IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES TAYLOR et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case Number: 1:01CV00561 (BJR)**
DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY	)	**Judge Barbara Jacobs Rothstein**
	)	
	)	
Defendant.	)	
	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' CONSENT MOTION FOR FINAL APPROVAL OF THE SETTLEMENT AGREEMENT, AND FOR OTHER RELIEF

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I. Introduction

This case began in March 2001. In August 2012, the Parties reached agreement on a settlement. The Settlement Agreement ("Agreement") was submitted to the Court for preliminary approval on August 24, 2012. The Court issued Administrative Order No. 1, preliminarily approving the Agreement, on September 24, 2012.

Pursuant to Administrative Order No. 1 and the terms of the Agreement, a Settlement Fund has been established, a Claims Administrator has been appointed, and notice has been sent to the Class Members.

The Plaintiffs herewith submit their memorandum of law in support of the accompanying Consent Motion for Re-certification of the Settlement Class, Final Approval of the Settlement Agreement and the Re-certified Class, and Authorization for Payment of a Service Award to the Named Plaintiff, Mr. Charles Taylor.

II. Factual and Procedural Background[1]

Charles Taylor is a resident of the State of Maryland. He is, and was when the complaint in this case was filed, employed by the Defendant. When he filed his Complaint, Mr. Taylor was employed as a Civil Engineering Technician.[2] He has been employed by the Defendant—including its predecessor and successor organizations—since 1989.

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[1] A more detailed recounting of this case's procedural history may be found in the Plaintiffs' Motion for Preliminary Approval of the Settlement Agreement, at 2-5.

[2] Complaint at 7, ¶9.

The Defendant, DC Water (formerly the District of Columbia Water and Sewer Authority) is an independent authority of the District of Columbia government. The Defendant employs well over one thousand people, most of whom are black.

On March 16, 2001, Charles Taylor filed a Class Action Complaint as Class Representative, on behalf of himself and current and former African-American employees of DC WASA, against DC WASA, in the United States District Court for the District of Columbia. The Complaint alleged that the Defendant subjected the proposed class "to a pattern and practice of discrimination, including disparate treatment, and personnel policies and practices which have a disparate impact on African Americans," and it sought relief "pursuant to Section 1981 of the Civil Rights Act of 1871, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981 ("Section 1981"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. ("Title VII"), including, but not limited to declaratory, injunctive and other equitable relief, and compensatory damages, litigation expenses and reasonable attorneys fees, based on Defendant's continuing deprivation of rights accorded to the named Plaintiff and [the proposed class]."[3]

In May 2001, the Defendant moved to dismiss the Complaint, which motion was denied in January 2002. In February 2002, the Defendant petitioned the U.S. Court of Appeals for the District of Columbia Circuit for permission to file an interlocutory appeal of the District Court's denial of the Defendant's motion to dismiss. The Court of Appeals denied the petition in April 2002.

[3]Complaint at ¶1.

Discovery commenced in November 2002. Hundreds, if not thousands, of documents were exchanged, and numerous depositions were held. Mr. Taylor moved to certify the class in January 2005. On March 13, 2007, the District Court granted the motion in part, and denied it in part.

The Court certified, under Rule 23(b)(2) for injunctive relief only, a class of "Black employees at WASA who sought and were denied positions, career ladder promotions, or other advancement, or whose advancement was delayed, or whose compensation was otherwise affected by WASA's alleged unlawful discrimination, from October 1996 through December 2000."[4]

The Defendant moved the Court for reconsideration of its order certifying the class. That motion was denied. In November 2007, Mr. Taylor moved the Court to enlarge the class period. That motion was denied in February 2008.

In April 2008, the Defendant moved the Court to "clarify the relevant class for notice purposes." The Court denied that motion.

In August 2008, the Defendant petitioned the Court of Appeals for permission to file an interlocutory appeal of the District Court's order certifying the class pursuant to Rule 23(f), and moved the District Court to stay issuance of the class notice and further discovery pending the

[4] Taylor v. D.C. Water & Sewer Auth., 241 F.R.D. 33, 48; 2007 U.S. Dist. LEXIS 17737, **47 (D.D.C. 2007); petition denied sub nom, In re DC Water & Sewer Auth., 561 F.3d 494, 385 U.S. App. D.C. 183, 2009 U.S. App. LEXIS 6921 (2009).

appeal. The District Court denied that motion. In April 2009, the Court of Appeals denied the Defendant's petition.[5]

In January 2010, the Court referred all discovery motions to Magistrate Judge Alan Kay. In July 2010, the Court ordered the Parties to file a joint report indicating whether alternative dispute resolution might be productive after the end of discovery but before the filing of dispositive motions.

In November 2010, the Parties agreed to have the case referred to the Court's Neutral Evaluation Program, and it was so-referred by Magistrate Judge Kay. Laurel Malson and Arthur Peabody served as the Neutral Evaluators. Before negotiations commenced, they requested, and the Parties submitted, confidential position statements. Mediation sessions were held in March, August, and September 2011.

In September 2011, the Parties reached an agreement in principal with respect to the monetary relief, but negotiations continued with respect to non-monetary, programmatic relief through August 2012, when the Parties agreed to and executed a Settlement Agreement. That Agreement was filed with the Court on August 24, 2012.

