

Plaintiffs file this Status Report as directed by the Court at the conclusion of the telephonic conference on October 30, 2009. In this Report, Plaintiffs both inform the Court of further discussions and agreements reached between the parties since that time, and submit an amended proposal for the awarding and distribution of the monetary relief previously awarded to Plaintiffs and the Class by the Court's prior Orders entered on various dates, as summarized in Plaintiffs' Status Report on Monetary Relief Proceedings filed on August 21, 2009 (Doc. 660), and in the final Order establishing the rate of interest applicable in the calculation of that relief, entered on August 25, 2009 (Doc. 662).

The amended proposal described in this Status Report and submitted herewith replaces in its entirety the proposal submitted with Plaintiffs' Memorandum in Support of Amended Proposed Further Order for Monetary Relief submitted on October 2, 2009 (Doc. 674).

A. Report on Further Discussions and Agreements of the Parties

Since November 3, 2009, the parties have conferred by telephone on approximately one-half dozen occasions in an attempt to clarify and reach agreement on methods of distributing the monetary relief amounts previously awarded by the Court.¹ None of the methods under discussion change the total amount of the monetary award, which has been determined by prior Orders of the Court. In these discussions, the parties attempted to (1) conform the distribution methods and amounts more closely to those that the Court indicated it was inclined to favor during the November 3 conference, and (2) reach agreement, to the extent possible, on a plan that Plaintiffs could submit.

Plaintiffs are now pleased to report that they are able to submit, and attach hereto, a proposed distribution plan that meets both of the objectives stated above, and that, in the opinion

¹ Several of these discussions have also involved minor revisions to the injunctive relief agreed upon by the parties and submitted to the Court. The final agreed-upon injunctive relief provisions have been or will be submitted separately to the Court. Additionally, the parties have submitted recommended candidates for the ombudsperson appointment for the Court's consideration.

of the class representatives and Class Counsel, is fair and equitable, as well as sufficiently clear and practicable to be understood and accepted by the class and efficiently administered by Lufkin and the Third Party Administrator recommended by the parties.

The amended proposal submitted with this Report changes all three of the major elements of the distribution plan previously submitted by Plaintiffs on October 2, 2009 (Doc. 674): the formula for distribution of the bulk of the back pay and interest based on time worked by class members during the class liability period; the per-capita awards payable to all class members without regard to their entitlement to time-worked awards; and participation awards to the named plaintiffs and class representatives. In the following section we describe the changes made to each of these three elements of the distribution plan, and Plaintiffs' proposal. It is our understanding, based on discussions with counsel for Lufkin, that Lufkin will comment on the adoption of this proposal by the Court and its incorporation in the judgment, and may acquiesce in much or all of Plaintiffs' proposal subject to possible appeal on the issues previously disputed by Lufkin.

B. Plaintiffs' Proposed Distribution Method

1. Per-capita awards.

These awards would be payable to all class members without regard to their entitlement to awards based on time worked, or the amount of their time-worked awards. Plaintiffs' previous proposal was for all class members to be paid \$375, with the total amount of those awards to be deducted from the monetary relief fund as a whole before the division of the remainder based on time worked. The amended proposal is for a two-tiered distribution of per-capita payments. Class members who worked less than 90 days during the class period would receive \$375. Class members who worked 90 or more days during the class period would receive \$750. The significance of the 90 day threshold is that under Lufkin's promotion procedures and standards, only class members who worked for 90 days would have been effectively eligible for promotion, in most circumstances. The total amount distributable to the

class in per capita awards under the amended proposal would be \$749,250, or approximately 14% of the total amount of monetary relief to the class, inclusive of interest and assuming distribution at the end of 2009.

2. Participation awards.

These awards would be payable to those plaintiffs, class representatives, and several other class members who by their efforts and participation contributed in an objectively measurable fashion to the prosecution and success of the action, including particularly the claim for monetary relief, on behalf of the class. Plaintiffs' prior proposal was for 19 such awards totaling \$233,662, with an average award amount of approximately \$12,500 and a maximum individual award amount of \$32,009. The amended proposal is based on a point system in which points are assigned to several objectively verifiable tasks and roles, resulting in 22 awards.² Lufkin is in agreement with this point-system approach. Plaintiffs request that each point be valued at \$1,000. Lufkin does not agree that this valuation results in appropriate participation award amounts and will submit its comments in that regard to the Court.³ At Plaintiffs' proposed point value, the participation awards total \$134,000, with an average award amount of slightly under \$6,090 and a maximum award amount, payable to lead named plaintiff Sylvester McClain, of \$18,000. In the aggregate, these participation awards would amount to approximately 2.4% of the total class recovery.

