of claims brought here – involving alleged breaches of duty by the Plans’ fiduciaries – are especially so. As mentioned above, the law is developing, there are significant conflicts between the approaches adopted by different trial and appellate courts, and much of the law in this area was decided after this case was filed. The length and number of the Parties’ briefs on the dismissal motions bear witness to the complexity and evolving nature of ERISA jurisprudence. Plaintiffs’ Counsel believe the claims in this case are solidly grounded in ERISA law, but it is beyond debate that the issues are complex.
- **Lack of established case values.** Because this was one of the first company stock cases filed, there was no formal “track record” to guide Plaintiffs’ Counsel’s development of the case, or provide any assurance that it would result in a victory for the class.
- **Complexity of establishing liability and losses.** A finding of liability would require careful presentation and analysis of lengthy and detailed Plan documents, complex corporate financial and accounting matters, and sophisticated judgments about the investment decisions the Defendants had made, or not made, as much as eleven years ago. In addition, damage assessments by the finder of fact often result in a battle of experts. In this case, the Defendants argued that even if the imprudence of Xerox stock as a Plan investment could be established, that did not occur until so late in the proposed class period that Plaintiffs’ damages would be minimal. One of the principal challenges Plaintiffs’ Counsel faced was showing that Xerox was an imprudent Plan investment early in the Class Period.

- **Risk of an unforeseen change in the law.** ERISA jurisprudence presents an ever changing legal landscape, and there is a constant risk that the law will change before judgment. While many recent decisions have upheld claims similar to those asserted here, there was no assurance a change in the law would not have affected, or negated, the claims in this lawsuit. The possibility that the law might materially and adversely change during the course of the litigation – as Defendants argued it did with, *inter alia*, the Supreme Court’s decision last year in *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020 (2008) – meant that Plaintiffs needed to structure their arguments and proofs to present multiple avenues to recovery. The necessity of avoiding an approach which placed all of Plaintiffs’ “eggs in one basket” greatly magnified the complexity of the Plaintiffs’ task.
- **Vigorous defense.** Further contributing to the complexity of this case were the quality of Defendants’ skilled and tenacious attorneys, and the virtually unlimited resources with which they were able to present their defenses through dismissal motions, as well as the anticipated summary judgment motions, trial, post-trial motions and appeals.
- **Decision tree.** Applying a standard “decision tree” analysis to this case only underscores its magnitude and complexity. Defendants asserted numerous factual and legal defenses to this suit, any one of which, if successful, could have resulted either in a judgment in Defendants’ favor, or a very small recovery for the Class. The innumerable forks-in-the-road leading to liability and damage findings all had to be considered by Plaintiffs’ Counsel and factored into their overall litigation strategy. The possibility of a loss at any of these forks in the road – from the motion to dismiss, through summary judgment, trial and appeal – had to be factored into the Plaintiffs’ analysis, and consequently bears on the Court’s analysis of the requested fee.

Joint Declaration ¶¶ 69-72, 131-132.

Despite the complexity and uncertainty in the law and the vigorous defense the Defendants mounted at every juncture, Plaintiffs’ Counsel navigated this case to a successful conclusion. Thus, this *Goldberger* factor also supports the requested fee award.

3. “Risk”

In approving the settlements in *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436 (S.D.N.Y. 2004), Judge Lynch observed that “the Second Circuit [in *Goldberger*] has identified the risk of success as perhaps the foremost factor to be considered in determining a reasonable award of attorneys’ fees.” *Global Crossing*, 225 F.R.D. at 467 (internal quotations

omitted). But the risk is not the same in all class actions. In *Goldberger* itself the panel noted that some securities fraud class actions are, in truth, really not that risky. *Goldberger*, 209 F.3d at 52. Particularly when there has been a large accounting restatement, government enforcement action, or criminal prosecution, it can be argued, as this Court noted in *Carlson*, that plaintiffs have a built-in likelihood of a substantial settlement. The same argument is sometimes made with respect to antitrust cases filed in the wake of a Department of Justice consent decree or products cases in the aftermath of a government-ordered recall. These cases may have risk, so the argument goes, but the risk is limited.

No such argument has, to our knowledge, ever been made in regard to ERISA cases like this one, nor could it. The tangible risks faced by plaintiffs' counsel in ERISA fiduciary breach class actions, including this one, are all too real. There are several reasons for this. The field of ERISA company stock litigation is relatively undeveloped for one thing. The securities laws, by contrast, have been a central part of federal law for over 75 years,⁷ and securities fraud class actions have been litigated at least since early 1940's, e.g., *Deckert v. Independence Shares Corp.*, 39 F. Supp. 592 (E.D. Pa. 1941), *rev'd sub nom.*, *Pa. Co. for Insurances on Lives and Granting Annuities*, 123 F.2d 979 (3d Cir. 1941). The securities fraud "infrastructure," so to speak, is enormous. On the legal side there is a separate statute, the PSLRA, spelling out the procedure in such cases,⁸ and there is a large body of appellate case law on every major issue that arises in case after case. There are numerous treatises and periodicals devoted to securities fraud litigation, there are many academics specializing in the field, and all experienced federal judges are familiar with the area. On the practical side, there is a large plaintiffs' bar specializing in such cases and many well-known experts (and firms of experts) involved in such litigation. Lead plaintiffs in major cases tend to be members of a small, somewhat cohesive group of public pension funds. Typically there is substantial insurance coverage in place. And, of course, over

