

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

EMANUEL JOHNSON, JR., et al., )  
 on behalf of themselves and )  
 as Representatives of a Class )  
 of all Others Similarly Situated, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 JANET RENO, )  
 in her official capacity as Attorney )  
 General of the United States of )  
 America )  
 )  
 Defendant. )

**FILED**

DEC 14 2000

J. MAYER-WHITE INCHON  
U.S. DISTRICT COURT

Civ. No. 93-0206 (TFH)

MEMORANDUM OPINION

Pending before this Court is the plaintiffs' Motion to Authorize Disbursement from Plaintiffs' Monitoring Fund for Payment of Interim Fees and Costs. In the motion, the plaintiffs have asked the Court for permission to disburse approximately \$200,000 from a monitoring fund maintained as part of the parties' settlement. Upon careful consideration of the plaintiffs' motion, the opposition and reply thereto, and the entire record, the Court will grant the plaintiffs' motion.

**I. BACKGROUND**

In 1993, certain black Special Agents of the Federal Bureau of Investigation ("FBI") filed an action in this Court, alleging racial discrimination in the FBI's employment policies and practices. On October 14, 1993, this Court approved a Settlement Agreement ("Agreement") entered into by the FBI and a certified class of black Special Agents, which was set to expire on

October 14, 1998. Under the Agreement, the FBI provided retroactive relief to the class including, *inter alia*, promotions and transfers to black Special Agents. In addition, the FBI provided prospective relief to the class, which included the requirement of establishing procedures by which the FBI would revise certain employment practices.

Based on a joint motion by the parties, the Court approved a Settlement Agreement Amendment (“Amendment”) on May 17, 2000, which applied retroactively to October 14, 1998. Under the Amendment, the FBI received an extended period of time to implement certain portions of the Agreement. The Amendment also clarified other aspects of the original Agreement and altered the enforcement provisions of the Agreement to simplify and streamline mediation.

Subsequent to the Court’s approval of the Amendment, the plaintiffs initiated mediation to resolve allegations that the FBI did not fulfill certain obligations under the Agreement, which allegedly resulted in an adverse impact on the class in promotions, discipline, and personnel evaluations. As a result of their mediation efforts, the parties entered into a Mediation Settlement Agreement (“MSA”) and jointly filed on October 20, 2000 a motion for preliminary approval of the MSA and notice to class members and other interested parties. Under the agreement, the parties agree that the FBI would provide class members who had pending EEO or future administrative EEO claims based upon alleged race discrimination respecting certain promotions, discipline, or performance appraisals with an opportunity to elect an alternative review of such claims. In addition, the MSA resolves, with certain limited possible exceptions, all outstanding attorneys’ fees and costs from October 1993 through the effective date of the MSA. Before the MSA may be effectuated, under Federal Rule of Civil Procedure 23 the Court

must grant preliminary approval of the MSA, direct that notice be given to class members and other interested nonmembers who are current FBI employees, and hold a fairness hearing to evaluate the agreement fully.<sup>1</sup>

While the parties' motion for preliminary approval of the MSA was pending, the plaintiffs filed with this Court on November 15, 2000 a Motion to Authorize Disbursement from Plaintiffs' Monitoring Fund for Payment of Interim Fees and Costs. Under their motion, the plaintiffs have asked this Court to approve a disbursement for attorneys' fees from a monitoring fund established by the original Agreement. The class attorneys seek approximately \$200,000 to cover interim costs and expense, including attorneys' fees, to pay for monitoring and enforcement activities related to the original Agreement, the Amendment, and the MSA.<sup>2</sup> The defendant has opposed the plaintiffs' motion, arguing that such a disbursement should not be made prior to the Court's final approval of the MSA.

## II. DISCUSSION

Under the parties' original Agreement, class members established a monitoring fund by "placing the entire amount received [for back pay and retroactive monetary payments] in an interest-bearing escrow account to cover expenses associated with monitoring of the Agreement

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<sup>1</sup> On November 22, 2000, one class plaintiff who had previously moved the Court to modify the Settlement Agreement Amendment withdrew her motion, permitting the Court to move forward with an examination of the parties' joint motion for preliminary approval of the MSA.