The objective factors on which award entitlement and amounts were based include, in descending order of importance or value: service as a named individual plaintiff; filing of an EEOC charge on which class claims were based; attendance at mediation sessions; service as a

² The additional three recipients of participation awards are individuals who were not listed in Plaintiffs' October 2 proposal but who did in fact participate in the ways recognized in the amended proposal based on objective factors as described in the text.

³ Plaintiffs believe that the per-point valuation may be the only remaining matter not agreed to by the parties relating to the distribution of the monetary relief.

class representative; testifying at trial; on the part of named plaintiffs or court-appointed class representatives, incurring the perceived risk of possible retaliation as a result of continuing to work at Lufkin after being designated as a plaintiff or class representative; giving deposition testimony; testifying at class certification hearings; and testifying by declaration.

These factors all relate, in one or more ways, to the factors recognized by courts as justifying participation awards: time and effort expended on behalf of the class; assisting counsel and performing representative tasks or fulfilling representative duties on behalf of the class; and incurrance of risk or perceived risk as a result of undertaking individual representative roles or duties. *See Roberts v. Texaco*, 979 F. Supp. 185, 201 (S.D.N.Y. 1997) (in discrimination-based litigation, the plaintiff is frequently a present or past employee whose present position or employment credentials or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of litigation at some personal peril.); *Dornberger v. Metropolitan Life Ins., Co.*, 203 F.R.D. 118, 124-25 (S.D.N.Y. 2001); *Yap v. Sumitomo Corp. of Am.*, No. 88 Civ. 700, 1991 WL 29112, at *4 (S.D.N.Y. Feb. 22, 1991) (award justified in part because named plaintiffs actively participated and were deposed for several days each); *Lachance v. Harrington*, 965 F. Supp. 630, 652 (E.D. Pa. 1997); *Huguley v. General Motors Corp.*, 128 F.R.D. 81, 85 (E.D. Mich. 1989) (award justified because of the “onerous burden of litigation”); *Cimarron Pipeline Constr., Inc. v. National Council on Comp. Ins.*, Nos. CIV 89-822-T, CIV-1186-T, 1993 WL 355466, at *2 (W.D. Okla. June 8, 1993) *see also, Hughes v. Microsoft*, No. C98-1646C, C93-0178C, 2001 WL 34089697, at *12-13 (W.D. Wash. Mar. 26, 2001) (where time and effort form the basis for incentive awards, courts have approved different levels of compensation for class representatives based upon the evidence of their individual participation.).

The court in *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003), noted with approval comparable awards of \$5,000 to each class representative in a case involving a much larger number of class members (5,400) and a significantly smaller total recovery (\$1.725 million). *Id.*, referring to *In re Mego Fin. Corp. Sec. Litig.*, 253 F.3d 454, 463 (9th Cir. 2000). That individual

award amounted to .0029 of the total recovery while the largest proposed award here is a comparable .0033 of the monetary fund. The proposed participation awards here are also quite modest in comparison to awards approved in other cases (admittedly involving larger recoveries). *Roberts*, 979 F.Supp. at 205. (Awards of \$2,500 to \$85,000) *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2006) (total individual awards of \$300,000 each to class representatives, in lieu of other compensation, and \$3,000 to affiants); *Yap*, 1991 WL 29112, at *4 (\$30,000 each to two named plaintiffs).

The points awarded to various factors, and the distribution of points and resulting dollar amounts proposed to be paid to the 22 individuals for whom participation awards are sought by Plaintiffs, are described in detail in the Declaration of Timothy B. Garrigan, which is being filed with this Status Report. The Garrigan Declaration also describes in detail the rationale for using those particular factors and the weighting accorded to them. The Participation Award Worksheet showing individual point distributions is attached as Exhibit A to this Report.

3. Time Worked Awards

The remainder (approximately 83.9%) of the monetary relief amount awarded to Plaintiffs and the class by the Court, after deduction for and payment of the per-capita and participation awards, would, as in Plaintiffs' previous proposal, be distributed among class members who worked for at least 90 days (the promotability threshold and sole factor determining "eligibility" to share in these awards) during the class period. However, the method of allocating the sums paid out in time worked awards is different. The amended method is designed to respond to the Court's recommendation that Plaintiffs propose a distribution plan that, while retaining a reasonable degree of clarity and simplicity, would increase the degree to which it results in an "equitable" distribution congruent with the Court's specific findings and awards with respect to the jobs and periods in which promotion shortfalls and resulting lost earnings affected the class.

