IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DeWayne Ketchum, Everett L. Richardson, Jr., Robert J. Harris, Barbara A. Nearon, Thomas Long, Theodore I. Busch, Jr., Levette Parish,	:	
	:	Civil Action No. 01-CV-1042
Plaintiffs,	:	
v.	:	
Sunoco, Inc.	:	CLASS ACTION
Defendant.	:	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT AND FOR AUTHORIZATION TO DISSEMINATE NOTICE

I. INTRODUCTION

As this Honorable Court is well aware, Plaintiffs have reached a proposed settlement with defendant Sunoco, Inc. ("Sunoco") that provides for the payment of $5.5 million as well as non-monetary relief, including a two-year compliance reporting period. At this juncture, the Court need only determine whether the settlement appears to be sufficiently fair, reasonable and adequate to allow dissemination of the Notices to the Class. Plaintiffs submit that the proposed settlement amply satisfies this minimal standard.

Attached as Exhibit A hereto is the Settlement Agreement that the parties have concluded. Exhibit B is an agreed-upon form of notice that may be mailed to all class members. The proposed order attached hereto preliminarily approves the settlement and directs that notice be given. Plaintiffs respectfully submit that settlement proceeds may be distributed before the end of this calendar year if class notices are mailed promptly. We, therefore, respectfully request that the Court address this matter at its earliest convenience.

II. FACTUAL BACKGROUND

This race discrimination class action was filed by seven current and former African-American employees of defendant Sunoco, Inc.,[1] under Title VII of the Civil Rights Act of 1964, as amended, and the Civil Rights Act of 1866, 42 U.S.C. § 1981, to redress alleged discrimination in Sunoco's compensation and promotion practices and procedures.

Plaintiffs' core allegation was that Sunoco did not give African-American employees fair opportunities to gain upper level managerial positions. While Defendant's leaders most often arise from the sales and production ends of its business, African-Americans at Sunoco, no matter what their inclinations, education and abilities, were routinely placed in one of three non-production areas: public relations, human resources, or financial analysis. Proof that defendant did not give African-Americans an equal opportunity to obtain upper management positions was adduced in the form of statistical analyses as well as anecdotal evidence.[2]

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[1] Sunoco is one of the largest independent petroleum refiner-marketer's in the United States. Defendant is headquartered in Philadelphia, Pennsylvania and employs approximately 11,000 people. Defendant operates five domestic refineries, sells gasoline under the Sunoco brand through approximately 3,500 retail outlets in 17 states, and sells lubricants and petrochemicals worldwide. Sunoco is comprised of five "business units": (1) Marketing & Logistics, (2) Chemicals, (3) Refining, (4) Coal and Coke, and (5) Shared Services. Six of the seven named plaintiffs work or worked at Sunoco's headquarters in Philadelphia; one works at Sunoco's Philadelphia refinery.

[2] In Sunoco's history, only one Black man has been permitted to achieve executive status. Although this gentleman is ineligible to participate in any recovery as a class member, having signed a general release upon retirement, he provided deposition testimony in this case in which he described a series of able Black professionals – lawyers, planners, and consultants – whose once-promising career paths at Sunoco had proven to be dead ends. When asked why so few of defendant's managers are Black, the witness identified racial discrimination as the cause or "something very close to it." He also provided a poignant summary of the African-American experience at Sunoco, "The environment was never there. When you look at the list of those who have passed through the portals of Sunoco, [you see] many qualified, many able, [but] very few retained."

Since this lawsuit was commenced (and, Plaintiffs contend, *because* this lawsuit was commenced), Sunoco has substantially revised the way it advertises and fills its managerial positions. More particularly, the "tap-on-the-shoulder" system of promotions formerly used by Human Resource Development Committees (HRDCs) has been replaced by a more transparent and systematic program called Talent Management. Sunoco also has adopted a new job posting policy that replaces much of the discriminatory process of the past with automatic posting requirements and automated its performance review process. These salutary changes, in conjunction with several key additions to Sunoco's leadership, are good reason to be optimistic about the Company's future course with respect to the treatment of African-American employees. The monetary relief provided for in the proposed settlement will likewise take great strides toward remedying the race-based inequities of the Company's past.