⁷ Securities Act of 1933, 48 Stat. 74 (May 27, 1933); Securities Exchange Act of 1934, 48 Stat. 881 (June 6, 1934); Investment Company Act of 1940, 54 Stat. 789 (Aug. 22, 1940).

⁸ Private Securities Litigation Reform Act, 109 Stat. 737 (Dec. 22, 1995).

the years tens of billions of dollars have been paid in securities fraud settlements and judgments, resulting in, among other things, meaningful comparators to guide settlement discussions and enable parties to assess litigation risk. Much of this can also be said of antitrust litigation, where the price fixing statute and the case law date back over a hundred years.⁹

Company stock fiduciary litigation is in stark contrast to all this. ERISA is a relatively new statute (1974), and the laws creating 401(k) plans are even newer (1981).¹⁰ Company stock actions involving 401(k) plans are newer still. The first pioneering cases were not filed until the late 1990s, only a few years before this case was commenced. Even now, the case law is exceptionally thin in comparison with securities and antitrust jurisprudence, with only a few appellate decisions on most issues (and no Supreme Court decisions¹¹). Although there are now a few treatises and periodicals on ERISA fiduciary litigation, they are of recent vintage and ERISA academics interested in fiduciary litigation are few and far between. There have been some substantial settlements, but nothing to rival the larger ones in the securities field (where the classes are much larger). The ERISA plaintiffs bar consists of the firms in this case and a few others. In short, in ERISA litigation there is nothing like the mature body of law and practice in the securities and antitrust fields.

Another major distinction is the state of the law itself. The law of ERISA fiduciary breach is still evolving, as evidenced by the fact that whenever a significant motion was pending in this case, the Court was virtually bombarded with supplemental filings highlighting relevant new decisions. The newness of the statute is part of the reason, but it is also true that ERISA was designed primarily to regulate traditional defined benefit (“DB”) plans, as opposed to defined contribution (“DC”) plans like 401(k)s, which did not even exist when ERISA was enacted.

⁹ Sherman Anti-Trust Act, 26 Stat. 209 (July 2, 1890).

¹⁰ Employee Retirement Income Security Act of 1974, 88 Stat. 829 (Sept. 2, 1974); Revenue Act of 1978, 92 Stat. 2763 (Nov. 6, 1978) (creating deferral arrangements that ultimately led to 401(k) plans); Certain Cash or Deferred Arrangements Under Employee Plans, 46 Fed. Reg. 55, 544 (Nov. 10, 1981) (first proposed regulations to authorize 401(k) plans).

¹¹ Although favorable in its holding that under ERISA, § 502(a)(2) claims are properly brought by participants on behalf of an ERISA plan, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, 1026 (2008), was not a company stock case.

Many courts have urged, in fact, that the law in some respects is so unsettled, that “Congress and the Supreme Court [should] revisit what is an ... entangled ERISA regime,” *Van Natta v. Sara Lee Corp.*, 439 F. Supp. 2d 911, 940-41 (N.D. Iowa 2006), and the academics have made similar points. *E.g.*, John H. Langbein, *What ERISA Means by “Equitable”*: *The Supreme Court’s Trail of Error in Russell, Mertens, and Great-West*, 103 Colum. L. Rev. 1317, 1353-62 (2003) (critical examination of ERISA as a remedial law by the nation’s premier ERISA expert). Our point here is not that the law is “right” or “wrong” on a given point, but that it is very unsettled, and this uncertainty exponentially increases the risks for the Plaintiffs’ Counsel.

And that is the state of ERISA fiduciary litigation in 2009. When this case was filed in July 2002, the situation confronting Plaintiffs’ Counsel was even more daunting. When the lawyers here decided to take this case, Judge Harmon’s lengthy, law-review style opinion in *Enron* – resolving in plaintiffs’ favor at least at the trial court level a number of open issues – had not yet been published. *In re Enron Corp. Sec., Derivative & “ERISA” Litig.*, 284 F. Supp. 2d 511 (S.D. Tex. 2003). Similarly, the Department of Labor (“DOL”) had not yet taken a position on the issues raised in these cases.¹² Instead, in July 2002, the case law was *de minimis*. There were only three cases: two cases in which motions to dismiss had been denied and one case in which the motion to dismiss was granted.¹³ The uncharted legal landscape was, in short, light years removed from that facing plaintiffs’ lawyers bringing class actions in more mature areas of the law, or lawyers bringing company stock cases now. Equally important, as best we

¹² It first did so in its amicus brief in the *Enron* case. Amended Brief of the Secretary of Labor as Amicus Curiae Opposing the Motions to Dismiss, 284 F. Supp. 2d 571 (S.D. Tex. 2003).