The Plaintiffs moved for preliminary approval of the Agreement on September 11, 2012. That motion was granted on September 24, 2012.

The Plaintiffs now move for re-certification of the Settlement Class, final approval of the Agreement and the re-certified Class, and authorization for payment of a Service Award to the Named Plaintiff, Mr. Charles Taylor, and submit this Memorandum of Law in support thereof.

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[5] In re DC Water & Sewer Auth., 561 F.3d 494; 385 U.S. App. D.C. 183; 2009 U.S. App. LEXIS 6921 (2009), petition denied, In re DC Water & Sewer Auth., 2009 U.S. App. LEXIS 7137 (D.C. Cir. 2009).

III. The Settlement Agreement[6]

A. Monetary Relief

Pursuant to the terms of the Agreement and Administrative Order No. 1, the Defendant transmitted the sum of $2,885,000 to the Claims Administrator ("Administrator") within ten days after the Court issued that Order. The Administrator established the Settlement Fund with those funds.

The Agreement requires the Administrator to reserve $1,900,000 ("the Claims Fund")[7] of the $2,885,000 Settlement Fund for the payment of claims (including taxes and withholdings related to individual claim awards) to eligible Class Members and for payment of other taxes as specified in the Agreement.[8] The remaining $985,000 is allocated to the payment of attorney's fees ($800,000),[9] litigation costs ($125,000),[10] and a Service Award to Mr. Taylor ($60,000).[11]

Upon the Court's final approval of the Agreement, the Administrator will distribute the Claims Fund to eligible Class Members pursuant to the Agreement's allocation formula.[12]

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[6] As was true of the Motion for Preliminary Approval of the Settlement Agreement, the Plaintiffs have made every effort to provide an accurate description of the Agreement, and any difference between the representations made herein and the Agreement or its exhibits is inadvertent. Nothing in this Memorandum is intended to modify the Agreement in any way.

[7] Settlement Agreement at §8.7.

[8] Id., § 9.1.8.

[9] Id., at §17.2.

[10] Id., at §17.2.

[11] Id., at §8.1.2.

[12] Id., at §8.8.

B. Claims Process

The Settlement Class consists of all Black persons who were employed by the Defendant between October 1, 1996 and December 31, 2000.[13] The Defendant transmitted a spreadsheet identifying 1,029 class members to the Administrator on October 5, 2012.[14]

The Agreement provides for two ways that a Class Member could be excluded from the Settlement Class. First, the Class Member could voluntarily exclude himself or herself by opting-out. To opt-out, the Class Member was required to send (mail or fax) a letter asking to opt-out of the settlement to the Administrator by January 3, 2013.[15] Second, the Agreement provides for the "mandatory exclusion" of a Class Member if he or she brought a claim of race discrimination and executed a release of that claim that encompasses the entire period from October 1, 1996 to December 31, 2000.[16]

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[13]The Parties stipulated that any individuals who were employed by the Defendant as either: (a) General Manager; (b) Assistant General Manager; (c) Deputy General Manager; (d) General Counsel; (e) In-House Counsel; or (f) Director of Human Resources at any point during that period are not part of the class (and are therefore not part of the proposed Settlement Class), even if those individuals would otherwise fall within the parameters of the class as defined by the Court. The Court approved that stipulation.

[14]Declaration of Mark Patton ("Patton Declaration"), at ¶3 (attached to Plaintiff's Motion for Final Approval as Exhibit A.)

[15]Id., at ¶9.

[16]The Agreement specifically exempted from mandatory exclusion: "(1) a Class Member who brought a claim of race discrimination and executed a release of that claim that encompasses less than the entire period from October 1, 1996 to December 31, 2000 (he or she will receive a pro rata share of the amount that he or she would have received from the Claims Fund but for the release); (2) a Class Member who signed a general release (e.g., a release of 'any and all claims,' or a release of 'all claims that were brought or could have been brought'); (3) a Class Member who signed a release without having brought a claim of race discrimination (e.g., as a result of a reduction-in-force); or (4) a Class Member who signed a release as a result of bringing a claim or claims the gravamen of which was other than a claim of race discrimination (e.g., as the result of bringing a sex discrimination or sexual harassment claim), even if the release purports to release a claim or claims of race discrimination."

Agreement at §8.1.2.2.

If the Defendant contended that a particular Class Member should be subject to mandatory exclusion, the Agreement required the Defendant to identify him or her and supply the Administrator and Class counsel with documentation supporting the Defendant's contention.[17] No such Class Members were identified, and no Class Member was excluded under the Agreement's mandatory exclusion provision.[18]

The Parties intended to provide the Class Members with actual notice, to the extent practicable, and so stated in the Agreement.[19] To that end, the list provided to the Administrator[20] by the Defendant on October 5, 2012, consisted of the name, social security number, employee identification number, last-known address, and last-known telephone number of each Class Member. Upon receipt of that list from the Defendant, the Administrator, in an effort to get the best address possible for each Class Member, updated the addresses provided by the Defendant using the United States Postal Service's National Change of Address database before mailing the notices.[21]

The Administrator mailed copies of the Notice of Class Action Settlement and the Claim Form to the 1,029 Class Members identified by the Defendant on November 5, 2012.[22] 129 of those Notices were returned to the Administrator as undeliverable. The Administrator was able

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[17]Agreement, at §8.1.2.3.