By Opinion and Order dated July 11, 2003 (Exhibit C hereto), this Court certified a class consisting of "all African-American exempt employees of Sunoco, Inc. employed within the Philadelphia area (as previously defined by the parties) at any time [since] January 1, 1996." The Court certified the Class pursuant to Fed. R. Civ. P. 23(b)(2) because Plaintiffs did not seek to resolve claims for pain and suffering attributable to racial harassment on a classwide basis. Rather, Plaintiffs sought classwide injunctive and equitable monetary relief (i.e., backpay) to remedy the allegedly unlawful practices from which this lawsuit arose. The Court's class certification decision explicitly limited the class to these purposes and warned, "If Plaintiffs deviate from their announced goal to seek only general equitable relief, the Defendant may always move for and the Court may consider modification." See Class Certification Opinion at 7.

The Class certified by the Court for litigation purposes is the same Class that will be used to distribute settlement proceeds if the Court approves of the settlement that the parties have reached.

Both before and after the Court's class certification decision, the parties engaged in extensive discovery, including the production and analysis of thousands of pages of textual documents as well as defendant's electronic database of personnel-related and payroll information. In addition, almost thirty depositions were completed, including those of the named plaintiffs and several of defendant's high-ranking officers. Both parties retained experts who analyzed defendant's databases and communicated with each other to ensure that they working from the same universe of information.[3] Finally, the parties have engaged in exhaustive, careful and arms-length settlement negotiations – often under the supervision of this Honorable Court – in order to reach the proposed settlement.

The litigation evidence in question showed, among other things, that Sunoco's promotional pool for supervisory and management positions is classwide, if not company-wide. Moreover, while each business unit maintains its own human resources manager and personnel, the human resources managers of each business unit report to a single Vice President of Human Resources. Defendant organizes its salaried positions by grades, which ranged from 1 to 28, with

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[3] Plaintiffs' expert, Dr. Janice Madden of Econsult Corporation, found statistically significant disparities in exempt employee compensation based on race. In addition, Dr. Madden analyzed defendant's initial assignment data and found significant evidence of race discrimination in initial assignments of Black employees. Dr. Madden further found, using a commonly-accepted multiple regression analysis, that Black exempt employees receive far fewer promotions than do similarly situated White exempt employees. Defendant's expert, Bernard Siskin, Ph.D., sought to divide pertinent data into the smallest possible pools. The effect of doing so would be to diminish the likelihood of finding statistically significant disparities.

1 being the lowest and 28 being the highest. Middle level management employees generally are at salary grades 8-10. Upper level management employees generally are at grades 11-13. Pursuant to Sunoco's new job posting policy, virtually all openings for positions in grade 13 and below will be posted.[4]

The Named Plaintiffs'[5] experiences illustrate the Sunoco "glass ceiling."[6]

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[4] Sunoco managers used to be permitted to exercise "discretion" insofar as job posting goes, particularly as it pertains to the more senior levels of jobs. Defendant's former company-wide policy appears to be that openings for jobs at salary grades 10 and below should be posted, while salary grades 11+ were not.

[5] Theodore I. Busch, Jr., is a Sunoco engineer and Named Plaintiff. Although he was deposed and otherwise participated in discovery, he has not responded to the proposed settlement. If he remains non-responsive, Plaintiffs will ask the Court to exercise its related discretion and remove Mr. Busch as a Named Plaintiff. So long as the dispute between the remaining parties is still alive and concrete, a court may reduce the number of named plaintiffs in this manner. See, e.g., Kremens v. Bartley, 431 U.S. 119, 142-43 (1977) (Brennan, J., dissenting) (citing Baker v Carr, 369 U.S. 186 (1962)). Of course, even if Mr. Busch were to object to the settlement, the Court would retain the discretion to approve it as fair, reasonable and adequate. See, e.g., Grant v. Bethlehem Steel Corp., 823 F.2d 20 (2d Cir. 1987) (affirming approval of settlement of employment discrimination action despite objections by 45 of 126 class members who responded to notice); Holden v. Burlington Northern, Inc., 665 F. Supp. 1398 (D. Minn. 1987) (opposition of five named plaintiffs to Title VII gender discrimination action did not block settlement approval).