¹³ *Koch v. Dwyer*, No. 98-5519, 1999 WL 528181 (S.D.N.Y. July 22, 1999) (motion to dismiss denied), *reconsideration denied*, 2000 WL 174945 (S.D.N.Y. Feb. 15, 2000), *Koch v. Dwyer*, 2001 WL 289972 (S.D.N.Y. Mar. 23, 2001), (class certified); *Whetman v. IKON*, 86 F. Supp. 2d 481 (E.D. Pa. 2000) (motion to dismiss denied), 191 F.R.D. 457 (E.D. Pa. 2000) (class certified); *Hull v. Policy Mgmt. Sys. Corp.*, No. 00-778, 2001 WL 1836286 (D.S.C. Feb. 9, 2001) (motion to dismiss granted).

can determine, in July 2002 only one defendant had paid anything to settle an ERISA company stock class action.¹⁴

Turning to the specific risks presented by this litigation, there were many. Defendants raised a host of defenses, any one of which, if successful, could have ended Plaintiffs' case. They maintained at length and with great vigor, for example, that Xerox stock was "hardwired" into Xerox's 401(k) plans as a matter of plan design and that because the Defendant fiduciaries had no power to remove or restrict it, they could have no liability. They also argued there were no damages in this case because of the efficient market for Xerox stock that existed and because the fiduciaries did not learn anything that would have led a reasonable person to conclude that Xerox stock was an imprudent investment until so late in our class period that Xerox stock had "bottomed out" and become not only a prudent investment, but the best performing option available to Plan participants. Defendants further claimed that removing Company stock as a Plan investment or selling Xerox stock out of the Plans would have violated laws against insider trading, that ERISA § 404(c), 29 U.S.C. § 1104(c), which places the responsibility for investments on the participants under certain circumstances, was an absolute defense, and that intra-class conflicts among class members would prevent certification.

It is true of course that the Defendants had settled with the SEC, paying what were then considered large fines, and that Xerox had restated its financials. But as useful as these facts may have been to the *Carlson* plaintiffs in proving their case, they were, at least according to the Defendants, of little or no relevance to the fiduciary duty claims in this ERISA case. Defendants in fact objected at our depositions to questioning that even touched on financial issues. This was because, in the Defendants' view, proving that Xerox had misstated its financials was the beginning, rather than the end, of what Plaintiffs in the ERISA case needed to prove. According to the Defendants, even assuming that the foregoing questions were all resolved in Plaintiffs'

¹⁴ And Plaintiffs' Counsel were not even aware of it. The settlement was approved less than two months before this case was filed, the settlement approval opinion was unpublished, and the settlement, being a relatively modest \$6.4 million, received, as far as we are aware, no publicity. *Koch v. Dwyer*, No. 98-5519 (S.D.N.Y. May 7, 2002) (Order and Final Judgment).

favor, Plaintiffs still could not recover unless they established not only that Xerox had misstated its financials but that the Company was, in effect, on death's door, and in such poor financial condition that no prudent person could ever have thought it was a suitable investment, at any price. In other words, unless Plaintiffs could show Xerox was on the verge of bankruptcy throughout the class period, it would be impossible for them to prevail.

Plaintiffs' response to these contentions is beyond the scope of this Memorandum, but it is in their briefs to this Court, and was discussed and briefed at length in the mediation. Suffice it to say, the Defendants were unpersuaded and intended to press all of these arguments in Court. Plaintiffs disagreed with the Defendants' analyses, but each of the Defendants' arguments raised the level of risk this case presented. And, despite the Court's rulings on the motions to dismiss, Defendants maintained that each was a live issue in the case right up until the time of settlement.

In addition to the foregoing risks pertaining to ERISA cases in general and company stock cases in particular, there were a host of what might be termed the "usual" risks inherent in any contingent litigation. These include, among others, the risk that witnesses will testify in unexpected ways, that documents may turn out not to mean what they appear to say, the risk of an adverse change in the law, and the risk that the court may apply the law differently than we envision. One also cannot overlook the risks posed by summary judgment, trial, post-trial motions, appeals, and even a petition for a writ of *certiorari*, or the risks inherent in the delays such proceedings occasioned. And given the current economic environment, we cannot overlook the risk of bankruptcy, which would have greatly reduced the value of the lawsuit.