[18]Patton Declaration, at ¶3.

[19]Settlement Agreement at §6.1.

[20]Settlement Services, Inc.

[21]Patton Declaration, at ¶5.

[22]Id., at ¶4.

to locate 106 of those 129 Class Members. The Administrator mailed a second notice to the last known address of the remaining 23 Class Members for whom new addresses could not be obtained. 19 of those notices were again returned as undeliverable.[23]

The Administrator established and maintains a toll-free telephone number to field calls from Class Members.[24] Additionally, the Administrator established and maintains a website[25] where Class Members can go to for more information about the case, including copies of the Agreement and the Claim Notice.[26]

The postmark deadline for submission of Claim Forms to the Administrator was January 3, 2013, and the Administrator received 436 claim forms by that date. Of those 436 Claim Forms, 13 were received from people who did not appear on the list provided by the Defendant. 8 of those individuals were determined to be Class Members, which increased the number of Class Members from 1,029 to 1,037.

20 Claim Forms were received after the deadline. Exercising the discretion vested in it by the Agreement, the Administrator accepted 12 of the late Claim Forms. The final number of Class Forms accepted by the Administrator was 421.[27]

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[23] Id., at ¶6.

[24] The Administrator has received more than 250 calls. Id., at ¶7.

[25] www.TaylorClassActionSettlement.com

[26] Patton Declaration, at ¶8.

[27] Patton Declaration, at ¶9.

The Administrator has only received 1 opt-out request, and it has not received any objections to the Settlement.[28]

The Agreement sets forth an allocation formula that the Administrator is required to follow to determine the payment each eligible Class Member who timely submits a Claim Form ("Claimant") will receive from the Claims Fund.[29] The Administrator is vested with non-reviewable discretion to determine whether a Claimant will be allotted additional "points" based on the criteria set forth in the Agreement.[30]

Upon the Court's final approval of the Agreement, as soon as practicable thereafter the Administrator will send each eligible Class Member a Notice of Award specifying the payment that he or she is eligible to receive, and a Claimant Release Form ("Release Form").[31] Each eligible Claimant will have sixty days from the date of the Notice of Award to return the signed Release Form to the Administrator.

As soon as practicable after the deadline for the receipt of the Release Forms, the Administrator will distribute to each eligible Claimant who submitted a timely, executed Release Form a settlement check in the amount that the Administrator determines he or she is entitled to receive. Each settlement check will be valid for One Hundred Eighty (180) days after the date appearing on the check.

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[28] Patton Declaration, at ¶¶10-11.

[29] Under the allocation formula, each Claimant automatically receives one point. Agreement, at §8.8.

[30] Id., at §§8.8-8.9.

[31] The releases, the claims covered by the releases, and the implied release and waiver of claims as to Class Members who did not opt-out of the Agreement are described in the Memorandum of Law in Support of the Plaintiffs' Consent Motion for Preliminary Approval of the Settlement and Other Relief. Dkt. 244-1, at 18-19.

The Administrator will distribute any undistributed funds equally to the Eligible Claimants, unless the amount is too small to justify such a distribution, in which case the Parties have agreed to jointly seek the Court's permission to distribute those funds cy pres to the District of Columbia Legal Aid Society.

C. Programmatic Relief

The Agreement provides for significant non-monetary, programmatic relief to the Class, which generally remains in effect for three years after the effective date of the Agreement. That relief consists of:

- **No Retaliation**

The Defendant has pledged that it will not retaliate against any Class Member because he or she complained of, opposed, or testified or provided information about racial discrimination at his or her workplace, or because he or she received any benefit from the Settlement.

- **Commitment to Non-Discrimination**

Within six months of the Agreement's Effective Date, the Defendant must provide all of its employees with a written statement of its commitment to equal employment opportunity, issued by its General Manager.

- **Publication and Distribution of EEO Policy**

Within six months of the Agreement's Effective Date, the Defendant must provide all of its employees, including new employees, with a copy of its EEO policy and post copies of the policy prominently in common areas of the workplace where they will be visible to employees during the workday.

- **Mandatory Diversity and EEO Training**

Within one year of the Agreement's Effective Date, the Defendant must conduct or cause to be conducted a mandatory EEO and Diversity training program for all of its employees, and it must ensure that all of its employees have received such training within three (3) years of the Effective Date. The Defendant has also agreed to use its best efforts to ensure that its employees: (1) understand their responsibility to report, properly investigate and respond to allegations of violations of those policies; and (2) are trained to identify violations of its EEO policies and to know the proper procedures to receive, process, investigate and resolve complaints of violations of those policies.

- **Complaint Procedures and Complaint Tracking System**

Within one year of the Agreement's Effective Date, the Defendant has agreed to develop, implement and maintain a system to record and track all internal complaints of compensation discrimination on the basis of race, and the status and resolution of each complaint.