[6] After DeWayne Ketchum joined Sunoco in 1972, he advanced quickly. His progress stopped, however, before he became eligible for executive positions. As the Manager of Business Development in the Terminal Division of Sun Pipeline, Mr. Ketchum directed the activities of some people who had a higher salary grade than he did – an anomaly that was not supposed to occur. After this lawsuit was filed, Mr. Ketchum's position was "eliminated." Everett Richardson is a 25+ year employee of defendant, who joined the company after a successful early career at a major accounting firm. Today, Mr. Richardson, an MBA recipient and a CPA, allegedly earns as little as half as much as other Sunoco CPAs with comparable experience. Thomas Long is also an accountant and another 25+ year employee of defendant. His career has been marked by unwanted and haphazard rotational assignments. Today, he still labors as a Financial Professional I – a salary grade 1 position. Robert Harris, another financial professional, began working for defendant in 1966 and has just retired. Despite his M.B.A., long years of service, and generally positive performance appraisals, Mr. Harris' last position at Sunoco was a Financial Consultant I. Barbara Nearon retired from defendant on August 1, 2000 after

III. SUMMARY OF THE SETTLEMENT TERMS

As set forth in the Settlement Agreement (Exhibit A hereto), this class action is being settled on the following terms:

1. Approximately $3.59 million shall be paid to class members and is designed to compensate them for the amount by which their compensation during 1999-2003, inclusive, was less than that of Caucasian employees with whom they are comparable in terms of education and experience. The individual recovery amounts shall be determined by Plaintiffs' experts, Dr. Janice Madden and Alex Vekker, and approved by Plaintiffs' counsel. The minimum payment to each class member shall be $2,500 (two-thousand, five hundred dollars).

2. Sunoco has agreed to pay approximately $1.5 million to Class Counsel for their fees from the inception of this litigation until the approval of the settlement, if the same is granted by this Court.

3. Sunoco has agreed to pay approximately $260,000 as special compensatory payments to the Named Plaintiffs.

4. Sunoco has agreed to pay approximately $150,000 for the expenses associated with this litigation, including up to $30,000 to be paid for the costs associated with monitoring this settlement over the next two years.[7]

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approximately 20 years of service. Most of this time was spent working under the direction of former Sunoco Vice President Kenneth Hill. Indeed, from 1988 until her retirement, Ms. Nearon was the only employee who reported to Mr. Hill. Levette Parish was employed by defendant from 1991 until she was fired without cause in November 2000. Ms. Parish started at Sunoco as an hourly worker but obtained exempt status before her departure.

[7] Of course, all of the fees and expense payments by Sunoco are subject to approval by the Court under Rule 23(e). The amount payable to the Named Plaintiffs may be diminished if the $30,000 earmarked for monitoring costs is not able to be paid in full from the $150,000 expense fund.

IV. THE COURT SHOULD DETERMINE THAT THE PROPOSED SETTLEMENT IS SUFFICIENTLY FAIR, REASONABLE AND ADEQUATE TO AUTHORIZE DISSEMINATION OF NOTICE TO THE CLASS

A. The Proposed Settlement Is In Class Members' Best Interest.

Courts favor settlements. See, e.g., In re Beef Industry Antitrust Litigation, 607 F.2d 167, 174 (5th Cir. 1979), cert. denied sub nom., Iowa Beef Processors, Inc., v. Meat Price Investigators Association, 452 U.S. 905 (1981). That maxim is nowhere more applicable than in the class action context, where the costs, delays, risks, and uncertainties of litigation are most pronounced. Moreover, at least one court has opined that the strong preference for the settlement of complex litigation is especially pronounced "where [the] subject matter is employment discrimination." Officers for Justice v. Civil Service Comm'n of City and County of San Francisco, 688 F. 2d 615, 625 (9th Cir. 1982).

