

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.

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**

Named Plaintiffs David Alliet, Thomas Patti, Linda Willis, and Cheryl Wright submit this memorandum in further support of their Motion for Final Approval of Class Action Settlement and Plan of Allocation (the "Approval Motion") and their Motion for Award of Attorneys' Fees, Expenses, and Case Contribution Awards (the "Fees and Expenses Motion"). Plaintiffs filed their Motions and supporting documents on March 24, 2009. Since that time, U.S. Trust, Bank of America Private Wealth Management, in its capacity as independent fiduciary (the "Independent Fiduciary") has completed its review of the Settlement and has authorized the Plans to enter into the Settlement. Further, the deadline for objections to the Settlement, the Approval Motion and the Fees and Expenses Motion was March 31, 2009, with only two objections filed from a Class in excess of 41,000 persons. As is explained more fully below, these facts provide further support for the approval of the Settlement, the Approval Motion and the Fees and Expenses Motion.

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.

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. 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 ("Sarko Decl.") ¶ 3. 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. Sarko Decl. ¶ 4.

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. Sarko Decl. ¶ 5. 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. Sarko Decl. ¶ 6. 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. Sarko Decl. ¶ 7.

The Independent Fiduciary's authorization of the Settlement provides strong support for the Court's approval of the Settlement, the Approval Motion and the Fees and Expenses Motion. The Independent Fiduciary was provided by counsel with voluminous material pertaining to the litigation, and interviewed counsel and the mediator. This process, coupled with the Independent Fiduciary's experience in serving as an independent fiduciary to employee benefit plans, including in connection with ERISA class action lawsuits, put the Independent Fiduciary in an ideal position to evaluate the reasonableness of all aspects of the Settlement, including in comparison to other settlements of ERISA class actions, and to bring to the Court's attention any concerns. Thus, the Independent Fiduciary's favorable conclusions and the fact that it has not raised with the Court any concerns confirm the fairness, adequacy and reasonableness of the Settlement as well as the reasonableness of the compensation sought by the Fees and Expenses Motion.

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

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. *See City of Detroit v. Grinnell Corp.*, 495 F. 2d 448, 463 (2d Cir. 1974) (including class reaction as a factor to be considered in evaluation of a proposed settlement). This conclusion is reinforced by the fact that the Settlement Administrator has received 387 telephone calls regarding the Settlement. Sarko Decl. ¶ 9. Thus, the Class has evidenced significant interest regarding the Settlement; the small number of objections clearly indicates that the Class overwhelmingly supports the Settlement.

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).

C. Neither Objection Has Merit.

The two objections that have been filed are not meritorious. Plaintiffs previously addressed the first of the two objections, submitted by Michael Petrison, in their Memorandum of Law in Support of Motion for Final Approval of Class Action Settlement and in the Joint Declaration.² The second objection is in the form of a letter from Andrew Whitmore. Although Mr. Whitmore appears to have failed to file his objection with the Court until after the March 31, 2009 deadline, we will nevertheless address the substance of his objection. 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.”

As an initial matter, the calculations and method underlying Mr. Whitmore’s conclusions are flawed.³ More important, 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, including *Goldberger v. Integrated Res. Inc.*, 209 F.3d 43 (2000), or the facts of this case. It is well established that attorneys who commit to litigating a complex case on a contingent basis and who thereafter create a settlement fund for the common benefit of members of the class are entitled to a *reasonable* fee – set by the court – to be taken from the fund. *Goldberger*, 209 F.3d at 47. The goal is to provide fair and reasonable compensation to the attorneys in light of the risks they have run, the work they have

² Plaintiffs will not address it again here, other than to note that Mr. Petrison does not appear to have filed his objection with the Court, based on a review of the docket, by the March 31, 2009 deadline set forth in Paragraph 7 of the Order Preliminarily Approving Settlement and Confirming Final Settlement Hearing, which was amended by Order dated February 5, 2009 (together, the “Preliminary Approval Order”), and Pages 6 and 7 of the Class Notice. Thus, Mr. Petrison’s objection may be excluded from consideration on that basis alone.

³ 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, set forth in detail in the Joint Declaration, is 22,164. Sarko Decl. ¶ 13.

done, and the results they have achieved for the class. *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1326 (2d Cir. 1990).

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 (“Fee Memo”) at 11-25, and which we summarize below. In addition, Plaintiffs submit herewith 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.

1. Magnitude and Complexity of the Litigation

The magnitude and complexity of this litigation is undisputed. Plaintiffs’ Counsel devoted more than 22,164 hours over nearly seven years to see this case through from beginning to settlement. Joint Declaration ¶¶ 112-119, 126-130. The case involved extensive briefing and massive discovery efforts pertaining to a host of challenging issues. Fee Memo at 12-14; Joint Declaration ¶¶ 12-47, 69-72, 131-32.