The Defendant will also use its best efforts to ensure that its Human Capital Management staff (or its functional equivalent) knows the requirements of: (1) the District of Columbia's anti-discrimination and anti-retaliation statutes and policies; (2) federal EEO, anti-discrimination and anti-retaliation statutes and policies; and (3) the Defendant's own anti-discrimination and anti-retaliation policies.

- **Development and Maintenance of a Voluntary Affirmative Action Program**

The Defendant has agreed to develop and fully implement a voluntary, written Affirmative Action Program (AAP), encompassing any positions in which less than fifty percent of the incumbent employees are African-American, by December 31, 2013.[32]

- **Settlement Compliance Monitor**

Michael Lewis of JAMS, Inc.,[33] will serve as the Settlement Compliance Monitor ("the Monitor"). He will monitor and report on the Defendant's implementation of the Agreement's programmatic relief provisions for the duration of the Agreement. The Defendant has agreed to pay all costs and fees associated with the Monitor.[34]

Beginning one year after the Agreement's Effective Date, the Defendant has agreed to submit, semi-annually, a detailed, written report of the implementation of all aspects of its programmatic relief obligations under the Agreement to the Monitor. The Monitor will review the Defendant's reports and issue a report to the Parties and Counsel assessing the Defendant's implementation of the Agreement's programmatic relief provisions.

- **Internal Implementation Team**

The Defendant has agreed to assemble and authorize an Internal Implementation Team ("The Team"), headed by a designated representative from its Office of General Counsel, to implement its programmatic relief obligations, within one year of the Agreement's Effective

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[32]The Agreement does not require the Defendant to impose any quotas or preferences on the basis of race in hiring, promotion, compensation or any other term or condition of employment. Agreement at §16.9.

[33]JAMS, Inc., 555 13th Street, N.W., Suite 400 West, Washington, D.C. 20004.

[34]Agreement at §16.10.

Date. In that same time frame, The Team will undertake a comprehensive review of the Defendant's compensation policies to ensure that those policies are consistent with the Defendant's commitment to equal employment opportunity, and it will recommend potential improvements to those policies and procedures and send a copy of its review and recommendations to the Monitor.

- **Annual Review of Pay Data and Practices**

Within one year of the Agreement's Effective Date, and at least yearly thereafter for the duration of the Agreement, the Defendant has agreed to undertake an annual assessment of the compensation paid to its employees to determine whether racial disparities exist and, if such racial disparities exist, to quantify the extent and statistical significance of the disparities and assess the probability that the disparities are due to legitimate, non-discriminatory factors or other factors.

If a statistically significant pay disparity is identified that cannot be accounted for by legitimate, non-discriminatory factors, the Defendant has agreed to conduct an individualized assessment of the basis for the specific pay decisions underlying the disparity. If, following that individualized assessment, any pay disparity cannot be accounted for by legitimate, non-discriminatory factors, the Defendant has agreed to make such appropriate adjustments to the pay of the particular employee disadvantaged by the disparity as are consistent with applicable legal standards. The Defendant has also agreed to send a copy of each Annual Pay Assessment and any individualized assessments to the Monitor. The Monitor is required to review and consider

the result of those assessments as he determines whether the Defendant is fulfilling its programmatic relief obligations under the Agreement.

IV. Argument

A. The Court Should Vacate the Class' Certification Under Federal Rule of Civil Procedure 23(b)(2) and Re-Certify the Class under Rule 23(b)(3)

"Before considering whether the proposed settlement should be finally approved, the Court first turns to whether the settlement class meets the requirements for certification pursuant to Rule 23. To certify a class for settlement, a court must consider whether the proposed class meets the requirements of Federal Rule of Civil Procedure 23."[35]

When the Court (Henry H. Kennedy, J.) granted in part the Plaintiffs' motion for class certification, it "partially certifie[d] the class as to liability under Rule 23(b)(2) for injunctive and declaratory relief, and postpone[d] the decision as to whether to certify the class as to damages,

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[35] Trombley v. National City Bank, 826 F.Supp.2d 179, 192 (D.D.C. 2011); Fed. R. Civ. P. 23(a).

Of course, as an initial matter, to be certified a class must first satisfy the requirements of Federal Rule of Civil Procedure 23(a): "(1) the class is so numerous that joinder of all members is impractical ('numerosity'), (2) there are questions of law or fact common to the class ('commonality'), (3) claims/defenses of representative parties are typical of the claims common to the class ('typicality'), and (4) the representative parties will fairly and adequately protect the interests of the class ('adequacy')." Id., 826 F.Supp.2d at 192.

The Plaintiffs presented their arguments that the proposed Class satisfies the requirements of Rule 23(a) in Plaintiffs' Amended Motion for Class Certification, at 17-21 (Document No. 99-3). Plaintiffs do not reiterate those arguments here because the Plaintiffs are only seeking re-certification of the class because the holding in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 180 L. Ed. 2d 374, 2011 U.S. LEXIS 4567 (2011), invalidates the Class' certification under Rule 23(b)(2). See infra, at pp. 15-16.

or whether to hold Teamsters hearings, until it is determined whether the class can prevail in the first phase."[36]

The Supreme Court's recent decision in Wal-Mart Stores, Inc. v. Dukes,[37] however, makes it clear that certification of the class in this case under Rule 23(b)(2) cannot be maintained.