Approval of class action settlements involves a well established, two-step process. The Manual for Complex Litigation Third (1997) ("Manual 3d") at §30.41 provides a framework for the same:

> First, counsel submit the proposed terms of the settlement and the court makes a preliminary fairness evaluation… . If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

See also 2 Newberg on Class Actions §11.25 (3d Ed. 1992); In re Vitamins Antitrust Litig., 1999 U.S. Dist. LEXIS 21963, **29-31 (D.D.C. November 23, 1999); In re NASDAQ Market-Makers Antitrust Litig., 176 F.R.D. 99, 102 (S.D.N.Y. 1997).

At the preliminary approval stage, courts usually consider the settlement documents and a legal memorandum, such as this one, that addresses the terms of the proposed settlement, the status of discovery, the arrangements about attorneys' fees, and why the settlement is believed to be in the best interests of the class. See MCL3d, §30.43.

Authorization to disseminate notice is a recognition by the Court that the settlement is in the range of possible approval. In re Corrugated Container Antitrust Litig., 643 F.2d 195, 205 (5th Cir. 1981); In re Montgomery County Real Estate Antitrust Litig., 83 F.R.D. 305, 313 (D. Md. 1979). As noted in In re Traffic Executive Assoc.-Eastern Railroads, 627 F.2d 631, 634 (2d Cir. 1980), approving dissemination of notice "is at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness."

Plaintiffs submit that the proposed settlement before the Court is well within the range of possible approval and is sufficiently fair to warrant notice to class members. The settlement with Sunoco provides for cash payments that are designed to approximate class members' backpay losses from 1999-2003 (the time period during which their claims are unquestionably timely). The other monetary components of the proposed settlement are as follows: (1) $1.5 million in counsel fees (this represents 27% of the settlement and a very small multiplier, if any, of less than two[8]);

[8] Even if the $30,000 monitoring cost must be taken from the Special Payments to the Named Plaintiffs and is deemed to be additional counsel fees (earned after the approval of the Settlement), then the total paid in fees will only be 27.8%, and the applicable multiplier, if any,

(2) reimbursement of expenses equal to approximately $150,000 (primarily for plaintiffs' statistical experts); (3) special compensatory payments to the named plaintiffs;[9] and (4) the settlement of an individual lawsuit arising from alleged retaliation against Named Plaintiff Everett Richardson. In addition, the Settlement provides for a two-year monitoring period during which Class Counsel will receive confidential reports (statistical and qualitative) from Sunoco regarding the operation and impact of the Human Resources (H.R.) processes that were implemented in the wake of this lawsuit. The Court will retain jurisdiction to enforce the terms of the settlement and to ensure that any resulting disputes may be heard promptly.

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will not exceed 2. A fee awarding this amount is relatively small and certainly consistent with prevailing guidelines. See, e.g., Roberts v. Texaco, Inc., 979 F. Supp. 185 (S.D.N.Y. 1997) (multiplier of 5.5 approved).

[9] On average, the Named Plaintiffs will each receive approximately $32,000 as special payments to compensate them for the time and effort that they have devoted to this litigation and for losses which Plaintiffs believe they have suffered as a result of filing this lawsuit. In addition, three of the Named Plaintiffs believe that they have suffered retaliation, including job terminations, as a result of having filed this action. In these circumstances, the special payments to the Named Plaintiffs are appropriate and consistent with prevailing guidelines. See, e.g., Butlram v. United Parcel Service, No. C-97-D1590 (N.D.Cal. April 9, 1997) (race discrimination suit settled for $12.1 million to be shared by some 15,000 part time UPS workers; $150,500 to be paid to seven named plaintiffs); Royal v. Aramark Corp. No. 97-CV-6226 (E. D. Pa. July 29, 1999) (approving settlement in which three named plaintiffs each received $50,000 in $3.75 million settlement arising from alleged race discrimination). See generally Gaskill v. Boula, 1995 US Dist. LEXIS 18576 (E.D. Ill. 1995) ("these individuals [class representatives] invested their time and effort and exposed themselves to litigation costs even though there was a significant risk that they might lost. Equity requires that they receive greater compensation than others who did not."); Carroll v. Blue Cross and Blue Shield of Massachusetts, 157 F.R.D. 142, 143 (D. Mass. 1994) (class representative received additional payments "as compensation for services rendered to the class in initiating and prosecuting this action ..."); In re Dun & Bradstreet Credit Services Customer Litigation, 130 F.R.D. 366, 376 (S.D. Ohio 1990) (incentive awards to compensate the class representatives for "time, risk and expenses" granted). Generally, the courts look favorably upon such reasonable additional compensation for named class representatives who play an active role in the suit, because such awards serve as an incentive for average persons to commence and work actively on the prosecution of a class suit for the benefit of others. See, e.g., Bogosian v. Gulf Oil Corp., 621 F. Supp. 27, 32 (E.D. Pa. 1985).