2. Risk

Mr. Whitmore’s dismissive reference to the risks faced by Plaintiffs and their counsel merely serves to demonstrate his misapprehension of the nature and circumstances of this litigation. When this case was filed nearly seven years ago, ERISA company stock cases were in their infancy with virtually no guiding precedent, and the law of ERISA fiduciary breach is still

evolving, as evidenced by the numerous supplemental authority submissions filed by both Plaintiffs and Defendants. In addition, Plaintiffs faced enormous risks specific to this case. *See* Fee Memo at 14-20. Those risks included not only the expenditure of an enormous amount of professional time without assurance of compensation, but also the advancement of over \$992,000 in litigation expenses without any assurance of reimbursement. Joint Declaration ¶¶ 165-66, 169. In his affidavit, Mr. Sachnoff discusses the high degree of risk associated with ERISA class actions generally, and particular circumstances that heightened the risk in this litigation. Sachnoff Affidavit ¶¶ 14-17.

3. Quality of Representation

The twenty-eight Defendants to this action were represented for nearly seven years by defense firms that are among the most respected, experienced, and resourceful in the nation. Xerox 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.

Just as Defendants had hired one of the most distinguished and capable defense teams imaginable, Plaintiffs were only able to succeed by matching these efforts. 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. Plaintiffs' counsel faced head-on the difficult factual, procedural, and legal issues presented by this case – a case involving 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 skilled counsel possessing a high degree of unique expertise in complex ERISA and class action matters.

4. Fee in Relation to the Settlement

As discussed in the Fee Memo (at 21 to 24), the fee requested here is plainly reasonable in relation to the settlement under both the “lodestar/multiplier” analysis and the “percentage of recovery” analysis. This is further confirmed by Mr. Sachnoff at paragraphs 19-21 of his Affidavit. Mr. Whitmore ignores completely the appropriateness of a lodestar multiplier in cases such as this, where counsel has devoted many thousands of hours over a number of years and advanced significant costs with no guarantee of repayment, *see, e.g., In re Prudential Sec. Inc. Ltd. P’ships Litig.*, 912 F. Supp. 97, 102 (S.D.N.Y. 1996),⁴ nor does he provide any support for his assertion that a substantially lower percentage of the recovery is appropriate.⁵ Instead, Mr. Whitmore refers to an hourly rate that he understands to be what his employer pays for legal representation, but that rate is significantly below the rates routinely approved by courts in this Circuit. As explained in the Fee Memo, 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.⁶ 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. *See In re AIG ERISA Litig.*, No. 04-9387 (S.D.N.Y. Oct. 8, 2008) (Second Corrected Order and Final Judgment); Sarko Decl. ¶ 20. 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

⁴ As Mr. Sachnoff notes, substantially higher multipliers are commonplace where, as here, counsel’s efforts have resulted in a substantial common fund. Sachnoff Affidavit ¶ 21. Examples of awards of significantly higher multipliers are set forth in the Fee Memo, at pages 21-23. And as noted at page 9 of our Fee Memo, based on past experience, we expect that we will spend a substantial amount of time in shepherding the settlement through to completion. *See* Fee Memo at 9; Sarko Decl. ¶ 18.

⁵ The reasonableness of the requested fee as a percentage of the recovery is confirmed by Mr. Sachnoff at paragraphs 18-20 of his Affidavit, as well as by the case law cited at pages 23-24 of the Fee Memo. Indeed, Mr. Sachnoff states in his Affidavit his belief that if a contingency fee agreement were to have been negotiated at the outset of this litigation, competent and adequately capitalized counsel would have required a fee of 30% to 40% of the recovery to justify the risk and magnitude of undertaking the representation. Sachnoff Affidavit ¶ 18. When measured as a percentage of the recovery, the fee requested here is below the low end of that range.

⁶ In his Affidavit, Mr. Sachnoff confirms that the rates charged here reasonable and consistent with the prevailing rates charged in complex litigation of this type. Sachnoff Affidavit ¶ 21.

hour. See *In re Electronic Data Systems Corp. "ERISA" Litig.*, No. 6:03-MD-1512 (E.D. Tex. August 6, 2008) (Order granting Class Counsel's Joint Petition for an Award of Attorneys' Fees, Reimbursement of Expenses, and An Incentive Award to the Named Plaintiffs); Sarko Decl. ¶ 20. Similarly, 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. And the hourly rates here are significantly less than the maximum hourly rate of \$925 in the *Carlson* litigation. *Carlson v. Xerox Corp.*, No. 00-1621 (D. Conn. Jan. 14, 2009).

5. Public Policy

Plaintiffs' Counsel took a substantial risk in filing and litigating this case, and advanced the costs of litigation for nearly seven years with no guarantee of reimbursement. Anything less than a multiplier of 1.6 would under-compensate Plaintiffs' Counsel and be contrary to the public interest. As Mr. Sachnoff notes, the failure to adequately compensate counsel here could have a chilling effect on the willingness of other counsel to undertake meritorious ERISA class actions in the future. Sachnoff Affidavit ¶ 22.

Thus, for the reasons set forth herein and in Plaintiffs' prior briefing, the Settlement is a fair, adequate, and reasonable resolution of the claims against the Defendants and the attorneys' fees requested by Plaintiffs' Counsel 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 respectfully request that the Court grant their motions in their entirety.

Respectfully submitted this 7th day of April, 2009.

Submitted By

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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 April 7, 2009, a copy of foregoing 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 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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