Class Counsel accepted this matter on a contingent basis, with the attendant risk that they would receive no fee or expense reimbursement. Courts uniformly hold that when recovery is contingent, a higher fee must be awarded than when counsel undertake no risk of non-payment. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 902 (1984) (Brennan, J., concurring) ("the risk of not prevailing, and therefore the risk of not recovering any attorney's fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee"); *Gaskil v.*

Gordon, 160 F.3d 361, 363 (7th Cir. 1998) (“Because they shift part of the risk of loss from client to lawyer, contingent fee contracts usually yield a larger fee in a successful case than an hourly fee would”).

Goldberger, 209 F.3d at 52, points out that there may not be “a substantial contingency risk in every common fund case.” In this case, however, there was, and Plaintiffs’ Counsel should be rewarded for having borne and successfully overcome it.

4. “Quality of Representation”

This demanding case presented difficult factual, procedural, and legal issues. It involved large amounts of money, scores of potential witnesses and millions of pages of documents. Successfully marshalling the evidence and applying the law to it required a high degree of expertise in complex ERISA and class action matters. Nor can there be any doubt that, as national leaders in pursuing this type of litigation, Plaintiffs’ Counsel provided the high quality of services this case needed, employing the expertise they have garnered from many years of spearheading company stock and other ERISA and class action cases. *See* Joint Declaration ¶¶ 105-107, 142-154.

The large number and extraordinarily high quality of the defense counsel opposing Plaintiffs’ efforts bears further witness to the caliber of representation that was necessary to achieve a \$51 million settlement. *Global Crossing*, 225 F.R.D. at 467, *quoting In re Warner Commc’ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985), *aff’d*, 798 F.2d 35 (2d Cir. 1986). The Company and certain individual Defendants employed Jones Day, well known for its ERISA litigation expertise, which assembled a large team of partners, associates and other professionals. Another group of individual Defendants separately retained Day Pitney LLP, another group retained WilmerHale, and Defendant Myra Drucker retained a fourth firm, Hannafan & Hannafan, Ltd. to represent her interests. In addition, Cravath, Swain & Moore, while not filing a formal appearance, also represented Xerox, along with in-house counsel at Xerox. In all, it is hard to imagine Xerox assembling a more distinguished and capable defense team.

Plaintiffs' Counsel's ability to obtain a favorable settlement for the Class in the face of such formidable legal opposition confirms the quality of Plaintiffs' Counsel's representation. Plaintiffs' Counsel possessed and effectively utilized the requisite skill to provide excellent legal services for the Class, and, thus, this *Goldberger* factor also supports the fee award requested.

5. "Fee in Relation to the Settlement"

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. We address the request first under the lodestar/multiplier rubric and then as a percentage of the common fund. *Goldberger*, 209 F.3d at 50 (lodestar may be an independent method of fee calculation or used as a "cross-check" on percentage of fund method).

Lodestar/Multiplier Analysis. Under the lodestar method, the court examines the fee petition to determine the number of hours reasonably billed to the litigation and multiplies that figure by appropriate hourly rates. *See Savoie v. Merchants Bank*, 166 F.3d 456, 460 (2d Cir. 1999). After that, the court usually increases the lodestar by applying a multiplier based on factors similar to those set forth in *Goldberger*, such as the risk of the litigation, the quality of the work done, and the results obtained. *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 912 F. Supp. 97, 102 (S.D.N.Y. 1996). The lodestar fee awarded should be based on hourly rates that are in line with the rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 895 n.11.

As detailed in the Joint Declaration, the total lodestar required by this case as of March 20, 2009 is approximately \$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. The Joint Declaration sets forth: (a) the names of the lawyers and paraprofessionals

who worked on the case for plaintiffs; (b) the hours expended by each; (c) their hourly rates and corresponding lodestar figures; and (d) lodestar totals by firm and in the aggregate.

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 rates approved in this Circuit and others in many recent class action cases. For example, more than a year ago, the Court in *Gilat* approved attorney rates ranging from \$325 for associates up to \$725 for certain partners. *In re Gilat Satellite Networks, Ltd.*, No. 02-1510, 2007 WL 2743675, at *17-18 (E.D.N.Y. Sept. 18, 2007). Similarly, in *In Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02-1484, 2007 WL 313474, at *22 (S.D.N.Y. Feb. 1, 2007), the Court two years ago approved billing rates ranging from \$550 for associates to \$850 for certain partners as comparable to rates charged by top tier New York law firms.