In essence, Plaintiffs' amended proposal adopts the major features of the plan advanced by Lufkin in its October 2, 2009 submission (Doc. 675), which allocates back pay (principal) amounts among class members based on weeks worked within (1) job categories, i.e. hourly or salaried positions and (2) time periods – four separate periods for hourly positions and two for salaried positions – corresponding to the periods for which the Court made specific awards, and to the specific amounts awarded, in prior Orders as summarized in Plaintiffs' Status Report filed August 21, 2009 (Doc. 660). Interest on those back pay amounts is allocated on a year by year basis, in the manner and using the interest rates previously established by the Court in its prior Orders. In effect, this method results in awards to class members in varying amounts on a per-week worked basis depending on the time period and job category in which they worked.⁴

The ways in which this current proposal differs from that previously suggested by Lufkin are: (1) the amounts available for allocation based on time worked (i.e. the remainder after deduction of per-capita and participation award payments) are reduced by the amount of change in the per-capita awards and increased by the amount of change in the participation awards, for a net decrease of \$261,088; and (2) the amounts "charged" to that remainder of the monetary relief fund are allocated among the 12 different categories (back pay and interest, respectively, for each of four hourly and two salaried position "cells" in the distribution formula) pro-rata in proportion to the amounts in each category.

The results of Plaintiffs' amended proposal for distribution of back pay and interest based on weeks worked by eligible class members in the various job categories and periods may be most clearly seen in the spreadsheet, "Distribution Proposal Summary," attached as Exhibit B to

⁴ Among class members in hourly positions, those who worked in 1994-1995 would receive slightly more on a per-week worked basis than those who worked in the 1996-2002 and 2003-2004 periods, and substantially more than those who worked in the 2005-2007 period (for which there was never any showing of statistical disparities or finding of discriminatory practices). Among salaried workers, those who worked in the 1994-1995 period would receive substantially more than those who worked in the 1996-2002 period, and those who worked after 2002 (when the evidence appears to show no promotional shortfalls) would not receive time-worked awards.

this Report. In summary, class members who worked in hourly positions would be paid amounts ranging from \$3.36 for weeks worked in 2007 to \$33.26 (inclusive of principal and interest) for weeks worked in 1994; and class members who worked in salaried positions would be paid amounts ranging from \$16.30 per week worked in 2002 to \$21.78 per week worked in 1996, and significantly larger amounts for weeks worked in 1994-1995, years when the Court found much larger promotional disparities existed.⁵

4. Overall results of proposed method for distribution of per-capita and weeks-worked awards

By Plaintiffs' preliminary calculation, and assuming a date for entry of judgment (ending the application of the pre-judgment interest rate) of December 31, 2009,⁶ the adoption of the proposed distribution method would result in total payments for per-capita and weeks-worked awards⁷ ranging from a maximum of \$19,946.68 for any member of the class (for two individuals who worked in salaried positions in 1994-1995 and in salaried and hourly positions after that throughout the class period), and a maximum of \$17,475.66 for class members who worked exclusively in hourly positions throughout the class period (102 individuals in this group), to minimum amounts of \$776.22 for class members who worked at least 90 days and \$375 for class members who worked less than 90 days (371 individual class members in this

⁵ The differences in amounts distributed among class members who worked in salaried jobs would be much less than the differences in amounts per-week worked in those jobs, due to the relative stability and longevity of employment in salaried jobs; for the most part, a single group of individuals worked in both the 194-1995 and the 1996-2002 periods. For the same reason, the large differences in per-week amounts for hourly workers in 1994-2004 and the 2005-2007 period would not, for most of the affected individuals who worked in the 2005-2007 period, preclude them from a more ample recovery based on the higher per-week worked amounts applicable to earlier periods.

⁶ Final payment amounts would, of course, be calculated once the date of entry of judgment is determined, but would vary only slightly from the figures summarized in the text assuming that the date entry date is within a matter of weeks of the end of this year.

⁷ Excluding participation awards which are not based on factors related to the length of the awardees' employment, but rather their participation in class representation activities.

group). The average or mean payment to all class members would be \$4,520, and the median payment would be \$1,275.⁸ Of the 1,181 members of the class who would share in the award of monetary relief, 232 would receive over \$10,000, and 327 would receive over \$5,000.

C. Plaintiffs' Proposal for Further Proceedings on Monetary Relief

In the opinion of Plaintiffs and Class Counsel, the amounts and allocations summarized above represent a fair distribution of the monetary award determined by the Court. Therefore, Plaintiffs urge the Court to approve the distribution plan and use it as the basis for awarding monetary relief in its final judgment in the case. Plaintiffs further offer their suggestions as to how the Court should proceed from the present stage to the entry of such a judgment, taking into consideration the non-monetary issues still pending in the case, the possibility that Lufkin may appeal from some aspects of the award of monetary relief, and the desirability of a final judgment for purposes of appellate review of any issues on which appeal is sought by either side.⁹ Plaintiffs have not discussed these procedures in any detail with Lufkin, but have attempted to fashion them in a way we believe may reduce the scope of any disputes between the parties.