In Wal-Mart v. Dukes, the Supreme Court reversed the certification under Rules 23(a) and 23(b)(2) of an expansive class of current and former women employees of Wal-Mart in a gender discrimination action brought under Title VII in which one of the class' claims was for back pay. Although Wal-Mart was a 5-4 decision, the Court unanimously held that the class' "claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2)" and that claims for backpay "may not be certified under that provision [if] the monetary relief is not incidental to the injunctive or declaratory relief."[38]

The Court further stated that "individualized monetary claims belong in Rule 23(b)(3)"[39] because certification under Rule 23(b)(3), as compared to certification under Rule 23(b)(1) or Rule 23(b)(2), "allows class certification in a much wider set of circumstances but with greater

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[36] Taylor v. D.C. Water & Sewer Auth., 241 F.R.D. 33, 48; 2007 U.S. Dist. LEXIS 17737, **45 (D.D.C. 2007) (footnote omitted).

[37] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 180 L. Ed. 2d 374, 2011 U.S. LEXIS 4567 (2011).

[38] Id., 131 S.Ct. at 2557; 180 L.Ed.2d at 396; 2011 U.S. LEXIS 4567 at ***38.

[39] Id., 131 S.Ct. at 2558; 180 L.Ed.2d at 398; 2011 U.S. Lexis 4567 at ***42.

procedural protections," including mandatory notice to class members and the right to opt out of the class.[40]

In this case, the Class' claims involve back pay that "is not incidental to the injunctive or declaratory relief," and the class was certified—though for injunctive relief only—under Rule 23(b)(2). In light of the Wal-Mart holding, the Class' Rule 23(b)(2) certification cannot be maintained. The Plaintiffs request, therefore, that the Court vacate the Class' Rule 23(b)(2) certification, and re-certify the Class under Rule 23(b)(3).

1. The Class Meets the Criteria for Certification Under Rule 23(b)(3)

A class may be certified under Rule 23(b)(3) "if the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[41]

a. Questions of Law or Fact Common to Members of the Class are Predominant Over Any Questions Affecting Only Individual Members

While there is no specific test to determine whether questions of law or fact common to class members predominate over questions that affect only individual members ("predominance"), it has been held that "[t]he predominance requirement of Rule 23(b)(3) 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'"[42]

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[40] Wal-Mart, 131 S.Ct. at 2558; 180 L.Ed.2d at 397; 2011 U.S. Lexis 4567 at ***41.

[41] Fed. R. Civ. P. 23(b)(3).

[42] Yager v. ING Bank, 2012 U.S. Dist. LEXIS 123927, *29 (D.Del. August 31, 2012) (quoting In re Hydrogen Peroxide Antitrust Litig. 552 F.3d 305, 310-11 (3d Cir. 2008)).

In this case, questions of law or fact common to the Class Members predominate over any questions that affect only individual Class Members, and the Class is "sufficiently cohesive" to warrant certification under Rule 23(b)(3).

The gravamen of the Plaintiffs' claims in this case is that they were, as a group, subjected to the Defendant's facially-neutral employment policies and procedures that, as they were applied, discriminated against them on the basis of their race. The existence, therefore, of such a set of facially-neutral employment policies and procedures that were, as applied, racially discriminatory, is at the very heart of this case. If those facially-neutral employment policies and procedures were not applied in such a manner as to discriminate against the class members on the basis of their race in violation of Title VII, then the employment actions that are the subject of the Plaintiffs' claims would have to be adjudicated individually, because no common question of law or fact would exist, let alone predominate, to hold those claims together. If, on the other hand, those facially-neutral employment policies and procedures were applied in a manner that discriminated against the class members as a group on the basis of their race, in violation of Title VII, then such common questions of law or fact do exist and predominate.

Whether the Defendant's facially-neutral employment policies and procedures were applied in an unlawfully discriminatory manner to the detriment of its black employees is the issue in this case. Because common issues of law or fact—i.e., the application of facially-neutral employment policies and procedures in an unlawfully discriminatory manner—predominate over issues that only affect individual class members in this case, certification of the Class under Rule 23(b)(3) is appropriate.

b. A Class Action Is Superior to Other Available Methods for the Fair and Efficient Adjudication of this Case

It is apparent that a class action is superior to other available methods for the fair and efficient adjudication of the Plaintiffs' claims in this case. The Class certified by the Court has approximately one thousand members—too many to be handled fairly and efficiently by any means other than a class action.

Additionally, because the question whether the Defendant's facially-neutral employment policies and procedures were applied in a manner so as to unlawfully discriminate against the class members as a group on the basis of their race is at the heart of this case, if each Class Member had to pursue a claim individually, he or she would have to present essentially the same proof in each case. It is hard to imagine a less efficient way to deal with this controversy than that. A class action is the only fair and efficient way to deal with the claims presented in this case.

2. The Class Should Be Re-Certified Under Rule 23(b)(3)

After the Supreme Court's Wal-Mart decision, the Court's certification of the Plaintiff class under Rule 23(b)(2) is no longer tenable. However, because questions of law or fact common to members of the class predominate over questions affecting only individual members, and because a class action is the only fair and efficient way to deal with the Plaintiffs' claims, the Court should vacate the Class' Rule 23(b)(2) certification and re-certify the Class under Rule 23(b)(3).