The requested fee represents a multiplier on Plaintiffs' Counsel's lodestar of 1.6. In a risky, long-duration case as this one, in which a substantial recovery was nonetheless obtained, a multiplier in this range is well justified. Substantially higher multipliers have been awarded in many other comparable company stock ERISA cases across the country, including in the Second Circuit. For example, multipliers of over 4.0 were awarded in *In re Household Int'l Inc. ERISA Litig.*, No. 02-7921 (N.D. III. Nov. 22, 2004) (Minute Order) (4.8 multiplier), and *In re Dynegy ERISA Litig.*, No. 02-3076 (S.D. Tex. Nov. 24, 2004) (Final Order) (4.4 multiplier), while multipliers of over 3.0 were awarded in *In re Bristol Myers Squibb Co. ERISA Litig.*, No. 02-10129 (S.D.N.Y. Oct. 12, 2005) (3.9 multiplier), *In re Honeywell Int'l ERISA Litig.*, No. 03-1214 (D.N.J. July 20, 2005) (Order) (3.7 multiplier), and *In re Royal Dutch/Shell Transport ERISA Litig.*, No. 04-1398 (D.N.J. Aug. 30, 2005) (Order Approving Settlement) (3.3 multiplier). And there are many cases in which the district judge awarded multipliers of 2.0 and higher.¹⁵ In sum, a lodestar analysis of similar cases confirms the reasonableness of the fee requested here.

¹⁵ *E.g.*, *Tittle v. Enron Corp.*, No. 01-3913 (S.D. Tex. July 24, 2006) (Order) (2.3 multiplier); *Global Crossing*, 225 F.R.D. at 469 (2.6 multiplier); *In re AOL Time Warner, Inc. ERISA Litig.*, No. 02-8238, 2006 WL 2789862 (S.D.N.Y. Sept. 27, 2006) (2.0 multiplier); *In re Xcel Energy Inc. ERISA Litig.*, 364 F. Supp. 2d 980 (D. Minn.

Percentage of Fund Analysis. Fee awards in common fund cases in this Circuit can also be computed as a percentage of the recovered fund. *Goldberger*, 209 F.3d at 50; *Wal-Mart*, 396 F.3d at 121. The fee requested by Plaintiffs' Counsel in this case is well-warranted, and well within the range of awards made by district courts in the Second Circuit. In *Central States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229 (2d Cir. 2007), the Second Circuit itself recently approved a 30% fee in an ERISA common fund case. In *Warner Communications*, 618 F. Supp at 749, the court noted that "[t]raditionally, courts in this Circuit and elsewhere have awarded fees in the 20%-50% range in class actions." See also *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 189 (W.D.N.Y. 2005) (awarding 38.26%); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) (awarding 33-1/3%); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (awarding 33-1/3%); *Becher v. Long Island Lighting Co.*, 64 F. Supp. 2d 174, 182 (E.D.N.Y. 1999) (awarding 33-1/3%); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 326 (E.D.N.Y. 1993) (awarding 34%); *In re Allstar Inns Sec. Litig.*, No. 88-9282, 1991 WL 352491, at *3 (S.D.N.Y. Nov. 20, 1991) (awarding 35%). And limiting ourselves only to ERISA company stock litigation, many courts, in this Circuit and elsewhere, have awarded percentage fees larger than that requested here.¹⁶

2005) (2.2 multiplier); *Reinhart v. Lucent Technologies*, No. 01-3491 (D.N.J. Mar. 15, 2004) (Opinion) (2.4 multiplier); *In re Healthsouth Corp. ERISA Litig.*, No. 03-1700, 2006 WL 2109484 (N.D. Ala. June 28, 2006) (2.2 multiplier); *In re Providian Fin. Corp. ERISA Litig.*, No. 01-5027, 2003 WL 22005019 (N.D. Cal. June 30, 2003) (2.1 multiplier); *In re Cardinal Health ERISA Litig.*, No. 04-643 (S.D. Ohio Oct. 24, 2007) (Order) (2.3 multiplier); *Kolar v. Rite-Aid*, No. 01-1229, 2003 U.S. Dist. LEXIS 3646 (E.D. Pa. Mar. 11, 2003) (2.5 multiplier); *In re Mirant Corp. ERISA Litig.*, No. 03-1027 (N.D. Ga. Nov. 16, 2006) (Order of Final Judgment) (2.3 multiplier); *Beam v. HSBC Bank*, No. 02-0682 (W.D.N.Y. Nov. 21, 2005) (Order and Final Judgment) (2.7 multiplier); *Spivey v. Southern Company*, No. 04-1912 (N.D. Ga. Aug. 14, 2007) (Order and Final Judgment) (2.5 multiplier). Many of the orders awarding fees that we have cited here are available only on PACER. In general they contain no legal analysis, only the court's actual award, and we thought it would merely burden the Court's file to provide copies of all of them. However, we are happy to supply any of them or all them to the Court on request.