The settlement was negotiated by experienced counsel,[10] at arm's length, following the completion of substantial discovery, and under the supervision of this Court. Class Counsel have concluded, after investigation of the facts and after considering the circumstances of the case and the applicable law, that it would be in the best interest of plaintiffs and the Class to enter into the Settlement Agreement.

While the standards that have developed for approval of class action settlements use varying terminology, the "bottom line" of this jurisprudence is that the settlement must be in the best interests of the class as a whole. 2 Newberg on Class Actions (3d ed. 1992 and 1996 Cumm. Supp.) §11.43. The proposed settlement undoubtedly satisfies this standard.

B. Class Notice

Fed. R. Civ. P. 23(e) provides that "notice of the proposed dismissal or compromise (of a class action) shall be given to all members of the class in such manner as the court directs." The notice to class members should make it clear that no decision on final approval[11] has yet been reached. In re Mid-Atlantic Toyota Antitrust Litig., 564 F. Supp. 1379, 1384 (D. Md. 1983).

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[10] The experience and reputation of counsel and the arms-length nature of the negotiations have often been recognized as important facts to be considered in assessing the fairness and reasonableness of proposed settlements. See, e.g., Fisher Brothers, 604 F. Supp. 446 at 452 (the "professional judgment of counsel involved in the litigation is entitled to significant weight."); In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F. Supp. 659, 667 (D. Minn. 1974) (the "recommendation of experienced antitrust counsel is entitled to great weight."); Blank v. Talley Industries, Inc., 64 F.R.D. 125, 132 (S.D.N.Y. 1974) (a factor "entitled to substantial weight, is that [the settlement] bears the imprimatur of seasoned and experienced counsel…").

[11] The standard for final approval of a settlement is that the settlement is fair, reasonable and adequate. See Stoetzner v. U.S. Steel Corp., 897 F.2d 115, 118 (3d Cir. 1990); Walsh v. Great Atlantic & Pacific Tea Co. Inc., 726 F.2d 956, 965 (3d Cir. 1983).

See also Holden, 665 F. Supp. at 1403 (in authorizing notice, the court refrained from "expressing any opinion concerning the ultimate merits of the proposed settlement.").

Plaintiffs have prepared, and respectfully submit for the Court's consideration, a proposed Notice of Class Action Settlement. Sunoco has agreed to the language of the same. The settling parties propose providing individual notice to Class Members via first class mail. The content and mode of dissemination of the Notice fulfill the requirements of Rule 23(e), and due process. See generally In re Prudential Ins. Co. America Practices Sales Litig., 148 F.3d 283, 326-27 (3d Cir. 1998).

IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant preliminary approval of the proposed settlement with Sunoco, and authorize the mailing of notice to class members.

DATED: October 12, 2004

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

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ORDER PRELIMINARILY APPROVING CLASSWIDE SETTLEMENT

WHEREFORE, the parties have negotiated a settlement of this class action and requested that their proposed settlement receive the Court's preliminary approval so that notice of the same may be disseminated;

WHEREAS, although the Court has not yet made any related determination, the proposed settlement appears to have been negotiated at arms-length and to provide a reasonable and fair basis for resolving this action;

IT IS HEREBY ORDERED as follows: (1) the proposed settlement of this action set forth in the Settlement Agreement tendered by the parties appears to be reasonable and is entitled to this Court's preliminary approval; (2) the parties may disseminate, by first class mail, the proposed notice attached hereto; and (3) a final fairness hearing in this matter is set to take place on November 30, 2004 at 10:00 a.m. in Courtroom 15B.

SO ORDERED this ____ day of October, 2004

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Hon. Clifford S. Green