B. The Court Should Grant Final Approval to the Settlement Agreement Because the Agreement is Fair, Reasonable and Adequate

Rule 23(e) of the Federal Rules of Civil Procedure provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval...".[43] The approval or rejection of a class action settlement lies in the district court's discretion.[44] "Before it can approve a settlement a district court 'must find that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties.'"[45] The court's determination is "... to approve or disapprove of the proposed settlement as a whole."[46]

Although Courts of Appeal in several Circuits have articulated specific factors that district courts in their respective circuits should examine to determine whether a settlement is fair, adequate, and reasonable,[47] "[t]here is no single test in this Circuit for determining whether a

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[43] Fed. R. Civ. P. 23(e).

[44] Trombley v. National City Bank, 826 F.Supp.2d 179, 191 (D.D.C. 2011); In re Lorazepam & Clorazepate Antitrust Litig. v. Mylan Labs., 205 F.R.D. 369, 375 (D.D.C. 2003) (citing In re: Vitamins Antitrust Litig., 2001 WL 856290, at *1 (D.D.C. July 19, 2001)).

[45] Thomas v. Albright, 139 F.3d 227, 231 (D.C. Cir 1998) (quoting Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1997) (other citations omitted)), aff'd sub nom, Thomas v. Powell, 247 F.3d 260, 345 U.S. App. D.C. 398, 2001 U.S. App. LEXIS 7687 (2001).

[46] Trombley, 826 F.Supp.2d at 208 (citing Schulte v. Fifth Third Bank, 805 F.Supp.2d 560, 591-92 (N.D.Ill. 2011) (citing 8 NEWBERG ON CLASS ACTIONS § 24:126 (4th ed.)).

[47] See, e.g., Vassalle v. Midland Funding LLC, 2013 U.S. App. LEXIS 3914, *11-12 (6th Cir.) ("A district court looks to seven factors in determining whether a class action settlement is fair, reasonable, and adequate: '(1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.'") (quoting UAW v. Gen. Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007)); Lane v. Facebook, Inc., 696 F.3d 811, 819 (9th Cir. 2012) ("A number of factors guide the district court in making that determination, including: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status

proposed class action settlement should be approved under Rule 23(e), and the relevant factors may vary depending on the factual circumstances."[48] One District Court concluded that to determine whether a proposed settlement agreement is fair, adequate and reasonable, courts in this Circuit have considered: " (a) whether the settlement is the result of arms-length negotiations; (b) the terms of the settlement in relation to the strength of plaintiffs' case; (c) the stage of the litigation proceedings at the time of settlement; (d) the reaction of the class; and (e) the opinion of experienced counsel."[49]

Taking each of those factors into account, it is clear that the Agreement is fair, adequate and reasonable, and the Court should grant the Plaintiffs' Motion for Final Approval of the Agreement.

1. The Agreement is Clearly the Result of Arm's-Length Negotiations

Settlement negotiations began in March 2011, but a final agreement was not reached until August 2012, almost 18 months later. The Agreement that resulted from those negotiations is specific, comprehensive, and tailored to the unique circumstances of this case. Counsel expended considerable time and effort to forge an agreement that satisfied both parties.

It is evident, simply from the length of the negotiations that produced the Agreement, that the Agreement is the result of arm's-length negotiations.

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throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.").

[48] In re Lorazepam & Clorazepate Antitrust Litig. v. Mylan Labs., 205 F.R.D. 369, 375 (D.D.C. 2003) (citing Pigford v. Glickman, 185 F.R.D. 82, 98 & n.13 (D.D.C. 1999) (citing Thomas v. Albright, 139 F.3d 227, 231 (D.C. Cir. 1998)).

[49] In re Lorazepam, 205 F.R.D. at 375 (citations omitted).

2. The Plaintiffs' Recovery Under the Agreement Bears a Reasonable Relationship to the Strength of the Plaintiffs' Case

Under the Agreement, the Plaintiffs will recover $1,900,000 for the payment of claims (including taxes on awards and other taxes as specified in the Agreement) to eligible Claimants.[50] The Defendant will also pay attorneys' fees,[51] litigation costs,[52] a service award to the Named Plaintiff, [53] and the costs of the Administrator.[54]

In addition to the monetary recovery, the Agreement provides for significant programmatic, non-monetary relief, including:

- mandatory diversity and EEO training across the Defendant's entire workforce;[55]
- the development and implementation of a voluntary, written affirmative action program that encompasses any positions in which less than fifty percent of the incumbent employees are African-American, by December 31, 2013;[56] and
- annual assessments of the compensation paid to the Defendant's employees to identify statistically significant racial disparities that cannot be accounted for by

[50]Agreement at §8.7.

[51]Id., at §17.2.

[52]Id.

[53]Id., at §8.1.2.

[54]Id., at §10.

[55]Id., at §16.6.