¹⁶ E.g., *In re Household Int'l Inc. ERISA Litig.*, No. 02-7921 (N.D. Ill. Nov. 22, 2004) (Minute Entry Order) (30%); *Kling v. Fidelity Mngmnt Trust Co.*, No. 01-11939 (D. Mass. June 29, 2006) (Order) (30%); *Kolar v. Rite-Aid*, No. 01-1229, 2003 U.S. Dist. LEXIS 3646 (E.D. Pa. Mar. 11, 2003) (48%); *In re Westar Energy ERISA Litig.*, No. 03-4032 (D. Kan. July 27, 2006) (Order and Final Judgment) (30%); *In re Sears, Roebuck & Co. ERISA Litig.*, No. 02-8324 (N.D. Ill. June 26, 2007) (Order Awarding Fees) (30%); *In re EDS ERISA Litig.*, No. 03-126 (E.D. Tex. Aug. 6, 2008) (Order) (33%); *In re AIG ERISA Litig.*, No. 04-9387 (S.D.N.Y. Oct. 7, 2008) (Order) (30%); *Blyler*

The reasonableness of the requested fee, under both the lodestar/multiplier and percentage of recovery analyses, is further bolstered by another metric – the lodestar as a percentage of the common fund. In this case the lodestar is approximately 20% of the recovery. This reflects the amount of work that was necessary to achieve this result, and indicates that a percentage award of well over that amount is appropriate, otherwise the lawyers are not fairly compensated for their risk. Whatever the rubric, lodestar multiplier, fees as percentage of recovery, or lodestar as percentage of recovery, the fee requested here is very reasonable.

6. “Public Policy”

This nation has a public policy of encouraging skilled attorneys to bring meritorious ERISA suits such as this one. Congress passed ERISA to promote the important goal of protecting and preserving the retirement savings of American workers. ERISA’s “most important purpose” was to “assure American workers that they may look forward with anticipation to a retirement with financial security and dignity, without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society.” *Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143, 1148 (9th Cir. 2000).

The ERISA statute itself specifically encourages private enforcement. *See, e.g.*, ERISA § 502(a), 29 U.S.C. § 1132(a). The Supreme Court has noted that private actions provide “a most effective weapon in the enforcement” of federal statutes that provide for both governmental and private rights of action. *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (discussing private actions in the context of securities class actions) (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964), *abrogated on other grounds by Touche Ross & Co. v. Redington*, 442 U.S. 650 (1979)).

“To make certain that the public [interest] is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.” *Ellman v. Grandma Lee’s Inc.*, No. 82-1912, 1986 WL 53400, at *9 (E.D.N.Y. May 28, 1986); *see also Maley*, 186 F.

v. Agee, No. 97-0332 (D. Id. Aug. 25, 2004) (Order and Judgment) (30%); *Koch v. Dwyer*, No. 98-5519 (S.D.N.Y. May 7, 2002) (Order and Final Judgment) (30%).

Supp. 2d at 373 (“Courts have recognized the importance that fair and reasonable fee awards have in encouraging private attorneys to prosecute class actions on a contingent basis . . . on behalf of those who otherwise could not afford to prosecute.”); *Spann v. AOL Time Warner*, No. 02-8238, 2005 WL 1330937, at *3-4 (S.D.N.Y. June 7, 2005) (awarding 33-1/3% fee, noting that lawsuits such as this create incentives for fiduciaries to comply with ERISA).

The DOL, after reportedly opening an investigation of this matter, closed it after our Complaint was filed, and took no action against Defendants. Without the efforts of Plaintiffs’ Counsel, the participants in Xerox’s two 401(k) Plans would likely not have obtained relief anywhere close to this magnitude. Plaintiffs’ Counsel have clearly promoted the public interest by vindicating the rights of the aggrieved Plan participants, and it is in the public interest for them to be paid a reasonable attorney’s fee.

In short, the *Goldberg* analysis strongly supports the fees requested here.

II. THE COURT SHOULD ALLOW COUNSEL’S REQUEST FOR REIMBURSEMENT OF EXPENSES

Litigating complex contingent cases such as this one requires counsel to incur significant expenses. The need to defray these expenses on an ongoing basis places significant demands on counsel and increases their overall level of litigation risk. Plaintiffs’ Counsel have thus far advanced \$992,108.61, and they are entitled to reimbursement of these expenses. *See Mitland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) (“Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients”).

Awarding expenses and costs of litigation to counsel who create a common fund like this one is necessary and commonplace. *See In re Veeco Investments Inc. Sec. Litig.*, No. 05-1695, 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007) (“It is well established that counsel who create a common fund are entitled to the reimbursement of expenses that they advance to a class”); *Reichman v. Bonsignore, Brignati & Mazzotta, P.C.*, 818 F.2d 278, 283 (2d Cir. 1987) (courts in the Second Circuit normally grant expense requests in common fund cases as a matter

of course). The expenses that may be reimbursed from the common fund are not limited to those taxed in a judgment against an opponent, but instead, encompass “all reasonable” litigation-related expenses. *Trustees v. Greenough*, 105 U.S. 527, 533 (1881).