<sup>2</sup> The plaintiffs' counsel state that they agreed to forego over \$700,000 in combined attorneys' fees and costs incurred since 1993 for the \$200,000 currently in the monitoring fund together with the \$230,000 that will be paid by the defendant if the MSA is approved.

pursuant to Section V., *infra*. The class has also decided that the Court shall approve all disbursements made from this account.” Agreement III.I.1-2.<sup>3</sup> Under Section V.F, “Costs of Monitoring,” the parties agreed to “bear their own costs related to the analysis of [monitoring data provided by the FBI].” The defendant cites this subsection for the proposition that the monitoring fund may not be used to pay class attorneys’ fees and costs. The defendant’s citation to this section, however, is misplaced. Attorneys’ fees are neither explicitly permitted nor prohibited in the text of the original section. The section’s requirement that each side must pay for its own data analysis does not address *how* each side must pay for the costs of obtaining and conducting such analyses. In particular, it does not preclude the use of monitoring funds for such payments.<sup>4</sup>

More important, the Amendment, executed voluntarily by both parties and approved by this Court on May 17, 2000, supplements Section V.F, explicitly adding that “[t]he Monitoring Fund may be used to cover fees associated with statistical analysis, and other expenses or fees, *including attorneys’ fees*, necessary to review, enforce or implement any of the provisions of the

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<sup>3</sup> The amount originally paid into the account by the FBI was \$11,989.00. The current balance in the account is approximately \$200,000.00.

<sup>4</sup> The defendant also cites Section VI.I.1 of the original Agreement for the proposition that the monitoring fund may not be used to pay attorneys’ fees. That section directly addresses attorneys’ fees and expenses, and it states that the FBI will pay for reasonable attorneys’ fees incurred by the plaintiffs for service from March 5, 1991 through the final approval of the Agreement. However, that section is extraneous to the specific governance of the monitoring fund, as is evidenced by the fact that it is found under the “Miscellaneous” section of the Agreement. And the defendant has made no colorable argument showing the subjugation of the terms governing the monitoring fund to this section. Thus, there is no reason for this Court to read the section as necessarily trumping all other provisions—such as Section V.F, as amended—with respect to attorneys’ fees.

Agreement or Amendment.” Amendment V.F.2 (emphasis added). It appears from the plain language of the Amendment, therefore, that the monitoring fund is intended to be used for costs, including attorneys’ fees, associated with monitoring the settlement provisions. This is confirmed in Section VI.I.1 of the Amendment as well: “Plaintiffs may obtain attorneys’ fees and costs incurred in connection with monitoring, enforcing and implementing the Agreement and this Amendment only from the Monitoring Fund as described in § V.F . . . .”

Rather than addressing the language of those sections, however, the defendant focuses on the MSA. The defendant concedes that the MSA will provide disbursement from the monitoring funds for attorneys’ fees. As stated by the MSA:

1. Defendant shall pay to class counsel \$230,000 in attorneys’ fees and costs to fully and finally resolve all outstanding attorneys’ fees and costs incurred by plaintiffs in this case since October 14, 1993, through the effective date of this Agreement . . . .

2. The existing monitoring fund may be used to cover fees associated with statistical analysis, and other expenses or fees, including attorneys’ fees necessary to review, enforce or implement any of the provisions of the Agreement or Amendment.

MSA I.D. The defendant contends, however, that the necessary predicates of such disbursement are a fairness hearing and the Court’s final approval. Because the MSA has not been subjected to a fairness hearing and approved by the Court, therefore, the disbursement is prohibited.

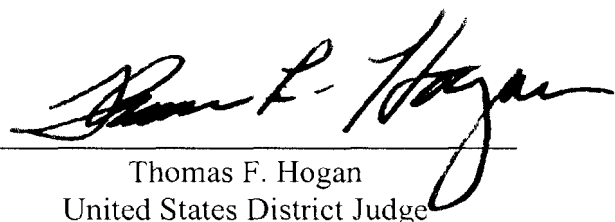
The defendant relies on an erroneous premise. While the defendant is correct that final approval is needed for the effectuation of the MSA and that it will address attorneys’ fees, the MSA is not required for disbursement of attorneys’ fees and costs from the monitoring fund at this time. The Agreement and Amendment, which currently govern the parties’ settlement, explicitly allow for the disbursement from the monitoring fund for attorneys’ fees upon Court

approval, as discussed above. See Amendment V.F.2. The defendant has failed, therefore, to convince the Court that the fees requested in this matter should not be granted.<sup>5</sup>

### III. CONCLUSION

For the reasons stated above, the Court will grant the plaintiffs' motion for disbursement from the monitoring fund. An appropriate Order will accompany this Memorandum Opinion.

December 12, 2000



Thomas F. Hogan  
United States District Judge

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<sup>5</sup> One caveat, however, should be noted. While Section VI.I.1 of the Amendment states that plaintiffs may obtain attorneys' fees from the monitoring fund pursuant to Section V.F, it warns that they "may not seek additional attorneys' fees and costs from the FBI once that fund is exhausted except as expressly provided in §§ V.F.5 (additional funds may be available under certain circumstances if this Amendment is extended after it expires) and VI.F.5 (ADR)."