[56]Id., at §16.9.

legitimate, non-discriminatory factors, and to correct such disparities if they are found to exist.[57]

The Agreement further provides for a Settlement Monitor, paid for by the Defendant, whose duty is to monitor and report on the Defendant's implementation of the Agreement's programmatic relief provisions for the duration of the Agreement.[58] None of this programmatic relief could have been recovered by the Plaintiffs, absent a court order, if this case had not been settled.

In Class Counsel's opinion, the major strengths of the Plaintiffs' case are: (1) the report of the Plaintiffs' Expert, Dr. Lanier; (2) deposition testimony; (3) the demographic distribution of the Defendant's workforce; and (4) certain aspects of the Defendant's expert report, and the case's major weaknesses are: (1) the difficulty of identifying a specific employment practice that is responsible for the alleged discrimination; (2) the report of the Defendant's expert, Dr. White; (3) the lack of comparators due to the demographic distribution of the Defendant's workforce; and (4) the uncertain legal environment occasioned by Wal-Mart v. Dukes.[59]

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[57] Agreement at §16.12.

[58] Id., at §16.10.2.

[59] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 180 L. Ed. 2d 374, 2011 U.S. LEXIS 4567 (2011).

At least one Court in this Circuit has considered the unsettled state of the legal environment in a particular field of law when it assessed the reasonableness of a settlement agreement. See, Trombley v. National City Bank, 826 F.Supp.2d 179, 196 (D.D.C. 2011) (noting, while assessing settlement terms in relation to the strength of the plaintiff's case, that "the legal landscape for such suits remains challenging and riddled with uncertainty.").

3. This is an Appropriate Stage in the Litigation for Settlement

This case, which began just over 12 years ago, is at an appropriate juncture for settlement. There has been enough discovery for each Party to make an informed and realistic assessment of the strengths and weaknesses of its respective case, and neither party has yet committed itself to expending the resources necessary to bring and resolve dispositive motions and to prepare for trial.

If this case can be settled, this is the time to settle it. Here, settlement "does not come 'too early to be suspicious nor too late to be a waste of resources,' but instead it comes 'at a desirable point in the litigation for the parties to reach an agreement and to resolve the issues without further delay, expense, and litigation.'"[60]

4. The Reaction of the Class to the Agreement Has Been Favorable

The Administrator mailed copies of the Notice of Class Action Settlement and the Claim Form to the 1,029 Class Members identified by the Defendant on November 5, 2012.[61] The Administrator has received and accepted 423 Claim Forms.[62] No objections and only 1 opt-out request have been received.[63]

Of the 422 submissions received by the Administrator (421 Claim Forms and 1 opt-out request), only 1/422, or 0.2%, can be characterized as being in any way negative, and "the

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[60] Trombley, 826 F.Supp.2d at 199 (quoting Vista Healthplan v. Warner Holdings Co. III Ltd., 246 F.R.D. 349, 362 (D.D.C. 2007) (quoting In re Vitamins Antitrust Litig, 305 F.Supp.2d 100, 103 (D.D.C. 2004)).

[61] Patton Declaration, at ¶4.

[62] Id., at ¶9.

[63] Id., at ¶¶10-11.

relatively low number of objections and opt-outs, in light of the number of claims submitted, weighs in favor of the settlement."[64]

5. Class Counsel Strongly Endorses the Agreement

Class Counsel are experienced attorneys who have spent years representing employees in employment discrimination and civil rights cases. David A. Branch has been in private practice since 1994. He has served as class counsel in two class actions, and lead counsel in approximately 100 employment discrimination cases before the EEOC and local administrative agencies, and state and federal courts. Alexander Hillery, II, has served as class counsel in two class actions, and lead counsel in approximately 20 employment discrimination cases before the EEOC and local administrative agencies, and state and federal courts in the Washington, D.C.[65]

It is the considered judgment of Class Counsel that the Agreement is fair, reasonable, and adequate, and that the settlement bears a reasonable relationship to the strength of the Plaintiffs' case. Class Counsel strongly endorses the Agreement.[66]

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[64] Trombley, 826 F.Supp.2d at 200 (citing In re Lorazepam, 2003 U.S. Dist. LEXIS 12344, 2003 WL 22037741 at *6 ("[T]he existance [sic]of even a relatively few objections certainly counsels in favor of approval.")).

[65] See Declaration of David A. Branch, Esq., attached to Class Counsel's Unopposed Motion for an Award of Attorneys' Fees and Expense Reimbursement, at ¶¶ 14-28 (Dkt. No. 252, filed March 18, 2013).

[66] When the Court evaluates whether a settlement agreement is fair, reasonable and appropriate, it should not substitute its own judgment for that of Class Counsel. Nelson v. Mead Johnson & Johnson Co., 484 Fed. Appx. 429, **12-13, 2012 U.S. App. LEXIS 14876, *434 (11th Cir. 2012) ("Absent fraud, collusion, or the like, the district court 'should be hesitant to substitute its own judgment for that of counsel.'" (quoting Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977)); Trombley v. National City Bank, 826 F.Supp.2d 179, 203 (D.D.C. 2011) ("it is not the Court's role to use its own business judgment in place of the parties' assessment in determining the fairness of the proposed settlement.") (citing BofA Order of Final Approval, 2011 U.S. Dist. LEXIS 135014 at *85); Hammon v. Barry, 752 F.Supp. 1087, 1093 (D.D.C. 1990) ("It is well established that a court deciding whether to approve a class action settlement should not substitute its judgment for that of the proponents of the settlement, and that unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.") (internal quotation marks and additional citations omitted).