Because the expenses incurred here were incurred with no guarantee of recovery, Plaintiffs’ Counsel had a strong incentive to keep them at a reasonable level, and did so. Class Counsel made a concerted effort to avoid unnecessary expenditures and economized whenever possible. These expenses were largely attributable to ordinary and necessary items such as court reporters, expert fees, computer-assisted document organization, mediator fees, travel, and copying, and are itemized in detail in the Joint Declaration, at Exhibits H through O. They were essential to the successful development and prosecution of the case, and amount to less than 2% of the Class’ recovery.

III. CASE CONTRIBUTION AWARDS FOR THE NAMED PLAINTIFFS ARE WELL DESERVED

The notice sent to Class members disclosed that the Plaintiffs and proposed class representatives would seek awards of \$5,000 each for their initiative and efforts in the litigation.

Thomas Patti, David Alliet, Linda Willis, Cheryl Wright and William Saba have been active, hands-on participants in this litigation, expending significant amounts of their own time to benefit the Class. They came forward to initiate this action, and thereafter remained in frequent contact with Counsel. They responded to document requests and interrogatories; reviewed and approved pleadings; assisted with discovery; prepared for, traveled to New York for, and attended their depositions; and participated in the settlement process. Joint Declaration ¶¶ 170-172.¹⁷ These individuals should be rewarded for their willingness to step forward to ensure that the interests of the Class were vindicated.

¹⁷ Although Mr. Saba actively participated in the litigation as a Lead Plaintiff and proposed class representative, including by responding to interrogatories and document requests, he passed away before he could be deposed. Joint Declaration ¶ 170, n. 18. Plaintiffs ask that a case contribution award, in the amount of \$5,000 or such other amount the Court believes is proper, be approved and paid to Mr. Saba’s estate.

Case law in this and other circuits fully supports compensating class representatives for their work on behalf of the class which has benefited from them. *See McBean v. City of New York*, 233 F.R.D. 377, 391 (S.D.N.Y. 2006) (stating incentive awards are generally awarded in a variety of class actions and that awards of \$25,000-\$30,000 are “solidly in the middle of the range”); *Sheppard v. Consolidated Edison Co. of New York, Inc.*, No. 94-403, 2002 WL 2003206, at *6 (E.D.N.Y. August 1, 2002) (Gleeson, J.) (collecting cases with incentive awards in various circuits, many higher than \$10,000). Courts reason that such awards are compensatory in nature, reimbursing class representatives who “take on a variety of risks and tasks when they commence representative actions, such as complying with discovery requests and often must appear as witnesses in the action.” *Bassini*, 258 F. Supp. 2d at 264 (granting incentive award of \$15,000 to class representative).

Named Plaintiffs request a payment of modest case contribution awards out of the settlement Fund in the amount of \$5,000 for Named Plaintiffs Thomas Patti, David Alliet, Linda Willis, Cheryl Wright and the estate of Plaintiff William Saba. Courts may grant such awards as a class action expense and routinely do so. *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (citation omitted). This request is fully appropriate under Second Circuit law. *See Spann*, 2005 WL 1330937, at *4 (awarding class representatives \$10,000 each); *Koch v. Dwyer*, No. 98-5519 (S.D.N.Y. May 7, 2002) (awarding each class representative \$10,000); *Dornberger v. Metropolitan Life Ins. Co.*, 203 F.R.D. 118, 124-25 (S.D.N.Y. 2001) (reviewing case law supporting awards from \$2,500 to \$85,000).

IV. CONCLUSION

The attorneys’ fees and expenses Plaintiffs’ Counsel request will reasonably compensate them for the risks they assumed, and the time and resources they committed over nearly seven years to obtain the excellent result achieved here. Plaintiffs’ Counsel respectfully request that the Court: (1) award attorneys’ fees in the amount of \$15,250,000 from the Settlement Fund; (2) order reimbursement of \$992,108.61 in expenses advanced by Plaintiffs’ Counsel; and (3) award

\$5,000 each to Named Plaintiffs Thomas Patti, David Alliet, Linda Willis, Cheryl Wright and the estate of Plaintiff William Saba in recognition of their efforts on behalf of the Class in this case.

A proposed form of Order granting this relief is filed herewith.

DATED this 24th day of March, 2009.

Submitted By

/s/Elizabeth A. Leland

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**UNITED STATES DISTRICT COURT
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 March 24, 2009, a copy of foregoing PLAINTIFFS' MEMORANDUM IN SUPPORT OF 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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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

IN RE XEROX CORPORATION
ERISA LITIGATION

Master File No. 02 CV-1138 (AWT)

This Document Relates To:

_____, 2009

ALL ACTIONS.