1. Incorporation of the Court's monetary relief award into a judgment.

Once the Court has determined how it will award monetary relief to the Plaintiffs and the class, it should enter an order announcing its decisions, without immediately incorporating that order into a judgment. If the Court will specify a date on which it will enter the final judgment, the parties will be able to determine the exact amounts of money to be awarded in per-capita

⁸ The large difference between the average and median figures is attributable to the large number of class members who worked less than 90 days and would therefore receive only the \$375 first-tier per-capita award.

⁹ Since the parties have made a joint proposal for all aspects of the injunctive relief, we do not anticipate any appeal from the Court's judgment in this regard, assuming the Court adopts the joint proposal. Any appeal would likely be by Lufkin, from the monetary relief award, or by one or both parties from the interim award of attorneys' fees (which both parties previously attempted unsuccessfully to appeal).

awards, participation awards, and time-worked awards (principal and interest) based on the Court's order and the anticipated judgment date.¹⁰ If desired by the Court, the parties could submit a list of class members and amounts to be awarded for incorporation into the judgment or filing with the Court and adoption by reference in the Court's judgment. As the Court stated was its intention in the November 3 telephonic hearing, the judgment should – and under Plaintiffs' amended proposal would – break down the monetary awards by categories in a manner that would allow Lufkin to appeal those aspects of the monetary relief (salaried positions and the 1994-1995 time period) that it may wish to appeal, and should not provide by its terms for a partial payment in the event of an appeal by Lufkin.

2. Form of judgment and issues addressed.

The judgment could easily incorporate both injunctive and monetary relief, without complications. Inclusion of an award of costs and attorneys' fees to Plaintiffs presents additional issues, however. This is especially so as the Court previously entered an interim award (Docs. 621, 622), covering the period up to December 31, 2008, and reserved consideration of a further award for the period since January 1, 2009; Plaintiffs appealed and Lufkin cross-appealed that award; and the Fifth Circuit dismissed the appeal on finding that the Rule 54(b) judgment incorporating the Court's interim award (Docs. 672, 673) was not an appealable order (Doc. 673).

Plaintiffs believe that the forthcoming judgment should incorporate the Court's previously entered interim award of costs and attorneys' fees, at a minimum, while reserving

¹⁰ Because the per-capita and participation awards are to be deducted from the monetary relief fund and allocated between back pay (principal) and interest amounts on a pro-rata basis, that allocation cannot be finalized until the pre-judgment interest amount, and therefore the date of judgment, are known.

consideration of a further or final award for the period after January 1, 2009.¹¹ However, Plaintiffs – and, we assume, Lufkin – would urge the Court to fashion its judgment so that it will be found to be appealable by the Fifth Circuit. We believe it is possible to do so but suggest that the Court allow the parties to consult and submit their recommendation(s) on how this might best be accomplished, once the Court has entered its order deciding how and when the award of monetary relief to the class will be determined and judgment thereon issued. Plaintiffs (and we assume Lufkin) would submit proposals for the specific language or form appropriate for the judgment should the Court so request.

Although Plaintiffs' suggestions would entail a short delay before entry of the Court's judgment, that delay would not prejudice either side. The Court could, and we submit should, enter the injunction so that its remedial provisions will go into effect as soon as possible, without awaiting entry of a judgment.¹² The delay before entry of the judgment incorporating the monetary relief awarded by the Court will result in the continuation of interest at 5%, but the period in which interest at this rate continues can be minimized by the Court's requiring the parties to carry out the tasks needed to move from entry of the monetary relief order to entry of the judgment as expeditiously as possible. Plaintiffs would certainly make every effort to expedite that process.

¹¹ An alternative procedure would be to make a further award of interim costs and fees for work done and expenses incurred by Plaintiffs' counsel in 2009. However, such a further interim award would (1) entail additional delay in entry of a final judgment since it will require submission of an application by Plaintiffs and proceedings on that application, and (2) would not finally dispose of all fees issues since a further appeal may be taken by Lufkin on monetary relief issues relating to the class awards or by one or both sides on fees issues.

¹² Although an injunctive relief order would be appealable and if appealed could throw into doubt the Court's jurisdiction to award monetary relief, it is our understanding that since Lufkin has joined Plaintiffs in a joint proposal for injunctive relief it will not appeal the injunction. The Court might request confirmation from Lufkin on this point as it considers how to proceed.

CONCLUSION

The Court should: (1) enter an Order adopting the amended proposal for distribution of monetary relief to the class described in this Status Report, the results of which are summarized in further detail in Exhibits A and B to this Report; and (2) establish a schedule for determining the form of a judgment and for further proceedings on any remaining issues to be addressed in such a judgment.

Dated: November 13, 2009

Respectfully submitted,

By: /S/ Morris J. Baller

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CERTIFICATE OF SERVICE

I hereby certify that I have served all counsel of record in this case, including the following, with a true and correct copy of the foregoing by sending same via electronic filing to:

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on this 13th day of November 2009.

/S/
Morris J. Baller