6. The Court Should Grant Final Approval to the Settlement

Even though the Plaintiffs are confident of the strength of their case, they are keenly aware of the vicissitudes of litigation and the risks and uncertainty of trial.

Class Counsel has weighed the strengths and weaknesses of the Plaintiffs' case, the time and resources necessary to litigate this case further, the risks and uncertainty of further litigation, and the probability of appeal (with the attendant delay) even if the Plaintiffs prevail at trial and concluded that the monetary and programmatic relief that the Class will receive under the Agreement is fair and reasonable, and that this is an appropriate point to settle the case.

The Court should grant the Plaintiffs' motion and grant final approval to the Agreement.

C. The Court Should Approve Payment of the Service Award Because Mr. Taylor Has Gone to Great Lengths to Protect the Interests of the Class and the Class Has Benefitted Greatly From His Service

1. Mr. Taylor Has Given the Class Long, Dedicated and Effective Service

"To determine whether incentive awards should be granted, and the proper amount of such awards, 'courts consider factors such as the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.'"[67]

Except for a very brief period between May 2001 and October 2001, when he was a co-plaintiff with Mr. Ronald Marshall,[68] Charles Taylor has been the sole Named Plaintiff in this

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[67] Trombley v. National City Bank, 826 F.Supp.2d 179, 207 (D.D.C. 2011) (citing In re Lorazepam, 2003 U.S. Dist. LEXIS 12344, 2003 WL 22037741, at *10) (quoting Cook v. Niedert, 142 F.3d 1004, 1006 (7th Cir. 1998)).

[68] See Dkt. No. 6 (adding Mr. Marshall as a Plaintiff); Dkt. No. 23 (dismissing Mr. Marshall from the complaint).

action. He has reliably and earnestly represented the interests of the Class Members in this matter, virtually alone, for more than 13 years.

Mr. Taylor has been an active participant in the prosecution of this lawsuit. He was deposed; he answered interrogatories; he produced documents; he attended almost every court proceeding related to this matter; and he has been diligent about communicating with Class Counsel.[69]

Mr. Taylor has been instrumental in helping counsel to identify people who were willing and able to assist with the prosecution of this case, and he has served as a conduit between Class Counsel and Class Members. He actively participated, on behalf of the Class, in all three of the mediation sessions, and in the subsequent negotiations that led to the Agreement.[70]

The Class has greatly benefitted from Mr. Taylor's long and resolute service. If the Court approves the settlement, eligible Claimants will share $1.9 million, and all of the Defendant's black employees will benefit from the Agreement's programmatic relief.[71]

Without Mr. Taylor's determined service to the Class, this case likely would have been abandoned or settled on far less favorable terms years ago. Without him there would be no case, no settlement, and no relief for the Class.[72]

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[69] See Declaration of Alexander Hillery, II, Esq., ("Hillery Declaration"), attached to Plaintiffs' Motion for Final Approval as Exhibit B.

[70] Id.

[71] The mandatory EEO training, analysis of the compensation paid to the Defendant's employees and other programmatic relief that arose out of the Settlement will potentially benefit all of the Defendant's employees, not just its black employees.

[72] See Hillery Declaration.

Mr. Taylor deserves the Service Award, and the Court should approve it.

2. The Proposed Service Award to Mr. Taylor is Fair and Reasonable

The Agreement provides for payment of a $60,000 Service Award to Mr. Taylor, in lieu of receiving a payment from the Claims Fund based on the Allocation Formula.[73] That payment is reasonable in light of his long and dedicated service to the Class.

Mr. Taylor filed the administrative complaint with the EEOC that was the genesis of this class action, raising class-based claims on behalf of the himself and the Defendant's other current and former black employees. Thereafter, he personally paid a $3,000 retainer to Attorney Branch to bring this lawsuit.

The proposed Service Award to Mr. Taylor is not inconsistent with incentive payments to named plaintiffs in other employment discrimination class actions.[74] Considering the fact that he has carried this case alone for almost its entire 13-year duration, the amount of time and energy he has expended on behalf of the Class, and the risk he took by bringing this case, the Service Award is fair and reasonable.

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[73] Agreement at §8.12.

[74] See, e.g., Roberts v. Texaco, 979 F.Supp. 185 (S.D.N.Y. 1997) (incentive awards of $7500 to $85,000 for named plaintiffs in employment discrimination class action with common fund of $115 million); Ingram v. Coca-Cola, 200 F.R.D. 685, 694 (N.D.Ga. 2001) (approving incentive awards of $300,000 to three named plaintiffs in employment discrimination class action which created $84 million damage fund and fund for future salary increases).

V. Conclusion

For the reasons set forth herein, the Plaintiffs respectfully request that the Court grant the Plaintiffs' Motion and issue an Order re-certifying the Settlement Class, granting final approval of the Settlement Agreement and the re-certified Class, and authorizing payment of a Service Award to the Named Plaintiff, Mr. Charles Taylor.

Respectfully submitted,

/s

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