**[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR AWARD
OF ATTORNEYS' FEES, EXPENSES, AND CASE CONTRIBUTION
AWARDS**

On April 14, 2009, the Court heard Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Case Contribution Award ("Motion"). Having heard argument and having fully considered the pleadings and evidence submitted, the Court hereby finds as follows:

1. The Settlement Class has been given proper and adequate notice of the Motion and that such notice has been provided in accordance with the Court's Order Preliminarily Approving Settlement and Confirming Final Settlement Hearing in this action.
2. Based on the entire record, including the evidence presented in support of the Motion, and specifically including 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,

a. The Settlement achieved as a result of the efforts of Plaintiffs' Counsel has created the Settlement Fund, a common fund of \$51 million in cash that is already on deposit, plus interest thereon, and which will benefit thousands of Settlement Class Members;

b. More than 40,000 copies of the Class Notice was mailed and otherwise disseminated to Settlement Class Members stating that Plaintiffs' Counsel were moving for attorney's fees in the amount of up to 30 percent of the Settlement Fund and for reimbursement of expenses and that such request would be presented at the Fairness Hearing;

c. Plaintiffs' Counsel initiated and have conducted the litigation in the face of substantial risk and achieved the Settlement as a result of their skill, perseverance, and diligent advocacy;

d. The Action involved complex factual and legal issues prosecuted over nearly seven years and, in the absence of a settlement, would involve further lengthy proceedings, the resolution of which would be uncertain;

e. Had Plaintiffs' Counsel not achieved the Settlement, there would remain a significant risk that the Named Plaintiffs and the Settlement Class would recover less or nothing from the Defendants;

f. The amount of the case contribution awards and the attorneys' fees awarded and expenses reimbursed from the Settlement Fund are reasonable, well-warranted by the facts and circumstances of this case and consistent with awards in similar cases;

g. Plaintiffs' Counsel has expended more than 22,164 hours, with a lodestar value of \$9,318,130.70, to achieve the Settlement; and

h. Named Plaintiffs David Alliet, Thomas Patti, Linda Willis and Cheryl Wright and Plaintiff William Saba rendered valuable service to the Plans and to the Plans' participants and beneficiaries. Without their participation, there would have been no case and no settlement, and the Plans would not have recouped any of their losses.

3. The expenses for which Plaintiffs Counsel seek reimbursement from the common fund created by the Settlement were reasonably incurred for the benefit of the Class in prosecuting the Class's claims and in obtaining the Settlement.

4. Named Plaintiffs David Alliet, Thomas Patti, Linda Willis and Cheryl Wright and Plaintiff William Saba should be awarded compensation for the time and effort they have invested for the benefit of the Class, including providing information to Plaintiffs' Counsel, reviewing and approving pleadings, assisting with discovery, and participating in settlement discussions.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Plaintiffs' Motion is granted.
2. Plaintiffs' Counsel are awarded \$15,250,000 from the Settlement Fund as attorneys' fees in this case, which shall be paid to Co-Lead Counsel. Co-Lead Counsel shall allocate the award among Plaintiffs' Counsel.
3. Co-Lead Counsel are further awarded \$992,108.61 for reimbursement of their expenses, to be paid out of the Settlement Fund, which amount shall be paid to Co-Lead Counsel, who shall allocate the award among Plaintiffs' Counsel.

4. Named Plaintiffs David Alliet, Thomas Patti, Linda Willis and Cheryl Wright and the estate of Plaintiff William Saba are each awarded \$5,000 as compensation for their substantial contribution to the litigation on behalf of the Class.

It is So Ordered.

Dated this ____ day of _____, 2009 at Hartford, Connecticut.

Alvin W. Thompson
United States District Judge

**UNITED STATES DISTRICT COURT
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 March 24, 2009, a copy of foregoing [PROPOSED] ORDER GRANTING PLAINTIFFS' 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.

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Motions

[3:02-cv-01138-AWT Patti, et al v. Xerox Corp, et al](#)

DFM, EFILE, LEAD, MOTREF, STAYED

U.S. District Court

United States District Court for the District of Connecticut

Notice of Electronic Filing

The following transaction was entered by Leland, Elizabeth on 3/24/2009 at 10:58 PM EDT and filed on 3/24/2009

Case Name: Patti, et al v. Xerox Corp, et al

Case Number: [3:02-cv-1138](#)

Filer: Thomas Patti
Cheryl L. Wright
David Alliet
Linda Willis

Document Number: [347](#)

Docket Text:

[MOTION for Cost and Fees Motion for Award of Attorneys' Fees, Expenses, and Case Contribution Awards by Linda Willis, David Alliet, Thomas Patti, Cheryl L. Wright. Responses due by 4/14/2009 \(Attachments: # \(1\) Memorandum in Support Plaintiffs' Memorandum in Support of Motion for Award of Attorneys' Fees, Expenses, and Case Contribution Awards, # \(2\) \[Proposed\] Order Granting Motion for Award of Attorneys' Fees, Expenses and Case Contribution Awards\)\(Leland, Elizabeth\)](#)

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Document description: [Proposed] Order Granting Motion for Award of Attorneys' Fees, Expenses and
Case Contribution Awards

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